Solitary Confined

The Case for a Frontier Tort

Harvard Law School
1563 Massachusetts Avenue
Cambridge, MA 02138
PRISON PRACTICES POLICY GROUP

William Ahee  Phillip Godfrey  Michael Perloff
Micaela Alvarez  Kelsey Jost-Creegan  Jeffrey Roderick
Arun Bodapati  Alexandra LaFalce  Viktoria Safarian
Benjamin Burkett  Sean Lo  Katherine Sandson
Lisa Dicker  Jennifer Mindrum  Pedro Spivakovsky-Gonzalez
Roni Druks  Diane Mokoro  Eleanor Tang
Alexandra Fischbein  John O’Toole  Christian Williams
Judith Flumenbaum  David Ryan  Danielle Young
Lauren Gabriel  David Neuhauser

Teaching Advisors

Sam Caravello
Deena Greenberg
Oded Oren

Instructor

Jon Hanson
hanson@law.harvard.edu
About the Frontier Torts Project


In the fall of 2014, roughly eighty students in Harvard Law School’s 1L Section 6 participated in a group project in their first-year Torts class. The project required students to research, discuss, debate, and write about a current policy problem for which tort law (or some other form of civil liability) might provide a partial solution.

Based on their expressed preferences, students were assigned to one of three policy groups:

1. Police Use of Excessive Force
2. For-Profit Colleges
3. Solitary Confinement

Each of the three policy groups consisted of roughly 27 students. Each policy group was further divided into the following eleven specialty groups consisting of 2 or 3 students each:

1. Project Steering Committee
2. Tort Doctrinalists
3. Historians
4. External Situationists – or Contextualists
5. Internal Situationists – or Mind Scientists
6. Economists
7. Policy Wonks
8. Public Choice Experts
9. Media Analysts
10. Storytellers
11. Presentation Committee

The name and role of each specialty group was purposefully vague. The roles could vary based on the nature of the policy issue itself and the interests and particular focus of students working in the given specialty group.
Each policy group drafted a white paper and gave a presentation to the class about their policy problem and possible solutions to that problem. Experts working on each issue visited the class to speak about the topic and their work. At the conclusion of the class presentations, each group led a class discussion and a class vote to select the best policy options. Videos are available of the class various class presentations.

Each policy group then submitted a final draft of its white paper, informed by further research, the class presentations, discussions, and votes, and by written feedback from the class and teaching staff.

**The Voting Procedure**

The vote on policy proposals took place at the conclusion of each group’s ninety-minute presentation and class discussion. Those presentations and discussions were informed by each group’s draft white paper, which all students were assigned to read, and by a one-hour talk delivered by a guest speaker who was an expert on the underlying topic. The discussion and voting process lasted between ten and twenty minutes. Voting took place in an open forum. Students voted by raising their hands, with outcomes determined by majority rule. The policy proposals recommended in each of the Frontier Torts white papers reflect a class vote and not necessarily the views or recommendations each white paper’s authors.

This group presented and voted on the following policy proposals:

1. **Abolish solitary confinement of minors.** (100% approval)
2. **Alleviate supermax prison conditions by increasing the availability of exercise, visitation, educational programming, entertainment, and socialization.** (100% approval)
3. **Mandate development and publication of state procedures for imposing solitary confinement.** (100% approval)
4. **Require collection of, and access to, data regarding solitary confinement practices in supermax prisons.** (100% approval)
5. **Mandatory psychological pre-screening and regular mental health exams for prisoners subject to incarceration in supermax prisons.** (100% approval)
6. **Expand definition of ‘extreme and outrageous’ to allow for civil liability of penal institutions that implement solitary confinement resulting in exacerbation of psychological illness in prisoners with mental disorders.** (75% approval)

**Frontier Torts at Harvard Law School**

**Solitary Confined: The Case for a Frontier Tort**
7. Require training for prison staff on identifying mental conditions and preventing additional infliction of psychological harm. (100% approval)

Frontier Torts Terminology

**Dispositionism** is an attributional approach that explains human behavior and outcomes as primarily the result of individuals’ thoughts, preferences, and will. Dispositionism presumes that a person’s behavior reflects decisions and choices. These decisions and choices themselves reflect the person’s beliefs, attitudes, preferences, personality, thoughts, and intentions, the details of which she is generally conscious. The dispositionist model assumes a person’s preferences are revealed through her choices, since the actor has the will to choose her actions.

**Naïve psychology** is a model of human thinking and behavior that posits that people are aware of, and able to explicate, the forces motivating their decisions and behaviors. The dominant naïve psychology model, particularly in western cultures, is dispositionism. That naïve psychology model is also at the foundation of law and many of the most influential legal theories, including law and economics.

**Situationism** is an attributional approach that explains behavior, outcomes, and events by looking at situational influences—that is, non-salient internal and external forces operating within and around individuals. Situationism is informed by social science—particularly social psychology, social cognition, cognitive neuroscience and related fields—and the discoveries of market actors devoted to influencing consumer behavior, such as marketers and public relations experts. Situationism is premised on the social scientific insight that the naïve psychology on which our laws and institutions are based—that is, the highly simplified, affirming, dispositionist model for understanding human thinking and behavior—is largely wrong. In explaining human behavior, situationism looks to nonconscious psychological forces and non-obvious contextual behavioral constraints that might shape people’s behavior.
# CONTENTS

EXECUTIVE SUMMARY ............................................................................................................. 1

I. History of Solitary Confinement and Supermax Prisons .......................................................... 4
   Emergence of Supermax Prisons ................................................................................................. 6
   Rise of Dispositionist Academic Theory .................................................................................. 7

II. Representations in the Media .................................................................................................. 9
   Fictional Representations ........................................................................................................... 9
   Television News ......................................................................................................................... 10
   Print Journalism ....................................................................................................................... 12

III. Societal Context of Supermax Prisons .................................................................................. 13
   Tough-on-Crime Culture and Political Pressures ..................................................................... 14
   Moral Concerns ......................................................................................................................... 16

IV. Mind Science Analysis .......................................................................................................... 16
   The Public .................................................................................................................................. 17
   Prisoners and Prison Staff ......................................................................................................... 19

V. Key Actors’ Influence on Policy .............................................................................................. 24
   Federal Government and the Bureau of Prisons ..................................................................... 24
   Politicians, Communities, and Private Companies ................................................................. 26
   Prison Employee Unions ........................................................................................................... 28
   Prison Advocates ....................................................................................................................... 32
   Prisoners and Their Families ..................................................................................................... 34

VI. Public Policy Developments .................................................................................................. 38
   State Policy Reforms ................................................................................................................ 38
   National Policy Reform ............................................................................................................. 40
Executive Summary

A prisoner living in long-term solitary confinement in the United States typically spends twenty-three hours alone each day in a six foot by nine foot cell. Everything in the cell is gray concrete and there are no windows. A solid metal door encloses the prisoner, and meals are delivered through a small slot. The cell is under constant video surveillance and most communication with staff is conducted via an intercom system. The prisoner usually has no social contact with other prisoners and very few restricted visits from friends and family, conducted through a thick glass pane or by video.¹ For years at a time, the only physical contact a prisoner living in solitary confinement is likely to have is that of “being touched through a security door by a correctional officer while being placed in restraints or having restraints removed.” ²

Solitary confinement has a long history in the United States, dating back to its use by the Quakers in the 19th century. The Quakers believed that solitary confinement would create an opportunity for repentance and rehabilitation through solitary reflection.³ As this paper will illustrate, however, solitary confinement not only results in detrimental psychological effects for prisoners as well as guards,⁴ it also has little bearing on rehabilitation, as recidivism rates are actually higher for prisoners in solitary confinement.⁵

Solitary confinement is used in prisons as a disciplinary measure and sometimes justified as a means of keeping certain vulnerable prisoners safe from violence.⁶ Even though solitary confinement for short periods of time has
deilitating psychological effects, the probability and severity of damage is much greater for individuals in long-term isolation. This paper addresses the long-term housing of inmates in solitary confinement, with particular focus on super maximum security prisons, facilities comprised entirely of solitary cells, designed for near absolute, long-term isolation.

The growing trend of mass incarceration and prison overcrowding was instigated in part by a “tough-on-crime” political rhetoric, popularized during the Nixon presidency. As the prison system became strained to accommodate the burgeoning population of inmates, the number of super-maximum (“supermax”) security prisons in the United States rose from zero in 1983 to fifty-seven in 1997. In 2000, Human Rights Watch estimated that 20,000 prisoners in the United States were housed in supermax facilities.

The tough-on-crime rhetoric casts prisoners as exceptionally violent, arguing that placement in supermax prisons and long-term isolation units is necessary to keep prison staff, other prisoners, and the general population safe. This stereotyping of prisoners is often racialized, and the media’s depictions usually further dehumanize prisoners, contributing to the alienation of this population from the public. Importantly, the criteria for placement in supermax prisons and long-term isolation remain unclear, often resulting in overrepresentation of the prison system’s most vulnerable populations, like minors and those with mental illnesses. Additionally, various societal actors, such as the Federal Bureau of Prisons, prison unions,
and private companies, exert pressure to maintain the use of long-term solitary confinement. The lack of clear goals, evaluation, and data concerning the effectiveness of long-term solitary confinement further exacerbates this issue by allowing the practice to proliferate unchecked by institutional oversight.

This paper explores the societal and economic context of the use of indefinite solitary confinement, details the psychological cruelty of long-term isolation, and examines possible policy and doctrinal reforms.
Amid the rolling foothills of Colorado’s Rocky Mountains, stands ADX Florence, the highest security prison on United States soil. The maximum security unit, one of three facilities on Florence’s sprawling prison campus, houses inmates in small sterile cells. Prisoners spend 22-24 hours per day in these rooms, separated from human contact and the outside world for the majority of their time in the facility. This emphasis on solitary confinement separates Florence from ordinary correctional institutions and places it in the class of facilities known as supermax prisons.

While practitioners continue to debate the proper way to characterize supermax prisons, most wardens agree with a modified version of the definition established in a 1996 National Institute of Corrections survey. Professor Daniel P. Mears summarizes that definition as follows: “A supermax is a stand-alone unit or part of another facility and is designated for violent or disruptive inmates. It typically involves up to 23-hour-per-day, single-cell confinement for an indefinite period of time. Inmates in supermax housing have minimal contact with staff and other inmates.”

Although this type of institution has only emerged in the past three decades, American prisons have relied on solitary confinement for centuries. The Quakers first introduced it in the eighteenth century, and since then American prisons have cycled through phases of heavy reliance on solitary confinement. The rise of supermax prisons over the past thirty years is an outgrowth of the country’s complicated
The rise of supermax prisons over the past thirty years is an outgrowth of the country’s complicated relationship with solitary confinement and its changing views on criminality.

The Quakers implemented the first significant use of solitary confinement in the United States prisons in 1829 at Philadelphia’s Eastern State Penitentiary. Given bibles, locked in stone cells, and isolated for long periods of time, prisoners were allowed human communication only with their warden and reverend. The Quakers believed that isolation would lead prisoners to reflect on their actions, to confront their evil dispositions, and to ultimately become good Christian people. This isolation was considered an improvement from previous forms of punishment, such as public physical abuse. The Quakers believed that communal prison settings allowed criminals to spread their criminality to each other, a situation the Quakers thought should be avoided.

The solitary confinement system, however, did not accomplish the Quaker goal of rehabilitation. In fact, it caused many prisoners to become insane, some even violently so. Public figures such as Charles Dickens, who visited the Eastern State Penitentiary in 1842, recorded chilling accounts of the effects that solitary confinement was having on the mental health of the inmates. Dickens described how they stared absently, picked at their own flesh, and appeared “dead to everything but torturing anxieties and horrible despair,” concluding in the end that solitary confinement was “immeasurably worse than any torture of the human body.” Given these harsh reports by public figures, which contrasted starkly with the underlying Quaker goals of rehabilitation, it is unsurprising that the
practice of solitary confinement in prisons failed to catch on widely at the time.

A number of legal opinions also helped to impede the spread of solitary confinement in the nineteenth century, including the landmark 1890 Supreme Court case, *In re Medley*, which recognized the severe mental health effects of solitary confinement. As states restricted their uses of solitary confinement, the practice became increasingly scarce. By the beginning of the twentieth century, long-term solitary confinement was no longer common in United States prisons.

**Emergence of Supermax Prisons**

Even during this dormant period, however, the practice of solitary confinement did not entirely disappear. Brief sentences of solitary confinement continued to be handed out in some jurisdictions, and it was used in response to prison infractions throughout the country. More significantly, long-term solitary confinement was still in use at a few select institutions, such as the infamous Alcatraz Federal Penitentiary, where the strict routine and mandate of silence reportedly drove many inmates “violently insane.” Although Alcatraz closed in 1963, the Bureau of Prisons (BOP) opened a new federal penitentiary in Marion, IL, which featured a “special control unit” modeled after the conditions at Alcatraz.

In the 1970s, riots became common at Marion and other prisons across the country. In response, the facility placed difficult prisoners in a constant state of solitary confinement. On October 22, 1983, prisoners murdered
two guards in this lockdown system, and four days later an inmate was murdered at the prison.33 As a result, Marion placed every inmate on 24-hour lock-down, a treatment that came to be known as the Marion Model.34

The Marion Model prompted a new type of prison designed specifically for these lockdown conditions, referred to as a super-maximum security or supermax prison.35 By 1991, at least thirty-six states in the US had constructed or were in the process of constructing facilities based on the procedures used in Marion.36 In 1994, the first federal super-maximum facility prison opened in Florence, Colorado.37

By 1991, at least thirty-six states in the US had constructed or were in the process of constructing facilities based on the procedures used in Marion

Rise of Dispositionist Academic Theory

The growth of dispositionist theories of crime during the 1970s38 also contributed to the reemergence of solitary confinement and the growth of supermax prisons. This trend had two sources. First, a growing body of research on the criminal justice system supported findings that prisons did not effectively rehabilitate inmates.39 This evidence skewed scholarly debates toward theories that defined criminal conduct in terms of disposition and argued that prisons should promote deterrence and incapacitation rather than rehabilitation.40 Rational choice criminologists, for example, argued that people commit crimes when the benefits of success outweigh the costs they will endure if punished.41 As a result, these thinkers reasoned, harsher sentences would raise the stakes of committing a crime and discourage people from illegal conduct.42 With academics questioning the effectiveness of rehabilitation, dispositionist approaches to crime gained prominence.
Dispositionist theory also gained popularity among politicians extolling the merits of harsh criminal justice policy. Richard Nixon introduced this approach in his 1968 presidential campaign, promising harsh punishments as a way to stop urban riots.\(^{43}\) This “law and order solution” to crime grounded itself in the dispositional actor model by assuming that certain individuals were more likely to commit crimes, and therefore locking those individuals in jail would protect the public from lawlessness.

As other politicians used this approach to further their political ambitions, legislatures began to enact statutes that resulted in overcrowded prisons. Beginning in the 1980s, federal and state legislatures passed laws requiring extensive prison sentences for minor drug offenses, commonly known as mandatory-minimum sentences.\(^{44}\) At the same time, legislatures at both levels of government enacted laws that replaced indeterminate sentencing with determinate sentencing, which in effect prevented prison officials from releasing inmates, even when they showed improved conduct.\(^{45}\) The result was ballooning prison populations, which rose from 744,208 inmates in 1985 to 1,630,940 in 1997.\(^{46}\)

This prison overcrowding may help explain the rise in supermax prisons. From 1983 to 1997, the number of supermax prisons in the United States increased from zero to fifty-seven.\(^{47}\) Prison overcrowding put pressure on guards and prisoners alike. In California, for example, prison institutions and camps transitioned from being full in 1980 to exceeding 180% of their capacity in 1990.\(^{48}\) Over the past two decades, the reliance on supermax prisons has
increased even further. By 2000, Human Rights Watch reported that approximately 20,000 prisoners in the United States were living in supermax facilities. In 2004, the Urban Initiative reported that forty-four of the fifty states had at least one supermax prison, which together held about 25,000 inmates. Another study concluded that, by 2006, there were over 57 supermax facilities spread throughout the country. The vast number of prisoners held in isolation cells in supermax prisons explains why the United States houses more inmates in solitary confinement than any democratic country.

II. Representations in the Media

While solitary confinement in supermax prisons is widespread in the United States, media representations of solitary confinement are often misleading. In particular, they tend to dehumanize the prisoners, making it difficult for viewers to gain insight into the inmates’ perspectives and understand the realities of solitary confinement. Media representations of solitary confinement are thus unlikely to impact audiences in any meaningful way or motivate them to effect any systemic change.

Fictional Representations

Fictional representations of solitary confinement have the potential to influence viewers’ understandings of this type of incarceration. One famous fictional depiction of prison life is Netflix’s original series *Orange is the New Black*, which has widely been lauded for its realistic portrayal of
prison inmates and prison life. Helen Vera, a National Prison Project Fellow from the ACLU, writes, “Orange Is the New Black gives a wider audience a glimpse into the darkest corners of American prisons—including their miserable, counterproductive solitary confinement cells.”

The issue of solitary confinement appears a number of times throughout the series. Most notably, the main character, Piper, is sent to solitary confinement at the end of the first season for fighting with another inmate. As she emerges in the beginning of the second season, the audience sees a character that was relatively rational and healthy having deteriorated into a disoriented, illogical, and “mentally unstable” state. Very shortly after her release, however, Piper returns to her prior “healthy” mental state as though she had never experienced any mental or emotional turmoil. This portrayal of solitary confinement could lead audiences to believe that solitary confinement’s harmful mental health effects are only temporary. Unfortunately, this portrayal runs counter to the consensus of psychologists regarding the significant long-term effects of solitary confinement.

Television News

Television coverage of solitary confinement is rare, due in part to the limited access news crews are given to these areas. When TV reports on the subject do surface, they tend to focus on extreme, attention-grabbing imagery. Recent reports, for example, have shown inmates screaming violently, ripping apart the Bible, and, in one case, receiving third-degree burns from the Secure Housing Unit.
(SHU) bathing practices. These newscasts purport to expose the “ugly side” of solitary confinement. However, sensationalized reporting may inadvertently overshadow inmates’ perspectives and obscure whatever psychological trauma they may be suffering. For example, a recent CNN report on a man who was mistakenly held in solitary confinement for two years introduced the story by informing viewers that the man’s “toenails curled over and he was not allowed to shower,” rather than by discussing whatever emotional or psychological impact that time may have had on him. By focusing on shocking imagery rather than the inmate’s perspective, TV newscasts offer a dehumanizing view of inmates in solitary confinement. These programs may induce a sense of pity or awe, but they do not provide insight into how these inmates’ experiences in solitary confinement are fundamentally human experiences.

The use of undercover reporting on solitary confinement has further facilitated the dehumanization of prisoners. Two recent, high-profile television news pieces on solitary confinement featured outside individuals spending forty-eight hours in solitary confinement to give viewers an “insider’s” perspective on what the practice is really like. For the vast majority of these programs, the narrators were kept apart from other inmates. Consequently, these programs offered little to no insight into the perspectives of the actual inmates.
The failure of print media to adequately address the reality of solitary confinement and the humanity of prison inmates arises from policies that limit media access to the prison system. Indeed, state law and prison policies significantly restrict media access to information. For example, California Department of Corrections and Rehabilitation (CDCR) policies prohibit inmates from participating in scheduled face-to-face interviews with prisoners. Notably, media representatives may conduct face-to-face interviews with prison staff, yet may only conduct random interviews with prisoners who are pre-selected by the CDRC.

This California policy – and similar policies in other states – may explain the publication of articles like Laura Sullivan’s NPR article, "At Pelican Bay Prison, a Life in Solitary," which typifies some of the major problems in print journalism’s reporting on solitary confinement. The article fails to thoroughly critique abuses that occur within Pelican Bay. For instance, it does not reference the extreme sensory deprivation that mentally ill prisoners experience within the Secure Housing Unit. It does not mention the brutal cell extractions that guards perform for minor infractions such as refusing to return a meal tray, banging a cell door, or insulting a guard. The article further fails to accurately portray the humanity of the prisoners in the Secure Housing Unit. It lacks rich, detailed descriptions of individual prisoners’ experiences. The most intimate visual representation of prison life comes from an image of guards searching a Secure Housing Unit for a metal binder clip that had been fashioned into a weapon. The image emphasizes...
the criminality of Pelican Bay prisoners and contributes to the public’s perception of them as deviants rather than suffering human beings. The limitations of Sullivan’s article may be explained by regulations that grant prison officials the power to restrict access to cell units. The policy specifically asserts that media representatives cannot enter security-housing units (SHU) without approval from the CDCR Secretary, the Director of the Division of Adult Institutions, or a designee. Encumbered by various restrictions, print media thus often fails to elucidate and faithfully peer into the reality of solitary confinement.

III. Societal Context of Supermax Prisons

While the precise goals of supermax facilities remain unclear, commonly cited goals include increasing prison safety, increasing system-wide order and control, improving prisoner’s behavior, reducing the influence of gangs, punishing violent and disruptive prisoners, increasing public safety, and improving operational efficiencies. Unfortunately, the lack of consensus on the primary goals of supermax facilities has made evaluation of their effectiveness and impact next to impossible. The lack of clear goals and intended outcomes has also lead to concerns about the classifications of prisoners that should be placed in such facilities. Prison authorities stress the importance of classifying the right prisoners for supermax prisons, meaning “those whose confinement can help achieve a specific goal.” Unfortunately, this creates a great deal of confusion in classifying methods, since there is no uniform idea of what goals are trying to be achieved.
states do not even compile statistics on the characteristics of inmates housed in their supermax facilities, nor do they typically keep documentation of their procedures used for identifying, classifying, and placing inmates in supermax prisons. Although supermax facilities are often marketed as housing the “worst of the worst,” it seems that no one quite knows what that is intended to mean. As noted in this paper’s economic analysis, there has been strikingly little research on the impacts and effectiveness of supermax prisons. Before serious research and evaluation can occur, it is necessary to determine what needs evaluating.

**Tough-on-Crime Culture and Political Pressures**

Since there are no uniformly articulated goals for the use of supermax prisons, it may be confusing to understand why they were created. One of the most pervasive factors that influenced the creation and use of supermax prisons is the modern “tough-on-crime” movement, which emphasizes strict punishment as the primary or even sole response to crime. Prior to the rise of tough-on-crime policies, prison populations were comparatively low and the penal philosophy was dominated by a rehabilitative ideology. However, the tough on crime movement caused a shift
towards an ideology which understood the purpose of the penal system to be crime control and punishment. The movement emerged in the 1980s as a nation-wide concern that crime was out of control and that prison disorder and violence were increasing. Indeed, there was a public perception that the modern criminal was more “violent, disturbed, and disruptive than his predecessor,” and therefore the prisons that housed these criminals needed to be different as well. For this reason, many members of the public and the politicians who represent them supported the creation and use of supermax prisons as the only facilities that could adequately deal with such dangerous individuals. Prior to the tough-on-crime movement of the 1980s, no states had supermax prisons. Today, more than forty states have them, and nearly two percent of the prison population is housed in a supermax.

Explaining the growth of the tough-on-crime policies during the 1980s, and their continued power today, research has shown that even if politicians originally oppose supermax prisons and solitary confinement, they may eventually support opening such facilities for political gain. In the words of one government official:

“Politically, [a supermax] is a really easy sell. There is an appetite for punishment. It taps into public fear without much cost and with a big political gain. Even though it’s relatively expensive, the cost is still a drop in the bucket. There’s not a huge difference between the Democrats and the Republicans on this issue.”
Overall, it appears that America’s growing fear of crime and the correlating growth in support for tough-on-crime policies drove the creation of supermax facilities, while the political capitalization of these two forces has enabled the continued use of supermax facilities. As evidence of this trend, supermax prisons are often used as “political symbols of how ‘tough’ a jurisdiction has become.”

Moral Concerns

The moral concerns of solitary confinement and supermax facilities are topics of a great deal of debate. Research has shown that prolonged solitary confinement causes extensive physical, mental, and emotional health issues. While historically the American prison system has used solitary confinement, the new research into health effects has opened new doors for litigation. These concerns have also fueled special interest groups and general members of the public who view solitary confinement as immoral, inhumane, and a form of torture. Yet there is little evidence thus far that politicians and policymakers have given such moral objections serious consideration.

Although objections to the use of solitary confinement and supermax prisons have not yet brought about substantial change, there is evidence that the pendulum is beginning to swing, as the issue confronts more and more challenges from a growing community that objects to its use.

IV. Mind Science Analysis

The mind sciences help describe and explain the use of supermax facilities by examining the psychological results...
of confinement, identifying their justification mechanisms, and isolating powerful, subconscious obstacles to change. An understanding of the internal situation of key parties – the general public, prison staff, and prisoners themselves – is essential to an understanding of supermax facilities and solitary confinement.

The Public

Criminal stereotypes are central to the public’s justification of supermax prisons, and are particularly powerful justificatory tools because they relate to broader racial stereotypes dating back hundreds of years. While unacceptable when phrased in the explicitly racist terms of the past, these racial stereotypes have been refashioned into criminal stereotypes (i.e. the public envisions the “criminal predator” as a young black male), and are used to justify the continuing racial power differentials regarding the prison system. The connections between racial and prisoner stereotypes help to explain findings that people are less likely to support a reform in punitive policies when they believe that the criminal population is predominantly black. Furthermore, a recent study has found that when participants perceived members of an out-group to be experiencing social pain, they underestimated the severity of that pain when compared to in-group members. This study further suggests that, as part of group categorization and stereotyping, the participants viewed the out-group as less human. In this way, stereotypes dehumanize prisoners, impede the possibility of empathic understanding, and ultimately justify the current prison system.
Prisoners’ stories demonstrate that this dehumanization marks the prison system. Malcolm Raheem is currently serving time in Northern Correctional Institution, Connecticut’s supermax prison. After a series of suicide attempts, the guards grew increasingly frustrated with him — a curious response to someone whose condition would often breed empathy in another person. However, Malcolm’s story reveals a different interaction. “At one point, I angrily protested to a corrections officer [saying] that ‘no human being should be treated this way’. The guard responded, ‘That’s even considering you are a human being.’ ”

The public’s general belief in free will further strengthens the justificatory force of these stereotypes. In fact, a recent study suggests that a person’s belief in free will grows stronger when confronted with activities that they deem to be immoral. This study suggests that a belief in free will is central to justifications for retributive punishment, allowing people to assign blame for harms. While there are consequentialist arguments for harsh punitive policies, studies show that a “mere exposure to modern neuroscience,” which explains actions as the result of forces beyond direct human control, reduces one’s motivations for retributive punishment. Therefore, the public’s justification for the criminal justice system’s retributive practices, with supermax prisons as an extreme case, is reliant upon the idea that these persons freely chose to commit their crimes. Additionally, a belief in free choice may be used to overcome the dissonance created when one holds racial criminal stereotypes and simultaneously
believes that racism is bad. Insofar as one assumes that criminals freely choose their actions, one is likely also to believe that the criminal disposition of these individuals makes them criminals, not their situations. In this way, the public may justify racial criminal stereotypes while simultaneously passing judgment upon historically racist practices.

Here, a criminal is envisioned as a dangerous, black man and this image fits with a much larger story within American on the justification of racial inequalities. This dangerous person is simultaneously dehumanized and held to unrealistic standards of free will and human agency. In the end, the prison system is justified, and harsh practices are required to deter these dangerous criminals from acting on their base desires. It is not the public that should feel guilt about supermax prisons, because the prisoners are there as a result of their dangerous and chosen behaviors.

**Prisoners and Prison Staff**

Many of the same psychological impulses that mold the internal situation of the general public are also at work in prison staff and prisoners. However, these same psychological impulses produce varied effects due to the different situational contexts of the parties. In contrast to members of the general public, who have salient identities and societal roles that are largely separate from the criminal justice system, the roles of prison staff and prisoners are much more closely intertwined with the penal system.

In 1971, Philip Zimbardo’s Stanford Prison Experiment infamously demonstrated how people may be influenced by...
the role that their situation assigns to them. Sociologist Pierre Bourdieu articulated this idea: “[I]nstitution is thus an act of communication, but of a particular kind: it signifies to someone what his identity is, but in a way that both expresses it to him and imposes it on him . . . informing him in an authoritative manner of what he is and what he must be.” For prisoners and prison staff, this “act of communication” begins before either group sets foot in a supermax facility. Rather than entering with a “blank psychological slate,” stereotypes and dispositionism will have already primed how the two groups believe they should view themselves, and how they believe they should react to each other.

Stereotypes and dispositionism set the stage in the following way: having been employed in facilities that are self-described as housing the most violent and problematic criminals, prison staff expect prisoners to be dangerous, mentally unstable, or both. This expectation is reinforced by the real risk of injury and even death on the job. Prison staff expectations of prisoners are further influenced by a dispositionist conceptualization of the individual, meaning that staff are likely to believe that dangerous criminals have freely chosen, and may even desire, to be the way that they are. Based on this perspective, harsh conditions in supermax facilities are seen as desirable, as a mechanism that both punishes those who deserve punishment and deters those who may be contemplating criminal activity. However, prison staff are not the only ones whose expectations are molded by stereotypes and dispositionist
attitudes. Given popular cultural beliefs and societal stereotypes of prison staff, prisoners may expect guards to be unfriendly and even abusive.116 When dispositionist attitudes are layered on top of these expectations, prisoners are primed to believe that any and all negative behavior from staff has been willfully chosen and executed.117

Once prison staff and prisoners are within a supermax facility, their expectations are supplemented by situational role-defining. For prison staff, each member is clothed in a uniform, given certain weapons, and confined to the actions and reactions prescribed by protocol.118 Depending on the facility, this protocol may emphasize minimum limits on response and de-emphasize maximum limits.119 This means that protocol may require staff to respond to an infraction with corporal punishment, even if the prisoner’s infraction does not seem to deserve a violent response, or if negotiation would have been equally as effective.120 For prisoners, their role is equally defined by the situation. Those who are incarcerated in solitary confinement are deprived of almost everything that could suggest individual identity.121 Inmates live in closet-sized cells, wear identical uniforms, and exist largely in enforced idleness.122 As supermax prisoners, they are labeled the “worst-of-the-worst” of American criminals, and those who share the facility with them expect the “worst-of-the-worst” behavior.123 Thus, even if individuals do not believe themselves to be dangerous or violent, their own perception of themselves must compete with the identity that their situation will attempt to force upon them.124 Supermax prisoners are essentially deprived of all physical touch.

Even if individuals do not believe themselves to be dangerous or violent, their own perception of themselves must compete with the identity that their situation will attempt to force upon them.

For the duration of their stay they will be implicitly, (and perhaps explicitly), told that they are too dangerous to be allowed to interact freely with others.
Solitary confinement has been found to produce extreme anxiety, paranoia, depression, despondency, obsessive and uncontrollable thoughts, hallucination, hysteria, and psychosis. Attempts at suicide are commonplace.

except when being placed into restraints before leaving their cell. If inmates receive visits from family or friends, these visits may be conducted via video screen instead of in-person. For the duration of their stay they will be implicitly, (and perhaps explicitly), told that they are too dangerous to be allowed to interact freely with others.

With little opportunity to alter or disprove the stage that has been set by stereotypes, dispositionism, and situationally assigned roles, supermax prisons become a self-fulfilling prophecy of violence, trauma, and abuse. Psychologists use the term “behavioral confirmation” to describe how opposing groups who have bad experiences with each other will come to feel justified in maintaining their stereotypes about one another. These negative interactions lead them to believe that they were “right” about each other all along. In the prison context, this mechanism opens the door for abuse as social norms break down, and both prisoners and prison staff regard each other as less and less human. As mentioned, prison staff expect prisoners to be mentally unstable. Ironically, inmates with formally undiagnosed or subtle conditions are likely to suffer from sudden, severe manifestations of these pathologies due to the mental strain of solitary confinement. Indeed, solitary confinement has been found to produce extreme anxiety, paranoia, depression, despondency, obsessive and uncontrollable thoughts, hallucination, hysteria, and psychosis. Attempts at suicide are commonplace. This behavior reinforces perceptions by prison staff that inmates are inferior or even outright lunatics. Overseen by people who increasingly see them as sub-human, and deprived of
almost all forms of individual expression, prisoners commonly begin to feel that they are being deprived of humanity itself, of the right to be human. Confined to a small space with limited possessions, they may begin to believe that disobedience and violence are the only remaining ways to express any personhood at all. When prisoners act out, staff respond with the corporal punishment prescribed by protocol, and eventually become desensitized to inflicting physical pain. Prison staff behavior may also be exacerbated as occupational strain produces anxiety, depression, muscular ailments, and headaches in the staff themselves. Because interactions between prisoners and staff are disproportionately negative, the two groups are unlikely to change their minds about each other, and a perfect storm for abuse is created.

An infamous example of such abuse was exposed in the case of Madrid v. Gomez. In unrebutted testimony, a supermax nurse described how guards from the Pelican Bay Security Housing Unit force-bathed a prisoner in scalding water until folds of his skin fell off. Even after observing the damage, these guards did not seek any medical assistance for the inmate. A traditional dispositionist theory would blame such an action on fundamentally sadistic prison guards. Situationist theory instead suggests that this heinous indifference points, not to individuals with inherent character flaws, but to individuals who are completely captivated by the role they have been assigned.
V. Key Actors’ Influence on Policy

In addition to the insight offered by the mind sciences, the prevalence of solitary confinement and supermax prisons can be explained in part by examining the various stakeholders vying for influence in this debate. Because of their greater financial and political resources, several major stakeholders who have a vested interest in justifying the use of indefinite solitary confinement perpetuate reliance on this practice. Unfortunately, those most affected by solitary are those least able to effect change.

Federal Government and the Bureau of Prisons

Despite the estimated 80,000 prisoners who spend twenty-three hours a day alone in a single cell, the U.S. government maintains that “[t]here is no systematic use of solitary confinement in the United States.” 143 In the government’s view, the “restrictive procedures” in place at the ADX and state supermax prisons are mandated by “security requirements,” but prisoners are not entirely deprived of human interaction.144

The government asserts that prisoners may interact with one another through their cell doors, which all face the same direction, and in recreation yards, though they are segregated in outdoor cells.145 Visits by correctional staff and doctors provide other opportunities for human contact, though the Federal Bureau of Prisons (BOP) is unable to confirm how often these visits occur. As revealed in a 2013 Government Accountability Office (GAO) report, there is almost no data publically available surrounding the BOP’s
use of solitary confinement and few studies have been undertaken to corroborate the BOP’s claims about its benefits and costs.\textsuperscript{146}

The BOP characterizes solitary confinement as a necessary prison practice that increases safety by protecting staff and inmates from the most violent and unpredictable prisoners. Though they acknowledge the much higher costs associated with solitary confinement, officials argue that use of ‘segregated housing’ can reduce BOP cost by lowering assault rates and the number of costly prison lockdowns.\textsuperscript{147} Despite these claims, the GAO report concluded “the BOP has not studied the impact of segregated housing on inmates, staff, and institutional safety.”\textsuperscript{148}

The BOP remains committed to using solitary confinement in spite of its soaring costs and the mounting evidence of its deleterious effects because they are beholden to politicians who consider prison reform a toxic issue and seek to appear ‘tough on crime.’\textsuperscript{149} Additionally, eliminating supermax prisons or reducing dependence on solitary would require recognition of decades of faulty BOP policy. System justification theory (SJT) posits that individuals are motivated to defend and support the status quo, even at the expense of their own best interests.\textsuperscript{150} This effect is especially salient when a system to which one belongs is under threat.\textsuperscript{151} SJT would explain the BOP’s resistance to acknowledge the failures of their policy in spite of mounting evidence as an attempt to justify the system in the face of an external threat.
On the state level, where most supermax prisons are managed, the facilities are typically overseen by the state Department of Corrections. As government agencies, we expect these state organisms to face similar pressure dynamics as those faced by the BOP.

**Politicians, Communities, and Private Companies**

Politicians stand to benefit from aligning themselves with the tough-on-crime narrative and gain little from advocating for prisoners’ rights. Importantly, politicians may also experience pressure from constituents who seek to establish or keep open a supermax facility in their community.

State governments tend to “view supermaxes as an effective strategy for improving their correctional systems” despite the “dearth of research” as to the actual impact of their proliferation. The costs of construction and operating costs of supermax prisons are “substantial,” and yet state governments have not adequately scrutinized their efficacy. Policymakers also tend not to engage in “discussions about the morality of supermax prisons.”

For economically depressed communities, prisons in general, and supermax facilities in particular, can represent an important source of employment and tax revenue. At general population prisons, inmates perform many of the available jobs. By contrast, supermax prisoners are not allowed to work and require a two-guard escort when...
leaving their cells.\textsuperscript{156} At one facility reviewed by the GAO, which had both a general and segregated population, the officer to inmate ratio was 1:41 in the segregated unit and 1:124 in the general population unit.\textsuperscript{157} Prisons can also be a source of increased tax revenue.\textsuperscript{158} While these taxes and the costs of running prisons represent significant expenses for the federal government, they may represent substantial revenues for communities that are voting for politicians.\textsuperscript{159}

Communities that depend on supermax prisons for employment and tax revenues are a considerable obstacle in any effort to eliminate solitary confinement. In interviewing policymakers, scholars Daniel P. Mears and Jamie Watson found that they “emphasized that once a supermax prison was built, the political pressures from constituents precluded closing them, even if studies showed that supermax prisons did not work and that their costs far exceeded their benefits.”\textsuperscript{160} What is more, once built, supermax prisons are perceived to have a high sunk cost, which creates pressure for the “continued operation of the facility.”\textsuperscript{161} In turn, communities who benefit economically from the arrival of a supermax prison may reward the policymaker who is responsible in the next election cycle.\textsuperscript{162}

As Pizarro, Stenius, and Pratt observe, “in areas where jobs and votes go together, policy makers have a vested interest in helping bring prisons into the areas that they represent.”\textsuperscript{163} Supermax facilities are generally an easy sell with large potential gain.\textsuperscript{164} Overall, “some communities and ‘get tough’ legislators” have a disproportionate amount of political leverage, and can make presenting any argument against supermax prisons “an uphill battle.”\textsuperscript{165}
Similarly, the companies that run private prisons and supply goods and services to prison populations stand to benefit from the continued use of solitary confinement. Supermax prisons are often built new, from the ground up, and so they provide contracting possibilities for construction companies and temporary work for construction workers. Supermax facilities “strongly emphasize surveillance,” so they tend to generate “higher technology costs” which translate into higher profits for companies that produce camera and computer systems used for surveillance. Perversely, because psychological damage caused by solitary confinement may make released inmates more likely to reoffend, profit-driven corporations may benefit from solitary confinement practices by helping to ensure future revenue in the form of potentially increased recidivism rates.

**Prison Employee Unions**

Prison employee unions are a powerful political force in the debate on prison policy and practice. Nationwide, there are four major unions representing prison employees: the American Federation of State, County and Municipal Employees (AFSCME), the Service Employees International Union (SEIU), the American Federation of Government Employees (AFGE) and the Teamsters. In addition to these national unions, there are also unions that represent employees within state prisons. Several of these unions are quite well known, including the California Correctional Peace Officers Association (CCPOA), the New York State Correctional Officers and Police Benevolent Association (NYSCOPBA), and the Corrections Officers Benevolent Association (COBA) of New York City.
For many of these prison unions, the primary focus is protecting jobs.\textsuperscript{171} This goal influences prison unions’ positions on different prison reform measures.\textsuperscript{172} In terms of fighting overcrowding, understaffing, and the privatization of prisons, the unions tend to align with prisoners’ rights advocates, who fight against these trends.\textsuperscript{173} Unions tend to oppose overcrowding and understaffing because they argue these conditions severely impede prison staff’s abilities to perform their duties.\textsuperscript{174} Many potential solutions for reducing overcrowding would also increase staff numbers, thereby aligning with unions’ central goal. The unions oppose privatization, claiming it is immoral and arguing that a focus on profit decreases safety and depresses standards within prisons.\textsuperscript{175}

On other issues, however, unions have also opposed prison reform movements. For example, the goal of preserving jobs “clearly runs counter to the goal of reducing mass incarceration.” \textsuperscript{176} Accordingly, prison workers’ unions have supported policies like the death penalty and Three Strikes Laws, which impose mandatory harsh penalties on repeat offenders. Some unions have also opposed parole reform, and they tend to support the tough-on-crime narrative and politicians who promote it.\textsuperscript{177}
Most significantly for the solitary confinement debate, unions are generally opposed to “prison closures and programs that would divert offenders into treatment programs and other alternatives to incarceration.” Overall, supermax facilities have higher staff-to-prisoner ratios and thus generate more job openings. Not unlike economically depressed communities, therefore, prison workers’ unions can become a force for inertia – fighting the closure of prisons and thereby raising the political cost of shutting down preexisting supermax facilities.

However, prison workers unions’ opposition to solitary confinement runs deeper than protecting pre-existing facilities. Indeed, some unions have opposed the closure of supermax prisons even when there was no anticipated job loss. In 2013, for example, the AFSCME was a strong challenger of the closure of the Tamms supermax prison in Southern Illinois, despite the fact that the change was not anticipated to decrease jobs. The AFSCME “challenged” the order to close the prison “through its legislative allies, stalled it through the courts, and mounted a public campaign to keep the prison open.” The union claimed that closing Tamms would “destabilize the entire prison system, worsen dangerous overcrowding and put the safety of employees, inmates, youth and the public at risk.” AFSCME’s filed a lawsuit that managed to temporarily enjoin the closure of the facility, but ultimately the prison was indeed closed. In this case, the union’s campaign failed, but it gives insight into how prison workers’ unions organize and advocate.
On “issues of prisoners’ rights in general, and solitary confinement in particular,” the prison workers’ unions are “seen as a major obstacle to reform.” Unions often cite the perceptions of solitary confinement as necessary for guard’s safety and for discipline, implicating issues which have been discussed in further depth by the internal and external situationists. While many major unions have refrained from taking a national position on the topic of solitary confinement, “in local fights . . . unions have taken positions squarely in favor of maintaining extreme isolation practices.”

Unions are particularly important to take into consideration because they are generally seen as “liberal-minded” and often affiliated with democratic or progressive politicians. AFSCME, for example, is “seen as a prime labor force behind Obama’s presidential victories, a great backer of health care reform, and, in a time of labor’s decline, the biggest organizing union in the ALF-CIO.” These unions therefore are likely to hold significant sway with democratic politicians, thereby influencing the party which is arguably more likely to push progressive prison reform. This may explain in part why there is little significant variation between Democrats and Republicans regarding their opinions on solitary confinement. In addition, some unions have seen a significant budget increase, potentially also contributing to their political clout.

Despite these general trends, some unions have advocated to limit the use of solitary confinement. In January 2014 the president of the Texas AFSCME Local 3807, Lance Lowry, called for the State to change its policy and decrease the use
of solitary confinement.\textsuperscript{190} In particular, the letter called for the Texas Department of Criminal Justice to “house death-row prisoners who pose the lowest security risk in cells with other inmates” and introduce privileges such as “work assignments, streaming television and technology such as computer tablets.” \textsuperscript{191} Other prison guard unions have altered their positions on other prison reform issues. For example, in August 2013 the American Corrections Association (ACA) – the largest association for correctional officers in the world – released a statement that criticized the current system as “unsustainable” and called for an end to mandatory minimum sentences. In their letter, the union argued, “legislators, prosecutors and judges need to differentiate between who we are afraid of and who we are just mad at and then sentence each appropriately.” \textsuperscript{192}

**Prison Advocates**

On the opposing side, a variety of nonprofit organizations and civil society coalitions advocate for restricting or eliminating the use of solitary confinement. These groups include well-known actors such as the American Civil Liberties Union, as well as other nonprofit and religious organizations.\textsuperscript{193} Groups pushing for reform stress that solitary confinement is costly, harmful, and ineffective. Some prisoners’ rights advocates argue that supermax confinement “may result in increased recidivism of supermax prisoners” and can harm the mental health of prisoners, causing problems such as major depression and posttraumatic stress disorder.\textsuperscript{194} In addition, “many former prison officials and mental health workers” have come
forward, arguing that “solitary confinement actually increases the danger posed to staff and other inmates.” 

These groups act through advocacy, raising awareness, fact-finding, lobbying, and/or class action law suits, among other tactics. In 2011, the United Nations Special Rapporteur on Torture criticized the use of solitary confinement in the United States, arguing that it “can amount to acts prohibited by article 7 of the International Covenant on Civil and Political rights [or] torture as defined in Article 1 of the Convention Against Torture.” However, given the complicated relationship between the United States and the United Nations, the report of the Special Rapporteur is unlikely to have a significant effect on tangible prison policy within the United States.

The influence of prisoner advocates pushing to end the use of long-term solitary confinement may be limited on several fronts, however. First, when compared to large corporate business interests, these groups may have limited funding and capability to conduct lobbying. Second, the population detained in supermax facilities generally does not make for sympathetic plaintiffs or campaign poster-children. Prisoners held in supermax detention are often among some of the most feared detainees in the country, and advocates may have difficulty generating compassion for them among the general population.

Nevertheless, prisoner advocacy groups have been successful in some cases of prompting policy reform and/or the closure of particularly controversial facilities. For example, the closing of the Tamms supermax prison in
Illinois was seen as a major victory for local and national groups that had long advocated the shut down the prison.\textsuperscript{197} A collective of “former inmates, prisoners’ families, and activists” had formed the Tamms Year Ten campaign, and aggressively lobbied the Illinois General Assembly for the facility’s closure. They also worked to raise awareness about the conditions in the prison through letter and photo campaigns to increase the inmates’ contacts with the outside world.\textsuperscript{198} While the Governor primarily cited fiscal reasons for closing the facilities,\textsuperscript{199} the campaign is often credited with the prison’s closure.\textsuperscript{200}

**Prisoners and Their Families**

Compared to the other stakeholders, prisoners and their families likely have the greatest stake in the issue, but have proportionally little influence. The ability of prisoners to act and operate in the political system and to advocate on their own behalf is obviously limited by the nature of their confinement. Moreover, their families are largely cut off from them, and they themselves may have limited political influence.

However, prisoners may engage in collective action, such as hunger strikes, in an attempt to influence prison policy.\textsuperscript{201} Recent examples of such strikes include the Menard Correctional Center in Illinois and the Pelican Bay Prison in California. One prisoner participating in a hunger strike at the Menard Correctional Center explained, “Today we declared a hunger strike – a peaceful hunger strike – due to the conditions of confinement we are being subjected to.” \textsuperscript{202} Another mass hunger strike that began at Pelican...
Bay Prison in California in 2013 prompted state legislators to hold hearings on prisoner isolation.\textsuperscript{203} The strike came to include protesting prisoners from all over the CA prison system, “testimony . . . to . . . [the inmates] ability to form solidarities across physical distance and social boundaries, and to organize effectively for a large-scale peaceful protest.” \textsuperscript{204} The prisoners’ individual stories of their experiences in the prison strikes indicate how significant the effects were on their minds and bodies.

However, solitary confinement does severely limit contact between prisoners, thereby making this sort of collective action more difficult. What is more, prisoners who choose to participate in collective action such as hunger strikes may face significant consequences. Prisoners at the Menard Correctional Center who participated in the January 2014 hunger strike reported that guards threatened to strip search them and take all of their property, including legal documents, despite rules that only food and toothpaste could be removed from cells in response to hunger strikes.\textsuperscript{205} One prisoner who participated in the hunger strike was reportedly brutally beaten by corrections officers.\textsuperscript{206} In response to the CA Pelican Bay Prison hunger strike, courts allowed ‘do-not-resuscitate’ orders signed by prisoners to be thrown out and allowed the prison to force-feed striking prisoners.\textsuperscript{207} Force-feeding not only puts a forcible end to the hunger strike, but the practice can often result in “excruciating pain, bleeding and vomiting.” \textsuperscript{208}

Prisoners’ ability to advocate against the use of solitary confinement before and after their imprisonment may also be limited by other structural factors. For example, the
Prison Litigation Reform Act, passed in 1996, made it much more difficult for prisoners to "challenge conditions of confinement in federal courts." Additionally, the ability of felons to participate in the electoral process depends on state laws. With the exceptions of Maine and Vermont, most states bar felons from voting while they are incarcerated. And the ability of felons to vote after finishing their sentences varies. In the majority of jurisdictions – 38 states plus Washington, D.C. – most ex-felons automatically regain the right to vote upon the completion of their sentence. The process of registration can be difficult, particularly as eligibility for regaining voting rights may depend on factors such as the particular time or the length of time that has passed since the crime. According to the National Conference of State Legislators, "The complex restoration process also can be daunting. It often involves lengthy paperwork, burdensome documentation, and the involvement and coordination of several state agencies." Ex-felons are often also unaware that they may be able to regain voting rights. In states where voting rights are not automatically restored to at least some ex-felons, there are additional barriers such as a required waiting period before ex-felons can regain their voting rights, or an application process in order to have voting rights restored. In four states – Florida, Iowa, Kentucky, and Virginia – felons and ex-felons permanently lose the right to vote, unless they receive a pardon from the governor. Accordingly, those most directly impacted by solitary, those who have experienced and witness the practice and its affects, are often not participating directly in the political process.
processes after ex-felons complete their sentences extend this disenfranchisement beyond the prison population and into the general population. Accordingly, those most directly impacted by solitary, those who have experienced and witness the practice and its effects, are often not participating directly in the political process. This lack of participation affects other stakeholders, as it has the potential to further disincentivize politicians from considering prisoners’ experiences and rights.

The ability of prisoner’s families to advocate on their behalf are likely limited by the fact that solitary confinement severely restricts contact between prisoners and family members. This limited contact may result in “weakened family relationships for supermax prisoners.” Furthermore, the fact that a disproportionate proportion of the prison population comes from “poor, immigrant, and racially marginalized communities” affects the potential ability of their home communities to advocate for them in the political system. Immigrant and racially marginalized communities may face significant barriers to participating in the political process, either due to lack of regularized migratory status, or because of modern voting restrictions – such as voter ID laws and restrictions on early voting – that often disproportionately affect communities of color. Additionally, the economic resources of families of prisoners as individual households – and particularly as individual households in “poor, immigrant, and racially marginalized communities” – are likely to be more limited than those of corporate business interests or even the major nonprofit organizations.
VI. Public Policy Developments

This section reviews potential policy reforms to solitary confinement in the U.S. by examining individual state reform efforts, proposed federal legislation, and actions taken by the international community.

State Policy Reforms

Several states, including Maine and Mississippi, have enacted sweeping reforms, with significant financial benefits for the states’ budgets. Promising changes include psychological screening of prisoners, enhanced staff training, and reformed procedures for confinement as a disciplinary method.

In 2010, Maine began reforming its solitary confinement practices in its supermax prisons to the benefit of prisoners and the state alike.\(^{221}\) The Maine State Prison (MSP) system modified its disciplinary policy to reduce the number of prisoners sent to solitary confinement for minor disciplinary infractions or administrative segregation purposes.\(^{222}\) Prisoners are no longer placed in solitary confinement based solely on the determination that they are high risk inmates.\(^ {223}\) In addition, the prison staff was trained in verbal intervention to lessen both the use of physical force and the frequency of sending prisoners to solitary confinement for minor infractions.\(^ {224}\) Prisoners are now informed that their stays in solitary confinement are not permanent and they are regularly evaluated by psychologists.\(^ {225}\) Additionally, tiered incentive programs have been used to limit stays in solitary confinement.\(^ {226}\)
Mississippi recently saved roughly $5.6 million after reducing the population in solitary confinement by roughly sixty-six percent.\textsuperscript{227} Mississippi further reduced its prison violence rate by fifty percent. In order to do this, Mississippi transferred prisoners suffering from mental illness to a hospital capable of treating them, and moved the rest into the general prison population.\textsuperscript{228} However, there is still work to be done. Commissioner Epps of the Mississippi Department of Corrections was indicted for corruption charges with respect to the operations of some privately owned facilities.\textsuperscript{229} While Mississippi has drastically reduced its use of solitary confinement, the threat of private interests could thwart these efforts, and ethics inquiries will be required to sustain the progress that has been made.\textsuperscript{230}

Prisons in other states, such as Colorado and Georgia, are starting to adapt their prison systems to reflect this new trend away from isolation and towards “normalization.”\textsuperscript{231} These efforts are focused on bettering the outcomes for reentry into both the general prison population and the public by allowing prisoners to join prayer groups and allowing additional personal property.\textsuperscript{232} As a result of these reforms aimed at reducing the use of solitary confinement, several states have been able to benefit financially, while increasing prisoner welfare at the same time.
Effective reform will require state initiatives as well as legislative action that encourages internal shifts in national prison policy. In May 2014, Rep. Cedric Richmond (LA-2) introduced the Solitary Confinement Study and Reform Act of 2014. The basic goals of this bill are to (1) introduce a more humane system that accelerates the development of reform, (2) establish a commission to study the use of solitary confinement and recommend best practices, (3) require the Department of Justice to issue binding regulations regarding solitary confinement, and (4) significantly alter the system of confining mentally ill prisoners and juvenile offenders to solitary units.

The effects of this Act would be two-fold. First, in authorizing a commission to study solitary confinement, the government would gain a more comprehensive understanding of how this practice is used across the country. This information would allow all actors to address the use of solitary confinement more efficiently and effectively. Secondly, this bill authorizes the Attorney General to establish cohesive national regulations on the conditions under which solitary confinement could be used. States that fail to comply would be penalized with a reduction in their national prison budget, incentivizing states to use solitary confinement more sparingly. As of July, this Bill is under consideration in the Subcommittee on Crime, Terrorism, Homeland Security, and Investigations.

Another area for direct reform is through the unilateral elimination or reform solitary confinement practices by the
Federal Bureau of Prisons (BOP). Unfortunately, in 2011, instead of creating more progressive changes, the BOP adopted a new regulation that further entrenches disciplinary solitary confinement. The change allows disciplinary officers to send prisoners to solitary units indefinitely, even for small misdemeanors. These practices have come under strong scrutiny and the BOP is currently undergoing an internal investigation into their use. During this audit, up to 13 facilities will be inspected and reviewed for their practices of solitary confinement, including treatment of the mentally ill and the application of due process. While their internal report is not yet released, the BOP should ensure that mentally ill prisoners and inmates with small misdemeanor offenses are not put into solitary confinement units.

The importance of non-governmental organizations (NGOs) has proved particularly useful when advocating and lobbying for solitary confinement reform. In November, 2013, prior to the BOP internal investigation, six NGOs critical of the solitary confinement practices met in Washington, DC with the team hired to conduct the internal review. These organizations encouraged the BOP and the executive office to make reforms. Accordingly, these NGOs will review the BOP report and suggest changes. To keep federal legislation on the forefront, governmental actors need the assistance and support of non-governmental organizations.

These organizations have created their own programs to prevent abuse in the solitary confinement system. The ACLU Prisoner’s Rights department focuses on advocacy and
The ACLU Prisoner’s Rights department focuses on advocacy and research for the rights of prisoner’s currently in solitary confinement. They highlight the human rights abuses occurring throughout these units and keep dialogue relevant on these issues.\textsuperscript{242} The Center for Constitutional Rights (CCR) similarly highlights solitary confinement issues.\textsuperscript{243} This group advocates for more direct action and encourages prisoners to speak out about these issues.\textsuperscript{244} CCR highlights hunger strikes in prisons in California and other forms of prisoner protesting. They are currently coordinating a class-action suit against the state of California for its use of prolonged solitary confinement.\textsuperscript{245} Similarly, mental health advocates offer potential solutions for the abuse of solitary confinement for mentally ill inmates. The National Alliance for Mental Illness (NAMI) recommends health care alternatives to solitary confinement that include “enhanced mental health treatment, services and programs, crisis intervention, training for correctional officers and mental health step-down units.” \textsuperscript{246} NAMI notes that bolstering mental health treatments instead of continuing to place mentally ill inmates in solitary confinement improves safety and reduces governmental spending.

In addition to these more formal options, there are a variety of plausible solutions to the federal practice of solitary confinement organized by ancillary participants of the system. Supermax prisons, and solitary confinement units, are part of a much larger prison system with a wide range of actors. For instance, architects, construction workers, and contractors all create the physical solitary confinement units. It is feasible that these individuals, or their organizing
unions, could refuse to design or build these buildings. Furthermore, food service providers could refuse to work in these types of buildings. This form of civil disobedience could change the conversation and jumpstart reform across the country.

**International Solitary Confinement Policies**

International law provides another possible method to change the practices of solitary confinement in the United States. The International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture (CAT) establish international guidelines that apply to the treatment of prisoners. They require that corrections officers respect the inherent dignity of inmates, not subject them to cruel and unusual punishment, and view rehabilitation as the chief purpose of imprisonment. The prison systems of The Netherlands and Germany offer an alternative to the U.S.’s reliance on solitary confinement that has seen more cooperative inmates. These results are achieved primarily through training prison guards to respect inmates and provide them with both regular human contact and positive incentives for good behavior.

The international view of solitary confinement is significantly more critical than that of the United States. The U.N. Special Rapporteur of the Human Rights Council has gone so far as to recommend the minimization and abolition of solitary confinement, arguing that it could be
considered cruel and unusual on a mental basis alone.\textsuperscript{254} In particular, he has advocated for limiting the length of confinement to a maximum of fifteen days, and, even then, only for adults who are not mentally ill.\textsuperscript{255}

The changes that seem to be most promising involve the use of positive incentives to encourage better behavior from inmates, more frequent psychological evaluations of inmates, and, most importantly, the revision of disciplinary policies to discourage the use of solitary confinement for minor infractions. In the case of supermax prisons, these reforms will likely have to be made by the federal or state governments. Change at the international level can only indirectly address these governments, so the prospect of federal or state legislation and litigation is probably the best method of pressuring them to reform their policies.

\textit{VII. Economics of Supermax Prisons}

In evaluating the economic efficiency of any public policy, the goal is to determine whether society’s scarce resources are being allocated to their most valued uses.\textsuperscript{256} To this end, one tool used by economists is a Cost-Benefit Analysis (CBA), which provides an aggregate of “all impacts, to all affected parties, at all points in time.” \textsuperscript{257} To conduct a CBA, the researcher first states the policy question to be answered, defines the relevant parties, identifies all costs and benefits incurred by these parties as a result of the policy, assigns monetary values to benefits and costs, and addresses questions of uncertainty and time in these values.\textsuperscript{258}
Using this approach, we address the question of whether supermax prisons are cost-effective on the institutional-level, defining relevant parties as all actors within the Federal Bureau of Prisons. In conducting an analysis of economic research on the costs and benefits incurred by these parties, we conclude that while the costs of these facilities are extremely high, the benefits may only be limited, making it unlikely that supermax prisons are cost-effective as presently operated. Because the Federal Bureau of Prisons will likely continue using these prisons despite assessments of their cost-effectiveness, we also consider ways to improve use of supermax prisons to maximize benefits and minimize costs.

**Costs**

Researchers have identified two main costs of supermax prisons. The first is their well-documented high cost of operation. According to statistics from state Department of Corrections, the annual cost per inmate in a supermax prison in states such as California, Illinois, Colorado, and Ohio is between $12,000 and $27,000 more per year than regular, maximum-security prisons. In some states, this represents a two- or even three-times higher cost of operation per prisoner per year. One aggregate study estimated that the average cost of housing an inmate in a supermax prison was $75,000 per year, as opposed to $25,000 per year for lower-security prisons. This discrepancy results from higher staffing and supervision costs.
A second cost reflects the toll supermax prisons have on inmates’ mental, emotional, and physical health. These costs are much less studied and less documented, and some researchers even argue against their existence. Because the evidence on the health costs of supermax prisons is still debated among researchers and such costs would be very difficult to monetize even if accepted, in this analysis we will focus on whether the proposed benefits of supermax prisons outweigh their high operational costs. However, we will show that even excluding these costs from the analysis, supermax prisons as currently operated are not cost-effective because evidence suggests that their proposed benefits do not exceed their high costs of operation.

**Benefits**

On the institutional level, we identify two main benefits of supermax prisons. First, we consider the potential for a reduction in system-wide violence as supermax prisons separate the most dangerous inmates from the general prison population. If this segregation reduces conflict for all prisons in the system, this could reduce expenditures by prison staff in supervising inmates. Second, we consider the potential for a reduction in recidivism for those prisoners who spend a significant amount of time in these prisons. If supermax prisons lead to lower levels of reoffending, this could reduce costs to the institution by reducing the number of prisoners who reenter the system after release.

**Violence**

Perhaps the strongest argument in favor of supermax prisons is their use to decrease violence among general
prison populations. Proponents contend that supermax prisons do so through two main channels. First, supermax prisons act as a restriction, effectively incapacitating inmates from committing crimes against other inmates or staff members through constant surveillance and confinement. Second, supermax prisons act as a strong deterrent against committing crimes in prison. However, opponents counter that segregating these prisoners from the general prison population does not lead to safer prisons because removing one prisoner simply leads to a replacement effect, whereby another inmate fills the social role left by the first prisoner’s exit into a supermax prison. Furthermore, they argue that supermax prisons cannot effectively deter prisoners because the types of prisoners who end up in supermax prisons, such as the mentally ill and socially isolated, and inmates simply seeking asylum from threats or risks in lower-security prisons, will not be affected by such a deterrent.

While reduction in violence is the strongest argument in favor of the benefits of supermax prisons, there have been few economic analyses of the effects of supermax prisons on system-wide violence. In perhaps the only example of such a study, Briggs, Sundt, and Castellano used a time-series analysis to study the relationship in three states between construction of a supermax prison and incidents of
While reduction in violence is the strongest argument in favor of the benefits of supermax prisons, there have been few economic analyses of the effects of supermax prisons on system-wide violence.

Preliminary evidence suggests no reductions in inmate-on-inmate violence, and there is only limited evidence of potential reductions in inmate-on-staff violence.

While it is difficult to draw conclusions from the little evidence available on the topic, we can conclude that the effects of supermax prisons on system-wide violence are not as clear as proponents argue. Preliminary evidence suggests no reductions in inmate-on-inmate violence, and there is only limited evidence of potential reductions in inmate-on-staff violence. Additional research is necessary, but if there is no benefit of violence reduction, absent some other, stronger benefit of supermax prisons, it is unlikely the benefits will ever outweigh the high costs these facilities pose to the entire prison system.
Recidivism

A second argument in favor of supermax prisons stresses their role as a deterrent against recidivism for released inmates. Proponents argue that offenders who spend time in supermax prisons will be less likely to reoffend after release than other types of prisoners due to the severity of the punishment they experienced. On the other hand, critics claim that supermax prisons are more likely to lead to higher recidivism rates due to the destabilizing effect they have on inmates. If supermax confinement leads to higher levels of paranoia and social anxiety, released offenders from supermax prisons would be less likely to reintegrate into society after their release, leading to a higher probability of reoffending.

While evidence on this topic is sparse, there are two studies in particular that may shed light on the relationship between prisoners who stay in our nation’s highest-security prisons and their probability of reoffending. First, in a broad analysis of the relationship between high-security federal prisons and recidivism, Chen studied 1,205 inmates released from federal prisons in the first six months of 1987. With a regression-discontinuity design, Chen used a prisoner’s “security custody score,” which is assessed at the time of an inmate’s entry and used to sort him into the proper level of security, to compare prisoners just below and just above the official cutoff for high-security prisons. Using this design, evidence suggests that inmates in high-security prisons were anywhere between 9 percentage points less likely and 23 percentage points more likely to reoffend than their medium-security counterparts, leading Chen to
conclude that harsher prison conditions do not lead to reductions in recidivism and may even increase it.\textsuperscript{275}

In a study speaking directly to the relationship between supermax prisons and recidivism, Lovell, Johnson, and Cain used a retrospective matched-pair analysis,\textsuperscript{276} pairing inmates in Washington’s supermax prisons with similar inmates in non-supermax prisons based on eight predictors of recidivism and a mental health indicator.\textsuperscript{277} Their evidence showed a significant difference in felony recidivism between supermax and non-supermax prisoners, with 53\% of supermax prisoners being rearrested for felonies compared with 46\% of non-supermax prisoners.\textsuperscript{278} Furthermore, they found that this difference was driven mainly by the high percent of felony recidivism among supermax prisoners who were directly released from supermax, rather than those supermax prisoners who were released after downgrading to a non-supermax prison.\textsuperscript{279} When studied separately, 69\% of direct-release supermax prisoners committed felonies after release compared to 51\% of their non-supermax counterparts, and the difference between later-release supermax prisoners and their non-supermax matched-pairs disappeared.\textsuperscript{280} These results led the researchers to suggest that supermax confinement may induce high paranoia and social anxiety that makes it more difficult to reintegrate into society after release.\textsuperscript{281} However, inmates appear able to recover from these effects of supermax prisons if they spend time in social prison settings before release.\textsuperscript{282}
Taken together, the evidence suggests that the benefits from reduced recidivism for inmates in supermax prisons is likely zero or even slightly negative. The basis of the argument for a reduction in recidivism relies on the idea that harsher prison conditions act as a stronger deterrent against future crime. However, with results showing that generally this principle does not hold for inmates in high-security federal prisons across the country, it seems unlikely that the increased severity of supermax prisons creates a strong deterrence. This is particularly true if, as evidence suggests, inmates come out of solitary confinement less able to act as rational agents who can be deterred by the threat of punishment.

Discussion

The first conclusion we draw from our examination of available research is that there is a very serious need for more data on the costs and benefits of supermax prisons. The lack of viable studies on the subject suggests policymakers still do not have enough information to make informed decisions on the effectiveness of these facilities.

Furthermore, our analysis suggests that even accepting the health costs of supermax prisons on inmates, the evidence of the proposed benefits of these facilities is not strong enough to justify the large costs incurred in their operation. When we further consider the preliminary evidence suggesting that supermax prisons have a destabilizing effect on inmates who serve a significant period of time, these prisons seem even less likely to be cost-effective.
Considering current data, one possible solution to minimize costs on the institutional level could be to shut down these facilities and transfer inmates to maximum-security prisons. Such a policy decision would eliminate the high operational costs of these prisons and possibly have little negative effect on the system, given the evidence suggesting supermax prisons’ lack of positive effects. However, while we recognize that economists make decisions ignoring sunk costs, politicians often do not. Therefore, given the large amount of resources already spent on building and operating these prisons, and their large-scale political and economic importance today, we now turn to alternatives to increase supermax prisons’ cost-effectiveness through better targeting inmates to realize possible benefits and minimize costs.

**Game Theory as an Alternative**

**General Rule – Prison Decides**

\[ \text{Prisoner, Prison} \]

\[ \begin{align*}
\text{Prison} & \quad \begin{cases}
(-10, 15) \\
(-5, 5) \\
(-100, 15) \\
(-5, 5)
\end{cases}
\end{align*} \]

\[ \begin{align*}
\text{Nature} & \quad \begin{cases}
\text{Supermax} \\
\text{Alternative Approach}
\end{cases}
\end{align*} \]

\[ \begin{align*}
\text{Solitary-Neutral} & \quad \begin{cases}
\text{Prison} \\
\text{Supermax}
\end{cases}
\end{align*} \]

\[ \begin{align*}
\text{Solitary-Vulnerable} & \quad \begin{cases}
\text{Prison} \\
\text{Supermax}
\end{cases}
\end{align*} \]

*Figure 1: General Rule – Prison Decides*
The model above is a simplified version of the current system. The prison system ("prison") has imperfect information (represented by the red oval) about the mental health status of the prisoner. The prison has already decided the prisoner cannot remain in the general prison population. The model posits that "Nature" chooses whether a prisoner is more likely to be solitary-vulnerable or solitary-neutral. The prison system can choose to either send the prisoner to a supermax prison or use an alternative approach. Such an alternative approach might be alternative punishments (hard labor, "dispersion" to other prison, or other possible punishment for a stable inmate) or treatment at a mental care facility (for a mentally ill patient).

The dominant strategy given those assumptions and payoffs is for the prison to send the prisoner to the supermax facility, which always results in a higher payoff to the prison according to the model. The supermax facility exists, it isolates a troubled prisoner, and it does not require the effort involved in screening mental health patients, running mental health facilities, or carrying out alternative approaches to discipline. While this situation may only mildly punish a solitary-neutral prisoner (as represented by the payoff of -10), it may permanently damage a solitary-vulnerable prisoner (with a payoff of -100). The prison system may reach an efficient (i.e. cost-minimizing) outcome if the prisoner is solitary-neutral, but it will not reach an efficient outcome if the prisoner is solitary-vulnerable. A different liability rule might help solve this issue.
In this model, the prison system decision-makers can still either send the prisoners to a supermax facility or use an alternative approach. For a solitary-neutral prisoner, the supermax approach might remain the correct strategy. However, if the prison system decision-makers are held liable for the costs suffered by a solitary-vulnerable person in a supermax prison, the decision-makers’ payoffs change. They will no longer automatically choose to send the prisoner to the supermax prison. If it turns out the prisoner is solitary-vulnerable, the prison is liable, and will incur a significantly higher cost (here represented as -20).

This game has no equilibrium. To resolve this, the prison system could add a robust mental health screening process to eliminate the information shortfall. If the cost of this screening process is less than the cost the prison officials might suffer, it could be a preferred solution. For example,
if the cost is 5, we have an added cost of 5 to the prison payoffs, but in exchange the prison knows whether it is dealing with a solitary-neutral or a solitary-vulnerable prisoner. This in turn allows it to minimize costs, leading to an efficient solution where solitary-neutral prisoners are sent to supermax prisons with solitary confinement while solitary-vulnerable prisoners are not.

Allocating Solitary-Neutral and Solitary-Vulnerable Prisoners via Prisoner Choice

Prisoners understand their personal vulnerability to solitary confinement better than the prison system. Prisoners empowered to choose what sort of punishment they will face for a given infraction could self-select into the less-damaging (or perhaps desired) type of punishment, reducing the total costs to the prisoners and to the prisons.
A solitary-neutral prisoner may choose a supermax prison to avoid alternative punishments. A solitary-vulnerable prisoner can “enjoin” the prison from sending him or her to a supermax prison and instead submit to the alternative approach. The prison system still gets to punish the prisoner (hence a positive payoff for both options), but the prisoner has at least some control over the sort of punishment and can avoid the most painful option. This leads to an efficient solution for both types of prisoner.

**Conclusion**

While the data available are limited and incomplete, it appears that the supermax prison system as presently operated is inefficient and ineffective. The preliminary cost-benefit analysis described in this paper suggests that supermax prisons have failed to reduce recidivism or prison
violence in the broader prison population despite significantly higher construction and operational costs. Because the facilities already exist, it is unlikely that the prison system will stop using supermax prisons in the near future. The early-stage game theory models described above indicate possible policies to mitigate the costs of the supermax system. These preliminary analyses are valuable, but as previously stated in the CBA, much more research is required before any firm conclusions can be drawn.

**VIII. Litigation: Tort and Constitutional Claims**

While solitary confinement has been the subject of much litigation, courts have historically deferred to the discretion of prison administrators. This section addresses the current state of law governing solitary confinement, and the limited success of litigation thus far as a medium for reform. Adverse psychological effects, federal tort claims, and constitutional claims are considered in turn.

**Adverse Psychological Effects**

As discussed in the Mind Science Analysis in Section IV of this paper, the psychological damage caused by solitary confinement has been well documented. Even short periods of solitary confinement can lead to psychological issues in prisoners. However, prisoners held in solitary confinement for an extended period of time suffer the greatest effects.

**Federal Tort Claims**

By default, civil actions cannot be brought against state or federal officials because of their inherent sovereign
immunity. However, 42 U.S.C. § 1983 waives the sovereign immunity of state and local governments in cases dealing with civil rights violations, and the Federal Tort Claims Act (FTCA) similarly waives immunity for the federal government. Although the FTCA contains certain exception to this waiver, suits challenging solitary confinement will generally be allowed unless the sole basis for the claim is false imprisonment. Federal courts have indicated that a prisoner may have a valid FTCA claim if the plaintiff can prove negligent government conduct in the procedure or exercise of solitary confinement policy, but such a case has not yet been successful.

Constitutional Claims

Cruel and Unusual Punishment

Perhaps more than any other litigation strategy, solitary confinement has been challenged on the grounds that it violates the Eighth Amendment’s prohibition of cruel and unusual punishment, but the vast majority of courts have ruled that solitary confinement alone does not meet this standard. In one rare instance, a Texas District Court found that solitary confinement of mentally ill inmates violates the Eighth Amendment where prison officials were “deliberately indifferent” to the psychological consequences of confinement. But this finding was overturned on appeal.

While federal courts have held that “[t]he Eighth Amendment simply does not guarantee that inmates will not suffer some psychological effects from incarceration or segregation,” they have also suggested that solitary
confinement conditions may be serious enough to constitute cruel and unusual punishment in violation of the Eighth Amendment for prisoners with pre-existing mental health conditions and those with an unreasonably high risk of suffering mental illness. The drastic increase in prisoner suicide rates among mentally ill prisoners in solitary confinement may be a strong argument for defining solitary confinement as cruel and unusual punishment. As described in Section V of this paper, UN bodies consider solitary confinement to constitute torture.

Judges have sometimes been sympathetic to the plight of inmates with preexisting mental illnesses. Those with preexisting mental illnesses are even more prone to experience the effects of solitary confinement, including anxiety, depression, anger, cognitive disturbances, perceptual distortions, paranoia, psychosis, suicide, and self-harm. As a result, the Supreme Court has suggested that mentally ill prisoners may be entitled to additional protection under the Eighth Amendment. Thus, constitutional claims that focus on the especially harmful effects of solitary confinement for mentally ill prisoners may have a higher chance of success.

The Supreme Court has held that the definition of “cruel and unusual” continues to change with “evolving standards of decency,” as social norms change and new evidence comes to light regarding the negative effects of the punishment in question. This principle offers a more promising litigation strategy. Lawyers and prisoners’ rights advocates should argue that modern attitudes towards solitary confinement and the increasing evidence of its
harmful effects support a finding that it constitutes cruel and unusual punishment.

**Due Process**

The Fourteenth Amendment provides another constitutional base to challenge solitary confinement. Due process provides a way for prisoners to insist that the conditions of their confinement are subject to proper justification and review. While this may not eliminate solitary confinement entirely, it may assist in protecting the most vulnerable members of the prison population, and in preventing the use of solitary confinement on an indefinite basis.

Prisoners hold very limited due process rights. However, the Supreme Court has distinguished between the indefiniteness of supermax placement as opposed to the temporary nature of disciplinary segregation. The 2005 decision in *Wilkinson* found that indefinite solitary confinement subject to review only on an annual basis “imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life,” violating the due process clause. *Wilkinson* also underscored procedural requirements for imprisonment in a supermax facility, and offers fruitful ground for future cases establishing basic due process standards to help limit use of solitary confinement.

**International and Foreign Law Influences**

The Supreme Court increasingly considers international and comparative law in its decisions on cruel and unusual
punishment. The Council of Europe recommends that solitary confinement be permitted only after a medical examination has certified that a prisoner is fit to sustain the isolation and only when its use is paired with daily monitoring of the prisoner’s psychological state. This modest standard seems to provide a reasonable target for future litigation, particularly given the standards established in *Wilkinson* and *Estelle*.

### Other Litigation Strategies

Prisoners subjected to solitary confinement may also be able to bring tort actions for intentional infliction of emotional distress. In order to establish a claim, the defendant must have intentionally or recklessly caused severe emotional distress by outrageous and extreme conduct. Florida courts have determined that for conduct to be outrageous and extreme it must “go beyond all possible bounds of decency, to be regarded as atrocious, and utterly intolerable in a civilized community.” From the evidence presented in this paper, it can be argued that solitary confinement, at least in some instances, meets this definition. However, this argument has been attempted in a handful of solitary confinement cases, and the courts have responded by setting an extremely high bar for solitary confinement to satisfy the elements of a tort claim. Again, courts may be more sympathetic to these claims if they come from plaintiffs with preexisting mental health issues. Although this is a novel approach to challenging the use of solitary confinement, it seems to be a plausible avenue.
Conclusion

While courts have typically declined to find that solitary confinement is itself actionable, the Supreme Court has recognized that solitary confinement may constitute cruel and unusual punishment if it is administered to “prisoners with pre-existing mental health conditions and those with an unreasonably high risk of suffering mental illness.” The Court has also established a minimum standard of due process before inmates are confined in this manner.

In developing future litigation strategies, tort practitioners will likely have the strongest cases representing plaintiffs who have been placed in solitary confinement with a preexisting mental illness. These suits have a higher probability of success than those for plaintiffs without a history of mental illness. If suits involving mentally ill prisoners are successful, it may open the door for litigation by other prisoners held in solitary confinement.
3 Id. at 5.
4 Id. at 19.
5 Id. at 48.
6 Smith, supra note 1, at 454.
7 Smith, supra note 1, at 494.
8 Id. at 14.
9 Id. at 8.
10 Id. at 9.
11 Id. at 15.
12 Id. at 17.
13 Id. at 11.
14 Id. at 24.
15 Id. at 13-14.
18 Hsieh, supra note 17.
20 Id.
22 Id.
23 See infra Section IV. Mind Science Analysis.
24 Id.
26 Biggs, supra note 22.
27 In re Medley, 134 U.S. 160 (1890) (holding that a Colorado statute requiring solitary confinement for inmates prior to execution was unconstitutional).
29 Id.
30 Id. at 488.
31 Id. at 489.
33 Id.
34 Id.
35 Id.
36 Haney and Lynch, supra note 29, at 481.
37 Id.
39 Id. (describing a 1973 report by the National Advisory Commission on Criminal Justice Standards and Goals, which indicated that prisons may have been responsible for creating more crime than they prevented, and concluding that these institutions had a “shocking record of failure”).
41 Id.
42 Id.
44 Zimbardo and Haney, supra note 39, at 713.
45 Id.
46 Id.
47 Id.
50 Hunt et al., *supra* note 49.
51 *Id.*
52 *Id.*
56 See *infra* IV. Mind Science Analysis.
57 *Id.*
58 See *Solitary Nation, Locked up in America*, PBS FRONTLINE (April 22, 2014), available at http://www.youtube.com/watch?v=p2Pg2HAvnAE.
62 *Id.*
64 *Id.*
66 *Id.*
67 *Id.*


Id.

Media Access to Prisons, supra note 66.

See Li Onesto, The Living Hell in Pelican Bay Prison, REV.COM, http://revcom.us/a/237/Pelican-Bay-en.html. (“This is how the five-man cell extraction team proceeds: the first member of the team is to enter the cell carrying a large shield, which is used to push the prisoner back into a corner of the cell; the second member follows closely, wielding a special cell extraction baton, which is used to strike the inmate on the upper part of his body so that he will raise his arms in self-protection; thus unsteadied, the inmate is pulled off balance by another member of the team whose job is to place leg irons around his ankles; once downed, a fourth member of the team places him in handcuffs; the fifth member stands ready to fire a taser gun or rifle that shoots wooden or rubber bullets at the resistant inmate. After such a beating, a prisoner may be kept hog-tied in his cell for hours.”)

Media Access to Prisons, supra note 66.


Mears and Watson, supra note 50, at 242.

Id. at 257.

Id.

Id. at 258.

Mears, supra note 20, at 1.

Id. at 261.


Id.

86 Id.
87 Mears and Watson, supra note 50, at 234.
88 Id. at 247.
89 Id.
90 Id. at 259.
91 RIVELAND, supra note 2, at 2.
93 Mears and Watson, supra note 50, at 259.
94 Id. at 259.
95 Id.
97 See Rebecca C. Hetey and Jennifer L. Eberhardt, Racial Disparities in Incarceration Increase Acceptance of Punitive Policies, PSYCHOL. SCI. ONLINE FIRST 1, 4 (August 5, 2014).
98 See Paolo Riva and Luca Andrighetto, Everybody Feels a Broken Bone, But Only We Can Feel a Broken Heart: Group Membership Influences the Perception of Targets’ Suffering, 42 EUR. J. SOC. PSYCHOL. 801, 803 (2012).
99 Id. at 805.
101 Id.
104 Id.
105 Id. at 197 ( “Arguably the most important parallel between mass incarceration and Jim Crow is that both have served to define the meaning and significance of race in America. Indeed, a primary function of any racial caste system is to define the meaning of race in its time. Slavery defined what it meant to be black [a slave], and Jim Crow defined what it meant to be black [a second-class citizen]. Today mass incarceration defines the meaning of blackness in America: black people, especially black men, are criminals. That is what it means to be black.” ).
109 Id.
111 Id. at 156.
113 See Haney, supra note 110, at 975.
114 Id. at 980.
116 See Haney, supra note 110, at 979.
117 Id.
118 Id. at 972-976.
119 Id. at 969.
120 Id. at 969.
122 Craig Haney, Mental Health Issues in Long-Term Solitary and "Supermax" Confinement, 49 Crim. & Delinquency 124, 126 (2003).
123 Haney, supra note 110, at 963.
124 Zimbardo and White, supra note 108, at 7.
125 Haney, supra note 124.
126 King et al, supra note 112.
127 Haney, supra note 110, at 976.
128 Id. at 976.
129 Haney, supra note 110, at 974.
130 King et al., supra note 112, at 156.
131 Terry A. Kupers, What To Do with the Survivors? Coping With the Long-Term Effects of Isolated Confinement, 35 CRIM. JUST. & BEHAV. 1005, 1006 (2008).

132 Smith, supra note 123.

133 Id.

134 Haney, supra note 110, at 959.

135 Id. at 977.

136 Id.

137 Id. at 970.

138 Bierie, supra note 117, at 92.

139 Haney, supra note 110, at 974-976.


141 Id.

142 ZIMBARDO AND WHITE, supra note 108, at 7.


144 Id.

145 Id.


147 Id. at 33.

148 Id. at 41.


151 Id.

152 Mears and Watson, supra note 50.

153 Id.

154 Id. at 259.


156 U.S. GOVERNMENT ACCOUNTABILITY OFFICE, supra note 148, at 31.


159 See id. at 11.

160 Mears and Watson, supra note 50, at 259.


162 Mears and Watson, supra note 50, at 247.

163 Pizarro et al., supra note, at 163.

164 Mears and Watson, supra note 50, at 234, 259.

165 Mears and Watson, supra note 50, at 259.

166 Pizarro et al., supra note 163, at 165.

167 Lawrence and Mears, supra note 160, at 26.

168 Pizarro et al., supra note 163, at 14.


170 Id.

171 Id.

172 Id.

173 Id.

174 Pizarro et al., supra note 163, at 12.

175 Ridgeway and Casella, supra note 171.

176 Id.

177 Id.

178 Id.

179 Lawrence and Mears, supra note 160, at 26.

180 Ridgeway and Casella, supra note 171.

181 Ridgeway and Casella, supra note 171.


183 Id.

185 Ridgeway and Casella, supra note 171.

186 Ridgeway and Casella, supra note 171.

187 Ridgeway and Casella, supra note 171.

188 See Mears and Watson, supra note 50, at 247.

189 Mears and Wats on, supra note 50, at 247.


194 Lawrence and Mears, supra note 160.


197 Ridgeway and Casella, supra note 171.


199 Tamms Supermaximum Security Prison Now Closed, supra note 186.

200 Ridgeway and Casella, supra note 171.


Clark, supra note 196.


Mernard Hunger Strikers, supra note 205.

Mernard Hunger Strikers, supra note 205.


Dayan, supra note 207.

KIM ET AL., supra note 151, at 14.


Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Lawrence and Mears, supra note 160.


Davis, supra note 221.

Written Testimony of Michael Jacobson (June 19, 2012), available at
http://www.vera.org/sites/default/files/resources/downloads/michael-jacobson-testimony-on-
solitary-confinement-2012.pdf (delivered to the Senate Committee on the Judiciary,
Subcommittee on the Constitution, Civil Rights and Human Rights on the occasion of its first-ever
hearing on solitary confinement).

495, 516 (2014).

Richard Fausset, Indictment of Ex-Official Raises Questions on Mississippi’s Private Prisons,
raises-questions-on-mississippis-private-prisons.html?_r=0.

Ram Subramanian and Alison Shames, Sentencing and Prison Practices in Germany and the
Netherlands: Implications for the United States (Vera Institute of Justice 2013).


H.R. 4618 (113th): Solitary Confinement Study and Reform Act of 2014, GOVTRACK.US,
https://www.govtrack.us/congress/bills/113/hr4618#summary.

U.S. Department of Justice, Program Statement: Special Housing Units (August 2011), available

Deborah M. Golden, The Federal Bureau of Prisons’ Abuses of Solitary Confinement (February
during a hearing before the Senate Judiciary Subcommittee on the Constitution, Civil Rights, and
Human Rights).

Solitary Confinement, American Civil Liberties Union, https://www.aclu.org/blog/tag/solitary-
confinement.
243 Id.
244 Torture: The Use of Solitary Confinement, supra note 94.
245 Id.
246 Id.
251 SUBRAMANIAN AND SHAMES, supra note 234.
252 Id. at 13.
253 INTERIM REPORT OF THE SPECIAL RAPPORTEUR OF THE HUMAN RIGHTS COUNCIL ON TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, supra note 199, at ¶ 84-89.
254 Id. at 81.
255 Id. at 86, 88.
257 Id.
258 See LAWRENCE AND MEARS, supra note 160.
261 While supermax prisons are also known to cost a significant amount more to construct than general maximum-security prisons, these costs are known as “sunk costs” and are not taken into account in economic analyses of ongoing projects. The theory is that these costs have
already been incurred by society, and therefore should not be used in deciding whether to continue operating these facilities because they are not marginal costs of operation.


263 Briggs et al., supra note 87, at 1342.

264 Id. at 1349 (citing John Irwin and James Austin, *It’s About Time: America’s Imprisonment Binge* (2nd ed., 1997)).


266 Briggs et al., supra note 87, at 1350.


268 Briggs et al., supra note 87, at 1367.

269 Id.

270 Id.


274 Id. at 10.

275 Id. at 20 and 22.

276 Retrospective matched-pair analysis compares the means between two correlated variables in the past. *See* Lovell et al., supra note 277, at 636.

277 Id.
278 Id. at 643.
279 Id.
280 Id. at 644.
281 Id. at 650.
282 Id.

These estimates are very rough and used to illustrate different strategies that might be employed to help mitigate the costs of supermax prisons. Future research is necessary to solidify find the correct values and strengthen the model.

283 See Chen and Shapiro, supra note 278, at 5 (describing federal scoring of inmates for placement into prisons of various security levels).

284 “Solitary-vulnerable” includes mentally ill prisoners and stable prisoners that might suffer psychological harm due to solitary confinement. “Solitary-neutral” refers to prisoners for whom solitary confinement is not particularly trying, and possibly desired. See Briggs, supra note 87, at 1348 (describing how some prisoners use solitary confinement in supermax facilities as a way to avoid carrying out sentence-extending gang murders without facing gang retaliation). The probability of each type of prisoner is unknown ex ante, though one study found as many as 30% of one state’s supermax population exhibited signs of serious mental illness. Such percentages are removed from the model for the sake of simplicity. However, future research could help assess them and ascertain the actual percentages.


Solitary Confined: The Case for a Frontier Tort

291 See Ashford v. U.S., 511 F.3d 501, 504 (5th Cir. 2007); see also Millbrook v. United States, 133 S.Ct. 1441 (2013) (clarifying that the scope of the Federal Tort Claims Act’s waiver of sovereign immunity for certain intentional torts committed by federal law enforcement officials was not limited to executing searches, seizing evidence, or making arrests).

292 To constitute cruel and unusual punishment, the action or condition must be objectively serious, and prison officials must be deliberately indifferent to the harm caused by the action or condition. Farmer v. Brennan, 511 U.S. 825, 834 (1994).

293 Ruiz v. Johnson, 37 F. Supp. 2d 855, 915 (S.D. Tex. 1999) rev’d and remanded sub nom. Ruiz v. U.S., 243 F.3d 941 (5th Cir. 2001). The court stated: “It goes without question that an incarceration that inflicts daily, permanently damaging, physical injury and pain is unconstitutional. Such a practice would be designated as torture. Given the relatively recent understanding of the primal necessity of psychological well-being, the same standards that protect against physical torture prohibit mental torture as well—including the mental torture of excessive deprivation.” Id. at 914.

294 Madrid, 899 F. Supp. at 1264.

295 Id. at 1265-66.

296 Griffin v. Gomez, 741 F.3d 10 (9th Cir. 2014).

297 Id.


299 “The Fourteenth Amendment's Due Process Clause protects persons against deprivations of life, liberty, or property; and those who seek to invoke its procedural protection must establish that one of these interests is at stake.” Wilkinson v. Austin, 545 U.S. 209, 221 (2005). The court held that “a liberty interest in avoiding particular conditions of confinement may arise from state policies or regulations.” Id. at 222.


301 Wilkinson, 545 U.S. at 220. See also Sandin v. Conner, 515 U.S. 472 (1995) (finding that 30 days in solitary confinement did not violate a prisoner’s liberty interest, given the fact of his imprisonment).

302 Wilkinson, 545 U.S. at 222-223.

303 Id. at 226 (A prisoner must be presented with reasons for decisions, and prisoner must have opportunity to be heard).


308 *Wei Chin v. Fed. Bureau of Prisons*, 4:10 CV 1145, 2010 WL 4008846, at *3 (N.D. Ohio Oct. 12, 2010) (holding that the alleged intentional infliction of emotional distress was not sufficiently serious to support an Eighth Amendment claim). See also *Edison v. Florida*, 2:04CV157 FTM99SPC, 2007 WL 80831, at *8 (M.D. Fla. Jan. 8, 2007) (holding that solitary confinement for a period of 19 months was not “so outrageous and extreme as to go beyond all possible bounds of decency, to be regarded as atrocious, and utterly intolerable in a civilized community”).