SUPERMAX PRISONS: INCREASING SECURITY OR PERMITTING PERSECUTION?

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INTRODUCTION

> It is one thing to place persons under greater security because they have escape histories and pose special risks to our correctional institutions. But consigning anyone to a high security unit for past political associations they will never shed unless forced to renounce them is a dangerous mission for this country's prison system to continue.[1]

Departments of Corrections ("DOCs") have a new, high-tech tool for incapacitation of selected inmates.[2] Super-maximum security ("Supermax") facilities are purported to house the most invidious and dangerous criminals in the nation's prisons who pose such a threat to prison security that they can only be controlled by isolation.[3] However, a closer look inside the walls of these tiny cells tells an entirely different story. Many state prison systems use Supermax facilities to house inmates with gang affiliations, even without prior disciplinary violations or evidence that the inmate poses a threat to future prison security.[4]

Supermaxes were built for political reasons; the push for Supermax construction came from state legislatures, not state DOCs.[5] Once built, the pricey Supermax units are often filled, whether needed or not, by administrative

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1. Baraldini v. Meese, 691 F. Supp. 432, 449 (D.D.C. 1989) (reprimanding prison officials for sending female inmates to a "Supermax" (as hereafter defined) for radical political views in violation of inmates' First Amendment rights, while numerous inmates with histories of prior escape attempts remained in the general prison population; the purpose of the Supermax was to house inmates with escape histories), *rev'd by* 884 F.2d 615 (D.C. Cir. 1989) (disagreeing with the lower court that any of the inmates' rights had been violated).

2. CHASE R. RIVELAND, U.S. DEP'T. OF JUSTICE, SUPERMAX PRISONS: OVERVIEW AND GENERAL CONSIDERATIONS 1 (1999).

3. *Id.* at 3.

4. *Id.* at 8.

5. *Id.* at 1, 5; Leena Kurki & Norval Morris, *The Purposes, Practices, and Problems of Supermax Prisons*, 28 CRIME & JUST. 385, 421 (2001).

segregation.[6] Through administrative segregation, DOCs send inmates to Supermaxes based on group affiliation, transferring inmates with no evidence of misconduct, often providing fewer procedural safeguards than afforded inmates whose misconduct labels them as a threat to order.[7] The practice is ripe for abuse.[8] Although some might argue that inmates have no right to complain about serving time in Supermaxes and that DOCs' discretion in these matters should be unfettered by judicial intervention, this position ignores the role of the courts as defenders of our constitutional rights and neglects the impact that prison administration can have on communities.

Courts have a duty to protect the unpopular from irrational persecution and to defend the rights of the marginalized.[9] Convicted felons are among the most unpopular segment of society, and prisons house disproportionate numbers of traditionally marginalized groups, such as racial minorities, the mentally ill, and the poor.[10] But despite being on the fringe of societal acceptance, inmates do not check all of their constitutional rights at the prison door.[11] To protect them from the serious constitutional violations that occur in our prisons,[12] courts must be willing to act.

However, inmates have little, if any, political power.[13] Congress, assuming inmates were overly litigious,[14] created a few extra hurdles for inmates to overcome to assert their rights.[15] Inmates who manage to navigate their way into court should be given a fair opportunity to be heard and courts should not allow prison administrators to exercise unfettered discretion in matters that implicate constitutional rights.

Beyond intruding on constitutional protections, decisions made behind prison walls affect communities. Well over ninety percent of inmates will eventually be released back into society.[16] While imprisoned, many inmates in

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6. Jerry R. DeMaio, *If You Build It, They Will Come: The Threat of Overclassification in Wisconsin's Supermax Prison*, 2001 WISC. L. REV. 207, 220–21.

7. *See infra* notes 186–90 and accompanying text.

8. Philip Kassel, *The Gang Crackdown in Massachusetts Prisons: Arbitrary and Harsh Treatment Can Only Make Matters Worse*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 37, 51–55 (1998).

9. Kane v. Winn, 319 F. Supp. 2d 162, 175 (D. Mass. 2004).

10. *Id.* at 178–81.

11. Wolff v. McDonnell, 418 U.S. 539, 555 (1974).

12. *Kane*, 319 F. Supp. 2d at 182–92 (summarizing the range of constitutional deprivations inmates face).

13. *Id.* at 176–77.

14. Members of the Senate Judiciary Committee assumed that jailhouse lawyers were clogging the system with frivolous lawsuits. *Id.* at 221 n.89. This is a common misperception that is not supported by the facts. *Id.*

15. The Prison Litigation Reform Act of 1995 (PLRA), Pub. L. No. 104-134, 110 Stat. 1321–66 (codified at 11 U.S.C.A. § 523; 18 U.S.C.A. §§ 3601, 3624, 3626; 28 U.S.C.A. §§ 1326, 1346, 1915, 1915A, 1932; 42 U.S.C.A. §§ 1997a–c, e–f, h).

16. Sasha Abramski, *Breeding Violence: Locking People up is Supposed to Make our Streets Safer, but it may be Doing the Opposite*, MOTHER JONES, July 10, 2001, *at* http://www.motherjones.com/news/special_reports/prisons/violence.html (on file with Arizona Law Review).

administrative segregation face indefinite, often lengthy stays in Supermaxes.[17] The impact of this extreme isolation can be devastating, and inmates who survive their stays in Supermaxes are neither reformed nor rehabilitated upon release.[18] Nevertheless, twenty-two state DOCs release inmates directly from Supermaxes back into communities.[19] One critic analogizes this practice to beating a dog until it is vicious and uncontrollable, then releasing it on the streets of a major city.[20] DOCs should have valid reasons to subject inmates to the level of deprivation found in Supermaxes. Otherwise, the risks to inmates and to society are not justified.

This Note argues that assumptions based on tenuous, non-violent group affiliations should not serve as the sole basis for transfer to Supermaxes. Part I provides some background to the problem, including the current crisis-level overcrowding in U.S. prisons, gangs in prison, the conditions in Supermaxes, the impact of Supermax incarceration on inmates, and a look at how states use Supermaxes. Part II summarizes the failure of the Eighth Amendment to protect inmates from incarceration in Supermaxes.[21] Part III discusses the current due process analysis applied to determine whether an inmate's transfer to a Supermax has violated his rights. Part IV details the risks inherent in using group affiliations as the sole basis for transferring inmates to Supermaxes, and reviews the recent calls for a heightened evidentiary requirement. Finally, this Note proposes that DOCs should use Supermaxes for their original intended purpose—to house the most invidious and dangerous inmates—and that DOCs should rely on actual evidence showing that inmates pose a threat to prison security before resorting to the extreme level of Supermax incapacitation.

I. OVERVIEW OF PRISONS AND SUPERMAXES

A. U.S. Incarceration Trends and the Birth of Supermaxes

The U.S. currently incarcerates more than two million people in its prisons and jails,[22] more per capita than any other nation in the world.[23] If

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17. RIVELAND, *supra* note 2, at 10.

18. Holly Boyer, *Home Sweet Hell: An Analysis of the Eighth Amendment's "Cruel and Unusual Punishment" Clause as Applied to Supermax Prisons*, 32 SW. U. L. REV. 317, 327 (2003).

19. *Supermax Housing: A Survey of Current Practice*, Special Issues Corrections (Nat'l Inst. of Justice, U.S. Dep't. of Justice), Mar. 1997, at 4 [hereinafter *Supermax Housing*].

20. SURVIVAL IN SOLITARY: A MANUAL WRITTEN BY & FOR PEOPLE LIVING IN CONTROL UNITS 34 (Bonnie Kerness & Holbrook Teter eds., 1997) (interviewing Dr. Stuart Grassian, Board-certified psychiatrist and Harvard Medical School faculty member, discussing the practice of releasing inmates directly from Supermaxes), *at* http://www.afsc.org/nymetro/criminalJustice/resources/CJSurvivorsManual.pdf (on file with Arizona Law Review).

21. U.S. CONST. amend. VIII.

22. Paige M. Harrison & Jennifer C. Karberg, *Prison and Jail Inmates at Midyear 2003*, BUREAU OF JUST. STATISTICS BULL. (U.S. Dep't. of Justice, Office of Justice Programs, Wash., D.C.), May 2004, at 1.

incarceration rates remain unchanged, one in every fifteen people in the U.S. in 2001 will spend some time in prison during his or her lifetime.[24] The prison population exploded over the past two decades as a result of the "tough-on-crime" approach adopted by Congress and state legislatures during the 1980s and 1990s.[25] Many states have been unable to keep up with the prison population growth, leaving numerous prisons severely overcrowded.[26] Overcrowding in prisons exacerbates traditional prison security concerns, and may have led to increased prison violence.[27]

Prisons are organized by security level, with the most dangerous offenders serving time in maximum-security facilities.[28] Many institutions have built Supermaxes to deal with the most dangerous inmates.[29] Touted as state-of-the-art, modern prisons,[30] Supermaxes house inmates in solitary confinement away from the rest of the prison population.[31] States began using Supermax prisons as a means to separate the worst of the worst from the rest of the prison population.[32] Inmates with escape-attempt histories and inmates who exhibited violent behavior in prison were envisioned as the appropriate Supermax inhabitants.[33] However, as discussed below, that is not how many jurisdictions use Supermaxes.

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23. Int'l Ctr. for Prison Studies, *World Prison Brief*, *at* www.prisonstudies.org (on file with Arizona Law Review). The U.S. tops the list with 714 out of 100,000 people in prison, followed by Belarus with 532 out of 100,000. *Id.*

24. Thomas P. Bonczar, *Prevalence of Imprisonment in U.S. Population, 1974–2001*, BUREAU OF JUST. STATISTICS BULL. (U.S. Dep't. of Justice, Office of Justice Programs, Wash., D.C.), Aug. 2003, at 1.

25. Chase Riveland, *Prison Management Trends, 1975–2025*, 26 CRIME & JUST. 163, 163–64 (1999).

26. RIVELAND, *supra* note 2, at 5; Riveland, *supra* note 25, at 169–70, 181. For an extreme case of overcrowding giving rise to unconstitutional prison conditions, see *Carty v. Farrelly*, 957 F. Supp. 727, 734 (D.V.I. 1997) (finding defendants in civil contempt of settlement agreement to remedy unconstitutional conditions including extreme overcrowding in prison).

27. Riveland, *supra* note 25, at 179–80.

28. *See* Ariz. Dep't. of Corrections, Offender Classification System, *at* http://www.azcorrections.gov/programs/classification.html (describing how inmates are classified and providing the security level ranking of each of Arizona's prisons) (on file with Arizona Law Review).

29. *Supermax Housing*, *supra* note 19, at 3; *but see* Wiley Hall, *States Question "Supermax" Prisons*, ASSOCIATED PRESS, Nov. 5, 2003 (reporting that Maryland plans to close its Supermax facility because it is inhumane, inconsistent with Maryland's current view that prisoners should be rehabilitated, and "as expensive to operate and ineffective"), *available at* http://www.cbsnews.com/stories/2003/11/05/national/main582117.shtml (on file with Arizona Law Review).

30. 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, 479 (1997).

31. RIVELAND, *supra* note 2, at 1.

32. Kurki & Morris, *supra* note 5, at 391.

33. RIVELAND, *supra* note 2, at 6.

B. Gangs in Prison

In 2000, Arizona's DOC administrators estimated that thirty-five to forty percent of Arizona's inmates were affiliated with street gangs, and an additional five percent were affiliated with prison gangs.[34] Members of both groups have been increasing in recent years.[35]

In 1997, Arizona's Director of DOC issued a policy order requiring all Security Threat Group ("STG," or prison gang[36]) members be transferred to Arizona's most restrictive Supermax facility, SMU-II.[37] Arizona does not target prison gang leaders for transfer to SMU-II; rather, any affiliation with a group defined as an STG can lead to a transfer to SMU-II.[38] The goal is to deter prison gang membership and reduce gang violence.[39]

Transferring STG affiliates to SMU-II has been met with questionable success. In conjunction with outside consultants, Arizona's DOC received a grant from the U.S. Department of Justice ("USDOJ") to evaluate the impact of its policy order on prison security and filed a Final Report detailing its findings.[40] The Final Report concludes that the program is reducing violent and non-violent misconduct throughout the prison system, but that future research should evaluate the impact of street gangs on prison security.[41] However, the data presented in the Final Report indicate that only a few categories of violations decreased from 1997-2000, the three years following the policy order requiring that all validated STG members be transferred to SMU-II.[42]

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34. DARRYL R. FISCHER, ARIZ. DEP'T OF CORRECTIONS, SECURITY THREAT GROUP (STG) PROGRAM EVALUATION vi (2002) (unpublished report), *available at* http://www.ncjrs.org/gangs/searchabstracts.html (on file with Arizona Law Review).

35. *Id.*

36. In this Note, prison gangs are defined as gangs that evolved in prison, as opposed to street gangs, which evolved outside of prison.

37. ARIZ. DEP'T OF CORRECTIONS, DEPARTMENT ORDER 806, SECURITY THREAT GROUPS (STGS) § 806.07 (1999), *available at* http://www.adc.state.az.us/Policies/806.htm [hereinafter ARIZONA DO-806] (on file with Arizona Law Review). While the policy mandates transfer of STG members, STGs are predominantly defined as prison gangs (gangs that evolved in prison); the policy does little to address the overwhelming population of *street* gang members (gangs that evolved outside prison).

38. ARIZONA DO-806, *supra* note 37.

39. *Id.* Prison administrators agreed that the main goal of the new STG policy was to remove STG members from the general population; however, few prison administrators cited increasing prison safety and reducing incidents between inmates as the goal. FISCHER, *supra* note 34, at 159.

40. FISCHER, *supra* note 34 *passim*.

41. *Id.* at 184.

42. *Id.* at 76–107. The Final Report graphs the number of rule infractions by category (e.g. assault or threat violations) from 1990 to 2000 for non-gang member inmates and from 1994 to 2000 for gang inmates. *Id.* While significant decreases in several categories are observed for the entire time periods analyzed, very few categories of infractions decreased from 1997 to 2000 for either gang or non-gang inmates. *Id.* Some categories show a slight increase in infraction rate. *Id.* at 78, 81, 92, 97, 99, 101–02. The greatest decrease was observed for the undefined category of "Other Violent Infractions," which presumably includes any violent infraction that cannot be described as an assault,

The Final Report shows that prison gangs are the most likely group of inmates to commit several types of violent infractions, followed by street gangs, and then followed by inmates with no documented gang affiliation.[43] Transfer to SMU-II does admittedly have a large incapacitation effect on individuals.[44] But does it deter gang activity? Arizona correctional officers surveyed in the Final Report doubt whether the current policy is controlling gang behavior, or whether any policy could control gang activity.[45] Even if gang leaders were targeted by the policy, another inmate would likely rise to take his place.[46]

Policies like Arizona's can actually harm prison security, rather than enhance it.[47] Persecution of gangs can lead to martyrdom and increased gang cohesion, which in turn leads to increased gang activity.[48] Gangs generally form along racial lines, and are often associated with drugs, sex, and contraband in prisons.[49] However, there is simply not enough space in Supermaxes to isolate all gang members.[50] Perhaps to reduce inter-racial tensions, Arizona also segregates many Mexican nationals into separate units.[51] It may not be the most politically correct solution, but it is far more humane than sending a greater fraction of Mexican nationals to SMU-II.[52]

DOCs often rely on tenuous evidence to send suspected STG affiliates to SMU-II.[53] No specific instance of violent behavior is required.[54] This is contrary to

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fighting, rioting, or threat violation. *Id.* at 83, 94. The decrease across the entire time periods studied may be due to several other security initiatives put in place over the same time period, but which were not included in the analysis. *Id.* at 39.

43. *Id.* at 29.

44. *Id.* at 31, 37.

45. *Id.* at 183.

46. Kassel, *supra* note 8 *passim*.

47. *Id.* at 51, 61–62.

48. *Id.*

49. Riveland, *supra* note 25, at 190.

50. For example, in Arizona less than 500 beds in SMU-II are used to house STG members; however prison administrators estimate that thirty-five to forty percent of all inmates are gang members. FISCHER, *supra* note 34, at 165. Over 30,000 inmates are currently incarcerated in Arizona's prisons. ARIZ. DEP'T OF CORRECTIONS, INMATE STATISTICS: WHO IS IN PRISON? (Feb. 2005), *at* http://www.azcorrections.gov/reports/Who.htm (on file with Arizona Law Review).

51. ARIZ. DEP'T. OF CORRECTIONS, INMATE ETHNIC DISTRIBUTION BY UNIT (2005), *at* http://www.azcorrections.gov/reports/Ethnic.htm (showing that 99.3 percent of inmates in Santa Rita level 2 and 89.9 percent of inmates in Santa Rita level 3 security units are Mexican nationals) (last visited Mar. 6, 2005) (on file with Arizona Law Review).

52. This Note neither condemns nor condones this practice; it is only mentioned as one of many approaches Arizona is taking to address its prison security concerns. However, compare Arizona's approach to the approach taken in Massachusetts, where ninety percent of Supermax beds are occupied by Latino inmates. Kassel, *supra* note 8, at 37.

53. Telephone interview with Dennis Palumbo, Professor Emeritus, Arizona State University Criminal Justice Department, consultant for FISCHER, *supra* note 34, (Jan. 13, 2003) [hereinafter Telephone Interview with Professor Palumbo]. Professor Palumbo sat in on several STG validation hearings, and states the hearings were perfunctory, a sham, and relied upon shaky evidence for inmate transfers to SMU-II. Inmates may have wised up to

the advice of the USDOJ, National Institute of Corrections, which counsels against reliance on subjective predictive factors—such as member status—to transfer inmates to Supermaxes.[55] The absence of objective evidence gives the outward appearance of a wholly arbitrary, bureaucratic system.[56] Therefore, USDOJ recommends that DOCs rely on specific inmate misconduct.[57]

Although gangs undoubtedly challenge prison security, transferring STG members to SMU-II has been met with limited, if any, demonstrable success in Arizona.[58] DOCs should examine whether following the advice of the USDOJ would be more effective at removing the worst threats to prison security than this transfer policy.

C. Supermax Conditions

Supermax conditions are harsher than maximum-security facilities.[59] While conditions in different facilities vary, several features remain constant. In general, inmates live in cells eight feet by ten feet in area.[60] Stark concrete cells are equipped with a metal sink and toilet, but no shower.[61] Food is passed to the inmate through a small, locked slot in the solid door.[62] Metal flaps may be placed

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DOCs practice of using gang tattoos to justify transfers to SMU-II. *Id.* As a result, evidence such as who the inmate eats lunch with and content of inmate mail is relied upon for STG validation. *Id.* Professor Palumbo and John R. Hepburn, Professor at Arizona State University, as the two primary researchers for the Final Report, signed a letter to the U.S. Department of Justice, stating that they did not agree with the Final Report's conclusions. The impact of street gang violence was down-played in the Final Report. *Id. See also* Castaneda v. Marshall, No. C-93-03118 CW, 1997 WL 123253, at *8 (N.D. Cal. Mar. 10, 1997); Haney & Lynch, *supra* note 30, at 492; Kassel, *supra* note 8, at 44–45.

54. ARIZONA DO-806, *supra* note 37; Haney & Lynch, *supra* note 30, at 492 (noting that in California, STG membership has replaced discrete evidence of misconduct as the only evidence required to transfer an inmate to a Supermax); Kassel, *supra* note 8 *passim*.

55. RIVELAND, *supra* note 2, at 7.

56. Richard D. Vogel, *Capitalism and Incarceration Revisited*, MONTHLY REV. Sept. 2003, at 1, *available at* http://www.monthlyreview.org/0903vogel.htm (on file with Arizona Law Review).

57. *Id.*

58. FISCHER, *supra* note 34.

59. Kurki & Morris, *supra* note 5, at 390.

60. Scott N. Tachiki, *Indeterminate Sentences in Supermax Prisons Based upon Alleged Gang Affiliations: A Reexamination of Procedural Protection and a Proposal for Greater Procedural Requirements*, 83 CAL. L. REV. 1115, 1123 (1995).

61. RIVELAND, *supra* note 2, at 13 (noting that recent designs include plans to equip cells with showers to eliminate the need for the staff-intensive shower escorts); Kurki & Morris, *supra* note 5, at 407.

62. *See* Austin v. Wilkinson (*Austin I*), 189 F. Supp. 2d 719, 724 (N.D. Ohio 2002), *subsequent determination in* 204 F. Supp. 2d 1024 (N.D. Ohio 2002), *aff'd in part and rev'd in part by* 372 F.3d 346 (6th Cir. 2004); *cert. granted*, 125 S. Ct. 686 (2004)). In Arizona, this apparently provides inmates with the opportunity to throw their feces at officers. Punishment for throwing feces through the food slat can include extracting the inmate from his cell and having him stand in a telephone booth-sized box with no lights for "hours and hours." Telephone Interview with Professor Palumbo, *supra* note 53.

around the door to complete the sense of isolation.[63] If there is a window, it is small and often placed high in the cell so that it is difficult for the inmate to peer out.[64] The light is always on, although it may be dimmed.[65] Cells are monitored constantly.[66]

Inmates are usually permitted to leave the cell for up to one hour, three times a week, for a shower and exercise.[67] Guards chain the inmates' hands to their waists and shackle their feet through the slot in the door before opening the cell door.[68] Once the inmate leaves the cell, he is constantly guarded by two or three officers and has no contact with other inmates.[69] These brief encounters, while shackled, are the only physical human contact the inmate is afforded.[70] Exercise usually occurs alone in small locked cages or cement bunkers; exercise areas contain no equipment.[71]

Inmates are allowed personal items in their cells, but the allowable personal items are more restricted than in other facilities.[72] If inmates are allowed religious materials, library books, or educational materials, they are delivered to the cells.[73] Religious services are provided.[74] Access to mental health care is usually inadequate.[75] Phone calls and visits are more restricted than in the general population, but are still allowed in most cases.[76]

D. The Impact of Prolonged Solitary Confinement on Inmates

The draconian conditions and extreme sensory deprivations in these high-tech facilities, which are far more severe than in general maximum-security facilities,[77] often lead to serious mental deterioration.[78] One of Arizona's deputy wardens was quoted as saying that Supermax inmates are "nothing but animals that

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63. *Austin I*, 189 F. Supp. 2d at 724.

64. Jones 'El v. Berge, 164 F. Supp. 2d 1096, 1099 (W.D. Wisc. 2001); Boyer, *supra* note 18, at 330.

65. *Austin I*, 189 F. Supp. 2d at 724; *Jones 'El*, 164 F. Supp. 2d at 1100.

66. DeMaio, *supra* note 6, at 208.

67. Kurki & Morris, *supra* note 5, at 407.

68. *Austin I*, 189 F. Supp. 2d at 724.

69. *Id.* at 741.

70. *Id.* at 724–25.

71. *Id.* at 741 (stating that a lack of outdoor recreation impairs a liberty interest); *Jones 'El*, 164 F. Supp. 2d at 1100 (discussing that many inmates in Wisconsin refuse to go to the austere exercise cell, which is merely a slightly larger version of a normal cell, with no equipment, and not enough room to jog); Boyer, *supra* note 18, at 329–30.

72. Lee v. Coughlin, 26 F. Supp. 2d 615, 624 (S.D.N.Y. 1998).

73. Kurki & Morris, *supra* note 5, at 390.

74. *Supermax Housing*, *supra* note 19, at 8.

75. *Id.*; Kurki & Morris, *supra* note 5, at 390.

76. Vogel, *supra* note 56.

77. *See* Sandin v. Conner, 515 U.S. 472, 486 n.8 (1995) (noting that nonsegregated maximum-security inmates kept in cells between twelve and sixteen hours a day); Kurki & Morris, *supra* note 5, at 391.

78. Lee v. Coughlin, 26 F. Supp. 2d 615, 637 (S.D.N.Y. 1998). *See generally* Kurki & Morris, *supra* note 5, at 413–15 (summarizing different studies on the effects of prolonged isolation, finding an array of detrimental effects).

we turn into senseless bums."[79] After years studying the effects of Supermaxes on inmates' mental health, Dr. Stuart Grassian defines the environment in Supermaxes as "strikingly toxic."[80] Dr. Grassian has identified a Supermax syndrome that includes such symptoms as hallucinations or other perceptual disorders, paranoia, delusions, and primitive aggressive fantasies such as revenge against or torture of prison guards.[81] Inmates have difficulty remaining alert, thinking, concentrating, and remembering due to prolonged lack of stimuli.[82] They enter a sort of stupor or dissociative state, and may become obsessive.[83] They may become extremely agitated by the sound of water rushing through pipes, or even the smell of food.[84] More resilient inmates fare better than those with histories of mental infirmity, but severe psychological pain nonetheless results due to prolonged solitary confinement, especially if the isolation is indefinite in duration.[85] In one case, Dr. Grassian said that no human could tolerate a period in excess of four years.[86] Less resilient inmates may face a "confusional psychoses [sic] with intense agitation, fearfulness, and disorganization."[87] Some inmates suffer additional physical harms, such as rashes, headaches, or the inability to stand to shower.[88]

E. Who Are in Supermaxes?

Supermaxes house a variety of inmates, depending on the particular institution, such as death row inmates,[89] the mentally ill,[90] members of unpopular religious groups,[91] and security threat group members.[92] In at least one state,

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79. Joan Dayan, *Cruel and Unusual: Parsing the Meaning of Punishment*, 5 L. TEXT CULTURE 7, 27–28 (2001).

80. *Lee*, 26 F. Supp. 2d at 637. Dr. Grassian's findings are largely corroborated by Dr. Terry Kupers, a board certified psychiatrist and fellow of the American Psychiatric Association, who toured the Supermax in Wisconsin. Jones 'El v. Berge, 164 F. Supp. 2d 1096, 1102–03 (W.D. Wisc. 2001).

81. Christine Rebman, *The Eighth Amendment and Solitary Confinement: The Gap in Protection from Psychological Consequences*, 49 DEPAUL L. REV. 567, 580 (1999).

82. McClary v. Kelly (*McClary I*), 4 F. Supp. 2d 195, 205–07 (W.D.N.Y. 1998).

83. *Id.*

84. Rebman, *supra* note 81, at 580.

85. *McClary I*, 4 F. Supp. 2d at 205–07.

86. *Id.* Dr. Grassian was testifying in a case where four years of solitary confinement was at issue. *Id.*

87. Lee v. Coughlin, 26 F. Supp. 2d 615, 637 (S.D.N.Y. 1998).

88. *See id.* at 637 n.18.

89. RIVELAND, *supra* note 2, at 1.

90. *Supermax Housing*, *supra* note 19, at 2. Some DOCs transfer the mentally ill to Supermaxes because the "paucity" of mental health resources makes isolation in Supermaxes the easiest way to deal with these inmates. *Id.* This practice appears to be at odds with evidence suggesting that inmates with histories of mental problems are most susceptible to further mental deterioration in Supermaxes. *See McClary I*, 4 F. Supp. 2d at 205–07.

91. *See infra* Section V.B.

92. Tachiki, *supra* note 60 *passim*. For example, in 2000 Arizona held 390 validated STG members, 116 death row inmates, and ninety disruptive inmates in SMU-II. FISCHER, *supra* note 34, at 6.

inmates can be transferred to a Supermax to alleviate overcrowding in lower security facilities.[93] Indiana transferred inmates to a new Supermax based on minor rule infractions simply to fill up the facility.[94] These types of transfers are non-punitive, and are called administrative segregation.[95] Supermaxes are also used to punish inmates who exhibit disruptive behavior behind bars.[96] These punitive transfers are called disciplinary segregation.[97] Some states use Supermaxes to house inmates who are no longer safe in the general population.[98] This type of protective segregation is often less harsh than administrative or disciplinary segregation, as inmates may have the ability to interact with each other and may have more privileges than other inmates in Supermaxes.[99]

Due to the ethnic basis for gang membership, transferring STG members to Supermaxes also has the effect of disproportionately segregating more minorities in solitary confinement.[100] In Massachusetts, Hispanics filed a class action lawsuit claiming that they were discriminated against when their alleged gang affiliations were used to transfer them to a Supermax.[101] The court denied summary judgment to the defendant and found that the inmates had stated a valid equal protection claim.[102] The inmates had alleged racial animus and provided evidence that Hispanic inmates were statistically singled out as gang members and segregated more frequently than non-Hispanic inmates.[103] Given the historical misuse of segregation, sending STG members to Supermaxes may further a broader, oppressive agenda.[104]

Incarceration in isolation has historically been used for inmate persecution.[105] During the Civil Rights movement, Black Panthers, Puerto Rican Independentistas, members of the American Indian movement, and other radicals were subjected to solitary confinement as a behavior modification tactic.[106] "[J]ail house lawyers, Islamic militants and ethnically based prison gangs, many of whom

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93. DeMaio, *supra* note 6, at 220.

94. *Id.* at 221. Indiana settled with inmates who filed a class action lawsuit alleging transfer to Supermaxes based on minor rule infractions. *Id.* The settlement raised the standards for Supermax transfers. *Id.* After the new rules were implemented, the Supermax remained essentially empty. *Id.*

95. RIVELAND, *supra* note 2, at 8.

96. *Supermax Housing*, *supra* note 19, at 1–3.

97. *Id.*

98. RIVELAND, *supra* note 2, at 1. In addition, segregating the mentally ill in Supermaxes may be protective segregation. *Id.*

99. Lee v. Coughlin, 26 F. Supp. 2d 615, 628 (S.D.N.Y. 1998).

100. Haney & Lynch, *supra* note 30, at 492.

101. Haverty v. Dubois, No. 953634F, 1999 WL 1487591, at *9 (Mass. Super. Oct. 13, 1999).

102. *Id.*

103. *Id.*

104. Bonnie Kerness, Coordinator, Prison Watch, Am. Friends Serv. Comm., Prison Gang Workshop, National Lawyers Guild Convention held in Boston, Massachusettes (Nov. 3, 2000), *available at* http://www.afsc.org/nymetro/criminalJustice/resources/CJprisonGang20001103.pdf (on file with Arizona Law Review).

105. *Id.*

106. *Id.*

were highly political" were commonplace in solitary confinement.[107] Meanwhile, the infamous government counterintelligence group, COINTELPRO, was targeting these unpopular groups using blatantly unconstitutional tactics.[108]

DOCs should reflect on their Supermax populations and determine what purposes these isolation units are serving. Does prison security require complete incapacitation of these inmates? Does administrative segregation have a deterrent effect on the general population? Is prison security increased, or are valuable state resources wasted?

II. THE FAILURE OF THE EIGHTH AMENDMENT TO ADDRESS PROLONGED SEGREGATION IN SUPERMAXES

> The United States has both a strong commitment to human rights and a clear history of human rights violations against prisoners, making [judicial] protection particularly appropriate and necessary.[109]

In May 2000, a United Nations committee found ten egregious human rights violations in U.S. prisons.[110] Reports of torture devices in prisons predominantly originate from Supermax facilities.[111] Nevertheless, courts overwhelmingly find that confinement of sane inmates in Supermax facilities does not violate the Eighth Amendment prohibition on cruel and unusual punishment.[112]

Eighth Amendment precedent requires courts to analyze whether cruel and unusual punishment is present by considering both objective and subjective factors.[113] In the objective prong of the test, courts ask whether the confinement conditions deprive the inmate of a basic human need and whether the deprivation violates "contemporary standards of decency."[114] To satisfy the subjective prong, the inmate must show that the defendant acted with deliberate indifference to the inmate's health or safety.[115] The defendant must know of and act with disregard to the inmate's peril.[116]

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107. *Id.*

108. *Id.*

109. Kane v. Winn, 319 F. Supp. 2d 162, 175 (D. Mass. 2004).

110. *Conclusions and Recommendations of the Committee Against Torture, United States of America;* U.N. CAT, 24th Sess., ¶ 179(a)–(i), U.N. Doc. A/55/44 (2000) (on file with Arizona Law Review).

111. Bonnie Kerness, Editorial, *U.S. Must Look to its Own Human Rights Violations*, STAR LEDGER (N.J.), June 26, 2000, http://webarchive.afsc.org/nymetro/criminaljustice/resources/CJUSHRAbuses20000626.htm (on file with Arizona Law Review); *see also* AMNESTY INT'L, A BRIEFING FOR THE U.N. COMMITTEE AGAINST TORTURE, AMR 51/056/2000 *passim* (2000).

112. U.S. CONST. amend. VIII; Rebman, *supra* note 81, at 602–03.

113. U.S. CONST. amend. VIII; Wilson v. Seiter, 501 U.S. 294, 297–98 (1991).

114. Helling v. McKinney, 509 U.S. 25, 36 (1993).

115. Farmer v. Brennan, 511 U.S. 825, 847 (1994).

116. *Id.*; *see* Charles A. Pettigrew, *Technology and the Eighth Amendment: The Problem of Supermax Prisons*, 4. N.C. J. L. & TECH. 191, 205–06 (2002); Sally Mann Romano, *If the SHU Fits: Cruel and Unusual Punishment at California's Pelican Bay State*

Because Supermax inmates face psychological, rather than physical, deprivations, both the objective and subjective prongs of the test are more difficult to satisfy.[117] The objective prong of the test is difficult for mentally stable Supermax inmates to satisfy because the harm may take years to accrue; it is not imminent.[118] In addition, many courts either do not understand the magnitude of the psychological peril the inmate faces, or consider it part of the inmate's punishment.[119]

The subjective prong of the analysis is also difficult to satisfy.[120] In Supermax facilities, the deleterious psychological effects can be devastating.[121] However, correctional officers are not trained to recognize the signs of mental illness, and may not be aware of the inmate's condition or peril.[122]

Because of the high occurrence of mental deterioration in Supermax facilities, commentators have called for an expansion of the Eighth Amendment prohibition against cruel and unusual punishment to include psychological harms.[123] Three district courts have found that warehousing mentally ill inmates in Supermaxes was cruel and unusual. First, a California district court found the risk of severe psychological harm to mentally ill inmates and inmates with borderline personalities caused by Supermax incarceration amounted to an Eighth Amendment violation.[124] Likewise, a Texas district court found that the state prisons had become a repository for a great number of mentally ill citizens, and it was cruel and unusual to house mentally ill inmates in Supermaxes.[125] Finally, a Wisconsin district court found that the state DOCs lack of meaningful assessment of whether an inmate is mentally ill before assignment to a Supermax was deliberate indifference,[126] and warehousing mentally ill inmates in Supermaxes

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Prison, 45 EMORY L.J. 1089, 1116–17 (1996) (discussing *Farmer*'s new standard for the subjective prong of Eighth Amendment claims brought by inmates).

117. Rebman, *supra* note 81, at 602–09.

118. Madrid v. Gomez, 889 F. Supp. 1146, 1267 (N.D. Cal. 1995) (holding that inmates with no history of or current signs of serious mental illness could not recover for incarceration in California's Supermax because the likelihood of future serious mental injury was not shown to be sufficiently imminent).

119. Rebman, *supra* note 81, at 603–04.

120. *Id.* at 605–07.

121. Boyer, *supra* note 18, at 332.

122. Rebman, *supra* note 81, at 603–04.

123. Nan D. Miller, *International Protection of the Rights of Prisoners: Is Solitary Confinement in the United States a Violation of International Standards?*, 26 CAL. W. INT'L L.J. 139, 169–70 (1995) (stating that compliance with international standards of cruelty would force the U.S. to adjust its Supermax policies).

124. Madrid v. Gomez, 889 F. Supp. 1146, 1265 (N.D. Cal. 1995).

125. Ruiz v. Johnson, 37 F. Supp. 2d 855, 915 (S.D. Tex. 1999), *rev'd and remanded by* 243 F.3d 941 (5th Cir. 2001) (remanding for analysis under a new statute affecting prisoner's right to sue), *on remand to* 154 F. Supp. 2d 975 (S.D. Tex. 2001) (finding the same constitutional violation using the statutory analysis).

126. Jones 'El v. Berge, 164 F. Supp. 2d 1096, 1121 (W.D. Wisc. 2001).

was cruel and unusual.[127] Nevertheless, several DOCs continue to incarcerate the mentally ill in Supermaxes.[128]

Supreme Court Justice Stevens and former Supreme Court Justice White have questioned the applicability of the subjective prong of the cruel and unusual punishment analysis to conditions in solitary confinement, as the actions of the day-to-day corrections officers are not usually the cause of the harm.[129] This approach, however, does not command a majority of the current Court.[130] Until the mental effects of prolonged Supermax confinement on inmates with no history of mental illness have been shown to be sufficiently serious and imminent, and until these effects are well known by prison administrators, correctional officers, and the courts, the Eighth Amendment is unlikely to shield many inmates from prolonged isolation.[131]

III. DUE PROCESS

A. Fourteenth Amendment Substantive Due Process Claims

In general, to violate substantive due process, transfer to a Supermax must "shock[] the conscience or interfere[] with rights implicit in the concept of ordered liberty."[132] Alternatively, the transfer should not be wholly arbitrary or capricious; it must be based on some evidence.[133] Furthermore, the evidence must have some indicia of reliability.[134]

The Seventh Circuit recognizes that substantive due process is violated if inmates are transferred to Supermax facilities for absolutely no reason.[135] However, because inmates have no fundamental liberty interest in being free from such transfers, the court will only determine whether there was a rational basis for the transfer.[136] For example, in *Bono v. Saxbe*, the purpose for transferring inmates to administrative segregation was to remove inmates with demonstrable behavioral

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127. *Id.* at 1096.

128. *Supermax Housing*, *supra* note 19, at 2; HUMAN RIGHTS WATCH, COLD STORAGE: SUPER-MAXIMUM SECURITY CONFINEMENT IN INDIANA § II (1997) (discussing Indiana's practice of incarcerating the mentally ill in Supermaxes), *available at* http://hrw.org/reports/1997/usind/ (on file with Arizona Law Review).

129. Boyer, *supra* note 18, at 332–33 (citing Wilson v. Seiter, 501 U.S. 294, 310 (1991) (White, J., concurring); Estelle v. Gamble, 429 U.S. 97, 110–16 (1976) (Stevens, J., dissenting)).

130. Boyer, *supra* note 18, at 332–33.

131. *See generally* Bono v. Saxbe, 620 F.2d 609, 615 (7th Cir. 1980) ("[I]t is well within [DOCs] discretion not to provide any special training for guards at [the Supermax] and not to give psychological testing to every inmate who is placed in [the Supermax]."); Boyer, *supra* note 18, at 325, 332–33.

132. Nunez v. City of Los Angeles, 147 F.3d 867, 871 (9th Cir. 1998).

133. Superintendent v. Hill, 472 U.S. 445, 454 (1985) (holding that there must be some evidence in the record showing why the inmate was segregated); *Bono*, 620 F.2d at 612 (stating that the transfer of inmate to Supermax for no reason at all violates substantive due process).

134. Cato v. Rushen, 824 F.2d 703, 705 (9th Cir. 1987).

135. *Bono*, 620 F.2d at 611.

136. *Id.*

problems from the general population.[137] The Seventh Circuit affirmed the district court's decision to review the reasons for the transfer of the plaintiff-inmates to determine if the inmate transfers were consistent with that purpose.[138] Thus, in addition to the procedural protections discussed below, transfers to Supermaxes must be rationally related to the state's legitimate purpose.[139] However, given the extreme deference afforded prison administrators in the realm of prison security, most courts do not address whether administrative transfer decisions are rational.[140] In fact, the Ninth Circuit finds that to violate substantive due process, a transfer to a Supermax must shock the conscience or interfere with rights implicit in the concept of ordered liberty.[141] Therefore, unless an inmate alleges that a fundamental right has been violated, the Ninth Circuit will not address substantive due process claims.[142]

B. Procedural Due Process

The courts disagree about whether procedural due process applies to Supermax transfers.[143] When courts find that procedural protections apply, the Supreme Court holds that inmates facing disciplinary transfers have a right to more procedural protections than inmates facing administrative transfers.[144] This is counter-intuitive, as administrative and disciplinary segregation conditions are often identical, but administrative segregation usually lasts much longer.[145] The due process analysis sheds some light on these apparent inconsistencies.

The analysis has two steps.[146] First, courts must find a liberty interest in the confinement conditions to determine whether Fourteenth Amendment

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137. *Id.*

138. *Id.*

139. *Id.*

140. The Seventh Circuit case, *Bono v. Saxbe*, 620 F.2d 609, 611 (7th Cir. 1980), may be the only notable exception.

141. Nunez v. City of Los Angeles, 147 F.3d 867, 871 (9th Cir. 1998).

142. Holloway v. Cohen, 61 Fed. Appx. 435, 437 (9th Cir. 2003).

143. Inmates often have some procedural safeguards in the Second and Ninth Circuits. Colon v. Howard, 215 F.3d 227, 231–32 (2d Cir. 2000); Castaneda v. Marshall, No. C-93-03118 CW, 1997 WL 123253, at *4 (9th Cir. Mar. 10, 1997) (citing the pre-*Sandin* case Toussaint v. McCarthy, 801 F.2d 1080, 1097–98 (9th Cir. 1986)). Procedural protections are less frequently awarded in the Third, Fourth, Fifth, and Sixth Circuits and New Jersey. Jones v. Baker, 155 F.3d 810, 812 (6th Cir. 1998); Beverati v. Smith, 120 F.3d 500, 504 (4th Cir. 1997); Griffin v. Vaughn, 112 F.3d 703, 706 (3rd Cir. 1997); Pichardo v. Kinker, 73 F.3d 612, 613 (5th Cir. 1996); Blyther v. N.J. Dep't. of Corrections, 730 A.2d 396, 401 (N.J. Super. Ct. App. Div. 1999).

144. *Compare* Wolff v. McDonnell, 418 U.S. 539, 563 (1974) (prescribing the process required for disciplinary proceedings, which includes a disciplinary transfer), *with* Hewitt v. Helms, 459 U.S. 460, 476 (1983) (prescribing the process required for an administrative transfer).

145. Austin v. Wilkinson (*Austin I*), 189 F. Supp. 2d 719, 724 (N.D. Ohio 2002), *subsequent determination in* 204 F. Supp. 2d 1024 (N.D. Ohio 2002), *aff'd in part and rev'd in part by* 372 F.3d 346 (6th Cir. 2004); Tachiki, *supra* note 60, at 1139–40.

146. *Thirty-Second Annual Review of Criminal Procedure: VI. Prisoner's Rights, Substantive Rights Retained by Prisoners* 91 GEO. L.J. 887, 911–12 (2003) [hereinafter *Prisoner's Rights*].

protections apply.[147] If a liberty interest is implicated, the court must determine whether the inmate was afforded the appropriate procedural protections.[148]

1. Finding a Liberty Interest

In *Sandin v. Conner*, the Supreme Court revised the process for finding a liberty interest in confinement conditions.[149] The Court's decision marks a return to *Wolff v. McDonnell*, which places emphasis on the deprivation's nature and duration in finding a liberty interest.[150] Courts must now find that the conditions either exceed the sentence imposed on the inmate (for example, by lengthening the inmate's sentence), or constitute an "atypical and significant hardship" on the inmate.[151]

a. Exceeds Sentence Imposed

After *Sandin*, a transfer to a Supermax will exceed the sentence imposed only if it *inevitably* lengthens the inmate's sentence.[152] When transfers to Supermaxes discard accrued "time credits,"[153] they inevitably lengthen sentences, and therefore require procedural protections.[154] In contrast, some courts have found that merely removing the opportunity to accumulate time credits does not necessarily lengthen the sentence, and therefore does not impair a liberty interest.[155]

b. Atypical and Significant Hardship

The second basis for finding a liberty interest, as described in *Sandin*, has proved a more fruitful claim for inmates challenging their transfers to Supermaxes.

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147. *Id.* at 912.

148. *Id.*

149. Sandin v. Conner, 515 U.S. 472, 483 (1995).

150. Wolff v. McDonnell, 418 U.S. 539, 557, 560–61 (1974). In the years between *Sandin* and *Wolff*, courts had to determine whether the state had conferred a liberty interest on the inmate through mandatory language in statutes or official corrections policies; the *Sandin* Court found that this sort of test deterred states from recording official policies about confinement. *Sandin*, 515 U.S. at 482.

151. *Sandin*, 515 U.S. at 484.

152. *Id.* at 487.

153. Inmates with "time credits" are released before their sentence expires. Many states have adopted "truth in sentencing," which usually requires that inmates serve no less than 85.7% of their sentences. Paula M. Ditton & Doris James Wilson, *Truth in Sentencing in State Prisons*, BUREAU OF JUST. STATISTICS SPECIAL REP. (U.S. Dep't. Justice, Office of Justice Programs, Wash., D.C.), Jan. 1999, at 2–3. An inmate in a truth-in-sentencing state earns one day off of her sentence for every six days served (assuming the inmate is eligible to earn time); for example, the model inmate in Arizona will serve six-sevenths of her sentence, or 85.7%. ARIZ. REV. STAT. § 41-1604.07 (West 2004).

154. Brown v. Smith, 828 F.3d 1493, 1495 (10th Cir. 1987) (finding that removal of a federal inmate's accrued time credits requires due process); *accord* Griffin v. Brooks, 13 Fed. Appx. 861, 864 (10th Cir. 2001).

155. *See, e.g.*, York v. Addison, 44 Fed. Appx. 296, 297 (10th Cir. 2002); Antonelli v. Sheahan, 81 F.3d 1422, 1431 (7th Cir. 1997); Luken v. Scott, 71 F.3d 192, 193 (5th Cir. 1995).

However, the procedure for finding this atypical and significant hardship varies by jurisdiction.

First, to determine whether the inmate has endured an atypical and significant hardship, courts must compare the conditions of confinement in Supermaxes to some baseline that inmates should expect in prison.[156] Different courts use different baselines for comparison.[157] The Fourth and Ninth Circuits compare the segregation conditions to general population conditions.[158] The Second, Third, and District of Columbia Circuits use typical conditions in administrative segregation as a baseline.[159] In the Seventh Circuit, Judge Posner held that courts must look to conditions state-wide, including the most restrictive confinement conditions found in other facilities.[160] The Sixth Circuit recently declined to select a baseline, saying that its Supermax imposes atypical and significant hardships on inmates when compared to either the general population or typical segregation conditions.[161] The Fifth Circuit ignores the second basis for finding a liberty interest entirely, indicating that confinement conditions alone will not implicate a liberty interest; the transfer must lengthen the prisoner's sentence.[162] Interestingly, although the chosen baseline helps frame the analysis, it is not determinative; comparisons to the general population do not necessarily lead to more favorable results.[163]

Some courts doubt whether disciplinary segregation ever constitutes an atypical and significant hardship;[164] other courts have doubts about administrative segregation.[165] For example, the Seventh Circuit has suggested that because an

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156. *Sandin*, 515 U.S. at 484.

157. *See* Austin v. Wilkinson (*Austin I*), 189 F. Supp. 2d 719, 739 (N.D. Ohio 2002) (summarizing the approaches of several circuit courts), *subsequent determination in* 204 F. Supp. 2d 1024 (N.D. Ohio 2002), *aff'd in part and rev'd in part by* 372 F.3d 346 (6th Cir. 2004).

158. Beverati v. Smith, 120 F.3d 500, 503 (4th Cir. 1997); Keenan v. Hall, 83 F.3d 1083, 1089 (9th Cir. 1996).

159. Hatch v. District of Columbia, 184 F.3d 846, 856 (D.C. Cir. 1999); Griffin v. Vaughn, 112 F.3d 703, 708 (3rd Cir. 1997); Brooks v. DeFasi, 112 F.3d 46, 49 (2d Cir. 1997).

160. Wagner v. Hanks, 128 F.3d 1173, 1175 (7th Cir. 1997).

161. Austin v. Wilkinson (*Austin III*), 372 F.3d 346, 355 (6th Cir. 2004) (declining to select baseline, but explicitly rejecting the prison's argument that the court should compare conditions to out-of-state Supermaxes).

162. Carson v. Johnson, 112 F.3d 818, 821 (5th Cir. 1997); Pichardo v. Kinker, 73 F.3d 612, 613 (5th Cir. 1996). Some state courts agree. *See* Blyther v. N.J. Dep't. of Corrections, 730 A.2d 396, 398, 401–02 (N.J. Super. Ct. App. Div. 1999) (finding that only minimal process is due inmates in administrative segregation, where good time credits are still awarded to inmates and only *associational* privileges were removed). However, in a recent case involving administrative segregation, the Fifth Circuit indicated that the district court must determine what baseline is appropriate. Wilkerson v. Stalder, 329 F.3d 431, 436 (5th Cir. 2003).

163. *Compare Beverati*, 120 F.3d at 504, *with* Rodgers v. Johnson, 56 Fed. Appx. 633, 636 (6th Cir. 2002).

164. *Wagner*, 128 F.3d at 1176.

165. Person v. Campbell, 182 F.3d 918, 918 (6th Cir. 1999); Talley v. Hesse, 91 F.3d 1411, 1413 (10th Cir. 1996); *Pichardo*, 73 F.3d at 613.

inmate convicted of a white-collar crime, initially assigned to a low-level security facility, could end up in high-security administrative segregation for non-disciplinary, entirely bureaucratic reasons, the inmate will probably not be able to establish a liberty deprivation when transferred to segregation for disciplinary reasons.[166] In contrast, the Second Circuit has explicitly rejected the argument that disciplinary segregation can *never* implicate a liberty interest because it is often a much smaller liberty deprivation than administrative segregation.[167] The Second Circuit encourages factual inquiries into whether or not the confinement conditions endured for a brief period amount to atypical and significant hardships.[168] In assessing whether an inmate has a liberty interest to satisfy the first prong of the due process analysis, courts in New York consider both the segregation duration and the differences between the segregation conditions and the chosen baseline conditions.[169] In weighing these two factors, the Second Circuit recognizes that "especially harsh conditions endured for a brief interval and somewhat harsh conditions endured for a prolonged interval might both be atypical."[170] In contrast, the Fourth Circuit held that administrative segregation for six months in cells that were initially "infested with vermin," smeared with feces and urine, and flooded from a toilet leak in an upper floor did not impair a liberty interest.[171]

The analysis the Supreme Court used in *Sandin* has caused some confusion as to whether administrative segregation can ever constitute an atypical and significant hardship.[172] In *Sandin*, the Supreme Court said that the confinement conditions must be an atypical and significant hardship relative to the ordinary instances of prison life.[173] The Court compared the confinement conditions to both the general population and to administrative segregation and held that the inmate did not have a liberty interest in a thirty-day disciplinary segregation.[174] The Second Circuit found that it is "the *nature*, of the deprivation and not the *reason*,

166. *Wagner*, 128 F.3d at 1176.

167. Brooks v. DeFasi, 112 F.3d 46, 49 (2d Cir. 1997).

168. Scott v. Coughlin, 78 F. Supp. 2d 299, 311 (S.D.N.Y. 2000) (denying summary judgment for the defense, and allowing the inmate's claim for lack of due process in a sixty-day disciplinary segregation to proceed.) The court's in-depth analysis includes analyzing how frequently members of the general prison population face administrative segregation. *Id.*

169. *See* McClary v. Kelly (*McClary I*), 4 F. Supp. 2d 195, 202–03 (W.D.N.Y. 1998).

170. Colon v. Howard, 215 F.3d 227, 231 (2d Cir. 2000) (citing Welch v. Bartlett, 196 F.3d 389, 393–95 (2d Cir. 1999)).

171. Beverati v. Smith, 120 F.3d 500, 504 (4th Cir. 1997). The inmates did not spend the entire six months in these conditions; they cleaned their cells with their clothes and shampoo. *Id.*

172. *McClary I*, 4 F. Supp. 2d at 198 (discussing the confusion about whether *Sandin* applies to administrative segregation). *See also* Person v. Campbell, 182 F.3d 918, 918 (6th Cir. 1999); Griffin v. Vaughn, 112 F.3d 703, 708 (3rd Cir. 1997); Talley v. Hesse, 91 F.3d 1411, 1413 (10th Cir. 1996); Pichardo v. Kinker, 73 F.3d 612, 613 (5th Cir. 1996).

173. Sandin v. Conner, 515 U.S. 472, 486 (1995).

174. *Id.* at 487.

for the deprivation that is central to the *Sandin* analysis," and the label placed on the type of solitary confinement should not be determinative.[175]

Courts consistently agree that when applying *Sandin* to administrative segregation due process, lower courts look at the actual, rather than the potential, time served in isolation when determining whether a liberty deprivation occurred.[176] Administrative segregation is inherently limitless in duration.[177] Considering the potential deprivation, rather than the actual deprivation, would ensure that inmates facing administrative segregation receive higher procedural safeguards.[178] Perhaps optimistically, the Second Circuit assumes that when an inmate is likely to endure significant liberty deprivation, correctional facilities will have the foresight to offer them some form of process.[179]

Finally, many courts do not directly address the requirement that the transfer to segregation must be atypical. A New York district court again appears to be the exception.[180] In *Scott v. Coughlin*, a New York district court denied summary judgment to the state in a case where the inmate had endured a sixty-day administrative segregation.[181] The court stated that evidence showing how often inmates face administrative segregation would be relevant.[182]

Therefore, when analyzing an inmate's due process violation claim, courts should consider the confinement conditions relative to the jurisdiction's chosen baseline, the segregation duration, the segregation type (disciplinary or administrative), and, for an administrative transfer, the administrative segregation frequency.

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175. *McClary I*, 4 F. Supp. 2d at 199.

176. *See, e.g.*, *McClary I*, 4 F. Supp. 2d at 199–200; *see also Sandin*, 515 U.S. at 472–73.

177. *McClary I*, 4 F. Supp. 2d at 200 n.2.

178. *See* Mims v. Shapp, 744 F.2d 946, 951–52 (3rd Cir. 1984). The pre-*Sandin* approach for evaluating an inmate's due process claims included considering the potential liberty deprivation. *See id.*

179. Scott v. Albury, 138 F.3d 474, 478 (2d Cir. 1998) ("[O]ne assumes that states will take the precaution of providing the required level of due process to every inmate who realistically faces a punishment that is atypical under *Sandin*, a precaution that would render the actual punishment rule perfectly workable.").

180. Scott v. Coughlin, 78 F. Supp. 2d 299, 311 (S.D.N.Y. 2000); Lee v. Coughlin, 26 F. Supp. 615, 619–23 (S.D.N.Y. 1998) (reproducing the tables of data which led the court to conclude that the plaintiff's confinement was atypical). Although the Third Circuit has mentioned the requirement that the transfer be atypical, the court merely held that it was "apparent" that such transfers were not atypical. Griffin v. Vaughn, 112 F.3d 703, 708 (3rd Cir. 1997). The court did not discuss the evidence that led to that conclusion or how frequently inmates faced administrative segregation. *Id.* However, in March 1997, Pennsylvania reported Supermax capacity of 0.5 % of the inmate population, and space in additional facilities for disciplinary and "other" routine segregation amounting to ten percent of the inmate population. *Supermax Housing*, *supra* note 19, at 6.

181. *Scott v. Coughlin*, 78 F. Supp. 2d at 311.

182. *Id.*

2. Procedural Protections for Inmates with a Liberty Interest

After finding a liberty interest, courts proceed to the second prong of the analysis to determine whether adequate procedural safeguards were in place.[183] To find the amount of process due, some courts balance the risk of erroneous deprivation plus the magnitude of the deprivation against the government's interests and the burden of establishing procedural safeguards.[184] The balance is initially tipped in favor of upholding state DOC policies, as courts must give state DOCs extreme deference.[185]

The Supreme Court laid out the process due inmates facing disciplinary[186] and administrative segregation.[187] Inmates facing disciplinary segregation must be given written notice of the claimed disciplinary infraction, an opportunity to be heard and present evidence, and—after the disciplinary hearing—a written statement of the evidence relied upon for the disciplinary transfer.[188] Inmates facing administrative segregation must only receive notice and an opportunity to be heard.[189] Therefore, fewer procedural protections are afforded inmates facing indefinite confinement in isolation than inmates facing finite disciplinary sentences.[190]

Commentators have criticized this inconsistency.[191] Inmates risking a greater liberty deprivation are afforded less process.[192] Under the traditional *Mathews v. Eldridge*[193] test for determining adequate procedural protections, the process afforded STG member inmates is inadequate in light of the huge liberty interest at stake: the significant risk of erroneous STG validation and subsequent segregation,[194] and the relatively small administrative cost to produce actual evidence of inmate misconduct for transfers to a Supermax.[195]

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183. *Prisoner's Rights*, *supra* note 146, at 911–12.

184. Mathews v. Eldridge, 424 U.S. 319, 335 (1976); Austin v. Wilkinson (*Austin I*), 189 F. Supp. 2d 719, 741, 745 (N.D. Ohio 2002) (employing the *Mathews* test explicitly), *subsequent determination in* 204 F. Supp. 2d 1024 (N.D. Ohio 2002), *aff'd in part and rev'd in part by* 372 F.3d 346 (6th Cir. 2004).

185. Sandin v. Conner, 515 U.S. 472, 482 (1995).

186. Wolff v. McDonnell, 418 U.S. 539, 563 (1974).

187. Hewitt v. Helms, 459 U.S. 460, 476 (1983). Although *Sandin* refashioned the procedure for finding a liberty interest, it did not overrule *Hewitt*'s procedural requirements for inmates facing a liberty deprivation. *Sandin*, 515 U.S. at 484 n. 5 (1995) (noting that the decision only abandons *Hewitt*'s approach to finding a liberty interest).

188. *Wolff*, 418 U.S. at 566.

189. *Hewitt*, 459 U.S. at 476.

190. Tachiki, *supra* note 60, at 1135. However, because administrative segregation is indefinite, a New York district court has found that inmates must be provided with a meaningful review of their classification. McClary v. Coughlin, 87 F. Supp. 2d 205, 214 (W.D.N.Y. 2000) ("Due process is not satisfied where the periodic review is a sham or a fraud." (quoting the trial transcript)).

191. *See* Tachiki, *supra* note 60 *passim*.

192. *Id.* at 1135.

193. Mathews v. Eldridge, 424 U.S. 319 (1976).

194. As ADC's STG expert, Brian Parry, says, "gang membership is difficult to ascertain with precision absent evidence of overt acts, self admission, [or] gang related

More procedure may be afforded to inmates facing disciplinary segregation simply because there is *something* to prove. The inmate is being punished, and there is likely to be evidence detailing his misconduct. Courts will seek to protect the wrongfully accused. In contrast, administratively segregated inmates are not being punished, and often have done nothing wrong beyond the crime for which they were convicted. There is no risk that the inmate has been wrongfully accused, and courts are hesitant to second-guess purely bureaucratic, administrative decisions.[196]

Courts should refrain from blindly applying the prescribed procedural protections defined by the Supreme Court. The Court decided the procedure-defining cases mentioned above before the proliferation of Supermaxes.[197] The inmates were transferred to isolated units, but they were not sent to Supermaxes. The deprivation and corresponding liberty interest associated with a Supermax transfer are likely to be greater than those associated with pre-Supermax segregation. If a court finds that a Supermax transfer implicates an inmate's liberty interest, it should engage in the *Mathews v. Eldridge* balancing test and require more procedural protections to account for the greater liberty interest at stake.[198]

C. Due Process with Teeth: The Evidentiary Component

The procedural protections afforded inmates ring hollow if the evidence relied upon to transfer them to Supermaxes is unreasonable or unreliable.[199] The Supreme Court has held that when a DOC impairs an inmate's protected liberty interest, there must be some evidence in the record to support the deprivation.[200] The Court held that such a requirement would not impose an undue burden on the state, and would protect the inmate from arbitrary liberty deprivations.[201] As the Ninth Circuit noted, the Supreme Court set the bar extremely low by holding that as long as there is any evidence that could support the disciplinary action, there is no due process violation.[202] The Ninth Circuit, by contrast, requires that there be some indicia of reliability if the evidence is to be relied upon.[203]

District Courts in Ohio and Arizona have recently scrutinized the practice of sending inmates to Supermaxes. Both found that the evidence relied on by the

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offenses." Koch v. Stewart, Nos. 01-16891, 02-15061, 2002 WL 32136389, at *7 (9th Cir. June 12, 2002). Of course, ADC requires none of these.

195. Tachiki, *supra* note 60, at 1138–45.

196. *See* Blyther v. N.J. Dep't. of Corrections, 730 A.2d 396, 400 (N.J. Super. Ct. App. Div. 1999).

197. Hewitt v. Helms, 459 U.S. 460 (1983) (inmate incarcerated in a Pennsylvania prison); Wolff v. McDonnell, 418 U.S. 539 (1974) (inmate incarcerated in a Nebraska prison). The first Supermax opened in 1978. RIVELAND, *supra* note 2, at 5. Pennsylvania's first Supermax opened in 1992. *Supermax Housing*, *supra* note 19, at 6.

198. *See Mathews*, 424 U.S. at 319.

199. *See* Cato v. Rushen, 824 F.2d 703, 705 (9th Cir. 1987).

200. Superintendent v. Hill, 472 U.S. 445, 454 (1985).

201. *Id.* at 454–55.

202. *Cato*, 824 F.2d at 704.

203. *Id.*

respective DOCs was insufficient.[204] Both courts indicated that the type of evidence was either unreasonable, or not a rational basis for transferring the plaintiff-inmates to Supermaxes.[205] In addition, uncorroborated testimony from inmates attempting to buy their way out of a Supermax by testifying against other inmates is unreliable.[206] These two cases are discussed in detail in Sections V.A and V.D.

IV. ATTACKS ON THE PRACTICE OF SENDING STG-MEMBER INMATES TO SUPERMAXES

This Part elaborates on the dangers of transferring inmates to Supermax facilities based solely on group affiliations. First, Subpart V.A notes that because some Supermax facilities have been built to meet political demands—rather than to address actual security needs—prison officials may be compelled to fill the expensive Supermax units with inmates who do not deserve the highest security level classification. This Part also discusses one court's proposed procedural remedies to the over-classification problem. Second, Subpart V.B shows how some religious groups have been labeled as STGs, allowing DOCs to trample on their First Amendment right of free religious exercise. Third, Subpart V.C posits that when DOCs are allowed to rely on tenuous evidence of group affiliations to send inmates to Supermaxes, the risks of retaliatory transfers increases. Finally, Subpart V.D discusses a recent Arizona case, which may provide an example of over-classification or retaliation that exemplifies why inmate misconduct should be necessary before the inmate is segregated, and outlines heightened procedural protections for inmates facing administrative transfers.

A. The Threat of Rampant Over-Classification

Many state Supermaxes were created for political reasons, not because state DOCs felt that Supermaxes were necessary to meet correctional needs.[207] It is more expensive to house an inmate in a Supermax than in a traditional, maximum-security facility.[208] Additional procedural steps should be taken to ensure that these expensive facilities are used to house inmates who pose a great threat to the

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204. Austin v. Wilkinson (*Austin I*), 189 F. Supp. 2d 719, 735–36, 747 (N.D. Ohio 2002), *subsequent determination in* 204 F. Supp. 2d 1024 (N.D. Ohio 2002), *aff'd in part and rev'd in part by* 372 F.3d 346 (6th Cir. 2004); Koch v. Lewis (*Koch III*), 216 F. Supp. 2d 994, 1004, 1007 (D. Ariz. 2001). These cases are discussed *infra* at Subparts V.A and V.D.

205. *Austin I*, 189 F. Supp. 2d at 735–36, 747; *Koch III*, 216 F. Supp. 2d at 1004, 1007.

206. Tachiki, *supra* note 60, at 1128.

207. RIVELAND, *supra* note 2, at 7; Kurki & Morris, *supra* note 5, at 421.

208. *Austin I*, 189 F. Supp. 2d at 734 n.17 (citing Ohio Department of Rehabilitation and Corrections data stating a cost of $49,000 per year to house an inmate in Ohio's Supermax versus $34,000 per year to house an inmate in Ohio's maximum-security prisons); DeMaio, *supra* note 6, at 216 (citing estimates of $31,500 per year to house an inmate in Wisconsin's Supermax versus $20,700 per year to house inmates in other Wisconsin state prisons).

security of the general prison population, rather than being used to catch the spillover from a state's overcrowded, lower security facilities.[209]

A district court in Ohio recently concluded that lack of procedural protections for transfer to a Supermax combined with a rampant disregard of the prison Reclassification Committee's recommendations to lower several inmates' security levels violated the inmates' due process rights.[210] In *Austin v. Wilkinson*, the court determined the confinement conditions and lengthy duration in administrative segregation implicated the inmates' liberty interests.[211] Applying the *Mathews v. Eldridge* balancing test to determine the scope of the required process,[212] the court found that an important inmate interest was at stake, that the risk of erroneous transfer to the Supermax was high, and that increasing procedural safeguards would not impair a legitimate state interest and would place little administrative burden on the prison.[213] Characterizing a transfer as disciplinary or administrative should not determine the amount of process an inmate receives when facing time in a Supermax.[214] The court explained that the substance of the transfer, and not its name, determines the amount of process due.[215] Therefore, the court held that inmates were entitled to reasonable notice of the charges against them, a hearing at which the inmates could present evidence and call witnesses,[216] and a statement of all of the evidence the state had gathered against them.[217] In addition, after the final decision, the inmate must be notified of the evidentiary reasons relied upon for the transfer.[218] The court concluded that the old procedures for reviewing the inmate's security level classification did not provide for notice, opportunity to be heard, or access to the decision-maker, and should be adjusted to provide adequate process.[219]

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209. DeMaio, *supra* note 6, at 220–21; *see also* HUMAN RIGHTS WATCH, *supra* note 128, § V (discussing inmates' class action lawsuit claiming that minor infractions were being used to transfer disfavored, politically active, or litigious inmates to a Supermax facility).

210. *Austin I*, 189 F. Supp. 2d at 754.

211. *Id.* at 742.

212. *Id.* at 745.

213. *Id.* at 745–46.

214. *Id.* at 744.

215. *Id.* This step in the decision was important, as blindly applying the required procedures for an administrative transfer, outlined in *Hewitt v. Helms*, 459 U.S. 460, 476 (1983), would have totally ignored the conditions in Ohio's Supermax and the facts of the case. In *Hewitt*, where the conditions of confinement were not as harsh as in today's modern Supermaxes, the Court explicitly found that the inmates' interest was not of great consequence. 459 U.S. at 473.

216. The inmate may call witnesses "when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals." Wolff v. McDonnell, 418 U.S. 539, 566 (1974).

217. *Austin I*, 189 F. Supp. 2d at 747. A statement of the evidence against them prevents inmates from having to respond to vague allegations. *Id.*

218. *Id.* at 752.

219. *Id.* at 731. The court issued a supplemental decision detailing the requirements. Austin v. Wilkinson (*Austin II*), 204 F. Supp. 2d 1024 (N.D. Ohio 2002), *rev'd in part by* 372 F.3d 346, 359–60 (6th Cir. 2004) (upholding all procedural

The Sixth Circuit upheld all of the procedural modifications imposed by the district court.[220] The prison officials argued that limiting Supermax transfer decisions to matters disclosed in the notice given to the inmate was "burdensome,"[221] and that they should be entitled to rely on "rumor, reputation, and even more imponderable factors" when deciding who to send to their Supermax.[222] The Sixth Circuit, after reviewing the detailed factual record and carefully reapplying the *Mathews* test itself, was not persuaded.[223]

The Supreme Court has granted certiorari, and argument is set for March 30, 2005.[224] The narrow question presented is, essentially, do prisons owe inmates facing transfers to Supermaxes anything beyond notice and opportunity to be heard? The Court's decision may hinge on the depth of the factual record. If the Court does not distinguish between transfers to Supermaxes and general administrative segregation (to a non-Supermax), then it may apply *Hewitt v. Helms*[225] and decide that inmates need only notice and opportunity to be heard. However, if the grotesque nature of the Supermax and the high risk of erroneous deprivation due to the vagaries of STG member validation come to light, the Court may hold the *Mathews*[226] scale tips a bit further in favor of the inmate. The trial court had the luxury of exploring all the relevant facts before deciding the case. Unfortunately, the Supreme Court will not.

The facts in *Austin* paint a clear picture of why meaningful evidence (i.e., the reason why they are being transferred) must be presented to inmates facing prolonged, isolated segregation. The trial court heard details about the conditions in Supermax prisons before concluding that transferring inmates to Supermaxes implicates a liberty interest.[227] But the conditions were not the only persuasive factor.

The *Austin* court was concerned by the fact that the state—at trial—was unable to present any reliable evidence indicating the inmates posed a threat to the harmony of the prison.[228] Ohio had recently built its first Supermax, the Ohio State Penitentiary ("OSP").[229] The OSP was built to house "prisoners who were hellbent

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requirements and reversing three substantive requirements that specified when a prisoner should be eligible for transfer to a Supermax), *cert. granted*, 125 S. Ct. 686 (2004).

220. Austin v. Wilkinson (*Austin III*), 372 F.3d 346, 359–60 (6th Cir. 2004) (reversing as to the three substantive changes imposed by the district court, which, in the interest of brevity, are not discussed here).

221. *Id.* at 359.

222. *Id.*

223. *Id.*

224. Wilkinson v. Austin, 125 S. Ct. 686 (2004). The Court's schedule is available at http://www.supremecourtus.gov/oral_arguments/argument_calendars/monthlyargumentcalmarch2005.pdf.

225. 459 U.S. 460 (1983).

226. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

227. Austin v. Wilkinson (*Austin I)*, 189 F. Supp. 2d 719, 724–26 (N.D. Ohio 2002).

228. *Id.* at 732–33, 735–36.

229. *Id.* at 723.

on disrupting the orderly operation of [Ohio's] correctional institutions."[230] Faced with a lack of "the most predatory and dangerous prisoners,"[231] Ohio started filling the beds with inmates who did not need such high levels of security.[232]

In some cases, there was scant evidence that the inmates may have been affiliated with STGs several years earlier,[233] and the state presented no evidence of disruptive behavior by the inmates while in prison.[234] In one case, an inmate was hit in the head—from behind—with a spatula while he stood in line for food.[235] The inmate did not retaliate, and was not charged with any rule violation.[236] From the validation hearing record, it appears that being hit in the head, from behind, with a spatula, was "some evidence" the inmate was a gang leader, as he appeared to be the target of violence.[237] Given the luxury of a bench trial, the district court heard about the plight of several inmates whose transfers seemed irrational at best.[238]

In addition, OSP was not following its own rules. OSP had laid out specific criteria to determine whether the prison should change an inmate's security level.[239] In some cases, while the inmates' forms indicated they were ready for a security level decrease, they were instead reassigned to administrative segregation—the highest security classification level.[240] While OSP officials presented evidence that some gangs were violent and disruptive, they were unable to link the inmates to any gang activity during the prior two years or to any violent behavior.[241] Furthermore, OSP's own rules required evidence of gang leadership, not mere gang affiliation, before reassignment to administrative segregation was appropriate.[242]

Under OSP's rules, inmates were entitled to a Reclassification Committee's annual review of their assignments to administrative segregation.[243] The Reclassification Committee frequently recommended reassignment for inmates to lower security level housing.[244] Their recommendations, however, were subject to review by the Regional Director.[245] For no apparent reason, the Regional Director systematically denied about half of the Reclassification Committee's

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230. *Id.*
231. *Id.*
232. *Id.* at 724 (discussing that *state* witnesses testified to the haphazard way in which inmates were assigned to OSP).
233. *Id.* at 733.
234. *Id.* at 732–33, 735.
235. *Id.* at 732–33.
236. *Id.* at 733.
237. *Id.* at 748.
238. *Id.* 728–31.
239. *Id.* at 732 n.15.
240. *Id.* at 733.
241. *Id.* at 733.
242. *Id.*
243. *Id.* at 752 (discussing changes to be made to the current reclassification procedure).
244. *Id.* at 753.
245. *Id.*

recommendations for reassignments to lower security levels.[246] On these facts, it appears prudent to require prison officials to articulate the evidence and reasoning they rely on; it might inspire them to acquire real evidence and to make rational decisions.

One can only hope that the Supreme Court is given sufficient facts before it reaches its conclusion. The problems laid out in *Austin* are, unfortunately, not isolated. Other DOCs may have fallen prey to the "because we have built it, they will come" rationale.[247] Indiana used minor rule infractions to transfer "disfavored, politically active or litigious prisoners" to a Supermax.[248] Wisconsin transferred inmates to a Supermax to alleviate overcrowding.[249] Additional procedural and evidentiary requirements may assist these facilities in determining how to best utilize their most expensive and draconian prison cells.[250]

B. The Threat of Religious Persecution

The ability of DOCs to classify religious groups as STGs creates a possibility of unfairly targeting religious minorities. One expert on prison gang management testified that he would validate the Catholic Church as an STG if numerous inmates identified as Catholics were written up for violent acts.[251]

Some state DOCs have validated minority religious groups—predominantly black Muslim groups—as STGs.[252] When a religious group is characterized as an STG, it becomes easier to treat the entire group as a gang, rather than determine which group members are acting in a gang-like fashion.[253]

Before 2000, courts found that prisons could classify religious groups as STGs without running afoul of the First Amendment right to free religious exercise.[254] However, in 2000, Congress enacted the Religious Land Use and

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246. *Id.* at 736, 753.

247. DeMaio, *supra* note 6, at 207.

248. *Id.* at 221.

249. *Id.* at 220.

250. *Id.*

251. Marria v. Broaddus (*Marria II*), No. 97 Civ.8297 NRB, 2003 WL 21782633, at *17 n.34 (S.D.N.Y. July 31, 2003).

252. *See id.* at *1 (New York validated the Nation of Gods and Earths as an STG); *see also* Sutton v. Rasheed, 323 F.3d 236, 254 (3rd Cir. 2003) (failing to find a legitimate penological reason for why Pennsylvania did not allow Nation of Islam texts to the Nation of Islam members who were incarcerated in a Supermax); Fraise v. Terhune, 283 F.3d 506, 521 (3d Cir. 2002) (upholding New Jersey policy validating the Nation of Gods and Earths as an STG); *In re* Long Term Administrative Segregation of Inmates Designated as Five Percenters v. Moore, 174 F.3d 464, 469–71 (4th Cir. 1999) (finding ample evidence to support South Carolina validating the same group as an STG); Johnson v. Martin, 223 F. Supp. 2d 820, 822–23 (W.D. Mich. 2002) (upholding Michigan validating the Melanic Islamic Palace of the Rising Sun as an STG).

253. *Marria II*, 2003 WL 21728633, at *18 n.35.

254. *See, e.g.*, *Fraise*, 283 F.3d at 521 (affirming the district court's finding that prisons could classify religious members of the Nation of Gods and Earths as gang members); *In re Five Percenters*, 174 F.3d at 469–71 (holding that classification of members of religious group and transfer of inmates to administrative segregation does not

Incarcerated Persons Act ("RLUIPA")[255] to increase the level of scrutiny courts use when reviewing prison regulations that burden religious exercise. Under the RLUIPA, state prisons that accept federal funds cannot substantially burden an inmate's religious exercise absent a compelling purpose.[256]

Treating religious groups like STGs substantially burdens the free exercise of religion.[257] Once a group of inmates is validated as an STG, they may not possess group literature, congregate at regular meetings, or informally gather with other group members.[258] Some DOCs permit inmate transfers to Supermaxes based on group membership alone, while others require, or purport to require, "core" group membership.[259]

A New York district court recently found that banning religious literature and validating a religious group as an STG violated an inmate's free exercise rights under the First Amendment and the RLUIPA.[260] The court found that the inmate possessed sincerely held religious beliefs as a member of the Nation of Gods and Earths ("Nation"),[261] and that the inmate's beliefs deserved protection.[262]

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violate the First Amendment); *accord* Allah v. Dep't. of Corrections, 742 A.2d 162 (N.J. Super. Ct. App. Div. 1999).

255. Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C.A. § 2000cc (West 2005).

256. RLUIPA, 42 U.S.C.A. § 2000cc (West 2005). The majority of courts dealing with inmate claims under the RLUIPA have found that the RLUIPA is constitutional. *See generally* Madison v. Riter, 355 F.3d 310, 318–19 (4th Cir. 2003); Charles v. Verhagen, 348 F.3d 601, 610 (7th Cir. 2003); Mayweathers v. Newland, 314 F.3d 1062, 1069 (9th Cir. 2002); Williams v. Bitner, 285 F. Supp. 2d 593, 601 (M.D. Pa. 2003); Johnson v. Martin, 223 F. Supp. 2d 820, 825–27, 830 (W.D. Mich. 2002) (finding that the RLUIPA is a valid exercise of the Congressional spending power, and finding no establishment clause violation); John V. Dvorske, *Validity, Construction, and Operation of Religious Land Use and Institutionalized Persons Act of 2000 (42 U.S.C.A. §§ 2000cc et seq.)*, 181 A.L.R. FED. 247. *But see* Cutter v. Wilkinson, 349 F.3d 257, 268 (6th Cir. 2003) (finding that the RLUIPA unconstitutionally favors the right of religious exercise over other fundamental rights in violation of the establishment clause).

257. *Marria II*, 2003 WL 21782633, at *13–14.

258. *See Fraise*, 283 F.3d at 509–11; Marria v. Broaddus (*Marria I*), 200 F. Supp. 2d 280, 282 (S.D.N.Y. 2002).

259. *Fraise*, 283 F.3d at 510 ("core" membership required); *In re Five Percenters*, 174 F.3d at 467 (STG affiliation enough); ARIZONA DO-806, *supra* note 37 (STG affiliation enough).

260. U.S. CONST. amend. I; RLUIPA, 42 U.S.C.A. § 2000cc; *Marria II*, 2003 WL 21782633, at *18.

261. The Nation of Gods and Earths is also known as the Five Percent Nation, due to the tenet that they are among the five percent of the world who are the poor righteous teachers, who must attempt to dispel the ten percent white-devil's myth of a mystery god. The other eighty-five percent are the easily mislead masses. *Marria I*, 200 F. Supp. 2d at 284 n.2.

262. *Marria II*, 2003 WL 21782633, at *19–21 (finding that both banning literature and validating the Nation as an STG violated inmate's free exercise rights under the RLUIPA, holding that specific religious texts could not be banned, and—while finding that the group was religious—not addressing the remedy for STG validation, and remanding to DOC for reassessment of the policy prohibiting gatherings).

The New York DOC conceded that the Nation's literature was innocuous, but argued that the materials were used to recruit new members of a dangerous and violent gang.[263] The DOC's Deputy Superintendent of Security Services testified that some Nation members were sincere, while others behaved in a gang-like fashion.[264] The court concluded that, under the RLUIPA, DOCs cannot continue to treat the Nation as an STG, and must reevaluate their policies to determine what accommodations can be made for the Nation.[265] The court also found that the New York DOC may not ban all Nation literature.[266] While this case marks a victory for New York's incarcerated Nation members, problems exist in other state facilities.[267]

C. The Threat of Retaliation

Prison officials often retaliate against inmates who attempt to remedy prison injustices by filing prison grievance reports.[268] The Prison Litigation Reform Act ("PLRA")[269] requires that inmates exhaust internal grievance procedures before they can file official complaints with courts.[270] Although the PLRA has been criticized because it singles out one unsavory group of litigants—inmates—and imposes a series of special rules designed to deter inmate lawsuits, it is unlikely any court will find it unconstitutional.[271] The PLRA, therefore, subjects

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263. *Id.* at *6. The Nation studies religious texts such as the Bible and the Koran, recent texts including the Supreme Alphabet, 120 Degrees, and Supreme Mathematics, and a newsletter published by the Nation outside prison. *Id.* at *13. All materials are widely available outside of prison, and cannot be used as code to transmit gang messages. *Marria I*, 200 F. Supp. 2d at 287.

264. *Marria II*, 2003 WL 21728633, at *15 n.29.

265. *Id.* at *19.

266. *Id.* at *19–20.

267. Larry P. Mitchell, *Prisons Labeling Blacks as Terrorists*, S.F. BAY VIEW.COM, Nov. 11, 2003 (describing the indiscriminant transfer of eighty black Muslims to California's Supermax after a violent incident between one black Muslim inmate and a guard). In addition, the cases resolved before the enactment of the RLUIPA indicate that some states need to revisit the issue. For example, the Fourth Circuit and a district court in the Third Circuit have upheld the constitutionality of the RLUIPA. *See* Madison v. Riter, 355 F.3d 310, 318–19 (4th Cir. 2003); Williams v. Bitner, 285 F. Supp. 2d 593, 601 (M.D. Pa. 2003). But both pre-RLUIPA circuits found that classification of the Nation as an STG was a valid exercise of DOC discretion pre-RLUIPA. Fraise v. Terhune, 283 F.3d 506, 521 (3rd Cir. 2002); *In re* Long Term Administrative Segregation of Inmates Designated as Five Percenters v. Moore, 174 F.3d 464, 466 (4th Cir. 1999).

268. *See* John Boston, *The Prison Litigation Reform Act: The New Face of Court Stripping*, 67 BROOK. L. REV. 429, 454 n.7 (2001) (providing a partial list of successful inmate claims of retaliation for filing grievances); DeMaio, *supra* note 6, at 221 (recounting the problem in Indiana, where nuisance inmates were transferred to a Supermax).

269. Prison Litigation Reform Act of 1995 (PLRA), Pub. L. No. 104-134, 110 Stat. 1321 (codified at 11 U.S.C.A. § 523; 18 U.S.C.A. §§ 3601, 3624, 3626; 28 U.S.C.A. §§ 1326, 1346, 1915, 1915A, 1932; 42 U.S.C.A. §§ 1997a–c, e–f, h).

270. 42 U.S.C.A. § 1997e(a) (West 2005).

271. Boston, *supra* note 268, at 429–30; Susan N. Herman, *Slashing and Burning Prisoners' Rights: Congress and the Supreme Court in Dialogue*, 77 OR. L. REV. 1229, 1290 (1998).

inmates to more frequent risks of retaliation.[272] When prison officials enjoy near unfettered discretion to decide who is placed in Supermax facilities, inmates may face long periods in isolation if they use the internal grievance system.[273]

In Arizona, inmate Mark Koch survived a defendant's motion for summary judgment on retaliation claims.[274] Koch, "commended for his exemplary behavior" on several occasions, was a jailhouse lawyer with a few successes in the courts.[275] He was incarcerated in medium security facilities before his transfer to a Supermax.[276] The court found the chronology of events leading up to his transfer were more than adequate to support a retaliation claim.[277]

DOC initially claimed Koch was transferred because of a positive drug test, but after the enactment of a new STG policy, it validated Koch as an STG member and proceeded to rely on the STG validation as grounds for the transfer.[278] Although the retaliation claim was dropped,[279] Koch won on his due process claims.[280] The story reflects why STG validation is a shaky, unreliable ground for transfer to a Supermax.

D. A Sweeping Condemnation of Arizona's STG Policy

In Arizona, once an inmate is validated as an STG member, he is sent to administrative segregation in a Supermax facility ("SMU-II") until his sentence expires or until he successfully "debriefs."[281] To successfully debrief, an inmate must provide names of STG members to prison officials.[282] Therefore, the inmate is no longer safe in the general population, and is transferred to protective segregation in another maximum-security facility (often another Supermax, SMU-I).[283] The confinement conditions in SMU-I are largely similar to the conditions in SMU-II, although some privileges are restored to the inmate.[284] Therefore, even for the small number of inmates who successfully debrief, STG validation means that many inmates will spend their sentence remainders with little or no contact with other inmates.[285]

In *Koch III*, a federal district court judge considered the Arizona DOC policy regarding STG member transfer to control units as applied to inmate

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272. Boston, *supra* note 268, at 431.
273. *See* Koch v. Lewis (*Koch II*), 96 F. Supp. 2d 949 (D. Ariz. 2000).
274. Koch v. Lewis (*Koch I*), 62 F.3d 1424 (9th Cir. 1995).
275. *Koch II*, 96 F. Supp. 2d at 952 nn.3–4, 956.
276. Koch v. Lewis (*Koch III*), 216 F. Supp. 2d 994, 996 (D. Ariz. 2001).
277. *Koch II*, 96 F. Supp. 2d at 956.
278. *Id.* at 952, 955.
279. *Koch III*, 216 F. Supp. 2d at 996 n.3.
280. *Id.* at 1007.
281. *Id.* at 997; ARIZONA DO-806, *supra* note 37.
282. *Koch III*, 216 F. Supp. 2d at 997.
283. *Id.* at 998.
284. *Id.*
285. *Id.*

Koch.[286] For reasons that are still unclear, inmate Koch spent sixty-six months in SMU-II.[287]

In 1996, Koch was notified he had been identified as an STG member.[288] According to Arizona DOC policy, suspected gang members must be "validated" at a prison hearing.[289] Koch was validated as an STG member at a hearing, although he "received little or no notice or details of the charges against him."[290] Koch was, therefore, revalidated in 1998 under new Arizona procedures.[291] At the new hearing, Arizona cited three pieces of evidence against Koch: "1) a photograph of Koch posing with alleged [STG] members; 2) [four] incident reports noting that Koch had been observed associating with known [STG] members; and 3) purported membership lists identifying Koch as an [STG] affiliate."[292] The court found that the evidence was flimsy and outdated because it relied on a seventeen-year-old prison rodeo photograph, prior lawful associations, and contacts Koch made while working as a prison legal assistant.[293] Nevertheless, the court assumed for the purposes of Koch's due process claim that the evidence was sufficient to support his validation.[294] Koch alleged that his assignment to SMU-II based on STG validation and no instances of misconduct violated his due process rights.[295] The court agreed.[296]

After hearing evidence of the SMU-II conditions and the psychological peril faced by inmates in SMU-II, the court not only found a significant liberty deprivation,[297] but also that the entire practice of sending inmates to Supermaxes based on status alone—with no charges or evidence of specific inmate misconduct—violated due process.[298]

The *Koch III* court explained that due process provides inmates with both procedural and evidentiary protections.[299] While notice, an opportunity to be heard, and periodic review of classification status may fulfill the procedural safeguard requirements of due process, some evidence is required to fulfill the evidentiary safeguard requirements.[300] As the court pointed out, "[t]hese evidentiary protections operate 'to prevent arbitrary deprivations without threatening

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286. *Id.* This is one of a series of fourteen published and unpublished opinions documenting Koch's "epic journey" through the courts. *Id.* at 996.

287. *Id.* at 998.

288. *Id.* at 997.

289. ARIZONA DO-806, *supra* note 37. Koch also claims that the hearings were a sham. *Koch II*, 96 F. Supp. 2d at 956.

290. *Koch III*, 216 F. Supp. 2d at 997.

291. *Id.*

292. *Id.* at 997, 1004.

293. *Koch II*, 96 F. Supp. 2d at 956.

294. *Id.* at 1004, n.14.

295. *Koch III*, 216 F. Supp. 2d at 996.

296. *Id.*

297. *Id.* at 1002.

298. *Id.* at 1007.

299. *Id.* at 1003.

300. *Id.*

institutional interests or imposing undue administrative burdens.'"[301] The court concluded that there must be "'some evidence' with 'indicia of reliability' sufficient to justify placing Koch in SMU II for an indefinite (likely permanent) term."[302]

As the court construed *Sandin*[303] and *Wolff*,[304] "the nature of the deprivation is the paramount consideration in the due process analysis, critical at both the liberty and process stages of inquiry."[305] The court found Koch's indefinite and likely permanent assignment to SMU-II to be one of the "most severe deprivations of liberty that can be visited upon an inmate within [Arizona]."[306] Given the nature of the deprivation, the court found that sending an inmate to SMU-II based on status, with no evidence of misconduct, did not satisfy the evidentiary aspects of due process.[307] The court further noted:

> Determining the status of an inmate as a gang member is fraught with difficulties. According to one court-appointed monitor: "gang membership . . . is inherently virtually impossible to ascertain or discover with precision. The gang's only tangible existence is in the minds of the prisoners and prison officials. It is quite unlikely that any two individuals would independently list the same set of persons as members of the group."[308]

Thus, the court termed the assignment of inmates to SMU-II based on status alone to be a "precarious endeavor."[309]

The *Koch III* court relied on several scholarly reviews, including a study by the U.S. Department of Justice, concluding that "segregation should be 'solely based on actual behavior' because '[a]ttempting to use predictive criteria based on subjective information has led historically to unsatisfactory and possibly indefensible results.'"[310] The court also relied on precedent, analogizing STG affiliation with membership in the Communist Party, drug addiction, and homosexuality to find that liberty deprivations should be based on misconduct, not status.[311] Finally, the *Koch III* court ordered that Koch be transferred from SMU-II. The court later condemned Koch's initial transfer from SMU-II to the highly-restrictive Florence Central as non-compliance with the court's previous order.[312]

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301. *Id.* (citing Superintendent v. Hill, 472 U.S. 445, 455 (1985)).
302. *Id.*
303. Sandin v. Conner, 515 U.S. 472 (1995).
304. Wolff v. McDonnell, 418 U.S. 539 (1974).
305. *Koch III*, 216 F. Supp. 2d at 1004.
306. *Id.*
307. *Id.* at 1007.
308. *Id.* (citing *Madrid*, 889 F. Supp. 1146, 1272 n.221 (N.D. Cal. 1995) (omission in original)).
309. *Id.*
310. *Id.* at 1005 (quoting RIVELAND, *supra* note 2, at 7).
311. *Id.* at 1005–06.
312. Koch v. Lewis (*Koch IV*), No. Civ. 90-1872 PHX-JBM, 2001 WL 1944736, at *1–2 (D. Ariz. Nov. 21, 2001). Florence Central is another maximum-security facility with restrictive confinement conditions similar to SMU-II. The court was confused as to

In *Koch IV*, the court recognized that Arizona was faced with a significant gang problem, and left open the possibility of brief stays in SMU-II to deter gang membership.[313] Nonetheless, the court held that Arizona cannot continue to transfer STG-validated inmates to SMU-II for indefinite periods, where the only way out is to debrief, and where the transfer out is to similarly restrictive confinement conditions.[314]

The aftermath of *Koch III* is disappointing. Koch was released from prison before the case could be heard by the Ninth Circuit, and therefore *Koch III* was remanded to determine if it should be vacated as moot.[315] Arizona does not agree with the policy changes proposed by the *Koch* court,[316] and has not yet revised its STG policy.[317]

V. CONCLUSION

Policies that allow for inmate transfers to Supermaxes based solely on DOC-defined STG affiliations, rather than evidence of misconduct, are fraught with pitfalls. Arizona exemplifies the problems with sending STG member inmates to Supermaxes. First, the evidence of gang membership is often inherently unreliable, amplifying the risk of transferring inmates who are not STG members and who pose no threat to prison security. In addition, there are not enough Supermax cells in Arizona to house all of their STG members. Arizona does not have guidelines indicating which STG members are singled out. Finally, while Supermaxes effectively incapacitate segregated inmates, administrative segregation of STG members does not appear to significantly deter gang activity. Progressive solutions, such as inmate dispersion[318] (sending members of identifiable, cohesive, disruptive gangs to out-of-state facilities), increasing opportunities for productive prison work,[319] and inmate rehabilitation[320] (including educational, vocational, and substance abuse programs) are viable alternatives to sending non-violent inmates to SMU-II. While these measures require an initial investment, the state will save money in time by reducing the reliance on expensive Supermaxes, reducing recidivism rates, and eventually slowing the expansion of the prison population.

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why the other inmates in Florence Central were subjected to the harsh conditions and limited exercise regimens. *Id.*

313. *Koch III*, 216 F. Supp. 2d at 1006–07.

314. *Id.*

315. Koch v. Ryan (*Koch V*), 335 F.3d 993 (9th Cir. 2003).

316. *Koch IV*, 2001 WL 1944736, at *2.

317. Arizona DOC's STG policy is available at http://www.azcorrections.gov/Policies/806.htm.

318. RIVELAND, *supra* note 2, at 1.

319. Kassel, *supra* note 8, at 61–62.

320. *Id.*