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Bagaric, Mirko

Svilar, Jennifer

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THE CRUELTY OF SUPERMAX DETENTION AND THE CASE FOR A HARD-TIME SENTENCING DISCOUNT: A PRAGMATIC SOLUTION TO A MORAL SHORTCOMING

Mirko Bagaric* & Jennifer Svilar**

We should send offenders to prison as punishment, not for punishment. This principle is currently being violated for approximately 60,000 offenders who are caged in 'supermax' prison conditions in the United States. Prisoners subjected to supermax conditions suffer considerably more than those in conventional prison conditions. Many of these prisoners spend up to 23 hours in a small cell with no contact with any person. The conditions are traumatic. Emerging evidence demonstrates that these conditions cause considerable psychological and physical harm to prisoners. Understandably, there are growing calls to abolish confinement of this nature. However, there are no signs that abolition of supermax conditions will occur soon. In this Article, we make recommendations regarding the manner in which prison conditions should impact the length of a prison term. We suggest that for most prisoners, every day spent in supermax conditions should result in two days of credit towards the expiration of the prison term. Hard-time credits are justified by the principle of proportionality, which provides that the seriousness of the crime should be proportional to the hardship of the penalty. The main cohort of prisoners that should not be eligible for hard-time credits are serious sexual and violent offenders who are at risk of re-offending, as determined by the application of a risk assessment instrument. Infringement of the proportionality principle is justified in these circumstances because of a more important aspect of sentencing: community protection. Providing hard-time credits for most prisoners who are forced to endure supermax conditions will not overcome the ethical problems associated with this form of detention. Additional ethical questions are raised by the fact that African American and Hispanic inmates are disproportionately subjected to supermax confinement. The reform proposed in this Article provides a pragmatic solution to a considerable failing in our sentencing and prison systems. Implementing this reform would also disincentivize prison authorities from subjecting prisoners to cruel conditions and would do this in a manner that does not compromise community safety.

* Director of Evidence-Based Sentencing Project, Swinburne University.

** J.D. Candidate, University of Tennessee College of Law, 2020.

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I. INTRODUCTION

The United States has a serious incarceration problem. More than two million Americans are currently in prison.¹ This is the harshest form of punishment in our legal system, with the obvious exception of the death penalty.² The United States has the highest prison population of all nations, and by a considerable margin.³ Less than five percent of the world's population lives in the United States, yet the United States incarcerates approximately twenty-five percent of the entire world's prison population.⁴

The United States rapidly moved toward a state of mass incarceration due to an increasing crime rate and the War on Drugs, which led to the adoption of wide-ranging harsh, mandatory penalty regimes.⁵ These changes commenced about four decades ago and resulted in a rapid

1. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie*, PRISON POL'Y INITIATIVE (Mar. 19, 2019), <https://www.prisonpolicy.org/reports/pie2019.html> (explaining that the American criminal justice system currently holds 2.3 million incarcerations).

2. The United States is the only developed nation apart from Japan that still imposes the death penalty. *Death Penalty in 2018: Facts and Figures*, AMNESTY INT'L (Apr. 10, 2019), <https://www.amnesty.org/en/latest/news/2019/04/death-penalty-facts-and-figures-2018/>. The death penalty, because of its extreme nature, raises for discussion a number of different human rights and normative considerations. Indeed, the literature and analysis regarding the desirability of the death penalty is voluminous. It can only be examined in the context of a stand-alone dissertation focusing on this issue. This is not a meaningful limitation to this paper, given that not all states impose death penalty and that there have been fewer than 1,499 executions since 1976. *Facts About the Death Penalty*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf> (last updated May 31, 2019). There are twenty-nine states which still have the death penalty. *Id.*

3. See Roy Walmsley, *World Prison Population List*, WORLD PRISON BRIEF 2 (12th ed., Sept. 2018), https://www.prisonstudies.org/sites/default/files/resources/downloads/wppl_12.pdf. It is widely accepted that the United States has a "serious over-punishment" and "mass incarceration" problem. Lynn Adelman, *What the Sentencing Commission Ought to Be Doing: Reducing Mass Incarceration*, 18 MICH. J. RACE & L. 295, 295–96, 307–08 (2013); see also ANTHONY C. THOMPSON, *RELEASING PRISONERS, REDEEMING COMMUNITIES: REENTRY, RACE, AND POLITICS* 9–15 (2008); David Cole, *Turning the Corner on Mass Incarceration?*, 9 OHIO ST. J. CRIM. L. 27, 27–28 (2011); Sharon Dolovich, *Creating the Permanent Prisoner*, in *LIFE WITHOUT PAROLE: AMERICA'S NEW DEATH PENALTY?* 96–100 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2012); Bernard E. Harcourt, *Keynote: The Crisis and Criminal Justice*, 28 GA. ST. U. L. REV. 965, 970–78 (2012); Andrew E. Taslitz, *The Criminal Republic: Democratic Breakdown as a Cause of Mass Incarceration*, 9 OHIO ST. J. CRIM. L. 133, 153–64 (2011); Anne R. Traum, *Mass Incarceration at Sentencing*, 64 HASTINGS L. J. 423, 426–36 (2013); Clare Foran, *What Can the U.S. Do About Mass Incarceration?*, THE ATLANTIC (Apr. 28, 2016), <https://www.theatlantic.com/politics/archive/2016/04/ending-mass-incarceration/475563/>.

4. Tim Lau, *Sentencing Reform Should Be a Top Post-Election Priority for Congress*, BRENNAN CTR. FOR JUST. (Nov. 7, 2018), <https://www.brennancenter.org/blog/sentencing-reform-should-be-one-of-congress-top-post-election-priorities>.

5. See NAT'L RESEARCH COUNCIL, *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES* 118–21 (Jeremy Travis et al. eds., 2014) (for announcement of mandatory sentences by President Richard Nixon in 1971).

increase in imprisonment numbers, rising more than four-fold in the forty years to 2012.⁶ In the past few years, this trend has started to reverse. Prison populations have reduced approximately seven percent from 2009 to 2017.⁷ Although this trend is headed in the right direction, it is too slow. At this rate, it would take nearly half a century for the United States imprisonment rate to reduce to the international average.

The mass incarceration crisis has led to loud calls for a reduction in prison population.⁸ Hidden within the number of incarcerated prisoners lies an even more acute problem: the brutal and arguably inhumane manner in which tens of thousands of prisoners are confined.

Confinement in supermaximum (“supermax”) prison conditions often involves long periods of solitude and access to little more than life’s bare necessities. Supermax is synonymous with solitary and constitutes a meaningfully harsher deprivation than conventional prison conditions, which typically permit interactions with large numbers of other prisoners, visits from friends and relatives, access to educational programs, and the capacity to move around in relatively large spatial areas.⁹ The contrast between the conditions in supermax and conventional prison is so pronounced that it is verging on intellectual and legal sloppiness to describe both forms of confinement under the same terminology: “imprisonment.”

The principal consideration that should inform penalty severity is the principle of proportionality. This is the view that the seriousness of the crime should be matched by the hardship of the punishment.¹⁰ This principle commands that the additional burden experienced by prisoners

6. *Id.* at 13.

7. *United States Still Has Highest Incarceration Rate in the World*, EQUAL JUST. INITIATIVE (Apr. 26, 2019), <https://eji.org/news/united-states-still-has-highest-incarceration-rate-world>.

8. See, e.g., NAT’L RESEARCH COUNCIL, *supra* note 5, at 342–53; MICHAEL TONRY, SENTENCING MATTERS 134 (1996) [hereinafter TONRY, SENTENCING MATTERS]; Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 STAN. L. REV. 85, 89–95 (2005); Douglas A. Berman & Stephanos Bibas, *Making Sentencing Sensible*, 4 OHIO ST. J. CRIM. L. 37, 40–54 (2006); Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: “Proportionality” Relative to What?*, 89 MINN. L. REV. 571, 627–34 (2005) [hereinafter Frase, *Excessive Prison Sentences*]; Cassia Spohn, *Twentieth-Century Sentencing Reform Movement: Looking Backward, Moving Forward*, 13 CRIMINOLOGY & PUB. POL’Y 535, 536–39 (2014); Michael Tonry, *Crime and Human Rights—How Political Paranoia, Protestant Fundamentalism, and Constitutional Obsolence Combined to Devastate Black America: The American Society of Criminology 2007 Presidential Address*, 46 CRIMINOLOGY 1, 5–9 (2008) [hereinafter Tonry, *Crime and Human Rights*]; Michael Tonry, *Remodeling American Sentencing: A Ten-Step Blueprint for Moving Past Mass Incarceration*, 13 CRIMINOLOGY & PUB. POL’Y 503, 504–07 (2014) [hereinafter Tonry, *Remodeling American Sentencing*].

9. See *infra* Part II.

10. See *infra* Part IV.

who spend time in supermax conditions should be factored into the sentencing calculus. Presently there are approximately 60,000 offenders enduring supermax conditions in the United States.¹¹ They are suffering far more than offenders who are in normal prison conditions. Their additional suffering has no recognition in the sentencing or prison system. This is a profound oversight. The hardship of a prison sentence is currently measured primarily by its length, a quantitative measure. However, this is too simplistic because this measure fails to account for the qualitative severity of the punishment.

We propose that for each day in supermax prison, a prisoner should receive two days of credit towards fulfilling his or her term of imprisonment. This approach would make sentencing law and practice more jurisprudentially sound, dissuade prison authorities from subjecting prisoners to supermax conditions for trivial reasons, and would not compromise community safety. The main exception to this recommendation is for prisoners who are serving time for serious sexual and violent offences and who are assessed by a risk assessment instrument as continuing to present a meaningful threat to the community. Such prisoners should not receive an earlier release date because the objective of community safety trumps the principle of proportionality.

Ideally, supermax conditions would be banned or strictly restricted. These conditions are so severe that they should be used only in the rarest of circumstances. However, our recommendation is a practical compromise that stops short of imposing stricter regulations on supermax conditions because more significant regulatory changes would face significant political barriers. Medical and empirical data establishes that these conditions cause prisoners, who are subjected to them for a considerable time, significant physical and psychological ailments.¹² The ideal approach to this form of punishment is to abolish it, except in the rare instances where prisoners are repeatedly and uncontrollably violent towards prison guards or other prisoners. Indeed, there are now growing calls for abolition.¹³ Despite this, there is insufficient support for systematically reducing the use of supermax confinement. Therefore,

11. Judith Resnik, *Not Isolating Isolation*, in SOLITARY CONFINEMENT: EFFECTS, PRACTICES, AND PATHWAYS TOWARDS REFORM (Jules Lobel & Peter Scharff Smith eds., Oxford Univ. Press, forthcoming 2019) (manuscript at 20, 22) (on file with author), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3420043; see also ASS'N OF STATE CORR. ADM'RS AND THE LIMAN CTR. FOR PUB. INTEREST LAW AT YALE LAW SCH., REFORMING RESTRICTIVE HOUSING: THE 2018 ASCA-LIMAN NATIONWIDE SURVEY OF TIME-IN-CELL 9 (2018) [hereinafter 2018 TIME-IN-CELL], https://law.yale.edu/system/files/documents/pdf/Liman/asca_liman_2018_restrictive_housing_revised_sept_25_2018_-_embargoed_unt.pdf.

12. See *infra* Part III.

13. See *infra* Part IV.

although we do not disagree with calls to effectively abolish the use of supermax detention, a pragmatic and workable solution that accepts the ongoing regrettable reality of supermax prisons into the foreseeable future is necessary. This Article provides that solution.

In the next part of this Article, we provide an overview of the history of the development of supermax conditions and the extent and manner of its current use. This is followed in Part III by an examination of the impact that supermax conditions have on inmates. We discuss current legal efforts to abolish or reduce the use of supermax confinement in Part IV. Our key reform recommendations are set out in Part V and summarized in the concluding remarks.

II. THE EXTENT OF USE OF SUPERMAX CONDITIONS AND THE NATURE OF THE CONDITIONS

A. Overview of Use of Supermax Confinement

Supermax confinement is commonly used to “isolate people in a myriad of ways” within the United States justice system.¹⁴ At the end of fall 2017, more than 60,000 people were held in solitary confinement in the United States.¹⁵ Because efforts to track the number of people in solitary is completely dependent on officials’ reporting, the actual number of individuals held in solitary is probably larger (closer to 80,000 to 100,000).¹⁶ Although the number has decreased slightly over the past few years as significant shifts in culture have occurred,¹⁷ the use of solitary confinement is still prevalent in United States jails and prisons today.¹⁸

Supermax confinement is a “startling . . . yet familiar” way for prisons to discipline inmates in some cases, although allowing prisons to control inmates in others.¹⁹ It is a versatile tool, often explained as

14. Resnik, *supra* note 11, at 20; *see also* 2018 TIME-IN-CELL, *supra* note 11, at 4. Within our Article, the term “supermax” is used interchangeably with “solitary,” as both practices focus on long-term segregated housing within prisons. The practice of isolating inmates also has other names depending on the length of time an inmate is isolated. Within supermax prisons, one part of the facility, or the entire facility, is created specifically to hold inmates in isolation. *See* Stephanie Wykstra, *The Case Against Solitary Confinement*, VOX (Apr. 17, 2019, 4:30 PM), <https://www.vox.com/future-perfect/2019/4/17/18305109/solitary-confinement-prison-criminal-justice-reform>.

15. Resnik, *supra* note 11, at 20.

16. *Id.* at 18.

17. *See id.* at 21.

18. *See id.* at 1.

19. *See id.* at 3, 5 (citing *Wilkinson v. Austin*, 545 U.S. 209, 229 (2005) (noting that “[p]rolonged confinement in Supermax may be the State’s only option for the control of some inmates.”)).

“protective custody,” “discipline,” or “administrative segregation,” particularly when a prisoner is viewed as a threat.²⁰ Reasons for putting an inmate into supermax may include “incapacitation (preventing the prisoner from harming others or vice-versa); deterrence (discouraging future bad behavior); punishment (making prisoners suffer because of past bad behavior); and necessity (such as a shortage of cells in other parts of the system).”²¹ Some form of solitary confinement is used in all jails and prisons in the United States at the federal, state, and local levels.²²

B. History

Even before the first appearance of solitary in prisons, philanthropists and religious groups endorsed the idea that solitary could help separate inmates from their sins “in order to facilitate their spiritual recovery.”²³ In 1790, solitary made its first appearance in the United States in Philadelphia’s Walnut Street Prison, where “incorrigible inmates” were required to serve some or all of their terms in solitary.²⁴ The Walnut Street Prison was eventually replaced by two other prisons designed especially for solitary: the Western State Penitentiary in Pittsburgh, which opened in 1826, and the Eastern State Penitentiary, which opened in 1829.²⁵ Charles Dickens visited the Eastern State Penitentiary, after which he wrote, “I hold this slow and daily tampering with the mysteries of the brain, to be immeasurably worse than any torture of the body.”²⁶ Not long after the Eastern State Penitentiary opened, more solitary prisons were created in states such as Massachusetts, Maryland, and New Jersey.²⁷ Despite this burgeoning use of solitary, it was quickly abandoned, and a 1939 psychiatric report further suggested that solitary should not be used in any civilized nation.²⁸

20. *Id.* at 6 (citing *Sandin v. Conner*, 515 U.S. 472, 472 (1995)).

21. Christopher Logel, Comment, *Ghastly Signs and Tokens: A Constitutional Challenge to Solitary Confinement*, IDAHO L. REV. (forthcoming 2019) (manuscript at 4-5) (on file with author), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3350146.

22. Merin Cherian, *Cruel, Unusual, and Unconstitutional: An Originalist Argument for Ending Long-Term Solitary Confinement*, 56 AM. CRIM. L. REV. 1759, 1772 (2019) (citing Jean Casella & Sal Rodriguez, *What Is Solitary Confinement?*, THE GUARDIAN (Apr. 27, 2016), <https://www.theguardian.com/world/2016/apr/27/what-is-solitary-confinement>).

23. *Id.* at 1774 (citing ADAM J. HIRSCH, THE RISE OF THE PENITENTIARY: PRISON AND PUNISHMENT IN EARLY AMERICA 19); *see also* Wykstra, *supra* note 14.

24. Cherian, *supra* note 22, at 1773 (citing HIRSCH, *supra* note 23, at 59).

25. *Id.* (citing HIRSCH, *supra* note 23, at 65).

26. Wykstra, *supra* note 14.

27. Cherian, *supra* note 22, at 1775 (footnotes omitted).

28. *Id.* at 1776 (citing J.S. WILSON & M.J. PESCOR, PROBLEMS IN PRISON PSYCHIATRY 25 (Caxton Printers, 1939)).

Even before the 1939 report, the U.S. Supreme Court in *In re Medley* objected in 1890 to the use of solitary as punishment.²⁹ According to the Court, “after even a short confinement,” isolation caused the prisoner to take on “a semi-fatuous condition,” from which he was unable to “recover sufficient mental activity to be of any subsequent service to the community.”³⁰ Following this understanding that isolation could lead to grave psychological harm, prison authorities largely abandoned the punishment.³¹ However, after years of not using solitary, it again emerged as a common punishment in the United States in the 1970s and 1980s.³²

Solitary re-emerged during this time for a variety of reasons. First, the prison population increased to the point where solitary was needed in order to house all inmates.³³ Second, the goal of rehabilitation through incarceration was replaced with incapacitation and retribution, and as a result, prisons “aim[ed] to punish, not cure.”³⁴ Third, officials used solitary to address gang-related violence that was apparently incapable of being controlled via other means.³⁵ As prison populations and violence rose, officials sought and secured the ability to impose isolated confinement for those who they subjectively believed were “the worst of the worst.”³⁶ Solitary allowed officials to control prisoners—whether they actually needed to be controlled or not— and subsequent legislative measures made it increasingly difficult for inmates to fight the system.³⁷

The first modern “supermax” prison was incidentally created in 1983 when a penitentiary in Marion, Illinois was put on permanent lockdown after inmates murdered two corrections officers inside.³⁸ A few years later, in 1989, Pelican Bay State Prison opened in California and was the first supermax prison specifically designed to keep inmates

29. *In re Medley*, 134 U.S. 160 (1890).

30. *Id.* at 168.

31. See Wykstra, *supra* note 14; Cherian, *supra* note 22, at 1776 (explaining that long-term solitary confinement became an unusual practice in the United States because of “the detrimental effects it had on prisoners”).

32. Resnik, *supra* note 11, at 2.

33. See Cherian, *supra* note 22, at 1776–77 (noting a more than 400-percent increase in the prison population from 1978 to 2012).

34. *Id.* at 1777 (citing Elizabeth Bennion, *Banning the Bing: Why Extreme Solitary Confinement Is Cruel and Far Too Usual Punishment*, 90 IND. L.J. 741, 750 (2015)).

35. *Id.* (citing *Wilkinson v. Austin*, 545 U.S. 209, 213–14 (2005)).

36. Resnik, *supra* note 11, at 2.

37. See *id.* at 7 (noting that Congress’s enactment of the Prison Litigation Reform Act of 1995 §§ 801–10, Pub. L. No. 101–134, 110 Stat. 1321 (1996) made it harder for inmates to access the federal court system).

38. Cherian, *supra* note 22, at 1777 (citing Bennion, *supra* note 34, at 750–51).

isolated.³⁹ By 2004, at least forty-four states had supermax prisons.⁴⁰ Today, every single jurisdiction within the United States uses solitary or restrictive housing, in which inmates are kept in their cells for a minimum of twenty-two hours per day.⁴¹

C. *The Nature of Supermax Conditions: Numbers and Realities*

Although not all supermax prisons are created the same, they all are characterized by extreme isolation of prisoners. Conditions have not improved over time,⁴² and if anything, isolation has become even more severe, as modern technology has made solitary “more complete and dehumanizing than ever before.”⁴³ Reports issued by the Association of State Correctional Administrators (“ASCA”) and the Liman Center at Yale Law School confirmed conditions that include:⁴⁴

- Cells sized roughly 8 feet by 10 feet;
- Holding of inmates within cells for between 22.5 and 24 hours per day;
- Constant monitoring of inmates;
- No congregation between inmates;
- Very limited access to activities or programs; and

39. Wykstra, *supra* note 14.

40. Cherian, *supra* note 22, at 1777 (citing Daniel P. Mears, *Evaluating the Effectiveness of Supermax Prisons*, URB. INST. JUST. POL’Y CTR. 1, 4 (2006), <https://www.urban.org/research/publication/evaluating-effectiveness-supermax-prisons/view/full-report>).

41. *Id.* (citing CHARLIE EASTAUGH, UNCONSTITUTIONAL SOLITUDE: SOLITARY CONFINEMENT AND THE US CONSTITUTION’S EVOLVING STANDARDS OF DECENCY 117 (2017)).

42. *See, e.g.*, Hutto v. Finney, 437 U.S. 678, 682 (1978) (noting Arkansas’s 1970s practice of putting prisoners in groups “into windowless 8’x10’ cells containing no furniture other than a source of water and a toilet that could only be flushed from outside the cell”); Gates v. Collier, 501 F.2d 1291, 1305 (5th Cir. 1974) (noting Mississippi’s 1970s practice of putting prisoners “in the dark hole, naked, without any hygienic material, without any bedding, and often without adequate food.”); Madrid v. Gomez, 889 F. Supp. 1146, 1155 (N.D. Cal. 1995) (noting that prisoners in Pelican Bay’s “Security Housing Unit” were put “in windowless cells for 22 and ½ hours each day” while also being “denied access to prison work programs and group exercise yards.”).

43. Cherian, *supra* note 22, at 1772 (citing Sal Rodriguez, *Solitary Confinement in the United States: FAQ*, SOLITARY WATCH (2015), <https://solitarywatch.org/wp-content/uploads/2017/09/Solitary-Confinement-FAQ-2015.pdf>); *see also* Jones ‘El v. Berge, 164 F. Supp. 2d 1096, 1098 (W.D. Wis. 2001) (“A video camera rather than a human eye monitors the inmates movements.”).

44. *See* Resnik, *supra* note 11, at 19 (noting that solitary cells were between 45 and 128 square feet, and that prisoners often spent at least 23 hours in their cells during the week and 48 hours straight on weekends).

- Very limited access to visitors, as in some cases, visits occur through a thick glass barrier or via video.⁴⁵

Inmates are put in supermax for a variety of reasons, all of which provide a way for prison officials to exert control over inmates. For instance, inmates may be put in solitary for violent acts.⁴⁶ They may also be put in solitary for petty offenses, such as drug use, possession of contraband, and use of profanity.⁴⁷ According to a 2015 report from the Vera Institute of Justice, even simple disruptive behaviors may land a person in solitary.⁴⁸ Inmates may also end up in supermax when they have an untreated mental illness, have been threatened by other inmates, or have reported rape or other abuse by officials.⁴⁹

The conditions in supermax are hence very trying, verging on brutal. They are far more arduous than conditions experienced by prisoners in mainstream detention. Each state system and the federal jurisdiction have their own prison systems, and there is no uniformity regarding the manner in which prisoners are housed and treated.⁵⁰ Moreover, in many jurisdictions there are different prisoner classifications, ranging from low to high security, with conditions generally getting stricter as the security classification rises.⁵¹ However, there are some general standards that apply regarding the manner in which prisoners are housed and treated.

To better understand these general standards, one study examined data from the Survey of Inmates in State and Federal Correctional Facilities (“SISFCF”), as well as the Survey of Inmates in Local Jails (“SILJ”), to characterize “average” conditions of confinement.⁵² Historically, these organizations have collected such data every five to seven

45. Wykstra, *supra* note 14 (citing SHARON SHALEV, SUPERMAX: CONTROLLING RISK THROUGH SOLITARY CONFINEMENT (Willan 2013)); *see also* Logel, *supra* note 21, at 5 (citing *Jones ‘El*, 164 F. Supp. 2d at 1098).

46. Cherian, *supra* note 22, at 1782 (citing Rodriguez, *supra* note 42).

47. *Id.* (citing Rodriguez, *supra* note 42).

48. Wykstra, *supra* note 14 (noting how “disruptive behavior—such as talking back, being out of place, failure to obey an order, failing to report to work or school, or refusing to change housing units or cells—frequently lands incarcerated people in disciplinary segregation.”).

49. Cherian, *supra* note 22, at 1782 (citing Rodriguez, *supra* note 42).

50. *See generally* Franklin E. Zimring, *A More Perfect System: Twenty-Five Years of Guidelines Sentencing Reform*, 58 STAN. L. REV. 323 (Oct. 2005).

51. *See id.* at 324; *see, e.g.*, Michelle Ghafar, *Exiting Solitary Confinement: A Survey of State Correctional Policies*, 64 UCLA L. REV. 508 (Feb. 2017) (examining the various policies for exiting solitary confinement in different states).

52. *See* Christopher Wildeman, Maria D. Fitzpatrick, & Alyssa W. Goldman, *Conditions of Confinement in American Prisons and Jails*, 14 ANN. REV. L. & SOC. SCI. 29, 34 (2018).

years.⁵³ The data, which are analyzed based on a pool of state and federal prisoners and local jail inmates, shows that roughly 40% of these inmates reside in either an open dorm or a dorm that is divided into cubicles.⁵⁴ About 58% reside in a facility that has air conditioning.⁵⁵ On average, a prisoner will spend more than half of every day in the same space where they sleep.⁵⁶ Somewhere between one-fifth and one-third of inmates engage in formal programming, and for inmates who have children, contact does not occur very often.⁵⁷ Inmates in higher-security prisons “typically are housed in cells (rather than dormitories), and the facilities themselves generally are surrounded by high walls or fences, with armed guards, detection devices, or lethal fences being used to carefully monitor and control the ‘security perimeters.’”⁵⁸

Some jails and prisons may even offer inmates in the general population amenities such as television, web access,⁵⁹ or newspapers,⁶⁰ while others have required inmates to pay for such amenities.⁶¹ Inmates in general population are often afforded the opportunity to exercise,

53. *Id.* at 34-35. According to Wildeman, Fitzpatrick, and Goldman, “the most recent version of the SILJ data is from 2002 and the most recent version of the SISFCF data is from 2004.” *Id.* at 34.

54. *Id.* at 37. Extreme temperatures, whether hot or cold, can lead to dangerous conditions for inmates; see, e.g., Jennifer Lackey, *The Measure of a Country Is how it Treats its Prisoners. The U.S. Is Failing.*, WASH. POST (Feb. 6, 2019), https://www.washingtonpost.com/opinions/the-measure-of-a-country-is-how-it-treats-its-prisoners-the-us-is-failing/2019/02/06/8df29acc-2a1c-11e9-984d-9b8fba003e81_story.html (noting that 1,200 prisoners were left in freezing temperatures and denied extra clothing and blankets at a federal prison in Brooklyn); Alexi Jones, *Cruel and Unusual Punishment: When States Don’t Provide Air Conditioning in Prison*, PRISON POL’Y INITIATIVE (June 18, 2019), <https://www.prison-policy.org/blog/2019/06/18/air-conditioning/> (noting that at least thirteen states in high-heat regions of the United States do not have universal air conditioning in prisons).

55. Wildeman, Fitzpatrick, and Goldman, *supra* note 52, at 37.

56. *Id.*

57. *Id.*

58. NAT’L RESEARCH COUNCIL, *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES* 158-59 (2014), <https://www.nap.edu/catalog/18613/the-growth-of-incarceration-in-the-united-states-exploring-causes>.

59. See, e.g., Jerry Metcalf, *A Day in the Life of a Prisoner*, THE MARSHALL PROJECT (July 12, 2018, 7:00 PM), <https://www.themarshallproject.org/2018/07/12/a-day-in-the-life-of-a-prisoner> (detailing a day in the life of a prisoner, including time spent watching television, reading, and drafting emails).

60. See, e.g., Brian Ray, *Law Provides for Basics, but Jail Amenities Vary by Location*, THE GAZETTE (Dec. 14, 2009), <https://www.thegazette.com/2009/12/14/law-provides-for-basics-but-jail-amenities-vary-by-location> (noting that in a few Eastern Iowa jails, inmates were not allowed to read newspapers, while in others, newspapers were made available to the cell block).

61. See Danny Cevallos, *What \$100 Can Buy You in Jail Might Surprise You*, CNN (Mar. 30, 2017, 9:46 AM), <https://www.cnn.com/2017/03/29/opinions/pay-to-stay-jails-cevallos-opinion/index.html> (noting that at some California jails, people could reside in “pay-to-stay” facilities where \$100 would buy them “flat screen TVs, a computer and media room, and new beds”).

though views on how much time should be granted to exercise pursuant to the Constitution vary.⁶²

Although prisoners may have some access to certain amenities, they still live in isolation from the community when housed in mainstream jail or prison, and improvements could be made to restore some level of human dignity⁶³ to these prisoners. Law professor Sharon Dolovich suggests that improving prison conditions will lead inmates to feel safe, and once this occurs, programs that would help inmates “feel more human” may be offered, including “meaningful and challenging educational programs, programs in the arts . . . vocational training, or any other opportunities for self-development and for cultivating a healthy self-respect.”⁶⁴ Although this goal is important for individuals in general population, it is even more important for those residing in supermax conditions even though it may be more difficult to afford the same opportunities to these inmates because of the severity of isolation forced upon them.

D. Empirical Data: A Closer Look at the Use of Supermax Confinement

To better understand the incidence of supermax confinement in United States prisons, one must consider aggregate data.⁶⁵ However, any data-derived picture of the use of solitary in United States prisons may be incomplete or lead to inaccurate conclusions because prison systems

62. See, e.g., *Stewart v. Crawford*, 452 F. App'x 693 (8th Cir. 2011) (per curiam) (finding three hours a week to be enough); *Barkley v. Ricci*, 439 F. App'x 119 (3d Cir. 2011) (per curiam) (finding two hours to be enough); *Davenport v. DeRobertis*, 844 F.2d 1310, 1315 (7th Cir. 1988) (finding that inmates should be provided with at least five hours per week of exercise time); *Bono v. Saxbe*, 462 F. Supp. 146 (E.D. Ill. 1978), *aff'd in part*, 620 F.2d 609 (7th Cir. 1980) (requiring seven hours per week); *Stewart v. Gates*, 450 F. Supp. 583 (C.D. Cal. 1978) (finding two hours and twenty minutes of outdoor recreation time per week to be enough). *But see* G.A. Res. 70/175, *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)* (Dec. 17, 2015), <http://daccess-ods.un.org/access.nsf/GetFile?OpenAgent&DS=A/RES/70/175&Lang=E&Type=DOC> [hereinafter *Nelson Mandela Rules*]; STANDARDS FOR CRIMINAL JUSTICE, TREATMENT OF PRISONERS § 23-3.6 cmt. at 90–91 (AM. BAR ASS'N 2011) (both generally suggesting that inmates should be afforded outdoor recreation time daily).

63. The protection of human dignity is one of the foremost concerns of the Cruel and Unusual Punishment Clause of the Eighth Amendment to the United States Constitution. See *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (“The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards.”).

64. Sharon Dolovich, *Prison Conditions*, in 4 REFORMING CRIMINAL JUSTICE: PUNISHMENT, INCARCERATION, AND RELEASE 291 (Erik Luna ed., 2017).

65. See Resnik, *supra* note 11, at 17.

in the United States do not collect standardized data.⁶⁶ Furthermore, data primarily comes from state-wide systems, which indicates that the studies focus on prisons and not jails or local institutions that may also employ some form of supermax.⁶⁷ As previously mentioned, the population of prisoners in solitary has decreased slightly, but solitary confinement is still a very common punishment, posing serious dangers to inmates' constitutional rights.

The ASCA and the Liman Center have conducted a joint project since 2012 to better understand and track the use of solitary in the United States.⁶⁸ Initial reports were based on responses from forty-seven jurisdictions and provided data on prison officials' policies on "administrative segregation," which was explained as forcing a prisoner to spend between twenty-two and twenty-three hours a day in a cell for thirty days or more.⁶⁹ These reports demonstrated that although the segregation process itself was easy, getting out of segregation for prisoners was far more complicated.⁷⁰ In fact, allowing segregation to occur so easily, particularly under the guise that a prisoner poses a threat to other inmates and/or prison officials, has led to "tens of thousands of individuals housed in profoundly isolated conditions."⁷¹

The ASCA and the Liman Center issued their 2014 Report, *Time-In-Cell*, which, based on reporting from thirty-four jurisdictions, estimated that 66,000 prisoners were in restricted housing.⁷² These systems housed roughly 73% of the 1.5 million inmates in United States prisons.⁷³ For the 2015-2016 report, restrictive housing was defined as "22 hours or more in cells (single or double), per day, for 15 days or more."⁷⁴ Under these parameters, forty-eight jurisdictions, which housed more than 96% of the prison population in the United States, responded that a total of 67,442 people were in restrictive housing.⁷⁵ These data showed that a range of between a quarter and a half percent of the prison population was in supermax.⁷⁶

66. See *id.*; 2018 TIME-IN-CELL, *supra* note 11, at 9.

67. Resnik, *supra* note 11, at 17.

68. *Id.*

69. *Id.*

70. See *id.*

71. *Id.* at 18.

72. *Id.* (citing 2018 TIME-IN-CELL, *supra* note 11, at 14).

73. Resnik, *supra* note 11, at 17.

74. *Id.* at 19.

75. *Id.*

76. *Id.* (citing ASS'N OF STATE CORR. ADM'RS AND THE LIMAN CTR. FOR PUB. INTEREST LAW AT YALE LAW SCH., AIMING TO REDUCE TIME-IN-CELL: REPORTS FROM CORRECTIONAL SYSTEMS ON THE NUMBERS OF PRISONERS IN RESTRICTED HOUSING AND ON THE POTENTIAL OF POLICY CHANGES TO BRING ABOUT REFORMS 7 (Nov. 2016),

The definition of restrictive housing was again modified for the 2017-2018 report, and the question focused on “how many people were held on *average* (rather than *per* day) for 22 hours or more for 15 days or more.”⁷⁷ In 2016, more than 1.5 million people were in prison in the United States (and there are an additional nearly 800,000 inmates in local jails).⁷⁸ Forty-three jurisdictions,⁷⁹ which housed 80.6% of the prison population, provided data.⁸⁰ These jurisdictions reported a total of 49,197 prisoners in restrictive housing, or 4.5% of prisoners.⁸¹

These reports also captured data on how long inmates were kept in restrictive housing.⁸² Part of what makes supermax so difficult for inmates is the length of time spent living in such conditions. In 2015, the United Nations General Assembly adopted the Nelson Mandela Rules,⁸³ which defined solitary within the international community as holding an individual for twenty-two hours or more per day “without meaningful human contact.”⁸⁴ The Rules further defined “indefinite” solitary as holding an individual for more than fifteen days, calling for the elimination of its use as it was considered “torture or other cruel, degrading or inhuman treatment.”⁸⁵ Despite having an international definition of solitary, the American Correctional Association (ACA) has established definitions of its own.⁸⁶ The ACA definition of “restrictive housing” requires that a prisoner “be confined to a cell at least twenty-two hours per day,” and “extended restrictive housing” is defined as “separating a prisoner from contact with general population while restricting [the prisoner] to his/her cell for at least 22 hours per day and for more than 30

<https://law.yale.edu/sites/default/files/area/center/liman/document/aimingtoreducetic.pdf> [hereinafter 2016 TIME-IN-CELL]).

77. *Id.* at 20 (citing 2016 TIME-IN-CELL, *supra* note 76, at 8, 15 tbl.2).

78. *Key Statistics: Jail Inmates*, BUREAU JUST. STATS., <https://www.bjs.gov/index.cfm?ty=kfdetail&iid=489> (last visited Sept. 28, 2019); John Gramlich, *America's Incarceration Rate is at a Two-Decade Low*, PEW RES. CTR. (May 2, 2018), <https://www.pewresearch.org/fact-tank/2018/05/02/americas-incarceration-rate-is-at-a-two-decade-low/> (finding that, “[a]t the end of 2016, there were about 2.2 million people behind bars in the U.S., including 1.5 million under the jurisdiction of federal and state prisons and roughly 741,000 in the custody of locally run jails”).

79. Resnik, *supra* note 11, at 20 (citing E. Ann Carson, *Prisoners in 2016*, BUREAU JUST. STAT. 4 tbl.2 (Apr. 2018), <https://www.bjs.gov/content/pub/pdf/p16.pdf>).

80. *Id.*

81. *Id.*; 2018 TIME-IN-CELL, *supra* note 11, at 10.

82. Resnik, *supra* note 11, at 20 (citing 2018 TIME-IN-CELL, *supra* note 11, at 14).

83. Nelson Mandela Rules, *supra* note 62.

84. *Id.* at Rule 44.

85. *Id.* at Rule 43.

86. Resnik, *supra* note 11, at 20 (citing 2018 TIME-IN-CELL, *supra* note 11, at 14).

days.”⁸⁷ These different definitions impact data showing the number of inmates in solitary. If the right question is not asked, the data will be incomplete.

In some jurisdictions reporting in 2014, many inmates were in supermax for more than three years, and in thirty jurisdictions reporting numbers from 2013, 4,400 inmates left solitary only to be released back into the community.⁸⁸ The 2016 report involved 54,382 prisoners who were kept in solitary in forty-one jurisdictions.⁸⁹ According to the data, 99% of these prisoners were in solitary for fifteen days or more—76% of them were in solitary for fifteen days to one year and 23% of them were in solitary for one year or more.⁹⁰ The 2018 reports examined the length of time individuals spent in restrictive housing within thirty-six jurisdictions, detailing time spent for 41,061 inmates.⁹¹ About one-fifth of inmates confined in restrictive housing were kept in such conditions for 15 to 30 days.⁹² Nearly an additional third were kept in restrictive housing for one to three months.⁹³ Roughly a quarter were kept in restrictive housing for a year, although nine percent were held for three years or more.⁹⁴ Of these, 1,950 were in isolation for more than six years.⁹⁵ Some inmates have even been held in solitary for decades.⁹⁶

Researchers also added context to the 2018 data by comparing information from jurisdictions that provided data for the 2015-2016 and 2017-2018 reports.⁹⁷ Forty jurisdictions provided information for these years, and across these jurisdictions, the percentage of inmates in restrictive housing decreased from 5.0% in 2015 to 4.4% in 2017.⁹⁸ The number of inmates in restrictive housing declined in twenty-eight of the jurisdictions, but increased in twelve of them.⁹⁹

87. Resnik, *supra* note 11, at 16 (citing AM. CORR. ASS’N, RESTRICTIVE HOUSING PERFORMANCE BASED STANDARDS 3 (Aug. 2016), <https://www.asca.net/pdfdocs/8.pdf> [hereinafter ACA RESTRICTIVE HOUSING STANDARDS]).

88. *Id.* at 19 (citing ASS’N OF STATE CORR. ADM’RS AND THE LIMAN CTR. FOR PUB. INTEREST LAW AT YALE LAW SCH., TIME-IN-CELL: THE ASCA-LIMAN 2014 NATIONAL SURVEY OF ADMINISTRATIVE SEGREGATION IN PRISON 27–29 (Aug. 2015), https://law.yale.edu/sites/default/files/documents/pdf/asca-liman_administrative_segregation_report_sep_2_2015.pdf [hereinafter 2014 TIME-IN-CELL]).

89. Cherian, *supra* note 22, at 1773 (citing 2016 TIME-IN-CELL, *supra* note 76, at 7).

90. *Id.* (citing 2016 TIME-IN-CELL, *supra* note 76, at 7).

91. Resnik, *supra* note 11, at 20; 2018 TIME-IN-CELL, *supra* note 11, at 14.

92. Resnik, *supra* note 11, at 20.

93. *Id.*

94. *Id.*

95. *Id.* (citing 2018 TIME-IN-CELL, *supra* note 11, at 14).

96. Wykstra, *supra* note 14 (sharing the story of Albert Woodfox, who was held in solitary for more than 40 years in a Louisiana prison).

97. Resnik, *supra* note 11, at 20.

98. *Id.* at 21 (citing 2018 TIME-IN-CELL, *supra* note 11, at 97).

99. *Id.* (citing 2018 TIME-IN-CELL, *supra* note 11, at 97).

E. Race as a Factor

Based on reporting compiled by ASCA and the Liman Center, African Americans and Hispanics are overrepresented in supermax.¹⁰⁰ The supermax population is also disproportionately young and male.¹⁰¹ Forty-three of forty-eight jurisdictions surveyed provided details on race in the 2015 studies, and according to this data, African American male prisoners constituted “40 percent of the total population in those 43 jurisdictions, but constituted 45 percent of the ‘restricted housing population.’”¹⁰² In thirty-one of these jurisdictions, the proportion of African American men in solitary was greater than their proportion of the general population.¹⁰³

To understand these data in context, the study also looked at data for white inmates.¹⁰⁴ According to the data, thirty-six of the forty-three jurisdictions reported that white men were underrepresented in solitary, though the degree of under representation varied depending on the state.¹⁰⁵ For instance, in California, Hispanics constituted 42% of the general prison population and 86% of the solitary population, while whites constituted 22% of the general prison population and only 9% of the solitary population.¹⁰⁶ Similar results were seen in Texas, where Hispanics constituted 50% of the solitary population, but only 34% of the general prison population, while whites made up 32% of the general prison population and 25% of the solitary population.¹⁰⁷

Thirty-three jurisdictions reported on race and ethnicity among male prisoners in the general prison population and in supermax for the 2017-2018 report.¹⁰⁸ According to this data, African American men comprised 46.1% of the male solitary population, compared to 42.5% of the total male general prison population.¹⁰⁹ In twenty-four of these jurisdictions, the male solitary population had a greater percentage of African American prisoners than did the entire male population in those jurisdictions.¹¹⁰ As for Hispanics, at least one of the thirty-three

100. *Id.* at 19 (citing 2014 TIME-IN-CELL, *supra* note 88, at 30); 2018 TIME-IN-CELL, *supra* note 11, at 5; *see also* Wykstra, *supra* note 14; Juleyka Lantigua-Williams, *The Link Between Race and Solitary Confinement*, THE ATLANTIC (Dec. 5, 2016), <https://www.theatlantic.com/politics/archive/2016/12/race-solitary-confinement/509456/>.

101. Wykstra, *supra* note 14.

102. Lantigua-Williams, *supra* note 100.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. 2018 TIME-IN-CELL, *supra* note 11, at 24.

109. *Id.*

110. *Id.*

jurisdictions did not use “Hispanic” as a racial category.¹¹¹ However, for the remaining thirty-two, Hispanic male inmates comprised 18.7% of the male solitary population, compared to 17.2% of the total general prison population.¹¹² In twenty-nine of the thirty-three jurisdictions, the percentage of white males in supermax was smaller than the percentage of white males in the total male prison population.¹¹³

Understanding the general race statistics in a given jurisdiction helps clarify why there are such disparities in the number of individuals of different races in solitary. New York, for example, has “a significant racial imbalance between [prison] staff and prisoners.”¹¹⁴ In jurisdictions like New York, law professor Andrea C. Armstrong suggests that “minority offenders may be more likely to be perceived as a disciplinary threat by correctional officers, regardless of an offender’s actual behavior.”¹¹⁵ Because a perceived threat to other inmates may be sufficient to land a prisoner in solitary, this may help explain the disparity in numbers. Ambiguous disciplinary standards may also lead to disparate treatment of prisoners based on race because individual guards must interpret such standards, and they often do so with their implicit racial biases operating in the background.¹¹⁶ The effect of supermax conditions is damaging to an inmate, no matter his race, and the impact is not just felt when an inmate is first put into these conditions, but may last long after an inmate returns to mainstream prison or leaves altogether.

III. IMPACT OF SUPERMAX ON PRISONS

A. *Mental Illness*

Supermax confinement—particularly long-term isolation lasting more than fifteen days—has a negative impact on inmates, often leading to mental health problems. Inmates subjected to this treatment “slowly become insane” and often suffer irreversible effects.¹¹⁷ Furthermore, studies show that harmful mental effects of confinement are more likely to occur in solitary.¹¹⁸ Of course, the negative impact of solitary is not

111. *Id.* Alabama used the term “Other,” which included “other than Black White, and Indian. Hispanics are grouped as Caucasian, and Asians are grouped in ‘Other.’” *Id.* at 113 n.51.

112. *Id.*

113. *Id.* at 26.

114. Lantigua-Williams, *supra* note 100.

115. Andrea C. Armstrong, *Race, Prison Discipline, and the Law*, 5 U.C. IRVINE L. REV. 759, 770 (2015).

116. Lantigua-Williams, *supra* note 100 (citing Armstrong, *supra* note 115, at 772).

117. Cherian, *supra* note 22, at 1760.

118. *Id.* at 1779.

new. German doctors published several studies between 1854 and 1909 documenting psychological illnesses among prisoners in general population and solitary, concluding that solitary caused many mental problems, such as “hallucinations, persecutory delusions, hyper-responsiveness to stimuli, acute confusion, and memory disturbances.”¹¹⁹ Additional studies conducted in the mid-1960s concluded that solitary can be psychologically damaging.¹²⁰

In 2005 alone, forty-four prisoners within the California prison system committed suicide, and 70% of these individuals were in solitary.¹²¹ A 2014 study of New York City jails showed that even though only about seven percent of inmates spent time in solitary, these inmates accounted for nearly half of all events of potentially fatal self-harm.¹²² Other studies show that at least one quarter of suicides behind bars happen in solitary.¹²³ When psychologist Craig Haney and criminologist Mona Lynch reviewed studies on the impact of solitary confinement in an article published in 1997, they discovered common negative psychological effects across inmates, including “insomnia, anxiety, panic, withdrawal, hypersensitivity, ruminations, cognitive dysfunction, hallucinations, loss of control, aggression, rage, paranoia, hopelessness, lethargy, depression, emotional breakdowns, self-mutilation, and suicidal impulses.”¹²⁴ Furthermore, recent studies have shown that inmates in solitary sometimes hear voices and have difficulties tolerating stimuli and concentrating.¹²⁵ Even just a few days in solitary may lead to “a shift toward an abnormal pattern that is indicative of stupor and delirium.”¹²⁶ Therefore, it should not surprise anyone that many inmates in solitary have “become so desperate for relief that they [have] set their mattresses afire, [torn] their sinks and toilets from the walls, ripp[ed] their clothing and bedding, and

119. Logel, *supra* note 21, at 7 (citing Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J.L. & POL’Y 325, 367–72 (2006)).

120. JAMELIA MORGAN, CAGED IN: SOLITARY CONFINEMENT’S DEVASTATING HARM ON PRISONERS WITH PHYSICAL DISABILITIES, ACLU 25 (2017), <https://law.yale.edu/sites/default/files/area/center/liman/document/010916-aclu-solitarydisabilityreport-single.pdf>.

121. Cherian, *supra* note 22, at 1779 (citing Don Thompson, *Convict Suicides in State Prisons Hit Record High: ‘05 Numbers Prompt Calls for Focus on Prevention*, ASSOCIATED PRESS (Jan. 3, 2006)).

122. Wykstra, *supra* note 14.

123. *Id.*

124. Cherian, *supra* note 22, at 1780 (quoting 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, 530 (1997)); *see also* Logel, *supra* note 21, at 9–10.

125. Cherian, *supra* note 22, at 1780 (citing Grassian, *supra* note 119, at 335); *see also* Wykstra, *supra* note 14.

126. Cherian, *supra* note 22, at 1780 (citing Grassian, *supra* note 119, at 331); *see also* Logel, *supra* note 21, at 10.

destroy[ed] their few personal possessions, all in order to escape the torture of their own thoughts and despair.”¹²⁷

Personal accounts of time spent in solitary confirm the profound impact solitary can have on an individual. Jack Abbott described the punishment as being so powerful that it can “alter the ontological makeup of a stone.”¹²⁸ The late Senator John McCain spent two years in solitary, noting “It’s an awful thing, solitary . . . It crushes your spirit and weakens your resistance more effectively than any other form of mistreatment.”¹²⁹ Extended solitary confinement causes severe mental illness in many inmates, even in individuals who are considered healthy and have no history of mental illness.¹³⁰

B. Physical Harm

When inmates are placed in supermax, they are also at risk of suffering physical harms. Studies show that “solitary confinement can not only destroy the human psyche, but it can also result in physical deterioration due to the limited access to exercise, physical therapies, as well as quality medical and mental health care.”¹³¹ Movement within solitary is highly controlled, and movement outside of a cell is often made more difficult by required restraints, while architectural barriers also make it difficult for physically disabled prisoners to reach important areas of the prison.¹³² Additionally, the physical and mental harm caused by solitary may result in “long-term disability and additional health care costs upon release from prison.”¹³³

C. Inmates Vulnerable Before Solitary

1. The Physically and Mentally Disabled

Although solitary poses the risk of great harm to anyone living in such extreme isolation, the dangers to vulnerable groups are even more considerable. Individuals with mental illnesses and disabilities are at

127. MORGAN, *supra* note 120, at 24 (citing Frank Rundle, *The Roots of Violence at Soledad*, in *THE POLITICS OF PUNISHMENT: A CRITICAL ANALYSIS OF PRISONS IN AMERICA* 167 (Erik Olin Wright, ed., 1973), <https://www.ssc.wisc.edu/%7Ewright/Published%20writing/pop.c8.pdf>).

128. Cherian, *supra* note 22, at 1781 (citing JACK ABBOTT, *IN THE BELLY OF THE BEAST: LETTERS FROM PRISON* 45 (1981)).

129. *Id.* (citation omitted).

130. Logel, *supra* note 21, at 24.

131. MORGAN, *supra* note 120, at 24 (citing Expert Report of Brie Williams at 8–13, *Parsons v. Ryan*, No. 2:12-cv-00601-NVW (MEA) (D. Ariz. Nov. 8, 2013); Class Action Compl. at ¶ 75(c), *Lewis v. Cain*, No. 3:15-cv-00318-BAJ-RLB (May 20, 2015)).

132. *Id.* at 26, 28–29.

133. *Id.* at 24.

even greater risk of suffering harm from solitary.¹³⁴ For this reason, the American Psychiatric Association released a statement in 2012 concluding that absent certain exceptions, people with serious mental illnesses should not be placed in solitary.¹³⁵ The ACA currently restricts the ability to put an inmate with serious mental illness in “Extended Restrictive Housing,” which is where an inmate is confined to his cell for at least twenty-two hours per day and for more than thirty days.¹³⁶ Serious mental illness is defined as:

Psychotic Disorders, Bipolar Disorders, and Major Depressive Disorder; any diagnosed mental disorder (excluding substance use disorders) currently associated with serious impairment in psychological, cognitive or behavioral functioning that substantially interferes with the person’s ability to meet the ordinary demands of living and requires an individualized treatment plan by a qualified mental health professional(s).¹³⁷

Unfortunately, prisons do not always follow this advice, and individuals with serious mental health problems end up in supermax.¹³⁸

For solitary inmates who already have psychiatric disabilities, these disabilities can worsen.¹³⁹ Aside from the obvious problems that extreme isolation causes, prisoners in solitary often have limited access to mental health professionals.¹⁴⁰ When accommodations are required but not provided, inmates with physical disabilities are also at a disadvantage, as they may not be able to protect their mental health by participating in mental health-focused sessions.¹⁴¹

Inmates with physical disabilities are very likely to experience worsening health while in supermax, as these individuals are often denied access to the care that will prevent further physical problems.¹⁴² “[S]trict schedules in solitary confinement result in disrupted treatment plans where corrections officials refuse to modify schedules to allow these prisoners with mobility-related disabilities to take medications at specific times.”¹⁴³ Additionally, inmates in solitary often face strict restrictions on the items they may have in their cells, and as a result, inmates with physical disabilities may not have access to items they

134. Wykstra, *supra* note 14.

135. *Id.*

136. 2018 TIME-IN-CELL, *supra* note 11, at 47.

137. *Id.* (citing ACA RESTRICTIVE HOUSING STANDARDS, *supra* note 87, at 35).

138. Wykstra, *supra* note 14.

139. MORGAN, *supra* note 120, at 26.

140. *Id.*

141. *Id.*

142. *Id.* at 27.

143. *Id.*

require.¹⁴⁴ These restrictions allegedly are in place for safety and security reasons, but the restrictions present challenges for individuals who need regular access to medical equipment and supplies, such as catheters, pressure socks, and colostomy bags.¹⁴⁵ At times, “access to clean medical equipment has been outright denied,” or equipment has been provided but was “unsterile, improperly maintained, or otherwise not suitable for use.”¹⁴⁶

Another issue arises when solitary prisoners are faced with limited access to medical care. For instance, this can cause problems for inmates who are under medical therapy and arrive at prison with specific medications.¹⁴⁷ Inmates usually are not allowed to keep prescription drugs with them and are only given access to the drugs under medical staff supervision, which may not occur at the optimal time for the drugs’ efficacy.¹⁴⁸ The lack of exercise can also lead to extremely detrimental effects on inmates, particularly those with disabilities who require regular exercise to stay healthy.¹⁴⁹ Solitary inmates often have very limited access to outdoor recreation, and when it is available, it is usually available within a small cage, often compared to a “dog run.”¹⁵⁰ Although a small cage may seem better than nothing, inmates with physical disabilities—particularly those requiring use of a wheelchair or other assistive device—often cannot access these areas.¹⁵¹ Furthermore, in some cases, an inmate may have an assistive device confiscated, which makes it even more difficult for these individuals to participate in activities offered by the prison, further isolating them.¹⁵²

Supermax conditions have an especially harmful effect on inmates with sensory disabilities. The fact that communication is curtailed and primarily occurs through a slot in the door harms these prisoners because they “experience profound and heightened isolation due not only to the sensory and social deprivation experienced by all prisoners subjected to solitary, but also because they face huge barriers to meaningful communication in correctional environments.”¹⁵³ Deaf inmates may be further marginalized when put in solitary because they are often “left without the ability to engage their sense of sight, occupy their minds, and connect

144. *Id.* at 29.

145. MORGAN, *supra* note 120, at 29.

146. *Id.* at 30.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* at 31; Casella & Rodriguez, *supra* note 22.

151. MORGAN, *supra* note 120, at 31.

152. *Id.* at 32 (sharing the story of Brian Follmer, who has neuropathy and had his wheelchair confiscated and replaced with a walker, which actually worsened his condition).

153. *Id.*

with the outside world,” making the solitary experience much more intense.¹⁵⁴ As for blind inmates, they are often unable to use their remaining sense of hearing to engage with the outside world when in solitary because opportunities for such interaction are very limited.¹⁵⁵ Additionally, blind inmates have fewer opportunities for mental stimulation, which makes solitary conditions even more harsh for them.¹⁵⁶ Mentally and physically disabled inmates are not the only ones at risk with this practice. The risks to young people in solitary are also “particularly severe,” with the placement of these individuals in supermax posing a risk for serious and long-lasting effects.¹⁵⁷

2. *The Young*

The ACA has called for the prohibition of solitary for individuals under the age of eighteen.¹⁵⁸ For the 2017-2018 report, prisons were asked to provide data on prisoners ranging from under 18 to 50, and thirty-four jurisdictions responded with information on male prisoners.¹⁵⁹ These jurisdictions housed a total of 842,941 male prisoners, and four of these jurisdictions reported holding a total of sixteen boys under the age of eighteen in supermax.¹⁶⁰

D. Overview of Negative Impact of Supermax Conditions

Regardless of age or whether there is a pre-existing disability, the overwhelming majority of data shows that extreme isolation negatively impacts inmates. However, some studies question the seriousness of harm from solitary. For instance, a 2011 Colorado study concluded that the evidence showed that “those in solitary for months to a year fared no worse psychologically than similar people in the general population of the prison.”¹⁶¹ Another study alleges that “solitary has only a modest negative impact on mental health.”¹⁶² Both of these studies suffered from serious methodological problems,¹⁶³ however, and the corpus of

154. *Id.* at 34.

155. *Id.* at 35.

156. *Id.*

157. Wykstra, *supra* note 14.

158. 2018 TIME-IN-CELL, *supra* note 11, at 36.

159. *Id.*

160. *Id.*

161. Wykstra, *supra* note 14 (citing Maureen L. O’Keefe et al., *One Year Longitudinal Study of the Psychological Effects of Administrative Segregation*, NAT’L CRIM. JUST. REFERENCE SERV. (2011), <https://www.ncjrs.gov/pdffiles1/nij/grants/232973.pdf>).

162. *Id.* (citing R.D. Morgan et al., *Quantitative Synthesis of the Effects of Administrative Segregation on Inmates’ Well-Being*, 22 PSYCHOL. PUB. POL’Y & L. 439 (2016)).

163. *Id.*

data reveals that living in supermax has a serious impact on the physical and mental health of those subjected to these isolating conditions.

As previously mentioned, one of the biggest problems with supermax conditions is that the impacts of living in these conditions do not stop when an inmate is released. Supermax conditions can have prolonged effects on an inmate, seriously damaging their ability to rejoin society. This was particularly true in the case of Kalief Browder, a 22-year-old who spent two of three years in solitary on Rikers Island, despite never being convicted of a crime.¹⁶⁴ Kalief never recovered from the time he spent in supermax and took his own life about two years after release.¹⁶⁵ Unfortunately, Kalief was not an anomaly, and cases like his conflict with the idea that supermax conditions are not harmful to inmates. Cases like Kalief's also bring the problems with supermax conditions to light, providing officials with a political basis upon which they can eliminate or at least significantly lessen the use of supermax confinement.

IV. EFFORTS AT ABOLISHING OR REDUCING THE USE OF SUPERMAX CONDITIONS

A. Overview: Supermax Is Disturbing but not Illegal

Given the severe adverse consequences of supermax confinement, it is not surprising that there are calls to abolish it or at least severely curtail its use. Despite abhorrent conditions and evidence of considerable harm caused by supermax conditions, courts addressing the punishment itself have yet to ban the practice.¹⁶⁶ Even so, there are persuasive arguments in favor of a complete ban of the practice. We now provide an overview of relatively recent developments relating to efforts to ban or reduce the incidence of supermax confinement.

The prison's need to control and discipline inmates has made supermax confinement a typical and ordinary part of prison life, which arguably limits inmates' constitutional rights despite its common occurrence. Even though the U.S. Supreme Court has concluded that "conviction and incarceration extinguishe[s] most liberty interests of prisoners," inmates still have some rights, and the overuse of this

164. MORGAN, *supra* note 120, at 26.

165. *Id.*

166. *See, e.g.,* Resnik, *supra* note 11, at 4 (citing *Madrid v. Gomez*, 889 F. Supp. 1146, 1267 (N.D. Cal. 1995) (holding that extreme isolation was not a violation of the Eighth Amendment's prohibition on cruel and unusual punishment except in two situations: inmates who were mentally ill before being put in isolation and individuals who have an "unreasonably high risk" of suffering serious mental illness)).

supermax confinement can potentially violate those rights.¹⁶⁷ The Supreme Court, however, leaves many punitive decisions—such as whether to impose solitary confinement—to prison officials unless an inmate shows an “atypical and significant hardship . . . in relation to the ordinary incidents of prison life.”¹⁶⁸ Because solitary has become so common in prison, it may be very difficult for an inmate to show an “atypical and significant hardship” when he has to endure conditions to which other inmates are also subjected.¹⁶⁹

How does an inmate make a showing of an “atypical and significant hardship” when supermax conditions are so typical in United States prisons? Judith Resnik argues that because supermax is so typical, we have become “collectively numb” to the harms caused by supermax conditions.¹⁷⁰ By equating typical with legal, which has been done by the courts when applying the “atypical and significant hardship” standard, prison officials have retained unchecked authority to incarcerate inmates however they please.¹⁷¹ Resnik suggests that instead of comparing the atypical to the typical, “constitutional law should require us all to undo that which has come to be the commonplace and typical in United States prisons.”¹⁷²

B. Constitutional Analysis: Cruel and Unusual Punishment

Although most agree that supermax is far too common in the United States, some scholars take a different approach in their arguments for why the practice should be abolished. For instance, Merin Cherian makes a constitutional argument for abolishing supermax, noting that under an original understanding of the Cruel and Unusual Punishment Clause,¹⁷³ “a punishment is cruel and unusual if it is overly harsh in light of longstanding practice.”¹⁷⁴ Cherian’s approach suggests that although common in the United States, supermax does not comply with longstanding practice because there was a time when it was not used, making supermax unusual in the grand scheme of punishment. The Supreme Court uses an “evolving standards” approach when construing the

167. *Id.* at 6 (citing *Shaw v. Murphy*, 532 U.S. 223 (2001); *Sandin v. Conner*, 515 U.S. 472 (1995)).

168. *Id.* (citing *Sandin*, 515 U.S. at 484).

169. *See id.*

170. *Id.* at 24.

171. *Id.*

172. *Id.*

173. “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. CONST. amend. VIII.

174. Cherian, *supra* note 22, at 1761 (citing John F. Stinneford, *The Original Meaning of “Cruel,”* 105 GEO. L.J. 441, 464 (2017) [hereinafter Stinneford, *The Original Meaning of “Cruel”*]).

Eighth Amendment, which, according to the Court, “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”¹⁷⁵ According to Cherian, there are many problems with this approach, one of which is that the Court fails to really analyze what “unusual” means in the context of the Clause.¹⁷⁶ Although the Supreme Court defines “unusual” as “something different from that which is generally done,”¹⁷⁷ some scholars supporting the originalist view argue that it means “contrary to ‘long usage.’”¹⁷⁸

Applying this originalist definition, supermax should be considered unusual because of the length of its use. At one point, it fell out of use for more than a century.¹⁷⁹ Although the practice re-emerged in the 1970s and 1980s and has been in use since, this length of time is not sufficient to deem it a usual practice.¹⁸⁰ Supermax can only be considered usual if it has been “continuously employed throughout the jurisdiction for a very long time.”¹⁸¹ Supermax was not used continuously, as it was nearly abandoned within two decades after being created,¹⁸² and it has not been used for a “very long time” since its resurgence.¹⁸³ Cherian argues that “a period of thirty-five years is not long enough to incorporate a punishment into the common law,” even though history does not provide a specific time period for which a punishment must be used to be defined as “usual.”¹⁸⁴ The Court’s application of the current evolving standards does not leave room for the originalist definition of “unusual,” but perhaps the Court should reconsider its understanding of the word. As Cherian notes, unusual does not mean “strange” or “out of the ordinary.” Its meaning is “contrary to ‘long usage.’”¹⁸⁵ Since supermax has not been practiced continuously for a sufficient period of time to make it usual, it is, by definition, an unusual practice that violates the Eighth Amendment and should be abolished.¹⁸⁶

175. See *Trop v. Dulles*, 356 U.S. 86, 101 (1985).

176. Cherian, *supra* note 22, at 1763.

177. *Trop*, 356 U.S. at 100–1 n.32 (citations omitted).

178. Cherian, *supra* note 22, at 1765 (citing John F. Stinneford, *The Original Meaning of Unusual: The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1745 (2008) [hereinafter Stinneford, *The Original Meaning of Unusual*]).

179. See *id.* at 1769.

180. See *id.* at 1776–77.

181. *Id.* at 1775 (citing Stinneford, *The Original Meaning of Unusual*, *supra* note 178, at 1745).

182. See *id.* at 1775 n.158.

183. *Id.* at 1777.

184. Cherian, *supra* note 22, at 1777.

185. *Id.* at 1778 (citing Stinneford, *The Original Meaning of Unusual*, *supra* note 178, at 1745).

186. But see Logel, *supra* note 21, at 2 (arguing that solitary “is a cruel, but not unusual punishment in contemporary American prisons,” likely applying the “something different

Similar issues exist with the word “cruel” within the Clause. It may be understood to refer to the intent of the punisher or to refer to the actual effects of the punishment.¹⁸⁷ The latter understanding should arguably apply, though the former has often been applied. To show that conditions are cruel, the Supreme Court requires that the inmate “must show, at a minimum, that a prison official acted with deliberate indifference.”¹⁸⁸ However, as both Cherian and John F. Stinneford argue, this does not apply the correct definition of “cruel,” under which “the cruelty of a punishment should turn on the effect of the punishment, rather than the intent of the punisher.”¹⁸⁹ Applying this definition in conjunction with the originalist definition of “unusual” shows that supermax is cruel and unusual because it is “unjustly harsh in light of longstanding practice.”¹⁹⁰ Although at first glance it may not appear as cruel as historical, atrocious punishments, it is certainly “a quiet and invidious form of punishment that amounts to torture.”¹⁹¹ The proper comparison for determining the harshness is whether supermax is significantly harsher than the punishment it replaces, which for these purposes, is confinement in the general prison population.¹⁹² When comparing supermax confinement to confinement in the general population, the impact on supermax prisoners is far worse and sometimes irreparable.¹⁹³ When compared to being confined in general population, supermax is unjustly harsh, making it cruel under the Eighth Amendment.¹⁹⁴ Using the cruel effects definition of “cruel” better protects inmates’ rights by allowing individuals in supermax to more effectively litigate claims regarding prison conditions, thereby giving a voice to those trapped in supermax.¹⁹⁵

According to Christopher Logel, “[t]he Supreme Court has never found that a purely mental harm rises to the level of an Eighth Amendment violation. However, it has never categorically held that

from that which is generally done” definition rather than applying the “contrary to ‘long usage’” definition).

187. Cherian, *supra* note 22, at 1770 (citing Stinneford, *The Original Meaning of “Cruel”*, *supra* note 174, at 444).

188. *Id.* at 1771 n.116.

189. *Id.* at 1771 (citing Stinneford, *The Original Meaning of “Cruel”*, *supra* note 174, at 445).

190. *Id.* at 1778 (citing Stinneford, *The Original Meaning of “Cruel”*, *supra* note 174, at 464).

191. *Id.* at 1779 (citing CHARLES DICKENS, *AMERICAN NOTES FOR GENERAL CIRCULATION* 146–47 (John S. Whitley & Arnold Goldman eds., Penguin Books 1972) (1842)).

192. *Id.*

193. See Cherian, *supra* note 22, at 1782.

194. *Id.*

195. *Id.*

psychological harm is beyond the scope of the Eighth Amendment, either.”¹⁹⁶ Thus, theoretically, is possible to challenge the use of supermax conditions on this basis. If the Court finds that mental harm suffered as a result of prison conditions is an Eighth Amendment violation, then supermax inmates could be helped because mental harm is such a common side effect of living in supermax conditions. Recognizing that mental harm as a result of supermax conditions is such a serious, widespread problem may also lead the Court closer to disapproving of the practice altogether.

C. Constitutional Analysis: Due Process Clause

Inmates have also attempted to argue against supermax under the Due Process Clause, as applied to the states by the Fourteenth Amendment.¹⁹⁷ Inmates in supermax may bring a procedural due process claim when their lives or liberty are threatened by government action.¹⁹⁸ Litigants challenging solitary under the premise of due process often allege that solitary is “not an inherent feature of sentences,” and as such, they have “a liberty interest in avoiding solitary confinement.”¹⁹⁹ Just because a person is imprisoned does not mean his liberty interests fall away completely, and being forced to live in supermax conditions often triggers a liberty interest under the Due Process Clause.²⁰⁰ Whether solitary violates a cognizable liberty interest is determined by looking at “(a) the particular conditions of solitary confinement, (b) the duration of stay within those conditions, and (c) the difference between the solitary confinement conditions and those generally prevailing in the rest of the prison system.”²⁰¹ Once a liberty interest is established, the court must determine whether “the process afforded solitary confinement prisoners [is] constitutionally sufficient.”²⁰² However, inmates have not been overly successful in bringing claims under the Due Process Clause. In 2005, the Court decided in *Wilkinson* that the entire supermax system in Ohio, which was run and reviewed only by prison officials, was adequate under the Due Process Clause.²⁰³

196. Logel, *supra* note 21, at 20.

197. “No state shall . . . deprive any person of life, liberty, or property, without due process of law . . .” U.S. CONST. amend. XIV, § 1.

198. Logel, *supra* note 21, at 11.

199. *Id.* at 12.

200. See *Wilkinson v. Austin*, 545 U.S. 209, 223–24 (2005).

201. Logel, *supra* note 21 (citing *Wilkinson*, 545 U.S. at 209).

202. *Id.* at 13.

203. See *id.* at 15 (citing *Wilkinson*, 545 U.S. at 217).

D. Other Arguments

Inmates may also challenge their confinement to supermax by showing that they have been deprived of a “single, identifiable human need.”²⁰⁴ Although studies show that social interaction is important to the physical and mental health of inmates in supermax, many courts have rejected the classification of social interaction as an “identifiable human need.”²⁰⁵ Additionally, the majority of courts—but not all—²⁰⁶ require a showing of physical harm to proceed on a challenge to confinement under the Eighth Amendment.²⁰⁷

One of the biggest issues with supermax is that it does not achieve its primary goal—providing and maintaining safety and security within prison walls.²⁰⁸ According to a 2016 report from the National Institute of Justice: “There is little evidence that administrative segregation has had effects on overall levels of violence within individual institutions or across correctional systems.”²⁰⁹ There have only been a few studies on the impact of the increased usage of supermax; yet none of these studies show a reduction in violence among inmates within the facilities.²¹⁰ There is also little evidence that supermax conditions “meaningfully improve safety for staff in prisons and jails.”²¹¹

Not only is the protection of prison officials a primary goal of supermax, the protection of vulnerable groups, such as individuals with disabilities and members of the LGBTQIA+ community, is also important and has been identified as a reason for confining individuals in supermax.²¹² There are, however, other more desirable options for keeping members of vulnerable groups safe without resorting to supermax.²¹³ For example, the Vera Institute, in conjunction with the American Civil Liberties Union (ACLU) and the American Bar Association,

204. *Wilson v. Seiter*, 501 U.S. 294, 304 (1991).

205. Logel, *supra* note 21 (citing *McMillan v. Wiley*, 813 F. Supp. 2d 1283 (D. Colo. 2011)).

206. *Ruiz v. Johnson*, 37 F. Supp. 2d 855, 940 (S.D. Tex. 1999), *rev'd on other grounds*, 243 F.3d 941 (5th Cir. 2001), *adhered to on remand*, 154 F. Supp. 2d 975 (S.D. Tex. 2001) (holding that Texas's solitary system violated the Eighth Amendment based on the psychological harm it inflicted on inmates).

207. Logel, *supra* note 21 (citing *Keenan v. Hall*, 83 F.3d 1083 (9th Cir. 1996), *amended on denial of reh'g*, 135 F.3d 1318 (9th Cir. 1998)).

208. See *Wykstra*, *supra* note 14.

209. *Id.*

210. *Id.*

211. *Id.*

212. See *id.*

213. See *id.*

recommends separating people if necessary for safety reasons but ensuring that they still have full access to programming and services.²¹⁴

Having a disability or being a member of a specific vulnerable group should never be considered a valid reason for putting inmates in supermax and further isolating them. Logel focuses primarily on inmates' mental health, arguing that there should be no difference between preexisting serious mental illness and mental illness caused by supermax confinement.²¹⁵ According to Logel, all prisoners have a "categorical right to be free from confinement-caused severe mental illness."²¹⁶ The right to be free from severe mental illness should arguably be considered a "single, identifiable human need" under an Eighth Amendment analysis, and even if severe mental illness does not affect *all* inmates in supermax, it is predictable and widespread enough that the significant risk of an inmate developing severe mental illness even after a short time in solitary is sufficient to create a claim under the Eighth Amendment.²¹⁷ These arguments receive some support from courts that have concluded that a significant risk of harm is sufficient for a cognizable claim under the Eighth Amendment.²¹⁸ Although these arguments have some normative appeal, they have not proven to be effective jurisprudential weapons against the legality of supermax conditions.

E. New Rules and Limitations

Given that constitutional and other strict legal arguments have not been effective in abolishing supermax conditions, some advocates have attempted to attenuate the use of supermax confinement by narrowing the situations in which it is deemed appropriate. Another goal of recent research into supermax confinement was to track rules and policies for the use of restrictive housing across multiple jurisdictions. In 2012, most correctional rules gave officials wide discretion in placing inmates in restrictive housing.²¹⁹ In 2015, the ASCA publicly admitted that the use of isolation in prisons was a "grave problem," noting that the practice should be eliminated or, at the very least, reduced.²²⁰ The following

214. See Wykstra, *supra* note 14.

215. Logel, *supra* note 21, at 22 ("If preexisting serious mental illness precludes the transfer of an inmate to solitary confinement, then an inmate's mental illness caused by solitary confinement precludes her continued presence therein.")

216. *Id.*

217. *Id.* at 20, 23, 24 (quoting Seiter, 501 U.S. at 304).

218. *Id.*

219. Resnik, *supra* note 11, at 21.

220. *Id.* at 15 (citing Press Release, Ass'n of State Corr. Adm'rs, New Report on Prisoners in Administrative Segregation Prepared by the Association of State Correctional Administrators and the Arthur Liman Public Interest Program at Yale Law School (Sept. 2, 2015)), <https://perma.cc/V8TF-BRCG>.

year, the ACA called for limits on the use of isolation.²²¹ In 2017, Colorado followed the ACA's recommendations by instituting "some of the most progressive policies in the country, limiting solitary confinement to the UN standard²²² of no more than 15 days."²²³ North Dakota has also taken measures to reform the use of solitary within the state.²²⁴

More broadly, although supermax has been accepted for quite some time in the United States, views have begun to change, particularly after conditions of prisoners at U.S. facilities in Guantanamo Bay became a topic of public debate after the attacks of September 11.²²⁵ In 2005, the U.S. Supreme Court recognized in *Wilkinson v. Austin* that prisoners may have a liberty interest when placed in isolation.²²⁶ This recognition provided inmates the opportunity to argue that officials had violated their constitutional rights.²²⁷ Some forms of solitary were seen as actionable, allowing prisoners to seek refuge from abysmal conditions and long-term isolation.²²⁸ Furthermore, the Court continued to modify its stance on supermax, eventually recognizing the negative effects on prisoners.²²⁹ Justice Kennedy, who had previously defended solitary as a necessary part of prison, appeared to steer this modification, noting that the "judiciary may be required . . . to determine whether workable alternative systems for long-term confinement exist, and, if so, whether a correctional system should be required to adopt them."²³⁰ Shortly after Justice Kennedy's comment, Justice Breyer and Justice Ginsburg echoed the

221. *Id.* at 16 (citing ACA RESTRICTIVE HOUSING STANDARDS, *supra* note 87, at 3).

222. The United Nations uses the Nelson Mandela Rules. *See infra* text accompanying notes 248–50.

223. Wykstra, *supra* note 14.

224. *Id.*

225. *See* Resnik, *supra* note 11, at 2–3, 12.

226. *Wilkinson v. Austin*, 545 U.S. 209, 220–21 (2005).

227. *See* Resnik, *supra* note 11, at 10.

228. *See, e.g., Gillis v. Litscher*, 468 F.3d 488, 489 (7th Cir. 2006) ("Stripped naked in a small prison cell with nothing except a toilet; forced to sleep on a concrete floor or slab; denied any human contact; fed nothing but 'nutria-loaf'; and given just a modicum of toilet paper—four squares—only a few times. Although this might sound like a stay at a Soviet gulag in the 1930s, it is, according to the claims in this case, Wisconsin in 2002."); *Johnson v. Wetzel*, 209 F. Supp. 3d 766, 770, 781 (M.D. Pa. 2016) (holding that confinement of a prisoner who had served 36 years in solitary was unconstitutional); *Wilkerson v. Stalder*, 639 F. Supp. 2d 654, 659, 679 (M.D. La. 2007) (concluding that "28 to 35 year confinements" in Louisiana's State Penitentiary could violate the Eighth Amendment of the Constitution).

229. *Davis v. Ayala*, 135 S. Ct. 2187, 2209 (2015) (Kennedy, J., concurring) (noting that prisoners should be told that "during the many years you will serve in prison before your execution, the penal system has a solitary confinement regime that will bring you to the edge of madness, perhaps to madness itself").

230. *Ayala*, 135 S. Ct. at 2210.

sentiment, condemning “[t]he dehumanizing effect of solitary confinement.”²³¹

Although these opinions were not majority decisions, sentiments of this nature paved the way for broader social and legal movements to bring attention to the suffering caused by supermax confinement. For instance, the ACLU’s National Prison Project launched a “Stop Solitary” campaign in 2010, making public various atrocities that prisoners faced.²³² The media also became involved in the argument against solitary by bringing attention to the suicides of men in pre-trial detention at Rikers Island and the hunger strikes by inmates at Pelican Bay, California.²³³ In 2014, directors of several prison systems placed limitations on the use of supermax after determining it was “the right thing to do.”²³⁴

By 2018, the “bases for entry” into supermax confinement had become more narrow across many prisons.²³⁵ For example, certain behaviors, like horseplay, that formerly provided a basis for placing inmates into restrictive housing were no longer sufficient.²³⁶ Additionally, some of the jurisdictions expanded oversight of placement into restrictive housing, modified the amount of time that would be spent in-cell, offered additional opportunities for social interaction through various programs, and considered less restrictive alternatives.²³⁷ Many jurisdictions’ efforts to narrow entry bases and improve oversight were guided by the ACA standards.²³⁸ As noted above, state legislation has also contributed to improving the solitary situation, as legislators have set out to protect vulnerable groups or mandate that prisons report data on the use of solitary.²³⁹ As of April 2019, New York and New Jersey were considering legislation offering reforms for all those incarcerated.²⁴⁰

International standards have also been developed to guide the use of supermax conditions. For instance, the Nelson Mandela Rules preclude the placement of prisoners with mental and/or physical disabilities in supermax when such disabilities would be made worse by supermax

231. *Glossip v. Gross*, 135 S. Ct. 2726, 2765 (2015) (Breyer, J., and Ginsburg, J., dissenting).

232. See Resnik, *supra* note 11, at 12.

233. See *id.*

234. *Id.* at 15.

235. *Id.* at 21.

236. *Id.* (citing 2018 TIME-IN-CELL, *supra* note 11, at 60).

237. *Id.* (citing 2018 TIME-IN-CELL, *supra* note 11, at 60, 61, and 62).

238. Resnik, *supra* note 11, at 21 (finding that the 2016 ACA standards prompted at least thirty-six jurisdictions to review their policies and more than twenty-four jurisdictions to revise their policies).

239. Wykstra, *supra* note 14.

240. *Id.*

conditions.²⁴¹ Ultimately, under these rules, solitary is to “be used only in exceptional cases as a last resort, for as short a time as possible and subject to independent review.”²⁴² There is no consensus regarding whether it is desirable to apply these rules in the domestic setting, and these rules are not always harmonious with other proposed standards. Although the ACA has called for limits on supermax confinement, its policies create distinctions that could lead to more harm than following the Nelson Mandela Rules might. For instance, the ACA’s definition of solitary addresses the holding of prisoners for more than thirty days, while the definition under the Nelson Mandela Rules stops at fifteen days.²⁴³ Even though the ACA does not allow prisoners who were under the age of eighteen, pregnant, or suffering from mental illness to be placed in “extended restrictive housing,” the standards appear to leave open the question of whether these individuals could still be placed in “restrictive housing” for up to thirty days.²⁴⁴

In limited instances, state legislators in several states have also introduced limits to the use of supermax conditions. For example, Massachusetts barred placing pregnant prisoners in solitary, as well as the use of an individual’s gender or sexual orientation as reasons to place a prisoner into solitary.²⁴⁵ Massachusetts was joined by other jurisdictions that placed limits on the use of solitary for inmates with serious mental illnesses.²⁴⁶ Massachusetts also ensured that individuals held in solitary for sixty days or more were given “access to vocational, educational, and rehabilitative programming.”²⁴⁷ Some states have also condemned the use of solitary for juvenile inmates, and Colorado has ended the use of solitary for fifteen days or more and for twenty-two hours or more in a cell.²⁴⁸ Colorado now requires that inmates in supermax are allowed out of their cells “for a minimum of four hours per day, at restraint tables with up to four other inmates, for programming and other activities.”²⁴⁹ Colorado also precludes the placement of the mentally ill in supermax.²⁵⁰ In Colorado, if correctional officers and clinicians determine that mental illness was the cause of a disciplinary incident, “the offender is taken out

241. Nelson Mandela Rules, *supra* note 62, at Rule 45(2).

242. *Id.* at Rule 45(1).

243. Resnik, *supra* note 11, at 16 (citing ACA RESTRICTIVE HOUSING STANDARDS, *supra* note 87, at 3).

244. *Id.* at 16 (footnotes omitted).

245. *Id.* at 13 (citing Crimes and Offenses, 2018 Mass. Legis. Serv. Ch. 69, § 93 (S.B. 2371) (West)).

246. *See id.* at 14.

247. Crimes and Offenses, *supra* note 245, Ch. 69, § 93.

248. Resnik, *supra* note 11, at 14, 16.

249. 2018 TIME-IN-CELL, *supra* note 11, at 67.

250. *Id.*

of the disciplinary process and given treatment.”²⁵¹ This is far removed from other jurisdictions where mental health treatment is often withheld.

F. Overview of Attempts to Abolish or Limit the Use of Supermax Confinement

As we have seen, supermax conditions place severe restrictions on prisoners and inflict a high degree of suffering on them. These conditions often have detrimental mental and physical consequences. There are compelling normative reasons for abolishing supermax confinement. However, the numerous legal challenges which have been made to supermax confinement have, by and large, not been successful. Greater community awareness of the brutality of supermax has in some circumstances encouraged state lawmakers to limit the use of supermax confinement. However, the reality is that supermax conditions remain commonplace, and this is likely to continue to into the foreseeable future. In light of the likely ongoing significant prevalence of supermax conditions, more pragmatic measures must be employed to address supermax confinement. It is to this that we now turn.

V. THE CASE FOR HARD-TIME CREDITS

A. Overview of Argument

Offenders should be sent to prison as punishment, not for punishment.²⁵² It is incontestable that supermax confinement is far more arduous than conventional prison conditions. The hardship of imprisonment is normally measured in quantitative terms, i.e. by the length of the prison term. But the deprivations experienced by inmates also have a qualitative aspect. It is hard to objectively contrast the extent of deprivation of one prison term to that of another because although most prisons are run along relatively similar lines, they all have minor differences.²⁵³ However, the difference between supermax conditions and typical prison conditions are so pronounced that they differ not in degree, but in nature. This logically should result in a different calibration of the punitiveness of this sanction, whereby each day spent in supermax conditions should result in a reduction of the prison time that an offender is

251. *Id.* The stance taken in Colorado is the antithesis of the stance taken in Ohio, where the DRC appears to allow the seriously mentally ill to be placed in supermax when they commit acts of violence even if it is related to their mental illness because “the threat to the safety of others cannot be ignored.” *Id.* at 79.

252. See *Organisational Review – Unlocking Potential, Transforming Lives*, SCOT. PRISON SERV., 19 (Jan. 21, 2014), <https://www.sps.gov.uk/Corporate/Publications/Corporate9.aspx>.

253. See *supra* Part II.

required to serve. This approach will not directly abolish supermax confinement but will reduce the overall harshness of sanctions imposed on prisoners who are subjected to supermax conditions and should logically operate to provide prison officials a disincentive from the overuse of such confinement, thereby reducing the incidence of this form of punishment.

There is, however, one group of prisoners to whom such credits should not apply, and this group consists solely of sexual and violent offenders who are at a substantial risk of reoffending.²⁵⁴ This group warrants special treatment because the interest of community safety outweighs the burden of the disproportionate punishment inflicted on supermax inmates.

We now discuss the rationale for these reform proposals in greater detail.

B. The Nature of Punishment

The argument for hard-time credits for supermax prisoners is based on the underpinnings of punishment and the principle of proportionality. Ultimately, sentencing concerns the infliction of punishment. The below discussion establishes that in evaluating the nature and extent of punishment, it is important to factor in the actual impact of the hardship on the offender.²⁵⁵ If a sanction imposes an additional burden on a certain category of offenders, it is necessary to incorporate the actual total burden of the punishment into sentencing calibrations.

There is no universally accepted definition of punishment. In defining punishment, some commentators focus on its association with guilt.²⁵⁶ Antony Duff defines punishment as “the infliction of suffering on a member of the community who has broken its laws.”²⁵⁷ Similarly, John McTaggart defines punishment as “the infliction of pain on a person because he has done wrong.”²⁵⁸ Andrew von Hirsch states that “[p]unishing someone consists of doing something painful or unpleasant to him, because he has purportedly committed a wrong, under circumstances and in a manner that conveys disapprobation of the offender for his wrong.”²⁵⁹

254. See *infra* Section G for information on two other cohorts to whom the use of hard-time credits cannot apply: prisoners sentenced to death or life sentences.

255. Adam Kolber, *The Subjective Experience of Punishment*, 109 COLUM. L. REV. 182, 186 (2009) (making a similar observation).

256. Herbert Morris, *Persons and Punishment*, in THEORIES OF PUNISHMENT 76, 83 (S.E. Grupp, ed., 1972).

257. R.A. DUFF, TRIALS AND PUNISHMENTS 267 (1985).

258. J.M.E. MCTAGGART, STUDIES IN HEGELIAN COSMOLOGY 111 (1901).

259. ANDREW VON HIRSCH, PAST OR FUTURE CRIMES 35 (1985) (emphasis added).

A key aspect of punishment that has been identified by many scholars is the association between punishment and pain or suffering. Chin Liew Ten states that punishment “involves the infliction of some unpleasantness on the offender or it deprives the offender of something valued.”²⁶⁰ Others have placed somewhat emotive emphasis on the hurt that punishment seeks to cause and assert, for example, that “[t]he intrinsic point of punishment is that it should *hurt* – that it should inflict suffering, hardship or burdens.”²⁶¹ Honderich is somewhat more expansive regarding the type of evils that can constitute punishment: punishment involves “the infliction of something which is assumed to be unwelcome to the recipient: the inconvenience of a disqualification, the hardship of incarceration, the suffering of a flogging, exclusion from the country or community, or in extreme cases, death.”²⁶²

Thus, there are numerous definitions of “punishment.” From the above accounts, it seems there is consensus on two points. Core aspects of punishment are that it consists of: (i) a hardship or deprivation, and the taking away of something of value,²⁶³ and (ii) it is imposed for a wrong actually committed or perceived to have been committed. The first requirement is incontestable: an experience that benefits an individual or has no impact on them is not punishment. The second requirement is equally essential. Without this stipulation, any experience that constituted a detriment could be termed a punishment. Clearly, it is not credible to describe an illness, failure in an exam, or a marriage break-up as a form of punishment.

In short, a punishment must be a form of deprivation, and there must be a connection between the deprivation and violation of a norm. Thus, punishment by its very nature involves the infliction of a degree of inconvenience or hardship on an offender. An important aspect of this is that hardship comes in degrees and the intensity can vary considerably. This is a principle which is accepted without reservation in relation to most criminal sanctions. Thus, for example, there is no question that prison is harsher than either a small fine or home arrest. By analogy, it follows that supermax detention constitutes a more serious form of sanction than conventional prison conditions.

260. C.L. TEN, *CRIME, GUILT, AND PUNISHMENT* 2 (1987) (emphasizing that punishment is inflicted to express disapproval or condemnation of a person’s conduct).

261. Antony Duff, *Punishment, Citizenship and Responsibility*, in *PUNISHMENT, EXCUSES AND MORAL DEVELOPMENT* 17, 18 (Henry Tam ed., 1996) (describing a feature of current debates about punishment, which the author later calls into question).

262. NIGEL WALKER, *WHY PUNISH?* 94 (Oxford University Press, Oxford, 1991).

263. See JOHN KLEINIG, *PUNISHMENT AND DESERT* 22–23 (1973) (stating that punishment involves some deliberate imposition by the punisher on the punished).

C. *The Principle of Proportionality*

The principle of proportionality requires that the seriousness of the crime be matched by the harshness of the penalty.²⁶⁴ Proportionality is explicitly incorporated into sentencing law in the United States. It is a constitutional requirement of the sentencing regimes of ten states²⁶⁵ and is a core principle of the Federal Sentencing Guidelines.²⁶⁶ The Guidelines Manual states that one of the three objectives underpinning the Sentencing Reform Act is “proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity.”²⁶⁷

Broken down to its core features, proportionality has two limbs. The first is the seriousness of the crime, and the second is the harshness of the sanction. The principle has a quantitative component—the two limbs must be matched. In order for the principle to be satisfied, the seriousness of the crime must be nearly equal to the harshness of the penalty. The main criterion regarding the sanction harshness limb is the extent to which the penalty sets back the interests of offenders.²⁶⁸ Given that supermax prisoners suffer more than prisoners who are in mainstream conditions, it follows that proportionality requires the type of confinement to be factored into sentencing.²⁶⁹

D. *The Magnitude of the Premium for Supermax Confinement*

The next issue is the penalty reduction that should be accorded to offenders for time spent in supermax detention. The lack of an objective criterion answer for determining a one-size-fits-all reduction raises the question of what substitution would be most appropriate. There is no established framework for this process. The concept of a sanction unit has been suggested; however, attempts to inject content into such an

264. See Richard G. Fox, *The Meaning of Proportionality in Sentencing*, 19 MELB. U. L. REV. 489, 491–92 (1994); *Solem v. Helm*, 463 U.S. 277, 284–90 (1983) (discussing the longstanding principle that a punishment should be proportionate to the crime).

265. See, e.g., Gregory S. Schneider, *Sentencing Proportionality in the States*, 54 ARIZ. L. REV. 241, 242 (2012) (focusing on the operation of the principle in Illinois, Oregon, Washington, and West Virginia).

266. See U.S. SENTENCING GUIDELINES MANUAL 2–5 (2018).

267. *Id.* at 3. The most basic objective is to “combat crime through an effective, fair sentencing system” through (i) honesty in sentencing (that is, removing the power of the parole commission to reduce the term to be served); (ii) reasonable uniformity in sentencing – by reducing the wide disparity of sentences for similar offenses; and (iii) proportionate sentences. See *id.* at 2–3.

268. Mirko Bagaric, *Injecting Content into the Mirage that is Proportionality in Sentencing*, 25 N.Z. U. L. REV. 411, 438 (2014).

269. See ANDREW ASHWORTH, SENTENCING AND CRIMINAL JUSTICE 79–80 (2d ed. 1995) (describing the principle that sanctions analysis should incorporate offenders’ different resources and sensitivities so that sanctions have an equal impact on different offenders).

approach have not been adopted or even developed with a high degree of specificity.²⁷⁰ This lack of specificity is primarily due to the large number of variables involved and the high degree of subjectivity that exists regarding the extent to which individuals covet different types of interests. There is no way, for example, to equate a fine of a certain amount²⁷¹ with the burden of imprisonment for a day. It is likely that some people would prefer to spend a day in prison rather than, for example, pay a fine of \$1,000 or be denied internet access for a week. But other individuals would rather pay a fine of almost any amount to avoid even a day in prison.

Despite such complexities and inevitable approximations that are involved in comparing and contrasting the respective hardships associated with sanctions, intellectual rigor and doctrinal transparency require that relevant conclusions and calculations should be expressly set out. We propose that each day in supermax conditions should count for two days of normal imprisonment.²⁷² Thus, for example, if a prisoner spends all of his or her term in supermax conditions, then he or she would be released from prison at the expiration of half of the prison term.

This formula stems from relative comparison on the deprivations stemming from the two forms of prison conditions. As we have seen, supermax confinement involves prisoners being stripped of effectively everything that is meaningful in day-to-day life. These prisoners lose total control of their environment. They are devoid of any meaningful

270. For example, there is no clear basis for determining the parity and interchangeability of existing sanctions which are seemingly disparate. For a discussion regarding the concept of sanction (or punishment) units and sanction substitution or equivalences, see MICHAEL TONRY, *SENTENCING MATTERS* 131 (Oxford Univ. Press 1996); ANDREW VON HIRSCH, *CENSURE AND SANCTIONS* 60 (1993); Joan Petersilia & Elizabeth Deschenes, *Perceptions of Punishment: Inmates and Staff Rank the Severity of Prison Versus Intermediate Sanctions*, 74 *PRISON J.* 306 (1994); Voula Marinos, *Thinking About Penal Equivalents*, 7 *PUNISHMENT & SOC.* 441 (2005); NORA V. DERMLEITNER ET AL., *SENTENCING LAW AND POLICY: CASES, STATUTES, AND GUIDELINES* 631-33 (3d ed. 2013) (discussing the concept of a day fine which adjusts the amount to the income of the offender, but not as a substitute to imprisonment).

271. In some jurisdictions for relatively non-serious offenses, prison can be converted for a fine of a designated amount. Additionally, in some instances, people who cannot afford to pay (or refuse to pay) a fine are imprisoned for a set duration, but there is no established rationale for setting these calibrations. In the Australian state of Victoria, for example, previously a fine could be discharged by imprisonment or community work in default of payment at the rate of \$100 per day or \$20 per hour, respectively. RICHARD G. FOX & ARIE FREIBERG, *SENTENCING: STATE AND FEDERAL LAW IN VICTORIA* 414-15 (Oxford Univ. Press, 2d ed. 1999). There is, however, no doctrinal framework underpinning this supposed equivalence.

272. Previously, I have suggested that in the Australian context, supermax conditions should result in a 50% loading. See Mirko Bagaric, Richard Edney & Theo Alexander, (*Particularly*) *Burdensome Prison Time Should Reduce Imprisonment Length – And not Merely in Theory*, 38 *MELB. U. L. REV.* 409 (2014). However, in light of more recent evidence (mentioned in Part III of this Article) regarding the profoundly damaging effects of supermax confinement, this loading was too light.

form of stimulation and prevented from engaging in many types of activity. Contact with other people is negligible. It is boredom, passivity, and loneliness at the highest scale. As we have seen, it often also leads to more enduring mental and physical pain. Prisoners in the mainstream environment are deprived of their physical liberty; however, they are still capable of engaging in a degree of physical mobility, socializing with other prisoners, and having some control over their activities. Hence, supermax conditions are far more burdensome than normal prison conditions.²⁷³

Logically, the correct adjustment for supermax confinement prison compared to conventional prison arises when prisoners who have experienced both forms of incarceration would be indifferent to whether they served their time in normal prison conditions or supermax confinement. However, given the diversity of the profile of prisoners and the differing degrees of resilience and tolerance that they would have for supermax conditions, this adjustment would vary significantly across the inmate population. For this reason, the suggestion that supermax confinement should count for two days in prison is an approximation of the relative deprivations of the two forms of punishment.

The increased deprivation associated with supermax conditions is arguably more than twice as burdensome as normal prison conditions. However, this formula has several advantages. First, it is numerically simple to understand and implement. Second, if an error is to be made in terms of comparing the two forms of prison conditions, it should err on giving less time reduction for time spent in supermax conditions. This is because an overly generous time reduction could result in a significant number of prisoners electing to serve at least part of their terms in supermax confinement. Of course, this is an election that cannot be directly actioned by way of prisoner request, but it could be orchestrated by prisoners who deliberately misbehaved in order to be sent to supermax confinement by prison officials. Prisoners should be prevented or deterred from gaming the system. Such mechanisms are discussed in subsection F of this Article, after we examine an exception to our recommendation.

E. Serious Sexual and Violent Offenders – No Hard-Time Credits Warranted

The principle of proportionality, which underpins our argument in favor of a credit adjustment for supermax conditions, is not absolute and, hence in some circumstances, it can be trumped by other sentencing

273. See *supra* Part III.

objectives.²⁷⁴ To this end, the most important sentencing aim is protection of the community, which in fact is the ultimate aim of the criminal law.²⁷⁵

All crime is harmful and, hence, there is a need to protect the community from all types of offenses. However, empirical data shows that certain offenses are especially damaging to individuals. A number of studies have measured the impact of certain offense categories on victims. Empirical data show that serious sexual and violent offenses often impact victims far more profoundly than other forms of crime.

Rochelle Hanson, Genelle Sawyer, Angela Begle, and Grace Hubel following an extensive review of many studies which examined the effects of violent and sexual crimes on crimes noted these crimes often lead to significant long-term harm.²⁷⁶ The report concluded:

In sum, findings from the well-established literature on general trauma and the emerging research on crime victimization indicate significant functional impact on the quality of life for victims. However, more research is necessary to understand the mechanisms of these relationships and differences among types of crime victimization, gender, and racial/ethnic groups.²⁷⁷

The study showed that victims of violent crime, and sexual crime in particular, have difficulties in maintaining intimate relationships,²⁷⁸ compromised parenting skills for (female victims of partner violence) (although this finding was not universal),²⁷⁹ higher rates of unemployment;²⁸⁰ high levels of dysfunction in social and leisure activities²⁸¹ and high medical costs.²⁸²

Further, a literature review published in 2006 found that victims of violent crime were 2.6 times as likely as non-victims to suffer from depression²⁸³ and many females (one in twenty) who had been seriously sexually assaulted attempted to commit suicide.²⁸⁴

274. Portions of this section are adapted from and discussed in more detail in Mirko Bagaric & Brienna Bagaric, *Mitigating the Crime That Is the Over-Imprisonment of Women: Why Orange Should Not Be the New Black*, 41 VT. L. REV. 537, 585-87 (2017).

275. See generally MIRKO BAGARIC ET AL., AUSTRALIAN SENTENCING (2019).

276. Rochelle F. Hanson et al., *The Impact of Crime Victimization on Quality of Life*, 23 J. TRAUMATIC STRESS 189 (2010).

277. *Id.* at 194-95.

278. *Id.* at 190-91.

279. Hanson et al., *supra* note 276, at 190.

280. *Id.* at 191.

281. *Id.* at 191-92.

282. *Id.* at 193.

283. MIKE DIXON ET AL., CRIME SHARE: THE UNEQUAL IMPACT OF CRIME 25 (2006).

284. *Id.* at 17, 39.

Chester L. Britt, in a study examining the effects of violent and property crime on the health of 2,430 respondents, noted that most victims of crime reported reduced levels of well-being²⁸⁵ but this applied most strongly for victims of violent, as opposed to property, crime.²⁸⁶

It is clear that serious sexual and violent offenses often devastate the lives of victims, providing a powerful argument for the imposition of stern punishment for the perpetrators of such crimes. Given the significance of these offenses, community protection from this type of behavior should be a cardinal consideration. Mitigation normally accorded to offenders for criminal acts should be negated if there is a substantial likelihood that the inmate would reoffend if released prior to his or her original release date.

A disproportionate number of serious sexual and violent offenses are committed by repeat offenders.²⁸⁷ Thus, offenders who have committed serious sexual and violent offenses are statistically more likely to commit such offenses than other people. They present a meaningful risk of serious offense to the community. Thus, the reforms such as our proposed hard-time loading, which could potentially result in serious sexual and violent offenders being released earlier, should be implemented with a significant degree of caution—and arguably not at all.

A sensible compromise that applies in relation to this cohort of offenders is to only apply hard-time credits to inmates who are serving time for sexual and violent offenses who are not likely to reoffend on release. This would require accurate predictions to be made of an offender's likely risk of recidivism. Until recently, such predictions were inherently unreliable.

However, in recent years instruments have been developed which provide relatively accurate predictions of an offender's risk profile. These tools come in two main forms. The first form is known as a risk assessment tool. These instruments predict future risk on the basis of actuarial-based assessments²⁸⁸ that examine past events and seek to

285. Chester L. Britt, *Health Consequences of Criminal Victimization*, 8 INT'L REV. VICTIMOLOGY 63, 63 (2001).

286. *Id.* at 69–70; see also Adriaan J.M. Denkers & Frans Willem Winkel, *Crime Victims' Well-Being and Fear in a Prospective and Longitudinal Study*, 5 INT'L REV. VICTIMOLOGY 141, 141 (1998).

287. See Mirko Bagaric, *The Punishment Should Fit the Crime – Not the Prior Convictions of the Person that Committed the Crime*, 51 SAN DIEGO L. REV. 343, 410 (2014).

288. Melissa Hamilton, *Back to the Future: The Influence of Criminal History on Risk Assessments*, 20 BERKELEY J. CRIM. L. 76, 91–92 (2015); Michael Tonry, *Legal and Ethical Issues in the Prediction of Recidivism*, 26 FED. SENT'G REP. 167 (2014). Such tools are in fact now used in the majority of states in the United States. See Shawn Bushway & Jeffrey Smith, *Sentencing Using Statistical Treatment Rules: What We Don't Know Can Hurt Us*, 23 J. QUANTITATIVE CRIMINOLOGY 377, 378 (2007); Pari McGarraugh, *Up or Out: Why*

identify variables that contributed to their occurrence.²⁸⁹ Developers of “actuarial instruments manipulate existing data in an empirical way to create rules. These rules combine the more significant factors, assign applicable weights, and create final mechanistic rankings.”²⁹⁰

A large number of risk assessment tools have been developed. The key differences between the various risk assessment instruments are the variables that they use and the weightings that they apply to relevant considerations that have been ascertained as being relevant to the risk of future offending. Typically, an offender’s criminal history is a constant base determinant.²⁹¹ Other key variables are an offender’s criminal associates, pro-criminal attitudes, and antisocial personality characteristics.²⁹² One of the most sophisticated tools is the Post Conviction Risk Assessment (PCRA), which is currently used in relation to probation assessments in the United States federal jurisdiction.²⁹³ It is more nuanced than many earlier predictive models because it scores not only static factors (such as prior criminal history), but also dynamic variables, including employment status and history, education, and family relationships.²⁹⁴

The second form of assessment instrument that has been developed to predict an offender’s likelihood of reoffending is a “risk and needs” instrument. This not only assesses the risk of offenders reoffending but also identifies the needs of those offenders that, if met, would lower their

“Sufficiently Reliable” Statistical Risk Assessment Is Appropriate at Sentencing and Inappropriate at Parole, 97 MINN. L. REV. 1079, 1091 (2013).

289. McGarraugh, *supra* note 288.

290. Hamilton, *supra* note 288, at 91–92.

291. *Id.* at 89.

292. JAMES BONTA ET AL., RISK-NEED-RESPONSIVITY MODEL FOR OFFENDER ASSESSMENT AND REHABILITATION 6 (2007), <https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/rsk-nd-rspnsvty/index-en.aspx>.

293. Other assessment tools are: COMPAS (Correctional Offender Management Profiling for Alternative Sanctions); LSI-R (Level of Service Inventory – Revised); LSI/CMI (Level of Service/Case Management Inventory); LS/RNR (Level of Service/Risk, Need, Responsibility); ORAS (Ohio Risk Assessment System); Static-99 (for sex offenders/offenses only); STRONG (Static Risk and Offender Needs Guide); and Wisconsin State Risk Assessment Instrument. Most of these are used for assessing post-sentencing correctional populations. Jordan M. Hyatt & Steven L. Chanenson, *The Use of Risk Assessment at Sentencing: Implications for Research and Policy* 4 (Villanova Law/Pub. Policy Research Paper No. 2017-1040, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2961288.

294. Hamilton, *supra* note 288, at 94; *see also* Hyatt & Chanenson, *supra* note 293, at 6. Another common similar tool is the Level of Service Inventory, which incorporates fifty-four considerations. In terms of predicting future violence, it has been noted that dynamic measures are slightly more accurate than static measures for short- to medium-term predictions of violence. *See* C. M. Chu et al., *The Short- to Medium-Term Predictive Accuracy of Static and Dynamic Risk Assessment Measures in a Secure Forensic Hospital*, 20 ASSESSMENT 230 (2013). Given that these tools go beyond the use of static factors and incorporate dynamic factors, they are sometimes referred to as structured professional judgment tools.

probability of recidivism.²⁹⁵ Although these instruments are often referred to interchangeably with risk assessment tools, there are functional differences between them. Although risk assessments focus on measuring individuals' chances of reoffending and thus endangering the public,²⁹⁶ risk and needs assessments attempt to reduce offenders' risk of recidivism by ascertaining which programs and other interventions would meet their needs.²⁹⁷ The methodology underpinning risk and needs assessment tools is often termed "structured professional judgment."²⁹⁸ It differs from a strictly actuarial approach because the "primary goal of this type of instrument is to provide information relevant to needs assessment and a risk management plan rather than to predict antisocial behavior."²⁹⁹ The score that results from application of this instrument is therefore not designed to reflect only the offender's risk of reoffending, it is also used to guide actions that can be put in place to reduce the individual's risk of recidivism.

In the United States, risk and needs assessment tools are commonly used in the probation context.³⁰⁰ Increasingly, they are also being used in the sentencing process to determine the appropriate sanction.³⁰¹ The use of the instruments is not without controversy. Opponents argue that the instruments are flawed because the algorithms which underpin the tools can contain settings that operate unfairly against minority groups. Thus, researchers have suggested that although the tools may not be overtly racist, they can have this effect by possibly incorporating factors that operate as proxies for race, such as the educational level of an offender.³⁰² The indicia which are considered by risk and needs assessments tools in some parts of the United States are not transparent and,

295. Nathan James, *Risk and Needs Assessment in the Criminal Justice System*, FED'N AM. SCIENTISTS 2 (Oct. 13, 2015), <https://www.fas.org/sgp/crs/misc/R44087.pdf>.

296. McGarraugh, *supra* note 288, at 1091.

297. *Id.*

298. See Christopher Slobogin, *Risk Assessment*, in THE OXFORD HANDBOOK OF SENTENCING AND CORRECTIONS 199 (2012).

299. *Id.*

300. NAT'L CTR. FOR STATE COURTS, USING OFFENDER RISK AND NEEDS ASSESSMENT INFORMATION AT SENTENCING: GUIDANCE FOR COURTS FROM A NATIONAL WORKING GROUP (2011), <https://www.ncsc.org/~media/Microsites/Files/CSI/RNA%20Guide%20Final.ashx>.

301. *Id.*; James, *supra* note 295, at 4.

302. *Machine Bias: There's Software Used Across the Country to Predict Future Criminals. And it's Biased Against Blacks*, PRO REPUBLICA (May. 23, 2016), <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing>; see also *Big Data May be Reinforcing Racial Bias in the Criminal Justice System*, WASH. POST (Feb. 10, 2017), https://www.washingtonpost.com/opinions/big-data-may-be-reinforcing-racial-bias-in-the-criminal-justice-system/2017/02/10/d63de518-ee3a-11e6-9973-c5efb7cefb0d_story.html?utm_term=.6a19034da71a.

hence, it is difficult to firmly rebut criticism of this nature.³⁰³ Despite this, the first state appellate decision to expressly consider the appropriateness of risk and needs assessment in sentencing was the Indiana case of *Malenchik v. State*,³⁰⁴ which expressly noted that “evidence-based assessment instruments can be significant sources of valuable information for judicial consideration in deciding whether to suspend all or part of a sentence.”³⁰⁵ Moreover, objections that the tools incorporate inappropriate variables, such as race, can be overcome if the indicia that drive the tool are transparent.

There are various versions of such tools. One of the most widely utilized is the Ohio Risk Assessment System (ORAS),³⁰⁶ and this provides an example of the variables that are used by these instruments. The ORAS evaluates eight risk and need factors: history of antisocial behavior, antisocial personality patterns, antisocial cognition, antisocial associates, the quality of family relationships, performance at school and work, levels of involvement in leisure and recreation, and history of substance abuse.³⁰⁷ It has been shown that although these instruments are not always accurate, they can predict reoffending patterns with approximately 70% accuracy.³⁰⁸ Such tools have demonstrably lowered recidivism levels for high-risk offenders when programs are selected for such offenders based at least in part on the outcome of the needs assessments.³⁰⁹

Risk and need assessment tools are becoming increasingly commonplace and are a feature of the Formerly Incarcerated Reenter Society Transformed Safely Transitioning Every Person (“FIRST STEP”) Act, which received overwhelming support from the Democrats and Republicans in Congress in December 2018.³¹⁰ Professor of Law Douglas Berman describes it as the most significant piece of sentencing legislation

303. As noted below, this is a considerable shortcoming relating to such instruments, and the manner in which it can be overcome in the Australian setting is to ensure that all of the variables which inform the tool are disclosed.

304. 928 N.E.2d 564 (Ind. 2010).

305. *Id.* at 573; see also NAT’L CTR. FOR STATE COURTS, *supra* note 300, at 13.

306. For an explanation of the manner in which it is used, see SUPERIOR COURT WORKING GRP. ON SENTENCING BEST PRACTICES, CRIMINAL SENTENCING IN THE SUPERIOR COURT BEST PRACTICES FOR INDIVIDUALIZED EVIDENCE-BASED SENTENCING (March 2016).

307. James, *supra* note 295, at 8.

308. Edward J. Latessa & Brian Lovins, *The Role of Offender Risk Assessment: A Policy Maker Guide*, 5 VICTIMS & OFFENDERS 212 (2010).

309. *Id.*

310. *Fact Sheet: President Donald J. Trump Secures Landmark Legislation to Make Our Federal Justice System Fairer and Our Communities Safer*, WHITE HOUSE (Dec. 21, 2018), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-secures-landmark-legislation-to-make-our-federal-justice-system-fairer-and-our-communities-safer/>.

in over two decades.³¹¹ The FIRST STEP Act will significantly reduce federal prison numbers, including by providing for the early release of thousands of non-violent and non-sexual offenders. The Act requires the Attorney General to create a “Risk and Needs Assessment System” to ascertain all inmates’ risk of recidivism and the evidence-based recidivism reduction programs that will best suit them and to provide inmates with access to these programs.³¹² The Act gives Federal Bureau of Prisons (“BOP”) institutions discretion to provide incentives for prisoners to participate in the programs (including mandatory extra phone time).³¹³ Inmates who complete such programs may be able to increase the period that they spend in pre-release custody—in a halfway house or home confinement outside a BOP prison—or begin their supervised release term up to a year earlier.³¹⁴ Nevertheless, offenders who have committed a broad range of specified offenses are ineligible to earn these time credits that apply to pre-release custody or supervised release.³¹⁵

Attorney General William Barr directed the Department of Justice’s (“DOJ”) to release a plan for the implementation of this assessment system.³¹⁶ The DOJ responded by outlining the Prisoner Assessment Tool Targeting Estimated Risk and Needs program in a July 2019 report.³¹⁷ Known colloquially as “PATTERN,” this program is the DOJ’s vision for how the algorithm will look in practice.³¹⁸ In addition to the logistics of implementing this program, the report also identified those components that the DOJ believed to be effective in any type of risk and needs assessment program.³¹⁹ Although these components are somewhat generic, they provide insight into the DOJ’s goals for the program. The DOJ highlights four components of an effective assessment tool: (1) Dynamic Individualized Assessment; (2) Periodic Re-Validation and

311. Douglas A. Berman, *Prez Trump Signs Historic (Though Modest) First Step Act into Law ... and Now Comes the Critical Work of Implementing It Well!!*, SENT’G L. & POL’Y BLOG (Dec. 21, 2018, 2:21 PM), https://sentencing.typepad.com/sentencing_law_and_policy/2018/12/prez-trump-signs-historic-though-modest-first-step-act-into-law-and-now-comes-the-critical-work-of-i.html.

312. *Id.*

313. *Id.*

314. *Id.*

315. See generally Edward J. Latessa & Brian Lovins, *The Role of Offender Risk Assessment: A Policy Maker Guide*, 5 VICTIMS & OFFENDERS 203 (2010).

316. See Jeff Mordock, *Attorney General William Barr Reaffirms Commitment to Criminal Justice Reform*, THE WASHINGTON TIMES (Mar. 4, 2019), <https://www.washington-times.com/news/2019/mar/4/william-barr-reaffirms-commitment-first-step-act-c/>.

317. *The First Step Act of 2018: Risk and Needs Assessment System*, OFF. ATT’Y GEN. vi (July 19, 2019).

318. *Id.*

319. *Id.*

Update; (3) Racial and Ethnic Neutrality; and (4) Assessment of Criminogenic Needs.³²⁰

If hard-time credits are to be applied to sexual and violent offenders for time spent in supermax confinement, this should only occur when there is some basis for confidence that the offenders will not reoffend. Pragmatically, this means that a risk and needs instrument needs to be applied to such offenders, and only if the results indicate a low risk of recidivation should the credit be applied. This, of course, entails that some supermax prisoners will be denied recognition for the additional suffering they have endured. The interest of community safety, however, trumps the principle of proportionality.

F. Offenders who Game the System

The other cohort of prisoners that hard-time credits should be denied to are those who deliberately behave in a manner to attract such credits by being placed in supermax conditions. As noted above, people vary considerably in terms of their resilience, preferences, and priorities. Although many people would find supermax conditions to border on intolerable, some people will find these conditions less oppressive than serving a longer sentence and will be able to function in this climate—at least to the extent that they are confident they can endure the hardship until it ceases. If a policy is implemented that supermax conditions derive a hard-time credit, it is likely that some prisoners will undertake a cost-benefit assessment and opt to be placed in supermax conditions in order to be released from prison earlier.

As we have seen, many situations that result in offenders being placed in supermax conditions are beyond their control, for example, when they are in protective custody. But often it is the voluntary acts of prisoners that lead to this confinement, such as where they assault another prisoner (although this obviously would not relate to acts of self-defense).³²¹ It will generally not be possible to discern with confidence whether such voluntary acts were merely poor judgment or deliberate attempts to earn hard-time credits. To deal with this complexity, the solution is to reduce hard-time credits for a second and subsequent voluntary transgression that lands an offender in supermax confinement. This way, even if an offender is attempting to game the system, it can only be moderately effective. To deny any hard-time credits for even voluntary acts which result in an offender being placed in supermax detention is arguably too harsh an outcome. The best manner in which to

320. *Id.* at 26–29.

321. *See supra* Part II.C.

balance the desire to discourage offenders gaming supermax credits, while recognizing the reality of the additional burden associated with supermax conditions is to reduce the size of hard-time credits with each voluntary infraction that results in an offender being placed in supermax detention. Thus, the second period in supermax detention which stems from a voluntary infraction would see the hard time credits reduced by 50% and the third by another 50% from the contracted amount, as so on. Thus, by way of example, the third period of detention leading from a voluntary infraction would result in the offender only receiving a 25% of the total discount that is attributable to time spent in supermax conditions.

G. Prisoners Serving Life Terms

There are two additional cohorts of prisoners to whom our proposal for hard-time credits cannot apply. Prisoners who have been sentenced to death or life imprisonment are obviously ineligible to be released early. There are approximately 2,500 prisoners on death row³²² and approximately 160,000 serving life terms. In principle, supermax hard-time credits should apply to all prisoners who experience these conditions. However, pragmatism can often stifle the operation of principle. This does not necessarily reveal a shortcoming with the principle, rather it is a concession to the other policies and practices. The solution to expanding the range of prisoners to whom our proposal applies rests with changing sentencing practices to more appropriately reflect the principle of proportionality. This would see the use of life imprisonment substantially curtailed. There is ample scope for this to occur, especially for example in the federal jurisdiction, where two-thirds of prisoners serving life terms have not committed violent or sexual offenses.³²³

The fact that federal lawmakers are retrospectively reducing prison terms for some cohorts of federal prisoners provides some optimism that this approach may be expanded to more prisoner cohorts.³²⁴ Beyond this, the imperative to reduce the length and severity of prison terms for large numbers of prisoners is beyond the scope of this Article.³²⁵

322. *Death Row*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/death-row/overview> (last visited Sept. 28, 2019).

323. See SENT'G PROJECT, *STILL LIFE: AMERICA'S INCREASING USE OF LIFE AND LONG-TERM SENTENCES* 12, 13 (2017).

324. See *supra* Part IV.E.

325. For observations, see Mirko Bagaric & Sandeep Gopalan, *Saving the United States from Lurching to Another Sentencing Crisis: Taking Proportionality Seriously and Implementing Fair Fixed Penalties*, 60 ST. LOUIS U. L.J. 169 (2016).

H. Incidental Benefit of Hard-Time Credits – Less Resort to Supermax

The case for hard-time credits, as we have seen, stems mainly from the imperative for doctrinal and jurisprudential coherence, and in particular from the need to give effect to the proportionality principle. In addition, adopting this recommendation will beneficially promote the abolition or significantly curtailment of the use of supermax confinement.

Lawmakers do not have an interest in offenders being released early from prison. It is for this reason that “Truth in Sentencing” legislation was passed in most states and the federal jurisdiction over the past few decades.³²⁶ The aim of these legislative schemes is to “reduce the apparent disparity between court-imposed sentences and the time offenders actually serve in prison.”³²⁷ Lawmakers recognize that from a principled and pragmatic perspective, they desire transparency regarding the sentences that offenders actually serve.

Hard-time credits for time spent in supermax conditions obviously have the capacity to reduce the apparent efficacy of truth in sentencing schemes and, hence, lawmakers will be motivated to ensure that supermax detention is only used when there is good reason for doing so, such as when an offender acts violently towards others and there is a risk of future similar behavior. However, it is feasible for lawmakers to make rules or for corrections officials to enact protocols that ensure that supermax conditions are not utilized for non-essential reasons. There are currently few legal limits to the use of supermax conditions. At present, prisoners are sometimes sent to supermax confinement as punishment for minor transgressions of prison rules or because of the lack of cells in other parts of the system.³²⁸ Providing hard-time credits for time spent in supermax conditions will encourage lawmakers and prison officials to considerably limit the circumstances in which prisoners are forced to endure supermax conditions.

VI. CONCLUSION

Imprisonment is a severe hardship. It is for this reason that it constitutes the most serious sanction in our system of law—apart from capital punishment, which appropriately is a rarely-implemented sanction.³²⁹ In evaluating the hardship of prison, the only relevant measure for sentencing purposes is the length of the prison term. This is an error.

326. Katherine J. Rosich & Kamala Mallik Kane, *Truth in Sentencing and State Sentencing Practices*, NAT'L INST. JUST. (July 1, 2005), <https://nij.ojp.gov/topics/articles/truth-sentencing-and-state-sentencing-practices>.

327. *Id.*

328. *See supra* Part III.C.

329. *See supra* Part I.

Although conditions vary considerably, and the diversity of the conditions is typically a matter of degree, this is not always the case. Sometimes the difference is manifestly stark—so much so that the forms of punishment are effectively different in nature. Generally, all mainstream imprisonment conditions involve offenders being out of their cell for several hours per day; contacting other prisoners; visiting rights; and accessing basic amenities such as libraries and exercise facilities. Supermax conditions stand apart from this construct. They involve imprisonment within imprisonment. They are constrictive to the extreme and involve removing every aspect of stimulation and engagement from a person. They are isolationist to the extreme and cause immense suffering. They are so different from conventional prison conditions that they constitute a different form of hardship and thereby a different form of punishment.

The brutal nature of supermax conditions has been increasingly recognized in recent times. Although commendable efforts have been undertaken to minimize the effects of supermax conditions on certain groups of inmates, no states have undertaken the effort that would resolve the issue completely—the total banning of supermax.³³⁰ Despite these commendable efforts, the number of prisoners in supermax conditions has not been meaningfully reduced. Hence, solutions other than seeking the abolition or radical reduction of supermax numbers should be considered.

In this Article, we have recommended that a doctrinally coherent and pragmatic approach to supermax conditions requires a premium to be added for time spent in supermax conditions. There is no objective mathematical formula that can be applied to determine the correct quotient for this loading, but the reduction must be meaningful. We suggest that prisoners should receive a discount should of 50% of the time that they are confined in supermax conditions, with limited exceptions. In other words, prisoners should receive two days of credit for each day they spend in supermax conditions. This is a sizeable discount. It is justified by the facts that the burden of imprisonment has a quantitative component (i.e., the length of the term) and a qualitative component (i.e., the prisoner's experience of imprisonment), and that supermax prisoners are far more constrained than other prisoners.

330. In fact, the Ohio Department of Rehabilitation and Corrections (DRC) has made it clear that the complete banning of supermax is not a goal of its reforms. 2018 TIME-IN-CELL, *supra* note 11, at 76. According to Director Gary Mohr, “DRC leadership was compelled to constantly remind staff that restrictive housing reform never meant prisons could not use restrictive housing to address violence or seriously disruptive behaviour.” *Id.* at 77.

We propose several exceptions to this discount. The primary exception is that the discount should not be credited to offenders who have committed serious sexual or violent offenses unless they are deemed to be at low risk of reoffending as assessed by a risk and needs assessment tool. For this cohort of offenders, the aim of community protection outweighs the proportionality principle. A second exception applies for prisoners who game the system in order to be sent to supermax conditions. Such prisoners should not receive the discount. A final exception applies for prisoners on death row or sentenced to life imprisonment, who also cannot receive the discount.

If the recommendation in this Article is adopted, supermax conditions will not be abolished. However, supermax conditions will be employed more fairly. Our recommendation also motivates lawmakers to reduce the use of supermax conditions in order to ensure that offenders are not released prior to the expiration of their sentence. This motivation has the capacity to encourage the definition of firm guidelines limiting the use of supermax conditions to situations when it is absolutely necessary.