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## Requiring the State to Justify Supermax Confinement for Mentally Ill Prisoners: A Disability Discrimination Approach

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**Requiring the State to Justify Supermax Confinement for Mentally Ill Prisoners: A Disability Discrimination Approach**

REQUIRING THE STATE TO JUSTIFY SUPERMAX  
CONFINEMENT FOR MENTALLY ILL PRISONERS:  
A DISABILITY DISCRIMINATION APPROACH

BRITTANY GLIDDEN & LAURA ROVNER<sup>†</sup>

ABSTRACT

The Eighth Amendment has long served as the traditional legal vehicle for challenging prison conditions, including long-term isolation or “supermax” confinement. As described by Hafemeister and George in their article, *The Ninth Circle of Hell: An Eighth Amendment Analysis of Imposing Prolonged Supermax Solitary Confinement on Inmates with a Mental Illness*, some prisoners with mental illness have prevailed in Eighth Amendment challenges to prolonged isolation. Yet an equal or greater number of these claims have been unsuccessful. This Essay considers why some of these cases fail, and suggests that one reason is that Eighth Amendment jurisprudence does not contain a well-defined doctrinal framework for courts to use in considering a prison’s proffered “legitimate penological interest” in a given condition of confinement, including prolonged supermax confinement. In this Essay, we explore the idea that the federal disability discrimination statutes may offer a more tailored methodology for challenging solitary confinement of mentally ill prisoners. Unlike an Eighth Amendment claim, in which a prisoner typically challenges the aggregate of supermax conditions, a disability discrimination approach requires courts to assess the individual conditions that comprise supermax confinement, a process that requires an analysis of whether discrimination is occurring vis-à-vis each component deprivation. Finally, the Essay concludes by examining the disability discrimination approach in the context of claims asserted by the Civil Rights Clinic of the University of Denver Sturm College of Law on behalf of a mentally ill man who has been in isolation for over a decade.

TABLE OF CONTENTS

INTRODUCTION .....	56
I. THE PROBLEM WITH THE EIGHTH AMENDMENT: THE UNDEFINED ROLE OF “LEGITIMATE PENOLOGICAL INTEREST” .....	59
II. A DIFFERENT APPROACH: THE DISABILITY RIGHTS STATUTES .....	65

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<i>A. The Federal Disability Discrimination Statutes: A Brief Overview</i> .....	66
<i>B. Anderson v. Colorado Department of Corrections</i> .....	69
<i>C. The Case Against Segregation Under the American with Disabilities Act and Rehabilitation Act</i> .....	70
1. Disabled by Mental Illness .....	71
2. Services .....	72
3. Cause of the Deprivation.....	72
4. “Fundamental Alteration” .....	73
CONCLUSION.....	75

## INTRODUCTION

A man is taken away from his experience of society, taken away from the experience of a living planet of living things, when he is sent to prison.

A man is taken away from other prisoners, from his experience of other people, when he is locked away in solitary confinement in the hole.

Every step of the way removes him from experience and narrows it down to only the experience of himself.

There is a thing called death and we have all seen it. It brings to an end a life, an individual living thing. When life ends, the living thing ceases to experience.

The *concept* of death is simple: it is when a living thing no longer entertains experience.

So when a man is taken farther and farther away from experience, he is being taken to his death.

—Jack Henry Abbott<sup>1</sup>

As described in *The Ninth Circle of Hell: An Eighth Amendment Analysis of Imposing Prolonged Supermax Solitary Confinement on Inmates with a Mental Illness*, the practice of housing prisoners in prolonged isolation or “supermax” conditions has grown significantly over the past few decades.<sup>2</sup> Today, at least 25,000 prisoners across the country are held in long-term solitary confinement.<sup>3</sup> Many of them have mental

1. JACK HENRY ABBOTT, IN THE BELLY OF THE BEAST: LETTERS FROM PRISON 52–53 (1981).

2. Thomas L. Hafemeister & Jeff George, *The Ninth Circle of Hell: An Eighth Amendment Analysis of Imposing Prolonged Supermax Solitary Confinement on Inmates with a Mental Illness*, 90 DENV. U. L. REV. 1, 13–14 (2012).

3. Ryan Devereaux, *Solitary Confinement on Trial: Senators Hear From Experts on Prison Reform*, GUARDIAN.CO.UK (June 19, 2012, 12:25 AM), <http://www.guardian.co.uk/world/2012/jun/19/solitary-confinement-trial-us-senators>. Some estimates place the number of people in solitary confinement closer to 80,000. *Id.*; see also *Reassessing*

illnesses that caused or contributed to their segregation, and even those without a pre-diagnosed condition suffer mental health harms as a result of prolonged isolation.

The idea that supermax confinement can cause or worsen mental health issues is both intuitively obvious and supported by psychological studies.<sup>4</sup> This psychological trauma results not only from the characteristic separation from other people but also from the confluence of extremely restrictive conditions that comprise solitary confinement. As noted by Hafemeister and George, this collection of conditions is remarkably uniform. Typical segregation involves being locked up alone in a small cell for twenty-three hours or more each day.<sup>5</sup> Meals generally come through a slot in the solid steel door of the cell, as do any communications with prison staff.<sup>6</sup> Most prisoners are permitted to exercise one hour a day in a fenced area that resembles a “dog run,” though even this time is spent alone.<sup>7</sup> Segregated prisoners usually are denied many services and programs provided to non-segregated prisoners, such as educational classes, job training, drug treatment, work, or other kinds of rehabilitative programming.<sup>8</sup> Access to law libraries, family visits, and phone calls is very limited. And prisoners in solitary confinement typically are not permitted any human touch, save for when the correctional officers shackle them to escort them from location to location.<sup>9</sup>

Students at the University of Denver Sturm College of Law’s Civil Rights Clinic (CRC or the Clinic) are all too familiar with the use of

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*Solitary Confinement: The Human Rights, Fiscal and Public Safety Consequences: Hearing Before the S. Comm. on the Judiciary Subcomm. on the Constitution, Civil Rights and Human Rights*, 112th Cong. (June 19, 2012) [hereinafter *Hearings*] (statement of Sen. Dick Durbin) (citing the Bureau of Justice statistics).

4. Dr. Craig Haney, a psychologist who has studied the effects of solitary confinement for nearly thirty years and has visited dozens of solitary-confinement units across the country detailed the effects of these conditions generally in an expert report in the Clinic’s case *Silverstein v. Federal Bureau of Prisons*, No. 07-cv-02471, 2011 WL 4552540 (D. Colo. Sept. 30, 2011). In that report, he summarized decades of research, concluding that

[t]he psychological effects of solitary or isolated confinement are well understood. Knowledge of these effects is based on literature developed over many years, by researchers and clinicians from diverse backgrounds and perspectives. The literature is empirically consistent—virtually every one of the studies conducted has documented the psychologically precarious state of persons confined under conditions of penal isolation, and many address in detail the pain and suffering that isolated prisoners endure. It is also theoretically sound; there are numerous reasons why one would expect long-term isolation, the absence of meaningful social interaction and activity, and the other severe deprivations that are common under conditions of solitary confinement to have harmful psychological consequences.

Report of Craig William Haney at 3–4, *Silverstein v. Fed. Bureau of Prisons*, No. 07-cv-02471 (D. Colo. Apr. 13, 2009), 2009 WL 8514046.

5. Dr. Haney testified at Senate Judiciary Subcommittee on Reassessing Solitary Confinement, where he detailed the conditions generally seen in isolation or supermax units. See *Hearings*, *supra* note 3 (statement of Prof. Craig Haney).

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

long-term solitary confinement in both state and federal prisons in Colorado. One of six clinics comprising the Student Law Office,<sup>10</sup> the Civil Rights Clinic represents prisoners in cases challenging the constitutionality of their prison conditions.<sup>11</sup> The law school is 100 miles away from Colorado's "prison valley," an area near Cañon City that holds thirteen prisons, several of which are supermax facilities.<sup>12</sup> This region contains the nation's only federal supermax—the U.S. Penitentiary, Administrative Maximum (ADX)—as well as three solitary-confinement facilities run by the state system, the Colorado Department of Corrections (CDOC). Many of the Clinic's clients have been held in solitary confinement for years and, in the case of one client, for decades.<sup>13</sup> Having conducted interviews and corresponded with hundreds of prisoners in these facilities, the Civil Rights Clinic has made the constitutionality of conditions in solitary confinement the focus of its current caseload. Over the past five years, our cases have challenged the living conditions at various supermax facilities, the processes by which prisoners are placed and retained in these facilities, and the treatment of prisoners with mental illness in supermax prisons.<sup>14</sup>

In *The Ninth Circle of Hell*, Hafemeister and George assert that long-term solitary confinement of mentally ill prisoners violates the Eighth Amendment's prohibition against cruel and unusual punishment. They offer this assertion both normatively and descriptively, setting forth the theoretical basis for why isolation of mentally ill prisoners *should* be unconstitutional and citing case law for the proposition that many courts have so held. As a normative matter, we agree that holding mentally ill prisoners in long-term segregation should be illegal. But we do not believe that courts are reaching this conclusion with the consistency or ease

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10. The Student Law Office (SLO) is the in-house clinical education program at the University of Denver Sturm College of Law. Founded in 1904, the SLO is one of the oldest clinical programs in the country. In the SLO, students develop their legal knowledge, lawyering skills, and professional values while working with underserved clients and communities to address urgent problems, influence public policy, and improve the quality of legal problem solving.

11. A brief overview of all of the Civil Rights Clinic's cases can be found at University of Denver Sturm College of Law's website. *Civil Rights Clinic Cases*, STURM COLL. OF LAW, UNIVERSITY OF DENVER, <http://law.du.edu/index.php/law-school-clinical-program/civil-rights-clinic/civil-rights-clinic-cases> (last visited Sept. 9, 2012).

12. See *Welcome to Prison Valley*, TIME.COM PHOTOS, [http://www.time.com/time/photogallery/0,29307,2009197\\_2173542,00.html](http://www.time.com/time/photogallery/0,29307,2009197_2173542,00.html) (last visited Sept. 9, 2012).

13. One of the Clinic's clients has been in solitary confinement for over twenty-nine years. See *Silverstein v. Fed. Bureau of Prisons*, No. 07-cv-02471, 2011 WL 4552540, at \*1 (D. Colo. Sept. 30, 2011).

14. The Civil Rights Clinic operates as most law-school clinics do, though our docket is somewhat unusual in that our cases are litigated in federal court and generally take several years to complete. See generally Paul D. Reingold, *Why Hard Cases Make Good (Clinical) Law*, 2 CLINICAL L. REV. 545, 545 (1996). CRC students who have been admitted to practice by court order represent clients under the supervision of clinic faculty. While enrolled in the CRC, the student attorneys perform all of the required litigation tasks on their cases, including client counseling, propounding and responding to discovery requests, taking and defending depositions, drafting motions and briefs, and conducting trials.

portrayed by Hafemeister and George. While acknowledging that a state's "legitimate penological interest" in holding a prisoner in segregation is a factor considered by the courts in determining the constitutionality of solitary confinement, Hafemeister and George assert that this factor will, or at least should, "readily falter" in cases involving prisoners with mental illness.<sup>15</sup> By contrast, our review of the cases and our experience litigating Eighth Amendment cases on behalf of individual plaintiffs is that an asserted "legitimate penological interest" plays a significant, and potentially determinative, role in judicial decisions of the constitutionality of solitary confinement.<sup>16</sup> We believe that when prison officials claim that isolation is necessary for correctional purposes, such as safety and security, courts often will hold that there is no violation of the Eighth Amendment—even when the prisoner is mentally ill.

This Essay proceeds in two parts. In Part I, we describe the failure of Eighth Amendment doctrine to explicitly consider a state's interest in a challenged prison condition and discuss the ways in which the legitimacy of the state's interest nevertheless pervades—and sometimes dictates—the outcome of Eighth Amendment claims challenging the imposition of solitary confinement on mentally ill prisoners. In Part II, we share our thinking about an alternative legal approach the CRC is exploring to address the overuse of long-term solitary confinement for people with mental illness. This approach, which is grounded in the federal disability rights statutes, may provide an additional vehicle for some people with mental illness to challenge some of the component conditions that comprise supermax confinement.

#### I. THE PROBLEM WITH THE EIGHTH AMENDMENT: THE UNDEFINED ROLE OF "LEGITIMATE PENOLOGICAL INTEREST"

To prevail on an Eighth Amendment claim that a prison condition is cruel and unusual, a prisoner must satisfy a two-prong test with objective and subjective components. The objective prong requires the prisoner to demonstrate that the challenged condition is sufficiently serious to merit review, either because it deprives a prisoner of a "basic human need"<sup>17</sup> or because the condition presents a "substantial risk of serious harm."<sup>18</sup> The

15. Hafemeister & George, *supra* note 2, at 45.

16. This dynamic exists not only in Eighth Amendment cases but also in cases in which a prisoner challenges prolonged or indefinite placement in solitary confinement as a violation of his rights under the Due Process Clause. *See, e.g.,* Rezaq v. Nalley, 677 F.3d 1001, 1011 (10th Cir. 2012); *Silverstein*, 2011 WL 4552540, at \*1.

17. The Eighth Amendment violation must include "the deprivation of a single, identifiable human need such as food, warmth, or exercise." *Wilson v. Seiter*, 501 U.S. 294, 304 (1991); *see also* *Craig v. Eberly*, 164 F.3d 490, 495 (10th Cir. 1998) ("The Eighth Amendment requires jail officials 'to provide humane conditions of confinement by basic necessities of adequate food, clothing, shelter, and medical care and by taking reasonable measures to guarantee the inmates' safety.'" (quoting *Barney v. Pulsipher*, 143 F.3d 1299, 1310 (10th Cir. 1998))).

18. *See, e.g., Helling v. McKinney*, 509 U.S. 25, 35–38 (1993) (finding sufficiently grave harm where there was a "substantial risk of serious harm" resulting from second-hand smoke).

subjective prong requires a showing that prison officials acted with “deliberate indifference” in imposing or maintaining the condition despite knowing about the harm or risk of harm.<sup>19</sup> Notably, the test is silent with respect to penological interest.

Despite the fact that the Eighth Amendment inquiry does not contemplate a role for the state’s penological interest in determining the constitutionality of a prison condition, we agree with Hafemeister and George that judicial deference to any “legitimate penological interests” asserted by prison officials is a “significant hurdle” to successful litigation under the Eighth Amendment.<sup>20</sup> Having said that, however, we question their conclusion that the penological and administrative concerns underlying this deference will be overcome in cases in which mentally ill prisoners are being held in isolation.<sup>21</sup> Although it is true that several class action lawsuits have succeeded in challenging this practice, the more common lawsuits brought by individual plaintiffs have not consistently fared as well.<sup>22</sup> Many Eighth Amendment cases brought by mental-

19. See, e.g., *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

20. Hafemeister & George, *supra* note 2, at 32.

21. *Id.* Although Hafemeister and George discuss several cases that hold that mentally ill prisoners should not be in solitary confinement, these are class action lawsuits. *Id.* at 25–31. The one case they cite in which a mentally ill plaintiff lost was an individual suit. *Id.* at 27–28.

22. We are unaware of any in-depth analysis of the reasons why individual cases have not fared as well as class actions in challenges brought on behalf of mentally ill individuals. A reading of the cases offers several possibilities. First, many individual prisoner-plaintiffs are not represented and cannot afford counsel or expensive mental health experts. Although this distinction is important, it is not independently sufficient because there are cases where prisoners are represented and these claims are still dismissed. See, e.g., *Horne v. Coughlin*, 155 F.3d 26 (2d Cir. 1998); *Williams v. Branker*, No. 5:09-CT-3139-D, 2011 WL 649845 (E.D.N.C. Feb. 10, 2011). Second, class action cases appear to bear a lower causal burden than cases brought by individual plaintiffs. Typically, mentally ill plaintiffs must demonstrate that any deterioration in their condition is caused by solitary confinement and not the course of their disease generally. See generally *Helling*, 509 U.S. at 35–36 (requiring condition to cause risk). In a single-plaintiff case, it may be difficult to demonstrate this causal relationship and to exclude other potential causes, such as prison generally, age, or other factors. See generally *Silverstein v. Fed. Bureau of Prisons*, No. 07-cv-02471, 2011 WL 4552540, at \*18 (D. Colo. Sept. 30, 2011) (denying risk of harm from insomnia because plaintiff failed to demonstrate “direct connection” between harm and isolation, and relied on general studies regarding mental harms caused by solitary confinement, which were not found to be persuasive). If the individual prisoner-plaintiff has not notably deteriorated in solitary confinement, this may actually count against him, perhaps because it is believed that the risk of harm going forward is lessened. See *Farmer v. Kavanagh*, 494 F. Supp. 2d 345, 367 (D. Md. 2007) (“It should be noted that Ms. Farmer’s conditions, at least as documented in the record before the court, have not led to the type of violence and uncontrollable behavior exhibited by the plaintiffs discussed in *Jones ‘El*, whose incarceration in Supermax unhinged them from any connection to the world around them.”). Class action plaintiffs, however, can rely upon broader data and studies regarding the effects of solitary confinement on mentally ill people more generally, making the causal proposition easier to prove. See generally *Madrid v. Gomez*, 889 F. Supp. 1146 (N.D. Cal. 1995) (relying, in part, on interviews of sixty-five individuals to demonstrate harm to entire class). Finally, and perhaps most importantly, legitimate penological interest is harder to demonstrate in the context of a class. When a single plaintiff is before the court, the prison officials can put on evidence of his crimes and risks in the prison system, both of which inevitably appear frightening and are often persuasive. See, e.g., *Scarver v. Litscher*, 434 F.3d 972, 976 (7th Cir. 2006) (“[T]he treatment of a mentally ill prisoner who happens also to have murdered two other inmates is much more complicated than the treatment of a harmless lunatic.”). In the context of a class action, however, prison officials have a more difficult time providing compelling evidence, in part, because of the number of class members and the diversity of reasons



ly ill individuals have lost, failing even under compelling circumstances to obtain relief.<sup>23</sup>

At times, these cases explicitly cite legitimate penological interest as a basis for denying the claim, stating that housing a mentally ill prisoner in isolation is not unconstitutional unless it is “without penological justification.”<sup>24</sup> For example, in the one individual suit discussed by Hafemeister and George, *Scarver v. Litscher*,<sup>25</sup> the Seventh Circuit acknowledged that the prisoner had endured mental suffering from his placement in supermax confinement, noting that he had repeatedly banged his head against the solid wall of the cell.<sup>26</sup> Despite acknowledging that these circumstances were disturbing, Judge Posner’s opinion made clear that the courts do not want to interfere with correctional management of dangerous prisoners.

The murderous ingenuity of murderous inmates, especially in states such as Wisconsin that do not have capital punishment, so that inmates who like Scarver are already serving life terms are undeterable, cannot be overestimated. Prison 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. It is a delicate balance.<sup>27</sup>

Although not all federal judges express their opinions so bluntly, a similar underlying sentiment is regularly present in such cases, and may be influencing the decision even absent any explicit language.<sup>28</sup>

As a doctrinal matter, *how* courts assess the role and legitimacy of a penological interest in a prison condition (including solitary confine-

for their placement in segregation, and also because the pattern of conduct and the impact of solitary confinement are more apparent.

23. See, e.g., *Horne*, 155 F.3d at 31 (holding that placement of prisoner with mental illness did not violate Eighth Amendment, in part, because it was not “without penological justification”); *Haggins v. Minnesota Comm’r of Corr.*, No. 10-1002, 2012 WL 983590, at \*8 (D. Minn. Feb. 14, 2012) (finding that placing mentally ill prisoner in disciplinary isolation did not violate the Eighth Amendment, after extensive discussion of his disciplinary infractions); *Farmer*, 494 F. Supp. 2d at 370 (finding, as a matter of law, that prison officials were not deliberately indifferent to mentally ill prisoner placed in solitary confinement); *Hill v. Pugh*, 75 F. App’x 715, 721 (10th Cir. 2003) (denying Eighth Amendment claim regarding isolation of prisoner with mental illness by finding it did not meet objective standard); *Williams*, 2011 WL 649845, at \*3 (finding prisoner with mental illness did not meet standard to show he was likely to be harmed by isolation). *But see* *Washington-El v. Beard*, No. 2:08-CV-01688, 2011 WL 891250, at \*3-4 (W.D. Pa. Mar. 11, 2011) (finding prisoner with history of severe mental illness “nudged his claim for relief across the line of the conceivable,” though noting it was a “very close call” to survive a motion to dismiss).

24. *Horne*, 155 F.3d at 31 (internal quotation marks omitted); see also *Washington-El*, 2011 WL 891250, at \*5.

25. 434 F.3d 972 (7th Cir. 2006).

26. *Id.* at 975.

27. *Id.* at 976 (citations omitted).

28. See generally Mikel-Meredith Weidman, Comment, *The Culture of Judicial Deference and the Problem of Supermax Prisons*, 51 UCLA L. REV. 1505 *passim* (2004) (discussing significant deference given to state penological interests and examining the three class actions cited by Hafemeister and George).

ment) is a significant question, given that the test for whether a condition violates the Eighth Amendment does not contemplate the role of the prison's "legitimate penological interest."<sup>29</sup> Because of the limits the federal courts have imposed on the other constitutional rights of prisoners, courts are in the habit of deferring to prison officials when they claim that a particular condition or treatment is necessary.<sup>30</sup> Judges are explicit about the fact that they lack experience in managing prison systems, and that prison officials should be given wide berth to address issues of safety and security.<sup>31</sup> As a result, most constitutional protections are limited for those who are in custody. Yet, the Eighth Amendment stands in contrast to other sources of rights for prisoners precisely because prisoners are those whom the Amendment is meant to protect. As such, the Supreme Court has affirmed that the limits imposed on the other constitutional rights of prisoners do not apply to claims of "cruel and unusual punishment" because doing so would thwart its entire purpose: protecting those who are incarcerated.<sup>32</sup> The Court has explained that "[t]he full protections of the [E]ighth [A]mendment most certainly remain in force [in prison]. The whole point of the [A]mendment is to protect persons convicted of crimes."<sup>33</sup> Accordingly, the Court has held that affording "deference to the findings of state prison officials in the con-

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29. See Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 819 (2006) (discussing empirical research that demonstrates that courts defer to penal institutions more than any other government entity, even when "strict scrutiny" analysis is applied). See generally Brittany Glidden, *Necessary Suffering?: Weighing Government and Prisoner Interests in Determining What Is Cruel and Unusual*, 50 AM. CRIM. L. REV. (forthcoming 2013) (on file with author).

30. See *Turner v. Safley*, 482 U.S. 78, 89 (1987). Although prisoners retain some degree of their constitutional rights while in prison, many of these give way to legitimate penological interests of the States. *Id.* (weighing violation against legitimate interest as part of test); Weidman, *supra* note 28, *passim* (discussing the "culture of deference that constrains federal courts from intervening in prison affairs"). The majority of challenges to violations of prisoners' constitutional rights are examined under a form of "rational basis" review. Fred Cohen, *Penal Isolation: Beyond the Seriously Mentally Ill*, 35 CRIM. JUST. & BEHAV. 1017, 1021-24 (2008) (discussing the standard of review applied by the Supreme Court in several cases involving prisoner's rights). Accordingly, if the prison has any reasonable basis for acting in the manner that it does, the practice will be upheld. This reasonableness standard is not without critique. Fred Cohen describes Supreme Court decisions regarding the rights of prisoners as "almost nonchalant and consistently out of touch with reality, in constitutionally accepting the most fundamental deprivations imposed on inmates as legitimate consequences of conviction and imprisonment," citing *Turner* as "part of the contemporary, constitutional foundation for determining inmate claims to fundamental rights, including First Amendment claims." *Id.* at 1021. His observation of the effect of *Turner* on prisoners'-rights jurisprudence is incisive: "*Turner* has evolved into a so-called rule of reasonableness that consistently limits inmate claims ranging from visits to access to reading material. The flipside of severe judicial limits on inmate condition claims is the expansion of deference to the opinions—and not necessarily opinions supported by evidence—of prison officials." *Id.*

31. See generally Weidman, *supra* note 28, *passim* (discussing significant deference given to state penological interests).

32. *Johnson v. California*, 543 U.S. 499, 511 (2005) ("[T]he integrity of the criminal justice system depends on full compliance with the Eighth Amendment.").

33. *Id.* (quoting *Spain v. Procunier*, 600 F.2d 189, 193-94 (9th Cir. 1979)).

text of the [E]ighth [A]mendment would reduce that provision to a nullity in precisely the context where it is most necessary.”<sup>34</sup>

Yet, how this “lack” of deference is to be implemented in the Eighth Amendment context remains uncertain.<sup>35</sup> Neither the objective nor the subjective components of the Eighth Amendment test specify how an asserted penological interest will be considered and whether it can preclude a finding that a particular condition is cruel and unusual. The absence of an express doctrinal mechanism to consider penological interest has not rendered it irrelevant to the analysis but rather has permitted courts to implicitly fold it into both the objective and subjective prongs of the test.<sup>36</sup> This is not entirely surprising; common sense dictates that we cannot evaluate whether punishment is cruel and unusual without understanding the reason it is imposed. But without explicit direction as to *how* penological interest should be considered—including the weight it should be given and whose burden of proof it is to demonstrate the validity of that interest—courts often do the exact opposite of what was directed by the Supreme Court and defer to prison officials’ interests in determining whether a condition is constitutional.<sup>37</sup>

This failure to scrutinize the legitimacy of an asserted penological interest is particularly troubling in the context of supermax litigation, in which the challenge is not to just one condition but rather to a collection of conditions that, in the aggregate, produce extreme isolation and sensory deprivation. Under the Eighth Amendment, prisoner-plaintiffs argue that the psychological and physical harm resulting from this confluence of conditions—twenty-three-hour-per-day lockdown, denial of employment and educational opportunities, extreme limits on the ability to have fresh air and exercise, and lack of visits and phone calls—can satisfy the objective standard<sup>38</sup> even though each component condition likely would be deemed insufficiently serious to warrant Eighth Amendment protection.<sup>39</sup> While combining these conditions assists the prisoner in demonstrating harm in the form of the deprivation of a human need or a risk of serious harm, this “sum total” approach also may advantage prison officials, who are not required to provide a legitimate penological basis for each of the denials that contribute to that harm. For example, courts do not ask prison officials to explain why the number of phone calls in a supermax unit is severely limited and instead only look for justification for a prisoner’s placement in that unit.

34. *Id.* (quoting *Spain*, 600 F.2d at 193–94).

35. Gilidden, *supra* note 29 (manuscript at 15–16).

36. *Id.* (manuscript at 7–8).

37. *Id.* (manuscript at 15–16).

38. *Rhodes v. Chapman*, 452 U.S. 337, 363 n.10 (1981) (“Prison conditions *alone or in combination*, may deprive inmates of the minimal civilized measure of life’s necessities.” (internal quotation marks omitted)).

39. *See, e.g., Overton v. Bazzetta*, 539 U.S. 126, 136–37 (2003) (finding denial of all visitation for a period of years is not cruel and unusual punishment).

Against this legal backdrop, prison officials are encouraged to cite blanket interests of “safety” and “security” as the basis for the multiple deprivations that comprise solitary confinement.<sup>40</sup> Parsing that general assertion is difficult, in part, because the decision to place a prisoner in a supermax unit often follows the adage “when all you have is a hammer, everything looks like a nail.” Prison administrators use solitary confinement for a diverse range of issues: to restrain a prisoner who is acting violently, as punishment for prisoners who have committed disciplinary infractions, to protect prisoners who are at risk in the general population, and as a place to house those awaiting classification or designation.<sup>41</sup> Additionally, supermax cells are also used for “status-based” reasons (i.e., to confine those who have been convicted of certain types of crimes or are believed to be gang members).<sup>42</sup> In each of these situations, insulation<sup>43</sup> from other prisoners may be appropriate for some period of time. But the collection of other conditions that accompany segregation—loss of employment, contact visits, phone calls, and limited reading material—may be at best unnecessary and at worst harmful.

The significance of these related conditions cannot be overstated. Dr. Craig Haney, one of the nation’s foremost mental health experts on solitary confinement, has observed, “Although social deprivation is at the core of solitary confinement, and what seemingly accounts for its most intense psychological pain and the greatest risk of harm, prison isolation units also deprive prisoners of more than social contact.”<sup>44</sup> He notes the “characteristically high levels of repressive control, enforced idleness, reduced environmental stimulation, and physical deprivations,” all of which, he says, “lead to psychological distress and can create even more lasting negative consequences.”<sup>45</sup> Haney further observes that “most of the things that we know are beneficial to prisoners—such as increased participation in institutional programming, visits with persons from outside the prison, and so on—are either functionally denied or greatly restricted to prisoners housed in solitary confinement.”<sup>46</sup> And these deprivations, both in and of themselves and coupled with social isolation, can cause a separate set of harms: “In addition to the social pathologies that

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40. See Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. REV. L. & SOC. CHANGE 477, 550–51 (1997).

41. *Id.* at 492–95 (discussing history of solitary confinement and reasons given for its application).

42. See *id.* at 492–93 (discussing rise of use of solitary confinement for gang-related issues); Plaintiffs’ Second Amended Complaint, *Ruiz v. Brown*, No. 4:09-cv-05796-CW (N.D. Ca. Sept. 10, 2012) (challenging status based isolation in California).

43. We borrow this term from Fred Cohen, who uses it to distinguish *separation* of a prisoner from *penal isolation*, which includes deprivations of sensory and social stimulation, as well as exercise, reading material, telephone access, and educational and vocational programming. Cohen, *supra* note 30, at 1037.

44. Report of Craig William Haney, *supra* note 4, at 16.

45. *Id.*

46. *Id.*

are created by the experience of solitary confinement, . . . these other stressors also can produce their own negative psychological effects.”<sup>47</sup>

Under the current Eighth Amendment framework, however, prison officials are not required to justify the specific deprivations that comprise supermax confinement. Because a generalized assertion of “security” often suffices to demonstrate a legitimate penological interest, prison administrators have no incentive to tailor the particular conditions of confinement to the purpose for which the person is placed there. Unsurprisingly, generalized assertions that conditions are necessary—and judicial deference to those assertions—pervade Eighth Amendment jurisprudence, leaving the attendant conditions of supermax prisons largely unexamined.

## II. A DIFFERENT APPROACH: THE DISABILITY RIGHTS STATUTES

Given the concerns associated with an Eighth Amendment approach, the Civil Rights Clinic began exploring alternative ways to challenge the component parts of supermax confinement. The federal disability rights statutes—the Americans with Disabilities Act (ADA)<sup>48</sup> and § 504 of the Rehabilitation Act (RA)<sup>49</sup>—provided this opportunity for prisoners in solitary confinement who have mental illnesses that rise to the level of a disability.<sup>50</sup> For those prisoners, the ADA and RA permit challenges to each of the underlying conditions that comprise supermax confinement (access to education, telephone calls, books, etc.) on the theory that the denial of each service or privilege—if withheld because of a prisoner’s disability—may constitute an act of discrimination.

In the remainder of this Essay, we discuss how a disability discrimination claim on behalf of a mentally ill prisoner in solitary confinement might look. This discussion is grounded in the work and thinking of the students and faculty in the Civil Rights Clinic, especially those who litigated a similar claim over the past several years.<sup>51</sup> We offer this framework as a possible vehicle for some prisoners with mental illness to challenge supermax conditions. Yet, we also have the goal of demonstrating a way to conceptualize the burden that the state might shoulder when placing a prisoner in segregation and determining the particular conditions of his confinement. The disability discrimination paradigm demon-

47. *Id.*

48. Pub. L. No. 110-325, 122 Stat. 3553 (2008) (codified at 29 U.S.C. § 705 (2006 & Supp. V 2011), 42 U.S.C. §§ 12101–12213 (2006 & Supp. V 2012)).

49. 29 U.S.C. § 794 (2006).

50. We are grateful to the attorneys at Fox & Robertson, P.C., our co-counsel in *Anderson v. Colorado Department of Corrections*, for their work with us in developing these theories.

51. The case is *Anderson v. Colorado Department of Corrections*, 848 F. Supp. 2d 1291 (D. Colo. 2012). Three generations of Civil Rights Clinic students have represented Troy Anderson in his claims against the State, culminating in a bench trial held earlier this year. The student attorneys were Patrick Curnalia, Ashley Wheeland, Lee Knox, Courtney Longtin, Matt Court, Katherine Hartigan, Maha Kamal, and Brenden Desmond.

strates that it is possible to place the burden of justification on the prison officials, and for this requirement to be specific. Examining each of the various conditions comprising supermax confinement also highlights the punitive (sometimes-draconian) nature of supermax prisons, in that it becomes clear that many of the conditions and restrictions do not serve any legitimate purpose. As detailed below, although prison officials may espouse safety as the reason for a deprivation, there often is no evidence or apparent basis to support this claim. We believe that a similar approach should be incorporated into the Eighth Amendment framework, particularly in light of the Supreme Court's directive to avoid generalized deference to prison officials in conditions of confinement litigation.

#### *A. The Federal Disability Discrimination Statutes: A Brief Overview*

Title II of the ADA prohibits discrimination by public entities on the basis of disability.<sup>52</sup> The Rehabilitation Act, the precursor to the ADA, prohibits such discrimination by recipients of federal funding.<sup>53</sup> To state a claim under these statutes, the plaintiff must allege that "(1) he is a qualified individual with a disability, (2) who was excluded from participation in or denied the benefits of a public entity's services, programs, or activities, and (3) such exclusion, denial of benefits, or discrimination was by reason of a disability."<sup>54</sup>

A person has a qualifying disability when he has a physical or mental impairment that substantially limits one or more of his major life activities, has a record of such impairment, or is regarded as having such an impairment.<sup>55</sup> The name or diagnosis of an impairment does not make a person disabled; rather, it is whether the impairment affects the person's ability to perform a "major life activity," which is statutorily defined to include learning, concentrating, thinking, and communicating, as well as the operation of neurological and brain functions (among others).<sup>56</sup> Significantly, several circuits have determined that an impairment that substantially limits a person's ability to interact with others qualifies as a disability.<sup>57</sup>

The second element of an ADA or RA claim is that the plaintiff must demonstrate that he is being denied "services, programs or activi-

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52. 42 U.S.C. § 12132 (2006).

53. 29 U.S.C. § 794 (2006). Because most prisons, including state facilities, typically receive federal financial assistance, virtually all of them are subject to liability pursuant to the RA.

54. *Robertson v. Las Animas Cnty. Sheriff's Dep't*, 500 F.3d 1185, 1193 (10th Cir. 2007).

55. ADA Amendments Acts of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008) (codified at 29 U.S.C. § 705 (2006 & Supp. V 2011), 42 U.S.C. §§ 12101-12213 (2006 & Supp. V 2011)); 29 U.S.C. § 705(20)(B) (2006).

56. 42 U.S.C. § 12102(4)(a)(1)(A)-(C) (2006 & Supp. V 2011). Additionally, the determination of whether a person's "impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as . . . medication . . . or learned behavioral or adaptive neurological modifications." § 12102(4)(a)(4)(E)(i).

57. See *infra* Part II.C.1.

ties”<sup>58</sup> that he is qualified to receive. Services, programs, and activities include essentially “anything a public entity does.”<sup>59</sup> Because prisoners have virtually every aspect of their lives controlled by the correctional department, almost any official activity in which inmates participate is within the scope of the ADA and RA.<sup>60</sup> Examples of covered services include phone calls, visits, job opportunities, educational courses, and access to reading material. Per the statutes, a prisoner must be “qualified” to receive these services. The prisoner is so “qualified” as long as the services are provided by the correctional department (or potentially within the prison where the individual is housed).<sup>61</sup>

The third element of a *prima facie* claim under the disability rights statutes is that the prisoner-plaintiff was discriminated against on the basis of his disability.<sup>62</sup> Under the ADA and RA, the denial of equal access to services for behavior resulting from a disability constitutes discrimination regardless of the specific intent motivating the denial.<sup>63</sup> Under the regulations implementing the ADA, discrimination is defined to include “[d]eny[ing] a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service” or affording a disabled person “an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others.”<sup>64</sup> Additionally, the antidiscrimination mandate of the disability rights statutes prohibits public entities from “utiliz[ing] criteria or methods of administration . . . that have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability.”<sup>65</sup>

Finally, the disability rights statutes require public entities to make “reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability.”<sup>66</sup> Accordingly, if a prison offers educational courses but does not

58. Department of Justice General Prohibitions Against Discrimination, 28 C.F.R. § 35.130(b)(1)(i), (ii) (2012).

59. *Yeskey v. Pennsylvania Dep’t of Corrections*, 118 F.3d 168, 171 (3d Cir. 1997) (discussing ADA regulations and concluding that they state that the statute’s “broad language is intended to ‘appl[y] to anything a public entity does.’” (alterations in original) (quoting 28 C.F.R. § 35.102)), *aff’d*, 524 U.S. 206 (1998).

60. *See Yeskey*, 524 U.S. at 211.

61. Title II of the ADA states that a “[q]ualified individual with a disability” is a person with a disability “who, with or without reasonable modifications to rules, policies, or practices . . . meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.” 42 U.S.C. § 12131(2) (2006).

62. *See* 28 C.F.R. § 35.130 (“No qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.”).

63. *See id.*; James Leonard, *A Damaged Remedy: Disability Discrimination Claims Against State Entities Under the Americans with Disabilities Act After Seminole Tribe and Flores*, 41 ARIZ. L. REV. 651, 726–27 (1999) (noting that Congress intended the ADA to protect against not only discrimination motivated by malicious intent but also that resulting from indifference).

64. 28 C.F.R. § 35.130(b)(1)(i)–(ii).

65. § 35.130(b)(3)(i).

66. § 35.130(b)(7).

provide a means for prisoners with vision or hearing impairments to access those courses, the denial is discriminatory. Further, the accommodation mandate is intended to be flexible in order to address each individual's situation; for example, it may require Braille materials or a reader for a blind prisoner, or a sign-language interpreter or written materials for a deaf prisoner.

In certain situations—typically involving prisoners with physical disabilities who have been placed in solitary confinement—courts have ruled that a prison's denial of equal services constitutes discrimination on the basis of disability and issued remedial orders to the prison.<sup>67</sup> If a prisoner is placed in solitary confinement solely because of his disability—for example, a wheelchair user who is housed in a segregation unit because that is the only part of the prison that contains wheelchair-accessible cells—courts have held that there is no basis for also denying him access to the educational programs and other services that are typically associated with segregated confinement.<sup>68</sup> Some of these courts have parsed the various conditions that comprise segregation, and held that the only permitted deprivations are those that prison officials can demonstrate are necessary and “fundamental”<sup>69</sup> to the goals of the prison. For example, the Ninth Circuit determined that although segregation of disabled prisoners was shown to serve legitimate safety goals, there was no basis to deny the prisoners access to educational and other programming.<sup>70</sup> If denial of a program or service is unnecessary, courts have found such denials to constitute additional “punishment” that is not justified and have ordered prisons to modify the programs to make them accessible to and usable by prisoners with disabilities.<sup>71</sup>

Once a prisoner has demonstrated a *prima facie* case of discrimination, prison officials can raise an affirmative defense. Because the disability rights statutes require only *reasonable* modifications to policies, practices, and procedures, modifications will not be required where they would “fundamentally alter the nature of the service, program, or activity.”<sup>72</sup> In the prison context, the reasonable modification—fundamental

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67. See *Pierce v. County of Orange*, 526 F.3d 1190, 1220–22 (9th Cir. 2008); *Love v. Westville Corr. Ctr.*, 103 F.3d 558, 560 (7th Cir. 1996) (holding that denying quadriplegic prisoner housed in infirmary access to programs violated the ADA).

68. *Pierce*, 526 F.3d at 1221.

69. 28 C.F.R. § 35.130(b)(7).

70. *Pierce*, 526 F.3d at 1220–22; see also § 35.130(h) (“A public entity may impose legitimate safety requirements necessary for the safe operation of its services programs or activities. However, the public entity must ensure that its safety requirements are based on actual risks, not on mere speculation, stereotypes or generalizations about individuals with disabilities.”).

71. *Pierce*, 526 F.3d at 1221–22.

72. § 35.130(b)(7). In the employment context, the classic example of a fundamental alteration (there termed “undue hardship”) is a blind person who seeks employment as a bus driver. Because the accommodation required for the person to perform the essential functions of the job (driving the bus) is so onerous—i.e., a sighted person having to do (or very closely guide) the actual driving—provision of the accommodation would constitute an undue hardship and therefore is not required.



alteration doctrine has the effect of placing the burden on prison officials to demonstrate why denial of a particular service, benefit, program, or activity is necessary. Because the accommodations should be specific and individualized, prison officials must demonstrate why *in each case* the particular prisoner cannot receive the requested services. As a result, it becomes more difficult for the prison to rely on generalized assertions of “safety” to support the deprivations and instead forces an articulation of the reason for the particular condition. In this way, the disability rights statutes do not render irrelevant the penological concerns of prison officials, but compared with the Eighth Amendment, the prison’s burden to demonstrate the necessity of a particular denial is both heavier and more clearly defined.

### B. Anderson v. Colorado Department of Corrections

As discussed by Hafemeister and George, many prisoners held in solitary confinement have mental health issues that qualify as impairments.<sup>73</sup> Yet there have been very few cases brought by prisoners with mental illnesses that have challenged the individual deprivations comprising solitary confinement. One of the CRC’s cases, *Anderson v. Colorado Department of Corrections*,<sup>74</sup> proved to be suitable for a novel challenge under the disability rights statutes. Mr. Anderson is a mentally ill man who had been isolated in one of the state supermax prisons, Colorado State Penitentiary (CSP), for more than a decade. Mr. Anderson—unlike many people held at CSP—did not seek to be removed from solitary confinement. Despite his desire to leave isolation, Mr. Anderson believed there was a legitimate reason to keep him there: the particular combination of his mental illnesses had previously caused him to act out impulsively and violently,<sup>75</sup> and he was afraid that if he were put in a general-population unit without adequate mental health treatment, history would repeat itself.

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73. Hafemeister & George, *supra* note 2, at 38–39.

74. No. 10-cv-01005-RBJ-KMT, 2012 WL 3643063 (D. Colo. Aug. 24, 2012). In this case, Mr. Anderson asserted three theories under the ADA and the RA: first, that the prison’s failure to provide him necessary medication to treat his attention deficit hyperactivity disorder (ADHD) constituted a denial of services on the basis of his disability; second, that the prison’s refusal to provide the treatment for his ADHD that would enable him to participate in a program through which he could progress out of isolation constituted a discriminatory failure to make reasonable modifications in policies and practices; and third, that to the extent that his mental illness disability requires Mr. Anderson to be insulated from other prisoners, the automatic denial of other services and benefits such as outdoor access, books, educational programs, canteen items, etc., discriminated against him on the basis of his disability. It is the third theory that is discussed in this Essay.

75. In the lawsuit, it was undisputed that Mr. Anderson is diagnosed with attention deficit hyperactivity disorder, polysubstance abuse (in remission in a controlled environment), dysthymic disorder, antisocial disorder, and personality disorder not otherwise specified with borderline and narcissistic features. Mental health expert Dr. Raymond Patterson explained that these disorders lead to inability to concentrate, impulsivity, violence, self-injury, and difficulty focusing. Dr. Patterson explained that this constellation of symptoms both led to Mr. Anderson’s placement in isolation, and prevented him from participating in necessary therapies and progressing out of solitary confinement.

Mr. Anderson desperately wanted mental health care, though in the event that treatment was unsuccessful in resolving his behaviors, he was willing to stay in the supermax in order to preserve everyone's safety. If indefinite supermax confinement was to be his fate, however, Mr. Anderson wanted the onerous and punitive conditions associated with CSP confinement to be lessened. CSP has many of the deprivations typically found in supermax confinement: prisoners are allowed to own only two books, they receive a very limited number of phone calls, all of their visits are non-contact, educational programming is extremely limited and correspondence courses are not permitted, canteen access (which includes food and hygiene items) is severely limited, and the ability to hold any job is limited to one porter position per unit. In addition, CSP subjects prisoners to some conditions that are even more severe than those found in many supermax units. For example, CSP prisoners accrue only a fraction of the earned time credits available to prisoners in general-population units, resulting in longer periods of incarceration. Additionally, prisoners at CSP are denied all outdoor access; their only exercise occurs alone in an empty, indoor cell.

A traditional approach to this case would have been to challenge Mr. Anderson's placement in solitary confinement as violative of the Eighth Amendment and to seek his removal from CSP. Yet, because of Mr. Anderson's concerns, the complaint drafted by the student team did not request removal; instead, it raised challenges to the supermax conditions under the ADA and the RA.<sup>76</sup> In one of these challenges, we sought to parse "solitary confinement" into its elements and remove those that were not justified by safety or another legitimate interest. Although Mr. Anderson conceded the interest in insulating him from other prisoners (absent successful mental health treatment), he disputed that this interest required him to be denied services such as books, education, and outdoor exercise. The prison officials could argue that "safety" justified his isolation, but arguments that he was too unsafe for books and outdoor exercise were unpersuasive because these "benefits" were provided to other high-security prisoners without issue. Placing the burden on the prison officials to justify the denials made it apparent that much of the treatment in solitary confinement is unnecessarily punitive and discriminatory, even if it may not always reach the level of being declared "cruel and unusual."

### *C. The Case Against Segregation Under the American with Disabilities Act and Rehabilitation Act*

In this final subpart, we discuss the elements of the ADA and RA claims in Mr. Anderson's case and explain how the disability rights stat-

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76. These two claims require identical showings of proof, with the exception that cases brought under the RA must be against entities that receive federal funding.

utes might be used in similar lawsuits with the effect of more firmly placing the burden on the state to justify the various conditions and restrictions comprising solitary confinement.

### 1. Disabled by Mental Illness

The first requirement of an ADA or RA claim is that the plaintiff has a physical or mental impairment that substantially limits his ability to perform a major life activity. In some ways, Mr. Anderson is emblematic of many prisoners who are put in solitary confinement. He has a history of extensive and varied diagnoses that reach back to his childhood years, which include bipolar disorder, intermittent explosive disorder, depression, anxiety, polysubstance dependence, and attention deficit hyperactivity disorder (ADHD).<sup>77</sup> Expert witnesses and prison mental health staff testified that these disorders impaired Mr. Anderson's ability to think, learn, concentrate, and to interact with others. Although Mr. Anderson was receiving some mental health treatment, his severe ADHD impaired his ability to participate in therapy because he could not concentrate or learn the cognitive and behavioral therapies offered by his psychologist.

Although each individual prisoner's disability will vary, many people in administrative segregation may qualify as disabled within the meaning of the disability rights statutes because their mental illnesses significantly impair their ability to interact with others.<sup>78</sup> Indeed, the inability to interact with others, which often results from mental illness, is the main reason that many people are placed in solitary confinement. While the nature and extent of such an impairment would be a factual question appropriate for determination on an individualized basis, it is plausible that a significant number of prisoners in administrative segregation are disabled because of a mental impairment that substantially limits their ability to interact with other people. In Mr. Anderson's case,

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77. Interestingly, the Equal Employment Opportunity Commission regulations implementing Title I of the ADA (which applies to private employers) state that the following mental illnesses will usually be considered disabilities under the Americans with Disabilities Act Amendments Act of 2008: "major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia." 29 C.F.R. § 1630.2(j)(3)(iii) (2012).

78. Although somewhat controversial, many circuits have found that a severe limitation in the ability to interact with others is a protected disability under the ADA or RA. *See Jacques v. DiMarzio, Inc.*, 386 F.3d 192, 203 (2d Cir. 2004). A harder question is what distinguishes a mental impairment that substantially limits a person's ability to interact with others from maliciousness (or even simple grouching). The Second Circuit answered this question by explaining that an employee is disabled when his ability to "connect with others" is significantly impaired, as evidenced by his inability "to initiate contact with other people and respond to them, or to go among other people—at the most basic level of those activities." *Id.*

Additionally, a point to consider is whether some prisoners are actually disabled as a result of their isolation. Evidence shows that prisoners who spend years in solitary confinement have predictable problems when required to integrate back into society. Studies indicate that they suffer anxiety at being around people, sometimes have auditory and visual hallucinations, and have higher re-offense and recidivism rates upon release. *See generally Haney & Lynch, supra* note 40, at 496–539 (discussing recognized effects of solitary confinement).

the prison officials continued to hold him in solitary confinement because of negative interactions with staff members; his record contained numerous inappropriate comments he had made to staff and these were relied upon to keep him in isolation. Similarly, many prisoners may have records indicating that the basis for their placement in isolation is an inability to interact with others,<sup>79</sup> as most prisoners are placed there either because of unsafe behavior or for their own security, both hallmarks of an inability to interact with others.

## 2. Services

The second element of an ADA or RA claim is that the plaintiff is being denied access to services, programs, and activities for which he is qualified. This element of a disability discrimination claim is the least complicated to prove. All prisons have numerous programs and services; nearly every activity during a prisoner's day qualifies as a "service" or "benefit" under the statutes. Because the services are provided to prisoners as part of their incarceration, most prisoners are "qualified" to receive them.<sup>80</sup> Almost as a matter of course, placement in a supermax unit results in prisoners being denied many services that are available in open-population units. In Mr. Anderson's case, we asserted that he was denied numerous services as a result of his administrative segregation placement. Most obviously, he was not permitted many of the services provided to general-population prisoners: outdoor exercise, reading material, phone calls, contact visits, most canteen items, and mental health treatment commensurate with the community standard of care.<sup>81</sup>

## 3. Cause of the Deprivation

The most difficult aspect of a disability discrimination claim is establishing that the deprivation is occurring "on the basis of," or because

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79. Another way to demonstrate a disability under the ADA and RA is to show that a person is "regarded as" having an impairment that substantially limits a major life activity. 29 C.F.R. § 1630.2(g)(1)(iii) (2012). Some prisoners who believe they are able to function in an open prison population may be able to show that they are being discriminated against because the prison regards them as being disabled due to an inability to interact.

80. Of course, certain benefits may be limited by location (particular prison or unit) or by another qualification (e.g., some jobs may require specific prior training or experience).

81. In Colorado, as in most state correctional systems, its own policies stated that prisoners would receive medical and mental health care treatment that is at the "community standard." Yet, Mr. Anderson was being denied medications and therapies that are considered standard for his disorders. For example, CDOC denied almost everyone stimulant medications (Adderall, Ritalin), which are universally regarded as the most effective treatments in the community. The prison claimed that to provide these medications caused a security risk (i.e., a legitimate penological interest), however, because some individuals did receive them it remained questionable whether their provision would constitute a "fundamental alteration" of services. Second, we alleged that these drugs would be a reasonable accommodation to permit Mr. Anderson to participate in state programs such as mental health therapy and the progression program that would allow him to progress out of solitary confinement.

of, the prisoner's disability.<sup>82</sup> Under this requirement, the plaintiff must demonstrate that he was placed or retained in solitary confinement as a result of behavior resulting from his disability. For example, if a prisoner were required to complete an educational program to progress out of solitary confinement, he would be held there "by reason of" his disability if that disability (or the prison's failure to accommodate it) kept him from completing the program.<sup>83</sup>

In Mr. Anderson's situation, there was little question that he was housed in administrative segregation based on his behavior; his cluster of disorders caused him to act impulsively and inappropriately.<sup>84</sup> These outbursts resulted in Mr. Anderson receiving numerous incident reports for rule violations that prevented him from progressing out of solitary confinement. In an Eighth Amendment context, these types of incidents typically would be used by a prison to justify isolation. Here, however, they served as evidence that Mr. Anderson's disability-caused behavior was the reason he remained in solitary confinement. Mr. Anderson testified about how he wanted to improve his behavior—in particular, his interaction with others—but could not control his outbursts and threatening interactions. His prison record was replete with proof of his sincerity and his attempts to improve through mental health counseling and drug therapy. His situation is likely analogous to many people in prison; the reasons they are held in solitary confinement ultimately relate to their mental illnesses.

#### 4. "Fundamental Alteration"

Once a *prima facie* case of discrimination is made under the ADA or RA, prison officials may claim that to make modifications to their policies and practices in supermax units would constitute a "fundamental alteration" to their services, programs, and activities.<sup>85</sup> In Mr. Anderson's case, one of the fundamental alteration arguments made by the prison officials was that the set of deprivations comprising confinement at CSP was part of the behavioral modification program of the prison, meaning that the deprivations existed to give Mr. Anderson and other prisoners an incentive to progress out of CSP. Here, however, Mr. Anderson was not *choosing* bad behavior; it was caused by his mental illness. For the individual deprivations attendant to CSP confinement—loss of phone access,

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82. ADA Amendments Acts of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008) (codified at 29 U.S.C. § 705 (2006 & Supp. V 2011), 42 U.S.C. §§ 12101–12213 (2006 & Supp. V 2011)); 29 U.S.C. § 705(20)(B) (2006).

83. For example, it is discriminatory under the ADA and RA for the prison to require a program but not to give a blind prisoner audio or Braille materials, or to fail to provide a learning-disabled prisoner additional time for testing or other accommodation.

84. Although the State argued that his conduct was volitional, even prison mental health staff acknowledged that many of his behaviors resulted from his mental illnesses.

85. A prison could also assert that requiring it to permit certain mentally ill prisoners to participate in services, programs, or activities would "pose[] a direct threat to the health or safety of others." 28 C.F.R. § 35.139 (2012). The State did not make this argument in Mr. Anderson's case.

limited reading material, denial of canteen, and denial of contact visits—prison officials struggled to give explanations as to why they had an interest in denying these services to a prisoner who is in long-term isolation and does not appear to be close to progressing out, especially when the purpose of the denial—behavior modification—is rendered irrelevant by virtue of Mr. Anderson’s disability. And because the ADA and RA require individualized accommodations, the prison officials had difficulty claiming that one prisoner could not be treated differently from others.<sup>86</sup>

Although multiple and varied fundamental alteration arguments exist in different contexts, the disability rights statutes place prison officials in a defensive posture, requiring them to justify the various denials that comprise segregated confinement. If a prisoner is denied a service or benefit based on his disability, discrimination has occurred *unless* the entity can provide sufficient justification for the denial. In contrast to the amorphous role that penological interest plays in an Eighth Amendment analysis, the disability rights statutes place the burden on the prison to explain why a deprivation or practice is necessary. For example, while prison officials may successfully assert that it would be a fundamental alteration to allow a person in solitary confinement more access to other prisoners, it often will be harder for them to demonstrate why reduced phone calls or limited access to educational correspondence classes are necessary. In this way, it may be possible to challenge aspects of the isolation itself, such as the refusal to permit contact visits with family members, or the denial of additional reading materials or correspondence courses.<sup>87</sup>

Although the disability discrimination framework cannot be incorporated wholesale into the Eighth Amendment context, it does offer two features that are lacking in current Eighth Amendment supermax jurisprudence: the ability to examine the specific components of solitary confinement and the imposition of a requirement on the State to justify those specific conditions. Disability discrimination litigation demonstrates that it is possible and practicable to require more from the State, a lesson that could be imported into the Eighth Amendment context to better align it with the Amendment’s purpose of serving as a check on government power.

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86. Indeed, CSP’s own progression and regression programs contemplate different privileges being granted and removed based on individual behavior. *See* COLO. DEPT. OF CORR. ADMIN. REG. NO. 650-03 § IV(G)(1), ADMIN. SEGREGATION (2012).

87. Ultimately, in Mr. Anderson’s case, the court did not reach this issue, focusing instead on the two other ADA and RA claims asserting discrimination based on the prison’s failure to make the necessary modifications to its policies for Mr. Anderson to receive appropriate medication.

### CONCLUSION

To be sure, a disability discrimination approach to challenging solitary confinement is not a perfect solution. It does not solve the epidemic of penal isolation, nor does it even ensure that mentally ill prisoners will be kept out of isolation. But in those cases where the legitimate interest in isolation may undermine an Eighth Amendment claim, or where the need for insulation from other prisoners is conceded, the disability rights statutes provide a vehicle for making incremental improvements to supermax confinement. The ADA and RA provide a more nuanced approach to addressing the collection of conditions that a mentally ill person in a supermax endures, requiring prison officials to justify the need for each deprivation of a service or benefit in order to continue the denial. This approach can be used to benefit individual prisoners and, we hope, as a template for the direction that courts should move toward in the Eighth Amendment arena.

