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The Ninth Circle of Hell: An Eighth Amendment Analysis of Imposing Prolonged Supermax Solitary Confinement on Inmates with a Mental Illness

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THE NINTH CIRCLE OF HELL*: AN EIGHTH AMENDMENT ANALYSIS OF IMPOSING PROLONGED SUPERMAX SOLITARY CONFINEMENT ON INMATES WITH A MENTAL ILLNESS

THOMAS L. HAFEMEISTER†
JEFF GEORGE‡

ABSTRACT

The increasing number of inmates with a mental disorder in America's prison population and the inadequacy of their treatment and housing conditions have been issues of growing significance in recent years. The U.S. Department of Justice estimates that "over one and a quarter million people suffering from mental health problems are in prisons or jails, a figure that constitutes nearly sixty percent of the total incarcerated population in the United States." Furthermore, a person suffering from a mental illness in the United States is three times more likely to be incarcerated than hospitalized, with as many as 40% of those who suffer from a mental illness coming into contact with the criminal justice system every year and police officers almost twice as likely to arrest someone who appears to have a mental illness. As a result, the United States penal system has become the nation's largest provider of mental health services, a "tragic consequence of inadequate community mental health services combined with punitive criminal justice policies."

This growth in the number of inmates with a mental disorder, combined with the recent rise in the use of prolonged supermax solitary confinement and the increasingly punitive nature of the American penological system, has resulted in a disproportionately large number of inmates with a mental disorder being housed in supermax confinement. The harsh restrictions of this confinement often significantly exacerbate these inmates' mental disorders or otherwise cause significant additional harm to their mental health, and preclude the delivery of proper mental health treatment. Given the exacerbating conditions associated with supermax confinement, this setting not only is ill suited to the penological problems

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* *See* DANTE ALIGHIERI, INFERNO 537–90 (Robert Hollander & Jean Hollander trans., Doubleday 2000) (containing cantos XXXII–XXXIV) (describing the Ninth Circle as the deepest depths of hell, where its denizens are immobilized in ice ranging from up to their face to being completely encapsulated).

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posed by the growing number of these inmates but also intensifies these problems by creating a revolving door for many such inmates who are unable to conform their behavior within the general prison environment.

Housing inmates with a mental disorder in prolonged supermax solitary confinement deprives them of a minimal life necessity because this setting poses a significant risk to their basic level of mental health, a need "as essential to human existence as other basic physical demands," and thereby meets the objective element required for an Eighth Amendment cruel and unusual punishment claim. In addition, placing such inmates in supermax confinement constitutes deliberate indifference to their needs because this setting subjects this class of readily identifiable and vulnerable inmates to a present and known risk by knowingly placing them in an environment that is uniquely toxic to their condition, thereby satisfying the subjective element needed for an Eighth Amendment claim. Whether it is called torture, a violation of evolving standards of human decency, or cruel and unusual punishment, truly "a risk this grave—this shocking and indecent—simply has no place in civilized society."

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I. PRINCIPLES TO GUIDE SOCIETY'S RESPONSE TO INCARCERATED OFFENDERS WITH A MENTAL DISORDER

For almost as long as there has been a criminal justice system, criminal justice officials have struggled with how to respond to incarcerated offenders with a mental disorder. Virtually everyone who interacts with this population believes that society's current response is woefully inadequate, a problem that has been exacerbated in recent years. This Article will focus on one aspect of the incarceration of this population—prolonged supermax solitary confinement—that is widely believed to contribute to and enhance mental disorders among inmates placed in this setting. Furthermore, it will propose an alternative approach that can provide a better response for all affected parties, including both the offenders and the correctional officials charged with overseeing them. At the same time, there is a general lack of overarching principles to guide such an analysis. Based on a review of the current literature and a growing consensus regarding various points drawn from this literature, this Article begins with an effort to articulate applicable principles.[1] These principles include:

1. "Many individuals within society have a mental disorder."[2]

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1. The first nine of these principles are derived from pre-incarceration principles previously articulated by the first author in Thomas L. Hafemeister, Sharon G. Garner & Veronica E. Bath, *Forging Links and Renewing Ties: Applying the Principles of Restorative and Procedural Justice to Better Respond to Criminal Offenders with a Mental Disorder*, 60 BUFF. L. REV. 147, 148–55 (2012).

2. *Id.* at 148; *see also* Julie Steenhuysen, *Nearly 1 in 5 Americans Had Mental Illness in 2009*, REUTERS, Nov. 18, 2010, *available at* http://www.reuters.com/article/2010/11/18/us-usa-mentalhealth-idUSTRE6AH4GW20101118 ("More than 45 million Americans, or 20 percent of U.S. adults, had some form of mental illness last year, and 11 million had a serious illness .... Young adults aged 18 to 25 had the highest level of mental illness at 30 percent ...."); Steven Reinberg, *CDC: Half of Americans Will Suffer from Mental Health Woes*, USA TODAY (Sept. 5, 2011, 11:28 AM), http://usatoday30.usatoday.com/news/health/medical/health/medical/mentalhealth/story/2011-09-05/CDC-Half-of-Americans-will-suffer-from-mental-health-woes/50250702/1 ("About half of Americans will experience some form of mental health problem at some point in their life ...." (citing CTRS. FOR DISEASE CONTROL AND PREVENTION, MORBIDITY AND MORTALITY WEEKLY

2. "Mental disorders are not monolithic, but encompass a diverse set of conditions. These disorders manifest in many forms and affect individuals in many different ways. Their impact on capacities, abilities, cognitions, emotions, and behavior vary enormously."[3]

3. "A mental disorder is not an all-or-nothing phenomenon. It tends to fluctuate significantly over time and to interfere with some functions but not others."[4]

4. "A mental disorder can be debilitating, disorienting, frightening, or overpowering to the person experiencing it."[5]

5. "Mental disorders tend to be misunderstood and can be upsetting or frightening to observers, but the likelihood of resulting dangerous behavior is widely overestimated."[6] At the same time, an

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REPORT SUPPLEMENT, MENTAL ILLNESS SURVEILLANCE AMONG ADULTS IN THE UNITED STATES 2 (2011))).

3. Hafemeister et al., *supra* note 1, at 149; *see also* U.S. DEP'T OF HEALTH AND HUMAN SERVS., MENTAL HEALTH: A REPORT OF THE SURGEON GENERAL 5 (1999) [hereinafter SURGEON GENERAL'S REPORT] ("Many ingredients of mental health may be identifiable, but mental health is not easy to define.").

4. Hafemeister et al., *supra* note 1, at 149; *see also* SURGEON GENERAL'S REPORT, *supra* note 3, at 17 ("[R]elatively few mental illnesses have an unremitting course marked by the most acute manifestations of illness; rather, for reasons that are not yet understood, the symptoms associated with mental illness tend to wax and wane.").

5. Hafemeister et al., *supra* note 1, at 149. The Council of State Governments has noted: "People with mental illness are falling through the cracks of this country's social safety net . . . . [A] large number of people with mental illness . . . have been incarcerated because they displayed in public the symptoms of untreated mental illness. Experiencing delusions, immobilized by depression, or suffering other consequences . . . , many of these individuals have struggled, at times heroically, to fend off symptoms of mental illness." COUNCIL OF STATE GOV'TS, CRIMINAL JUSTICE/MENTAL HEALTH CONSENSUS PROJECT, at xii (2002).

6. Hafemeister et al., *supra* note 1, at 149. As explained by the U.S. Surgeon General:

> Are people with mental disorders truly more violent? Research supports some public concerns, but the overall likelihood of violence is low. The greatest risk of violence is from those who have dual diagnoses, i.e., individuals who have a mental disorder as well as a substance abuse disorder. . . . In fact, there is very little risk of violence or harm to a stranger from casual contact with an individual who has a mental disorder. Because the average person is ill-equipped to judge whether someone who is behaving erratically has any of these disorders, alone or in combination, the natural tendency is to be wary. Yet to put this all in perspective, the overall contribution of mental disorders to the total level of violence in society is exceptionally small.

SURGEON GENERAL'S REPORT, *supra* note 3, at 7 (emphasis omitted) (citations omitted); *see also Understanding Mental Illness: Factsheet*, SUBSTANCE ABUSE & MENTAL HEALTH SERVICES ADMIN., http://www.samhsa.gov/mentalhealth/understanding_MentalIlness_Factsheet.aspx (last visited Nov. 16, 2012) ("A consensus statement signed by more than three dozen lawyers, advocates, consumers/survivors, and mental health professionals reads in part: 'The results of several recent large-scale research projects conclude that only a weak association between mental disorders and violence exists in the community. Serious violence by people with major mental disorders appears concentrated in a small fraction of the total number, and especially in those who use alcohol and other drugs.'" (quoting John Monahan & Jean Arnold, *Violence by People with Mental Illness: A Consensus Statement by Advocates and Researchers*, 4 PSYCHIATRIC REHABILITATION J. 67, 70 (1996))).

individual with a mental disorder is often vulnerable to self-abuse or abuse by others.[7]

6. "Individuals with a mental disorder are more likely to come into contact with the criminal justice system."[8] Indeed, "[a] significant proportion of individuals whose actions are brought to the attention of the criminal justice system[, including sentenced offenders,] have a mental disorder."[9] In addition, inmates may develop a mental illness, including a serious mental illness, while incarcerated.[10]

7. "Persons with a mental disorder [, including those who are prison inmates,] should be afforded the respect and dignity to which all human beings are entitled."[11] "Human interactions generally remain important to them and how they are treated by others and society often has a significant impact on them."[12]

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7. Hafemeister et al., *supra* note 1, at 150. *See* Karen Hughes et al., *Prevalence and Risk of Violence Against Adults with Disabilities: A Systematic Review and Meta-analysis of Observational Studies*, 379 THE LANCET 1621, 1621 (2012) ("Adults with disabilities are at a higher risk of violence than are non-disabled adults, and those with mental illnesses could be particularly vulnerable."); Mary Elizabeth Dallas, *Disabled Adults More Apt to Be Victims of Violence: Study*, HEALTHDAY (Feb. 27, 2012), http://consumer.healthday.com/Article.asp?AID=662154 ("Disabled adults are at higher risk of being victims of violence than adults who aren't disabled, new research finds. Those with mental illness are particularly vulnerable, with about 24 percent reporting having experienced physical, sexual or 'intimate partner' violence during the past year . . . .").

8. Hafemeister et al., *supra* note 1, at 150; Mental Health Early Intervention, Treatment, and Prevention Act of 2000, S. 2639, 106th Cong. § 2(2) (2000) ("Twenty-five to [forty] percent of the individuals who suffer from a mental illness . . . will come into contact with the criminal justice system each year.").

9. Hafemeister et al., *supra* note 1, at 150; *see also* Robert Bernstein & Tammy Seltzer, *Criminalization of People with Mental Illnesses: The Role of Mental Health Courts in System Reform*, 7 D.C. L. REV. 143, 145 (2003) ("During street encounters, police officers are almost twice as likely to arrest someone who appears to have a mental illness."); SASHA ABRAMSKY & JAMIE FELLNER, HUMAN RIGHTS WATCH, ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS 17 & n.2 (2003) ("In 2000, the American Psychiatric Association reported research estimates that perhaps as many as one in five prisoners were seriously mentally ill, with up to 5 percent actively psychotic at any given moment." (citation omitted)); DORIS J. JAMES & LAUREN E. GLAZE, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 1 (2006) [hereinafter BJS REPORT] ("[M]ore than half of all prison and jail inmates ha[ve] a mental health problem.").

10. Prolonged solitary confinement, in particular, places even inmates with no previous history of a serious mental disorder at risk of suffering psychological deterioration. *See generally* ABRAMSKY & FELLNER, *supra* note 9, at 149–50; Stuart Grassian & Nancy Friedman, *Effects of Sensory Deprivation in Psychiatric Seclusion and Solitary Confinement*, 8 INT'L J.L. & PSYCHIATRY 49, 54 (1986); Stuart Grassian, *Psychopathological Effects of Solitary Confinement*, 140 AM. J. PSYCHIATRY 1450, 1450–52 (1983); Craig Haney, *Mental Health Issues in Long-term Solitary and "Supermax" Confinement*, 49 CRIME & DELINQ. 124, 130–32 (2003).

11. Hafemeister et al., *supra* note 1, at 151; *see, e.g.*, Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, art. 3, U.N. Doc. A/RES/61/106 (Dec. 13, 2006); Press Release, U.N. Dep't of Pub. Info., With 20 Ratifications, Landmark Disability Treaty Set to Enter into Force on 3 May, U.N. Press Release HR/4941 (Apr. 3, 2008).

12. Hafemeister et al., *supra* note 1, at 151; *see also* Howard Meltzer et al., *Feelings of Loneliness Among Adults with Mental Disorder*, 48 SOC. PSYCHIATRY & PSYCHIATRIC EPIDEMIOLOGY 5, 12 (2013) ("This study has highlighted the strong association between loneliness and mental disorder . . . ."); Victoria Maxwell, *This Won't Hurt a Bit, Really: Dating After Mental Illness*, PSYCHOL. TODAY (Apr. 17, 2009, 9:26 PM), http://www.psychologytoday.com/print/4384 ("[W]e don't leave

8. Like all human beings, inmates with a mental disorder may be involved in interactions with other human beings where friction, disputes, and altercations occur. Nevertheless, like most human beings, the occurrence of human interactions can be of considerable importance to them.[13]

9. Inmates with a mental disorder can "(a) learn from the consequences of their behavior, (b) benefit from being held accountable for criminal behavior, (c) be deterred from further criminal behavior, and (d) change their behavior, although they may have an impaired capacity to do so that may require special assistance."[14]

10. "Responding appropriately to a criminal offender with a mental disorder tends to be a complex undertaking" because mental illness tends to be multifaceted, with the appropriate course of treatment as much an art as a science—and the challenge of forging a successful treatment program is compounded when services are being provided in a correctional facility.[15] Nonetheless, placement of individuals with an untreated serious mental illness within a correctional facility may place them at risk of harming themselves or others.[16]

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our hearts and desires behind when we get a diagnosis. We take them with us, along with our bodies, minds (yes our minds) and spirits as we walk or, in my case, stumble our way to recovery. And that's the point isn't it? Not how graceful we are, but that we're heading in the right direction and surrounded, hopefully, with people who are heading our way too.").

13. For example, Hafemeister and Vallas have noted:

> Of all human desires, the longing for intimacy with another human being is one of the most intense. Yet despite the fundamental nature of this desire, for many it remains elusive. Intimate relationships can be difficult to establish, daunting to maintain, and devastating to lose. They can be a minefield for individuals who are relatively free of behavioral, cognitive, or emotional impairments. The quest for intimacy, however, is particularly complex and challenging for those with a mental disorder as such a disorder can limit and impede social interactions, while associated stereotypes and stigma routinely disrupt potential and existing relationships.

Thomas L. Hafemeister & Rebecca Vallas, *Intimate Partner Violence and Victims with a Mental Disorder* (forthcoming) (on file with author).

14. Hafemeister et al., *supra* note 1, at 152; *see also* SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., U.S. DEP'T OF HEALTH & HUMAN SERVS., NATIONAL CONSENSUS STATEMENT ON MENTAL HEALTH RECOVERY 2 (2006) ("Consumers have a personal responsibility for their own self-care and journeys of recovery. Taking steps towards their goals may require great courage. [They] must strive to understand and give meaning to their experiences and identify coping strategies and healing processes to promote their own wellness.").

15. Hafemeister et al., *supra* note 1, at 154. *See generally* Jamie Fellner, *A Corrections Quandary: Mental Illness and Prison Rules*, 41 HARV. C.R.-C.L. L. REV. 391, 391 (2006); Clarence J. Sundram, *Monitoring the Quality and Utilization of Mental Health Services in Correctional Facilities*, 7 UDC/DCSL L. REV. 163, 167–68 (2003) (describing the common problems of diagnosis and treatment of mental illness in correctional settings). The phrases "mental disorder" and "mental illness" are sometimes used interchangeably, but for purposes of this Article the latter will be used to focus on conditions that are more likely to vary over time and are considered to be relatively treatable.

16. *See infra* Parts IV–V; *see also* Joyce Kosak, *Mental Health Treatment and Mistreatment in Prisons*, 32 WM. MITCHELL L. REV. 389, 397–98 (2005) (providing adequate mental health treat-

11. Courts, including the U.S. Supreme Court, have been virtually unanimous in recent years in holding that inmates within a correctional facility are entitled to mental health treatment for a serious mental illness.[17] Inmates with a mental illness that is not serious may also need this treatment to prevent their illness from becoming a serious mental illness.[18]

12. Individuals placed within a correctional facility should be screened for the existence of a serious mental illness[19] upon their initial placement and periodically thereafter, including following a change in placement or an event that may indicate the presence of a serious mental illness.[20] When an inmate is identified as

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ment in prisons improves prison safety by reducing the number of violent disciplinary infractions, which is disproportionately high among inmates with a mental illness given inadequate treatment).

17. Brown v. Plata, 131 S. Ct. 1910, 1918 (2011) (finding that adequate mental health care constitutes "basic sustenance," the deprivation of which constitutes a violation of the Eight Amendment); Estelle v. Gamble, 429 U.S. 97, 104 (1976) ("[D]eliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' [that violates the Eighth Amendment]." (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976)); Ramos v. Lamm, 639 F.2d 559, 574–75 (10th Cir. 1980) (stating that the medical care that states are to provide inmates includes mental health care); Bowring v. Godwin, 551 F.2d 44, 47 (4th Cir. 1977) (establishing that a prison inmate is entitled to psychological or psychiatric treatment if a physician or health care provider, exercising ordinary care at the time of observation, concludes with reasonable certainty that (1) the inmate's symptoms demonstrate a serious disease or injury; (2) the disease or injury is curable or may be substantially alleviated as a result of necessary treatment; and (3) the potential for harm to the inmate through unnecessary delay or ultimate denial of care would be substantial to the inmate's health); McCoy v. Goord, 255 F. Supp. 2d 233, 259 (S.D.N.Y. 2003) (ruling that denial of psychiatric or mental health care, if sufficiently serious, may constitute an Eighth Amendment violation); Merriweather v. Sherwood, 235 F. Supp. 2d 339, 347 (S.D.N.Y. 2002) (ruling that although inmates are not entitled to the best possible mental health care, they are entitled to reasonable care that meets the state's minimum standards of mental health treatment); Starbeck v. Linn Cnty. Jail, 871 F. Supp. 1129, 1141 (N.D. Iowa 1994) ("A medical need is serious if it is one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention.").

18. *See* Harrison v. Barkley, 219 F.3d 132, 132 (2d Cir. 2000) (ruling that a medical condition constitutes a serious medical condition and implicates the right to treatment if untreated it will degenerate and cause needless harm); *see also* Helling v. McKinney, 509 U.S. 25, 33–34 (1993) (holding that inmates need not wait until harm occurs for a court to find that serious needs are unmet).

19. Three specifiers may be listed after most diagnoses to indicate their severity: mild, moderate, or severe. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL HEALTH DISORDERS 2 (4th ed. 2000). "Severe" is defined as "[m]any symptoms in excess of those required to make the diagnosis, or several symptoms that are particularly severe, are present, or the symptoms result in marked impairment in social or occupational functioning." *Id.* at 3. Another phrase often used is "serious mental illness." See Jones'El v. Berge, 164 F. Supp. 2d 1096, 1107–08 (W.D. Wis. 2001), where an "operational" definition of the phrase was used based on any one of five indicators. *See infra* note 235. However, in conjunction with prison inmates, the use of this phrase is primarily driven by *Estelle*'s prohibition of "deliberate indifference to [inmates'] serious medical needs." *Estelle*, 429 U.S. at 104.

20. *See* THE COMM'N ON SAFETY AND ABUSE IN AM.'S PRISONS, CONFRONTING CONFINEMENT 60 (John J. Gibbons & Nicholas B. Katzenbach eds., 2006) [hereinafter COMMISSION] (identifying the need for and outlining appropriate supermax screening mechanisms); Terry Kupers et al., *Beyond Supermax Administrative Segregation: Mississippi's Experience Rethinking Prison Classification and Creating Alternative Mental Health Programs*, 36 CRIM. JUST. & BEHAV. 1037 (2009) (reviewing Mississippi's newly adopted screening mechanism and noting positive outcomes); Hans Toch, *The Future of Supermax Confinement*, 81 PRISON J. 376, 384–85 (2001); *see also* Jerry R. Demaio, Comment, *If You Build It, They Will Come: The Threat of Over-*

having a serious mental illness, it is imperative that treatment be offered promptly.[21]

13. Although some inmates with a serious mental illness can be successfully treated within their current placement, others cannot. Close attention should be given to whether the current placement has contributed to the occurrence of mental illness or has exacerbated a previously existing mental illness. To the extent it is determined that such is the case, immediate efforts should be made to move the inmate to a more suitable placement.[22]

14. The treatment provided to inmates with a mental illness should be in accord with the generally accepted standards of practice of mental health providers for the treatment of individuals with a mental illness. Although accommodation to the security and administrative needs of a correctional facility should be taken into account, these needs do not excuse the delivery of substandard mental health care in this setting, particularly as the appropriate delivery of treatment will enhance the safety and security of inmates and correctional staff in general.[23]

15. The necessary components of a mental health program for inmates placed within a correctional facility include (a) periodic systematic assessment of the need for mental health treatment or special housing, including suicidal tendencies; (b) means by which inmates may promptly bring their concerns about their needs for mental health treatment to appropriate staff; (c) a sufficient number of qualified mental health providers to ensure timely access to needed mental health services; (d) timely delivery of needed, individualized mental health treatment by qualified mental health staff, including, but not limited to, the administration

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classification in Wisconsin Supermax Prisons, 2001 WIS. L. REV. 207, 208–09 (advocating narrowly tailored supermax screening mechanisms to prevent overclassification).

21. *See* 1 FRED COHEN, THE MENTALLY DISORDERED INMATE AND THE LAW 7-22 (2d ed. 2008) (contending that inordinate delays in access to mental health care "lead to exacerbation of the existing symptoms and needless suffering, both of which are at the very heart of the Eighth Amendment"); *see also Ramos*, 639 F.2d at 577–78 (finding that the lack of a psychiatrist caused impermissible delay in the delivery of mental health services); Coleman v. Wilson, 912 F. Supp. 1282, 1309 (E.D. Cal. 1995) ("Because the evidence demonstrates that there are delays everywhere within the system and that those delays result in exacerbation of illness and patient suffering, a violation of the objective facet of the test for violation of the Eighth Amendment has been demonstrated."); Dawson v. Kendrick, 527 F. Supp. 1252, 1307 (S.D. W. Va. 1981) (citing a failure to provide timely access to mental health services).

22. *See* Bruce A. Arrigo & Jennifer Leslie Bullock, *The Psychological Effects of Solitary Confinement on Prisoners in Supermax Units: Reviewing What We Know and Recommending What Should Change*, 52 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 622, 635 (2008) (recommending monitoring procedures and concluding that "prisoners who decompensate in solitary confinement should be removed from the [Security Housing Unit] immediately and should be offered appropriate psychiatric treatment").

23. *See Brown*, 131 S. Ct. at 1928–29 (2011) ("Courts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration.").

> of psychotropic medications in a manner that complies with prevailing professional standards and a program for the identification, treatment, and supervision of inmates with suicidal tendencies; (e) the use of appropriate individualized treatment plans; (f) timely communication among correctional and mental health staff about inmate treatment needs and treatment responses; (g) documentation of requests for treatment, identified mental health needs, and responses provided; (h) maintenance of confidentiality, complete and accurate mental health records, and timely transfer of mental health records between facilities and programs; and (i) preparation and implementation of an appropriate discharge plan for released or transferred inmates.[24]

II. A BRIEF HISTORY OF PROLONGED SUPERMAX SOLITARY CONFINEMENT

> I believe that very few men are capable of estimating the immense amount of torture and agony which this dreadful punishment, prolonged for years, inflicts upon the sufferers; . . . I am only the more convinced that there is a depth of terrible endurance in it which none but the sufferers themselves can fathom, and which no man has the right to inflict upon his fellow-creature. I hold this slow and daily tampering with the mysteries of the brain, to be immeasurably worse than any torture of the body . . . .
>
> —Charles Dickens (after visiting Cherry Hill prison), 1842[25]

The use of prolonged solitary confinement can be traced back at least to the Middle Ages,[26] but the modern supermax and its use of extended and total isolation is a relatively recent phenomenon. The supermax has its roots in the early part of the nineteenth century, when the use of prolonged solitary confinement became popular as what was perceived to be a new, progressive rehabilitation technique. Eastern State Penitentiary—opened in 1826 in Philadelphia and widely known as Cherry Hill—was the proud prototype of the so-called Pennsylvania system, which was considered innovative in that it subjected prisoners to

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24. *See* ABA CRIMINAL JUSTICE STANDARDS ON TREATMENT OF PRISONERS 55–56 (3d ed. 2011) [hereinafter ABA CRIMINAL JUSTICE STANDARDS]; 1 COHEN, *supra* note 21, at 2-8; Fred Cohen, *Correctional Mental Health Law & Policy: A Primer*, 7 UDC/DCSL L. REV. 117, 125–26 (2003); *see also* James R. P. Ogloff, Ronald Roesch & Stephen D. Hart, *Mental Health Services in Jails and Prisons: Legal, Clinical, and Policy Issues*, 18 LAW & PSYCHOL. REV. 109, 123 (1994); Joanna E. Saul, *This Game Is Rigged: The Unequal Protection of Our Mentally-Ill Incarcerated Women*, 5 MOD. AM. 42, 43–44 (2009); Sundram, *supra* note 15, at 165–66.

25. CHARLES DICKENS, AMERICAN NOTES 146 (Fromm Int'l ed. 1985) (1842).

26. Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 CRIME & JUST. 441, 441 n.1 (2006) (commenting that prolonged solitary confinement dates back "[p]erhaps to the monastic practice of imprisonment during the Middle Ages: so called *murus strictus* or 'close confinement,' e.g., seems to indicate imprisonment akin to solitary confinement").

complete isolation, much like supermax confinement of today.[27] However, as one critic put it, "[I]n Philadelphia . . . 'the celebrated system of penitentiary discipline has been abandoned,' and in its place solitary confinement is to be substituted, 'the most inhuman and unnatural that the cruelty of a tyrant ever invented.'"[28]

Implementing a "silent system," Cherry Hill mandated complete silence, and "inmates labored alone in their cells and wore hoods during exercise periods."[29] The emphasis on social isolation was so strong that prison architects even rearranged sewer pipes to prevent prisoners from communicating between cells.[30] The underlying rationale for this system was that prolonged isolation and silence would force an inmate into a state of contemplation and moral reflection, thereby making him "the instrument of his own punishment."[31] As Alexis de Tocqueville reported after a trip to America to view these model institutions, "The solitary cell of the criminal is for some days full of terrible phantoms. . . . [But when] he has fallen into a dejection of mind, and has sought in labor a relief[,] . . . from that moment he is tamed and forever submissive to the rules of the prison."[32]

The Pennsylvania model quickly became an "international sensation," as many European visitors came to inspect prisons like Cherry Hill thinking that they might bring the model back home with them for adoption.[33] Hundreds of similar prisons utilizing strict solitary confinement were constructed all over Europe, with the Pennsylvania model duplicated in England, France, Germany, Holland, Belgium, Portugal, Norway, Sweden, and Denmark, ushering in the "silent era" of prisons.[34]

But this era was short lived. The new prisons were exceptionally expensive to build and maintain, and a growing, widespread problem of

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27. *Id.* at 456–57.

28. ROBERTS VAUX, LETTER ON THE PENITENTIARY SYSTEM OF PENNSYLVANIA 6 (Jesper Harding ed. 1827) (emphasis omitted) (quoting WILLIAM ROSCOE, A BRIEF STATEMENT OF THE CAUSES WHICH HAVE LED TO THE ABANDONMENT OF THE CELEBRATED SYSTEM OF PENITENTIARY DISCIPLINE, IN SOME OF THE UNITED STATES OF AMERICA 24 (1827)).

29. LORNA A. RHODES, TOTAL CONFINEMENT: MADNESS AND REASON IN THE MAXIMUM SECURITY PRISON 36 (2004).

30. *See* NORMAN JOHNSTON, FORMS OF CONSTRAINT: A HISTORY OF PRISON ARCHITECTURE 92 (2000).

31. DAVID J. ROTHMAN, THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC 85 (1971).

32. G. DE BEAUMONT & A. DE TOCQUEVILLE, ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION IN FRANCE 39–40 (1833). It has also been noted that the Pennsylvania model was heavily influenced by Quaker philosophy. *See, e.g.*, THOMAS MOTT OSBORNE, SOCIETY AND PRISONS 109 (1916) (stating that Quakers "[t]hought that the way to reform men was to force them to think right; and they proposed to do this by means of a Bible in a solitary cell." (emphasis omitted)); *see also* Smith, *supra* note 26, at 456–57 ("The inmate was expected to turn his thoughts inward to meet God, to repent his crimes and eventually to return to society as a morally cleansed Christian citizen.").

33. JOHNSTON, *supra* note 30, at 74. For example, in 1839 over four thousand people, including groups of school children, toured Cherry Hill. *Id.*

34. *Id.*; Smith, *supra* note 26, at 457–58.

overcrowding in correctional systems made an emphasis on isolation virtually impossible to sustain.[35] More significantly, the Pennsylvania model was the target of increasing criticism from a variety of sources, including critiques based on multiple studies of the effects of prolonged solitary confinement on inmates' mental health.[36]

Prison officials in the United States and Europe began to notice the widespread development of serious mental health issues in the prisoners housed in these settings. At Cherry Hill, for example, reports began to materialize as early as the 1830s of inmates with serious mental disorders, "including hallucinating prisoners, 'dementia,' and 'monomania.'"[37] Officials at Cherry Hill attempted in vain to provide an alternative explanation for the extensive mental illness in its population. One report from 1846 attributed the disproportionate number of cases of mental illness at Cherry Hill, as compared to non-Pennsylvania model prisons, to the placement in Cherry Hill of "a high proportion of individuals from the 'mulatto race' who apparently could not handle the confinement as well as 'men of pure Saxon blood.'"[38] Another theory put forward by a physician at Cherry Hill was that "the cases of mental disorder occurring in this penitentiary are, with a few exceptions[,] . . . caused by masturbation and are mostly among the colored prisoners."[39]

However, prison officials elsewhere were quicker to recognize a connection between the extreme isolation of prisoners at these facilities and the increasing prevalence of mental illness. Millbank Prison in England, for example, introduced the Pennsylvania system of solitary confinement in the late 1830s, but officials at Millbank in an 1841 report complained "that a very extraordinary increase has taken place in the number of insane prisoners in the prison."[40] The report also suggested a telling course of treatment for them: prisoners "should be placed together and 'have the privilege of conversation.'"[41] Indeed, new 1841 regulations at Millbank reduced confinement periods and allowed prisoners to converse with two or more fellow inmates during exercise hours.[42] Similar developments took place across the United States as every state that tried

35. RHODES, *supra* note 29, at 39.

36. *See infra* notes 37, 40, 197–98 and accompanying text.

37. Smith, *supra* note 26, at 457–58. In nineteenth-century psychiatry, "monomania" denoted "a single pathological preoccupation in an otherwise sound mind." JAN E. GOLDSTEIN, CONSOLE AND CLASSIFY: THE FRENCH PSYCHIATRIC PROFESSION IN THE NINETEENTH CENTURY 155–56 (2001). In 1880, monomania was recognized as one of seven categories of mental illness. *See DSM: History of the Manual*, AM. PSYCHIATRIC ASS'N, http://www.psychiatry.org/practice/dsm/dsm-history-of-the-manual (last visited Oct. 28, 2012). However, monomania faded over time as a diagnostic category and is not found in the currently widely employed *Diagnostic and Statistical Manual of Mental Disorders*. *See generally* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 2000).

38. Smith, *supra* note 26, at 458.

39. *Id.* (internal quotation marks omitted).

40. *Id.* (internal quotation marks omitted).

41. *Id.*

42. *Id.*

the Pennsylvania model between 1830 and 1880 subsequently abandoned it within a few years, with the exception of Pennsylvania.[43] By the 1880s, other than Cherry Hill itself, which continued to employ the "silent model" until 1913, prisons based on the Pennsylvania model had completely disappeared.[44] Prolonged solitary confinement as a method of rehabilitation, in other words, was determined to be a profound failure.[45]

The systematic use of prolonged solitary confinement in correctional systems in the United States remained largely dormant through most of the twentieth century.[46] Likewise, even the selective use of extended solitary confinement as a means of imposing discipline within relatively traditional prisons began to lose favor.[47] Authors of a study on prison psychiatry in 1939 declared, perhaps optimistically, that around-the-clock, prolonged solitary confinement was no longer practiced by any "civilized nation."[48] The Manual of Correctional Standards produced in 1959 by the American Correctional Association, the largest and oldest correctional association in the world, instructed that solitary confinement should be used only briefly, and only as a last resort.[49] The manual advised that no "more than fifteen days, and normally a period of a few days [in solitary confinement] is sufficient."[50] It precluded the use of indefinite isolation and suggested instead a modified segregation for the most difficult prisoners that included therapy and work opportunities.[51] Excessive solitary confinement, it stated, will "defeat [its] own purpose by embittering and demoralizing the inmate," and it stressed that even inmates in solitary confinement must have daily group or individual therapy to protect their "[m]ental and emotional health."[52]

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43. JOHNSTON, *supra* note 30, at 138.

44. *Id.*; Smith, *supra* note 26, at 465. Prisons modeled on the Pennsylvania system at Cherry Hill were tried in "Maryland, Massachusetts, Maine, New Jersey (twice), Virginia, and Rhode Island," but all except Cherry Hill had abandoned the model by the 1880s. JOHNSTON, *supra* note 30, at 138. Although the legislation officially ending the silent system at Cherry Hill and converting it into a "congregation system" passed in 1913, the silent system had gradually and largely disappeared in practice over the years prior. NEGLEY K. TEETERS & JOHN D. SHEARER, THE PRISON AT PHILADELPHIA CHERRY HILL: THE SEPARATE SYSTEM OF PENAL DISCIPLINE 1829–1913, at 220–23 (1957).

45. *See generally* SHARON SHALEV, SUPERMAX: CONTROLLING RISK THROUGH SOLITARY CONFINEMENT 15–16 (2009) ("During the last quarter of the nineteenth century, it became clear that the new [Pennsylvania model] penitentiaries did not reform criminals and were extremely expensive to run, and there was little proof that they were any more effective than other forms of confinement. As evidence of the devastating health effects of solitary confinement surfaced, there was also a growing moral and ethical debate . . . .").

46. RHODES, *supra* note 29, at 39.

47. Smith, *supra* note 26, at 466.

48. *Id.*

49. RICHARD A. MCGEE ET AL., AM. CORRECTIONAL ASS'N, MANUAL OF CORRECTIONAL STANDARDS 246–47 (1959).

50. *Id.* at 247.

51. *Id.* at 247–49.

52. *Id.* at 253–54.

The mid-1970s, however, marked the beginning of an unprecedented growth in America's prison population.[53] Whereas the rate of incarceration had remained largely unchanged from 1925 to 1975, it quintupled over the next quarter century, driven in part by an increase in the crime rate.[54] The 1970s and 1980s also saw the virtual abandonment of a rehabilitative philosophy in U.S. prisons, increasingly replaced by a pervasive view that retribution, incapacitation, and deterrence were the primary purposes of incarceration.[55] It was in this increasingly punitive atmosphere that the supermax, prolonged solitary confinement model emerged and flourished.[56]

Most point to an October 1983 extended lockdown following the killing of two prison guards at the U.S. Penitentiary in Marion, Illinois—a maximum-security prison opened in 1963 to replace the infamous prison at Alcatraz—as the origin of the modern American use of supermax prolonged solitary confinement.[57] At Marion, a week of inmate rioting had led to a "prolonged emergency lockdown" of inmates that was never lifted, becoming a "'large-scale experiment in solitary confinement' that continues to this day."[58] The Marion lockdown "experiment" led correc-

53. Haney, *supra* note 10, at 127–28.

54. *See* Hafemeister et al., *supra* note 1, at 162–63 ("During the first seven decades of the twentieth century, 'the incarceration rate in the United States consistently averaged 110 inmates for every 100,000 people.' In the 1970s this rate began to increase, and in the 1980s and 1990s it grew exponentially. Between 2000 and 2009, the number of incarcerated offenders continued to increase, although this growth was slower than in previous decades. It is estimated that over two million (2,292,133) individuals were incarcerated in U.S. prisons and jails in 2009, or approximately 743 of every 100,000 members of the population. The result is the highest rate of incarceration in the world and a crowded and over-extended correctional system. Despite devoting substantial resources to the building of new facilities, many prison and jail systems are operating above their official housing capacity." (quoting DENNIS SULLIVAN & LARRY TIFFT, RESTORATIVE JUSTICE: HEALING FOUNDATIONS OF OUR EVERYDAY LIVES 9 (2001))); *see also* Haney, *supra* note 10, at 127–28. *But see* E. ANN CARSON & WILLIAM J. SABOL, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2011, at 1–2, 4 (2012) (reporting that the number of sentenced incarcerated individuals decreased in 2010 (a decline of 0.1%) and 2011 (a decline of 0.9%) to 1,598,780 at year-end 2011, although this still represented 492 sentenced prisoners per 100,000 U.S. residents). Most of this decrease was the result of efforts to reduce the prison census in California, which, in turn, was driven by a lower court ruling upheld by the U.S. Supreme Court in *Plata v. Brown*, 131 S. Ct. 1910 (2011), that the State of California must "reduce its prison population to 137.5% of the prisons' design capacity [approximately 110,000 prisoners] within two years" to alleviate overcrowding. *Id.* at 1928; *see also* CARSON & SABOL, *supra*, at 2–4.

55. *See* Haney, *supra* note 10, at 128–29; *see also* SHALEV, *supra* note 45, at 6; Hafemeister et al., *supra* note 1, at 162 ("Beginning in the 1970s, support for the rehabilitative model waned, driven by high recidivism rates and the perception that the process of rehabilitation was practically and morally complex and often unsuccessful.").

56. *See infra* notes 57–72 and accompanying text; *see also* Hafemeister et al., *supra* note 1, at 162 ("It is no coincidence that the more favored models of retribution, deterrence, and incapacitation, with their emphasis on incarceration, have in recent years combined to result in the imprisonment of more people in the United States for the purpose of crime control than virtually any other society in history.").

57. *See, e.g.*, Smith, *supra* note 26, at 442–43; RHODES, *supra* note 29, at 28; Arrigo & Bullock, *supra* note 22, at 624–25.

58. RHODES, *supra* note 29, at 28 (quoting HUMAN RIGHTS WATCH, COLD STORAGE: SUPER-MAXIMUM SECURITY CONFINEMENT IN INDIANA 24 (1997)) (internal quotation marks omitted). The lockdown was largely a response to the killing of two prison guards within a few hours of each other in two separate incidents. Smith, *supra* note 26, at 442.

tions departments across the United States to implement their own systematic lockdowns, and a new incarceration paradigm was born.[59] For example, in 1994, the first federal prison constructed to be expressly modeled after this approach, called a "super-maximum," opened in Florence, Colorado.[60] Many states followed suit,[61] systematically imposing long-term, oftentimes indefinite, disciplinary segregation in which inmates are placed in virtually total isolation and severely restricted in their movements.[62]

In 1991, the organization Human Rights Watch identified the rise of supermax confinement as "[p]erhaps the most troubling" human rights trend in the U.S. correctional system, estimating that at least thirty-six state prison systems had completed or were developing such facilities at that time.[63] In 1997, the authors of a study on the use of these facilities concluded: "[A]t no point in the modern history of imprisonment have so many prisoners been so completely isolated for so long a period of time in facilities designed so completely for the purpose of near total isolation."[64] By 2000, Human Rights Watch estimated that approximately 20,000 prisoners were confined in supermax facilities across the United States.[65] A 2004 Urban Institute survey of self-identified supermax wardens determined that forty-four states had at least one supermax facility, collectively housing roughly 25,000 prisoners.[66] Another study conducted in 2006 concluded that there were by then at least fifty-seven supermax prisons or units within prisons in approximately forty states.[67] A front-page, feature news article published in 2012 asserted:

> At least 25,000 prisoners—and probably tens of thousands more, criminal justice experts say—are still in solitary confinement in the United States. Some remain there for weeks or months; others for

59. Erica Goode, *Prisons Rethink Isolation, Saving Money, Lives and Sanity*, N.Y. TIMES, Mar. 10, 2012, at A1 (recounting that the use of long-term isolation "began three decades ago, when corrections departments—responding to increasing problems with prison gangs, stiffer sentencing policies that led to overcrowding, and the 'get tough on crime' demands of legislators—began removing ever larger numbers of inmates from the general population").

60. Gertrude Strassburger, *Judicial Inaction and Cruel and Unusual Punishment: Are Super-Maximum Walls Too High for the Eight Amendment?*, 11 TEMP. POL. & CIV. RTS. L. REV. 199, 202 (2001).

61. *Id.*

62. *See infra* notes 74–86 and accompanying text.

63. HUMAN RIGHTS WATCH, PRISON CONDITIONS IN THE UNITED STATES 3 (1991).

64. Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. REV. L. & SOC. CHANGE 477, 480 (1997).

65. JAIME FELLNER, HUMAN RIGHTS WATCH, OUT OF SIGHT: SUPER-MAXIMUM SECURITY CONFINEMENT IN THE UNITED STATES 2 (2000).

66. Arrigo & Bullock, *supra* note 22 at 624.

67. Jules Lobel, *Prolonged Solitary Confinement and the Constitution*, 11 U. PA. J. CONST. L. 115, 115 (2008).

> years or even decades. More inmates are held in solitary confinement here than in any other democratic nation.[68]

Notwithstanding that prison systems across the United States are increasingly financially strained and overcrowded,[69] with the U.S. Supreme Court recently taking the extraordinary step of ordering the California correctional system to dramatically reduce its prison population,[70] the popularity and use of supermax prisons has continued to grow despite their high operating costs.[71] The increasing popularity of this punitive penological approach and its severe isolation of purportedly dangerous and disruptive prisoners proved "politically contagious," as "politicians and prison administrators across the USA and elsewhere competed to build the most secure, high-tech, fortified isolation prison" possible,[72] although as a result of its high costs and perhaps influenced by increasing humanitarian concerns, the popularity of supermax prolonged solitary confinement may be beginning to diminish.[73]

Today, the correctional departments of the various states and the federal government use a variety of phrases to describe their own super-

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68. Goode, *supra* note 59; *see also* Atul Gawande, *Hellhole*, THE NEW YORKER, Mar. 30, 2009, at 37, 42 ("The United States now has five per cent of the world's population, twenty-five per cent of its prisoners, and probably the vast majority of prisoners who are in long-term solitary confinement."); Shanna McCord, *UC Santa Cruz Professor Craig Haney Talks to Senate Subcommittee About the Perils of Solitary Confinement*, SANTA CRUZ (Cal.) SENTINEL (June 20, 2012, 6:33 PM), http://www.santacruzsentinel.com/news/ci_20901442/uc-santa-cruz-professor-craig-haney-talks-senate?source=rss&utm_source=dlvr.it&utm_medium=twitter ("An estimated 80,000 of the 2.3 million inmates in U.S. prisons and jails are in long-term solitary confinement.").

69. *See* Hafemeister et al., *supra* note 1, at 162–64, 187.

70. Brown v. Plata, 131 S. Ct. 1910, 1923–24 (2011); *see also* Robert Barnes, *Justices Uphold Order That May Release Thousands of Calif. Inmates*, WASH. POST, May 23, 2011, at A1 ("[The] Supreme Court . . . ordered California to reduce its chronically overcrowded prisons by more than 30,000 prisoners, saying judges must get involved when prison conditions are 'incompatible with the concept of human dignity.'"); Adam Liptak, *Justices, 5–4, Tell California to Cut Prisoner Population*, N.Y. TIMES, May 23, 2011, at A1.

71. *See* SHALEV, *supra* note 45, at 4. *But see* Goode, *supra* note 59 ("[A] growing number of states . . . are rethinking the use of long-term isolation and re-evaluating how many inmates really require it, how long they should be kept there and how best to move them out. Colorado, Illinois, Maine, Ohio and Washington State have been taking steps to reduce the number of prisoners in long-term isolation; others have plans to do so. On Friday, officials in California announced a plan for policy changes that could result in fewer prisoners being sent to the state's three super-maximum-security units.").

72. SHALEV, *supra* note 45, at 4; *see also* Gawande, *supra* note 68, at 43 ("By 1999, the practice had grown to the point that Arizona, Colorado, Maine, Nebraska, Nevada, Rhode Island, and Virginia kept between five and eight per cent of their prison population in isolation, and, by 2003, New York had joined them as well. Mississippi alone held eighteen hundred prisoners in supermax—twelve per cent of its prisoners over all.").

73. *See* Goode, *supra* note 59 ("Humanitarian groups have long argued that solitary confinement has devastating psychological effects, but a central driver in the recent shift is economics. Segregation units can be two to three times as costly to build and, because of their extensive staffing requirements, to operate as conventional prisons are. They are an expense that many recession-plagued states can ill afford; Gov. Pat Quinn of Illinois announced plans late last month to close the state's supermax prison for budgetary reasons. Some officials have also been persuaded by research suggesting that isolation is vastly overused and that it does little to reduce overall prison violence. Inmates kept in such conditions, most of whom will eventually be released, may be more dangerous when they emerge, studies suggest.").

max prisons and units within prisons that impose prolonged solitary confinement, including "security housing units" in California, "special management units" in Arizona, "high security units" in Texas, "intensive management units" in Washington, and "special control units" in New Mexico, among others.[74] No matter what the phrase, these facilities all share a distinct approach: they "house prisoners in virtual isolation and subject them to almost complete idleness for extremely long periods of time."[75] A supermax can be a "freestanding facility, or a distinct unit within a facility" that houses specifically selected inmates in an extreme form of long-term administrative segregation emphasizing "separation, restricted movement, and limited direct access to staff and other inmates."[76]

Although supermax confinement exists in many states, housing both state and federal inmates, its operation and procedures are remarkably uniform. Employing sophisticated designs and technology, the ultimate goal is to limit, as much as possible, environmental and human interaction.[77] Often referred to as "prisons within prisons,"[78] inmates are typically confined for twenty-three or more hours per day in cells ranging from sixty to eighty square feet in size.[79] Exercise is limited to one hour per day, during which time an inmate is placed, unaccompanied by anyone else, in a designated (often-bare) exercise room.[80] Inmates eat all meals alone in their cells, and no social activity of any kind is permitted.[81] They are kept under constant surveillance with "computerized locking and tracking systems [used to] allow their movement to be regulated with a minimum of human interaction."[82]

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74. *See* WILLIAM C. COLLINS, U.S. DEP'T OF JUSTICE NAT'L INST. OF CORR., SUPERMAX PRISONS AND THE CONSTITUTION: LIABILITY CONCERNS IN THE EXTENDED CONTROL UNIT 5 (2004).

75. Haney, *supra* note 10, at 126.

76. CHASE RIVELAND, NAT'L INST. OF CORRECTIONS, U.S. DEP'T OF JUSTICE, SUPERMAX PRISONS: OVERVIEW AND GENERAL CONSIDERATIONS 3 (1999).

77. Haney, *supra* note 10, at 125–26.

78. CORRECTIONAL ASS'N OF N.Y., MENTAL HEALTH IN THE HOUSE OF CORRECTIONS: A STUDY OF MENTAL HEALTH CARE IN NEW YORK STATE PRISONS 47 (2004) [hereinafter CANY] ("Regardless of the terminology, conditions inside these prisons within prisons are basically the same: 23-hour lockdown, sensory deprivation, social isolation and enforced idleness . . . ."); *see also* Goode, *supra* note 59 (noting one former inmate described the conditions as "hell").

79. *See* Haney, *supra* note 10, at 127; *see also* COLLINS, *supra* note 74, at 6; SHALEV, *supra* note 45, at 3. Although the amount of time that prisoners spend in their cells may vary, actually *more* than twenty-three hours per day is the standard: often it is twenty-three hours per day five days a week, with twenty-four hours per day on weekends. RHODES, *supra* note 29, at 237.

80. *See* Haney, *supra* note 10, at 126. This exercise opportunity may be quite limited. *See* Anderson v. Colo. Dep't of Corr., 848 F. Supp. 2d 1291, 1295 (D. Colo. 2012) (noting that maximum security facility inmates are "taken to a similarly small cell with a pull-up bar for exercise"); Ford v. Bender, No. 07-11457-JGD, 2012 WL 262532, at *6 (D. Mass. Jan. 27, 2012) ("'[E]xercise' consisted of walking back and forth in outdoor cages that are approximately six feet wide by ten yards long. There was no exercise equipment.").

81. Haney, *supra* note 10, at 126.

82. *Id.*

Great pains are even taken to reduce an inmate's necessary interactions with prison staff.[83] Inmates are denied access to all work, rehabilitation, recreational, and other activities and programs, and any services provided are usually delivered through a small portal at their cell front, including mental health services.[84] Their principal and often sole human interactions are brief encounters with prison staff, which typically consist of muffled speech through a double-paned window or the passing of an object through a tray-sized "cuff port" on the cell door.[85] For years, their physical contact with other humans may be "limited to being touched through a security door by a correctional officer while being placed in restraints or having restraints removed."[86] The norm is to impose, to the fullest extent possible, complete sensory deprivation and social isolation.

III. PRISON CONDITIONS AND THE EIGHTH AMENDMENT

> [W]hen a sheriff or a marshal takes a man from a courthouse in a prison van and transports him to confinement for two or three or ten years, this is our act. We have tolled the bell for him. And whether we like it or not, we have made him our collective responsibility. We are free to do something about him; he is not.
>
> —Chief Justice Warren E. Burger, 1970[87]

Courts have long recognized the potential for serious harm to inmates subjected to prolonged solitary confinement. In 1890, the Supreme Court reflected on the recently defunct Pennsylvania model experiments with institution-wide, prolonged solitary confinement:

> A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others, still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community.[88]

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83. Consider, for example, the following description of a routine meal delivery in a supermax facility: "Two officers deliver lunch to each pod, carrying the trays to the inmates one at a time. One officer opens the cuffport and stands carefully to one side while the other, who is dressed in a waterproof jumpsuit, quickly pushes in the tray." RHODES, *supra* note 29, at 23.

84. *See* Haney, *supra* note 10, at 126 ("[S]ome facilities [even] employ 'tele-medicine' and 'tele-psychiatry' procedures in which prisoners' medical and psychological needs are addressed by staff members who 'examine' them and 'interact' with them over television screens from locations many miles away.").

85. *Id.*

86. RIVELAND, *supra* note 76, at 11.

87. Warren E. Burger, *"No Man Is an Island,"* 56 A.B.A. J. 325, 326 (1970).

88. *In re* Medley, 134 U.S. 160, 168 (1890). In *Medley*, the Court analyzed whether a legislative change resulting in solitary confinement for a prisoner condemned to death for an offense that occurred before this change amounted to an ex post facto violation. *Id.* at 162–63. In concluding that it did, the Court considered the nature of solitary confinement to determine whether it was in fact

Nevertheless, despite the Supreme Court's apparent condemnation of this practice (although it did not directly address its constitutionality in this or subsequent rulings) and a growing number of studies confirming the devastating psychological consequences of prolonged solitary confinement,[89] "virtually every court which has considered the issue" has thus far held that prolonged solitary confinement, *without more*, does not violate the Eighth Amendment prohibition against cruel and unusual punishment.[90]

A. The U.S. Supreme Court's Development of the Eighth Amendment Standard for Assessing the Adequacy of Prison Conditions

Prior to 1976, the U.S. Supreme Court had not examined the applicability of the Eighth Amendment to prison conditions. That began to change with the Court's issuance of its ruling that year in *Estelle v. Gamble*, where the Court addressed the failure of prison officials to provide medical attention to an inmate.[91] The Court ruled that the government has an "obligation to provide medical care for those whom it is punishing by incarceration," holding that "deliberate indifference to a prisoner's serious illness or injury" violates the Eighth Amendment.[92] Significantly, *Estelle* established for the first time that the protections of the Eighth Amendment are not limited to the terms and nature of the sentences imposed on criminal offenders, but are applicable as well to the care provided prison inmates during incarceration.[93] It also intro-

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punishment. *Id.* at 167–68. In doing so, the Court traced the history of prolonged solitary confinement and resolved that it was indeed "an additional punishment of the most important and painful character." *Id.* at 171.

89. *See infra* notes 193–216 and accompanying text.

90. 1 MICHAEL B. MUSHLIN, RIGHTS OF PRISONERS § 3:17 (4th ed. 2011). *See, e.g.*, Ajaj v. United States, 293 Fed. App'x 575, 582–84 (10th Cir. 2008) (finding conditions such as "lock-down for 23 hours per day in extreme isolation," "indefinite confinement," and "limited ability to exercise outdoors" did not, individually or in concert, amount to an Eighth Amendment violation); McMillan v. Wiley, 813 F. Supp. 2d 1238, 1249–51 (D. Colo. 2011) (ruling that inmate's allegations that he ate his meals alone, left his cell only up to five times per week for recreation in a "man cage," and had no human contact unless he was shackled and escorted by guards failed to establish deprivation of basic needs as required for Eighth Amendment claim); Sital v. Burgio, 592 F. Supp. 2d 355, 359 (W.D.N.Y. 2009) (determining that conditions during a nine-month stay in the security housing unit did not constitute a violation of the Eighth Amendment right to be free from cruel and unusual punishment, because no finding established that conditions were particularly severe or that they jeopardized prisoner's health or safety); Moore v. Schuetzle, 486 F. Supp. 2d 969, 983 (D.N.D. 2007) (concluding that administrative segregation that allows only one hour per day of recreation is not cruel and unusual punishment), *aff'd*, 289 Fed. App'x 962 (8th Cir. 2008) (per curiam). *But see infra* Part III.B–C.

91. Estelle v. Gamble, 429 U.S. 97, 106–07 (1976) (holding that an inmate suffering from a back injury whose complaint showed that he had been seen by doctors and medical assistants on seventeen occasions within a three-month period, failed to state a cause of action against his physician, both in his capacity as treating physician and as medical director of the corrections department). Although *Estelle* is important in that it removed the barrier between the Eighth Amendment and prison conditions, it concerned only the relatively limited question of medical care in the context of a single denial of such care to a particular prisoner. *Id.* at 102–05. It did not, therefore, address the broader question of the Eighth Amendment's role as applied to prison conditions in general.

92. *Id.* at 103, 105.

93. 1 MUSHLIN, *supra* note 90, § 3:3.

duced the phrase "deliberate indifference" as the standard for determining whether prison officials have violated an inmate's Eighth Amendment right to such care.[94]

In *Rhodes v. Chapman*,[95] the Court expanded the reach of the Eighth Amendment to encompass prison conditions in general.[96] There, the Court concluded that prison conditions violate the Constitution when they deprive inmates of "the minimal civilized measure of life's necessities."[97] In *Rhodes*, the Court varied from *Estelle* in that it did not take the state of mind of prison officials into account in its constitutional analysis; rather, it simply conducted "an objective analysis of the prison conditions."[98] Thus, following *Rhodes*, the Court had established two divergent approaches to an Eighth Amendment analysis of prison conditions: a subjective examination of whether the defendant had a sufficiently "culpable state of mind"—deliberate indifference—as established by *Estelle*, and an objective analysis addressing whether the deprivation was sufficiently serious, as established by *Rhodes*.[99]

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94. *Id.* Although the Court used the phrase "deliberate indifference" for the first time in *Estelle* as the governing standard for analyzing violations of the right to medical care, it provided little definition of the phrase. Prior to *Estelle*, the Supreme Court had apparently never used this language. JOHN BOSTON, Wilson v. Seiter*: A Preliminary Analysis*, *in* 8 NAT'L LAWYERS GUILD, CIVIL RIGHTS LITIGATION AND ATTORNEY FEES ANNUAL HANDBOOK 43 (Steven Saltzman & Barbara M. Wolvovitz eds., 1992) (utilizing results of a computer search of all Supreme Court cases since 1790). It should be noted that this deliberate indifference test is not the standard governing an emergency situation, such as a prison riot. For that scenario, there is an even higher requirement for finding a constitutional violation: a showing that conduct was carried out "maliciously and sadistically for the very purpose of causing harm." Whitley v. Albers, 475 U.S. 312, 318–22 (1986) (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973)).

95. 452 U.S. 337 (1981).

96. *Id.* at 448–52 (holding that the practice of housing two inmates in one cell ("double bunking") did not amount to cruel and unusual punishment). The Court further noted, "We consider here for the first time the limitation that the Eighth Amendment . . . imposes upon the conditions in which a State may confine those convicted of crimes." *Id.* at 344–45. Whereas *Estelle* involved the "relatively discrete question of medical care in the context of a single denial of care to a particular prisoner," *Rhodes* established for the first time that general prison conditions, either alone or in combination, can violate the Eighth Amendment. 1 MUSHLIN, *supra* note 90, §§ 3:3–:4.

97. *Rhodes*, 452 U.S. at 347.

98. Arthur B. Berger, Wilson v. Seiter*: An Unsatisfying Attempt at Resolving the Imbroglio of Eighth Amendment Prisoners' Rights Standards*, 1992 UTAH L. REV. 565, 584 ("The Court stressed that its inquiry was confined to determining 'whether the actual conditions of confinement . . . were cruel and unusual.' Thus, the Court made clear that suits challenging conditions of confinement were to be judged by objective consideration of the totality of prison conditions." (quoting *Rhodes*, 452 U.S. at 351 n.15)).

99. Justice William J. Brennan Jr., in his concurring opinion, added:

> The District Court may well be correct *in the abstract* that prison overcrowding and double celling such as existed at the Southern Ohio Correctional Facility generally results in serious harm to the inmates. But cases are not decided in the abstract. A court is under the obligation to examine the *actual effect* of challenged conditions upon the well-being of the prisoners. The District Court in this case was unable to identify any actual signs that the double celling at the Southern Ohio Correctional Facility has seriously harmed the inmates there; indeed, the court's findings of fact suggest that crowding at the prison has not reached the point of causing serious injury. Since I cannot conclude that the totality of conditions at the facility offends constitutional norms, and am of the view that double celling in itself is not *per se* impermissible, I concur in the judgment of the Court.

Rhodes, 452 U.S. at 367–68 (Brennan, J., concurring) (emphasis added) (footnotes omitted).

In 1991, with its ruling in *Wilson v. Seiter*,[100] the Court attempted "to rationalize and harmonize its decisions regarding the applicability of the Eighth Amendment to prison conditions and practices."[101] In *Wilson*, Justice Antonin Scalia concluded that, when challenging prison conditions on Eighth Amendment grounds, plaintiffs must satisfy both an objective and a subjective test.[102] For Scalia, a constitutional violation necessitates at least some culpable state of mind on the part of the actor, which requires at least some subjective analysis.[103] That is, plaintiffs not only must satisfy the objective requirement of *Rhodes* by showing that prison conditions caused a deprivation sufficiently serious to deprive them of a minimal life necessity, but also must show that this deprivation involved more than mere negligence on the part of a prison official.[104] In other words, it must be shown that the inadequate prison conditions were the result of "deliberate indifference" on the part of prison officials, the standard established in *Estelle*.[105]

Although the Court's imposition of a subjective test in *Wilson* increased the likelihood that prison officials—protesting that they were unaware of the adverse impact of inadequate conditions on prisoners—would be protected from Eighth Amendment liability, the Court's next two cases made clear that establishing deliberate indifference is far from an insurmountable hurdle for plaintiffs.

In *Helling v. McKinney*,[106] the Court ruled that a showing of actual, present injury was not necessary for a claim seeking relief, as it held that the Eighth Amendment protects inmates from "imminent dangers," as well as from harms actually experienced.[107] In *Helling*, the Court found that an inmate who was involuntarily subjected to tobacco smoke while housed with another inmate who smoked five packs of cigarettes per day stated a valid claim for relief under the Eighth Amendment, notwithstanding that the inmate had not yet experienced actual physical harm.[108] In doing so, the Court offered the example of a prison inmate subjected to unsafe drinking water, reasoning that such an inmate could bring a valid claim for relief under the Eighth Amendment "without waiting for an attack of dysentery."[109] Furthermore, *Helling* also established that

100. 501 U.S. 294 (1991).

101. 1 MUSHLIN, *supra* note 90, § 3:6 (internal quotation marks omitted); *see also Wilson*, 501 U.S. at 296, 303, 306 (vacating lower court finding that various prison conditions—including overcrowding, excessive noise, inadequate heating and ventilation, and unsanitary dining facilities—did not violate the Eighth Amendment, and remanding for reconsideration under the "deliberate indifference" standard).

102. *Id.* at 298.

103. *Id.*

104. *Id.* at 298, 305–06.

105. *Id.* at 303.

106. 509 U.S. 25 (1993).

107. *Id.* at 34.

108. *Id.* at 27–28, 34.

109. *Id.* at 33.

actual knowledge by prison officials of injury (or imminent injury) resulting from prison conditions need not be present to satisfy the culpable state of mind requirement, but rather that claimants need only show exposure to such conditions is "demonstrably unsafe," and that the risk is "so grave that it violates contemporary standards of decency to expose *anyone* unwillingly to such a risk."[110]

In *Farmer v. Brennan*,[111] the Court narrowed this component somewhat. In *Farmer*, the Court held that the requisite state of mind to establish "deliberate indifference" was indeed something more than mere negligence, namely that there must be a showing that the prison official was at least "reckless in a criminal sense."[112] However, the Court added that the claimant is not required to show that "acts or omissions [were committed] for the very purpose of causing harm or with knowledge that harm will result."[113] It is enough that the inmate demonstrates that officials were "recklessly disregarding" a "substantial risk of serious harm to a prisoner."[114] In other words, deliberate indifference exists "when a person disregards a risk of harm of which he [or she] is aware."[115] Furthermore, the Court explained that although a certain degree of knowledge on the part of prison officials as to the presence of harmful conditions is required, that knowledge can be inferred from objective circumstances when the risk is obvious.[116]

With regard to prison conditions that are purported to impose psychological harm on inmates, as Professor Michael B. Mushlin explains,

> [I]f a condition is obviously harmful to the mental well being of an inmate, . . . then it is permissible to infer that the defendant must have known of the risk, and the failure to correct it can be evidence of the [requisite] subjective state of mind of the defendant to be deliberately indifferent.[117]

Thus, *Farmer* makes clear that deliberate indifference can be established even if prison officials have no direct knowledge that a specific harm will befall a particular inmate because a present and known risk to a class

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110. *Id.* at 33–34, 36 (emphasis added).

111. 511 U.S. 825, 830–31, 847 (1994) (asserting deliberate indifference to claimant's safety because prison officials knew the prison had a violent environment and a history of inmate assaults, leaving the inmate particularly vulnerable to a sexual attack).

112. *Id.* at 831, 837.

113. *Id.* at 835.

114. *Id.* at 836.

115. *Id.* at 837.

116. *Id.* at 842 ("Whether a prison official had the requisite knowledge . . . is a question of fact subject to demonstration in the usual ways . . . and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious.").

117. 1 MUSHLIN, *supra* note 90, § 3:12.

of inmates establishes deliberate indifference to each of the members of the class.[118]

118. *Farmer*, 511 U.S. at 843–44 (using the example that if prison officials are aware that a particular class of inmates is at particularly high risk of rape in their prison, "it would obviously be irrelevant to liability that the officials could not guess beforehand precisely who would attack whom."). At the same time, it should be noted that a claimant seeking to establish the occurrence of a constitutional violation faces some significant procedural impediments. Inmates are indeed entitled to bring a federal civil rights action pursuant to 42 U.S.C. § 1983 against state officials who have violated their constitutional rights. 42 U.S.C. § 1983 (2006) ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ."); Cooper v. Pate, 378 U.S. 546, 546 (1964) (per curiam) (holding that prisoners could bring suit against state prison officials under 42 U.S.C. § 1983). Furthermore, many § 1983 suits challenging prison conditions involve Eighth Amendment violations. *See, e.g.*, Hope v. Pelzer, 536 U.S. 730 (2002); Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968); Jordan v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. 1966). However, in an attempt to curb an influx of what were perceived to be frivolous prisoner claims that were believed to be clogging the dockets of the federal courts, Congress enacted the Prison Litigation Reform Act (PLRA) in 1996. The Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321 (1996) (codified in scattered sections of 18 U.S.C., 28 U.S.C., and 42 U.S.C.); *see also* Shaheed-Muhammad v. Dipaolo, 138 F. Supp. 2d 99, 109 (D. Mass. 2001) (Congress enacted the PLRA to cut down on the filing of frivolous lawsuits by prisoners, in response to lawsuits seeking damages for such things as "insufficient storage locker space, a defective haircut by a prison barber, the failure of prison officials to invite a prisoner to a pizza party for a departing prison employee, and yes, being served chunky peanut butter instead of the creamy variety." (quoting 141 CONG. REC. S14408-01 (daily ed. Sept. 27, 1995) (statement of Sen. Robert Dole))).

There are two related impediments that are particularly germane to a cause of action seeking to establish that prolonged supermax solitary confinement constitutes an Eighth Amendment violation. First, under the PLRA, an inmate must show a physical injury as a predicate to a successful pleading of mental or emotional injury under § 1983. 42 U.S.C. § 1997e(e) (2006) ("No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury."). This physical injury must be more than de minimus, although not necessarily serious, in order for a claimant to successfully plead mental or emotional injury. *See, e.g.*, Dixon v. Toole, 225 F. App'x 797, 798–99 (11th Cir. 2007) (per curiam) (holding "mere bruising" from 17.5 hours in restraints was de minimus, even where prisoner complained of "welts"); Jarriett v. Wilson, 162 F. App'x 394, 396–98 (6th Cir. 2005) (concluding that inmate confined for twelve hours in "strip cage" in which he could not sit down did not suffer physical injury even though he testified he had a "bad leg" that swelled "like a grapefruit" and caused severe pain and cramps); Siglar v. Hightower, 112 F.3d 191, 193–94 (5th Cir. 1997) (inmate's sore, bruised ear, lasting for three days, was de minimus). *But see* Anderson v. Colo., Dep't of Corr., 848 F. Supp. 2d 1291, 1295, 1299 (D. Colo. 2012) (affidavit in which inmate stated that lack of outdoor exercise while placed in administrative segregation in a maximum security facility caused his muscles to grow weaker was sufficient to create a fact dispute that he sustained physical injuries and thereby defeat a motion for summary judgment based on the Prison Litigation Reform Act).

Second, the PLRA prevents any prisoner from bringing an action under § 1983 "until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a) (2006). This requirement essentially mandates the dismissal of any § 1983 claim where the inmate fails to comply with any aspect of the prison's grievance procedures, even if the relief sought by the inmate cannot be obtained through the grievance process. *See, e.g.*, Marshall v. Knight, No. 3:03-CV-460 RM, 2006 WL 3714713, at *1 (N.D. Ind. Dec. 14, 2006) (dismissing, for failure to exhaust his administrative remedies, plaintiff's claim that prison officials retaliated against him in their classification and disciplinary decisions, even though prison policy dictated that no grievance would be upheld that challenged classification and disciplinary decisions). *But see* Bonner v. Beth, No. 05-C-1075, 2007 WL 725120, at *12 (E.D. Wis. Mar. 7, 2007) (finding inmate pursuing a § 1983 claim had shown that there was deliberate indifference to his mental health while he was placed in segregation and that he had sufficiently exhausted his administrative remedies). For an inmate experiencing a mental disorder, it may be particularly difficult to satisfy all the requirements for pursuing and exhausting

B. The Modern Standard

As described above, an Eighth Amendment challenge to prison conditions must satisfy both an objective and a subjective test.

The objective component addresses whether the harm suffered or likely to be suffered was sufficiently serious to constitute cruel and unusual punishment. The Supreme Court has repeatedly stressed that this objective component of the Eighth Amendment must evolve to reflect "contemporary standards of decency."[119] Exactly what constitutes "contemporary standards of decency," however, is an elusive question.[120] As applied to prison conditions, the Supreme Court held in *Rhodes* that it is no longer tolerable for prison conditions to deprive inmates of the "minimal civilized measure of life's necessities."[121] The Supreme Court has suggested—with lower courts explicitly ruling—that minimal life necessities include adequate safety, food, warmth, exercise, and basic hygiene.[122] As discussed, the Supreme Court in *Estelle* further established "adequate medical care" as a minimal life necessity in this context.[123] As also noted, *Helling* further clarifies that an Eighth Amendment violation

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any available grievance procedure. *See* Giovanna Shay & Johanna Kalb, *More Stories of Jurisdiction-Stripping and Executive Power: Interpreting the Prison Litigation Reform Act (PLRA)*, 29 CARDOZO L. REV. 291, 321 (2007); *Developments in the Law: The Impact of the Prison Litigation Reform Act on Correctional Mental Health Litigation*, 121 HARV. L. REV. 1145, 1150 (2008).

119. Hudson v. McMillian, 503 U.S. 1, 8 (1992) (internal quotation marks omitted); *see also* Trop v. Dulles, 356 U.S. 86, 101 (1958) (determining that the prohibition against cruel and unusual punishment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society").

120. A part of this question is what sources can be relied upon in determining existing contemporary standards of decency. In a somewhat related Eighth Amendment context where the question was whether applying the death penalty to "mentally retarded" offenders constituted cruel and unusual punishment, the Supreme Court suggested that in ascertaining "the evolving standards of decency that mark the progress of a maturing society," Atkins v. Virginia, 536 U.S. 304, 311–12 (2002) (internal quotation marks omitted), international standards could be instructive. *Id.* at 325 & n.21 ("Moreover, within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved."). The inclusion of this source of information in the majority's analysis, however, drew a strong objection from Chief Justice Rehnquist in his dissenting opinion, who contended that "if it is evidence of a *national* consensus for which we are looking, then the viewpoints of other countries simply are not relevant." *Id.* at 325 (Rehnquist, J., dissenting). To the extent that the views of the world community are relevant to a determination of whether prolonged supermax solitary confinement constitutes cruel and unusual punishment in general or when applied to inmates with a mental illness, it is worth noting that the Special Rapporteur on Torture for the United Nations, Juan Mendez, recently issued a report that calls for significant limitations to be placed on the practice of solitary confinement. *See generally* U.N. Secretary-General, *Interim Report of the Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Doc. A/66/268 (Aug. 5, 2011).

121. Rhodes v. Chapman, 452 U.S. 337, 347 (1981).

122. Wilson v. Seiter, 501 U.S. 294, 303 (1991); *see, e.g.*, *infra* notes 217–20; *see also* CHRISTOPHER SLOBOGIN ET AL., LAW AND THE MENTAL HEALTH SYSTEM: CIVIL AND CRIMINAL ASPECTS 1002 (5th ed. 2009) ("Prisoners have successfully used the [Cruel and Unusual Punishment C]lause to obtain court censure of . . . generally abysmal conditions. But in reaching these results, the courts have usually required demonstration of 'barbarous' conditions that 'shock the conscience.'" (citing Paul Friedman, *Legal Regulation of Applied Behavior Analysis in Mental Institutions and Prisons*, 17 ARIZ. L. REV. 39, 61–62 (1975))).

123. Estelle v. Gamble, 429 U.S. 97, 103–04 (1976); *see supra* notes 91–94 and accompanying text.

can occur absent any actual injury if a threat of injury constituting a substantial risk of serious harm to a prisoner is present.[124]

One open question, however, is whether and when purely psychological harm (or an imminent danger of psychological harm) represents the denial of a minimal life necessity. As of yet, the Supreme Court has not directly addressed this question.[125] However, the Court's decision in *Helling*, which does not require actual physical injury to state a claim, seems to suggest that purely psychological harm can constitute a denial of a minimal life necessity.[126] This view also receives support from the Court's recent ruling in *Brown v. Plata*, where it found adequate mental health care constitutes "basic sustenance," with the deprivation of this care a violation of the Eight Amendment.[127] Indeed, most lower courts have reached precisely this conclusion.[128]

To establish a constitutional deprivation, however, the subjective component must also be met, which necessitates an inquiry into the state of mind of the person or persons responsible for the harm (or imminent harm).[129] As discussed, with regard to prison conditions, the applicable standard is "deliberate indifference,"[130] which requires at least the equivalent of criminal recklessness.[131] Nevertheless, this knowledge can be inferred from objective circumstances and does not require direct evidence of a culpable state of mind at the time in question.[132] Furthermore, these circumstances need not be linked to a particular risk to a specific inmate, but may be inferred when a general risk poses a threat to a class of inmates of which the claimant was a member.[133]

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124. *See supra* notes 106–10 and accompanying text.

125. However, Justice Blackmun did suggest that the Eighth Amendment encompasses both psychological and physical harm in his concurring opinion in *Hudson v. McMillan*. 503 U.S. 1, 16 (1992) (Blackmun, J., concurring) ("I do not read anything in the Court's opinion to limit injury cognizable under the Eighth Amendment to physical injury. It is not hard to imagine inflictions of psychological harm—without corresponding physical harm—that might prove to be cruel and unusual punishment.").

126. *See supra* notes 106–10 and accompanying text.

127. Brown v. Plata, 131 S. Ct. 1910, 1928 (2011).

128. *See, e.g.*, Delaney v. DeTella, 256 F.3d 679, 685 (7th Cir. 2001) (determining that claim can be based on the presence of a "strong likelihood" of psychological damage due to the denial of exercise privileges for ninety days); Babcock v. White, 102 F.3d 267, 273 (7th Cir. 1996) (remarking that "the Constitution does not countenance psychological torture merely because it fails to inflict physical injury"); Shakka v. Smith, 71 F.3d 162, 166 (4th Cir. 1995) (holding that a significant emotional injury can constitute Eighth Amendment pain); Thomas v. Farley, 31 F.3d 557, 559 (7th Cir. 1994) ("Mental torture is not an oxymoron, and has been held or assumed in a number of prisoner cases . . . to be actionable as cruel and unusual punishment."); Williams v. Ozmint, 726 F. Supp. 2d 589, 594 (D.S.C. 2010) (finding that inmates are not required to show physical injury to state a claim for cruel and unusual punishment); 1 MUSHLIN, *supra* note 90; *see also infra* Part III.C.

129. *See supra* notes 103–05, 111–18 and accompanying text.

130. *See* Wilson v. Seiter, 501 U.S. 294, 297 (1991).

131. Farmer v. Brennan, 511 U.S. 825, 839–40 (1994).

132. *See id.* at 842.

133. *Id.* at 843.

C. *Cases Considering Inmates with a Mental Illness or a Significant Vulnerability to Mental Illness Who Are Placed in Prolonged Supermax Solitary Confinement*

The Supreme Court has not yet taken under consideration whether the prolonged supermax solitary confinement of inmates with a mental illness violates the Eighth Amendment. However, this issue has been addressed in recent years in a series of lower court cases.

Most significantly, in *Madrid v. Gomez*,[134] a district court in California considered a claim that conditions in the supermax unit at Pelican Bay State Prison—known as the "Security Housing Unit" (SHU)—were sufficiently injurious to the mental health of inmates to constitute cruel and unusual punishment under the Eighth Amendment.[135] The court held that confinement in SHU constituted "cruel and unusual punishment in violation of the Eighth Amendment for two categories of inmates: those who are already mentally ill and those who . . . are at an unreasonably high risk of suffering serious mental illness."[136]

Turning to the requisite objective element, the court held that although mere "generalized psychological pain" resulting from prolonged segregation is not sufficient to implicate the Eighth Amendment, "if the particular conditions of segregation . . . inflict a serious mental illness, greatly exacerbate mental illness, or deprive inmates of their sanity, then [prison officials] have deprived inmates of a basic necessity of human existence—indeed, they have crossed into the realm of psychological torture."[137] That is, inflicting, causing, or exacerbating a serious mental illness by this confinement constitutes cruel and unusual punishment, and satisfies the objective component established in *Rhodes* because freedom from conditions that inflict a serious mental illness constitutes a minimal life necessity.[138]

Regarding the subjective element, the court refused to hold that conditions in SHU were a per se violation of the Eighth Amendment because the risk that psychological pain would rise to the level of a serious mental illness was not imminent enough as to all the inmates in SHU

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134. 889 F. Supp. 1146 (N.D. Cal. 1995).

135. Located in Crescent City, California, Pelican Bay State Prison at the time of *Madrid* was a maximum security prison where about half the facility was devoted to housing a general population of inmates and the other half imposed supermax confinement in the unit known as the SHU. *Madrid*, 889 F. Supp. at 1155. The Court's description of the SHU suggests that it was virtually identical in operation to other supermax settings across the country: "[I]nmates remain confined to their cells for 22 and ½ hours of each day. Food trays are passed through a narrow food port in the cell door. Inmates eat all meals in their cells. Opportunities for social interaction with other prisoners or vocational staff are essentially precluded. Inmates are not allowed to participate in prison job opportunities or any other prison recreational or educational programs. Nor is group exercise allowed." *Id.* at 1229.

136. *Id.* at 1267.

137. *Id.* at 1264–65.

138. *See id.* at 1266.

to establish deliberate indifference.[139] However, the court reasoned that the conditions did present a known "substantial or excessive risk of harm" to a specific class of these inmates, namely "those who the record demonstrates are at a particularly high risk for suffering very serious or severe injury to their mental health," which included "the already mentally ill, as well as persons with borderline personality disorders, brain damage or mental retardation, impulse-ridden personalities, or a history of prior psychiatric problems or chronic depression."[140] The court concluded that exposing this class of inmates to prolonged supermax solitary confinement put them at significant risk of serious mental illness, constituted a deprivation of a minimal life necessity, and demonstrated deliberate indifference to, and was thus a violation of, the inmates' Eighth Amendment rights.[141]

Two cases decided in the decade following *Madrid* came to the same conclusion utilizing similar reasoning. In 1999, a federal district court in Texas took up a challenge to multiple supermax "high security units" in Texas prisons.[142] In *Ruiz v. Johnson*, the court found that associated conditions "clearly violate constitutional standards when imposed on the subgroup of the plaintiffs' class made up of mentally-ill prisoners."[143] Without defining "mental illness," the court noted that "[i]n light of the obvious severity of these inmates' needs, it is determined that defendants have been deliberately indifferent to the serious risks" these placements posed to these inmates.[144]

In 2001, a federal district court in Wisconsin came to the same conclusion in *Jones'El v. Berge*[145] regarding the conditions at the Supermax Correctional Institution (Supermax) in Boscobel, Wisconsin, holding that "housing any seriously mentally ill inmates at Supermax constitutes cruel and unusual punishment."[146] Notably, although the facility did utilize mental health screening tools and monitoring apparently designed to identify and limit the risk to inmates with a mental illness, the court found that the screening and monitoring were grossly inadequate and

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139. *See id.* at 1266–67.

140. *Id.* at 1265, 1267.

141. *See id.* at 1264–67.

142. Ruiz v. Johnson, 37 F. Supp. 2d 855 (S.D. Tex. 1999), *rev'd on other grounds*, 243 F.3d 941 (5th Cir. 2001).

143. *Id.* at 915.

144. *Id.*

145. 164 F. Supp. 2d 1096 (W.D. Wis. 2001).

146. *Id.* at 1122. The same basic pattern of prolonged supermax solitary confinement described above in Part I and in conjunction with *Madrid* was recited by the court here. The court noted that inmates at Supermax

> spend all but four hours a week confined to a cell. . . . The cells are illuminated 24 hours a day. Inmates receive no outdoor exercise. Their personal possessions are severely restricted. . . . They are permitted no clocks, radios, watches, cassette players or televisions. . . . A video camera rather than a human eye monitors the inmate's movements. Visits other than with lawyers are conducted through video screens.

Id. at 1098.

ineffective because it was obvious that inmates with severe mental illness were still being housed there.[147] The court determined that deliberate indifference existed because "the Screening Tool and monitoring serve as little more than band-aids to the potentially detrimental conditions to which defendants are subjecting mentally ill inmates."[148]

Whereas the plaintiffs in *Jones'El* had sought only injunctive relief, another case addressing the placement of inmates with a mental illness in supermax confinement arose when one of the inmates considered in *Jones'El* brought a claim for monetary damages. In *Scarver v. Litscher*,[149] the court again concluded that prison staff at Supermax had violated this inmate's Eighth Amendment rights by subjecting him to "conditions so lacking in physical and social points of reference [that they] would lead to a kind of psychological torture and future acts of self-harm."[150] Similarly to the courts in *Madrid* and *Ruiz*, the *Scarver* court reasoned that because, as *Farmer* established, "a fact finder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious,"[151] deliberate indifference could be properly inferred from the court's finding that the defendants knew of the severe conditions, as well as from the serious mental illness and continued deterioration of the inmates housed there.[152]

Remarkably, however, on appeal Judge Richard A. Posner, writing for the majority of a panel of the Seventh Circuit, found that deliberate indifference had not been established.[153] Although Judge Posner found that "it is a fair inference that conditions at Supermax aggravated the symptoms of Scarver's mental illness and by doing so inflicted severe physical and especially mental suffering," Posner also determined that defendants were "not indifferent to [Scarver's] welfare."[154] In a line of reasoning strikingly divergent from the analysis established in *Farmer* and applied by other lower courts, Posner reasoned that deliberate indifference could not be established here because the plaintiff provided no

147. *Id.* at 1121. The court found that the screening and monitoring process was inadequate in that it was "not a reasonable safeguard against housing seriously mentally ill inmates at Supermax because it is not designed to keep seriously mentally ill inmates out of Supermax." *Id.* The screening tool utilized, by the defendant's own admission, was inadequate on its face in that it allowed prisoners with a diagnosis of serious mental illness and listed under the "restricted movement" category, to still be placed in Supermax on a case-by-case basis. *See id.* Furthermore, the screening mechanism was ineffective in that the evidence demonstrated that it was often not used, or was ignored. *See id.* at 1122. That is, the screening tool was not designed to keep seriously mentally ill inmates out of Supermax, and further it did not in practice keep seriously mentally ill inmates out of Supermax. *Id.*

148. *Id.*

149. 371 F. Supp. 2d 986 (W.D. Wis. 2005).

150. *Id.* at 1003.

151. Farmer v. Brennan, 511 U.S. 825, 842 (1994).

152. *Scarver*, 371 F. Supp. 2d at 1002–03. Although prohibiting such behavior in the future, the court determined that monetary relief was not appropriate as the defendants were entitled to qualified immunity because a constitutional prohibition of this behavior was not clearly established at the time. *See id.* at 1005.

153. Scarver v. Litscher, 434 F.3d 972, 977 (7th Cir. 2006).

154. *Id.* at 975.

direct evidence that the defendants in fact knew specific conditions in Supermax were contributing to the plaintiff's particular mental illness.[155] He reasoned that, although "[o]f course [the defendants] soon realized that Scarver was in serious distress because of his mental illness," deliberate indifference was not established because there was "no evidence . . . that they realized the harm that the conditions of his confinement were inflicting on him."[156]

Notwithstanding this ruling, similar lawsuits have been filed in many states, resulting in numerous court rulings or consent decrees establishing significant benchmarks affording protection to inmates with a mental illness placed in prolonged solitary confinement. For example, the Indiana Department of Correction in 2007 agreed to move all mentally ill prisoners housed in the SHU of a Supermax facility out of segregation.[157] Similar lawsuits targeting Supermax facilities in Wisconsin, Ohio, Connecticut, and New Mexico all resulted in a settlement agreement or a court order directing that all seriously mentally ill prisoners no longer be held in these facilities.[158]

In 2007, in *Disability Advocates, Inc. v. New York State Office of Mental Health*, a statewide settlement was reached regarding the solitary confinement of inmates with a mental illness in New York prisons.[159] The plaintiffs had argued that a large number of inmates with a mental illness were being housed in "extended isolation units," leading to a significant deterioration in their mental health.[160] The settlement, later embodied in legislation, mandated that all inmates with a serious mental illness receive a minimum of two hours per day of out-of-cell treatment or programming, and required the institution of a mental health screening program at admission, as well as the creation and expansion of available

155. *Id.*

156. *Id.* ("[T]here [was] no indication that [prison officials] attributed [the inmates serious distress because of mental illness] to the heat of the cell, the constant illumination of the cell, or the denial of audiotapes or similar equipment."); *see also* Ford v. Bender, No. 07-11457-JGD, 2012 WL 262532, at *10 (D. Mass. Jan. 27, 2012) (denying claim for mental and emotional injuries resulting from sensory deprivation while placed in the Department Disciplinary Unit in a maximum-security state prison because the inmate, who "suffered from depression, anxiety, insomnia and anorexia" at the time of his placement, was able to interact with others on a day-to-day basis, including "healthcare providers, mental health staff, other inmates, correctional staff, visitors and counselors" and "did not suffer from any major mental illness at any time throughout his incarceration"); Bonner v. Beth, No. 05-C-1075, 2007 WL 725120, at *15 (E.D. Wis. Mar. 7, 2007) (rejecting deliberate indifference to mental health claim of inmate placed in segregation for three and one half months after determining that the inmate "received prompt medical attention in response to his mental health issues").

157. Press Release, Am. Civil Liberties Union, *Solitary Confinement Called "Inappropriate" for Mentally Ill Prisoners in Indiana* (Jan. 30, 2007), http://www.aclu.org/prisoners-rights/solitary-confinement-called-inappropriate-mentally-ill-prisoners-indiana.

158. *Id.*

159. Private Settlement Agreement at 2, Disability Advocates, Inc. v. New York State Office of Mental Health, No. 02 Civ. 4002 (GEL) (S.D.N.Y. Apr. 25, 2007).

160. *See id.* at 2.

mental health residential programs.[161] The impetus for the settlement was a belief that inmates with a mental illness should receive treatment, not isolation.[162]

More recently, in 2010, an agreement was reached in *Presley v. Epps*, a lawsuit filed in the U.S. District Court for the Northern District of Mississippi, "challenging inhumane conditions and a lack of medical and mental health care" in Unit 32, which was being used for prolonged supermax solitary confinement at the Mississippi State Penitentiary in Parchman, Mississippi.[163] Under this agreement, which purportedly "paves the way for resolving the . . . lawsuit," state officials "pledged to transfer the entire population of Unit 32 to other facilities over the course of the next several months, move all seriously mentally ill prisoners to [the state's] mental health facility in Meridian, [Mississippi,] and remedy the inadequate medical and mental health care in Unit 32 so long as any prisoners remain there."[164] In a prior 2007 Supplemental Consent Decree, the parties agreed that "prisoners with Severe Mental Illness, other than those on Death Row," would not be held in Unit 32 for more than fourteen days, that those "requiring inpatient level of care will be housed at . . . another facility," and that a space at Unit 32 would be designated to be used exclusively as a "Mental Health Step-Down Unit . . . to house mentally ill prisoners who require an intermediate level of psychiatric care."[165] Strikingly, in a 2012 follow-up to this settlement, it was reported that prison officials found that as restrictions were loosened on this population, violence went down and the inmates became better behaved.[166] Mississippi's commissioner of corrections, Christopher B. Epps, who is also the president of the American Correctional Associa-

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161. *See id.* at 6.

162. *See id.* at 2.

163. Agreement of the Parties to Seek Order of Dismissal Without Prejudice at 1, Presley v. Epps, No. 4:05-cv-00148 (N.D. Miss. June 4, 2010); Press Release, Am. Civil Liberties Union, *ACLU Strikes Deal to Shutter Notorious Unit 32 at Mississippi State Penitentiary* (June 4, 2010), http://www.aclu.org/prisoners-rights/aclu-strikes-deal-shutter-notorious-unit-32-mississippi-state-penitentiary [hereinafter ACLU]; *see also* Goode, *supra* note 59 (describing how the judge had ruled that conditions at Mississippi's "super-maximum-security prison" were unacceptable and ordered improvements).

A similar lawsuit has also been filed in Arizona. David Fathi, *Solitary Confinement in Arizona: Cruel and Unusual*, NAT'L PRISON PROJECT (Mar. 6, 2012, 1:09 PM), http://www.aclu.org/blog/prisoners-rights/solitary-confinement-arizona-cruel-and-unusual ("A class action lawsuit filed today . . . alleges that the Arizona Department of Corrections (ADC) houses thousands of prisoners in solitary confinement conditions so harsh they violate the Eighth Amendment ban on cruel and unusual punishment. While other states also use solitary confinement, Arizona has added features that seem designed to gratuitously increase suffering. The cells in that state's supermax Special Management Units (SMUs) were deliberately constructed with no windows to the outside, so prisoners—many of whom have no means of telling the time—become disoriented and confused, not knowing . . . whether it is day or night. The cells are often illuminated 24 hours a day, making sleep difficult and further contributing to prisoners' disorientation and mental deterioration.").

164. ACLU, *supra* note 163.

165. Supplemental Consent Decree on Mental Health Care, Use of Force and Classification at 1–2, Presley v. Epps, No. 4:05-cv-00148-JAD (N.D. Miss. Nov. 13, 2007).

166. Goode, *supra* note 59.

tion, noted his own views had changed as a result of this lawsuit and that he now believes that "[i]f you treat people like animals, that's exactly the way they'll behave."[167]

Similarly, on April 12, 2012, "[a] federal judge . . . approved a settlement meant to guarantee alternatives to segregation for mentally ill inmates in Massachusetts prisons."[168] This settlement stemmed from a 2007 lawsuit filed after prisoners "engaged in self-destructive behavior while in solitary confinement without [being provided] adequate mental health services," and "11 prisoners, including some with serious mental illness, committed suicide in segregation cells within a 28-month period."[169] Under the settlement, "[w]hen seriously mentally ill inmates must be placed in segregation, they will receive extra psychological help, and their cases will be reviewed regularly to determine whether other options are appropriate."[170]

Another lawsuit is ongoing in Colorado, where it is being asserted that an inmate with "serious mental health issues" held in administrative segregation for more than eleven years in Colorado's maximum security facility not only is being subjected to cruel and unusual punishment but also has been deprived of a liberty interest without due process as a result of a failure to provide him with necessary medications, and that he has experienced discrimination on the basis of his mental impairment in violation of the Americans with Disabilities Act of 1990.[171] These three claims have all survived a motion for summary judgment.[172] Filed by members of the University of Denver Sturm College of Law's Civil Rights Clinic, it has been reported that during testimony the presiding federal judge "was strongly urging Colorado Department of Corrections officials to fix the harshest conditions at the state's supermax prison—before he has to do it for them."[173]

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167. *Id.* (observing that "prison officials started out isolating inmates they were scared of but ended up adding many they were simply 'mad at'"); *see also* Gawande, *supra* note 68, at 45 (interviewing a state-prison commissioner who had "been either a prison warden or a commissioner in several states across the country for more than twenty years" and who stated that he "would remove most prisoners from long-term isolation units if he could and provide programming for the mental illnesses that many of them have," and who asserted that "'I believe that today you'll probably find that two-thirds or three-fourths of the heads of correctional agencies will largely share the position that I articulated with you'").

168. Abby Goodnough, *Deal to Curb Isolation of Mentally Ill Inmates*, N.Y. TIMES, Apr. 13, 2012, at A20.

169. *Id.*

170. *Id.*

171. Anderson v. Colo. Dep't of Corr., No. 10-cv-01005-RBJ-KMT, 2012 WL 991620, at *1 (D. Colo. Mar. 26, 2012).

172. *Id.*

173. Alan Prendergast, *Troy Anderson Lawsuit: Supermax Conditions Draw Criticism from Judge*, DENVER WESTWORD (May 7, 2012, 8:30 AM), http://blogs.westword.com/latestword/2012/05/troy_anderson_lawsuit_supermax_conditions_colorado.php.

It has further been reported that New York and Texas "have begun to scale back the use of solitary confinement under pressure from prison watchdogs" and that "[l]awsuits have been brought by the American Civil Liberties Union and others in a half-dozen states—including . . . California—because of worries about isolation's effect on the mentally ill."[174] Furthermore, the U.S. Department of Justice "recently launched a probe into a 1,550-bed Pennsylvania prison where inmates complain of long periods of isolation and a lack of mental-health treatment" and has been requested by the Legal Aid Justice Center, which represents twelve inmates in isolation in Virginia, to commence an investigation of the Red Onion State Prison in Virginia, where more than 500 of its nearly 750 inmates are held in solitary confinement (on average for 2.7 years), including 173 who suffer from mental illness.[175]

Finally, the federal government has in general become more active in investigating the use of this practice as concerns grow about the adverse impact of prolonged solitary confinement. This past summer a Senate "hearing [was] held before the Subcommittee on the Constitution, Civil Rights and Human Rights, [which] represents the first time lawmakers on Capitol Hill have taken up the issue of solitary confinement."[176] The increased national and international scrutiny of this practice was noted, as well as the fact that it has "been the target of a growing number of lawsuits."[177]

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174. Anita Kumar, *Critics of Va. Supermax Prison Doubt Isolation Is The Solution*, WASH. POST, Jan. 7, 2012, at A01.

175. *Id.* In addition, the Editorial Board of the *Washington Post* has declared that "prolonged solitary confinement can lead to devastating consequences, including psychosis, reduced brain function, debilitating depression and increased rates of suicide" and urged Virginia to follow the lead of other states and reduce its reliance on solitary confinement. Editorial Board, *Solitary Confinement in Virginia*, WASH. POST, Jan. 15, 2012, at A14 [hereinafter Editorial Board, *Solitary Confinement*]. A subsequent report noted that in response "Virginia is reconsidering how it administers solitary confinement at the state's only super-maximum prison and plans to implement sweeping changes to its often-criticized practices." Anita Kumar, *Virginia Plans Changes in Prisoner Isolation Process*, WASH. POST, Mar. 30, 2012, at A01. The Editorial Board of the *New York Times* similarly called for "an immediate, strictly enforced bar on holding . . . mentally ill inmates in severe conditions of isolation." Editorial Board, *The Abuse of Solitary Confinement*, N.Y. TIMES, June 21, 2012, at A26 [hereinafter Editorial Board, *The Abuse*].

176. Erica Goode, *Senators Start a Review of Solitary Confinement*, N.Y. TIMES, June 19, 2012, at A13.

177. *Id.* (reporting testimony regarding "a class-action suit filed on [June 18, 2012,] on behalf of mentally ill inmates held in solitary at ADX, the federal super-maximum-security prison in Florence, Colo." and that in May 2012 "lawyers representing prisoners held for more than 10 years in isolation at Pelican Bay State Prison in California filed suit in federal court, arguing that solitary confinement is unconstitutional"); *see also* Erica Goode, *Fighting a Drawn-Out Battle Against Solitary Confinement*, N.Y. TIMES, Mar. 30, 2012, at A1 (describing the subsequent mental health problems of an inmate placed in solitary confinement for eight years and noting "California corrections officials—prodded by two inmates at Pelican Bay last year and the advice of national prison experts—this month proposed changes in the state's gang policy that could decrease the number of inmates in isolation").

It should also be noted that in February of 2010, the American Bar Association House of Delegates approved the *ABA Criminal Justice Standards on Treatment of Prisoners*, which declares that "[n]o prisoner diagnosed with serious mental illness should be placed in long-term segregated housing." ABA CRIMINAL JUSTICE STANDARDS, *supra* note 24, at 55; *see also id.* ("No prisoner

D. Deference to Legitimate Security Concerns

Although the line of cases just discussed suggests a strong trend towards recognizing that inmates with a mental illness placed in prolonged supermax solitary confinement are entitled to special attention and protection under the Constitution, a significant hurdle remains for inmates asserting such claims: courts tend to defer in these cases to legitimate penological interests.[178] Accordingly, the courts in these cases often recognize a need to defer to legitimate security concerns of prison officials.

The settlement in *Disability Advocates*, for example, mandated that all inmates with a mental illness be placed in residential mental health treatment units, unless "[e]xceptional circumstances . . . occur creating an unacceptable risk to [the] safety and security of inmates or staff."[179] Similarly, in *Madrid*, the court justified extending greater protection to inmates with a mental illness than to other inmates by reasoning that, for the latter, the security needs of the prison outweighed the mere "psychological pain" suffered by these inmates when placed in prolonged segregation and, with regard to those inmates, accorded "substantial deference" to prison management concerns.[180] In *Ruiz*, the court was careful not to "condemn Texas's system of administrative segregation" in its entirety, recognizing that segregation "'may be a necessary tool of prison

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should be placed in segregated housing for more than [one day] without a mental health screening, conducted in person by a qualified mental health professional, and a prompt comprehensive mental health assessment if clinically indicated. If the assessment indicates the presence of a serious mental illness, or a history of serious mental illness and decompensation in segregated settings, the prisoner should be placed in an environment where appropriate treatment can occur."); *id.* at 95 ("Correctional authorities should be permitted to physically separate prisoners in segregated housing from other prisoners but should not deprive them of those items or services necessary for the maintenance of psychological . . . wellbeing. . . . Conditions of extreme isolation should not be allowed regardless of the reasons for a prisoner's separation from the general population. Conditions of extreme isolation generally include a combination of sensory deprivation, lack of contact with other persons, enforced idleness, minimal out-of-cell time, and lack of outdoor recreation.").

178. *See* Washington v. Harper, 494 U.S. 210, 221–25 (1990) (balancing an inmate's "significant liberty interest in avoiding the unwanted administration of antipsychotic drugs" against the "interest [of prison administrators] in ensuring the safety of prison staffs and administrative personnel, [and their] duty to take reasonable measures for the prisoners' own safety"); Bonner v. Beth, No. 05-C-1075, 2007 WL 725120, at *15 (E.D. Wis. Mar. 7, 2007) ("[M]anaging prisons is not a job for the federal courts."). *But see* Brown v. Plata, 131 S. Ct. 1910, 1928–29 (2011) ("Courts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration.").

179. Private Settlement Agreement, *supra* note 159, at 4. Such exceptional circumstances are defined as occurring when there is an "unacceptable risk to safety and security of inmates or staff." *Id.* However, the settlement does not provide specific examples of such circumstances.

180. Madrid v. Gomez, 889 F. Supp. 1146, 1262 (N.D. Cal. 1995). In *Madrid*, the court specifically recognized the need for deference to prison officials, saying that "[g]iven the 'limitations of federalism and the narrowness of the Eighth Amendment,' it is not the Court's function to pass judgment on the policy choices of prison officials." *Id.* (quoting Hoptowit v. Ray, 682 F.2d at 1237, 1246 (9th Cir. 1982)). The court added that "prison administration is a matter 'peculiarly within the province of the legislative and executive branches of government.'" *Id.* (quoting Turner v. Safley, 482 U.S. 78, 84–85 (1987)). However, the court also noted that "the mental impact of a challenged condition should be considered in conjunction with penological considerations," and that conditions that are "sufficiently harmful . . . will at some point yield to constitutional constraints, even if the condition has some penological justification." *Id.*

discipline' [that] is certainly within the defendants' discretion."[181] Likewise, in *Jones'El*, the court noted that "defendants should be afforded due deference."[182]

Indeed, in other contexts the Supreme Court has "been particularly active in developing standards of deference to constrain lower courts in prison cases" and has often emphasized that deference must be afforded to prison administrators when there is a valid security reason for a given practice, even when that practice might otherwise constitute a constitutional violation.[183] The Court has recognized that there must be a "mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application."[184] In a challenge to various security measures in a New York short-term correctional facility, the Court remarked, "[E]ven [where] a restriction [otherwise violates] a constitutional guarantee . . . the practice must be evaluated in light of the central objective of prison administration, safeguarding institutional security."[185] Likewise, in *Rhodes*, the Court deferred to prison officials who placed up to seven inmates in cells built for two people, reasoning that these officials did the best they could given the overcrowded conditions and remarking that one cannot "assume that state legislatures and prison officials are insensitive to the requirements of the Constitution or to the perplexing sociological problems of how best to achieve the goals of the penal function in the criminal justice system."[186]

Moreover, the cases discussed above that have directly examined the constitutionality of housing inmates with a mental illness in prolonged supermax solitary confinement indicate that deference to a legitimate security interest can play a role in conjunction with both prongs of the applicable Eighth Amendment test. With regard to the objective component, in *Madrid*, the harm incurred by the class of inmates was

181. Ruiz v. Johnson, 37 F. Supp. 2d 855, 915 (S.D. Tex. 1999) (quoting Young v. Quinlan, 960 F.2d 351, 364 (1992)), *rev'd on other grounds*, 243 F.3d 941 (5th Cir. 2001).

182. Jones'El v. Berge, 164 F. Supp. 2d 1096, 1124 (W.D. Wis. 2001).

183. Mikel-Meredith Weidman, *The Culture of Judicial Deference and the Problem of Supermax Prisons*, 51 UCLA L. REV. 1505, 1512–13 (2004); *see, e.g.*, *Brown*, 131 S. Ct. at 1928 ("Courts must be sensitive to the State's interest in punishment, deterrence, and rehabilitation, as well as the need for deference to experienced and expert prison administrators faced with the difficult and dangerous task of housing large numbers of convicted criminals.").

184. Wolf v. McDonnell, 418 U.S. 539, 556 (1974); *see also id.* at 555 (holding that Nebraska prison disciplinary policy violated inmates' due process rights by depriving them of good-time credits without an opportunity for a hearing, but limited the holding by adding that inmates' rights "may be diminished by the needs and exigencies of the institutional environment").

185. Bell v. Wolfish, 441 U.S. 520, 547 (1979). In *Wolfish*, the Court concluded 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.*

186. Rhodes v. Chapman, 452 U.S. 337, 345 (1981). However, in his dissent in *Rhodes*, Justice Marshall wrote that it "is unrealistic to expect legislators to care whether the prisons are overcrowded or harmful to inmate health. It is at that point—when conditions are deplorable and the political process offers no redress—that the federal courts are required by the Constitution to play a role." *Id.* at 377 (Marshall, J., dissenting).

weighed against the need to maintain adequate levels of security and order within the institution.[187] With regard to the subjective component, the presence of a legitimate security interest may influence a determination of whether prison officials were deliberately indifferent to the protected interests of the inmate, as appeared to be part of the reasoning underlying the Seventh Circuit's ruling in *Scarver*.[188]

However, the case law also reveals that there are limits to the level of deference courts will accord prison officials in this context,[189] limits that will be further explored below.[190] As recently noted by the Supreme Court in *Brown v. Plata*, where a substantial reduction in the census of the California prison system was ordered, in part because of the inadequacy of the mental health services being provided to the inmates within this system, "Courts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration."[191]

IV. THE PROLONGED SUPERMAX SOLITARY CONFINEMENT OF INMATES WITH A MENTAL ILLNESS OR INMATES HIGHLY VULNERABLE TO A MENTAL ILLNESS CONSTITUTES A VIOLATION OF THE EIGHTH AMENDMENT

187. The court stated that "[o]n the one hand, a condition that is sufficiently harmful to inmates . . . will at some point yield to constitutional constraints, even if the condition has some penological justification. . . . On the other hand, a condition or other prison measure that has little or no penological value may offend constitutional values upon a lower showing of injury or harm." Madrid v. Gomez, 889 F. Supp. 1146, 1262–63 (N.D. Cal. 1995).

188. Scarver v. Litscher, 434 F.3d 972, 976–77 (7th Cir. 2006). As discussed, the plaintiff in *Scarver* was also one of the plaintiffs in *Jones'El*. Christopher Scarver, as it turns out, was an especially difficult inmate. Suffering from schizophrenia, delusions, and constant voices in his head, Scarver had murdered fellow inmates on two occasions since being incarcerated, claiming direction from God. Notably, one of those inmates was the infamous Jeffrey Dahmer, a notorious serial killer. *Id.* at 973. The court reasoned that "[p]rison authorities must be given considerable latitude in the design of measures for controlling homicidal maniacs without exacerbating their manias beyond what is necessary for security." *Id* at 976. The difficulty faced by prison officials weighing the dangers of confinement against Scarver's unique danger to other inmates apparently contributed to the court's refusal to issue a finding that deliberate indifference to Scarver's mental health needs occurred. *Id.* at 976–77. Another way in which deference to a legitimate security interest could negatively affect such a challenge is that a court may in fact find a violation of an inmate's constitutional rights and, nevertheless, deny the requested relief. Indeed, Scarver was the only inmate denied injunctive relief in *Jones'El*, based on a finding that he posed a significant security concern. *See* Jones'El v. Berge, 164 F. Supp. 2d 1096, 1125–26 (W.D. Wis. 2001). Likewise, Scarver also was denied monetary relief in *Scarver*, following a ruling that defendants' were entitled to qualified immunity. *Scarver*, 371 F. Supp. 2d at 1005. Strikingly, all three opinions addressing Scarver's complaint in the two cases recited the same facts, but each interpreted the application of the requisite deference differently.

189. *See supra* Part III.C.

190. *See infra* Part IV.

191. Brown v. Plata, 131 S. Ct. 1910, 1928–29 (2011).

> Objects talk to me .... Sometimes the radiator comes alive and tries to attack me. At night I get lonely and the door and the radiator and the shadows come alive and try to get me.
>
> —Supermax inmate[192]

A. The Objective Component: Housing Inmates with a Mental Illness or Inmates Who Are Highly Vulnerable to Mental Illness in Prolonged Supermax Solitary Confinement Deprives Them of a Minimal Life Necessity Because this Setting Poses a Significant Risk to Their Basic Level of Mental Health, a Need "as Essential to Human Existence as Other Basic Physical Demands," with the Harm Suffered or Likely to Be Suffered Sufficiently Serious to Constitute Cruel and Unusual Punishment

The research documenting the harmful psychological effects of prolonged solitary confinement is remarkable for its consistency. As one researcher put it, "There is not a single published study of solitary or super-max like confinement in which nonvoluntary confinement lasting longer than ten days ... failed to result in negative psychological effects."[193] Indeed, as will be discussed, the personal accounts, descriptive studies, and systematic research spanning multiple continents over more than a century is virtually unanimous in its conclusion: prolonged supermax solitary confinement can and does lead to significant psychological harm.[194]

As indicated,[195] studies of the psychological effects of prolonged supermax solitary confinement extend back to supermax's ill-designed predecessor, the Pennsylvania model. For example, Francis Gray's extensive 1847 study, *Prison Discipline in America*, concluded that the incidence of insanity and death at Pennsylvania model institutions far

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192. MCGEE ET AL., *supra* note 49, at 55 (quoting an inmate after eighteen months in solitary confinement).

193. Haney, *supra* note 10, at 132; *see also* U.N. Secretary-General, *supra* note 120, at 9 ("[Fifteen] days is the limit between 'solitary confinement' and 'prolonged solitary confinement' because at that point, according to the literature surveyed, some of the harmful psychological effects of isolation can become irreversible.").

194. *See* Gawande, *supra* note 68, at 37 (asserting that "to exist as a normal human being requires interaction with other people" and tracing scientific research supporting the conclusion that prolonged social isolation results in cognitive deterioration and the development of a range of psychiatric symptoms to attachment studies by Harry Harlow with baby rhesus monkeys in the 1950s, confirmed by EEG studies going back to the 1960s showing a "diffuse slowing of brain waves in prisoners after a week or more of solitary confinement," and demonstrated by accounts provided by a host of prisoners of war and prisoners in general placed in extended solitary confinement). *But see* MAUREEN L. O'KEEFE ET AL., ONE YEAR LONGITUDINAL STUDY OF THE PSYCHOLOGICAL EFFECTS OF ADMINISTRATIVE SEGREGATION viii–ix (2010) (finding negative effects from prolonged administrative segregation, but concluding that it was not as detrimental to mental health as hypothesized). This report, however, has sparked much controversy and criticism. *See, e.g.*, SHARON SHALEV & MONICA LLOYD, *THOUGH THIS BE METHOD, YET THERE IS MADNESS IN 'T: COMMENTARY ON* ONE YEAR LONGITUDINAL STUDY OF THE PSYCHOLOGICAL EFFECTS OF ADMINISTRATIVE SEGREGATION 2–5 (2011).

195. *See supra* Part II.

outpaced those at more traditional institutions.[196] Gray remarked, "[I]t appears that the system of constant separation as established here, even when administered with the utmost humanity, produces so many cases of insanity and of death as to indicate most clearly, that its general tendency is to enfeeble the body and mind."[197]

Likewise, modern case studies and descriptive accounts provided by mental health staff employed at modern supermax settings have consistently reported the same adverse symptoms: appetite and sleep disturbances, anxiety, panic, rage, loss of control, paranoia, hallucinations, and self-mutilations, among others.[198] In addition, direct studies of prison isolation have similarly documented a broad range of adverse psychological symptoms, including, but not limited to, insomnia, anxiety, panic, withdrawal, hypersensitivity, ruminations, cognitive dysfunction, hallucinations, loss of control, irritability, aggression and rage, paranoia, depression, self-mutilation, and suicidal ideation and behavior.[199] It has also been determined that some of the negative health effects are long-term, with

> continued sleep disturbances, depression, anxiety, phobias, emotional dependence, confusion, impaired memory and concentration [extending] long after the release from isolation. Additionally, lasting personality changes often leave individuals formerly held in solitary confinement socially impoverished and withdrawn, subtly angry and fearful when forced into social interaction[, which] often prevents individuals from successfully readjusting to life within the broader prison population and severely impairs their capacity to reintegrate into society when released from imprisonment.[200]

What is particularly striking about these studies is not the range or nature of these symptoms, but their overwhelming prevalence. Indeed, it appears that an inmate in supermax confinement is virtually guaranteed

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196. FRANCIS C. GRAY, PRISON DISCIPLINE IN AMERICA 181 (1847).

197. *Id.*

198. *See* Haney, *supra* note 10, at 130. *See generally* Frank J. Porporino, *Managing Violent Individuals in Correctional Settings*, 1 J. INTERPERSONAL VIOLENCE 213 (1986); Robert G. Slater, *Psychiatric Intervention in an Atmosphere of Terror*, 7 AM. J. FORENSIC PSYCHIATRY 5 (1986).

199. *See* Haney, *supra* note 10, at 131; U.N. Secretary-General, *supra* note 120, at 18 ("Research . . . shows that solitary confinement appears to cause 'psychotic disturbances,' a syndrome that has been described as 'prison psychoses.' Symptoms can include anxiety, depression, anger, cognitive disturbances, perceptual distortions, paranoia and psychosis and self-harm."); Goode, *supra* note 59 ("[S]tudies suggest that the rigid control, absence of normal human interaction and lack of stimulation imposed by prolonged isolation can cause a wide range of psychological symptoms including insomnia, withdrawal, rage and aggression, depression, hallucinations and thoughts of suicide, even in prisoners who are mentally healthy to begin with."). *See generally* Grassian, *supra* note 10, at 1450–54; Grassian & Friedman, *supra* note 10; Craig Haney, *Infamous Punishment: The Psychological Consequences of Isolation*, 8 NAT'L PRISON PROJECT J. 3 (2007); Richard Korn, *The Effects of Confinement in the High Security Unit at Lexington*, 15 SOCIAL JUST. 20 (1988).

200. U.N. Secretary-General, *supra* note 120, at 18; *see also* Gawande, *supra* note 68, at 41 ("One of the paradoxes of solitary confinement is that, as starved as people become for companionship, the experience typically leaves them unfit for social interaction.").

to develop some form of negative psychological effect as a result. In perhaps the most significant study of supermax confinement, psychologist Craig Haney assessed 100 randomly selected inmates in SHU at Pelican Bay in connection with the *Madrid* case. Haney concluded that 91% of the inmates suffered from anxiety, 84% experienced insomnia, and 70% faced an "impending nervous breakdown."[201] Furthermore, 88% were reported to be experiencing rumination and irrational anger, 86% exhibited an oversensitivity to stimuli, 83% showed social withdrawal, 77% suffered chronic depression, 67% demonstrated "overall deterioration," 61% had violent fantasies, 41% reported hallucinations, and 27% were suicidal.[202]

In addition, Haney noted a number of troubling social pathologies connected to supermax confinement among the inmates. Indeed, the deprivation of social interaction and the absence of external feedback appear to cause even mentally stable inmates to suffer. As Haney explained:

> Because so much of our individual identity is socially constructed and maintained, the virtually complete loss of genuine forms of social contact and the absence of any routine and recurring opportunities to ground one's thoughts and feelings in a recognizable human context leads to an undermining of the sense of self and a disconnection of experience from meaning. Supermax prisoners are literally at risk of losing their grasp on who they are, of how and whether they are connected to a larger social world. Some prisoners act out literally as a way of getting a reaction from their environment, proving to themselves that they are still alive and capable of eliciting a genuine response—however hostile—from other human beings.[203]

This desperation for external feedback is likely the cause of the high prevalence of feces, urine, and semen throwing that occurs universally in supermax confinement.[204] One explanation for this behavior is that inmates are so desperate to gain some sort of attention, no matter how negative, they will use the only tool they have—their own body and its products.[205]

Haney and other mental health experts have described these identified symptoms as a syndrome, calling it "isolation sickness," "reduced environmental stimulation syndrome," or "security housing unit[] syn-

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201. Haney, *supra* note 10, at 133.
202. *Id.* at 134.
203. *Id.* at 139–40.
204. RHODES, *supra* note 29, at 43–49.
205. *Id.* at 44, 46. Rhodes describes feces throwing as a uniquely *social* act: "[T]he products of the body are also heavily charged symbolic carriers of the fact that you are 'other' than me; one way a social boundary can be sustained is through the projection of disgust onto those on the 'other' side of it." *Id.*; *see also* Gawande, *supra* note 68, at 42 (noting that "[t]he main argument for using long-term isolation in prisons is that it provides discipline and prevents violence," but countering that "the evidence doesn't bear this out" and for individuals placed in extended solitary confinement, "[r]esistance [is] often [their] sole means of maintaining a sense of purpose, and so their sanity").

drome."[206] One of the most detailed and well-known descriptions of this phenomenon has been provided by Dr. Stuart Grassian.[207] Grassian has identified an extremely high prevalence of a number of related, severe symptoms in these inmates, including hypersensitivity to external stimuli, perceptual distortions, aggressive fantasies, and hallucinations.[208] Like Haney, Grassian concluded that these symptoms constituted "a clinically distinguishable psychiatric syndrome."[209]

As demonstrated by these studies, the psychological harms produced by supermax conditions clearly constitute a failure to provide a significant minimal life necessity, namely a reasonable opportunity for mental health as required by the Eighth Amendment.[210] The psychological harm typically resulting from prolonged supermax solitary confinement has consistently offended standards of decency for more than a century—as evidenced by the eventual rejection of the Pennsylvania model around the world,[211] and the outpouring of negative responses to today's use of prolonged supermax solitary confinement.[212]

In addition, research has established that inmates with a mental disorder are particularly vulnerable to suffering adverse psychological effects from this environment.[213] It has been noted that solitary confinement is "particularly damaging to those with pre-existing mental illness. For these prisoners, solitary [confinement] poses a grave risk of psychiatric injury, self-harm, and even suicide. Deprived of the social interaction

206. Haney, *supra* note 10, at 137.

207. *See* Grassian, *supra* note 10, at 1451–54.

208. *Id.* at 1452–53.

209. *Id.* at 1453; *see also* Goode, *supra* note 59 ("When Dr. Terry Kupers, a psychiatrist and expert on the effects of solitary confinement, toured Unit 32 for the plaintiffs in the A.C.L.U. lawsuit [challenging conditions in the Mississippi State Penitentiary at Parchman, Mississippi's "supermaximum-security prison"], he found that about 100 of the more than 1,000 inmates there had serious mental illness, in many cases improperly diagnosed. Some were actively hallucinating. Others threw feces or urine at guards or howled in the night."); Fathi, *supra* note 163 ("It's long been known that solitary confinement is extraordinarily damaging to mental health, often inducing mental illness in previously healthy prisoners.").

210. *See supra* Part III.B.

211. *See supra* Part II.

212. *See, e.g.*, ABA CRIMINAL JUSTICE STANDARDS, *supra* note 24, at 55; Lenna Kurki & Norval Morris, *The Purposes, Practices, and Problems of Supermax Prisons*, 28 CRIME & JUST. 385, 391 (2001); Charles A. Pettigrew, Comment, *Technology and the Eighth Amendment: The Problem of Supermax Prisons*, 4 N.C. J. L. & TECH. 191, 191 (2002); U.N. Secretary-General, *supra* note 120, at 7 ("[T]he social isolation and sensory deprivation that is imposed by some [nations] does, in some circumstances, amount to cruel, inhuman and degrading treatment and even torture. The Special Rapporteur's predecessors have noted that prolonged solitary confinement may itself amount to prohibited ill-treatment or torture."); *id.* at 23 ("Indefinite solitary confinement should be abolished. . . . Solitary confinement must never be imposed or allowed to continue except where there is an affirmative determination that it will not result in severe pain or suffering."); Weidman, *supra* note 183, at 1505; COMMISSION, *supra* note 20, at 14 (recommending, after a year-long investigation by a bipartisan national task force, prisons "[e]nd conditions of isolation" and "[e]nsure that segregated prisoners have regular and meaningful human contact and are free from extreme physical conditions that cause lasting harm"); Gawande, *supra* note 68, at 37–46; Goode, *supra* note 59; Fathi, *supra* note 163; Editorial Board, *The Abuse*, *supra* note 175; Editorial Board, *Solitary Confinement*, *supra* note 175.

213. *See* Fathi, *supra* note 163; *see also* U.N. Secretary-General, *supra* note 120, at 19.

that is essential to keep them grounded in reality, many prisoners with mental illness experience catastrophic and often irreversible psychiatric deterioration."[214] A United Nations report determined:

> Research has shown that with respect to mental disabilities, solitary confinement often results in severe exacerbation of a previously existing mental condition. Prisoners with mental health issues deteriorate dramatically in isolation. The adverse effects of solitary confinement are especially significant for persons with serious mental health problems which are usually characterized by psychotic symptoms and/or significant functional impairments. Some engage in extreme acts of self-mutilation and even suicide.[215]

This report concluded that "[nations] should abolish the use of solitary confinement for . . . persons with mental disabilities."[216]

Indeed, just as the Supreme Court in *Helling* found that a tobacco-smoke-free environment is a minimal life necessity by contemporary standards, and just as courts today routinely find basic physical conditions such as sanitation,[217] toilets,[218] warmth,[219] and exercise[220] to be min-

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214. Fathi, *supra* note 163.

215. U.N. Secretary-General, *supra* note 120, at 19. To the extent that a court requires a showing of physical harm in addition to mental harm, acts of self-mutilation and suicide should readily satisfy such a requirement. *See supra* notes 169, 175, 198–99, 202, 214 and accompanying text. Moreover, the Supreme Court and other courts have apparently embraced the recognition that mental deterioration can readily lead to physical harm and injury. *See supra* notes 107–10, 125-28, 139–41 and accompanying text.

216. U.N. Secretary-General, *supra* note 120, at 23; *see also id.* at 10 ("The Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has pointed out that prolonged solitary confinement may amount to an act of torture and other cruel, inhuman or degrading treatment or punishment and recommended that solitary confinement should not be used in the case of . . . the mentally disabled."); *id.* at 22 ("Considering the severe mental pain or suffering solitary confinement may cause when used . . . for . . . persons with mental disabilities, it can amount to torture or cruel, inhuman or degrading treatment or punishment."); COMMISSION, *supra* note 20, at 14 ("Prisoners with a mental illness that would make them particularly vulnerable to conditions in segregation must be housed in secure therapeutic units.").

217. *See, e.g.*, Burnette v. Bureau of Prisons, 277 Fed. App'x 329, 331–32 (5th Cir. 2007) (decrying inmates forced to endure odor of bagged sewage when prison officials refused to remove it from their cells); Keenan v. Hall, 83 F.3d 1083, 1090 (9th Cir. 1996) (cell "permeated with [s]tale air that was [s]aturated with [f]umes of [f]eces . . . , the smell of urine and vomit, as well as other bodily odors" (internal quotation marks omitted)); Blake v. Hall, 688 F.2d 52, 56, 59 (1st Cir. 1981) (condemning a failure to remove food, garbage, and excrement on floors and walls).

218. *See, e.g.*, Hearns v. Terhune, 413 F.3d 1036, 1042–43 (9th Cir. 2005) (no working toilets); Mitchell v. Newryder, 245 F. Supp. 2d 200, 204 (D. Me. 2003) (no access to bathroom facilities for five hours while plaintiff sat in his own feces); Masonoff v. DuBois, 853 F. Supp. 26, 29 (D. Mass. 1994) (no access to flushing toilets).

219. *See, e.g.*, Davis v. Biller, 41 Fed. App'x 845, 848 (7th Cir. 2002) (exposure to extreme cold while in segregation); Moore v. Garner, 199 F. Supp. 2d 17, 37–38 (W.D.N.Y. 2002) (subjection to prolonged "bitter cold"); Mitchell v. Shomig, 969 F. Supp. 487, 490 (N.D. Ill. 1997) (extended exposure to temperatures of fifty degrees or less).

220. *See, e.g.*, Antonelli v. Sheahan, 81 F.3d 1422, 1432 (7th Cir. 1996) (noting that prison officials prohibited inmate from "recreat[ing] for periods up to seven weeks in succession, and at most, was called once every two weeks for sessions of no longer than one hour at a time" (internal quotation marks omitted)); Divers v. Dep't of Corr., 921 F.2d 191, 194 (8th Cir. 1990) (noting that inmate was allotted forty-five minutes per week of exercise while in segregation); Platt v. Brocken-

imal life necessities falling within the Eighth Amendment objective component requirement, it is hard to imagine that conditions that almost inevitably lead to a significant deterioration of mental health do not trigger protection as well, particularly when inmates with a mental illness or inmates who are highly vulnerable to mental illness[221] are involved. Indeed, in the recent landmark decision of *Brown v. Plata*, the Court found adequate mental health care to be a basic need, the deprivation of which constitutes a violation of the Eight Amendment.[222] There, the Court compared adequate mental health care to "basic sustenance."[223] As the court in *Madrid* put it, "[I]t is beyond any serious dispute that mental health is a need as essential to a meaningful human existence as other basic physical demands our bodies may make for shelter, warmth or sanitation."[224]

B. The Subjective Component: The Placement of Inmates with a Mental Illness or Inmates Who Are Highly Vulnerable to Mental Illness in Prolonged Supermax Solitary Confinement Subjects Them as a Class to a Substantial Present and Known Risk of Serious Harm and Constitutes Deliberate Indifference to Their Needs in Violation of Their Eighth Amendment Rights

As discussed, the fact that supermax confinement is likely to pose a serious risk of harm to an inmate's mental health is not, by itself, enough to establish a constitutional violation; the claimant must also establish that prison officials were deliberately indifferent to the risk that this placement posed to the inmate.[225] As noted, courts have thus far generally refused to find that prolonged supermax solitary confinement, without more, violates the Eighth Amendment prohibition against cruel and unu-

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borough, 476 F. Supp. 2d 467, 471–72 (E.D. Pa. 2007) (noting that inmate was only allowed to exercise for one hour twice per month).

221. The application of this requirement to "inmates who are highly vulnerable to mental illness" is derived in part from *Madrid v. Gomez*, 889 F. Supp. 1146 (N.D. Cal. 1995). There, as discussed, the court held that confinement in SHU constituted "cruel and unusual punishment in violation of the Eighth Amendment for two categories of inmates: those who are already mentally ill and *those who . . . are at an unreasonably high risk of suffering serious mental illness*." *Id.* at 1267 (emphasis added); *see also supra* note 136 and accompanying text. The court added that the conditions presented a "substantial or excessive risk of harm" to "those [inmates] who the record demonstrates are at a particularly high risk for suffering very serious or severe injury to their mental health," which included "the already mentally ill, as well as persons with borderline personality disorders, brain damage or mental retardation, impulse-ridden personalities, or a history of prior psychiatric problems or chronic depression." *Id.* at 1265, 1267; *see also supra* note 140 and accompanying text. In addition, courts, other entities, and various commentators have noted the importance of pre-placement screening and post-placement monitoring to identify inmates for whom psychological harm is likely, in part because of the serious, long-term, and sometimes permanent nature of this harm when it occurs. *See supra* notes 20, 22, 147–148, 161, 170, 177 and accompanying text. Finally, the Supreme Court has stated: "We have great difficulty agreeing that prison authorities may not be deliberately indifferent to an inmate's current health problems but may ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year." Helling v. McKinney, 509 U.S. 25, 33 (1993).

222. Brown v. Plata, 131 S. Ct. 1910, 1947 (2011).

223. *Id.* at 1928.

224. Madrid v. Gomez, 889 F. Supp. 1146, 1261 (N.D. Cal. 1995).

225. *See supra* Part III.B.

sual punishment.[226] Although the research indicates that inmates in supermax confinement are highly likely to suffer some form of emotional and psychological trauma,[227] and that a number of inmates *do* suffer serious, often debilitating harm to their mental health,[228] particularly when their stay in this setting exceeds a relatively brief period of time,[229] not all inmates will suffer serious harm to their mental health.[230] Furthermore, it has been asserted that "taking prisoners out of these places often goes a long way in reducing or eliminating the negative effects."[231] Thus, although at some point the courts may find existing research sufficiently convincing to conclude that these placements pose an unacceptable risk of harm for inmates in general, this uncertainty as to who will be harmed poses a significant impediment for claimants who are required under the Supreme Court's current standard to establish that prison officials were deliberately indifferent to the risks posed.[232]

However, there is a subgroup of inmates, namely inmates with a mental illness or inmates highly vulnerable to mental illness, for whom the likelihood of a risk of harm is sufficiently established that the courts can, and should, rule that prison officials are sufficiently aware of these risks so that placing these inmates in prolonged supermax solitary confinement constitutes a deliberate indifference to their basic needs. In his study of supermax confinement, Haney concluded that "[a]lthough in my experience, virtually everyone in these units suffers, prisoners with preexisting mental illnesses are at greater risk of having this suffering deepen into something more permanent and disabling."[233] As discussed, prisoners with a preexisting or a high vulnerability to mental illness are far less likely to be able to withstand the stress, social isolation, sensory

226. *See supra* note 90 and accompanying text.

227. *See supra* Part IV.A.

228. *Id.*

229. *See supra* note 193 and accompanying text. When prisoners are sent to isolation as a disciplinary measure for specific misbehavior, the stay typically lasts from ten to up to thirty days, but the segregation associated with supermax confinement can last indefinitely. Goode, *supra* note 59.

230. Goode, *supra* note 59 ("Some inmates appear to function adequately in solitary confinement or even say they prefer it.").

231. Haney, *supra* note 10, at 141. *But see* U.N. Secretary-General, *supra* note 120, at 9 ("[Fifteen] days is the limit between 'solitary confinement' and 'prolonged solitary confinement' because at that point, according to the literature surveyed, some of the harmful psychological effects of isolation can become irreversible."); Gawande, *supra* note 68, at 40 (asserting that prolonged solitary confinement alters the normal functioning of the brain and often has long-term adverse psychological effects). *But see supra* note 200 and accompanying text (noting that some of the negative health effects are long-term).

232. *See supra* Part III.B. However, an inmate placed in prolonged solitary confinement may be able to successfully pursue a procedural challenge that there is not a rational basis for this placement and that the inmate should be transferred to the general population, although even here the claim may be more likely to prevail if the inmate can establish that this confinement is having a serious adverse effect on the inmate's mental health. *See, e.g.*, United States v. Bout, No. 08 CR 365(SAS), 2012 WL 653882, at *2–3 (S.D.N.Y. Feb. 24, 2012). *But see* Rezaq v. Nalley, 677 F.3d 1001, 1014–16 (10th Cir. 2012) (holding that inmates did not have a liberty interest in avoiding transfer without due process).

233. Haney, *supra* note 10, at 142.

deprivation, and idleness of supermax confinement.[234] In *Jones'El*, for example, expert witness Dr. Terry Kupers testified that supermax conditions were "toxic" for inmates with a mental illness.[235] Dr. Kupers, who had studied multiple supermax facilities all over the country, explained that "[t]he almost total isolation and inactivity deprives seriously mentally ill inmates of reality checks; they receive no feedback to keep their psychosis in check."[236]

Similarly, in an interview with the Correctional Association of New York (CANY), Dr. Grassian explained the effects of supermax confinement on inmates with mental illness:

> As a result of this [disorder], such individuals are almost pathologically stimulation seeking and incapable of tolerating stimulus deprivation. When placed in stringent conditions of confinement, they become agitated and paranoid and their emotional state and behavior deteriorates. Many become floridly psychotic or so agitated that they engage in awful, grotesque behaviors. They cover themselves and their cells with feces, they mutilate themselves; try to kill themselves.[237]

Likewise, a retired supermax unit chief told CANY that "[m]y feeling is that people with bipolar disorder, schizophrenia, or major depression should not be housed in SHU, period. These are seriously persistently mentally ill people. SHU is not the place for them."[238]

Another aspect of supermax confinement that should make the vulnerability of these inmates to serious harm relatively obvious to prison officials is that supermax confinement, by its very nature, significantly impedes the delivery of adequate mental health services on a timely basis. Prisons are ill equipped to meet the mental health needs of prisoners in general,[239] but the restrictive measures inherent in supermax confine-

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234. *See supra* notes 213–16 and accompanying text; *see also* BRUCE ARRIGO ET AL., THE ETHICS OF TOTAL CONFINEMENT 61 (2011) ("[T]he effects of placing inmates with pre-existing mental health conditions in solitary confinement—particularly in extreme isolative conditions and for protracted periods of time—are especially devastating."); Haney, *supra* note 10, at 142.

235. Jones'El v. Berge, 164 F. Supp. 2d 1096, 1103 (W.D. Wis. 2001). Dr. Kupers used an operational definition of "serious mental illness" that consisted of any one of five possible indicators:

> confirmed serious mental illness by evaluation of a mental health professional with the assessment recorded electronically; multiple acute care admissions (at least three) to an acute care facility at the state penitentiary; case management notes with mention of hallucinations, delusions and psychotropic medications in the chart; mental health residency of 30 or more days in one of the department's residential mental health units; or an electronically recorded diagnosis of a psychotic disorder, bipolar disorder, major depression, dementia or borderline personality.

Id. at 1107–08; *see also supra* note 19; *infra* note 266.

236. *Id.* at 1104.

237. CANY, *supra* note 78, at 48.

238. *Id.*

239. HUMAN RIGHTS WATCH, MENTAL ILLNESS, HUMAN RIGHTS, AND U.S. PRISONS 1–2 (2009).

ment typically have the effect of further limiting, if not curtailing, what little mental health treatment might otherwise have been forthcoming.[240] This forces the many inmates with a mental illness who are more vulnerable to the effects of this confinement to often face the tribulations of supermax confinement unaided by treatment or other forms of assistance that might prevent or diminish the harm they experience.[241]

For example, Christopher Scarver, the prisoner who was part of the plaintiff class in *Jones'El* and who was the exclusive focus of *Scarver*, while housed at Supermax in Boscobel, Wisconsin, suffered from "hearing" constant voices in his head.[242] Prior to being transferred to Supermax, Scarver was able to use headphones and a radio to help drown out the voices; however, a ban on such personal devices at Supermax meant that this "aid" was not available to him there.[243] As a result, after having had virtually no problems for a number of years in a less restrictive facility, once placed in Supermax, Scarver resorted to banging his head against the wall, engaged in multiple suicide attempts to "get the voices to stop," and cut his head with a broken piece of glass "because [he] wanted to see what was inside [his] head."[244] Surely, prison officials would or should have been aware of such behavior and its implications.

In addition, being confined to a cell twenty-three hours per day means that any mental health treatment that does occur in a supermax setting is typically limited to "cell front therapy," in which "[inmates] can [only] discuss intimate, personal problems with mental health staff who cannot easily see or hear them through the cell doors (unless they speak so loudly that other prisoners in the housing unit also can listen in)."[245] In some facilities, mental health treatment is done via "'telepsychiatry' sessions, in which disembodied images attempt to assess and address [inmates'] problems from distant locations."[246] In addition, Dr. Kupers concluded that mental health staff, even when they interacted

240. *Id.* at 4 ("The psychological harm of supermaximum security confinement is exacerbated because mental health professionals are not permitted to provide the full range of mental health treatment services to the prisoners."); *see also* Fellner, *supra* note 15, at 404 ("In many segregation units, mental health services are so poor that even floridly psychotic prisoners receive scant attention."). Supermax solitary confinement, designed to severely limit human interaction, also significantly impairs inmates' interactions with mental health and other prison staff who might provide them with needed assistance. *Id.* at 404–05, 411.

241. In light of the continual and close observation (albeit from a remote location) of inmates in supermax confinement and the series of reports and court rulings that have been issued documenting this problem, it defies logic to assert that prison officials are unaware of the deterioration of the mental health of inmates that often occurs in this setting.

242. Scarver v. Litscher, 434 F.3d 972, 974–75 (7th Cir. 2006).

243. *Id.*

244. Jones'El v. Berge, 164 F. Supp. 2d 1096, 1113–14 (W.D. Wis. 2001) (alterations in original) (internal quotation marks omitted).

245. Haney, *supra* note 10, at 143.

246. *Id.* In an effort to minimize direct human interaction and because supermax facilities tend to be located in relatively remote locations and are relatively unrewarding or undesirable locations in which to work, such facilities often rely instead on various technological means to enable mental health professionals to communicate with inmates without being directly present. *See supra* note 84.

with these inmates, were "too wary of malingering," causing them to "overlook those who are in serious need of psychiatric help."[247] Frequently, even inmates who had been repeatedly admitted to psychiatric hospitals, who were previously prescribed strong antipsychotic and mood-regulating medications, and who had been previously diagnosed with serious mental illnesses and treated for years, were nonetheless routinely found by staff to be malingering or "merely manipulating."[248]

As the Supreme Court made clear in *Farmer* and *Helling*, if a threat of actual injury posed by an environmental hazard to a class of inmates is imminent, the failure to remedy that hazard constitutes deliberate indifference on the part of prison officials.[249] The transfer of an inmate with a mental illness or an inmate who is highly vulnerable to mental illness into supermax confinement constitutes deliberate indifference to a significant risk that the inmate will suffer severe psychological harm. Not only are inmates with or highly susceptible to a mental illness particularly psychologically vulnerable to the strain and trauma caused by supermax confinement, they are made more vulnerable by the fact that the restrictive environment of supermax renders meaningful treatment and monitoring of their mental health difficult if not impossible.

Given the widely accepted research findings that inmates with a mental illness are a class particularly at risk, as well as the recognition of this risk by courts dating back to *Madrid*, prison officials can no longer genuinely claim that they are unaware of the risk prolonged supermax solitary confinement poses to inmates with or highly vulnerable to a mental illness. As a result, claimants can readily establish the requisite deliberate indifference by such officials to the impact of prolonged solitary confinement on these inmates.

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247. *Jones'El*, 164 F. Supp. 2d at 1107.

248. *Id.* Dr. Grassian noted:

> There was too great a pull towards seeing inmate behavior as manipulative and to uncritically, reflexively, view inmates as 'malingering' without any meaningful attempt at psychiatric evaluation—even utterly disregarding the existence of prior records clearly documenting serious psychopathology, and even utterly disregarding the fact that at the very same time that the inmate was being diagnosed as 'malingering,' he was simultaneously on high doses of potentially toxic antipsychotic medication.

CANY, *supra* note 78, at 59.

249. Farmer v. Brennan, 511 U.S. 825, 847 (1994) ("[A] prison official may be held liable under the Eighth Amendment for denying humane conditions of confinement . . . if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it."); Helling v. McKinney, 509 U.S. 25, 33 (1993) ("We have great difficulty agreeing that prison authorities may not be deliberately indifferent to an inmate's current health problems but may ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year. . . . That the Eighth Amendment protects against future harm to inmates is not a novel proposition."); *see also supra* Part III.A–B.

V. DEFUSING THE DEFERENCE DEFENSE: THE MYTH OF THE "WORST OF THE WORST"

> There is a notion in the popular mind that the people who end up in solitary confinement are the most ruthless kind of James Cagneys of the prison system. In fact, what you often see there is exactly the antithesis: they are very often the wretched of the earth, people who are mentally ill, illiterate, and cognitively impaired, people with neurological difficulties, people who just really can't manage to contain their behavior at times. The prison system tends to respond to this by punishment.[250]

As discussed above, judicial deference to penological and administrative concerns plays a significant role in Eighth Amendment challenges to prison conditions.[251] However, these concerns readily falter when attention is focused on the large number of inmates with a mental illness placed in prolonged supermax solitary confinement.

An assertion often advanced in describing and defending supermax facilities is that they house the "worst of the worst"; the violent, dangerous inmates who simply cannot be housed anywhere else.[252] According to the National Institute of Corrections (NIC), supermax prisons house a system's "most dangerous, recalcitrant, aggressive, and antagonistic inmates."[253] It has described supermax facilities as existing for the "control of inmates who have been officially designated as exhibiting violent or seriously disruptive behavior while incarcerated."[254] In fact, one of the primary rationales advanced in defense of supermax confinement is that it lowers the overall level of violence in prison systems by placing the most difficult-to-manage inmates in a facility or unit specially designed to meet the challenges posed by these inmates.[255] However, several studies have concluded that supermax facilities are not populated only by the "worst of the worst," and that "the effectiveness of supermax prisons as a mechanism to enhance prison safety remains largely speculative."[256]

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250. Stuart Grassian, Remarks at Advisory Committee Meeting of Correctional Association of New York (June 26, 2002).

251. *See supra* Part III.D.

252. Kurki & Morris, *supra* note 212 ("Prison administrators often describe supermax inmates as 'the worst of the worst' . . . ."); RHODES, *supra* note 29, at 24 ("These facilities are routinely described by correctional officials and in the press as housing 'the worst of the worst' and thus serving as 'prisons within prisons.'").

253. COLLINS, *supra* note 74, at v, xi.

254. RIVELAND, *supra* note 76 (internal quotation marks omitted).

255. Smith, *supra* note 26, at 443; *see also* Kurki & Morris, *supra* note 212 (identifying the two most common express goals of supermax confinement to be the reduction of violence by separating the most dangerous inmates and to provide a general deterrent of violence within the general population, concluding "however, [that there is] only anecdotal evidence to support either of these propositions," and noting that they have been "judged false by many prison researchers").

256. Smith, *supra* note 26, at 443; *see also* Goode, *supra* note 59 ("[P]rison systems began to send people to segregation units who bore little resemblance to the serial killers or terrorists the public imagined filled such prisons. . . . [P]rison officials started out isolating inmates they were scared of but ended up adding many they were simply 'mad at.'"); *id.* ("Some officials have also

Nevertheless, this conception of supermax prisons still predominates. According to one federal judge, for example, "[c]ommon sense . . . tells us that the prisoners . . . are apt to be the worst of the worst and that guards must therefore use more repressive methods in dealing with them."[257]

A. Who Really Is in Prolonged Supermax Solitary Confinement?

"Common sense" notwithstanding, nearly every expert who has studied supermax confinement has expressed serious doubt that the inmates housed in them truly represent the "worst of the worst."[258] Dr. Grassian told the Commission on Safety and Abuse in America's Prisons[259] that "[m]any of these people [placed in supermax confinement] who are said to be the 'worst of the worst' are simply the wretched of the earth. They're sick people."[260] According to Craig Haney, "there is no evidence that these allegedly 'worst' prisoners are any worse than those who had been adequately managed by less dramatic measures in the past."[261] Likewise, Fred Cohen, a renowned expert on prison mental health systems, concluded that "[s]erious doubts now have arisen as to whether such facilities actually have the 'worst of the worst.'"[262]

Due to differing classification schemes and a dearth of definitive empirical studies, it is difficult to ascertain exactly *who* is in supermax confinement.[263] However, the research that does exist unanimously indicates that supermax facilities and units house a disproportionately large number of inmates suffering from a serious mental illness. In 2004, CANY studied mental health care in prisons throughout the state of New York, and concluded that 11% of the inmates in twenty-three-hour lockdown had been diagnosed with "a major mental disorder such as schizophrenia."[264] The same report found that, at some prisons, more than 60% of the inmates in supermax confinement were receiving mental health services.[265] A comprehensive study of inmates in Washington's super-

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been persuaded by research suggesting that isolation is vastly overused and that it does little to reduce overall prison violence. Inmates kept in such conditions, most of whom will eventually be released, may be more dangerous when they emerge, studies suggest.").

257. Cooper v. Casey, 97 F.3d 914, 918 (7th Cir. 1996).

258. *See supra* note 257 and accompanying text.

259. COMMISSION, *supra* note 20. Established by the Vera Institute of Justice in 2005, the Commission on Safety and Abuse in America's Prisons seeks to identify and recommend solutions to serious challenges facing America's jails and prisons. *Id.* at ii, 7. The Commission was co-chaired by former United States Attorney General Nicholas B. Katzenbach and the Honorable John Gibbons. *Id.* at iii.

260. *Id.* at 60. Dr. Grassian was referencing prisoners with a mental illness, and describing a "'revolving door' phenomenon where mentally ill prisoners in the most isolating conditions become so acutely ill that they end up being committed to a psychiatric hospital, where they recover just enough to be sent back to the control unit. And the cycle begins again." *Id.*

261. Haney, *supra* note 10, at 129.

262. 1 COHEN, *supra* note 21, at 11-3.

263. Goode, *supra* note 59.

264. CANY, *supra* note 78, at 48.

265. *Id.*

max facilities—known as "Intensive Management Units" (IMUs)—concluded that "approximately 30 percent of IMU residents show evidence of serious mental illness. This is substantially higher than the 10–15 percent estimates of [serious mental illness] prevalence in [the] total inmate population[]."[266] A comprehensive Canadian study produced almost identical results, concluding that "29% of those in 'special handling units' and 31% of those in 'long-term segregation units' suffered from 'severe mental disorders.'"[267] Some, however, have suggested that even higher prevalence levels exist. Craig Haney estimated the percentage of supermax prisoners with a mental illness to be twice as high as found among prisoners in the general population, with a study of two supermax prisons in Indiana leading to the conclusion that "over half of the inmates at the SHU are mentally ill."[268]

B. How Do They Get There? A Look at the Classification Process

Generally, correctional systems employ two categories of segregation: administrative and punitive.[269] Punitive segregation—also called disciplinary segregation—is traditional solitary confinement where an inmate receives a time-based sanction for a disciplinary infraction after being afforded due process, which involves some sort of hearing and a finding of guilt.[270] On the other hand, placement in administrative segregation, which includes supermax confinement, is left "solely [to] the discretion of correctional administrators and staff."[271] These placement decisions are made unilaterally by prison officials and may last indefinitely.[272] As Craig Haney put it, "[M]any prisoners are placed in supermax not specifically for what they have done but rather on the basis of who someone in authority has judged them to be."[273]

Because placement in supermax confinement generally results from a classification decision, rather than being the consequence of a disciplinary violation and a punitive sanction to which due process protections attach, placement is almost always for an extended, indefinite period of

266. David Lovell et al., *Who Lives in Super-Maximum Custody? A Washington State Study*, 64 FED. PROBATION 33, 36 (2000). Researchers used a combination of five "proxy indicators" to identify serious mental illness: (1) the inmate had been confirmed as having a serious mental illness by prison staff; (2) the inmate had multiple acute care admissions for the treatment of mental illness; (3) case management notes mentioned the presence of hallucinations, delusions, or a prescription of psychotropic medications; (4) a previous mental health residency had occurred lasting thirty or more days; or (5) a diagnosis of a psychotic disorder, bipolar disorder, major depression, dementia, or borderline personality. *Id.* at 35–36; *see also supra* notes 19, 235.

267. Sheilagh Hodgins & Gilles Côté, *The Mental Health of Penitentiary Inmates in Isolation*, 33 CANADIAN J. CRIMINOLOGY 175, 176, 180 (1991).

268. HUMAN RIGHTS WATCH, *supra* note 58, at 17.

269. ARRIGO ET AL., *supra* note 234, at 63. The Federal Bureau of Prisons, for example, uses this dichotomy.

270. *Id.*

271. *Id.*

272. *Id.*

273. Haney, *supra* note 10, at 127.

time.[274] The NIC reports that the average length of stay an inmate can expect once placed in supermax confinement is "at least 12–24 months, if not longer."[275] The average length of time spent in the federal supermax facility in Florence, Colorado, for example, is over three years; the minimum stay in South Carolina's Kirkland supermax unit is a year and a half; and transfer out of Virginia's Red Onion supermax prison requires at least two years of confinement during which time no disciplinary infractions have been committed by the inmate.[276]

Classification criteria for placement in supermax confinement are often ambiguous.[277] In 1996, the NIC surveyed twenty-nine prison systems across the United States, of which eleven indicated that 1% or less of all inmates were in the supermax category, seven said that 5%–8% were, and one responded that 20% of its inmates fell in this category.[278] This survey suggests that the methods prison officials use to identify a "supermax inmate" vary widely from system to system. What these classification procedures suggest, moreover, is that they allow prison officials a significant degree of discretion in assigning inmates.[279] Although inmates may typically be placed in supermax confinement because of gang activity or violent behavior, it appears that most or all supermax settings also have a "catchall" category that permits confinement for merely difficult or disruptive behavior.[280] In the state of Washington, for example, inmates may end up in supermax confinement after being determined to exhibit "unpredictability" or "extremely bizarre behavior," or for being "difficult to manage in other prison settings."[281] In New York's correctional facilities, one can be assigned to supermax confinement for "committing an unhygienic act" or "disobeying a direct order."[282]

Not surprisingly, the broad nature of the classification schemes employed and their focus on disruptive or difficult behavior means that the types of behaviors sometimes associated with mental illness can serve as grounds for supermax confinement. As Craig Haney puts it:

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274. *Id.*

275. COLLINS, *supra* note 74, at 6.

276. Kurki & Morris, *supra* note 212, at 388.

277. Indeed, many commentators have raised the problem of overclassification in this setting, with prison officials feeling pressure to fill empty supermax beds both because the general population is typically overcrowded and because supermax facilities are costly and prison officials fear budget cuts, or perceptions of waste, if these beds are not kept full. *See* Demaio, *supra* note 20, at 216.

278. COLLINS, *supra* note 74, at 6.

279. *See* Goode, *supra* note 59 ("'Certainly there are a small number of people who for a variety of reasons have to be maintained in a way that they don't have access to other inmates,' said Chase Riveland, a former head of corrections in Colorado and Washington State who now serves as an expert witness in prison cases. 'But those in most systems are pretty small numbers of people.'").

280. *Id.* ("[P]rison officials started out isolating inmates they were scared of but ended up adding many they were simply 'mad at.'").

281. Lovell et al., *supra* note 266, at 37.

282. CANY, *supra* note 78, at 50.

> Unproblematic adjustment to prison requires conformity to rigidly enforced rules and highly regimented procedures. Many mentally ill prisoners lack the capacity to comply with these demands and they may end up in trouble as a result. If they are not treated for their problems, the pattern is likely to be repeated and eventually can lead to confinement in a supermax unit.[283]

That is, prison officials often "treat disordered behavior as disorderly behavior."[284] The result is that "[t]he mentally ill are disproportionately represented among prisoners in segregation."[285]

C. Inability to Conform Their Behavior

Facilities also typically employ a system of "levels or steps" by which inmates in supermax confinement can "earn" their way back to less restrictive housing by going lengthy periods of time without any disciplinary violations.[286] The goal is to encourage inmates to take responsibility for their actions and show that they are capable and willing to conform to the rigid structure of prison life if they want to return to general population. According to one commentator, "the logic of the infraction system is . . . to engage the rationality of the inmate. It posits that eventually—if staff hold their ground and refuse to deviate from supplying consequences [for misbehavior]—the prisoner will make a connection between what he does and what happens to him" and change his behavior accordingly.[287] But what happens when the environment of supermax confinement triggers those very behaviors that result in infractions, thereby precluding such a progression?

In *Jones'El*, Dr. Kupers randomly selected twenty-one inmates and determined that eight suffered from a serious mental illness.[288] Of those eight, just one had ever made it to level three, and only briefly, with progression to a level five required to "graduate" from supermax confinement.[289] The court noted that these prisoners were "stuck on levels one and two," and concluded that they were "not able to control their behavior to reach higher levels."[290] For example, when one of the eight inmates, Christopher Scarver, began banging his head against the wall out of desperation to silence the constant voices in his head, he was denied promotion to the next level.[291] In conjunction with this denial, a mental health staff worker wrote the following message to Scarver: "[T]he inci-

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283. Haney, *supra* note 10, at 142; *see also* HANS TOCH & KENNETH ADAMS, ACTING OUT: MALADAPTIVE BEHAVIOR IN CONFINEMENT 13 (2002).
284. *Developments in the Law*, *supra* note 118, at 1145.
285. Fellner, *supra* note 15, at 402.
286. COLLINS, *supra* note 74, at 6.
287. RHODES, *supra* note 29, at 77.
288. Jones'El v. Berge, 164 F. Supp. 2d 1096, 1108 (W.D. Wis. 2001).
289. *Id.* The inmates had been in this setting from one to three years. *Id.* at 1108–16.
290. *Id.* at 1120.
291. Scarver v. Litscher, 434 F.3d 972, 975 (7th Cir. 2006).

dent of you banging your head on the wall and other bizarre behavior is not appropriate. We highly recommend that you cooperate [with] clinical services so that advancement can be considered in the future."[292] This example demonstrates that there is little penological purpose being served by such a system when its infraction system is based on the rationality of the inmate but is applied to an irrational inmate. As Judge Posner rightly commented, Scarver "was banging his head because he was crazy, not because he was unwilling to cooperate."[293]

This type of incident, of course, is not unique to Scarver. Indeed, Dr. Kupers noted that several of the eight inmates with a serious mental illness who he examined appeared to have no knowledge of "why they were [in] Supermax or what they had to do to advance to a higher level."[294] Research has indicated that inmates with a mental illness are generally more likely to accumulate disciplinary infractions than counterparts who do not have a mental illness. For example, one study of the mental health records of 9,013 inmates in New York found that inmates with a mental illness accumulated significantly more disciplinary violations than did other inmates.[295] Another study examined 3,426 federal prison inmates and found a disciplinary infraction rate of 21.6 per 100 inmates for those inmates with a mental illness, and 14.0 per 100 inmates for all other inmates.[296] And perhaps most striking, when CANY conducted interviews with nearly 200 inmates in supermax facilities in New York, it discovered that the average stay was six-and-a-half times longer for inmates who appeared on the mental health caseload than for all other inmates.[297]

D. What's the Point? Looking for a Penological Justification

The Supreme Court has made it clear that deference to penological interests must play a part in appraising Eighth Amendment challenges to prison conditions, and that the legitimate security needs of the prison must be balanced against the gravity of the harm incurred by the inmates.[298] However, the arguments advanced as to the security needs served by supermax confinement tend to be largely unsubstantiated claims that its imposition reduces violence and improves prison functioning by isolating the most dangerous prisoners—the "worst of the worst."[299] The actual effectiveness and function of supermax settings in

292. *Id.* (internal quotation marks omitted).
293. *Id.*
294. *Jones'El*, 164 F. Supp. 2d at 1108.
295. Kurki & Morris, *supra* note 212, at 411–12.
296. Kenneth Adams, *Former Mental Patients in a Prison and Parole System*, 10 CRIM. JUST. BEHAV. 358, 362, 368 (1983).
297. CANY, *supra* note 78, at 50.
298. *See supra* Part III.D.
299. *See supra* Part V.A–B.

achieving these goals have been called into doubt.[300] Furthermore, it is not clear how certain aspects of supermax confinement, such as reduced access to vocational opportunities, personal items, and outdoor time, are rationally related to the penological interest in reducing violence.[301]

With regard to inmates with a mental illness, the security interest achieved is even more questionable. Given the disproportionately high number of inmates with a mental illness in supermax confinement, given the grave effect it has on their mental health, and given the fact that they are so often unable to conform adequately to the rigid disciplinary structure necessary to progress out of this setting,[302] it appears that housing inmates with a mental illness in supermax confinement more likely *creates* a penological burden, rather than diminishes it. Surely, no penological purpose can be served by herding inmates into an expensive and perpetual cycle of disciplinary infractions and further confinement of which the primary effect appears to be the exacerbation of the mental illness that was the root of their placement in the first place, but which may also render them more violent, unresponsive, impulsive, or disruptive.

Supermax settings do not contain the "worst of the worst"; they contain a mix of the "worst of the worst" and a relatively random group of inmates who in one way or another have been difficult to deal with. As Fred Cohen asserts, it is possible that supermax settings actually contain more of the "wardens' 'problem children'" than the "worst of the worst."[303] Unfortunately, a significant number of these "problem children" are inmates with a mental illness for whom supermax confinement serves only to magnify, rather than solve, a penological problem. As the court in *Ruiz* put it, supermax settings have become "a repository for a great number of mentally ill citizens. . . . Then, in a tragically ironic twist, they may be confined in conditions that nurture, rather than abate, their psychosis."[304]

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300. *See, e.g.*, Daniel P. Mears & Jamie Watson, *Towards a Fair and Balanced Assessment of Supermax Prisons*, 23 JUST. Q. 232, 235 (2006) ("[S]cant attention has been given to how supermax prisons achieve specific goals, thus undermining the plausibility of causal claims about the effectiveness of these prisons."); C. S. Briggs et al., *The Effect of Supermaximum Security Prisons on Aggregate Levels of Institutional Violence*, 41 CRIMINOLOGY 1341, 1367 (2003) (describing a study of changes in inmate-on-inmate and inmate-on-staff assaults in four states, concluding that the opening of supermax prisons had no effect on and may have increased system-wide violence); SHALEV, *supra* note 45, at 209 ("[T]he introduction of supermax prisons has not, in fact, succeeded in reducing violence throughout the prison estate, and may have even contributed to its increase.").

301. *See* Madrid v. Gomez, 889 F. Supp. 1146, 1263 (N.D. Cal. 1995) (noting that "aspects of the conditions in the SHU . . . appear tenuously related to legitimate penological interests . . . . For example, it is not clear how the lack of an outside view, the extreme sterility of the environment, and the refusal to provide any recreational equipment in the exercise pen . . . furthers any interest other than punishment, and defendants have not advanced one.").

302. *See supra* Parts IV.A., V.A–C.

303. 1 COHEN, *supra* note 21, at 11-31.

304. Ruiz v. Johnson, 37 F. Supp. 2d 855, 915 (S.D. Tex. 1999), *rev'd on other grounds*, 243 F.3d 941 (5th Cir. 2001).

It may be that the number of inmates with a mental illness in supermax confinement and their ready placement there, and the fact that broad infraction schemes keep them there, is due more to the political reality of supermax settings than a legitimate security interest. The reality of today's supermax confinement is perhaps best understood by comparing it to its earlier counterpart—the Pennsylvania model.[305] Nineteenth-century experiments with prolonged solitary confinement, however misguided, were apparently rationalized by the belief that they could effectively rehabilitate a prisoner by forcing him into a state of introspection and meditation.[306] Accordingly, they were rather abruptly abandoned when it was discovered that they had little rehabilitative value.[307]

Today's supermax confinement utilizes a very similar technique but with a very different, albeit equally misguided, justification. Arising in an increasingly punitive political environment,[308] the core logic that underlies its employment is "punitive individualism," which focuses on wrongful acts and a belief that inmates should be held accountable for their actions.[309] Its guiding principle is that inmates who fail to conform to society's rules have chosen to be difficult and therefore deserve to be further punished for their infractions. As one commentator put it, "The belief that the inmate moves in a charmed circle of his own reason and autonomy—or that he can be made to do so through discipline—is what ultimately justifies practices of order within the prison."[310] In reality, the modern supermax is not the unfortunate but necessary place to house the "worst of the worst." Instead, it is a calculated disciplinary mechanism. But when an inmate can neither conform to the rules generated by this mechanism nor benefit from resulting discipline, and is only made worse as a result of this placement, its penological purpose ceases to be valid.

In reality, today's supermax confinement has devolved to the point where it primarily serves another function: namely, a convenient, albeit inefficient and cruel, administrative solution to the pressing challenge posed by difficult prisoners with a mental disorder who permeate the correctional system. It is the real-life manifestation of the proverbial "lock 'em up and throw away the key" approach, as it has become a "repository" for difficult-to-manage inmates with a mental illness[311] and

305. *See supra* Part II.
306. *See supra* notes 31–32 and accompanying text.
307. *See supra* Part II.
308. *See supra* notes 53–56.
309. RHODES, *supra* note 29, at 84.
310. *Id.* at 81.
311. Ruiz v. Johnson, 37 F. Supp. 2d 855, 915 (S.D. Tex. 1999), *rev'd on other grounds*, 243 F.3d 941 (5th Cir. 2001).

their placement "of last resort."[312] Supermax confinement has become a warehouse for the system's and society's mental health problems.

VI. CONCLUSION

The increasing number of inmates with a mental disorder in America's prison population and the inadequacy of their treatment and housing conditions have been issues of growing significance in recent years. The U.S. Department of Justice estimates that "over one and a quarter million people suffering from mental health problems are in prisons or jails, a figure that constitutes nearly sixty percent of the total incarcerated population in the United States."[313] Furthermore, a person suffering from a mental illness in the United States is three times more likely to be incarcerated than hospitalized,[314] with as many as 40% of those who suffer from a mental illness coming into contact with the criminal justice system every year[315] and police officers almost twice as likely to arrest someone who appears to have a mental illness.[316] As a result, the United States penal system has become the nation's largest provider of mental health services,[317] a "tragic consequence[] of inadequate community mental health services combined with punitive criminal justice policies."[318]

This growth in the number of inmates with a mental disorder, combined with the recent rise of prolonged supermax solitary confinement and the increasingly punitive nature of the American penological system,[319] has resulted in a disproportionately large number of inmates with a mental disorder being housed in supermax confinement.[320] The harsh restrictions of this confinement often significantly exacerbate these inmates' mental disorders or otherwise cause significant additional harm to their mental health, as well as preclude proper mental health treatment.[321] Given this impact, focusing on "punitive individualism"[322] in this setting is not only an ill-suited response to the penological challenges these in-

312. The phrase "asylums of last resort," and versions of it, have been used on and off by various commentators in a variety of different ways, but was most notably used in this context by Lorna Rhodes to refer to supermax units. RHODES, *supra* note 29, at 99.

313. *Developments in the Law*, *supra* note 118, at 1145.

314. Rita Rubin, *Mentally Ill People Are Sent to Jail More Often Than Hospital*, USA TODAY, May 12, 2010, at 4D.

315. Mental Health Early Intervention, Treatment, and Prevention Act of 2000, S. 2639, 106th Cong. § 2 (2000).

316. JENNIFER WOOD ET AL., CENTER FOR BEHAVIORAL HEALTH SERVICES & CRIMINAL JUSTICE RESEARCH, RUTGERS UNIVERSITY, POLICE INTERVENTIONS WITH PERSONS AFFECTED BY MENTAL ILLNESSES: A CRITICAL REVIEW OF GLOBAL THINKING AND PRACTICE 11 (2011).

317. Shane Levesque, *Closing the Door: Mental Illness, the Criminal Justice System, and the Need for a Uniform Mental Health Policy*, 34 NOVA L. REV. 711, 713 (2010).

318. Fellner, *supra* note 15, at 392.

319. *See supra* notes 55–56, 59–72, 313–18 and accompanying text.

320. *See supra* notes 264–68 and accompanying text.

321. *See supra* Part IV.

322. RHODES, *supra* note 29, at 84.

mates pose but also inappropriate in light of the inability of many of these inmates to conform their behavior within the prison environment.[323]

Housing inmates with a mental disorder in prolonged supermax solitary confinement deprives them of a minimal life necessity because this setting poses a significant risk to their basic level of mental health, a need "as essential to . . . human existence as other basic physical demands,"[324] and thereby meets the objective element required for an Eighth Amendment cruel and unusual punishment claim.[325] In addition, placing such inmates in supermax confinement constitutes deliberate indifference to their needs as this setting exposes this class of readily identifiable and vulnerable inmates to a present and known risk by knowingly placing them in an environment that is uniquely toxic to their condition.[326] Whether it is called torture, a violation of evolving standards of human decency, or cruel and unusual punishment, truly "[a] risk this grave—this shocking and indecent—simply has no place in civilized society."[327]

323. *See supra* Part V.D.
324. Madrid v. Gomez, 889 F. Supp. 1146, 1261 (N.D. Cal. 1995).
325. *See supra* Part IV.A.
326. *See supra* Part IV.B.
327. *Madrid*, 889 F. Supp. at 1266.