

4-2015

“This Experiment, So Fatal”: Some Initial Thoughts on Strategic Choices in the Campaign Against Solitary Confinement

Elizabeth Alexander

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Recommended Citation

Elizabeth Alexander, “*This Experiment, So Fatal*”: *Some Initial Thoughts on Strategic Choices in the Campaign Against Solitary Confinement*, 5 U.C. IRVINE L. REV. 1 (2015).

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“This Experiment, So Fatal”*: Some Initial Thoughts on Strategic Choices in the Campaign Against Solitary Confinement

Elizabeth Alexander**

Introduction	2
I. A Map with Fuzzy Boundaries	4
II. A Short and Superficial History of Isolation in America.....	6
III. Eighth Amendment Challenges.....	12
A. Challenges on Behalf of Seriously Mentally Ill Prisoners	12
B. Challenges Related to Cognitive Disorders	18
C. Challenges Related to Other Serious Medical Needs, Including Physical Disabilities.....	19
D. Pregnant Women.....	24
IV. Substantive Due Process and the Special Case of Confined Youth	25
V. Procedural Due Process.....	29
VI. Claims Under the Americans with Disabilities Act	33
A. Barriers to Use of the ADA.....	33
B. ADA Challenges to Isolation of the Mentally Ill.....	37
VII. An End to Torture	39

* GUSTAVE DE BEAUMONT & ALEXIS DE TOCQUEVILLE, ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION IN FRANCE 42 (Herman R. Lantz et al. eds., Vail-Ballou Press, Inc. 1964) (1833) (“This experiment, so fatal for those who were selected to undergo it, was of a nature to endanger the success of the penitentiary system altogether.”); *see also infra* text accompanying note 48.

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INTRODUCTION

The symposium's theme of ensuring prisoners' access to services provides an opportunity to explore issues related to prisoners in solitary confinement since they experience the most extreme barriers to access. Indeed, the intended effect of placement in isolation is to cut off access to most of the services and programs that are available to prisoners in the general population.¹ Following decades of growth in the numbers of prisoners confined in isolation, a new campaign to end the use of solitary confinement in America's prisons has coalesced in recent years.² This campaign has already achieved considerable success in revealing isolated confinement as an unreasonably dangerous form of punishment that violates core concepts of human dignity.³ American prisons appear to be approaching a tipping point in which a prison practice that has been almost universally accepted in this country may lose its perceived status as a legitimate form of confinement.

If delegitimizing the use of solitary confinement is now a realistic possibility, that fact raises new questions for the campaign to end this scourge. Those marching under the banner of reform have ranged from prison commissioners⁴ to community activists, including former prisoners and their families.⁵ The former

1. Jean Casella & James Ridgeway, *In States That "Reduce" Their Use of Solitary Confinement, Suffering Continues for Those Left Behind*, SOLITARY WATCH (Nov. 13, 2013), <http://solitarywatch.com/2013/11/13/states-reduced-use-solitary-confinement-suffering-continues-left-behind>.

2. See Jean Casella & James Ridgeway, *How Many Prisoners Are in Solitary Confinement in the United States?*, SOLITARY WATCH (Feb. 1, 2012), <http://solitarywatch.com/2012/02/01/how-many-prisoners-are-in-solitary-confinement-in-the-united-states>.

3. While a number of organizations have contributed to the success of the campaign, its nerve center is Solitary Watch. Solitary Watch describes itself as a web-based project aimed at bringing the widespread use of solitary confinement out of the shadows and into the light of the public square. [Its] mission is to provide the public—as well as practicing attorneys, legal scholars, law enforcement and corrections officers, policymakers, educators, advocates, people in prison and their families—with the first centralized source of unfolding news, original reporting, firsthand accounts, and background research on solitary confinement in the United States.

See About, SOLITARY WATCH, <http://solitarywatch.com/about> (last visited Aug. 23, 2014). One measure of the growing success of the movement is the willingness of some corrections officials to speak out against isolated confinement and take steps to reduce it substantially. *See infra* text accompanying notes 4, 6.

4. See, e.g., *Reassessing Solitary Confinement II: The Human Rights, Fiscal, and Public Safety Consequences: Hearing Before the U.S. S. Judiciary Subcomm. on the Constitution, Civil Rights and Humans Rights*, 113th Cong. (2014) [hereinafter *Horn Testimony*] (statement of Martin F. Horn and Michael B. Mushlin), available at <http://solitarywatch.com/wp-content/uploads/2014/02/Written-Testimony-of-Martin-F.-Horn-and-Michael-B.-Mushlin-to-Sentate-Judiciary-Committee-Subcommittee-Hearing-on-Solitary-II-February-2014-the.pdf>. In this statement, Mr. Horn, the former head of the Pennsylvania and New York City Departments of Corrections, calls for "a drastic cutback" in the use of isolation. *Id.* at 3–4; see also Erica Goode, *After 20 Hours in Solitary Confinement, Colorado's Prison Chief Wins Praise*, N.Y. TIMES, March 16, 2014, at A16 (noting that both the current and previous head of Colorado Department of Corrections believed that solitary confinement is substantially overused in the nation's prisons).

5. See, e.g., *Reassessing Solitary Confinement II: The Human Rights, Fiscal, and Public Safety Consequences: Hearing Before the U.S. S. Judiciary Subcomm. on the Constitution, Civil Rights and Humans Rights*, 113th Cong. (2014) [hereinafter *Thibodeaux Testimony*] (statement of Damon A. Thibodeaux), available at <http://www.judiciary.senate.gov/imo/media/doc/02-25-14ThibodeauxTestimony.pdf>. Mr.

tend to phrase their goals in terms of reducing overuse of isolation;⁶ the latter generally seek something closer to complete abolition.⁷ As the campaign continues to build momentum, however, it is increasingly apparent that the current coalition in support of reform obscures internal divisions between the reformers and the abolitionists.⁸ Many of the correctional officials who have agreed that the use of isolation should be reduced have carefully not foresworn any use of isolation.⁹ In contrast, the codirector of Solitary Watch criticized aspects of a Senate hearing on isolated confinement in March 2014 as too likely to leave many prisoners subjected to conditions that resemble torture.¹⁰

Litigation challenging the use of isolated confinement is at the same crossroads. To date, essentially all of the litigation successes have come from challenges to the imposition of isolated confinement on behalf of particularly vulnerable groups. For many of these vulnerable groups, the legal theories have resulted in a substantial body of precedents supporting their claims. While this litigation has achieved important results, so far there are no examples of successful litigation attacking isolated confinement across the board. This Article, after a brief review of the American roots of the practice of isolated confinement, will discuss the status of litigation challenges to isolation on behalf of particularly vulnerable groups, because any future litigation strategy will have to contend with the body of case law from that litigation. In addition, in a number of jurisdictions, in the short term, litigation targeted at vulnerable groups may be the most that can be successfully pursued, and such litigation is highly valuable in its own right to the extent that it provides a remedy to some of those in isolation. Nonetheless, the long-term litigation goal must be ending isolated confinement. Finally, this Article

Thibodeaux spent fifteen years in solitary confinement for a murder for which he was subsequently exonerated, and testified that no one should be placed in solitary confinement. *Id.* at 1, 5.

6. See *Horn Testimony*, *supra* note 4; Goode, *supra* note 4.

7. See *Thibodeaux Testimony*, *supra* note 5, at 5.

8. See Jean Casella, *Way Down in the Hole: Senate Hearing Challenges Solitary Confinement for Some, but Not All*, SOLITARY WATCH (March 5, 2014), <http://solitarywatch.com/2014/03/05/way-hole-Senate-hearing-confirms-growing-opposition-solitary-confinement-prisoners>. Ms. Casella, a codirector and co-editor-in-chief of Solitary Watch, criticized some of the elected officials and correctional officials who had supported reform without endorsing abolition of solitary, writing that “[b]y sending the message that incarcerated individuals fall into two groups—those who deserve relief from the torturous effects of solitary confinement and those who do not—it may also have the effect of driving some people even deeper into the hole.” *Id.* Ms. Casella also noted that the policy did have pragmatic advantages, as it promised to relieve the suffering of many of those now subject to this practice, and that it would have more appeal to politicians and the general public than would an abolition status.

9. See *Horn Testimony*, *supra* note 4; Goode, *supra* note 4. Indeed, Christopher Epps, the Commissioner for the Mississippi Department of Corrections, who had received substantial praise from reformers for agreeing to a settlement that greatly reduced the use of isolation in the supermax unit of Parchman State Prison, continues to face litigation regarding conditions in isolation elsewhere in the system. See Erica Goode, *Seeing Squalor and Unconcern in a Mississippi Jail*, N.Y. TIMES, June 8, 2014, at 1; Jerry Mitchell, *East Mississippi Prison Called Barbaric*, CLARION-LEDGER (Sept. 25, 2014, 9:35 PM CDT), <http://www.clarionledger.com/story/news/2014/09/25/east-mississippi-prison-called-barbaric/16242399>.

10. See Casella, *supra* note 8.

discusses why courts have, so far, shown so little willingness to require an end to isolation and provides some suggestions about what a future litigation strategy aimed at abolition could look like, including some initial suggestions on the components that would have to be in place for such litigation to succeed in eliminating rather than simply circumscribing this scourge.

I. A MAP WITH FUZZY BOUNDARIES

The definition of “solitary confinement” or “isolated confinement” is intrinsically fuzzy because the details of solitary confinement vary across many dimensions. There is no standard definition of solitary confinement; prison officials generally prefer more antiseptic terms such as “administrative segregation” or “special management unit.”¹¹ The core concept of solitary confinement, however, is captured in the *Interim Report of the Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*:

There is no universally agreed upon definition of solitary confinement. The Istanbul Statement on the Use and Effects of Solitary Confinement defines solitary confinement as the physical isolation of individuals who are confined to their cells for 22 to 24 hours a day. In many jurisdictions, prisoners held in solitary confinement are allowed out of their cells for one hour of solitary exercise a day. Meaningful contact with other people is typically reduced to a minimum. The reduction in stimuli is not only quantitative but also qualitative. The available stimuli and the occasional social contacts are seldom freely chosen, generally monotonous, and often not empathetic.¹²

The Supreme Court provides another useful description of solitary confinement in its opinion in *Wilkinson v. Austin*,¹³ involving a challenge to solitary confinement at the Ohio State Penitentiary (OSP), a supermax facility. The Court noted that incarceration at OSP was “synonymous with extreme isolation” and that its conditions were more restrictive than those at any other Ohio prison,

11. See, e.g., *Reassessing Solitary Confinement II: The Human Rights, Fiscal, and Public Safety Consequences: Hearing Before the U.S. S. Judiciary Subcomm. on the Constitution, Civil Rights and Human Rights*, 113th Cong. (2014) (statement of Hope Metcalf, Director of the Arthur Liman Public Interest Program & Judith Resnik, Arthur Liman Professor of Law), available at <http://www.solitarywatch.com/wp-content/uploads/2014/02/Liman-Senate-Statement-Reassessing-Solitary-Confinement-Resnik-Metcalf-final-Feb-28-2014.pdf>.

12. See Special Rapporteur of the Human Rights Council, *Interim Report of the Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 25, U.N. Doc. A/66/268 (Aug. 11, 2011) (by Juan E. Méndez) (summarizing declarations from the General Assembly of the United Nations, various Committees of the organization, the European Court of Human Rights, and the Inter-American Court of Human Rights that solitary confinement in certain conditions may constitute torture or otherwise violate international law).

13. *Wilkinson v. Austin*, 545 U.S. 209, 214 (2005). The Court in *Wilkinson* held that procedural due process was required in light of the highly restrictive conditions of confinement and the indefinite length of confinement at the facility, as well as the fact that prisoners confined there were not eligible for parole consideration. *Id.* at 223–24; see also *infra* Section V.

including other units that the Court described as involving “highly restrictive form[s] of solitary confinement.”¹⁴ Prisoners at OSP were locked in their cells twenty-three hours a day, with cell lights on continually.¹⁵ Special steps were taken to prevent communications among prisoners, and visiting opportunities were rare.¹⁶ Meals were eaten alone in the cells.¹⁷ The conditions described by the Supreme Court in *Wilkinson* seem to be generally typical of segregation units, with the exception that most such units do not routinely prevent prisoners from talking to prisoners in neighboring cells,¹⁸ many but not all segregation units keep cell lights on continually,¹⁹ and the amount of out-of-cell time varies slightly in segregation units.²⁰ While some units provide prisoners with more out-of-cell time, in other units, the average in-cell time is more than twenty-three hours a day.²¹ The size of the cells differs, and cells also differ in whether they possess a solid door, a door with a window, or sometimes even a window facing the outside through which the prisoner can see the sky.²² Segregation units also vary in the amount and type of property they contain, such as books, magazines, and radios, and in how those rules affect the extent of isolation.²³ Further, in my experience, segregation units differ across a range of factors that are difficult to quantify, including the tone of the relationships between custody staff and prisoners, the responsiveness of medical and mental health staff, the degree of sanitation and the upkeep of mechanical systems, the typical decibel level, and the nutritional quality

14. *Wilkinson*, 545 U.S. at 214.

15. *Id.*

16. *Id.*

17. *Id.*

18. This statement is based on my personal experience with segregation units or supermax facilities, or both, in prisons operated in Alabama, California, Delaware, the District of Columbia, Michigan, Mississippi, Pennsylvania, South Dakota, Virginia, and Wisconsin.

19. For a description of prison segregation units that keep lights on continually, see *Grenning v. Miller-Stout*, 739 F.3d 1235, 1237 (9th Cir. 2013), which discusses continuously illuminated cells with four-foot long fluorescent tubes.

20. See, e.g., *Thomas v. Ramos*, 130 F.3d 754, 757–58 (7th Cir. 1997) (alleging that ordinary segregation routine was twenty-four hours per day in cell); *Vasquez v. Braemer*, No. 11-cv-806-bbc, 2013 WL 4084284, at *6 (W.D. Wis. Aug. 13, 2013) (noting that segregated prisoners are confined in cell twenty-three or twenty-four hours per day); *Ind. Prot. & Advocacy Servs. Comm’n v. Comm’r, Ind. Dept. of Corr.*, No. 1:08-cv-01317, 2012 WL 6738517, at *3 (S.D. Ind. Dec. 31, 2012) (noting policy for all segregation units in state to provide segregated prisoners with a minimum of one hour and fifteen minutes out of cell daily); Letter from Tom Perez, Assistant Att’y Gen. of the U.S., & David J. Hickton, U.S. Att’y, W. Dist. of Pa., to Tom Corbett, Governor of Pa. 3–4 (May 31, 2013) (informing Pennsylvania Governor that conditions for seriously mentally ill and cognitively disabled prisoners at SCI-Cresson violate the Eighth Amendment; prisoners are in their cells approximately twenty-two hours per day).

21. See *supra* text accompanying notes 14–18.

22. See *supra* text accompanying notes 14–18.

23. See N.Y. CIVIL LIBERTIES UNION, *BOXED IN: THE TRUE COST OF EXTREME ISOLATION IN NEW YORK’S PRISONS* 9, 28, 37–39 (2012), available at http://www.nyclu.org/files/publications/nyclu_boxedin_FINAL.pdf (referring to various property restrictions in New York solitary confinement units); see also *Beard v. Banks*, 548 U.S. 521, 531–32 (2006) (plurality opinion) (depriving Level 2 prisoners in a long-term segregation unit of their access to newspapers, magazines, and personal photographs was within prison’s discretion).

of the food.²⁴ Finally, of course, as the Supreme Court noted, the length of time spent in solitary confinement substantially affects the severity of the experience.²⁵

II. A SHORT AND SUPERFICIAL HISTORY OF ISOLATION IN AMERICA

There is great irony in the contemporary attack on isolated confinement in American prisons given the history of the practice. In the late eighteenth century, prisons scarcely existed in the United States.²⁶ Instead, most penal facilities (as distinct from workhouses for the poor) were jails for those awaiting trial or the execution of sentence, since sentences to confinement were rare while crimes punishable by death or corporal punishment were common.²⁷

In the early nineteenth century, a reform movement in the United States and Europe attempted to put into practice the ideas of Enlightenment thinkers that institutions should be consciously designed to promote the general social welfare.²⁸ Out of this general intellectual ferment came a focus on prison reform.²⁹ Drawing upon the writings of European thinkers, including Montesquieu and Beccaria, the reformers sought to design prisons that avoided unnecessary cruelty, yet would lead prisoners to turn away from criminal behavior following release.³⁰ In the United States, prominent Quakers led the reform movement mixing Enlightenment ideas with religious convictions.³¹ The first attempt to create a prison reflecting these ideas resulted in the Walnut Street Jail in Philadelphia, where the reformers envisioned confining prisoners in single cells so they would

24. See *supra* text accompanying note 18. For an example of reports of extreme conditions of confinement in an isolation facility, see Class Action Complaint, *Dockery v. Epps*, No. 3:13-cv-00326-TSL-JMR (S.D. Miss. May 30, 2013), available at https://www.aclu.org/files/assets/emcf_complaint_filed_5.30.13.pdf.

25. See *Wilkinson v. Austin*, 545 U.S. 209, 223–24 (2005) (finding that prisoners have a due process interest in avoiding confinement at OSP, in part because of the indefinite length of confinement there). The Court assumed that most other solitary confinement facilities did not impose indefinite lengths of confinement, but this assumption is questionable. Although most state policies on administrative segregation purport to have some process for periodic review of the prisoner’s assignment to that status, the standards for that review are frequently so vague that, for practical purposes, such assignment is indefinite in length. For example, the original policy for determining which prisoners would be transferred to OSP simply provided that the prisoner “has demonstrated behavior which meets high maximum security criteria” or “presents the highest level of threat to the security and order of the department, in the professional judgment of the classifying official.” See *Austin v. Wilkinson*, 189 F. Supp. 2d 719, 731 (N.D. Ohio 2002), *aff’d in part, rev’d in part*, 372 F.3d 346 (6th Cir. 2004), *aff’d in part, rev’d in part*, 545 U.S. 209 (2005).

26. Harry Elmer Barnes, *Historical Origin of the Prison System in America*, 12 J. CRIM. L. & CRIMINOLOGY 35, 36–37 (1921).

27. DE BEAUMONT & DE TOCQUEVILLE, *supra* note * at 37–39; Barnes, *supra* note 26, at 37.

28. Barnes, *supra* note 26, at 40–42.

29. Thorsten Sellin, *Introduction to DE BEAUMONT & DE TOCQUEVILLE*, *supra* note *, at xix–xx.

30. The Eastern State Prison was built on an architectural model similar to Bentham’s concept of the Panopticon, based on a central guard tower surrounded by a circular prison. See Barnes, *supra* note 26, at 44–45.

31. See Sellin, *supra* note 29, at xx, xxviii; Barnes, *supra* note 26, at 37–38.

be isolated from all other prisoners.³² This concept of imposing complete isolation on prisoners became known as the Pennsylvania System.³³ After the Walnut Street Jail proved to confine too many prisoners for the concept to be implemented as planned,³⁴ the Pennsylvania System was then attempted at the new Western State Penitentiary.³⁵ Again, its implementation was attended by adverse effects on the physical and mental health of the prisoners.³⁶ Nonetheless, the reformers pressed on and were ultimately successful in designing the Eastern State Prison in Philadelphia.³⁷ By legislative mandate, the new prison that was intended to carry out a modified Pennsylvania Plan of complete isolation combined with labor included features that were quite extraordinary for the time, including flush toilets in individual cells, state-of-the-art central heating and sewage systems, and individual exercise yards.³⁸ Built in 1836 at a cost of \$780,000, the Eastern State Penitentiary was one of the most expensive buildings in the country.³⁹

Many of the design features, such as individual exercise yards and in-cell plumbing, were necessitated by the requirement of the Pennsylvania System that prisoners be completely isolated from each other.⁴⁰ Prisoners were to eat, work, and reflect on their need for reform within their solitary cells.⁴¹ Newspapers, as well as correspondence and visits from family members, were barred.⁴² The isolation precautions were so extreme that when a new prisoner walked to his cell, a hood was placed over his head to prevent prisoners from learning each other's identities.⁴³

New York State, influenced by many of the same ideas, sought to implement the concepts of the reform movement when it opened Newgate Prison in Greenwich Village at the end of the eighteenth century.⁴⁴ The resulting prison, however, suffered from many of the same defects as the Walnut Street Jail,

32. See Barnes, *supra* note 26, at 48–49.

33. *Id.* at 48.

34. See DE BEAUMONT & DE TOCQUEVILLE, *supra* note *, at 37–38; Barnes, *supra* note 26, at 48–49.

35. See Norman B. Johnston, *John Haviland*, in PIONEERS IN CRIMINOLOGY 107, 110 (Hermann Mannheim ed., 2d ed. 1972) (recounting reform efforts to create Eastern State Penitentiary).

36. *Id.* at 111.

37. *Id.*

38. *Id.* at 111, 115 (noting that the legislative mandate for the prison included a requirement that prisoners work, and the inclusion of flush toilets and individual exercise yards); *History of Eastern State: Timeline*, E. ST. PENITENTIARY, <http://www.easternstate.org/learn/timeline> (last visited Aug. 24, 2014) (noting that the prison included state-of-the-art plumbing, sewage systems, and central heating); see also DAVID J. ROTHMAN, *THE DISCOVERY OF THE ASYLUM* 82 (rev. ed. 1990) (noting that according to the blueprint for the Eastern State Penitentiary, prisoners were to eat, work, and sleep in their individual cells).

39. *History of Eastern State: Timeline*, *supra* note 38.

40. See ROTHMAN, *supra* note 38, at 82; Johnston, *supra* note 35, at 111.

41. ROTHMAN, *supra* note 38, at 85.

42. *Id.* at 85, 95.

43. *Id.* at 85.

44. Barnes, *supra* note 26, at 51.

including congregate housing and a lack of classification.⁴⁵ The facility was widely acknowledged to be a failure after escapes, riots, and prisoner deaths in the overcrowded facility became common.⁴⁶

The next attempt at reform in New York involved the Auburn State Prison. Alexis de Tocqueville and Gustave de Beaumont described the first results:

The northern wing having been nearly finished in 1821, eighty prisoners were placed there, and a separate cell was given to each. This trial, from which so happy a result had been anticipated, was fatal to the greater part of the convicts.⁴⁷ In order to reform them, they had been submitted to complete isolation; but this absolute solitude, if nothing interrupts it, is beyond the strength of man; it destroys the criminal without intermission and without pity; it does not reform, it kills.

....

This experiment, so fatal to those who were selected to undergo it, was of a nature to endanger the success of the penitentiary system altogether. After the melancholy effects of isolation, it was to be feared that the whole principle would be rejected: it would have been a natural reaction.⁴⁸

As a result of the obvious failures with the first real attempt to test the Pennsylvania System, the prison implemented a modified version that became known as the Auburn System, in which prisoners slept in single cells but worked and ate in groups.⁴⁹ This modification made the system less expensive and eliminated the problem of finding work that prisoners could engage in while in their cells.⁵⁰ Nonetheless, the basic concept of the Pennsylvania System as implemented at Auburn was the same: prisoners were still forbidden to engage in any conversation with each other, and prisoners could be severely punished for violations of the rules.⁵¹ Despite the fact that solitary confinement had initially been viewed as a reform of barbaric practices, the custom began to elicit criticism that it was far more likely to harm than to rehabilitate a prisoner. In 1842, Charles Dickens toured the Eastern State Penitentiary and condemned what he saw:

45. *Id.* at 52.

46. EDWIN G. BURROWS & MIKE WALLACE, *GOTHAM: A HISTORY OF NEW YORK CITY TO 1898*, at 505 (1999); SCOTT CHRISTIANSON, *WITH LIBERTY FOR SOME: 500 YEARS OF IMPRISONMENT IN AMERICA* 95, 99 (1998).

47. As the authors note in an omitted portion of this passage, five prisoners in the unit died in a one-year period, and another attempted suicide. DE BEAUMONT & DE TOCQUEVILLE, *supra* note *, at 41.

48. *Id.* at 41–42. The authors were not condemning all policies that they characterized as involving solitary confinement. Significantly, however, they classified regimens that do not resemble current isolation practices as solitary confinement. *See, e.g., id.* at 45 (referring to the “happy success” of a revised form of the Auburn system that imposed “isolation by night, with common labor during the day”).

49. Barnes, *supra* note 26, at 53–54.

50. *Id.* at 56–57; *see also* ROTHMAN, *supra* note 38, at 86–88.

51. ROTHMAN, *supra* note 38, at 97, 101–02.

In its intention, I am well convinced that it is kind, humane, and meant for reformation; but I am persuaded that those who devised this system of Prison Discipline, and those benevolent gentlemen who carry it into execution, do not know what it is that they are doing. I believe that very few men are capable of estimating the immense amount of torture and agony which this dreadful punishment, prolonged for years, inflicts upon the sufferers.⁵²

It is particularly striking that Dickens' observations are so similar to those of modern observers of isolated confinement. Dickens noted that every cell had double doors, an outer door of oak, and an inner door of grated iron. The grated door had "a trap through which his food is handed."⁵³ Dickens noted that some of the prisoners reddened at the sight of visitors, and others turned very pale.⁵⁴ Two or three were very sick, including a man whose leg had been amputated in prison.⁵⁵ One was an African American youth; only Caucasians were eligible for a less harsh program for children.⁵⁶ Another prisoner, who had spent eleven years in solitary and would be released in a few months, did not respond to Dickens' attempt to engage him in conversation.⁵⁷ Instead, he stared at his hands and "pick[ed] the flesh upon his fingers," doing so "as though he were bent on parting skin and bone."⁵⁸ Prominent penologists of the nineteenth century also "had little respect for the Pennsylvania and Auburn principles."⁵⁹

Over time, solitary confinement became a status typically assigned to prisoners who were sentenced for crimes deemed especially heinous or who were being punished for misconduct within the prison system. In 1890, the Supreme Court granted, on ex post facto grounds, a petition for habeas corpus from a prisoner who was subjected to solitary confinement pending execution under a state statute that had not existed at the time of his crime.⁶⁰ In the course of the Court's opinion, it briefly mentioned the Philadelphia System and summarized the effects of solitary confinement:

The peculiarities of this system were the complete isolation of the prisoner from all human society, and his confinement in a cell of considerable size, so arranged that he had no direct intercourse with or

52. CHARLES DICKENS, *AMERICAN NOTES AND PICTURES FROM ITALY* 97–98 (Chapman & Hall Ltd. ed., 1907) (1842).

53. *Id.* at 99–100.

54. *Id.* at 102.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 102–03. Prisoners who deliberately cut themselves are a well-known feature of contemporary isolation units. See Fatos Kaba et al., *Solitary Confinement and Risk of Self-Harm Among Jail Inmates*, 104 AM. J. PUB. HEALTH 442, 445 (2014) (reporting results of a study among detainees confined in the New York City Jail (Riker's Island), and finding that detainees assigned to solitary confinement were almost seven times more likely to commit acts of self-harm when results were controlled for length of stay).

59. ROTHMAN, *supra* note 38, at 251.

60. *In re Medley*, 134 U.S. 160, 166 (1890).

sight of any human being, and no employment or instruction. . . . But experience demonstrated that there were serious objections to it. A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community.⁶¹

Into this century, variants of solitary confinement remained a feature primarily used to punish prisoners for misbehavior during their sentence, although death row prisoners continued in most states to be housed in separate death rows that often differed little, if at all, from the conditions imposed in disciplinary confinement.⁶² In the 1980s and 1990s, as prison populations skyrocketed,⁶³ separate facilities called “supermaxes,” designed for isolated confinement, gained popularity.⁶⁴ No longer was the purpose of solitary confinement assumed to be rehabilitation; now the primary goal was control.⁶⁵ The supermaxes were intended to aid prison management by separating out the “bad apples,” so that the bulk of the prisoners could be more easily managed.⁶⁶ Opening a supermax may generally result in a substantial increase in the number of prisoners subjected to isolated confinement.⁶⁷ There is little empirical evidence, however, that this strategy

61. *Id.* at 168.

62. See JOHN J. GIBBONS & NICHOLAS DE B. KATZENBACH, COMM’N ON SAFETY & ABUSE IN AMERICA’S PRISONS, CONFRONTING CONFINEMENT 54 (2006) (noting that prisoners are placed in segregation for disciplinary reasons or because the prisoners are considered either dangerous or at risk if placed in the general population); Sandra Babcock, Death Row Conditions (June 2006), available at <http://www.deathpenaltyinfo.org/time-death-row> (follow “Death Row Conditions” link) (indicating that the great majority of death row units confine prisoners under conditions characteristic of isolated confinement, with cell lockdown for twenty-three or more hours a day, solid cell doors, and restricted access to programming, including family visits); see also Mark D. Cunningham & Mark P. Vigen, *Death Row Inmate Characteristics, Adjustment, and Confinement: A Critical Review of the Literature*, 20 BEHAV. SCI. & L. 191, 204 (2002) (noting that, despite some variability, death row conditions in the United States are characterized by isolation and restricted movement).

63. Between 1970 and 2010 the population of U.S. prisons rose more than 700%. THE PEW CTR. ON THE STATES, PRISON COUNT 2010, at 1 (2010).

64. See DANIEL P. MEARS, EVALUATING THE EFFECTIVENESS OF SUPERMAX PRISONS 1, 40 (2006) (noting that in 1984 there was one supermax prison in the country, but by 1999, two-thirds of the states operated a supermax prison, and by 2004, forty-four states and the District of Columbia operated a supermax prison).

65. *Id.* at 1, 5 (noting that the primary rationale offered by correctional officials for supermaxes is that they provide protection of staff and other prisoners, either directly by preventing violence instigated by the worst prisoners, or because the incapacitation of the worst prisoners makes it easier to stop other prisoners from violent acts).

66. *Id.* at 1.

67. See *id.* at 40 (noting that a conservative estimate of the number of prisoners confined in supermaxes, as of 2004, was 25,000, and a high estimate was 80,000). This number is in addition to the number of prisoners in isolated confinement in facilities other than supermaxes. In fact, there is evidence that after a supermax is constructed, prisoners are sometimes assigned there based on the availability of beds rather than the prisoners’ assessed need for such confinement. See, e.g., *Austin v. Wilkinson*, 189 F. Supp. 2d 719, 723–24 (N.D. Ohio 2002), *aff’d in part, rev’d in part*, 372 F.3d 346 (6th

reduces system-wide levels of violence.⁶⁸ An evaluation of the effectiveness of supermax confinement in the Arizona, Illinois, and Minnesota correctional systems found that operating a supermax did not reduce the level of prisoner-on-prisoner violence in any of the systems.⁶⁹ Only in Illinois did the existence of a supermax appear to reduce the level of prisoner-on-staff violence.⁷⁰ Indeed, the level of prison violence appears to have increased within the California Department of Corrections, despite the use of the isolation units.⁷¹

The number of prisoners in the nation who are confined in isolation, whether in a supermax or a special unit within a traditional prison, has been estimated to be as high as 80,000.⁷² Thus, the continuing popularity of supermaxes has contributed substantially to the numbers of prisoners who experience isolated confinement, even as the total number of prisoners has fallen slightly very recently.⁷³ One reason for these large numbers is the variety of rationales that prison administrators have given for confining prisoners in isolation. Most prisoners are in isolated confinement because they have violated a prison rule or because they are viewed as a threat to prison security.⁷⁴ A prisoner may also be assigned supermax confinement because the prisoner is under a sentence of death, is a youthful offender, is at risk of attack by others, is seriously mentally ill, or has a major medical problem.⁷⁵ In fact, not only have these characteristics led to prisoners being assigned to isolation, but they have also resulted in litigation challenging the restrictive nature of that confinement.⁷⁶ The various legal theories

Cir. 2004), *aff'd in part, rev'd in part*, 545 U.S. 209 (2005) (noting that, prior to the construction of Ohio's supermax, the state did not fill all the beds available in the system's most restrictive housing unit, while it had a shortage of beds at the next-most restrictive security level).

68. See GIBBONS & DE B. KATZENBACH, *supra* note 62, at 54.

69. *Id.* (citing Chad S. Briggs et al., *The Effects of Supermaximum Security Prisons on Aggregate Levels of Institutional Violence*, 41 CRIMINOLOGY 1341 (2003)).

70. *Id.*

71. *Id.*

72. See MEARS, *supra* note 64, at 40. The estimated population of U.S. prisoners confined in solitary approaches the total number of prisoners reported by the British government in November 2013 of 84,592. Ministry of Justice, *Monthly Bulletin-November 2013* (Nov. 2013), available at <https://www.gov.uk/government/publications/prison-population-figures> (follow "Population Bulletin - Monthly November 2013" link).

73. BUREAU OF JUSTICE STATISTICS, U.S. PRISON POPULATION DECLINED FOR THIRD CONSECUTIVE YEAR DURING 2012 (2012), available at www.bjs.gov/content/pub/press/p12acpr.cfm (indicating that the total prison population of the United States dropped by about 1.7% in 2012, to an estimated 1,571,013 prisoners; prison populations had increased every year from 1978 to 2009).

74. See MEARS, *supra* note 64, at app. tbl.4 (describing wardens' responses to a survey about which prisoners were in supermax confinement and which prisoners should be; the great majority of reasons given for both sets of responses involved rule violations, security threats, or both).

75. *Id.* The survey does not appear to distinguish between characteristics that by themselves justify placement in isolated confinement and characteristics that merely do not exclude a prisoner from such placement.

76. Youthful offenders and other persons whom staff perceive as unsafe in general population can be sent to protective custody units that are operated as segregation units. See Sharon Dolovich, *Strategic Segregation in the Modern Prison*, 48 AM. CRIM. L. REV. 1, 3 & n.8 (2011) (noting that gay men

that have resulted in exclusions of members of these groups shed light on the prospects for a broader attack on the practice of isolation.

III. EIGHTH AMENDMENT CHALLENGES

The most familiar and arguably most successful rationale for excluding a particular group of prisoners from isolated confinement involves the Eighth Amendment bar to cruel and unusual punishment. Challenges to prisoners' conditions of confinement generally arise under the Eighth Amendment, and the same standard applies to such challenges whether the claim involves medical care or other prison conditions of confinement.⁷⁷ The standard involves both an objective and a subjective component.⁷⁸ A violation of the objective component can be demonstrated by showing a serious deprivation of a basic human need, such as medical care or reasonable safety.⁷⁹ In addition, the Eighth Amendment prohibits the unnecessary and wanton infliction of pain.⁸⁰ Unreasonable risks of serious damage to a prisoner's future health or safety can violate the objective component of the Eighth Amendment, even if the damage has not yet occurred and may not affect all prisoners subjected to the risk.⁸¹ Proof of the subjective component of an Eighth Amendment violation with regard to prison conditions requires a showing of "deliberate indifference."⁸² Such a demonstration requires, in the context of a prison conditions of confinement claim, proof that the defendant "knows of and disregards an excessive risk to inmate health or safety."⁸³

A. *Challenges on Behalf of Seriously Mentally Ill Prisoners*

Mentally ill prisoners are common in large part because the United States lacks an effective system to provide treatment for those with psychiatric disorders in the community.⁸⁴ Since the 1960s, public facilities providing inpatient mental health treatment have become an endangered species.⁸⁵ Because these facilities

and transgendered women, as well as other prisoners perceived as vulnerable, including youth, are frequently placed in protective custody, a form of segregation). Most prisoners in protective custody have either actively sought that status, or understandably do not wish to challenge it if the alternative is a general population unit in which they are in danger. *See, e.g.,* Nadeau v. Helgemoe, 561 F.2d 411, 412 (1st Cir. 1977) (considering a challenge to conditions of confinement in a prison where all assignments to protective custody were voluntary).

77. *Wilson v. Seiter*, 501 U.S. 294, 303 (1991).

78. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

79. *See id.* at 832.

80. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

81. *Helling v. McKinney*, 509 U.S. 25, 33 (1993).

82. *Farmer*, 511 U.S. at 837.

83. *Id.*

84. The numbers of inpatient state hospital beds available for psychiatric patients dropped from 339 per 100,000 U.S. residents in 1955 to 22 per 100,000 in 2000. H. Richard Lamb & Linda E. Weinberger, *The Shift of Psychiatric Inpatient Care from Hospitals to Jails and Prisons*, 33 J. AM. ACAD. PSYCHIATRY L. 529, 529 (2005).

85. *Id.* at 530–32 (stating that many mentally ill people are processed by the criminal justice system due to a lack of alternatives in the mental health system).

were not replaced by programs offering outpatient services, the criminal justice system has become, by default, the system for the provision of services to the seriously mentally ill.⁸⁶ Once in prison, the vulnerabilities of the seriously mentally ill put them at increased risk of isolated confinement because they have difficulty conforming their conduct to the disciplinary rules in the restrictive prison environment.⁸⁷ Assignment to a segregation unit then adds substantial stress.⁸⁸ A psychiatrist who extensively studied the effects of solitary confinement on the mentally ill has identified a number of symptoms that many mentally ill prisoners assigned to segregation developed: hypersensitivity to external stimuli; perceptual distortions; panic attacks; difficulties with thinking, concentration, and memory; intrusive, obsessional thoughts; overt paranoia; and problems with impulse control—comprising a psychiatric syndrome.⁸⁹

These particular vulnerabilities of the seriously mentally ill in isolation played an important role in spurring the campaign against isolated confinement.⁹⁰ A Human Rights Watch report, for example, quoted this description of a mentally ill prisoner confined in a supermax facility in Indiana:

Prisoner Brown . . . has had seizures and psychiatric symptoms since childhood. He has bipolar disorder and a severe anxiety disorder, a phobia about being alone in a cell, and many features of chronic post-traumatic stress disorder. After he has been in his cell for a while, his anxiety level rises to an unbearable degree, turning into a severe panic attack replete with palpitations, sweating, difficulty breathing, and accompanying perceptual distortions and cognitive confusion. He mutilates himself—for example, by inserting paper clips completely into his abdomen—to relieve his anxiety and to be removed from his cell for medical treatment.⁹¹

Evidence, such as this report by a psychiatrist, helped fuel the growing concern that solitary confinement of the seriously mentally ill is unacceptably dangerous. One manifestation of that concern was the action of the American Bar

86. *Id.* It is particularly noteworthy that during the same period that the number of mental health beds in the community plummeted, the number of the mentally ill in prison exploded so that now the number of mentally ill in prisons is nearly five times the number in state mental hospitals. *Id.* at 529–30 (noting that in 2000, the per capita rate of seriously mentally ill prisoners was estimated as at least 113 per 100,000 while the rate of such patients in state mental hospitals was 22 per 100,000).

87. Jeffrey L. Metzner & Jamie Fellner, *Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for Medical Ethics*, 38 J. AM. ACAD. PSYCHIATRY L. 104, 105 (2010).

88. *Id.*

89. See Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J.L. & POL'Y 325, 335–38 (2006). The psychiatric syndrome identified by Dr. Grassian is often referred to as "SHU Syndrome," referring to the common abbreviation for Special Housing Unit, a name frequently used by prison systems, including the Massachusetts system studied by Dr. Grassian. See *id.*

90. Much of this advocacy campaign is coordinated through Solitary Watch. Its website, www.solitarywatch.com, offers a compendium of campaign materials.

91. SASHA ABRAMSKY & JAMIE FELLNER, HUMAN RIGHTS WATCH, ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS 145 (2003) The report notes that this description comes from an inmate evaluation completed by Terry Kupers, M.D., in 1997. *Id.* Dr. Kupers has been deeply involved in the campaign against solitary confinement. See *infra* note 105.

Association, which in 2010 adopted a new set of Standards on Treatment of Prisoners that included the principle that “[n]o prisoner diagnosed with serious mental illness should be placed in long-term segregated housing.”⁹² Because so many of the seriously mentally ill are confined in prison,⁹³ and they suffer so profoundly from that confinement,⁹⁴ the failure to exclude the seriously mentally ill from solitary confinement is probably responsible for the largest share of the unnecessary deaths among prisoners in isolation.⁹⁵

There are already a number of cases in which the Eighth Amendment argument for exclusion has succeeded. The first of the significant successful cases is *Madrid v. Gomez*, involving a class-action challenge to the Pelican Bay supermax in California.⁹⁶ The court noted three basic factors that posed a risk to prisoners confined there: such prisoners were prone to engage in disruptive behavior, so that they were more likely to be assigned to Pelican Bay; the severity of the conditions and the restrictions placed upon prisoners caused deterioration among mentally ill prisoners; and some prisoners who were not seriously mentally ill became seriously mentally ill under the conditions in the prison.⁹⁷ While the court rejected the claim that the extreme social isolation and reduced environmental stimulation constituted sufficient harm to violate the Eighth Amendment rights of all prisoners assigned to Pelican Bay,⁹⁸ the court held that prisoners with serious mental disorders were at such high risk of severe injury that “placing them in the SHU is the mental equivalent of putting an asthmatic in a place with little air to breathe,” so that their placement in the facility violated the Eighth Amendment.⁹⁹ A second case in essence expanded the application of the *Madrid* holding

92. STANDARDS FOR CRIMINAL JUSTICE: TREATMENT OF PRISONERS 23-2.8(a) (2011). The American Psychiatric Association adopted a somewhat weaker standard in 2012: “Prolonged segregation of adult inmates with serious mental illness, with rare exceptions, should be avoided due to the potential for harm to such inmates.” AM. PSYCHIATRIC ASS’N, POSITION STATEMENT ON SEGREGATION OF PRISONERS WITH MENTAL ILLNESS 1 (2012), available at http://www.psychiatry.org/file%20library/learn/archives/ps2012_prisonersegregation.pdf.

93. According to the Bureau of Justice Statistics, fifty-six percent of state prisoners and forty-five percent of federal prisoners have a mental health problem. Among state prisoners, fifteen percent report symptoms that meet the criteria for a psychotic disorder, and additional prisoners meet the criteria for a major depression or bipolar disorder. About twenty-three percent report symptoms of major depression. DORIS J. JAMES & LAUREN E. GLAZE, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 1 (2006), available at www.bjs.gov/content/pub/pdf/mhppji.pdf.

94. See *infra* text accompanying notes 95–101, 128–151.

95. A high percentage of prisoner suicides take place in isolation. See, e.g., LINDSAY M. HAYES, DEPT OF JUSTICE, PRISON SUICIDE: AN OVERVIEW AND GUIDE TO PREVENTION 55 (1995) (noting that sixty-three percent of all suicides in the Bureau of Prisons during a five-year period occurred in segregation, administrative segregation, or a psychiatric seclusion unit). In addition, there is evidence that a number of deaths in isolation units that are not caused by a prisoner’s intentional act result from the interaction of the prisoner’s mental illness and an isolated environment, such as some deaths from starvation and from heat illness. See *infra* text accompanying notes 128–151.

96. *Madrid v. Gomez*, 889 F. Supp. 1146, 1155 (N.D. Cal. 1995).

97. *Id.* at 1223.

98. *Id.* at 1265.

99. *Id.* at 1265–66.

throughout the California Department of Corrections, finding that the California Department of Corrections inappropriately used disciplinary and behavioral control measures on mentally ill prisoners and that mentally ill prisoners were placed in segregation without any evaluation of their mental status.¹⁰⁰ Of twenty-four mentally ill prisoners reviewed by one of the plaintiff's psychiatric experts, seven were actively psychotic and needed hospitalization and nine had suffered serious reactions to confinement in the SHU, including periods of psychotic disorganization in a number of cases.¹⁰¹ Many other cases resulted in relief to mentally ill prisoners confined in isolation.¹⁰²

One case deserves particular note. *Gates v. Cook* involved Unit 32, a supermax unit of the Mississippi State Prison at Parchman.¹⁰³ In 2004, the Fifth Circuit Court of Appeals affirmed various items of injunctive relief involving the Death Row Unit located within Unit 32, including the order that prisoners diagnosed with psychosis were to be transferred out to a specialized unit that

100. *Coleman v. Wilson*, 912 F. Supp. 1282, 1321 (E.D. Cal. 1995).

101. *Coleman* resulted in a ruling that mental health care within the California Department of Corrections systemically violated the Eighth Amendment. *Id.* at 1308. The case was subsequently consolidated with a statewide challenge to medical care within the California Department of Corrections. After the prison system's prolonged failure to remedy the Eighth Amendment violations in mental health, as well as the similar failures to remedy dangerously deficient medical care found in another case, a three-judge court ordered a significant reduction in population as the only feasible method of addressing the failures. *Coleman v. Schwarzenegger*, 922 F. Supp. 2d 882, 1003 (E.D. & N.D. Cal. 2009). This remedy was ultimately upheld in *Brown v. Plata*, 131 S. Ct. 1910 (2011).

102. *See, e.g.*, *Matz v. Frank*, 340 F. App'x 323 (7th Cir. 2009) (reversing and remanding dismissal of Eighth Amendment claims regarding placement in segregation of prisoner with history of suicide attempts and serious mental illness); *Sardakowski v. Clements*, No. 12-cv-01326-RBJ-KLM, 2013 WL 3296569, at *7 (D. Colo. July 1, 2013) (adopting Magistrate Judge's report and denying motion to dismiss Eighth Amendment claim based on defendants' placement of plaintiff in segregation, where plaintiff's mental illness was exacerbated); *Ind. Prot. & Advocacy Servs. Comm'n v. Comm'r, Ind. Dep't of Corr.*, No. 1:08-cv-01317-TWP-MJD, 2012 WL 6738517, at *15 (S.D. Ind. Dec. 31, 2012) (finding that placement of seriously mentally ill in segregation violated Eighth Amendment due to defendants' knowledge of risk of exacerbation of mental illness); *Jones v. El v. Berge*, 164 F. Supp. 2d 1096, 1125–26 (W.D. Wis. 2001) (granting a preliminary injunction requiring the removal of certain prisoners from Wisconsin's supermax facility because of its effect on their mental statuses and requiring the screening of prisoners in certain classifications to determine whether they also required removal); *Goff v. Harper*, 59 F. Supp. 2d 910, 923 (S.D. Iowa 1999) (adopting remedy for failure to treat seriously mentally ill prisoners in a lock-up unit requiring defendants to establish a special needs unit); *Perri v. Coughlin*, No. 90-cv-1160, 1999 WL 395374, at *1, *11 (N.D.N.Y. June 11, 1999) (finding that conditions in an isolated confinement unit involving a prisoner with serious mental health problems who engaged in self-harm violated the Eighth Amendment and awarding damages); *Ruiz v. Johnson*, 37 F. Supp. 2d 855, 914–15 (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) (finding in a state-wide case that confining the seriously mentally ill in segregation violated the Eighth Amendment); *Casey v. Lewis*, 834 F. Supp. 1477, 1548–50 (D. Ariz. 1993) (holding that the use of lockdown as an alternative to mental health treatment violated the Eighth Amendment); *Inmates of Ocoquan v. Barry*, 717 F. Supp. 854, 868 (D.D.C. 1989) (prohibiting the confinement of seriously mentally ill prisoners in segregation unit); *see also Flynn v. Doyle*, 672 F. Supp. 2d 858, 860, 868 (E.D. Wis. 2009) (partially denying summary judgment to defendants on Eighth Amendment challenge to conditions that included, *inter alia*, confining prisoners with serious mental illness in a unit that operated as a "minimally staffed special management unit").

103. *Gates v. Cook*, 376 F.3d 323, 327 (5th Cir. 2004).

would offer meaningful mental health services.¹⁰⁴ Following that affirmation, prisoners represented by the *Gates* counsel filed *Presley v. Epps*, raising similar issues about conditions in the rest of Unit 32.¹⁰⁵ The parties subsequently settled the litigation for relief that included the relief won in *Gates*, including the removal of the seriously mentally ill from isolated confinement.¹⁰⁶ The results were dramatic. After implementation of the remedy began, the prison officials found that nearly eighty percent of the prisoners assigned to the unit did not require such restrictive confinement; subsequently the population dropped from about 1000 to the approximately 150 prisoners on death row.¹⁰⁷ After the implementation of the treatment program for the seriously mentally ill who had been held in isolated confinement, their rates of disciplinary infractions for a six-month period dropped from 4.7 per prisoner to 0.6.¹⁰⁸ One feature of *Gates* is common: challenges to the confinement of the seriously mentally ill in isolation frequently end in settlement.¹⁰⁹

The broad-based success of challenges to the confinement of the seriously mentally ill in segregation is particularly important because it means that one of

104. *Id.* at 342–43.

105. Terry Kupers et al., *Beyond Supermax: Administrative Segregation: Mississippi's Experience Rethinking Prison Classification and Creating Alternative Mental Health Programs*, 36 CRIM. JUST. & BEHAV. 1037, 1039–40 (2009). Remarkably, the authors of this article include persons from both sides of the litigation, including lawyers, experts, and the Deputy Director of the Mississippi Department of Corrections.

106. *Id.*

107. *Id.* at 1041.

108. *Id.* at 1046.

109. See David C. Fathi, *The Common Law of Supermax Litigation*, 24 PACE L. REV. 675, 682 n.36 (2003) (discussing common provisions in settlements in cases involving litigation against supermax facilities). One of these cases is *Jones'El v. Berge*, 164 F. Supp. 2d 1096. After the preliminary injunction was granted in the case, the parties settled for relief that included a continued ban on the housing of the seriously mentally ill in the facility, in addition to other changes. See Fathi, *supra*, at 678 n.13 (citing *Jones'El v. Berge*, No. 00-C-421-C, Ex. A at 5 (W.D. Wis. June 24, 2002)). Similarly, the article's notes discuss two additional settlements with provisions excluding the seriously mentally ill from segregation. One is *Austin v. Wilkinson*, No. 4:01-CV-071 (N.D. Ohio Nov. 21, 2001), in which a prisoner plaintiff class challenging confinement in Ohio's supermax obtained a preliminary injunction barring defendants from returning seriously mentally ill class members to the facility, and a few months later, the remaining Eighth Amendment claims settled with an agreement for injunctive relief. See Fathi, *supra*, at 678 n.17. This preliminary injunction involves an earlier stage of the litigation that culminated in *Wilkinson v. Austin*, 545 U.S. 209, a Supreme Court decision regarding procedural due process in decisions involving placement in isolation. The other settlement is *Ayers v. Perry*, No. 1:02-cv-01438 (D.N.M. Nov. 14, 2002), in which a challenge to supermax conditions resulted in settlement shortly after filing; the settlement agreement included a prohibition on the confinement of the seriously mentally ill at the facility. See Fathi, *supra*, at 679, 682. Other cases in which an Eighth Amendment challenge to solitary confinement resulted in a settlement barring assignment include *Disability Law Center v. Massachusetts Department of Corrections*, 960 F. Supp. 2d 271, 277 (D. Mass. 2012) (approving settlement); *Disability Advocates, Inc. v. New York State Office of Mental Health*, 02 Civ. 4002 (GEL) (S.D.N.Y. Apr. 27, 2007), in which a settlement increased therapeutic programming for prisoners with serious mental illness subject to confinement sanction, and established new units with increased mental health services; and *Office of Protection & Advocacy v. Choinski*, Civ. No. 3:03CV1352 (RNC) (D. Conn. Mar. 8, 2004), in which a settlement excluded seriously mentally ill prisoners from segregated confinement, with limited exceptions.

the biggest barriers to success across the board in closing down isolation can be overcome. Courts have been particularly anxious to defer to correctional officials when an issue is said to involve their special expertise in security matters.¹¹⁰ Indeed, the Supreme Court has noted that the standard for succeeding in a medical care claim brought by a prisoner is substantially lower than the standard for succeeding in a claim challenging the use of excessive or unnecessary force "because the State's responsibility to attend to the medical needs of prisoners does not ordinarily clash with other equally important governmental responsibilities."¹¹¹

Thus, it is key to the success of cases challenging isolated confinement that courts view them, as they should, as cases involving conditions of confinement and not through a distorted focus on security. This is another reason why the evidence from prison mental health and classification experts concluding that curtailing the use of isolation through treatment actually promotes institutional security is so critical.¹¹²

As to the specific issue of the danger of confining the seriously mentally ill in isolation, however, the battle is pretty much over. The defendants generally dispute specific facts, at least until they settle, such as whether the treatment of the seriously mentally ill is as bad as plaintiffs claim, or whether a particular prisoner is in fact seriously mentally ill.¹¹³ Similarly, defendants are likely to claim that they have, at least temporarily, removed the seriously mentally ill from solitary confinement in order to assert that they are entitled to termination of existing orders pursuant to the Prison Litigation Reform Act.¹¹⁴ Nonetheless, challenges to

110. *See, e.g.*, *Shaw v. Murphy*, 532 U.S. 223, 230–31 (2001) ("[U]nder [precedent cases], prison officials are to remain the primary arbiters of the problems that arise in prison management. [C]ourts are ill-equipped to deal with the increasingly urgent problems of prison administration and reform. . . . Augmenting First Amendment protection for inmate legal advice would undermine prison officials' ability to address the 'complex and intractable' problems of prison administration." (alteration in original) (citations omitted)).

111. *Whitley v. Albers*, 475 U.S. 312, 320–21 (1986) (holding that use of force on a prisoner did not violate the Eighth Amendment unless the force was used "maliciously and sadistically for the very purpose of causing harm" (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973))).

112. *See Kupers et al.*, *supra* note 105, at 1046–47 (noting evidence that disciplinary incidents declined markedly after removal of the seriously mentally ill from isolation). In certain circumstances, whether a court views a prisoner challenge as raising a medical issue or a security issue can be outcome determinative. *See infra* text accompanying notes 263–292, 309–314.

113. *See, e.g.*, *Gates v. Cook*, 376 F.3d 323, 337 (5th Cir. 2004) (rejecting argument that the defendant's treatment program already met the standard for mental health treatment set by the injunction); *Jones El*, 164 F. Supp. 2d at 1118 (rejecting defendant's argument that the prisoner plaintiffs were not as seriously mentally ill as plaintiffs claimed). Advocates have noted the tendency of prison mental health staff to misdiagnose mental illness as mere manipulation, and therefore claim that prisoners can be assigned to isolated confinement without placing them at unreasonable risk. *See ABRAMSKY & FELLNER*, *supra* note 91, at 106–09. Manipulative behavior is not inconsistent with the presence of mental illness. *Id.* at 106.

114. 18 U.S.C. § 3626(b) (2012) (providing for termination of injunctive orders in prison conditions of confinement cases if there is no longer a constitutional violation, among other restrictions on the continuation of relief).

the confinement of the seriously mentally ill in isolation can follow a well-beaten path to success.

*B. Challenges Related to Cognitive Disorders*¹¹⁵

A few cases have specifically noted that prisoners with other cognitive disorders should be included in the categories of prisoners unsuitable for confinement in isolation units. As the Supreme Court recognized in *Atkins v. Virginia*,¹¹⁶ persons with intellectual disabilities have characteristics that make it more difficult for them to function in challenging environments:

[C]linical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18. Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.¹¹⁷

Indeed, *Madrid v. Gomez*,¹¹⁸ the first of the significant cases articulating an Eighth Amendment rationale for the exclusion of the seriously mentally ill from isolation, noted that just as the California Department of Corrections itself recognized a category of prisoners (classified as “Category J” prisoners) whose serious mental illness required a supportive inpatient environment, the system also recognized a category of prisoners (“Category K”) whose cognitive impairment required a supportive inpatient environment.¹¹⁹ Nonetheless, prisoners at Pelican Bay could not be classified to that category by staff at that facility; such classifications could be ordered only at two other prisons in the system.¹²⁰ The court, relying on expert testimony that prisoners with brain damage or intellectual impairment, like the seriously mentally ill, were at particularly high risk of deterioration if placed in the SHU,¹²¹ ordered their exclusion from such confinement.¹²²

115. The term “cognitive disabilities” includes limitations in intellectual and academic functioning as well as deficiencies in adaptive behavior. *See, e.g.*, WIS. DEPT OF PUBLIC INSTRUCTION, ELIGIBILITY CHECKLIST: COGNITIVE DISABILITIES, *available* at <http://sped.dpi.wi.gov/files/forms/pdf/podelg-cd-001.pdf> (requiring deficiencies in these three areas to qualify for certain services).

116. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding that offenders with “mental retardation” are not eligible for the death penalty). In order to avoid confusion, I have reluctantly used the term used by the Supreme Court rather than a term such as “cognitive disorder” or “intellectual disabilities.”

117. *Id.* at 318.

118. *Madrid v. Gomez*, 889 F. Supp. 1146 (N.D. Cal. 1995).

119. *Id.* at 1220 n.154.

120. *Id.*

121. *Id.* at 1236.

122. *Id.* at 1265–66.

In *Indiana Protection & Advocacy Commission v. Commissioner, Indiana Department of Corrections*,¹²³ the court found a violation of the Eighth Amendment in the confinement of the seriously mentally ill to isolation units in a number of state prisons.¹²⁴ For the purpose of its opinion, the court defined the "seriously mentally ill" as including prisoners with organic brain syndrome as well as "mental retardation . . . leading to significant functional impairment."¹²⁵ The inclusion within the plaintiff class of prisoners with cognitive disorders suggests an appropriate strategy for these cases given the relative lack of cases challenging isolated confinement on behalf of prisoners with intellectual disabilities compared to the numbers that have been brought on behalf of mentally ill prisoners. Grouping may promote a showing of numerosity for class certification.¹²⁶ At the same time, the effects of failure to treat the seriously mentally ill are likely to be far more dramatic than the slow deterioration of prisoners with cognitive disabilities in the environment of an isolation unit, combining a lack of mental stimulation with often stressful conditions, so the context of the larger class may make it easier to convey the evidence of the debilitating nature of such confinement.¹²⁷

C. *Challenges Related to Other Serious Medical Needs, Including Physical Disabilities*

Prisoners who have serious medical needs that do not concern their mental health may not be disproportionately at risk for being placed in isolated confinement, but they are particularly at risk in isolated confinement. Of course, many prisoners placed in segregation have both serious medical problems and serious mental health problems, and their various conditions interact to produce an unreasonable level of risk. For example, during a five-year period, at least four prisoners died in the Michigan prison system from an interaction of their mental illness with the conditions in their segregated housing and their resulting needs for medical attention.¹²⁸

One of these prisoners was Anthony McManus who was five-feet-seven inches tall and at the time of death weighed seventy-five pounds; he was reported as looking like a concentration camp prisoner.¹²⁹ Nonetheless, staff restricted his access to food and water, and a nurse approved the use of chemical agents on him.¹³⁰ A nurse also observed him when he was moved, naked and emaciated, to another cell, but did not examine him; a videotape shows him requesting water.¹³¹

123. Ind. Prot. & Advocacy Servs. Comm'n, v. Comm'r, Ind. Dep't Corr., No. 1:08-cv-01317, 2012 WL 6738517 (S.D. Ind. Dec. 31, 2012).

124. See *id.* at *23.

125. *Id.* at *8.

126. See FED. R. CIV. P. 23(a)(1).

127. See *supra* text accompanying notes 94–101.

128. See Elizabeth Alexander & Patricia Streeter, *Isolated Confinement in Michigan: Mapping the Circles of Hell*, 18 MICH. J. RACE & L. 251, 253–60 (2013).

129. See Valarie v. Mich. Dep't of Corr., No. 2:07-cv-5, slip op. at 3, 6 (W.D. Mich. July 22, 2009).

130. *Id.* at 6.

131. *Id.* at 7.

Two days later, correctional officers asked that medical staff see him.¹³² The next morning he was found dead.¹³³

Another mentally ill prisoner was placed in a closed-door observation room at a facility for the mentally ill within the Michigan Department of Corrections.¹³⁴ After that placement, a psychiatrist prescribed a psychotropic medication that interfered with his body's ability to regulate heat.¹³⁵ The temperature in the observation room reached ninety-six degrees although it was January.¹³⁶ Despite noting that the patient's condition was worsening in the excessive heat of the room, the psychiatrist ignored a nurse's report indicating that the patient was dehydrated and needed immediate medical attention.¹³⁷ The prisoner was vomiting and dry heaving, but stayed in the overheated room until he was found dead the following morning.¹³⁸

A third Michigan prisoner collapsed on the prison yard during a period of high temperatures.¹³⁹ He was crying and incoherent at the time.¹⁴⁰ A correctional officer, apparently assuming that his symptoms reflected mental illness, took him to an observation cell that was functionally a segregation cell.¹⁴¹ The prisoner was described as screaming and barking like a dog.¹⁴² The next day, the prisoner's water was turned off by correctional staff, and a psychologist decided that the prisoner was psychotic.¹⁴³ Although the psychologist asked that the water be turned back on, the correctional staff failed to do so.¹⁴⁴ Later that day, the prisoner drank from the toilet.¹⁴⁵ Three days after he was moved to the cell, mental health staff described him as "virtually non-responsive."¹⁴⁶ Again, the water was turned off, and the following day, the prisoner was found dead, in rigor mortis, in the cell.¹⁴⁷

The fourth death was that of Timothy Souders, a young prisoner with an untreated mental illness, who spent five days, much of the time naked and lying in his own urine, in two segregation cells.¹⁴⁸ During that time, Souders was confined in top-of-bed restraints in a hot and humid closed cell where neither medical nor

132. *Id.* at 8.

133. *Id.*

134. *See* *Gibson v. Moskowitz*, 523 F.3d 657, 660 (6th Cir. 2008).

135. *Id.* at 662–63.

136. *Id.* at 660–61.

137. *Id.* at 662–63.

138. *Id.* at 661.

139. *Clark-Murphy v. Foreback*, 439 F.3d 280, 283 (6th Cir. 2006).

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 284.

144. *Id.*

145. *Id.*

146. *Id.* at 285.

147. *Id.*

148. *See* *Hadix v. Caruso*, 461 F. Supp. 2d 574, 577–78 (W.D. Mich. 2006), *remanded*, 248 F. App'x 678 (6th Cir. 2007).

mental health staff responded to his obvious medical needs.¹⁴⁹ A court reviewing the death described it as follows: "[A] psychotic man with apparent delusions and screaming incoherently was left in chains on a concrete bed over an extended period of time with no effective access to medical or psychiatric care and with custody staff telling him that he would be kept in four-point restraints until he was cooperative."¹⁵⁰

As the above examples illustrate, mentally ill prisoners, as well as other prisoners with urgent and emergent medical issues, can be particularly at risk when housed in isolation. Although the deaths discussed above all involve prisoners with serious mental health issues, such prisoners are the canary in the mineshaft demonstrating the risks for others with serious medical problems.¹⁵¹ For prisoners with disabilities, confinement in segregation can result in placement in a nonaccessible cell, or custody restrictions can bar assistive devices such as canes or crutches.¹⁵² In other cases, a prisoner may be assigned to an isolation cell because the cell happens to offer some feature related to the prisoner's medical condition, such as the isolation of prisoners who have potentially contagious conditions.¹⁵³

149. *Id.* at 577–80.

150. *See id.* at 578 (citing Pls.' Ex. 106B.).

151. For instance, another Michigan prisoner, Martinique Stoudemire, returned to prison from a hospital after the amputation of her second leg. *Stoudemire v. Mich. Dep't of Corr.*, 705 F.3d 560, 564 (6th Cir. 2013). The day of arrival, a laboratory report arrived indicating that the wound from the operation was infected with Methicillin-Resistant *Staphylococcus Aureus* (MRSA). *See id.* at 566. As a result, she was placed in medical isolation in the prison segregation unit. *Id.* The unit was not equipped for her disabilities and she experienced difficulties transferring from her wheelchair to the cell toilet, resulting in occasions in which she was unable to reach the toilet in time. *Stoudemire v. Mich. Dep't of Corr.*, No. 07-15387, slip op. at 3–4 (E.D. Mich. May 15, 2014). When Ms. Stoudemire requested assistance in dressing in the unsanitary cell in segregation, two nurses said she could do it herself. Women's Huron Valley Segregation Log Book entry for Jan. 18, 2006, at 30 (Bates 016824). The log records from the segregation unit confirm that she was refusing meals and that she was vomiting. *See id.* Log Book entries for Jan. 19, 2006; Jan. 20, 2006; Jan. 28, 2006; Jan. 30, 2006; Feb. 1, 2006; Feb. 2, 2006; Feb. 4, 2006. The records also confirm that she requested assistance with toileting and dressing, and at times that assistance was not provided. *Id.* Log Book entries for Jan. 18, 2006; Jan. 24, 2006; Jan. 31, 2006. By February 4, 2006, Ms. Stoudemire was complaining of difficulty breathing and custody staff gave the information to the nurse. Later that day, she asked again for medical assistance for difficulty breathing, and was told to report her problem. A custody officer brought that report to the attention of a nurse, who said to tell another nurse in a few minutes. The log notes that two nurses saw her, and that later, custody again requested that a nurse see Ms. Stoudemire. *Id.* Log Book entry for Feb. 4, 2006. On February 5, another unidentified medical staff member wrote "B.S." on a prison health care form in which a different staff member transmitted Ms. Stoudemire's report that she was having difficulty breathing and feeling pain in her chest, experiencing diarrhea, and not eating or drinking. *See Mich. Dep't of Corr. Health Care Contact Worksheet*, Feb. 5, 2006. Two days later, Ms. Stoudemire was transported for her regularly scheduled follow-up appointment at the hospital where the amputation had been performed. Because of her breathing and heart problems, the checkup turned into a two-week hospital stay. *Stoudemire*, No. 07-15387, slip op. at 3 (citing *Stoudemire Decl.* ¶ 24).

152. *See, e.g., Clarkson v. Coughlin*, 898 F. Supp. 1019, 1050–51. (S.D.N.Y. 1995) (upholding ADA claim when prisoners challenged transfer for disciplinary, safety, or medical reasons from facility equipped for disabilities to nonequipped facilities).

153. *See Stoudemire*, No. 07-15387, slip op. at 3 (assigning a prisoner to isolation because of her medical condition).

Prisoners in isolation generally have more limited access to medical personnel. Medical staff may make rounds in an isolation unit, but the primary purpose for such rounds is typically to deliver medication. Even if medical staff do make rounds in the isolation unit, the solid (or mostly solid) doors typical of isolation units pose a barrier to confidential communications between staff and prisoners, as well as an obstacle to staff observation of the condition of the prisoners. Similarly, outside appointments, as well as medical appointments within the prison, may be delayed until the prisoner is out of isolation because of the reluctance to transport such prisoners outside the isolation unit. Sanitation is frequently far worse in isolation units because staff may not allow prisoners access to cleaning agents or equipment to clean their cells; custody staff may frequently discharge chemical agents; and prisoners may set fires or deliberately flood their cells, so the physical conditions pose special risks to prisoners with heightened vulnerability to infections or impaired respiratory function. The rules of isolation units also typically limit access to showers and to exercise, which may have health implications for particular prisoners.¹⁵⁴

Moreover, the fact that relationships between staff and prisoners are almost universally more fraught with tension in the isolation units—and more stressful for staff as well as prisoners—also has important consequences for the delivery of medical and mental health care. Staff members, including medical and mental health staff, are particularly likely to view prisoners in isolation as manipulators seeking medical attention for secondary gain.¹⁵⁵ It would be deeply surprising if prisoners in isolation did not frequently exaggerate symptoms when seeking medical attention precisely because the restricted access to medical care and the distressing conditions of isolation itself provide an obvious motive to do so. Unfortunately, as the cases from Michigan illustrate, the development of a culture in which medical staff view prisoners seeking access to care as manipulators closes off the only access to medical care that a prisoner has and can easily lead to tragic consequences.¹⁵⁶

While the category of prisoners with serious medical needs may seem more diverse than the other categories considered so far, it is sufficiently defined to qualify for class treatment. In the ground-breaking litigation regarding medical and

154. These statements are based on my experience investigating, in connection with litigation, a large number of correctional facilities in many different jurisdictions over a number of years. The statements are not true of all facilities, and some are unlikely to be true of most facilities, since my experience is skewed by the focus of the investigations on facilities that were thought to pose potential Eighth Amendment violations.

155. See *Hadix v. Caruso*, 461 F. Supp. 2d 574, 577–78 (W.D. Mich. 2006), *remanded*, 248 F. App'x 678 (6th Cir. 2007) (refusing to examine a seriously mentally ill prisoner taken from isolation unit to medical unit for medical examination shortly before death because he had urinated on examination table); see also *supra* note 151 (discussing *Stoudemire*, No. 07-15387) (staff entry in prisoner's medical record that her complaints of difficulty breathing and chest pain while confined in segregation because of MRSA infection were "B.S."; shortly thereafter she needed hospitalization for two weeks).

156. See *Hadix*, 461 F. Supp. 2d at 577–78.

mental health care within California's massive prison system, federal courts certified a class of prisoners with serious medical needs unrelated to mental health, as well as a class of prisoners with serious mental health needs.¹⁵⁷ Thus, there is nothing conceptually novel about certifying a class of prisoners whose physical health would be placed at unreasonable risk by isolated confinement. To date, however, there appear to have been no cases in which a putative class of prisoners at serious risk of physical harm from confinement in isolation attempted to gain exclusion. Nonetheless, such a class is a conceptually straightforward application of *Farmer v. Brennan*.¹⁵⁸

In fact, in many if not most cases in which the plaintiffs seek to exclude a class of persons who are at substantial risk of serious mental or emotional harm when placed in isolated confinement, it seems likely that there is also a potential class of persons whose physical health would be substantially endangered. Although such a class would share a common vulnerability to serious harm in isolation, the source of that unreasonable risk could come from the interaction of medical and mental health issues, as in the Michigan death cases cited above.¹⁵⁹ Alternately, such an unreasonable risk could arise from the combination of a prisoner's vulnerability and the cell's design (such as a prisoner at increased risk of heat injury in a cell that routinely overheats in hot weather,¹⁶⁰ or a prisoner in a cell without accommodations who needs an assistive device to transfer from a wheelchair to a toilet¹⁶¹); or from the nature of staff-prisoner interactions in the unit (such as use of chemical agents on a prisoner with serious mental illness or with a serious respiratory condition, such as asthma).¹⁶² Accordingly, this could be a fertile area for new litigation combating isolation.

157. See *Brown v. Plata*, 131 S. Ct. 1910, 1924–26 (2011) (describing the plaintiffs in the consolidated case as encompassing a class of all California prisoners with serious medical conditions (the *Plata* class) as well as a separate class of all California prisoners who were seriously mentally ill (the *Coleman* class)); see also *Pride v. Correa*, 719 F.3d 1130, 1134 (9th Cir. 2013) (also describing the *Plata* class); *Coleman v. Wilson*, 912 F. Supp. 1282, 1293 (E.D. Cal. 1995) (describing the *Coleman* class).

158. See *Farmer v. Brennan*, 511 U.S. 824, 837 (1994).

159. See *supra* text accompanying notes 128–151; see also *Farmer*, 511 U.S. at 843 (violating the Eighth Amendment can spring from the interaction of various conditions; there need not be just one source of the risk); *Wilson v. Seiter*, 501 U.S. 294, 304 (1991) (violating the Eighth Amendment can result from a combination of conditions where their effect is to create a deprivation of a specific human need).

160. See *Gates v. Cook*, 376 F.3d 323, 340 (5th Cir. 2004) (affirming portion of trial court injunction designed to protect class of prisoners segregated in Death Row unit from exposure to excessive heat).

161. See *United States v. Georgia*, 546 U.S. 151, 159 (2006) (allowing claim to proceed under Title II of the Americans with Disabilities Act in light of lower court finding that where prisoner with paraplegia had stated a claim under Eighth Amendment based on allegations that he was unsafe and had suffered injuries in segregation facility not equipped for his disabilities).

162. See *Thomas v. Bryant*, 614 F.3d 1288, 1326 (11th Cir. 2010) (affirming injunction against use of chemical agents on a prisoner with mental illness rendering him incapable of controlling his behavior in response); cf. *Eccleston v. Oregon ex rel. Or. Dep't of Corr.*, 168 F. App'x. 760, 761 (9th Cir. 2006) (affirming denial of injunctive relief against use of chemical agents given the lack of claim that the plaintiff had a respiratory condition).

D. Pregnant Women

While the category of pregnant women could be simply folded into the last category of prisoners with challenges related to serious medical needs, there are two factors that justify some additional comments. First, the obvious: unlike any other category, confining a pregnant woman in isolation has effects not only on her health, but also on the health of her fetus. Second, it seems easier for judges and the general public to find unnecessarily harsh treatment of pregnant women inhumane and to view women in late pregnancy or labor as particularly unlikely to pose a security threat. Indeed, there is a useful model of this phenomenon of greater empathy for pregnant prisoners in the other highly effective campaign for prisoner health and safety in the last few years: the campaign to end the practice of shackling pregnant women. In 2000, Illinois became the first state to enact a law restricting the practice of shackling pregnant women; today there are twenty states with laws restricting shackling, and all but twelve state corrections systems, as well as the Federal Bureau of Prisons, have policies that in some manner restrict shackling during pregnancy and delivery.¹⁶³ Restrictions on the use of isolation on pregnant women would seem likely to raise similar health and safety concerns. So far, however, the only example of successful litigation occurred in New York State. In February 2014, the New York Department of Corrections and Community Supervision agreed to a comprehensive settlement of a legal challenge to isolated confinement. In the settlement, the department agreed to take

163. See 55 ILL. COMP. STAT. 5/3-15003.6 (West 2005 & Supp. 2012) (amended 2012). The statute was revised in 2012 to ensure coverage of all correctional facilities in the state. See *id.* For other state statutes imposing restrictions on shackling during pregnancy, see ARIZ. REV. STAT. ANN. § 31-601 (2002); CAL. PENAL CODE § 5007.7 (West 2011 & Supp. 2014); COLO. REV. STAT. §§ 17-1-113.7, 17-26-104.7, 19-2-924.7, 26-1-137, 31-15-403 (West, Westlaw through 2014 2d Reg. Sess.); DEL. CODE ANN. tit. 11, § 6603 (West Supp. 2014); FLA. STAT. ANN. § 944.241 (West, Westlaw through 2014 2d Reg. Sess. & Sp. A Sess.); HAW. REV. STAT. § 353-122 (West Supp. 2013); IDAHO CODE ANN. §§ 20-901–903 (West Supp. 2013); LA. REV. STAT. ANN. §§ 15:744.2, 744.8 (West, Westlaw through 2014 Reg. Sess.); MD. CODE ANN., CORR. SERVS. § 9-601 (West, Westlaw through 2014 Reg. Sess.); MASS. GEN. LAWS ANN. ch. 127, § 118 (West 2002 & Supp. 2014); MINN. STAT. ANN. § 241.87–89 (West, Westlaw through 2014 Reg. Sess.); NEV. REV. STAT. ANN. § 209.376 (West Supp. 2014); N.M. STAT. ANN. § 33-1-4.2 (West, Westlaw through 2014 2d Reg. Sess.); N.Y. CORRECT. LAW § 611 (McKinney 2003 & Supp. 2014); 61 PA. CONS. STAT. ANN. §§ 1758, 5905 (West 2010); R.I. GEN. LAWS § 42-56.3-3 (West, Westlaw through Ch. 555 of the Jan. 2014 Sess.); TEX. GOV'T CODE ANN. § 501.066 (West 2012); TEX. LOC. GOV'T CODE ANN. § 361.082 (West 2005 & Supp. 2014); VT. STAT. ANN. tit. 28, § 801a (West, Westlaw through 2014 Adjourned Sess.); WASH. REV. CODE ANN. § 72.09.65 (West 2004). The seven states that fail to restrict shackling of pregnant women are Missouri, Montana, Nebraska, New Jersey, South Carolina, Tennessee, and Utah. Personal communication from Amy Fettig, Staff Lawyer, Am. Civil Liberties Union Nat'l Prison Project (July 11, 2014) (on file with author) (providing an updated but as yet unpublished compilation of the status of antishackling policies in individual states). For an earlier version of the compilation, see ACLU, *State Standards for Pregnancy-Related Health Care and Abortion for Women in Prison*, ACLU, <https://www.aclu.org/maps/state-standards-pregnancy-related-health-care-and-abortion-women-prison-map> (last visited Aug. 23, 2014).

"immediate steps to remove . . . pregnant inmates" from "extreme isolation."¹⁶⁴ This litigation could serve as a model for plaintiffs in other jurisdictions since the inclusion of pregnant women in this larger class avoids possible problems with attempting to demonstrate numerosity in a more limited class, and it adds a group of particularly sympathetic plaintiffs.¹⁶⁵

IV. SUBSTANTIVE DUE PROCESS AND THE SPECIAL CASE OF CONFINED YOUTH

Challenges to isolated confinement of those under eighteen years of age based on the special vulnerabilities of youth take place in a more complex legal landscape than those seeking the exclusion of the categories discussed above. These cases include several different legal statuses: youth committed to a juvenile facility,¹⁶⁶ youth detained awaiting a hearing on commitment to a juvenile facility,¹⁶⁷ and youth who are held in an adult facility pursuant to criminal proceedings, whether pretrial or after conviction.¹⁶⁸ Claims against a juvenile facility seeking an end to isolated confinement are frequently filed under both the Due Process Clause of the Fourteenth Amendment as well as the Eighth Amendment.¹⁶⁹

The courts have responded with a variety of conclusions about the applicable constitutional standard. Some courts have applied the Eighth Amendment to claims of youth who have been judicially committed to a juvenile facility, as well as those who have been convicted of an adult crime for which they are serving a sentence.¹⁷⁰ Other courts have held that the Due Process Clause of the Fourteenth Amendment, rather than the Eighth Amendment, applies to those committed to juvenile facilities, since the youth have not been convicted of a crime.¹⁷¹ Still, other courts have applied the Eighth Amendment to certain claims

164. See *NYCLU Lawsuit Secures Historic Reforms to Solitary Confinement*, N.Y. CIV. LIBERTIES UNION (Feb. 19, 2014), <http://www.nyclu.org/news/nyclu-lawsuit-secures-historic-reforms-solitary-confinement>.

165. See FED. R. CIV. P. 23(a)(1).

166. See, e.g., *H.C. ex rel. Hewett v. Jarrard*, 786 F.2d 1080, 1086 (11th Cir. 1986); *Morales v. Turman*, 562 F.2d 993, 998 n.1 (5th Cir. 1977); *Nelson v. Heyne*, 491 F.2d 352, 355 (7th Cir. 1974).

167. See, e.g., *Doe ex rel. Doe v. Wash. Cnty.*, 150 F.3d 920 (8th Cir. 1998).

168. See, e.g., *Daniels v. Woodside*, 396 F.3d 730, 732 (6th Cir. 2005); *Edwards v. Gilbert*, 867 F.2d 1271, 1272–73 (11th Cir. 1989) (considering claim that youth convicted of adult crime was subjected to a violation of his constitutional rights under the Eighth or Fourteenth Amendment when he was held in an adult jail where he committed suicide after being harassed by adult prisoners).

169. See, e.g., *Milonas v. Williams*, 691 F.2d 931, 934 (10th Cir. 1982); *Morales*, 562 F.2d at 998 n.1; *Nelson*, 491 F.2d at 353, 355, 358.

170. See, e.g., *Betts v. New Castle Youth Dev. Ctr.*, 621 F.3d 249, 261 (3d Cir. 2010); *Morales*, 562 F.2d at 998 n.1; *cf. Santana v. Collazo*, 714 F.2d 1172, 1179 (1st Cir. 1983) (applying Eighth Amendment to youth incarcerated for offenses that would constitute crimes, but applying Due Process Clause to those found to have committed status offenses or minor offenses).

171. See, e.g., *Daniels*, 396 F.3d at 735 (youth confined in adult jail); *Gary H. v. Hegstrom*, 831 F.2d 1430, 1432 (9th Cir. 1987); *Jarrard*, 786 F.2d at 1085 (finding youth protected by both the Eighth Amendment and a Fourteenth Amendment right to treatment); *Milonas*, 691 F.2d at 942 & n.10; *Nelson*, 491 F.2d at 355, 358.

regarding conditions of confinement and the Due Process Clause to other conditions claims.¹⁷²

In many cases, however, it does not matter which constitutional provision is applied because the court concludes that the “deliberate indifference” standard, applicable to conditions of confinement under the Eighth Amendment, is also the proper benchmark for conditions of confinement claims brought under the Due Process Clause.¹⁷³ The application of the same standard, however, does not dictate that a “deliberate indifference” standard will produce the same results when applied to youth as it does in cases involving adult prisoners.

The Supreme Court has repeatedly recognized that the treatment of youth in the criminal justice system raises particular concerns because of differences in their state of intellectual and emotional development compared to that of typical adults. In *Ropers v. Simmons*,¹⁷⁴ for example, the Supreme Court noted, in the course of striking down the imposition of the death penalty for crimes committed when the offender was under eighteen years of age, that youth show a “lack of maturity and an undeveloped sense of responsibility.”¹⁷⁵ Similarly, in *Graham v. Florida*,¹⁷⁶ in which the Court struck down life sentences without the possibility of parole as punishment for crimes committed before the age of eighteen that did not involve homicide, it noted the “fundamental differences between juvenile and adult minds.”¹⁷⁷ Neurological evidence indicates that a part of the frontal lobe, the dorsolateral prefrontal cortex (DLPFC), is among the last regions of the brain to complete development.¹⁷⁸ This region of the brain is “linked to the ability to inhibit impulses, weigh consequences of decisions, prioritize, and strategize.”¹⁷⁹ Just as this lack of maturity may predispose youth to commit impulsive criminal acts, it could also lead youth to commit impulsive acts within the restrictive confinement of a correctional facility—including actions that violate the institution’s rules as well as incidents of self-harm.

Another risk factor for youth confined in an adult prison or jail is that they

172. In *Nelson*, 491 F.2d at 355, the court concluded that beatings of youth by staff violated the Eighth Amendment and the Due Process Clause. The court found that other aspects of confinement at the facility violated the Fourteenth Amendment right to rehabilitative treatment, which includes a right to individualized treatment. *Id.* at 360.

173. See, e.g., *Miller v. Harbaugh*, 698 F.3d 956, 957, 960 (7th Cir. 2012) (involving treatment of youth at detention facility filed under the Fourteenth Amendment; court applied the Eighth Amendment deliberate indifference standard, noting that “the standards under the Fourteenth and Eighth Amendments do not differ for our purposes”); *A.M. ex rel. J.M.K. v. Luzerne Cnty. Juvenile Det. Ctr.*, 372 F.3d 572, 579 (3d Cir. 2004) (applying substantive due process “shocks the conscious” test to detained youth; under that test, “deliberate indifference” to youth’s safety would satisfy standard).

174. *Roper v. Simmons*, 543 U.S. 551 (2005).

175. *Id.* at 569–70.

176. *Graham v. Florida*, 560 U.S. 48 (2010).

177. *Id.* at 68.

178. See Jay N. Giedd, *Structural Magnetic Imaging of the Adolescent Brain*, ANNALS N.Y. ACAD. SCI. 77, 83 (2004).

179. *Id.*

are often assigned to isolation for protection.¹⁸⁰ This practice is based on the statistically accurate perception of staff that youth are at higher risk of physical and sexual assault because of their small size or assumed lack of sophistication.¹⁸¹ Certainly, the conditions in juvenile isolation can result in risks that rival or exceed those of conditions that have occasioned findings of constitutional violations in adult facilities, as shown by this description by the United States Department of Justice of the isolation unit in a Mississippi juvenile facility:

Girls in the [isolation unit] are punished for acting out or for being suicidal by being placed in a cell called the "dark room." The "dark room" is a locked, windowless isolation cell with lighting controlled by staff. When the lights are turned out, as the girls reported they are when the room is in use, the room is completely dark. The room is stripped of everything but a drain in the floor which serves as a toilet.

Most girls are stripped naked when placed in the "dark room." According to Columbia staff, the reason girls must remove their clothing before being placed in the darkroom, [sic] is that there is metal grating on the ceiling and the cell door which could be used for hanging attempts by suicidal girls. Such suicidal hazards should be remedied rather than requiring suicidal children to strip naked.¹⁸²

When the unique psychological and cognitive issues affecting youth are considered, including the factors suggesting that youth are more impulsive and therefore less likely to fully consider the long-range impact from their actions, the data suggest that conditions like these, which are considered too extreme for an adult to tolerate for a short period, are likely to be experienced as even more

180. See HUMAN RIGHTS WATCH & AM. CIVIL LIBERTIES UNION, GROWING UP LOCKED DOWN: YOUTH IN SOLITARY CONFINEMENT IN JAILS AND PRISONS ACROSS THE UNITED STATES 19 (2012), available at <http://www.hrw.org/sites/default/files/reports/us1012ForUpload.pdf> (noting studies indicating that youth held in adult facilities are three times more likely to be sexually assaulted, twice as likely to be beaten by staff, and fifty percent more likely to be attacked with a weapon than youth held in juvenile facilities).

181. *Id.*; see also Edward Mulvey & Carol A. Schubert, *Transfer of Juveniles to Adult Court: Effects of a Broad Policy in One Court*, JUV. JUST. BULL., Dec. 2012, at 4, available at <http://www.ojjdp.gov/pubs/232932.pdf> ("The available evidence points to the conclusion that adolescents are at increased risk of being physically or sexually victimized when they are housed in adult facilities."). But see BUREAU OF JUSTICE, DEP'T OF JUSTICE, NCJ 242114, PREA DATA COLLECTION ACTIVITIES, 2013, at 2 (2013), available at <http://www.bjs.gov/content/pub/pdf/pdca13.pdf> (noting that the rate of sexual assault that youth in adult facilities reported was higher than the rate of such assaults reported by adult prisoners, but the difference was not statistically significant).

182. Letter from Ralph F. Boyd, Assistant Att'y Gen., to Ronnie Musgrove, Governor of Miss. 7 (June 19, 2003), available at http://www.justice.gov/crt/about/spl/documents/oak_colu_miss_findinglet.pdf. For cases considering comparable conditions in the context of isolation in adult prisons, see *Hoptonit v. Ray*, 682 F.2d 1237, 1257–58 (9th Cir. 1982), which found a violation of the Eighth Amendment when isolation cells allowed little or no light into the cell, and lights were controlled by correctional officers, *abrogated on other grounds by Sandin v. Conner*, 515 U.S. 472 (1995). See also *Maxwell v. Mason*, 668 F.2d 361, 365 (8th Cir. 1981) (confining youth in isolation without adequate clothing supports an Eighth Amendment claim; clothing is a basic necessity of human existence); *McCray v. Sullivan*, 509 F.2d 1332, 1336 (5th Cir. 1975) (violating the Eighth Amendment when isolation cells were "essentially concrete boxes" in which a hole in the floor served as the toilet).

intolerable by an adolescent.¹⁸³ For that reason, it is not surprising that more than sixty percent of all suicides of adolescents in correctional facilities involve youth who have spent time in isolated confinement, and half of all youth suicides in such facilities occur in isolation.¹⁸⁴

Youth held in isolation (often called “room confinement” in juvenile facilities) thus constitute another group in which it should be possible to show the existence of an excessive risk of harm, satisfying the objective component of the deliberate indifference standard that applies to adult prisoners.¹⁸⁵ Indeed, there is a body of case law holding that confinement of youth in isolation violates the Constitution.¹⁸⁶ Recent developments also highlight the vulnerability to legal challenge of jurisdictions permitting the isolation of youth. In the recent settlement agreement in New York, state officials promised that youth in disciplinary confinement in the adult prison system would be given at least five hours of outdoor exercise and programming outside of their cells five days a week, and certain facilities would maintain separate housing for youth who would ordinarily be placed in solitary confinement.¹⁸⁷ The state also agreed to set aside space at designated facilities to accommodate the youth who would normally be placed in solitary confinement.¹⁸⁸

Shortly after the New York settlement, the U.S. Department of Justice

183. See *Hoptowitz*, 682 F.2d at 1257–58; *Maxwell*, 668 F.2d at 365; *McCray*, 509 F.2d at 1336.

184. LINDSAY M. HAYES, DEP’T OF JUSTICE, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, JUVENILE SUICIDE IN CONFINEMENT: A NATIONAL SURVEY 18, 26 (2009), available at <https://www.ncjrs.gov/pdffiles1/ojdp/213691.pdf>.

185. See *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). To the extent that such isolation takes place pursuant to an institutional policy or routine practice, it would also be likely to violate the subjective component of deliberate indifference, because many objectionable conditions of isolation, such as the lack of necessary lighting, ventilation, clothing, or toileting facilities would be obvious to staff. See *id.* at 842 (allowing inference that when the challenged conditions would have been “obvious” to a defendant, that they were known to the defendant, although the inference is not required); *Milonas v. Williams*, 691 F.2d 931, 934 (10th Cir. 1982); *Morales v. Turman*, 562 F.2d 993, 998 n.1 (5th Cir. 1977); *Nelson v. Heyne*, 491 F.2d 352, 353, 355, 358 (7th Cir. 1974).

186. See, e.g., *R.G. v. Koller*, 415 F. Supp. 2d 1129, 1155–56 (D. Haw. 2006) (finding that a policy of placing youth in long-term isolation violated the Constitution); *D.B. v. Tewksbury*, 545 F. Supp. 896, 905 (D. Or. 1982) (finding a constitutional violation in placing younger children in isolation cells to protect them from older youth); *Inmates of Boys’ Training Sch. v. Affleck*, 346 F. Supp. 1354, 1366–67 (D.R.I. 1972) (holding that isolation of youth under conditions at facility violated the Eighth Amendment); *Lollis v. N.Y. State Dep’t of Soc. Servs.*, 322 F. Supp. 473, 480 (S.D.N.Y. 1970) (holding that solitary confinement of a fourteen-year-old girl for two weeks in strip cell with only night clothes and no recreational facilities or reading matter violated the Eighth Amendment); cf. *Feliciano v. Barcelo*, 497 F. Supp. 14, 35 (D.P.R. 1979) (holding solitary confinement of young adults unconstitutional); *Pena v. N.Y. State Div. for Youth*, 419 F. Supp. 203, 209 (S.D.N.Y. 1976) (requiring a state to follow its own policies that limited isolation of youth to twenty-four hours; that policy represented minimum constitutional requirements).

187. See Benjamin Weiser, *New York State in Deal to Limit Solitary Confinement*, N.Y. TIMES, Feb. 20, 2014, at A1; *NYCLU Lawsuit Secures Historic Reforms to Solitary Confinement*, *supra* note 164.

188. *NYCLU Lawsuit Secures Historic Reforms to Solitary Confinement*, *supra* note 164. According to the announcement of the New York Civil Liberties Union, which provided counsel to the plaintiffs in the litigation, the prison system would also take “immediate steps to remove youth, pregnant inmates and intellectually challenged prisoners from extreme isolation.” See *id.*

expanded litigation challenging solitary confinement to all Ohio juvenile correctional facilities.¹⁸⁹ Two months later, it announced a settlement that would reduce and eventually eliminate solitary confinement throughout Ohio.¹⁹⁰ Significantly, that settlement was supported by a concession from Ohio that the relief approved in the settlement was enforceable as a court order because it was necessary to remedy a constitutional violation.¹⁹¹

Litigation challenges to the use of isolation on youth, and state and local advocacy campaigns seeking to eliminate isolated confinement extending longer than necessary to defuse a crisis, seem to present a real target of opportunity, particularly because there are so many horror tales about youth sent to solitary.¹⁹² Moreover, there should be far fewer debates during monitoring about class membership. In contrast to questions of serious mental illness, for example, whether someone is below the age of eighteen is ordinarily not subject to debate.

V. PROCEDURAL DUE PROCESS

As noted above, in *Wilkinson v. Austin*,¹⁹³ the Supreme Court ruled that the prisoners subjected to indefinite confinement in Ohio's supermax, the Ohio State Prison, have a right to procedural due process.¹⁹⁴ The Court held that the "extreme isolation" flowing from conditions at the supermax, in light of the indefinite length of confinement and the lack of eligibility for parole while prisoners were confined there, constituted an "atypical and significant" deprivation.¹⁹⁵ Thus, confinement under such conditions satisfied the standard that the Court had announced in its earlier case of *Sandin v. Connor*¹⁹⁶ for recognizing a protected liberty interest under the Due Process Clause.¹⁹⁷

Notwithstanding the Supreme Court's cautious endorsement of an "isolation plus" standard for the imposition of due process protections, the lower federal courts since *Wilkinson* have been somewhat more open to finding that prisoners

189. Office of Pub. Affairs, Dep't of Justice, *Justice Department Settles Lawsuit Against State of Ohio to End Unlawful Seclusion of Youth in Juvenile Correctional Facilities*, JUST. NEWS (May 21, 2014), <http://www.justice.gov/opa/pr/2014/may/14-crt-541.html>.

190. *Id.*; see also Agreed Order at 1–2, *S.H. v. Reed*, 2:04-cv-1206 (S.D. Ohio May 21, 2014), available at http://www.justice.gov/crt/about/spl/documents/ohiojuv_order_5-21-14.pdf (consolidating the Department of Justice case with a private lawsuit for the purpose of case management and approving the settlement among all parties).

191. See Agreed Order, *supra* note 190, at 3 (including the findings necessary to satisfy the requirements of the Prison Litigation Reform Act, 18 U.S.C. § 3626(a)(1)(A) (2012)).

192. See, e.g., *supra* text accompanying note 182 (describing the conditions of girls sent to isolation in Mississippi). In addition, such cases in a separate juvenile facility would by their nature involve an abolitionist strategy, because the class would include all the persons confined in the facility.

193. See *Wilkinson v. Austin*, 545 U.S. 209, 214 (2005).

194. *Id.* at 224.

195. *Id.* at 214.

196. *Sandin v. Conner*, 515 U.S. 472, 476 (1995).

197. *Id.* at 486–87 (holding that isolated confinement of a prisoner is not protected by procedural due process unless it represents an "atypical, significant deprivation" or it necessarily affects the length of a prisoner's sentence).

have a protected liberty interest in avoiding isolated confinement. The most that one can say, however, is that conditions similar to the supermax conditions in the Ohio State Prison, imposed for a period of at least one year, have a good chance of being found subject to due process protections.¹⁹⁸ Of course, prisoners considering such litigation might ask how much a successful lawsuit would actually improve their circumstances, as observance of procedural regularity hardly ensures that the result of the process will actually be fair and equitable. This is particularly so in light of the minimal nature of the procedural protections that the Supreme Court has mandated for decisions that can have serious consequences for prisoners threatened with solitary confinement.

In *Wilkinson*, despite the extreme consequences of prisoners being assigned to a supermax that imposed extreme isolation and barred the possibility of parole, the Supreme Court imposed only the weakest of protections.¹⁹⁹ The Court determined that the procedures the prison system claimed to be following were sufficient to satisfy the demands of due process, since all that was needed were “informal, nonadversary procedures,” modeled after the procedures the Court had previously approved for parole hearings.²⁰⁰ According to the Court, the policy that

198. The lower courts have not converged upon criteria, including the length of time in isolation, for qualifying as atypical and significant under *Sandin* and *Wilkinson*. See, e.g., *Toeys v. Reid*, 685 F.3d 903, 910–11, 914 (10th Cir. 2012) (recognizing a due process right to meaningful review in light of the prisoner’s confinement for seven years in conditions similar to those in *Wilkinson*); *Marion v. Columbia Corr. Inst.*, 559 F.3d 693, 697–99 (7th Cir. 2009) (reversing order of dismissal and remanding; if conditions in segregation were found to be sufficiently severe, the court could find that punishment of 240 days of disciplinary segregation required due process); *Harden-Bey v. Rutter*, 524 F.3d 789, 793 (6th Cir. 2008) (reversing dismissal of complaint that alleged that plaintiff had been confined in administrative segregation for three years and that his confinement was indefinite in length). Some of the circuits had reached similar conclusions simply on the basis of *Sandin*. See, e.g., *Heron v. Schriro*, 11 F. App’x 659, 661 (8th Cir. 2001) (finding that confinement in administrative segregation for thirteen years constituted an atypical and significant deprivation); *Colon v. Howard*, 215 F.3d 227, 231–32 (2d Cir. 2000) (finding a protected liberty interest when prisoner was confined “in normal SHU conditions” for 305 days); *Shoats v. Horn*, 213 F.3d 140, 144 (3d Cir. 2000) (locking a prisoner in isolation for eight years, where all but two hours per week were spent in his cell while barred from programming, implicated a liberty interest under *Sandin*); *Hatch v. District of Columbia*, 184 F.3d 846, 847, 858 (D.C. Cir. 1999) (remanding for district court to compare conditions imposed on plaintiff to the most restrictive conditions imposed on prisoners at any facility to which prisoners in the system are routinely transferred; court should also consider the length of such plaintiff’s restrictive confinement to determine if the plaintiff had sustained an atypical and significant deprivation); *Keenan v. Hall*, 83 F.3d 1083, 1088–89, 1095 (9th Cir. 1996) (remanding to district court to reconsider whether conditions in segregation created an atypical and significant deprivation; conditions that did not violate the Eighth Amendment could nonetheless constitute such a deprivation); *Williams v. Fountain*, 77 F.3d 372, 374 n.3 (11th Cir. 1996) (assuming that because the plaintiff was confined to administrative segregation for a year, a penalty much more severe than that involved in *Sandin*, he suffered an atypical and significant deprivation requiring due process).

199. This follows a dispiriting pattern. For example, even for prison disciplinary hearings in which the punishment could involve the loss of good time, and thus can result in a substantial increase in the length of sentence, the Court has held that a finding of guilt need not be based on a preponderance of the evidence. See *Mass. Corr. Inst. v. Hill*, 472 U.S. 445, 455 (1985) (holding that requirements of due process are satisfied if some evidence supports the decision of prison disciplinary board to revoke good time credits).

200. *Wilkinson v. Austin*, 545 U.S. 209, 229 (2005) (citing *Greenholtz v. Inmates of Neb.*

applied to the supermax provided notice of the factual basis for considering supermax assignment by providing a short summary of the reasons for reclassification decisions and “a fair opportunity for rebuttal,” consisting of the right of the prisoner to submit information at the initial stage of placement decisions, as well as an opportunity to submit objections before the final level of review.²⁰¹

These procedures appeared particularly inadequate to provide procedural protection in *Wilkinson* itself. The Ohio prison system, with the opening of the supermax, had much more bed capacity at the most restrictive level than its own staff thought it needed, but was short of beds at the second-highest security level, creating pressure to classify prisoners to the supermax.²⁰² Given the minimal nature of the due process protections mandated by the Supreme Court, classifications to supermax based on considerations other than the security threat posed by a particular prisoner seem inevitable. In practice, the Ohio prison classification hearings had often seemed arbitrary and capricious.²⁰³ This follows a familiar pattern, since prison disciplinary hearings that can involve a loss of good time, and accordingly a longer period of prison confinement, often make a mockery of any concept of basic fairness.²⁰⁴

Penal & Corr. Complex, 442 U.S. 1, 16 (1979)). *Greenholtz* held that, for parole hearings that implicated a state-created due process interest, the procedures must include an opportunity to be heard by the decision makers, although that opportunity need not necessarily occur at the hearing itself. The procedures must also include notice of the reason for the decision, but the notice need not include a summary of the evidence relied upon. *Id.*

201. *Wilkinson*, 545 U.S. at 225–26. Following remand, the prison officials admitted that they were not following the classification policy upon which the Supreme Court had relied, and the district court had to issue another order requiring implementation of that policy. *See Austin v. Wilkinson*, 502 F. Supp. 2d 660, 664 (N.D. Ohio 2006) (noting that prison officials did not contest the plaintiffs’ claim that the prison system was not following the “New Policy” on which the Supreme Court decision was based).

202. *See Austin v. Wilkinson*, 189 F. Supp. 2d 719, 723–24 (N.D. Ohio 2002), *aff’d in part, rev’d in part*, 372 F.3d 346 (6th Cir. 2004), *aff’d in part, rev’d in part*, 545 U.S. 209 (2005).

203. For example, a prisoner was transferred to the supermax as a result of being charged with stabbing another prisoner. He was acquitted on the criminal charge stemming from the stabbing on the basis of his assertion of self-defense. Under Ohio law, he had the burden of persuasion on that defense. Nonetheless he was not reclassified, despite the fact that he had already served a sentence longer than the norm under the parole guidelines, so that he was in essence serving a sentence based on the crime of which he had been acquitted. *See Austin*, 189 F. Supp. 2d at 730–31; *id.* at 728–36 (offering other examples of apparently arbitrary classification decisions).

204. Prison disciplinary hearings that qualify for due process protections are mandated to provide more procedural protections than the Supreme Court required in *Wilkinson*. *See Wolff v. McDonnell*, 418 U.S. 539, 563–66 (1974) (finding that when good time credits are subject to forfeiture in a prison disciplinary hearing, due process requires that a prisoner be given notice of the claimed violation before the hearing as well as a written statement of the evidence relied upon and the reasons for the disciplinary action; there is also a qualified right to call witnesses if not unduly hazardous to security or other correctional goals). As an example of how some prison disciplinary systems operate on an expectation that prisoners will be routinely and automatically be found guilty as charged in disciplinary hearings, see *Perry v. McGinnis*, 209 F.3d 597, 605–06 (6th Cir. 2000), describing evidence that a hearing officer assigned to disciplinary proceedings was punished because he had a higher-than-average rate of finding prisoners not guilty and that the Department of

The various opinions in the course of *Wilkinson* illustrate concerns about the unpredictability of payoffs from efforts to provide procedural due process remedies in the context of prisons. Although the district court ultimately forced the Ohio prison authorities to admit that they planned to keep some members of the class in supermax confinement indefinitely and found that the authorities were in violation of an order requiring the authorities to inform each prisoner of the steps necessary to promote eventual release, this ruling hardly guaranteed that authorities would ultimately reclassify these prisoners to lower security.²⁰⁵ Nonetheless, what actually happened in *Wilkinson* is heartening; the plaintiffs' counsel reported that after the Ohio system was required to develop a far better classification system,²⁰⁶ about eighty percent of the prisoners who had been sent to the supermax achieved reclassification over the course of the ordered hearings.²⁰⁷ The apparent reason for this unexpected result was that, over the course of the litigation, the defendants came to share, to a significant extent, the view that a number of prisoners were being unnecessarily assigned to the supermax.²⁰⁸ Thus, the impressive success of the *Wilkinson* litigation obviously does not guarantee that similar success will occur in other cases pursuing a procedural due process claim.

There is, however, at least one discrete area where procedural due process claims could potentially have a significant effect in reducing the use of isolated confinement. In many states that retain capital punishment, prisoners under sentence of death are assigned to a segregated death row unit by statute or department of corrections policy, and the conditions on such units often

Corrections coerced additional hearing officers to find prisoners guilty of disciplinary offenses. In one of my cases recently, as I accompanied an expert on a prison inspection, I watched and listened as a staff member commented to another that he did not intend to serve a notice (presumably of a disciplinary violation or a similar matter) on a prisoner on the second tier. This comment appeared to support frequent complaints by prisoners at the facility that at times staff falsely state that a prisoner refused to sign forms that the prisoner had never been offered, such as a notice of a disciplinary hearing.

205. See *Austin*, 502 F. Supp. 2d at 674 (refusing to issue order requiring a reduction in classification of prisoners in the supermax on the ground that such an order would come “dangerously close to imposing substantive modifications” of the standards for release from supermax confinement, which the district court considered precluded by previous guidance from the court of appeals).

206. See Kupers et al., *supra* note 105, at 1041 (noting that part of the classification system adopted in Mississippi that resulted in a seventy-five percent reduction in prisoners in segregation was based on the Ohio system's criteria for release from isolation). The reforms in Ohio and Mississippi were not entirely separate developments. Ohio's “New Policy” was officially adopted before the Court of Appeal's decision in *Wilkinson*, which was released on July 8, 2004. See *Austin v. Wilkinson*, 372 F.3d 346 (6th Cir. 2004), *aff'd in part, rev'd in part*, 545 U.S. 209 (2005). Thus, the New Policy would have been the official classification system of the Ohio Department of Corrections in effect at the time that the Mississippi reforms were implemented in 2005 to 2008. See Kupers et al., *supra* note 105, at 1038–39 (the litigation that led to the Mississippi reforms was filed in 2005, and the settlement signed in 2007). The new Mississippi classification system was based on the Ohio New Policy. *Id.* at 1038.

207. Conversation with Jules Lobel, counsel for plaintiffs in *Wilkinson* (Sept. 18, 2014).

208. *Id.*

approximate the restrictions in an isolation unit. In a recent case brought by an individual prisoner without certification as a class action, a district court struck down a practice that automatically assigned prisoners sentenced to death to segregated confinement.²⁰⁹ The court found that confinement on death row was more restrictive than confinement in general population at the maximum security facility where the death row was located, and that the conditions on death row "amount to a form of solitary confinement," with prisoners spending twenty-three hours a day in a small cell.²¹⁰ The court also pointed out that confinement on death row meant that the prisoner spent almost all of his time without contact with any other human beings, except for staff at the prison.²¹¹ Finding the conditions of death row "uniquely severe" in comparison to conditions in the maximum security facility, the court determined that death row prisoners had a liberty interest in avoiding this classification, and that confining all prisoners under sentence of death to these conditions furthered few, if any, penological goals.²¹² The court concluded that the prison officials could cure the violation by providing the plaintiff with an individualized classification decision, or by changing the conditions on death row.²¹³ This case, originally filed without counsel, suggests a possible model for class actions seeking similar relief in other jurisdictions that automatically isolate prisoners under sentence of death.

VI. CLAIMS UNDER THE AMERICANS WITH DISABILITIES ACT

A. *Barriers to Use of the ADA*

Title II of the Americans with Disabilities Act (ADA)²¹⁴ provides another potential source of legal claims with which to challenge solitary confinement on behalf of the seriously mentally ill, albeit one quite limited in potential scope.²¹⁵ Title II prohibits state and local governmental entities from excluding from programs or otherwise discriminating against persons with a disability if the person's disability qualifies under the Act's definition and if the person can meet the "essential qualifications" of the program, with or without the need of

209. See *Prieto v. Clarke*, No. 1:12-cv-01199 (LMB/IDD), 2013 WL 6019215, at *27 (E.D. Va. Nov. 12, 2013).

210. *Id.* at *1–2.

211. *Id.* at *3.

212. *Id.* at *15, *19–20.

213. *Id.* at *27.

214. 42 U.S.C. §§ 12131–12134 (2012).

215. Prisoner cases involving both ADA and Eighth Amendment claims are often dismissed without serious attention to doctrine. See, e.g., *Crowder v. True*, 74 F.3d 812, 813–14 (7th Cir. 1996) (holding that the claims of a violation of the Eighth Amendment and the ADA by a prisoner with paraplegia were rightfully dismissed on the ground that prisons were not subject to suit under the ADA and that the allegations of prisoner's complaint that his cell doors were too narrow to allow passage of his wheelchair, resulting in its denial, as well as denial of access to physical therapy, exercise, hygiene care, and medical care, were insufficient to raise a claim under the Eighth Amendment).

reasonable accommodations.²¹⁶ The Act also gives the Department of Justice the responsibility to promulgate regulations to implement provisions of the Act, and it creates a private right of action so that enforcement is not solely dependent on the government.²¹⁷ Persons with either a physical or mental disability qualify for protection under the Act when that impairment substantially limits a “major life activity.”²¹⁸ Notably, the nonexclusive list of examples of “major life activities” provided in the Act includes thinking and other functions of the brain.²¹⁹

Aside from the general hostility with which some federal courts approach all prisoner cases and the general difficulties attending success on a Title II claim, there are several critical barriers that prisoners face when attempting to raise an ADA claim based on their assignment to solitary. One is that, beyond a holding that there is no state sovereign immunity for cases in which the conduct at issue also violates the Eighth Amendment, the Supreme Court has not resolved whether Congress validly waived the states’ Eleventh Amendment immunity in Title II cases generally, so that the availability of damages actions under Title II may be quite limited.²²⁰ As a practical matter, it seems unlikely that most litigants seeking damages would undertake the burden of creating the record necessary to show a valid abrogation of the Eleventh Amendment for those Title II claims unrelated to an Eighth Amendment claim. Most of the potential cases in which the plaintiffs have the resources necessary to raise a claim of abrogation are ones in which they are represented by the government or a nonprofit organization that seeks to promote disability rights, and often such organizations primarily represent plaintiffs seeking injunctive relief.²²¹

216. 42 U.S.C. §§ 12131–12132.

217. *Id.* §§ 12133–12134.

218. *Id.* § 12102(1)(A). Under this section, a person also qualifies as having a disability by virtue of a record of such an impairment, or by being regarded as having such an impairment. *Id.* § 12102(1)(B)–(C).

219. *Id.* § 12102(2)(A)–(B).

220. *See* *United States v. Georgia*, 546 U.S. 151, 159 (2006). There have been relatively few subsequent cases in which a court addressed abrogation of Eleventh Amendment immunity in Title II ADA cases, and they have reached differing results. *See, e.g.*, *Nasious v. Colorado*, 495 F. App’x 899, 903 (10th Cir. 2012) (involving an unrepresented prisoner, stating without explanation that the conduct challenged in the case would not, if proven, allow an abrogation of immunity because it did not involve a constitutional violation); *Keitt v. New York City*, 882 F. Supp. 2d 412, 454–55 (S.D.N.Y. 2011) (applying precedent from a Second Circuit nonprison case to uphold abrogation in prisoner’s challenge to failure to accommodate disabilities in educational programs); *Muhammad v. Dep’t of Corr.*, 645 F. Supp. 2d 299, 318–19 (D.N.J. 2008) (finding prisoner’s evidence sufficient to deny summary judgment on Eighth Amendment claim, and therefore allowing Title II claim to proceed), *aff’d*, 396 F. App’x 789 (3d Cir. 2010); *Chase v. Baskerville*, 508 F. Supp. 2d 492, 506 (E.D. Va. 2007) (rejecting argument that Title II abrogated immunity in the absence of an Eighth Amendment violation), *judgment aff’d*, 305 F. App’x 135 (4th Cir. 2008).

221. For example, the National Prison Project of the American Civil Liberties Union Foundation unsuccessfully represented plaintiffs in *Onisbea v. Hopper*, 171 F.3d 1289, 1292 (11th Cir. 1999), seeking to halt Alabama’s policies of segregating prisoners with HIV and excluding them from a variety of programs. Despite the loss in *Onisbea*, the National Prison Project later represented a new class of plaintiffs in *Henderson v. Thomas*, 913 F. Supp. 2d 1267, 1317 (M.D. Ala. 2012), holding that Alabama’s policy of excluding prisoners with HIV infection from programs violated Title II of the

A second barrier to the use of the ADA in challenging conditions of confinement of persons with disabilities is the deference that courts give to correctional officials' claims that failures to accommodate prisoners with disabilities in isolation can be justified by security and related concerns. This hesitation was initially manifested in decisions refusing to find the ADA applicable to prisons,²²² as well as decisions setting up additional burdens for prisoner plaintiffs seeking to prevail on such claims.²²³ While security issues may in some cases pose an obstacle to equal treatment for some prisoners with disabilities, the appropriate analysis should not be the refusal to apply the ADA or a standard that adds additional criteria to the stated ADA eligibility requirements. The analysis of security issues should instead be resolved by determining whether the prisoner is qualified for the program at issue, or can become qualified through reasonable accommodations. This is the analysis used by the Supreme Court in *School Board of Nassau County v. Arline*,²²⁴ in which a teacher who had experienced several episodes of active tuberculosis brought a challenge under the employment provisions of the Rehabilitation Act. The Court held that the teacher was "handicapped" under the Act and remanded for the lower courts to determine whether she was "otherwise qualified," with or without accommodations, for the position.²²⁵ Under the standard adopted by the Court, based on a policy of the American Medical Association, in order to determine whether a person with an infection posed such a significant risk to others that employers were justified in taking adverse employment actions on that basis, the decision maker should consider the nature of the risk (in the case of an infectious disease, how the disease is transmitted); the duration of the risk (of transmission); the severity of the potential harm to third parties; and the probability of transmission of the disease, along with the potential

ADA, with the exception of the exclusion from work release. The district court held that advances in medical care for HIV had so changed the outlook for persons infected with HIV that *Onishea* no longer barred relief based on res judicata, and that the same evidence also demonstrated that the plaintiffs could be accommodated in programs without creating a significant risk to other prisoners. *See id.* at 1294, 1317. In a subsequent opinion, No. 2:11cv224-MHT, 2013 WL 5493197, at *2 (M.D. Ala. Sept. 30, 2013), the *Henderson* court approved a settlement in which the Department of Corrections agreed to stop excluding prisoners with HIV from all programs, including work release, and to change its policy of isolating incoming prisoners who tested positive for HIV infection.

222. *See Torcasio v. Murray*, 57 F.3d 1340, 1346 (4th Cir. 1995) (characterizing the ADA as having "serious implications for the management of state prisons . . . [including] security procedures" in case in which defendants had not challenged the applicability of the ADA to prisons; expressing skepticism about its application and holding that whether it applied to prisons was not "clearly established," so that defendants enjoyed qualified immunity to the imposition of damages for its violation). Subsequently, the Supreme Court held that the ADA does apply to prisons. *See Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 213 (1998).

223. *See Gates v. Rowland*, 39 F.3d 1439, 1446-47 (9th Cir. 1994) (holding that in order to succeed on an ADA claim as applied to a prison, the record must demonstrate, in addition to satisfaction of the statutory requirements, that the exclusion was not reasonably related to a legitimate penological goal).

224. *Sch. Bd. of Nassau Cnty. v. Arline*, 480 U.S. 273, 288-89 (1987).

225. *Id.* at 288.

harm resulting from transmission.²²⁶ This standard is appropriate for judging security issues in ADA cases involving prisoners because it stays within the framework of the statute and avoids double counting the risk factor by considering it under the statute and yet again under judicially added glosses of the statute.²²⁷

Finally, another doctrine that has been sporadically applied by several of the appellate federal courts is particularly likely to pose difficulties for prisoners. Disputes between prisoners and staff regarding medical treatment are commonplace because the prison is almost always the only source of medical care available to the prisoner. In many cases, challenges under the ADA and the Rehabilitation Act of 1973,²²⁸ which is similarly intended to safeguard the treatment of persons with disabilities, have been rejected on the ground that the prisoner was really seeking to litigate a lack of necessary medical or mental health treatment, and that such claims are not within the purview of these statutes. The courts have been particularly hostile to claims that a prisoner with a disability can show a violation of the ADA based on a failure to provide a particular treatment regimen for that disability.²²⁹ In *Bryant v. Madigan*,²³⁰ for example, the Seventh Circuit held that the Rehabilitation Act “would not be violated by a prison’s simply failing to attend to the medical needs of its disabled prisoners.”²³¹ If refusing to treat a certain disability violates the Act on its face, it is unclear what principle of statutory construction allows the Act to be construed more narrowly because another statute or constitutional provision is violated. The Second Circuit has provided a slightly more reasoned argument for excluding such claims, suggesting that “[w]here the handicapping condition is related to the condition(s) to be treated, it will rarely, if ever, be possible to say with certainty that a particular decision was ‘discriminatory.’”²³² The fact that it may be difficult to determine if a particular statutory qualification is met is hardly a reason to read a particular provision out of a statute.

Another similar rationale was relied upon by the Eleventh Circuit in *Schiavo ex rel. Schindler v. Schiavo*.²³³ The *Schiavo* court reasoned that when a medical decision is made to deny treatment to a person with a disability, that person cannot show

226. *See id.*

227. *See* Blagdon v. Abbott, 524 U.S. 624, 649 (1998) (noting that the ADA codifies the holding of *Arline* regarding the evaluation of whether a person with a disability constitutes “a direct threat to the health or safety of other individuals”).

228. 29 U.S.C. § 701 (2012).

229. *See, e.g.,* Fitzgerald v. Corr. Corp. of Am., 403 F.3d 1134, 1144 (10th Cir. 2005) (endorsing the view that the ADA does “not provide a private right of action for substandard medical care” and expressing skepticism that an ADA claim could succeed when the disability was related to the medical care that the plaintiff challenged as discriminatory).

230. *Bryant v. Madigan*, 84 F.3d 246 (7th Cir. 1996).

231. *Id.* at 249.

232. *United States v. Univ. Hosp., State Univ. of N.Y. at Stony Brook*, 729 F.2d 144, 157 (2d Cir. 1984).

233. *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1289 (11th Cir. 2005).

that he or she is "otherwise qualified" for the governmental benefit or program.²³⁴ The court assumed that absent the disability the plaintiff would not need the medical treatment that constitutes the governmental program or benefit that has been denied.²³⁵ It is incorrect to assume that when the accommodation the plaintiff seeks involves a form of medical care, the potential accommodation will invariably be indistinguishable from the program eligibility sought, particularly in the context of prisoners. Accepting this assumption would create an arbitrary rule with no basis in the statutory language.

Consider a hypothetical situation in which a correctional system, as a cost-saving measure, had a policy of refusing to provide prisoners with prosthetic legs. If the prosthetic legs were provided, the prisoner would be eligible for a wide variety of programs that are not otherwise accessible because the programs are not accessible to a person in a wheelchair. Under these circumstances, construing provision of a prosthetic as a potential accommodation—given that prosthetics are routine medical care for persons with a disability and the prisoner is otherwise prevented from obtaining the prosthesis from the prison—is consistent with the ordinary ADA standards of whether an accommodation is required, creates no tension with the language of the Act, and serves the purpose of Title II to ensure equal access to government benefits for persons with disabilities.

B. ADA Challenges to Isolation of the Mentally Ill

One recent example in which a prisoner successfully stated a claim under the ADA for a program exclusion that was directly related to his disability is *Sardakowski v. Clements*.²³⁶ In that case, a prisoner raised Eighth Amendment claims that the prison staff was deliberately indifferent to the need for treatment of his serious mental illness. As a result, the plaintiff alleged he was subjected to an extended stay in administrative segregation that exacerbated his illness, leading to self-injury and suicide attempts.²³⁷ He also alleged that he qualified as disabled under the ADA, that his disabilities prevented him from using the "leveling-out program" that was designed to allow prisoners to work their way out of segregation, and that his inability to complete the leveling-out program resulted from the failure of the defendants to provide him with appropriate treatment and accommodations for his disabilities.²³⁸ The magistrate judge recommended that both the Eighth Amendment and ADA claim be allowed to go forward.²³⁹

The U.S. Department of Justice has endorsed a similar theory of the ADA pursuant to its authority under the Civil Rights of Incarcerated People Act.²⁴⁰ In a

234. *Id.* at 1300.

235. *Id.* at 1294.

236. *Sardakowski v. Clements*, No. 1:12-cv-01326-RBJ-KLM, 2013 WL 3296569, at *1, *2 (D. Colo. July 1, 2013).

237. *Id.* at *6–8.

238. *Id.* at *9.

239. *Id.*

240. 42 U.S.C. § 1997 (2012).

“Findings Letter” regarding an investigation of conditions of confinement at the State Correctional Institution-Cresson (SCI-Cresson) in Pennsylvania, the Department of Justice charged that the prison was violating Title II of the ADA by excluding prisoners with mental illness and intellectual disabilities from institutional programs, including classification, security, housing, and mental health services:

Prisoners with disabilities thus cannot be automatically placed in restrictive housing for mere convenience. If prisoners with serious mental illness can be housed in general population by being provided adequate care, the prison may not house such prisoners in segregated housing without showing that it is necessary to make an exception.²⁴¹

The letter notes that more than sixty percent of those placed in segregation are mentally ill, although the mentally ill comprise only twenty-eight percent of the prison population.²⁴² In addition, almost half of the prisoners who had been identified as having intellectual disabilities spent at least three months in segregation.²⁴³ In fact, SCI-Cresson operated an entire unit, called the Secure Special Needs Unit, in which all the prisoners had a serious mental illness.²⁴⁴ The Secure Special Needs Unit operated as an isolation unit where most of the prisoners were confined for twenty-two or twenty-three hours a day.²⁴⁵ Living conditions in this unit were even more austere than in the regular isolation unit.²⁴⁶ For example, while the cells in the regular isolation unit had small windows that offered the possibility of natural light, the cells in the unit for prisoners with special needs were windowless.²⁴⁷ Prisoners assigned to this unit typically received less than two hours a week of structured therapy.²⁴⁸ A second unit, the Psychiatric Observation Cells, also operated as an isolation unit for prisoners who were considered to be dangerous to themselves.²⁴⁹ Prisoners assigned to the Psychiatric Observation Cells received minimal treatment beyond a psychiatric assessment in the first seventy-two hours in the unit and monitoring by nurses and correctional

241. Letter from Thomas E. Perez, Assistant Att’y Gen., to Tom Corbett, Governor of Pa. (May 31, 2013) (citing 28 C.F.R. § 35.130(b)(3)(i)–(ii) (2014)), available at http://www.justice.gov/crt/about/spl/documents/cresson_findings_5-31-13.pdf. The Findings Letter also argued that the unnecessary segregation of prisoners with a disability violated their rights under the requirement that the disabled be integrated with others where feasible, consistent with the principles of *Olmstead v. L.C.*, 527 U.S. 581, 592 (1999), which held that a patient with mental disabilities was qualified for community placement, but mandated that, in determining whether immediate community placement was required, a court could take into account whether immediate relief would be inequitable in light of the needs of other persons with mental disabilities.

242. Letter from Thomas E. Perez, *supra* note 241.

243. *Id.* at 12.

244. *Id.*

245. *Id.* at 5.

246. *Id.*

247. *Id.* at 6.

248. *Id.* at 12.

249. *Id.* at 5–6.

officers.²⁵⁰ The Findings Letter gave examples of prisoners who were punished because of behavior resulting from mental illness.²⁵¹ The Findings Letter also argued that the ADA required that the facility include mental health staff in the process by which prisoners were classified to segregation,²⁵² and that the facility was obliged to provide appropriate treatment for the disabilities of prisoners with serious mental illness or intellectual disabilities who remained in segregated confinement.²⁵³

In February 2014, the Department of Justice sent a second Findings Letter, this time charging that the entire Pennsylvania Department of Corrections system was violating the Eighth Amendment and the ADA in its policies and practices related to isolation and the classification and treatment of prisoners who are seriously mentally ill or have intellectual disabilities.²⁵⁴ The allegations and the legal analysis in the 2014 letter regarding the ADA claim are broadly similar to the earlier SCI-Cresson letter.²⁵⁵ The second Findings Letter notes that since the initial letter about SCI-Cresson, the system has taken some positive steps by reducing the number of prisoners who have one of these disabilities and are nonetheless assigned to isolated confinement.²⁵⁶ This letter also notes that a policy is being developed to include mental health staff in making assessments when prisoners with a psychiatric or cognitive disability are subject to disciplinary hearings that could lead to isolated confinement, but the draft policy is not being consistently applied throughout the system.²⁵⁷

Because of the resources and institutional prestige of the Department of Justice, if the Department pursues the potential litigation outlined in the Findings Letters, that litigation could produce a potential breakthrough in the use of the ADA to protect prisoners from solitary confinement. While litigation based on the ADA will never provide a comprehensive solution to the problem of solitary confinement, if for no reason other than that large numbers of prisoners assigned to solitary are not disabled, it may nonetheless prove a useful addition to the array of litigation options where a comprehensive attack on isolated confinement is not yet feasible.

VII. AN END TO TORTURE

When I have been inside an isolation unit, either to conduct legal interviews

250. *Id.* at 33.

251. *Id.* at 16.

252. *Id.* at 33–34 (citing *Sch. Bd. of Nassau Cnty. v. Arline*, 480 U.S. 273, 278 (1987)).

253. *Id.* at 37.

254. See Letter from Joselyn Samuels, Acting Assistant Att’y Gen., to Tom Corbett, Governor of Pa. (Feb. 24, 2014), available at http://www.justice.gov/crt/about/spl/documents/pdoc_finding_2-24-14.pdf.

255. See *id.* at 17 (stating that the findings about the system’s “misuse of solitary confinement . . . largely mirror the determinations we made in the Cresson investigation”).

256. See *id.* at 1.

257. *Id.* at 21.

or to accompany an expert, I have experienced disturbing events ranging from walking across a tier in which I could not avoid stepping on human waste so that, after leaving the unit, I threw out my shoes, to coming across a cell where the walls and the floor were covered with blood because a prisoner had, several days earlier, deliberately cut himself. The decibel level from prisoners screaming and metal doors and gates clanging and often the smell make concentration difficult. I find it difficult to endure even a few hours in a bad unit. I find it even harder to imagine what it must be like for staff to spend a daily shift on such a unit, and they are victims too.²⁵⁸ The stress on someone who must live twenty-four hours a day in such a place is beyond my comprehension.

Isolation causes pain and suffering to everyone subjected to it, and places everyone at increased risk of physical and psychological deterioration. Indeed, this year the National Academy of Sciences published an extensive study of incarceration in the United States in which it decried the restrictions on social contact for prisoners in isolated confinement.²⁵⁹ The study described supermax prisons as a modern version of prison isolation “that had not been widely used in the United States for the better part of a century,” and that had been condemned by many penologists and correctional legal scholars as “draconian,” “redolent with custodial overkill,” and a kind of confinement that “raised the level of punishment close to that of psychological torture.”²⁶⁰

Why then has it been so difficult to persuade courts to enjoin practices that approach or cross the line into torture? The most obvious reason is that courts are deeply reluctant to interfere with practices of correctional officials, particularly practices that are common throughout the country and involve managing large numbers of prisoners. Whether this reluctance stems from a belief on the part of judges that prison officials actually have some special expertise to which courts should defer, or from a belief that however badly the current system deals with prisoners, disruption is likely to result in dangerous unrest, the result is to allow isolation to continue for many of those subjected to it.²⁶¹

There is no basis in the Supreme Court’s case law on Eighth Amendment conditions of confinement for this reluctance. As noted above, in *Whitley v. Albers*, the Court held that, in the context of a prison disturbance in which staff use force

258. See JAIME BROWER, OFFICE OF JUSTICE PROGRAMS DIAGNOSTIC CTR., DEP’T OF JUSTICE, CORRECTIONAL OFFICER WELLNESS AND SAFETY LITERATURE REVIEW 1, 5, 10–11 (2013), available at <http://www.dys.ohio.gov/DNN/LinkClick.aspx?fileticket=6qSSPqVzbsA%3D&tabid=225&mid=1100> (noting that correctional officers are subjected to high levels of stress related to factors including the threat of injury from prisoners, the effects of interacting with mentally ill prisoners, the nature of the closed work environment, and the need for hypervigilance and self-control; the average life span of a correctional officer is sixteen years less than the national average and suicide rates are substantially higher than among the general working-age population).

259. COMM. ON CAUSES & CONSEQUENCES OF HIGH RATE INCARCERATION ET AL., THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 184 (Jeremy Travis et al. eds., 2014).

260. *Id.* at 185.

261. See *supra* text accompanying notes 110–112, 222–227.

against prisoners, establishing a violation of the Eighth Amendment required a demonstration that force was used maliciously or sadistically.²⁶² In *Whitley*, the Court was careful to distinguish issues regarding the use of force from other prison staff concerns, such as medical care, in which there is ordinarily no need to balance competing institutional priorities such as the safety of other prisoners.²⁶³ Although in *Hudson v. McMillian*²⁶⁴ the Supreme Court expanded the reach of the "malicious or sadistic" standard by applying it to all cases involving the use of force by prison staff, it did not suggest that it was extending that standard to security measures other than the use of force.²⁶⁵ Moreover, *Farmer v. Brennan* explicitly applied the "deliberate indifference" standard to all prison conditions of confinement.²⁶⁶

Nonetheless, when prisoners challenge conditions of confinement not involving the use of force and the defense contends that the practice or condition is justified by security concerns, courts continue to struggle. The clearest analysis of this issue is in the en banc case of *Jordan v. Gardner*.²⁶⁷ *Jordan* involved women prisoners challenging a policy of using male correctional staff to perform pat searches of the women that involved touching their clothed breast and crotch areas.²⁶⁸ The plaintiffs presented evidence that the searches inflicted grave psychological pain because of the women's histories of physical and sexual abuse.²⁶⁹ On the basis of its finding that the searches were unnecessary for purposes of security, the district court had concluded that the searches lacked a penological justification and enjoined the practice.²⁷⁰ The court of appeals affirmed, applying the "deliberate indifference" standard, relying on the fact that the infliction of the pain from this practice was not simply a one-time event, and that the policy was formulated in the absence of time constraints, so that neither *Whitley* nor *Hudson v. McMillian*²⁷¹ controlled.²⁷² The court did not address what the outcome would have been if there had been a legitimate security rationale or if the decision to conduct such a search had occurred under real time pressures.

The Eighth Circuit has also grappled with the interaction of security concerns with the need to protect prisoner health and safety, in the context of challenges to shackling prisoners when such shackling poses health risks. In *Haslar*

262. See *supra* note 111; see also *Hudson v. McMillian*, 503 U.S. 1, 6–7 (1992) (determining that the "malicious or sadistic" standard applied to all uses of force by correctional staff, even in circumstances when no use of force was justified).

263. *Whitley v. Albers*, 475 U.S. 312, 320 (1986).

264. *Hudson*, 503 U.S. at 24.

265. *Id.* at 6–7.

266. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

267. *Jordan v. Gardner*, 986 F.2d 1521 (9th Cir. 1993) (en banc).

268. *Id.* at 1523.

269. *Id.* at 1526–27.

270. *Id.* at 1527.

271. *Hudson v. McMillian*, 503 U.S. 1 (1992); see *supra* text accompanying notes 110–112, 222–227.

272. *Jordan*, 986 F.2d at 1528.

v. Megerman,²⁷³ the court rejected an appeal from the award of summary judgment against a former jail detainee. The detainee, who had suffered permanent injuries when he was sent out for medical care because of renal failure, claimed that the jail policy on shackling was deliberately indifferent.²⁷⁴ The policy required that detainees remain shackled at all times during outside medical treatment.²⁷⁵ At the time of the incident, the detainee was almost comatose, and at one point the detainee's legs were so swollen that the shackles could hardly be seen.²⁷⁶ The correctional officers guarding the detainee ignored complaints that the shackles needed to be removed.²⁷⁷ The county defendants offered evidence that there was an unwritten qualification to the policy allowing shackles to be loosened or removed when medically necessary.²⁷⁸ On the basis of the unwritten exception, the court of appeals held that the policy was neither deliberately indifferent to the detainee's medical needs nor did it impose punishment on a pretrial detainee in violation of the Fourteenth Amendment because it was a reasonable measure to prevent escape.²⁷⁹ The court expressly noted that because the correctional officers who failed to act were not defendants, it was not commenting on whether the actions of the correctional officers might have been deliberately indifferent.²⁸⁰

As written, and if one is able to suppress doubts about how compelling the evidence of unwritten exceptions to the written policy was, *Haslar* is not an extreme decision. In *Nelson v. Correctional Medical Services*,²⁸¹ however, the court appeared to expand *Haslar* from approval of a flexible policy that allowed unshackling when medically appropriate to blanket approval of a far less nuanced shackling policy.²⁸² *Nelson* involved a prisoner who, pursuant to a general restraint policy of the Arkansas Department of Corrections, remained in shackles through most of her labor and was reshackled after delivery.²⁸³ She filed suit, alleging pain and anguish as well as physical injuries from the shackling. A panel of the court of appeals held that the district court should have granted summary judgment against the plaintiff, reasoning that although she had a serious medical need, the shackling policy of the department, as written, lacked an express intent to punish.²⁸⁴ The court quoted *Haslar* in finding that the policy also served a legitimate penological purpose:

A single armed guard often cannot prevent a determined, unrestrained,

273. *Haslar v. Megerman*, 104 F.3d 178 (8th Cir. 1997).

274. *Id.* at 179–80.

275. *Id.* at 179.

276. *Id.*

277. *Id.*

278. *Id.* at 180.

279. *Id.*

280. *Id.*

281. *Nelson v. Corr. Med. Servs. (Nelson I)*, 533 F.3d 958 (8th Cir. 2008), *rev'd en banc*, 583 F.3d 522 (8th Cir. 2009).

282. *Id.* at 963.

283. *Id.* at 961.

284. *Id.* at 963.

and sometimes aggressive inmate from escaping without resort to force. It is eminently reasonable to prevent escape attempts at the outset by restraining hospitalized inmates to their beds[.]²⁸⁵

The panel decision appears to suggest that a general policy without the claimed exceptions relied on in *Haslar* is equally defensible since it notes that the injuries in *Haslar* were even more serious and the risks of restraint more obvious.²⁸⁶ After rehearing en banc, the court of appeals rejected the panel's resolution of the implicit potential conflict between the medical needs of the plaintiff and the asserted security justification for the shackling policy.²⁸⁷ The court first focused on the Eighth Amendment question and determined that the record contained evidence from which a jury could find that the plaintiff had a serious medical need,²⁸⁸ and that the correctional officer knew of the risk posed by the need and nonetheless disregarded the need, despite discretion under the state policy that would have allowed unshackling.²⁸⁹ The court resolved the claimed security justification for shackling by determining that a jury could determine that the plaintiff did not present a flight risk, in light of the plaintiff's physical condition, since the officer was experienced and possessed a gun.²⁹⁰ Thus, again the court found it unnecessary to confront the possible conflict directly.²⁹¹ The existence of this lurking question nonetheless suggests that plaintiffs challenging isolated confinement based on any Eighth Amendment theory should present evidence that isolation is unnecessary from a security perspective because alternative, financially feasible strategies are equally or more effective in preserving security while avoiding the serious risks to prisoners.²⁹²

If, in fact, plaintiffs can effectively address the concerns of judges about security issues in cases challenging isolated confinement, they can return to the

285. *Id.* (quoting *Haslar v. Megerman*, 104 F.3d 178, 180 (8th Cir. 1997)).

286. *Id.* at 962–63 (noting there is no evidence in the record that the defendants were deliberately indifferent to the plaintiff's medical needs because she was taken to a hospital for delivery when the prison nurses determined she needed to be).

287. *See Nelson v. Corr. Med. Servs. (Nelson II)*, 583 F.3d 522 at 531, 534 (8th Cir. 2009) (en banc) (finding that a reasonable jury could conclude that the correctional officer violated the Eighth Amendment and that the officer did not enjoy qualified immunity).

288. *Id.* at 529.

289. *Id.* at 529–31.

290. *Id.* at 531.

291. *Cf. Villegas v. Metro. Gov't of Nashville*, 709 F.3d 563, 571 (6th Cir. 2013) (stating that *Nelson II* seems to have "similarly recognized the crossover nature of a shackling claim," but describing the crossover as occurring between medical care and conditions of confinement claims, both of which entail a "deliberate indifference" Eighth Amendment standard); *LeMaire v. Maass*, 12 F.3d 1444, 1452–53, 1457 (9th Cir. 1993) (applying "malicious and sadistic" use of force standard from *Whitley v. Albers*, 475 U.S. 312, 320 (1986), to use of in-shower mechanical restraints for a high security prisoner).

292. Kupers et al., *supra* note 105, provides one study of this nature. Since the evidence would also be relevant as evidence that the court can issue an injunction consistent with the requirements of 18 U.S.C. § 3626(a)(1)(A) (the Prison Litigation Reform Act) that restrict the scope of injunctions in cases involving prison conditions, the plaintiffs would not be conceding that showing a lack of adverse impact on security is necessary to establish their constitutional theory.

goal that, ironically enough, the plaintiffs sought in the *Madrid v. Gomez* case, which began this campaign: the abolition of isolated confinement.²⁹³ This is a propitious time for litigation to evolve from seeking removal of particularly vulnerable groups to ending the practice altogether because there is a developing consensus of expert opinion that isolated confinement causes serious harm. The recent study by the National Academy of Sciences summarizes and endorses the research literature finding that serious harm comes from isolated confinement.²⁹⁴ Among other findings, the study characterizes isolated confinement as an “official practice that had not been widely used in the United States for the better part of a century.”²⁹⁵ The most significant passages are probably the following:

There are sound theoretical bases for explaining the adverse effects of prison isolation, including the well-documented importance of social contact and support for healthy psychological and even physical functioning. The psychological risks of sensory and social deprivation are well known and have been documented in studies conducted in a range of settings, including research on the harmful effects of acute sensory deprivation, the psychological distress and other problems that are caused by the absence of social contact, and the psychiatric risks of seclusion for mental patients.

An extensive empirical literature indicates that long-term isolation or solitary confinement in prison settings can inflict emotional damage.

Some of the social pathologies that are adopted in reaction to and as a way of psychologically surviving the extreme rigors and stresses of long-term segregation can be especially dysfunctional and potentially disabling if they persist in the highly social world to which prisoners are expected to adjust once they are released.²⁹⁶

Plaintiffs who seek abolitionist remedies in challenges to the use of isolation would be greatly assisted by having access to additional research results on several issues. For example, I strongly suspect that in Michigan and in other states the rate of unexpected deaths from all causes is significantly higher in isolated confinement than it is the general population because prisoners typically have more difficulties gaining access to health care while in isolated confinement and because of the

293. See *supra* text accompanying notes 96–99. The history of the *Madrid* litigation also suggests that there is relatively little downside to challenging isolated confinement on behalf of everyone assigned to isolated confinement. After all, in *Madrid*, the attempt to win a complete victory did not prevent the plaintiffs from succeeding in rescuing the seriously mentally ill from isolated confinement. See *supra* text accompanying notes 96–99.

294. See COMM. ON CAUSES & CONSEQUENCES OF HIGH RATE INCARCERATION ET AL., *supra* note 259, at 183–88.

295. *Id.* at 185.

296. *Id.* at 186, 188.

physical effects of psychological stress of such confinement.²⁹⁷ The only research data that we have on that issue, however, concern the significantly higher risk of suicide in isolation.²⁹⁸ Although the Department of Justice Bureau of Justice Statistics publishes compilations of deaths in prisons and jails that include some demographic information and a reported cause of death where available, they do not include information about whether the death took place in general population or in isolated confinement, nor do the published data distinguish between expected and unexpected deaths.²⁹⁹ Collections of data that allowed comparison of unexpected death rates in isolation to deaths in general population, with other relevant variables taken into account, could shed substantial additional light on the effects of isolated confinement.

Another research project that would be extremely informative would be the replication in other jurisdictions of a study in Washington State. That study compared the success in avoiding new felony convictions of prisoners released directly from supermax confinement to the community with that of prisoners who were reclassified to less restrictive housing prior to their release.³⁰⁰ The study found that prisoners released to the community directly from supermax confinement committed new felonies much more quickly than did prisoners who went through a period of less restrictive confinement prior to release.³⁰¹ Moreover, the rate at which direct-release prisoners committed any new felony during the period was also significantly higher than for the prisoners who had a period in less restrictive confinement.³⁰²

In addition, litigation on this issue should include experts prepared to discuss the steps necessary to move prisoners from isolation to general population, including a meaningful classification system to allow placement in housing where the prisoner can be held safely but without the debilitating effects of isolation.

297. See *supra* text accompanying notes 128–155.

298. See *supra* note 95. Presumably most expected deaths take place in a community hospital, prison hospital, or prison infirmary rather than in a cell. The data would also need to be age adjusted to show significant trends, because otherwise the effects of age on mortality risk would be likely to obscure the effects of isolation. We also know that rates of a number of infectious diseases are higher among prisoners than in the general population. See 2 NAT'L COMM'N ON CORRECTIONAL HEALTH CARE, THE HEALTH STATUS OF SOON-TO-BE-RELEASED INMATES: A REPORT TO CONGRESS 17–18 (2002), available at http://www.ncchc.org/filebin/Health_Status_vol_2.pdf. In addition, the rates of most mental illnesses examined, including schizophrenia and bipolar disorder, are clearly higher for prisoners. *Id.* at 25.

299. See MARGARET E. NOONAN, BUREAU OF JUSTICE STATISTICS, MORTALITY IN LOCAL JAILS AND STATE PRISONS, 2000–2011, at 7–27 tbls.1–26 (2013), available at <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4917>.

300. David Lovell et al., *Recidivism of Supermax Prisoners in Washington State*, 53 CRIME & DELINQ. 633, 633 (2007). It would also help to have more studies of the effects on internal prison safety from adopting strategies other than isolation to respond to prisoners with difficult behavioral issues.

301. *Id.* at 646. Indeed the mean time before committing a new offense for the direct-release prisoners was less than half that of those released who had first experienced a period of time in less restrictive confinement.

302. *Id.* at 633, 646.

Such a program will require staff retraining and the careful screening of staff.³⁰³ It will also require the development of a range of treatment programs to support mental health and behavioral stability among the survivors of isolated confinement.³⁰⁴ Isolated confinement generally appears to be far more expensive than housing prisoners in general population,³⁰⁵ so at least a substantial portion of the cost of providing necessary treatment would likely be offset by the expected large percentage of prisoners who could be safely returned to general population immediately or in a relatively short period of time following reclassification.³⁰⁶

The environment for a return to the *Madrid* goal has also improved because of the enormous energy in the advocacy campaign against solitary confinement. Public attitudes towards the treatment of persons convicted of crimes appear to have softened in recent years as the skepticism about the wisdom of continuing to lock up more people has increased.³⁰⁷ To the extent that the general public is exposed to accurate information about the harms occasioned by isolated confinement, as well as the lack of evidence that it improves either prison security or community safety, they may be even more likely to support such steps, or at least less likely to be strongly opposed.

An across-the-board attack on solitary confinement would necessarily be based on the Eighth Amendment, alleging that, taken together, the risks to mental and physical health from placement in isolated confinement pose a substantial and unreasonable risk of serious harm.³⁰⁸ Such a challenge would have one additional argument not available to the plaintiffs in *Madrid*. In *Hope v. Pelzer*,³⁰⁹ the Supreme Court held that cuffing a prisoner to a hitching post for longer than necessary to address an immediate danger or threat violated the Eighth Amendment.³¹⁰ Several things about this decision are relevant to the litigation against solitary confinement.

First, the use of the hitching post, like the use of solitary confinement, raises issues about the discretion of prison officials to mandate policies that are justified as security needs but also pose risks of harm to prisoners. The Court disposed of the security concern by circumscribing the scope of its determination that the use of the hitching post amounted to a constitutional violation; it noted that “[a]ny

303. See Kupers et al., *supra* note 105, at 1043.

304. *Id.* at 1042–43.

305. See Daniel P. Mears & Jamie Watson, *Towards a Fair and Balanced Assessment of Supermax Prisons*, 23 JUST. Q. 232, 260 (2006) (indicating that most accounts estimate that supermax prisoners are between two and three times more expensive to build and operate than conventional prisons).

306. At this point, in my view, Mississippi remains the best model for such an approach. See *supra* text accompanying notes 105–108.

307. See, e.g., Erica P. Goode, *U.S. Prison Populations Decline, Reflecting New Approach to Crime*, N.Y. TIMES, July 25, 2013, at A11 (“But in recent years, tightened state budgets, plummeting crime rates, changes in sentencing laws and shifts in public opinion have combined to reverse the trend [to increasing incarceration rates].”).

308. See *supra* text accompanying notes 77–83.

309. *Hope v. Pelzer*, 536 U.S. 730 (2002).

310. *Id.* at 746–47.

safety concerns had long since abated by the time petitioner was handcuffed to the hitching post.”³¹¹ At the same time, in describing another case in which a lower court upheld the temporary denial of water to a prisoner who was part of a work squad, the Court stated that a violation of the Eighth Amendment would have occurred if the coercion had jeopardized the prisoner’s health.³¹² Although this statement is dictum, it is a clear rejection of the assumption that security issues trump serious risks to prisoner health and safety outside the context of direct use of force or emergency security steps. The Court also noted “the clear lack of an emergency situation,”³¹³ thus suggesting why *Whitley v. Albers*³¹⁴ does not control without directly discussing the issue.

Even more significant is a second feature of *Hope*. In its analysis of the Eighth Amendment issue, the Court first applies the standard “deliberate indifference” analysis from *Farmer*;³¹⁵ there is nothing surprising here. In its analysis of whether the defendants could employ a qualified immunity defense, however, the Court relies in part on something quite different to conclude that the Eighth Amendment violation was clearly established:

The obvious cruelty inherent in this practice should have provided respondents with some notice that their alleged conduct violated Hope’s constitutional protection against cruel and unusual punishment. Hope was treated in a way antithetical to human dignity—he was hitched to a post for an extended period of time in a position that was painful, and under circumstances that were both degrading and dangerous.³¹⁶

The suggestion that the fact that a treatment that is “antithetical to human dignity” is an independent ground to find a violation of the Eighth Amendment is the first hint since *Farmer* that considerations of human dignity have any relevance to determining that prison conditions of confinement are unconstitutional. *Hope* thus acknowledges an older strain of Eighth Amendment law, best represented in *Trop v. Dulles*,³¹⁷ in which the Court held that the Eighth Amendment barred Congress from enacting a statute imposing denaturalization as a punishment for wartime desertion from the military.³¹⁸ In that opinion, the Court adopted a broad view of the Eighth Amendment: “While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of

311. *Id.* at 738.

312. *Id.* at 743 (discussing *Ort v. White*, 813 F.2d 318 (11th Cir. 1987)).

313. *Id.* at 738.

314. *Whitley v. Albers*, 475 U.S. 312, 320–21 (1986) (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973)).

315. *Hope*, 536 U.S. at 738 (citing *Farmer v. Brennan*, 511 U.S. 825, 842 (1994)).

316. *Id.* at 745. The passage nonetheless concludes by finding that the law was clearly established that use of the hitching post violated the Eighth Amendment based on prior case law. *Id.* at 745–46.

317. *Trop v. Dulles*, 356 U.S. 86 (1958).

318. *Id.* at 101.

civilized standards. . . . The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”³¹⁹

In contrast, by the time of *Farmer*, when the Court referred to “evolving standards of decency,” it was in the context of explaining the limits of discretion of prison officials; allowing prisoners to be beaten or raped inflicts harm without any penological justification.³²⁰ There is no apparent suggestion that an affront to dignity could by itself, without other adverse consequences, violate the Eighth Amendment. The opinion in *Hope*, in contrast, suggests that a court hearing evidence about whether prolonged isolated confinement constitutes cruel and unusual punishment should be open to testimony about the effects of isolated confinement that goes beyond the body of literature addressing the propensity of such confinement to engender or exacerbate mental illness, but should also allow evidence regarding the emotional pain and anguish of isolated confinement, such as the effects of living in a tiny cell with no view of a world beyond, day after day confined without meaningful activity, physical contact with loved ones, or even normal face-to-face conversations with a friend.³²¹

One can speculate that the Supreme Court found it easier to perceive that the use of a hitching post is inconsistent with human dignity because the image of hitching posts may provoke the association of such treatment with the use of shackles during slavery and the post-Reconstruction forms of social control used on African Americans.³²² To the extent that the advocacy campaign seeking to end the use of solitary confinement can link the practice to some similarly repugnant form of punishment, it will be far easier to make the argument that isolated confinement, like the use of the hitching post, is antithetical to human dignity. Perhaps a comparison to medieval dungeons or animal cages in a traditional zoo could serve as an appropriate frame for such advocacy. With that frame for the issue of isolated confinement, evidence of the high risk of harm and the safer alternatives to the use of solitary confinement might finally locate a more receptive judicial audience. When the “fatal experiment” ends and the isolation units become museums, people will wonder why such practices were ever tolerated in a civilized country.

319. *Id.* at 100–01.

320. *Farmer*, 511 U.S. at 833–34.

321. *See, e.g., Thibodeaux: Testimony, supra* note 5.

322. *See* Priscilla A. Ocen, *Punishing Pregnancy: Race, Incarceration, and the Shackling of Pregnant Prisoners*, 100 CALIF. L. REV. 1239, 1243–44 (2012).