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I. INTRODUCTION

Prison overcrowding has increased in recent years and it is unlikely that the situation will be alleviated substantially in the near future. Consequently, prison administrators have devised means by which to cope with the problem of insufficient cell space for prisoners. Defense counsel have been confronted with prisoner claims of cruel and unusual punishment, as well as fourteenth amendment violations resulting from the means devised by prison administrators. *Gibson v. Lynch*, the subject of this note, illustrates one administrative response to the problem of prison overcrowding. Frazier Gibson was placed in solitary confinement for a period of almost three months due to a shortage of cells in the general population area of Trenton State Prison. He was not a disciplinary or risk prisoner, nor was he in need of protection for his own well-being.

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4. Solitary confinement normally is utilized for prisoners who are under disciplinary sanction or who require protection. *Id.* at 354.

5. *Id.* at 350.

6. When an inmate is found guilty of committing a prohibited act, a decision is made to the appropriate disciplinary action. The [sic] sanction imposed is selected after careful consideration of many factors which may include the inmate’s past history offenses, his overall institutional adjustment and the circumstances surrounding the particular infraction. *Trenton State Prison, Inmate Handbook* 31 (1977) [hereinafter cited as *Inmate Handbook*].

7. “Disciplinary detention is used where the inmate’s presence in the general population poses a serious threat to person, property, orderly operations or the security of the institution.” *Id.* at 35.

8. “Administrative segregation is used for the protection, confinement or treatment of those who cannot safely participate in, or adjust to the ordinary routine of the institutional program until evidence is available to warrant return to the general population.” *Id.* at 38-39.
This note addresses the question of whether a prisoner's expectation of the treatment that he will receive upon arrival at the prison is a protected liberty interest and whether this interest is violated when the prisoner is held under solitary conditions for administrative convenience rather than for disciplinary or protective reasons. The first area discussed in this note is the eighth amendment's prohibition against cruel and unusual punishment. Following this discussion is an overview of Supreme Court decisions in which the nature of an individual's liberty interest formerly had been interpreted broadly but in recent years has been narrowed sharply. Finally, an individual's right to a hearing will be examined.

II. **Gibson**

A. Gibson's Confinement

Frazier Gibson was convicted in New Jersey state court for possession of a stolen vehicle and sentenced to a minimum of three years and a maximum of five years imprisonment. Gibson was sentenced on December 16, 1976. He was sent to the Essex County Jail and was later transferred to the Classification Center at Yardville. There, he was housed in an individual cell in the reception unit because he was an adult and Yardville's population was primarily youthful inmates. While at Yardville, Gibson was not allowed to mingle with the general population, nor was he allowed access to the legal library, visitors, or to attend general worship services. Denial of these privileges, however, was normal procedure.

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10. 652 F.2d at 350.
11. Id.
12. Id.
13. Id. This transfer occurred on January 25, 1977. Id.
14. Id.
15. Id.
for handling inmates awaiting classification and assignment to one of the adult prison populations. On February 8, 1977, Gibson was classified for Rahway State Prison, a medium security institution. Due to a shortage of cell space at Rahway, however, he was transferred to Trenton State Prison, a maximum security institution, where he was considered a “housing hold.”

Upon arrival at Trenton, Gibson was put directly into lock-up. Normally, lock-up was used to discipline inmates who violated prison rules, to segregate inmates who were considered especially dangerous, or to protect the lives of those inmates threatened by other prisoners. In 1977, however, New Jersey had a serious shortage of cell space within its prison system. In addition, seventy prisoners had been transferred to Trenton from the minimum security prison at Leesburg for their involvement in a disruption there. Therefore, the solitary confinement cells were utilized to accommodate the additional prisoner population.

Gibson's confinement at Trenton from March 4, 1977, until June 1, 1977, was in Seven Wing, which contained maximum security isolation cells. His activities were restricted severely. He was

16. “No group religious services are conducted for residents of the reception unit and they are not provided access to any law library, nor any recreational or educational library which may be available to the youthful inmates of the center.” Brief on Behalf of Defendant-Appellant at 12a-13a, Gibson v. Lynch, 652 F.2d 348 (3d Cir. 1981) [hereinafter cited as Brief on Behalf of Defendant-Appellant].

17. The first two weeks of a prisoner's confinement is spent in the reception center at the Yardville facility where the prisoner undergoes a series of evaluations, examinations, and interviews. Personnel at Yardville compile personal information on the prisoner along with any information received from the courts. When this process is completed, the prisoner appears before the Prison Complex Inter-Institutional Classification Committee. This committee, which is made up of the superintendents, or their designates, of Trenton, Rahway, and Leesburg State Prisons makes the initial institution assignment. Inmate Handbook, supra note 6, at 2.

18. 652 F.2d at 350.

19. Id.

20. Id.

21. Gibson was considered a “housing hold” because he was awaiting cell space at Rahway. Id. Brief on Behalf of Plaintiff-Appellee at 7, Gibson v. Lynch, 652 F.2d 348 (3d Cir. 1981) [hereinafter cited as Brief on Behalf of Plaintiff-Appellee].

22. 652 F.2d at 350.

23. Id.

24. Id.

25. Id. Gibson was confined in a cell that was five feet by seven feet by eight feet, with a solid wall on three sides and a metal gate on the front. The cell contained a steel bed, a toilet, and a sink with cold running water. Id. Gibson described the toilet facilities as “protruding from the back wall of the cell leading from a center trap area.” Brief on Behalf of Plaintiff-Appellee at 7, supra note 18. As a result of this set-up, a stench from the toilets on the wing permeated the cell. Id.
confined to this cell for twenty-three hours and fifty minutes a day. On six separate occasions, he was released for one hour of recreation.\(^\text{26}\) Gibson was not allowed to eat with the prisoners in general population and was required, instead, to eat all meals in his cell.\(^\text{27}\) Gibson could shower for only ten minutes of each day.\(^\text{28}\) Other privileges were withheld completely: He had neither radio nor television;\(^\text{29}\) was not allowed direct access to the legal library;\(^\text{30}\) was not allowed to attend movies;\(^\text{31}\) was not allowed contact visits;\(^\text{32}\) was not allowed to attend community worship services;\(^\text{33}\) and was not allowed access to the recreational library.\(^\text{34}\) In addition, Gibson was required to wear the same clothes from March 4, 1977, until May 5, 1977.\(^\text{35}\) He was forced to launder his clothes in the cold water sink within his cell and he had no other clothes to wear while his laundered clothing dried.\(^\text{36}\)

B. The Findings of the District Court

On May 26, 1977 Gibson filed a pro se complaint\(^\text{37}\) alleging that his confinement under solitary conditions, the result of New Jersey's lack of prison housing, violated his constitutional rights.\(^\text{38}\) Prior to a hearing on the merits of his claim, he was removed from solitary confinement.\(^\text{39}\) On August 14, 1978 an attorney was appointed for Gibson\(^\text{40}\) and

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27. Id.
28. 652 F.2d at 350.
29. Brief on Behalf of Plaintiff-Appellee at 8, supra note 21.
30. Brief on Behalf of Defendant-Appellant at 14a, supra note 16.
31. Id.
32. Id.
33. Id.
34. Id.
35. Brief on Behalf of Plaintiff-Appellee at 8, supra note 21. His clothing consisted of one set of underwear, a pair of sneakers, a pair of socks, a khaki shirt and a pair of trousers. He was not issued any additional clothing nor was he able to obtain any laundry service for these clothes. Id. Included in the list of rights to which the prisoners at Trenton were entitled was “the right to health care which include[d]... proper bedding and clothing, [and] a laundry schedule for cleanliness of same...”. INMATE HANDBOOK, supra note 6, at 6.
36. Brief on Behalf of Plaintiff-Appellee at 8, supra note 21.
37. Id. at 3; Brief on Behalf of Defendant-Appellant at 2, supra note 16. The complaint was filed under 42 U.S.C. § 1983 (1976) in the Federal District Court in Newark, New Jersey seeking injunctive relief and a declaratory judgment.
38. Brief on Behalf of Defendant-Appellant at 5a, supra note 16.
39. 652 F.2d at 349.
40. Brief on Behalf of Plaintiff-Appellee at 3, supra note 21; Brief on Behalf of Defendant-Appellant at 2, supra note 16.
on October 2, 1978 an amended complaint was filed. The complaint deleted the claim for injunctive relief, added Superintendent Lynch of Yardville and Commissioner Fauver of the Department of Correction as defendants, and sought damages for Gibson’s confinement in Yardville and Trenton.

On March 5 and 6, 1979, pursuant to a May 2, 1978 order of the district court, an evidentiary hearing was held before a United States Magistrate. On May 25, 1979, the magistrate filed with the court a report and recommendation that judgment in the sum of eight-hundred dollars be entered against defendants Hilton and Fauver with costs and attorneys fees to be fixed. The magistrate further recommended that judgment be entered in favor of defendant Lynch. On June 21, 1979, the magistrate reversed her judgment against Fauver since it had been determined that he had not been the Commissioner of Corrections at the time of Gibson’s imprisonment. On January 29, 1980, an order of the United States District Court for the District of New Jersey adopting the magistrate’s recommendations was entered.

The district court endorsed the magistrate’s finding that Gibson had a state created expectation of liberty under the due process clause of the fourteenth amendment. The court found that such an
expectation had been violated on the basis of his solitary confinement at Trenton State Prison and that defendant Hilton was not entitled to the defense of immunity.52 The court found that no steps had been taken to remedy Gibson's situation, although prison officials were aware of the conditions and other inmates had been returned to general population.53 The district court rejected Gibson's claim that his confinement at both Yardville and Trenton violated eighth amendment standards and also rejected his claims of due process violations at Yardville.54

Defendant Hilton filed a motion of appeal to the United States Court of Appeals for the Third Circuit on April 28, 1980.55 The Third Circuit agreed with the district court that the conditions under which Gibson lived during this period did not violate the eighth amendment.56 The Third Circuit did not agree, however, that Gibson's confinement violated his fourteenth amendment right to due process and reversed the district court's orders awarding damages, costs, and attorneys' fees to Gibson.57

II. THE PARAMETERS OF CRUEL AND UNUSUAL PUNISHMENT—ARE THERE GUIDELINES?

The New Jersey Constitution provides that "[e]xcessive bail shall not be required, excessive fines shall not be imposed, and cruel and unusual punishments shall not be inflicted."58 This is virtually identical to the eighth amendment of the United States Constitution.59

The New Jersey Superior Court has defined punishment to be cruel and unusual if the nature of the punishment shocks the general conscience or violates principles of fundamental fairness.60 The Supreme Court of New Jersey has held that it "will not interfere with the prescribed form of penalty unless it is so clearly arbitrary and without rational relation to the offense or so disproportionate to

52. Brief on Behalf of Defendant-Appellant at 37a-38a, supra note 16.
53. Id.
54. 652 F.2d at 350.
55. Brief on Behalf of Defendant-Appellant at 47a, supra note 16.
56. 652 F.2d at 351.
57. Id. at 349-50.
59. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.
the offense as to transgress the Federal and State [constitutions]. . . .”

In addition, there should be no judicial interference “either as to the classification of offenders selected for separate treatment or as to the penalty prescribed for them, unless it is clearly constitutionally indefensible.”

At least one Justice of the Supreme Court of the United States has written on the subject. Justice Brennan indicated that the test of whether a punishment is cruel and unusual involves several factors, including whether the “punishment is unusually severe, [whether] there is a strong probability that it is inflicted arbitrarily, [whether] . . . it is substantially rejected by contemporary society, and [whether] there is no reason to believe that it serves any penal purpose more effectively than some less severe punishment. . . .”

Against this background, the Third Circuit began its discussion of whether Gibson’s confinement constituted cruel and unusual punishment by noting that as a convicted and sentenced prisoner, Gibson could not claim the right to be free from punishment. He could only claim the right to be free from excessive punishment “so totally without penological justification that it result[ed] in the gratuitous infliction of suffering.” The court then noted that the conditions of Gibson’s confinement satisfied his basic needs for nutrition and shelter.

The court of appeals noted that the district court, in adopting the magistrate’s recommendation, had also concluded that Gibson’s nutritional needs were met while he was at Trenton. Acknowledging that his living and hygienic accommodations were spartan, the district court concluded that they were not injurious to a person in reasonable physical and mental health. His medical needs were met and he was not callously denied medical attention. Gibson, however, testified that he received less than adequate medical attention and that he was never given a medical examination to investigate his complaint of stomach problems.

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62. Id., 276 A.2d at 374.
64. 652 F.2d at 352.
65. Id. (quoting Gregg v. Georgia, 428 U.S. 153, 183 (1976)).
66. 652 F.2d at 352.
67. Id.
68. Brief on Behalf of Defendant-Appellant at 20a-21a, supra note 16.
69. Id. at 21a.
70. Trial Transcript at 38-39, 70-71, Gibson v. Lynch, 652 F.2d 348 (3d Cir. 1981) [hereinafter cited as Trial Transcript]. Rather, he was given an array of medication in an
conclusion that adequate attention was given to Gibson's "nutritional and other needs," however, ignored the fact that Gibson was required to wear the same set of clothing for two months. In addition, all of his meals had to be taken in the cell, which was permeated with the smell of human waste from outdated toilet facilities protruding from the back wall of the cell.

The question raised by Gibson's confinement was whether his treatment was without penological justification, thereby making it excessive punishment. In an earlier decision, Hodges v. Klein, the District Court of New Jersey held that "segregated confinement does not in itself constitute cruel and unusual punishment. . . ." Hodges was a constitutional challenge to the creation and maintenance of a special unit known as the Management Control Unit (MCU) at Trenton State Prison. Several months of unrest at Trenton resulted in an administrative decision that a close custody unit was necessary. Under this plan, inmates in the general population who required more stringent security measures were segregated from others and their movements were restricted. Wing officers were instructed to compile lists of those inmates whom they believed needed closer scrutiny. One week after the inmates were moved from general population to the MCU, they were given written notice that the MCU had been created and a Special Classification Committee (SCC) had been established. The notice stated that the SCC would begin hearings to determine which inmates should remain in the MCU. Approximately eighty inmates ultimately were designated to remain and about forty inmates were designated for return to general population. The returning inmates were not moved immediately because space was not available in general population to accommodate them.

Violence erupted in the MCU following an escape attempt in which one inmate died and a prison guard was severely injured.

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71. 652 F.2d at 352.
72. Brief on Behalf of Plaintiff-Appellee at 7, supra note 21.
74. Id. at 1236.
75. Id. at 1229.
76. Id. at 1229-30.
77. Id. at 1230.
78. Id.
79. Id.
Inmates were transferred to lower tiers of Seven Wing and placed in empty cells. In some cases inmates had no clothes; the cells had no mattresses and there was no running water in the sinks or toilets. Although these transfers were made without prior notice and hearing, the court concluded that an inmate could be subjected to more restrictive confinement without prior notice and hearing when exigent circumstances warranted.

The Hodges court noted that the purpose of twenty-four hour lock-up segregation was to confine inmates who had displayed specific and recurring violent destructive behavior. Along these lines even nonviolent and nondestructive inmates who disrupted the orderly and peaceful operation of the prison could be segregated. The court could not, however, understand the need to keep nonviolent inmates under twenty-four hour lock-up conditions because any threat they may have presented existed only when they circulated in general population.

Confusion about the need to impose such extreme lock-up conditions is equally applicable to Gibson. The Third Circuit specifically stated that "Gibson was not a disciplinary problem, was not in need of protective custody and was not uncontrollable or suffering from any serious maladjustment requiring administrative segregation." Gibson had not displayed any characteristics that would trigger administrative concern, yet he was kept locked up for twenty-three hours and fifty minutes per day and was deprived of all privileges for three months. Unfortunately, the Hodges court merely questioned the necessity for keeping disorderly prisoners under twenty-four hour lock-up conditions. The court stated that its own views were irrelevant because a federal court could not command state officials to disregard a policy that the state had decided was suitable merely because the federal court believed the policy was unsound or personally repugnant.

The deference given by a court to prison administrators in the determination of whether certain treatment is cruel and unusual is very broad. The only criterion seems to be whether administrators decide that lock-up policy is suitable. Although individual punitive

80. *Id.* at 1230-31.
81. *Id.* at 1231.
82. *Id.* at 1237.
83. *Id.*
84. *Id.*
85. 652 F.2d at 355.
86. 421 F. Supp. at 1237.
administrative decisions may not rise to the level of cruel and unusual punishment, the cumulative effect of these decisions may rise to that level. There remains the issue of drawing the line to distinguish between situations in which courts will intervene when a policy, suitable to prison administrators, appears unsound or repugnant to the court, and those situations in which the court will defer to the prison administrator’s judgment.

A Justice on the Supreme Court has addressed this question. In his concurring opinion in *Rhodes v. Chapman,* Justice Blackmun feared that the courts had adopted a policy of general deference to prison administrators and state legislatures. He believed that federal courts should be available for those state inmates who made claims of eighth amendment violations. Incarceration entailed restrictions and a loss of privileges but it was not “an open door for unconstitutional cruelty or neglect.”

*Rhodes* marked the first time the United States Supreme Court considered the limitation that the eighth amendment imposes upon the conditions under which a state may confine convicted criminals. The Southern Ohio Correctional Facility (SOCF) began receiving inmates in late 1972. Prison administrators began double celling inmates in 1975 due to an increase in Ohio’s state-wide prison population. The cells were modern. Adjacent to the cell blocks were “day rooms,” open to inmates between 6:30 a.m. and 9:30

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88. *Id.* at 369 (Blackmun, J., concurring).
89. *Id.*
90. *Id.*
91. The eighth amendment was made applicable to the states through the fourteenth amendment in both Robinson v. California, 370 U.S. 660 (1962) and Louisiana *ex rel. Francis v. Resweber,* 329 U.S. 459 (1947).
92. 452 U.S. at 341.
93. Each cell at SOCF measures approximately 63 square feet. Each contains a bed measuring 36 by 80 inches, a cabinet-type night stand, a wall-mounted sink with hot and cold running water, and a toilet that the inmate can flush from inside the cell. Cells housing two inmates have a two-tiered bunk bed. Every cell has a heating and air circulation vent near the ceiling, and 960 of the cells have a window that inmates can open and close. All of the cells have a cabinet, shelf, and radio built into one of the walls, and in all of the cells one wall consists of bars through which the inmates can be seen.
94. According to the district court, “[t]he day rooms are in a sense part of the cells and they are designed to furnish that type of recreation or occupation which an ordinary citizen would seek in his living room or den.” *Id.* (quoting *Rhodes v. Chapman,* 434 F. Supp. 1007, 1012 (S.D. Ohio 1977)). Each day room contains a wall-mounted television, card tables, and chairs. Inmates can pass between their cells and the day rooms during a 10-minute period each hour, on the hour, when the doors to the day rooms and cells are opened. *Id.*
p.m. At the time of trial, SOCF housed 2,300 inmates, sixty-seven percent serving life or other long-termed sentences. About 1,400 inmates were double celled, of which approximately seventy-five percent had the opportunity to spend most of their waking hours in the day rooms, schools, workshops, library, visitation areas, at meals, or in the showers.

The district court concluded that double celling was cruel and unusual punishment. The Supreme Court disagreed and stated that the findings of fact did not support the district court's conclusion. The Court concluded that the Constitution does not mandate comfortable prisons and that prisons like SOCF, which house persons convicted of serious crimes, cannot be free of discomfort. This conclusion indicates that eighth amendment violations rarely will be found and portends far reaching effects. The Court chose to use prisoners' overall characteristics as a standard for determining conditions of confinement, meaning the more serious the offense, the less comfortable the prison may be.

The *Rhodes* Court noted that it could not be assumed that state legislatures and prison officials were insensitive to the requirements of the Constitution or to the sociological problems involved with trying to achieve the goals of the criminal justice system. Recent Supreme Court decisions have emphasized that deference should be given to the informed discretion of prison officials, although this notion has been tempered by the view that "prison administrators..."
may be 'experts' only by Act of Congress or of a state legislature.” 102  
If the courts blindly defer to the legislature and the legislature defers to prison administrators, the end result may be that prisons will be run by persons who are accountable to no one. The Court did not define a "comfortable" prison, nor did the Court indicate the degree of discomfort that would be allowed before an eighth amendment violation was found. Any court's interpretation of the severity of an offense, and the accompanying conditions of confinement, carries with it a certain degree of subjectivity. Lack of a definitive standard coupled with subjective evaluations of conditions ultimately will lead to inconsistent determinations and will leave no foundation upon which to base a claim of an eighth amendment violation.

Justice Marshall, dissenting in Rhodes, believed that as a result of the rising crime rate of recent years, there was an alarming tendency toward a simplistic penological philosophy: if we lock the prison doors and throw away the keys, our streets will somehow be safe. 103 If an irrebuttable presumption were created that prison administrators are sensitive to constitutional requirements, and wide-ranging deference 104 is given to implement their policies, in the future, it is likely that much of what occurs in the prisons will not be known to anyone except those inside. This confidence in the sensitivity of legislatures and prison administrators is misplaced. Evidence of this misplaced confidence can be found in the repeated need for federal intervention to protect the rights of inmates. 105 In light of this wide-ranging judicial deference, the minimal attention given to Gibson's medical and hygienic needs, and the tenuous rationalization for Gibson's solitary confinement, it may be said that Gibson's confinement solely for reasons of administrative convenience was excessive.

the officials have exaggerated their response . . ., courts should ordinarily defer to their expert judgment in such matters.” Pell v. Procunier, 417 U.S. 817, 827 (1974).


103. Justice Marshall stated that, given the current state of affairs, it was “unrealistic to expect legislators to care whether the prisons are overcrowded or harmful to inmate health.” 452 U.S. at 377 (Marshall, J., dissenting).

104. In Bell v. Wolfish, 441 U.S. 520 (1979), the Court asserted that “[p]rison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.” Id. at 547.

Judicial decisions provide little guidance to assist in the determination of the bounds of cruel and unusual punishment. The decisions contain such phrases as "shocks the general conscience" or "clearly arbitrary and without rational relation to the offense" but the courts have failed to apply these standards in any predictable fashion. The courts have refused to interfere with decisions by prison administrators when the decisions are thought to be suitable and in response to exigent circumstances. Indistinct standards and wide-ranging deference to prison administrators make clear that a violation of the eighth amendment's proscription against cruel and unusual punishment rarely will be found. Denial of an eighth amendment cause of action forces the prisoner to claim a due process violation of the fourteenth amendment for relief.

III. LIBERTY INTEREST IN THE PRISON SETTING

Gibson argued that prisoners had a justifiable expectation that they would not remain in solitary confinement for twenty-three hours and fifty minutes a day for a period of three months unless minimal due process procedures were followed. This expectation was created by the policies and practices of the New Jersey prison system. The district court found that Gibson was denied certain

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106. See supra note 9 and accompanying text.
108. Brief on Behalf of Plaintiff-Appellee at 17, supra note 21.
109. Id. The district court concluded that no constitutional entitlement, sufficient to invoke due process, existed in a transfer to a less favorable institution without some state practice that conditioned transfers upon proof of misconduct. Brief on Behalf of Defendant-Appellant at 23a, supra note 16. The court looked to Meachum v. Fano, 427 U.S. 215 (1976) and Montanye v. Haymes, 427 U.S. 236 (1976) for support for this proposition. See infra notes 149-56 and accompanying text. The district court then looked to established prison policies and practices to determine whether they created some liberty interest requiring due process. The court concluded that administrative quarantine, Gibson's classification in the prison, was not different from the other classifications, thus expressing a policy that isolated confinement for any appreciable period was to be preceded by a hearing and subject to continuing review. Brief on Behalf of Defendant-Appellant at 25a-26a, supra note 16. "The meticulous details governing assignment to isolated confinement reinforces the idea that isolation is an extreme circumstance, so drastically different from the usual prison experience as to be in fact a matter of substantial importance to a prisoner." Id. at 26a. The description of administrative quarantine is as follows:

Be advised that effective immediately administrative quarantine at State Prison, Trenton is to be used for the specific housing of the following designated inmate personnel.
privileges which appeared to be guaranteed to all inmates not subject to disciplinary restrictions. The court concluded that the express

1. Prison Reception Unit housing holds assigned by Inter-Institution Classification Committee for assignment to State Prison, Rahway or State Prison, Leesburg.
2. Pre-Hearing Detention (Management Control Unit) inmates who have been classified by the Special Classification Committee as general population and are referred back to the sending institution or to general population State Prison, Trenton pending space availability.
3. State Prison, Trenton inmate personnel who may be experiencing housing difficulties within the general population and re-assignment to another housing wing or unit is not readily available.

Placement in Administrative Quarantine is also under the direct control of the Superintendent, Assistants to the Superintendent, Chief Deputy and the Area 1 and 2 Shift Captains. Under no circumstances are inmates to be placed in Administrative Quarantine without the above authorities written and signed authorization to the Center Keepers.

Inmates placed in Administrative Quarantine are to be afforded the following sanctions:

1. Daily medical/dental and professional treatment staff services.
2. Regularly scheduled showers.
3. Current rules and policies governing the general population regarding reading-writing materials. Smoking in their cells—personal clothing—and weekly canteen services.
4. Inmates are entitled to window phone visits per institutional policy.
5. Inmates are entitled to phone calls per institutional policy.
6. Inmates do not have contact visit rights while in Administrative Quarantine.
7. Inmates do not have yard recreation rights while in Administrative Quarantine.
8. Inmates assigned to Administrative Quarantine are not processed through the State Prison, Trenton Prison Classification Committee for custody or program assignments.

The above listed sanctions are subject to review and change by the Superintendent's Office at any time. Due notice of any changes in the sanctions for administrative Quarantine will be given to all parties directly responsible for the management and security of said Unit.

Brief on Behalf of Defendant-Appellant at 33a-35a, supra note 16.

110. Brief on Behalf of Defendant-Appellant at 26a, supra note 16. The court enumerated the following: an adequate clothing supply to be issued shortly after admission; active and passive recreation including athletics, movies, reading and games; television in the auditorium twice weekly; daily active indoor or outdoor recreation even though confined to reception or administrative segregation or a special treatment unit; a weekly movie; and two hours per week of exercise even though confined to administrative segregation. *Id.* “While none of the enumerated privileges individually rises to the substance
policies of the Department of Corrections\textsuperscript{111} created a justifiable expectation that, without minimal due process procedures,\textsuperscript{112} Gibson would not be confined in isolation for three months under the conditions found to have existed.\textsuperscript{113}

The Third Circuit, however, rejected the district court’s conclusion and reversed its orders.\textsuperscript{114} Although the court acknowledged that Gibson’s confinement was severe, it emphasized that his quarantine status was due to the shortage of cell space for the general prison population.\textsuperscript{115} The court of appeals decided that it could not rely upon disciplinary cases nor upon cases concerning prisoner isolation in special risk units and in protective custody because those cases had no bearing on Gibson’s situation.\textsuperscript{116} The court stated that

\begin{itemize}
\item of a constitutionally protected right, all of them taken together appear to present a way of life which is guaranteed to New Jersey prisoners."\textit{Id.}
\item \textsuperscript{111} The Trenton State Prison Inmate Handbook for 1977 set out the inmates’ rights:
\begin{itemize}
\item You have the right to expect that as a human being you will be treated respectfully, impartially, and fairly by all personnel.
\item You have the right to be informed of the rules, procedures, and schedules concerning the operations of the institution.
\item You have the right to freedom of religious affiliation, and voluntary religious worship.
\item You have the right to health care which includes nutritious meals, proper bedding and clothing, a laundry schedule for cleanliness of same, an opportunity to shower regularly, proper ventilation for warmth and fresh air, a regular exercise period, toilet articles and medical and dental treatment.
\item You have the right to correspond and visit with family members, friends and other persons where there is no threat to the security order or rehabilitation in keeping with the rules and schedules of the facility.
\item You have the right to unrestricted and confidential access to the courts by correspondence (on matters such as the legality of your conviction, civil matters, pending criminal cases and to conditions of your confinement).
\item You have the right to legal counsel from an attorney of your choice by interview and correspondence.
\item You have the right to participate in the use of Law Library reference materials to assist you in resolving legal matters. You also have the right to receive help when it is available through a legal assistance program.
\item You have the right to a wide range of reading material for educational purposes and for your own enjoyment.
\item You have the right to participate in counseling, education, vocational training, and employment as far as resources are available and in keeping with your interest, needs and abilities.
\end{itemize}
\end{itemize}
such a housing crisis had not occurred prior to nor since this particu-
lar situation.\textsuperscript{117} Because of this anomaly, Gibson’s treatment was
considered acceptable as a legitimate response to a situation that had
taken prison administrators by surprise.\textsuperscript{118}

The dissent, however, failed to “see how overcrowding in the
state system or the disturbance at Leesburg had any bearing on
whether an inmate receive[d] clean laundry, access to educational
and legal books . . . and regular showers with soap, hot water and a
towel.”\textsuperscript{119} The dissent also questioned why sixty-nine of the Lees-
burg inmates, transferred to Trenton State because of a disturbance
at Leesburg, were given a hearing and reassignment within a month,
while Gibson suffered for three months.\textsuperscript{120}

A. \textit{United States Supreme Court Liberty Interest Decisions}

Due to the distinction the Third Circuit found between \textit{Gibson}
and other prisoner isolation cases, the court applied the general prin-
ciples found in related Supreme Court cases.\textsuperscript{121} The court examined
three Supreme Court cases dealing with liberty interests. The first,
\textit{Wolff v. McDonnell}\textsuperscript{122} recognized that a state may afford a prisoner a
liberty interest under the fourteenth amendment.\textsuperscript{123} The second two
cases, \textit{Meachum v. Fano}\textsuperscript{124} and \textit{Montanye v. Haymes,}\textsuperscript{125} rejected
claims of prisoners seeking fourteenth amendment protection to pre-
vent transfer from one prison to another.\textsuperscript{126} The three cases dis-
cussed by the court are part of a long line of cases in which the
Supreme Court has tried to define a liberty interest.\textsuperscript{127} Although the

\textsuperscript{117} \textit{Id.} at 356.

\textsuperscript{118} \textit{Id.} Less than three years before Gibson’s arrival at Trenton, the prison was so
overcrowded that a conscious policy to reduce the prison population was followed by
prison officials. Hodges v. Klein, 421 F. Supp. at 1228. Such a policy resulted in the
creation of the Management Control Unit. \textit{See supra} text accompanying notes 73-86.
Prison administrators thus cannot make the claim that such a situation had never existed
before and that deference should be given to the decisions they made in coping with
Gibson’s situation.

\textsuperscript{119} 652 F.2d at 367 (Higginbotham, J., dissenting).

\textsuperscript{120} \textit{Id.}

\textsuperscript{121} \textit{Id.} at 354. The Third Circuit previously had said it could not rely on these
cases. \textit{Id.} Ironically, the court relied on the general principles enunciated in these cases
to reach a decision in \textit{Gibson}.

\textsuperscript{122} 418 U.S. 539 (1974). \textit{See infra} notes 140-46 and accompanying text.

\textsuperscript{123} 418 U.S. at 557.

\textsuperscript{124} 427 U.S. 215 (1976). \textit{See infra} notes 149-60 and accompanying text.

\textsuperscript{125} 427 U.S. 236 (1976). \textit{See infra} notes 146-60 and accompanying text.

\textsuperscript{126} Meachum, 427 U.S. at 228; Montanye, 427 U.S. at 242-43.

\textsuperscript{127} \textit{See generally} Greenholtz v. Inmates of Nebraska Penal and Correctional
Third Circuit did not discuss the entire line of cases, it chose the three having the most significant bearing on the determination of the liberty interest. Cases in the line dealing with liberty interests that were not discussed by the court include Goldberg v. Kelly,128 Morrissey v. Brewer,129 Board of Regents v. Roth,130 and Perry v. Sindermann.131


128. 397 U.S. 254 (1970). Goldberg was an action by "residents of New York City receiving financial aid under the federally assisted program of Aid to Families with Dependent Children (AFDC) or under New York State's general Home Relief program." Id. at 255-56. Their complaint alleged that . . . officials administering these programs terminated, or were about to terminate, such aid without prior notice and hearing, thereby denying them due process of law." Id. at 256. In holding that a pretermination evidentiary hearing must be held, the Court made no mention of having to look to state law to find a liberty interest, but instead looked to the impact upon the individual. Id. at 266.

129. 408 U.S. 471 (1972). "Petitioner Morrissey was convicted of false drawing or uttering of checks in 1967." Id. at 472. He was paroled in 1968 and seven months later he was arrested as directed by his parole officer because "he had violated . . . [his] parole by buying a car under an assumed name and operating it without permission, giving false statements to police concerning his address and insurance company after a minor accident, obtaining credit under an assumed name, and failing to report his place of residence to his parole officer." Id. at 472-73. One week later the Parole Board revoked his parole and returned him to an institution about 100 miles from his home. Id. He "assert[ed] he received no hearing prior to revocation of his parole." Id. at 473.

Morrissey was concerned with whether the general requirements of due process applied to parole revocation. The Court noted that a parolee must rely on the implicit promise that parole revocation will only occur if he fails to live up to the parole conditions. Id. at 482. Termination of parole would inflict a "grievous loss" on the parolee and would upset society's stake in restoring the parolee to a normal and useful life. Id. at 482, 484. The Court required an informal hearing designed to assure that the finding of a parole violation would be based on verified facts and accurate knowledge of the parolee's behavior. Id. at 484.

130. 408 U.S. 564 (1972). Roth was hired as an assistant professor at a university for one academic year. Id. at 566. He completed the term and was informed he would not be rehired. Id. He had no tenure right. Id. In Wisconsin, a state university teacher could acquire tenure as a "permanent" employee only after four consecutive years of employment. Id. State law left the decision whether to rehire a nontenured teacher for another year to the unfettered discretion of university officials, and the rules established by the Board of Regents provided no real protection for the faculty members. The rules created by the Board of Regents "provid[ed] that a nontenured teacher 'dismissed' before the end of the year may have some opportunity for review" but there was no review process for a nontenured teacher who simply was not reemployed. Id. at 567. Roth alleged, first, that the decision not to rehire him "was to punish him for certain statements critical of the university administration," and this violated his right to freedom of speech. Id. at 568. The second allegation was that failure "to give . . . notice of any reason for nonretention and an opportunity for a hearing violated his right to procedural due process of law." Id. at 569.

131. 408 U.S. 593 (1972). In Perry, a teacher in the state college system alleged that the decision not to rehire him was due to his public criticism of administrative poli-
In *Goldberg*, the Court asserted that "[t]he extent to which procedural due process must be afforded the [individual] is influenced by the extent to which he may be 'condemned to suffer grievous loss' . . . and depends upon whether the [individual's] interest in avoiding that loss outweighs the governmental interest in summary adjudication."\(^{132}\) The *Morrissey* court stated that "[t]he question is not merely the 'weight' of the individual's interest, but whether the nature of the interest is one within the contemplation of the 'liberty or property' language of the Fourteenth Amendment."\(^{133}\) Although *Roth* addressed the issue of property interest, the case is relied upon in liberty interest decisions.\(^{134}\) The Supreme Court stated that the "Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits."\(^{135}\) In order to have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.\(^{136}\)

The *Roth* Court maintained "[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlements thus infringing upon his right to freedom of speech. *Id.* at 595. Even though he had no contractual or tenure right he maintained that he and others relied on a provision in the official faculty guide which indicated that reemployment would occur.\(^{132}\)

*Teacher Tenure*: Odessa College has no tenure system. The Administration of the College wishes the faculty member to feel that he has permanent tenure as long as his teaching services are satisfactory and as long as he displays a cooperative attitude toward his coworkers and his superiors, and as long as he is happy in his work. *Id.* at 600.\(^{133}\)

132. 397 U.S. at 262-63.
133. 408 U.S. at 481.
134. The Supreme Court relied on *Roth* in its decision in *Meachum v. Fano*, 427 U.S. at 224. See *infra* notes 149-60 and accompanying text.
135. 408 U.S. at 576.
136. *Id.* at 577.
ment to those benefits.” This statement has been subject to varied interpretation.

Subsequent cases have failed to recognize the phrase "such as" preceding "state law" and have interpreted the phrase to mean that property interests stem solely from state law. When properly divided into its component parts, the sentence means that property interests are created and defined by existing rules or understandings, a significant word largely ignored in the decisions, that stem from an independent source. State law was mentioned simply as one example of an independent source. The Court concluded that petitioner Roth had no claim of entitlement nor was there any state statute, rule or policy that created any legitimate claim to reemployment.

In Perry the Court examined the area of contract law that recognizes implied agreements although there has been no formal written agreement. The Court recognized that "there may be an unwritten 'common law' in a particular university ... that has no explicit tenure system ... but that nonetheless may have created such a system in practice."

In Gibson, the Third Circuit interpreted Wolff to mean that

137. Id.
138. See Sisbarro v. Warden, Mass. State Penitentiary, 592 F.2d 1, 3 (1st Cir. 1979); Twyman v. Crisp, 584 F.2d 352, 356 (10th Cir. 1978); Feeley v. Sampson, 570 F.2d 364, 376-77 (1st Cir. 1978); Russell v. Oliver, 552 F.2d 115, 117 (4th Cir. 1977).
139. 408 U.S. at 578.
140. Perry, 408 U.S. at 602.
141. Wolff involved a Nebraska statute which provided that the chief executive officer of each penal facility was responsible for the discipline of the inmates. The statute also provided a range of possible disciplinary action. 418 U.S. at 545.

Prison authorities, however, had established written regulations that dealt with procedures and policies for controlling inmate misconduct. Misconduct was classified into two categories: major misconduct, which was a "serious violation" and was to be formally reported to an Adjustment Committee having a wide range of sanctions available to it; and minor misconduct, which was "a less serious violation" and could be resolved immediately with or without formal reporting. Id. at 548-52. The Court reasoned that deprivation of good time credit, although of considerable importance, was "qualitatively and quantitatively different from the revocation of parole or probation." Id. at 561. "The deprivation of good time is not the same immediate disaster that the revocation of parole is for the parolee." Id. Good time can be restored and thus may not result in a postponement of parole eligibility and an extension of the term being served. Id. The State, therefore, had a different stake in the structure and content of the prison disciplinary hearing. Id. As prison disciplinary proceedings are not part of a criminal prosecution, the full range of procedures suggested in Morrissey, see supra notes 129, 133 and accompanying text, were not necessary in order to satisfy the minimum requirements of procedural due process. “[A]dvance written notice of the claimed violation and a written statement of the factfinders as to the evidence relied upon and the reasons for the disciplinary action taken [must be provided].” Id. at 563. An “innocent . . . should be allowed to call witnesses and present documentary evidence in his defense when permitting him
only state law is the source of a liberty interest. The court failed to recognize that Wolff also acknowledged that written regulations, which were framed by prison authorities and dealt with procedures and policies for controlling inmate misconduct, could support a liberty interest. \(142\) Wolff was based on the existence of those regulations. The state had created the right to good time and the prison regulations illustrated that depriving a prisoner of good time was a sanction used for major misconduct. \(143\) The prisoner's interest, therefore, fell within the fourteenth amendment's liberty interest. \(144\)

The Supreme Court stated that its analysis paralleled the due process analysis used in property deprivation cases in which the Court consistently held that a hearing was required before a person may be deprived of his property. \(145\) The Court considered a person's liberty to be equally protected stating that "[t]he touchstone of due process is protection of the individual against arbitrary action of government." \(146\) The Gibson court completely ignored this statement from Wolff, relying instead upon two 1976 Supreme Court decisions, Meachum and Montanye, as the bases for its decision.

Meachum and Montanye had a marked impact on the determination of prisoners' liberty interests. In both cases neither state law nor state practice existed which conditioned prison transfers on proof of serious misconduct or the occurrence of other events. \(147\)

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\(142\) 418 U.S. at 548.

\(143\) 652 F.2d at 354.

\(144\) The term of a committed offender could be reduced for "good behavior and faithful performance of duties while confined in a facility." 418 U.S. at 546 n.6.

\(145\) Id. at 551 n.8.

\(146\) Id.' at 557. The Court stated that "the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty' to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated." Id.

\(147\) Id. at 557-58.

\(148\) Id. at 558.

\(149\) In Meachum, there had been a two and one-half month period in which nine serious fires occurred in the Massachusetts Correctional Institution at Norfolk, a medium-security institution. 427 U.S. at 216. Six inmates were removed from the general population as a result of reports from informants and were placed in an administrative
The issue in these cases was whether the due process clause of the fourteenth amendment entitled a state prisoner to a hearing prior to being subjected to substantially less favorable conditions following a prison transfer. The transfers in *Meachum* resulted in a change from a medium security institution to a maximum security institution.\(^{150}\) In *Montanye*, however, the prisoner was transferred from one maximum security institution to another.\(^{151}\) In neither case was there any deprivation upon arrival at the new institution.\(^{152}\)

From the outset, the Court's discussion in *Meachum* indicated a narrowing of its previously expansive interpretation of a liberty interest. The Court rejected "the notion that *any* grievous loss visited upon a person by the State [would] invoke the procedural protections of the Due Process Clause."\(^{153}\) The Court stated that there is no constitutional guarantee that a convicted prisoner will be placed into any particular prison.\(^{154}\) A conviction extinguishes a prisoner's liberty interest in having the decision regarding prison assignment subjected to scrutiny under the due process clause.\(^{155}\) "[T]o hold . . . that *any* substantial deprivation imposed by prison authorities triggers the procedural protections of the Due Process Clause would subject to judicial review a wide spectrum of discretionary actions that traditionally have been the business of prison administrators rather than of the federal courts."\(^{156}\) The *Meachum* court distinguished *Wolff* v. *McDonnell*\(^{157}\) by stating that the liberty interest


\(^{151}\) *Montanye* v. *Haymes*, 427 U.S. at 238.


\(^{154}\) *Id.*

\(^{155}\) *Id.*

\(^{156}\) *Id.* at 225 (emphasis in original).

\(^{157}\) *See supra* notes 139-44 and accompanying text.
protected in Wolff was rooted in state law but in Meachum there was no liberty interest under Massachusetts law for a prisoner to remain at the prison where he initially was assigned.158 “Holding that arrangements like this are within reach of the procedural protections of the Due Process Clause would place the Clause astride the day-to-day functioning of state prisons and involve the judiciary in issues and discretionary decisions that are not the business of federal judges.”159 Montanye adopted Meachum’s holding and added that “[a]s long as the conditions or degree of confinement to which the prisoner is subjected is within the sentence imposed upon him and is not otherwise violative of the Constitution, the Due Process Clause does not in itself subject an inmate’s treatment by prison authorities to judicial oversight.”160

In Gibson, the Third Circuit rejected the district court’s finding of a policy and practice creating a liberty interest in a prisoner’s conditions or degree of confinement.161 The finding was first rejected because Meachum and Montanye provided that “deprivations and loss of privileges, even in combination cannot create a state expectation or liberty interest.”162 Second, the finding was rejected because the policy or practice which Gibson asserted was never established.163 The court gave undue weight to Meachum and Montanye. Both of those cases dealt with prisoner transfers due to disciplinary infractions. There, the inmates were not subject to disciplinary punishment upon arrival at the transfer prison.

In Meachum, the Court specifically limited its holding to Massachusetts and stated that other states were free to develop their own transfer policies.164 Meachum has been viewed as providing a hard

159. Id. at 228-29.
161. 652 F.2d at 357.
162. Id.
163. Id. The policy or practice of the institution was that after a short period of orientation, prisoners were afforded all of the privileges of the general population, that only risk inmates had privileges restricted, and that in all cases of restrictions hearings were afforded. Id. The court pointed to New Jersey’s arguments that other inmates were in the same position as Gibson and that “there had never previously existed a cell shortage of such magnitude in the prison system which could have fostered the beginning of any history of ‘policies and practices as alleged.’” Id.

A prisoner’s behavior may precipitate a transfer, and absent such behavior, perhaps transfer would not take place at all. But, as we have said, Massachusetts prison officials have the discretion to transfer prisoners for any number of reasons. Their discretion is not limited to instances of serious misconduct. . . . The individual States, of course, are free to follow another course, whether by
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and fast rule that although a prison transfer would have a substantially adverse impact on the prisoner, the resultant conditions of confinement would not invoke fourteenth amendment protection. Such an approach effectively prevents decisions on the merits of certain cases. The court failed to consider the broader implications of its limited view of a constitutionally protected liberty: "[I]f followed to its extreme, [this view] would allow the state to pass a law granting some benefit while explicitly disapproving the extension of procedural protections when a benefit [was] deprived."165

In Hodges v. Klein166 the district court briefly touched upon the issue of a hearing before prisoner transfer by noting that

[although the expectation of remaining at a particular prison or in a particular part of a prison unless found guilty of misconduct is 'too ephemeral and insubstantial' an expectation to require due process protection . . . it could be said that the New Jersey prison complex (like others), through its policies and practices . . . has created a justifiable expectation that an inmate would not be placed in solitary confinement or conditions similar to it absent proof of misconduct or the occurrence of certain events.167

Hodges, however, did not pursue the issue because Management Control Unit (MCU)168 inmates were provided hearings and periodic review.169 The Third Circuit in Gibson did not address this statement by the Hodges court.

Greenholtz v. Inmates of The Nebraska Penal and Correctional Complex170 was a class action suit alleging that Nebraska's statutes and the parole board's procedures denied due process:171 "The procedures used by the Board to determine whether to grant or deny discretionary parole arise partly from statutory provisions and partly

statute, by rule or regulation, or by interpretation of their own constitutions. They may thus decide that prudent prison administration requires pretransfer hearings. Our holding is that the Due Process Clause does not impose a nationwide rule mandating transfer hearings.

167. Id. at 1232 n.12.
168. See supra notes 73-86 and accompanying text.
169. 421 F. Supp. at 1232 n.12.
171. The statutes provided for both mandatory and discretionary parole. Parole was automatic when an inmate had served his maximum term, less good-time credits. NEB. REV. STAT. § 83-1,107(1)(b) (1981). Parole was discretionary when the minimum term, less good time credits, had been served. Id. § 83-1,110(1). See 442 U.S. at 4.
from the Board’s practices.” The district court held that the inmates had the same constitutionally protected “conditional liberty” interest recognized in *Morrissey v. Brewer* and that some of the board’s procedures fell short of constitutional guarantees. The Supreme Court stated that there was a crucial distinction between being deprived of a liberty one may have in parole, and being denied a conditional liberty that one desires. “That the state holds out the possibility of parole provides no more than a mere hope that the benefit will be obtained. . . . [T]he general interest asserted here is no more substantial than the inmate’s hope that he will not be transferred to another prison . . . .”

The argument that the language of the statute created a protected expectation of parole was rejected by the Court which noted that “[m]erely because a statutory expectation exists cannot mean that in addition to the full panoply of due process required to convict and confine there must also be repeated, adversary hearings in order to continue the confinement.” The Court decided that the procedures already in existence were adequate because to require more would turn the process into an adversarial proceeding and experience had shown that the parole release decision was “essentially an

172. 442 U.S. at 4. Hearings were conducted in two stages to determine whether to grant or deny parole: initial review hearings (held at least once a year for every inmate) and final parole hearings. If the Board determined the inmate was not a good risk then parole was deferred. If the Board determined the inmate was a likely candidate then a final hearing was scheduled. If parole was denied, the Board furnished a written statement of the reasons. *Id.* at 4-5.

173. *See supra* notes 129, 133 and accompanying text.

174. 442 U.S. at 5.

175. *Id.* at 9.

176. *Id.* at 11 (emphasis in original) (citation omitted).

177. The section relied on provided in part:

> **Whenever the Board of Parole considers the release of a committed offender who is eligible for release on parole, it shall order his release unless it is of the opinion that his release should be deferred because:**

> (a) There is a substantial risk that he will not conform to the conditions of parole;

> (b) His release would depreciate the seriousness of his crime or promote disrespect for law;

> (c) His release would have a substantially adverse effect on institutional discipline; or

> (d) His continued correctional treatment, medical care, or vocational or other training in the facility will substantially enhance his capacity to lead a law-abiding life when released at a later date. *Neb. Rev. Stat.* § 83-1,114(1) (1976).

442 U.S. at 11.

178. 442 U.S. at 14.
experienced prediction based on a host of variables."  

Greenholtz disregards Roth, Perry, and Wolff. The Court previously had said that the source of a liberty interest came from state law. In Greenholtz, however, the Court noted that even if a state law existed there might be only the possibility of finding a liberty interest and a mere hope that the benefit would be obtained once that interest was found. 

Rhodes v. Chapman is the most recent case in the line of liberty interest cases. In Rhodes, the Supreme Court held that double celling of inmates did not violate either the eighth or fourteenth amendments. The Supreme Court initially considered a liberty interest as an expansive right derived from a relationship between the individual and the state. A balancing of interests determined whether the individual loss outweighed the governmental interest. Some type of hearing, although not a formal adversarial procedure, was required prior to deprivation. The Court contended that claims upon which people relied in their daily lives should be protected. The parameters of those claims gained definition from existing rules or understandings. A further expansion resulted when the Court in Perry, recognized that policies and practices could be developed and some degree of reliance and expectation eventually would be associated with those practices. In Wolff, prison regulations were recognized by the Court as a source from which a liberty interest could be derived. 

The Court, in Meachum, retreated from this gradual expansion and narrowed its previous interpretation of the sources of a liberty interest and concluded that state law was the only source from which a liberty interest could be derived. The Court further narrowed potential sources by stating in Greenholtz that even if a state law existed there might be only a slight possibility of finding a liberty

179. Id. at 14-15.
180. See supra notes 130, 134-39 and accompanying text.
181. See supra notes 131, 140 and accompanying text.
182. See supra notes 141-48 and accompanying text.
183. See supra notes 149-65 and accompanying text.
184. 442 U.S. at 11.
185. 432 U.S. 337 (1981); see supra notes 92-105 and accompanying text.
186. Roth, 408 U.S. at 577; see supra notes 135-36 and accompanying text.
187. 408 U.S. at 577; see supra note 137 and accompanying text.
188. Perry, 408 U.S. at 602; see supra notes 131, 140 and accompanying text.
189. Wolff, 418 U.S. at 548, 557; see supra notes 141-48 and accompanying text.
190. Meachum, 427 U.S. at 226; see supra notes 149-60 and accompanying text.
interest and merely a hope that the benefit would be obtained. The Court’s recent decision in Rhodes determined that prisons which house inmates convicted of serious crimes need not be free of discomfort, indicating that it would be difficult to find a liberty interest in prison situations.

B. State Created Liberty Interest

After looking to United States Supreme Court cases, the Gibson court looked to New Jersey’s statutes to determine whether a liberty interest could be found. The court noted that under the relevant statute, the Commissioner of the Department of Corrections was given “broad and discretionary power over those persons who [were] committed to the State’s institutions.” The Commissioner also was granted the power to administer the work of the Department of Corrections: to issue rules and regulations; to transfer inmates from one institution to another; and to designate places of confinement. These sections refer to transfers “more appropriate for his

191. Greenholtz, 442 U.S. at 11; see supra notes 170-83 and accompanying text.
192. Rhodes, 452 U.S. at 349; see supra notes 98-107 and accompanying text.
193. 652 F.2d 348, 355 (3d Cir. 1981). The statute states that:
the purpose of the department shall be to . . . provide for the custody, care, discipline, training and treatment of persons committed to State correctional institutions . . . to supervise and assist in the treatment and training of persons in local correctional and detention facilities, so that such persons may be prepared for release and reintegration into the Community. . . .
N.J. STAT. ANN. § 30:1B-3 (West 1981).
194. N.J. STAT. ANN. § 30:1B-6. The statute, in pertinent part states:
The commissioner, as administrator and chief executive officer of the department, shall:
a. Administer the work of the department;
   * * * *
e. Formulate, adopt, issue and promulgate, in the name of the department such rules and regulations for the efficient conduct of the work and general administration of the department . . .
f. Determine all matters relating to the unified and continuous development of the institutions and noninstitutional agencies within his jurisdiction;
g. Determine all matters of policy and regulate the administration of the institutions or noninstitutional agencies within his jurisdiction, correct and adjust the same so that each shall function as an integral part of a general system. . . .
Id.
195. Id.
196. Id. § 30:4-85. The provision states: “Any inmate of any correctional institution . . . may be transferred to any other such correctional institution by order of the commissioner directing such transfer, either upon the application of the chief executive officer or upon the initiative of the commissioner. . . .” Id.
197. Id. § 30:4-91.1.
needs and welfare or that of other inmates or for the security of the institution.\textsuperscript{198} The \textit{Gibson} dissent noted that the Commissioner’s discretion was restricted both by statute and by the requirement that any exercise of discretion must not be arbitrary.\textsuperscript{199} The dissent agreed with the majority that New Jersey, by statute, had expressly given the Commissioner sole discretion to transfer inmates. It noted, however, that the majority failed to point to any statutory provisions authorizing the suspension of inmate rights at the Commissioner’s discretion.\textsuperscript{200}

The New Jersey legislature determined that “[t]here is a need to . . . [p]rovide maximum-security confinement of those offenders whose demonstrated propensity to acts of violence requires their separation from the community . . . [and that] [t]he environment for incarcerated persons should encourage the possibilities of rehabilitation and reintegration into the community. . . .”\textsuperscript{201}

The court referred to \textit{Rocca v. Groomes},\textsuperscript{202} in which two classification committees had recommended that a prisoner who had committed a disciplinary infraction\textsuperscript{203} be transferred to a maximum security institution. The court held that the transfer did not result in any denial of due process although it was accomplished without a prior hearing, reasoning that an individual is sentenced to the state prison and not to a particular component of it.\textsuperscript{204} Thus, an inmate has no statutory right to remain in any particular institution since prison officials have the broad discretion to transfer an inmate from

\begin{quote}
When a person has been convicted of an offense against the State of New Jersey and has been committed for a term of imprisonment by a court to an institution . . . and when it appears to the satisfaction of the Commissioner of Institutions and Agencies that the inmate should be transferred to an institution or facility more appropriate for his needs and welfare or that of other inmates or for the security of the institution, the commissioner shall be authorized and empowered to designate the place of confinement to which the inmate shall be transferred to serve his sentence.
\end{quote}

\textit{Id.} § 30:4-91.1.
\textsuperscript{198} \textit{Id.} § 30:4-91.1 (West 1981).
\textsuperscript{199} 652 F.2d at 366 (Higginbotham, J., dissenting).
\textsuperscript{200} \textit{Id.} at 367.
\textsuperscript{201} N.J. STAT. ANN. § 30:1B-3 (West 1981).
\textsuperscript{203} 652 F.2d at 355 n.8. An inmate at New Jersey State Prison at Leesburg was found guilty of a disciplinary infraction after a hearing before the Adjustment Committee and was subjected to a penalty of 15 days “lock up” in the readjustment unit and the loss of 30 days commutation credits. Upon the recommendation of the Classification Committee and approval by the Inter-Institutional Classification Committee he was transferred to Trenton State Prison. 144 N.J. Super. at 214-15, 365 A.2d at 196.
\textsuperscript{204} \textit{Id.}
one institution to another.205

The Gibson dissent argued that the state created right need not be embodied in a statute206 and examined Winsett v. McGinnes,207 a Third Circuit decision, as relevant to Gibson's situation. Winsett was convicted and sentenced to life imprisonment for felony murder of a Delaware state police officer.208 After serving ten years as a model prisoner he requested work release certification.209 His application was approved by two of the three requisite levels of decisionmakers but, before the superintendent could give his approval, public opposition began to mount.210 Winsett's application subsequently was rejected. Winsett then filed a civil rights action alleging that the superintendent's consideration of public opinion was an impermissible basis for evaluation of such applications.211

Winsett's claim of a liberty interest was grounded in the regulations issued by the Department of Corrections, promulgated by the department to implement the basic legislative grant of authority to create a work release program.212 The Third Circuit found that a "state-created liberty interest in work release arises when a prisoner meets all eligibility requirements under the state regulations and the exercise of the prison authorities' discretion is consistent with work release policy."213 The Third Circuit did not review the prison authorities' discretion as absolute, and therefore such discretion did not negate the existence of the state created entitlement.214

The Gibson majority, however, concluded that the Commissioner's rules and regulations concerning the use of solitary confinement dealt only with disciplinary detention, protective custody detention, and administrative segregation, and did not limit the use of segregated housing for housing holds.215 A provision of the New Jersey statutes provides that "[a]ny person transferred . . . shall be held in the custody of the institution to which transfer is made, subject to the rules and regulations thereof and the provisions of law applicable thereto as though originally committed to such institu-

205. Id. at 215, 365 A.2d at 199.
206. 652 F.2d at 363 (Higginbotham, J., dissenting).
208. Id. at 999.
209. Id.
210. Id. at 1000.
211. Id. at 998.
212. Id. at 1005.
213. Id. at 1007.
214. Id. at 1006.
215. 652 F.2d at 355.
A further provision specifies that every State penal and correctional institution shall formally promulgate and publish rules and regulations governing the rights, privileges, duties and obligations of the inmate population [and] detail the procedures for imposing summary and administrative punishment as well as for appealing therefrom. No punishment may be meted out other than of the type and in the manner prescribed by such rules and regulations. Upon the arrival of a prisoner he shall be furnished with a copy of the institution's rules and regulations and shall have the meaning of the same explained to him.

Gibson was sent to Yardville on January 25, 1977. On February 8, 1977, he was classified for Rahway. On February 18, 1977, the addendum to the Trenton State Prison Inmate Handbook was published providing that "administrative quarantine at State Prison, Trenton is to be used for the housing of Prison Reception Unit housing holds assigned by Inter-Institution Classification Committee for assignment to State Prison, Rahway or State Prison, Leesburg." The Inter-Institution Classification Committee is comprised of the Superintendents of Trenton, Rahway and Leesburg State Prison or their designates. Before the addendum was added to the handbook, solitary confinement was restricted to two categories of individuals: The first category was for inmates requiring special detention as a means of discipline; the second category, called administrative segregation, applied to inmates in need of protective custody or who continued to violate the institution's rules or regulations or who posed a continued serious threat to the inmate's safety and security.

Apparently, the superintendents of the respective institutions met, noted the existence of a cell shortage, and, in response, created the new classification of administrative quarantine. Because the description of administrative quarantine does not mention that housing holds would be inmates who were disciplinary problems or in need of protective custody, it is perplexing why the description in-

217. Id. § 30:4-8.4, 5.
218. Brief on Behalf of Defendant-Appellant at 33a, supra note 16.
219. 652 F.2d at 356 n.10.
220. Id. at 367 (Higginbotham, J., dissenting). Detention requires a due process hearing and is limited to a maximum period of 30 days. Id. A due process hearing is also required before administrative segregation can be imposed and confinement can last as long as the inmate demonstrates an inability to get along. Id.
cluded a list of sanctions to which the housing holds would be subjected. The sanctions proscribe contact visitation rights and yard recreation rights. Inmates so confined would not be processed through the Classification Committee for custody or program assignments. The district court and the Third Circuit dissent believed that administrative quarantine was meant to expand the category of prisoners who could be isolated and was not meant to deprive these inmates of the rights afforded to every other isolated prisoner.

The Third Circuit specifically rejected the arguments of Gibson and the district court that New Jersey's disciplinary regulations were the source of Gibson's liberty interest. Gibson contended that because a prisoner who had been segregated for disciplinary reasons must be afforded a hearing and periodic review of his confinement in isolation, a fortiori, a prisoner such as Gibson who had committed no infraction, should, at the least, be entitled to the same procedure before being subjected to the same conditions. The court, however, stated that the only standards and regulations of New Jersey limiting the authority and discretion of prison officials were found in the context of disciplinary, protective custody, and severe risk cases. Prisoners, in those cases, could claim a substantive right not to be so confined without due process protections. The court further reasoned that Gibson did not fall into any of these categories because he was segregated solely as a result of the cell shortage and because he was not the type of prisoner who properly would be classified for general population at Trenton. Gibson, therefore, had no substantive right that was entitled to due process protection.

Administrative quarantine had been created to alleviate the overcrowding, thus, Gibson did not fall within any of the previously stated categories. The claim that Gibson was not the type of prisoner for general population at Trenton was an indication that prison officials wanted to protect him from the inmates at Trenton who were there because they had committed serious offenses. Superintendent Hilton testified that although the Leesburg prisoners were “minimum” custody status, he was not concerned. Some of these Leesburg prisoners were transferred to general population in Tren-

221. Brief on Behalf of Defendant-Appellant at 34a, supra note 16.
222. 652 F.2d at 368 (Higginbotham, J., dissenting).
223. Id. at 358.
224. Id.
225. Id.
226. Id.
227. Trial Transcript at 11-12, supra note 70.
The court's reasoning is far from clear in explaining why an inmate who does not fit within a particular defined category, yet whose treatment in effect is the same as those who do fit within that category, should be denied the same procedural protections. If Gibson had committed an infraction, he would have been entitled to a due process hearing after which the maximum period of solitary confinement was thirty days. In deciding that the Commissioner's discretion is limited only by regulations which specifically state the prisoner has a right to due process protections, the Third Circuit, in effect, gave prison administrators the authority to determine under what circumstances a substantive right will exist.

IV. RIGHT TO A HEARING

The Third Circuit stated that disciplinary hearings were held to determine if the prisoner breached a prison rule. In Gibson's case, however, there was no basis upon which to hold a hearing. The court stated that Gibson's complaint did not pertain to the fact that he did not receive a hearing but that he was kept in solitary confinement. Even if he were to have received a hearing, he would have been dissatisfied. The court concluded that a hearing at this point would have consisted of no more than a statement to Gibson that he was being held in quarantine because of a shortage of cell space in general population.

A hearing in this situation should be more than simply the obvious statement that the inmate was being kept in quarantine. It should consist of a brief explanation of the situation, how long prison officials thought the situation would continue, and what the inmate could expect during his confinement under quarantine conditions. Assurances that the inmate would be removed from quarantine as soon as a cell became available might also be given. A hearing would serve the important administrative functions of creating a record, providing official notification, and putting prison officials on notice that a prisoner was being held in solitary confinement pending a transfer to the assigned institution.

The dissent argued that "[e]xperience has shown that when administrators are required to document the reasons for their decisions
the constitutional and statutory rights of persons affected by those decisions receive greater consideration and protection. It is this value which is lost when the right to due process is abrogated.\textsuperscript{233}

In \textit{Smoake v. Fritz},\textsuperscript{234} the State of New York argued that prisoners who had been placed in segregated quarters were being kept in "administrative segregation" rather than solitary confinement or punitive segregation.\textsuperscript{235} The court concluded that the distinction was largely semantic: each was in his cell twenty-three hours per day, there was no mingling with the general population or participation in normal prison activities.\textsuperscript{236} Access to the mess hall was denied, inmates wore the same clothing for seven days, showers were provided once a week, and there was no hot water supplied.\textsuperscript{237} These arguments are applicable to Gibson's situation for he was subjected to similar treatment and similar rationalizations were advanced by prison officials.

In \textit{King v. Higgins},\textsuperscript{238} the court stated that it was no answer to the failure to provide notice prior to the hearing that "King knew why he had been placed in the 'Awaiting Action' cell."\textsuperscript{239} The prisoner was entitled to due process "whether the decision affecting his status was based on security, rehabilitation, or punishment."\textsuperscript{240}

The \textit{Gibson} dissent also argued that Gibson did not differ from a prisoner in the segregation category\textsuperscript{241} because the prison officials stated they had placed him in administrative quarantine because he was not the type of prisoner who would properly be classified for general population.\textsuperscript{242} Judge Higginbotham inquired, "Is the right to due process so fragile that it can be lost by a sleight of hand that

233. \textit{Id.} at 369 (Higginbotham, J., dissenting).
235. \textit{Id.} at 610.
236. \textit{Id.}
237. \textit{Id.}
239. \textit{Id.} at 1028.
240. \textit{Id.} at 1029.

While the prisoner may be charged with knowledge of facts and circumstances of a particular event, he cannot be charged with knowledge as to the legal interpretation or theory of action which prison authorities may seek to follow with respect to such event. The situation is analogous to that involving an individual who knows the circumstances which brought about his arrest, but is nonetheless entitled to notice as to the theory of action the government intends to pursue with respect to his case.

\textit{Id.} at 1028.

241. 652 F.2d at 368 (Higginbotham, J., dissenting). A prisoner is put in segregation because of an inability to get along in the general population. \textit{Id.}
242. \textit{Id.}
alters form but leaves substance untouched? I cannot believe that such a drastic change in constitutional protection can be effected by the mere expedient of a name change."

V. Conclusion

Gibson v. Lynch244 is representative of a developing trend to narrow prisoners’ rights. A number of Supreme Court decisions have provided an impetus to lower courts dealing with questions of prisoners’ rights. The Court initially placed emphasis on the individual loss in a given circumstance and balanced individual and governmental interests. Claims relied upon by people in their daily lives were to be protected. The Court eventually recognized that policies and practices could develop upon which some degree of reliance and expectation would become associated.

The Court’s decision in Meachum v. Fano245 marked the beginning of its withdrawal from this expansive line of decisions. Meachum heralded another equally expansive line of decisions which contorted the earlier pronouncements into unrecognizable vestiges. Meachum has been interpreted to mean that if the state has not provided a liberty interest to the prisoner in any of its laws, then the prisoner cannot find such an interest elsewhere.

The case was not intended to establish a nationwide rule in transfer situations, but such a rule has evolved. There were no deprivations imposed upon the Meachum transferees after their transfer to the receiving institution. The decision has been held determinative in transfer situations which resulted in the imposition of deprivations at the receiving institution. Unlike the situation in Gibson, the transfers in other cases were the result of rule violations by the transferred inmates. The transfer thus becomes somewhat more justifiable in those cases due to issues of prison security. Most disturbing is the judiciary’s willingness to close its eyes to these disparities and apply Meachum as a standard applicable to all situations in which a prisoner is moved from one institution to another, irrespective of the motivations behind the move.

The consequences of these decisions are that federal courts should not interfere in prison administration; state law has become the source of a liberty interest; prison administrators are to be accorded wide-ranging deference; prisoners can be transferred from

243. Id.
244. 652 F.2d 348 (3d Cir. 1981).
one institution to another and subjected to adverse conditions where exigent circumstances exist and the security of the institution is promoted; and preliminary hearings are not necessary where the prisoner "knows" the reasons for his treatment.

The Gibson court, like other courts, misinterpreted Meachum. It failed to look to its own decision in Winsett. The court looked instead for an explicit statement in the very recently written and adopted Addendum which would grant housing holds the right to a hearing and would limit the length of time spent in solitary confinement. Finding no such statement, the court decided it could reach no other conclusion than that Gibson had no liberty interest. Gibson is a result-oriented decision that effectively denies prisoners any recovery from such arbitrary treatment.

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