THE CULTURE OF JUDICIAL DEFERENCE AND THE PROBLEM OF SUPERMAX PRISONS

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Ever since the prison reform movement ended in the early 1980s, it has become increasingly difficult for inmates to challenge their conditions of confinement under the Eighth Amendment. Supreme Court rulings, statutes, and lower courts' conservative applications of precedent have worked together to create a culture of deference that constrains federal courts from intervening in prison affairs. At the same time, the controversial model of the supermax prison has flourished over the past twenty years, earning notoriety for its harsh regime of extreme isolation and sensory deprivation. Conditions in supermax facilities test the boundaries of the Eighth Amendment more than any other contemporary prison conditions. Cases challenging supermax conditions therefore illustrate courts' struggle with the culture of deference more dramatically than do other Eighth Amendment cases.

This Comment analyzes three recent cases in which federal courts facing Eighth Amendment challenges to supermax prison conditions granted inmates relief, and concludes that all of these courts relied on the same strategy to defuse the tension between their desire to intervene and their obligation to defer. Rather than engaging in a detailed analysis of the challenged conditions, these courts shifted their focus to the characteristics of the inmates and tied relief to the vulnerability of a subgroup of mentally ill prisoners.

The author argues that this strategy threatens prisoners' rights in the long term because it prevents courts from policing the constitutionality of new types of prison conditions. Based on another recent supermax case, Austin v. Wilkinson, *the author concludes that Fourteenth Amendment procedural due process challenges may help counter the culture of judicial deference and mitigate the constricted state of Eighth Amendment jurisprudence by providing a crucial forum for ongoing constitutional analysis of innovative prison conditions.*

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INTRODUCTION

Any court facing a constitutional challenge to prison conditions must accommodate two competing interests in its decision. Clear precedent established during the prison reform movement of the 1960s and 1970s assigns federal courts the responsibility for protecting inmates' constitutional rights.[1] This obligation conflicts with a culture of judicial deference that has developed since the end of the reform movement, in which federal courts defer to the policies of prison administrators in prison affairs.[2] The present and future interaction of these competing tensions is best exemplified in case law regarding the constitutionality of conditions in supermax prisons, a question recently identified as the "most important new issue in large-scale inmate litigation."[3]

Supermax prisons are uniquely harsh, high-tech facilities that house inmates typically identified as "the worst of the worst."[4] Inmates are characteristically kept in solitary confinement for twenty-three hours a day,[5]

1. *See, e.g.*, Procunier v. Martinez, 416 U.S. 396, 405–06 (1974) ("When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights.").
2. *See infra* Part II.
3. Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1668 (2003).
4. *See, e.g.*, Madrid v. Gomez, 889 F. Supp. 1146, 1155 (N.D. Cal. 1995).
5. *See* NAT'L INST. OF CORRECTIONS, U.S. DEP'T OF JUSTICE, SUPERMAX HOUSING: A SURVEY OF CURRENT PRACTICE 4 (1997), http://www.nicic.org/pubs/1997/013722.pdf.

in cells designed to minimize sensory stimulation and human contact.[6] The supermax model developed during the 1980s, beginning with the notorious federal penitentiary in Marion, Illinois,[7] and proliferated rapidly. Most states now operate at least one supermax prison,[8] and they are touted as models of the "prison of the future."[9] Although these modern, technologically advanced facilities appear to comply with the laws that regulate prison conditions,[10] their novel regime of solitary confinement and sensory deprivation has been extremely controversial. While corrections officials claim that supermaxes produce safer environments for all inmates,[11] critics charge that the institutions cause severe psychological damage and violate prisoners' human rights.[12]

The Eighth Amendment protects inmates from cruel and unusual punishment[13] and has been interpreted to allow prisoners to challenge the conditions of their confinement.[14] Because supermax prisons impose unique deprivations, they push constitutional limits on conditions of confinement more than any other type of contemporary American prison. Thus, if a court is inclined to intervene in prison affairs to enforce constitutional limits on conditions of confinement, it is reasonable to suppose that it would do so in a supermax case. At the same time, however, contemporary courts face the highest standards of deference since the reform movement of the 1960s and 1970s. They may therefore feel unable or unwilling to venture into new territory—and thus even to entertain the possibility of intervention—by considering the constitutionality of the distinctive supermax approach to inmate control.

In this Comment, I examine several recent supermax cases and show that the culture of deference severely impinges on courts' ability to intervene

6. *See* Leena Kurki & Norval Morris, *The Purposes, Practices, and Problems of Supermax Prisons*, 28 CRIME & JUST. 385, 389 (2001).

7. *See* HUMAN RIGHTS WATCH, COLD STORAGE: SUPER-MAXIMUM SECURITY CONFINEMENT IN INDIANA 17–18 (1997) [hereinafter COLD STORAGE].

8. NAT'L INST. OF CORRECTIONS, *supra* note 5, at 3.

9. *See Madrid*, 889 F. Supp. at 1155.

10. *See id.* at 1146.

11. *See* Gerald Berge et al., *Technology is the Key to Security in Wisconsin Supermax*, CORRECTIONS TODAY, July 1, 2001, at 105.

12. *See, e.g.*, HUMAN RIGHTS WATCH, OUT OF SIGHT: SUPER-MAXIMUM SECURITY CONFINEMENT IN THE UNITED STATES 1–2 (2000) [hereinafter OUT OF SIGHT].

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

14. *See* Rhodes v. Chapman, 452 U.S. 337 (1981).

in conditions of confinement cases. Even in instances in which inmates have been granted relief, courts have employed a strategy that threatens to further limit the scope of the Eighth Amendment in the long run. In a series of cases beginning with *Madrid v. Gomez*,[15] federal district courts have subdivided inmate plaintiffs into groups based on their mental health and granted relief only to those inmates who qualify as "seriously mentally ill."[16] By tying constitutional protection to the vulnerability of the plaintiffs, rather than to their conditions of confinement, these courts shift the focus of their opinions away from constitutional analysis of supermax conditions and prevent Eighth Amendment jurisprudence from evolving with prison conditions. In light of this trend, I argue that *Austin v. Wilkinson*,[17] a recent supermax ruling on a Fourteenth Amendment procedural due process claim, is particularly important because it may preserve a toehold for future challenges to conditions of confinement in new types of prisons. In *Austin*, the court declared that supermax conditions are different from conventional prison conditions in a constitutionally significant way.

Part I of this Comment discusses the pressures placed on federal courts to defer to prison administrators. Part II examines the constitutional problems presented by supermax prisons and discusses three recent supermax cases involving Eighth Amendment challenges to conditions of confinement. I focus on the way these three courts respond to the tension between the urge to intervene and the pressure to defer. All three courts try to resolve this tension by linking relief to the vulnerability of the inmate plaintiffs, rather than to the conditions themselves. Although this strategy protects some inmates in the short run, I argue that it is an unsatisfactory long-term solution for inmates, because it may inadvertently narrow the scope of Eighth Amendment protections. Part III discusses *Austin*, and suggests that a line of cases declaring that supermax conditions are constitutionally significant for due process purposes might provide support for an argument that supermax conditions are also constitutionally significant for Eighth Amendment purposes.

15. *Madrid*, 889 F. Supp. 1146.
16. *See, e.g.*, Jones'El v. Berge, 164 F. Supp. 2d 1096, 1098 (W.D. Wis. 2001).
17. 189 F. Supp. 2d 719 (N.D. Ohio 2002).

I. JUDICIAL DEFERENCE

Before the prison reform movement began in the early 1960s, courts rarely involved themselves in prison cases. During the nineteenth century, courts stayed out of prison matters because prisoners were considered to have no constitutional rights for courts to enforce.[18] In 1871, for instance, the Virginia Supreme Court of Appeals rejected an appeal by a prisoner on the grounds that, as a "slave of the State," he had no constitutional rights to be violated.[19] But even after prisoners were no longer openly considered slaves, prevailing interpretations of the law generally led courts to believe that there was nothing they could do for prisoners. They therefore maintained a "hands-off" approach to prison cases.[20] Concerns about separation of powers, federalism, and courts' lack of expertise in prison management were sometimes cited in support of this position.[21]

In the 1960s and 1970s, however, there was a break with this tradition. In a majority of U.S. jurisdictions, federal courts held prison conditions to be unconstitutional,[22] and the Supreme Court made it clear that prisoners

18. *See* LYNN S. BRANHAM, THE LAW OF SENTENCING, CORRECTIONS, AND PRISONERS' RIGHTS 334 (6th ed. 2002).

19. Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 796 (1871).

20. *See* BRANHAM, *supra* note 18, at 334; MALCOLM FEELEY & EDWARD RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS 30–31 (1998). Technically, prisoners who believed that their rights had been violated could seek relief by filing writs of habeas corpus or suits under the Civil Rights Act of 1871, *see* 42 U.S.C. § 1983 (2000), or the U.S. Constitution. Courts, however, had a very narrow understanding of the type of relief they could grant, so these options were not very useful. *See* FEELEY & RUBIN, *supra*, at 31. Habeas corpus, for example, was understood to operate only to release prisoners from illegal confinement. *See id.* (citing United States *ex rel.* Atterbury v. Ragen, 237 F.2d 953, 955 (7th Cir. 1956)). Similarly, the Civil Rights Act, which creates a federal cause of action for individuals whose rights are violated "under color of any statute, ordinance, regulation, custom, or usage" of state law, was interpreted to offer relief only when the violation was legal under state law. BRANHAM, *supra* note 18, at 338; FEELEY & RUBIN, *supra*, at 32–33. This narrow interpretation meant that, when state actors violated prisoners' constitutional rights by breaking the law, prisoners could not invoke the protection of the Civil Rights Act. *See* BRANHAM, *supra* note 18, at 338; FEELEY & RUBIN, *supra*, at 32. Finally, some courts thought that the Eighth Amendment was not enforceable against the states. BRANHAM, *supra* note 18, at 338–39; FEELEY & RUBIN, *supra*, at 33–34 & 34 n.32 (citing cases in which "prisoner complaints were rejected on the ground that the Eighth Amendment did not apply to the states").

21. *See* BRANHAM, *supra* note 18, at 335–36 (listing cases in which courts cited these policy reasons in support of their rejection of prisoners' claims); 1 MICHAEL MUSHLIN, RIGHTS OF PRISONERS 7–9 (2d ed. 1993).

22. *See* FEELEY & RUBIN, *supra* note 20, at 39–40. By 1998, "forty-eight of America's fifty-three jurisdictions [had] had at least one facility declared unconstitutional by the federal courts . . . ." *Id.* at 40.

do have some constitutional rights.[23] This dramatic change was probably the result of at least three different factors.[24]

First, in the years before the reform movement began, there were signs of a more general shift in federal courts' attitudes toward prisoner cases. In their discussion of the role of federal courts in prison reform, Malcolm Feeley and Edward Rubin note that courts' changing attitudes appeared in "sympathetic language" in opinions of the late 1940s.[25] Specifically, some courts responded to disturbing prison conditions by describing them in detail in their opinions, even if they ultimately denied relief.[26] For example, in *Gordon v. Garrson*,[27] the court's opinion "took care to specify the prisoner's allegations,"[28] not only describing the precise details of his beating and starvation by prison officials, but also noting minor abuses, such as the fact that "he was compelled to walk in his stocking feet in snow the distance of a city block" for his bath.[29] In addition, U.S. Supreme Court Justice Douglas used similar rhetoric in a dissent in the early 1950s.[30] While the majority opinion mentioned none of the facts of the case and dismissed the claim on procedural grounds, Justice Douglas' dissent responded with detail of the case's allegations, which, he said, "if true, make this a shocking case in the annals of our jurisprudence."[31] He insisted that "we deal here not with an academic problem but with

23. *See* Procunier v. Martinez, 416 U.S. 396, 405–06 (1974).

24. *See generally* FEELEY & RUBIN, *supra* note 20, at 39–40 (exploring the centrality to prison reform of the federal courts' willingness to act as policymakers).

25. *Id.* at 35; *see also* BRANHAM, *supra* note 18, at 336. The discussion in this paragraph draws heavily on Feeley and Rubin's work, which is perhaps the most detailed account of the history of judicial involvement in the U.S. prison system.

26. FEELEY & RUBIN, *supra* note 20, at 35–37 (citing pre-reform cases in which courts displayed sympathy toward plaintiffs, and noting that one "judge took care to specify the prisoner's allegations."). Feeley and Rubin also comment on a change in tone that "indicates a growing revulsion toward southern penal practices and a growing discomfort with the doctrine that courts should not intervene in the management of prisons." *Id.* at 37; *see also infra* Part I.A.2.

27. 77 F. Supp. 477 (E.D. Ill. 1948).

28. FEELEY & RUBIN, *supra* note 20, at 35.

29. *Gordon*, 77 F. Supp. at 479.

30. Sweeney v. Woodall, 344 U.S. 86, 91 (1952) (Douglas, J., dissenting).

31. *Id.* Justice Douglas wrote:

> He offered to prove that the Alabama jailers have a nine-pound strap with five metal prongs that they use to beat prisoners, that they used this strap against him, that the beatings frequently caused him to lose consciousness and resulted in deep wounds and permanent scars.
>
> He offered to prove that he was stripped to his waist and forced to work in the broiling sun all day long without a rest period.
>
> He offered to prove that on entrance to the prison he was forced to serve as a 'gal-boy' or female for the homosexuals among the prisoners.
>
> Lurid details are offered in support of these main charges.

Id.

allegations which, if proved, show that petitioner has in the past been beaten by guards to the point of death and will, if returned, be subjected to the same treatment."[32] This shift in the contextual framework in which prison cases were considered, from an "academic problem" to a moral one, represents an important step in federal courts' movement away from their "hands-off" stance.

Then, in the early 1960s, several reinterpretations of existing law removed the only concrete legal obstacles to judicial intervention in prison cases.[33] These changes allowed prisoners to take their claims to federal courts more easily, but none of these legal developments actually took on the issue of prison conditions[34] or addressed the policy concerns some courts cited in their rejection of inmate suits.

And finally, the broader context of the civil rights movement may have played the most critical role in prison reform, not only by increasing public awareness of prison conditions at the time, but also by providing a social context of sympathy for the rights of "disfavored minorities."[35] Prison conditions throughout the country came to public attention in part through prison disturbances and riots, such as the famous 1971 riot at Attica State Prison.[36] Some prisoner groups, however, especially the Black Muslims, helped raise public awareness by asserting their legal claims.[37] The severity of the conditions that came to light[38] therefore built upon existing public and judicial concern and increased the impetus toward prison reform.

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32. *Id.*

33. The Supreme Court's reinterpretation of the Civil Rights Act in *Monroe v. Pape*, 365 U.S. 167 (1961), and its explicit application of the Eighth Amendment to the states in *Robinson v. California*, 370 U.S. 660 (1962), are two of the most significant changes. BRANHAM, *supra* note 18, at 337–38; FEELEY & RUBIN, *supra* note 20, at 37; Edgardo Rotman, *The Failure of Reform: United States, 1865–1965*, *in* THE OXFORD HISTORY OF THE PRISON 169, 192–93 (Norval Morris & David J. Rothman eds., 1995). Another important change was the reinterpretation of habeas corpus law in *Brown v. Allen*, 344 U.S. 443 (1953). *See* BRANHAM, *supra* note 18, at 337–38; FEELEY & RUBIN, *supra* note 20, at 37; Rotman, *supra*, at 192–93.

34. *Monroe v. Pape* arose out of an illegal search and seizure. *See Monroe*, 365 U.S. at 169. *Robinson v. California* addressed the constitutionality of a law that criminalized the status of being a drug addict. *See Robinson*, 370 U.S. at 660–61. *Brown v. Allen* attacked the validity of three death sentences. *See Brown*, 344 U.S. at 447.

35. BRANHAM, *supra* note 18, at 337; *see also* FEELEY & RUBIN, *supra* note 20, at 37; MUSHLIN, *supra* note 21, at 9–11.

36. *See* BRANHAM, *supra* note 18, at 337; Rotman, *supra* note 33 , at 188–89.

37. *See* FEELEY & RUBIN, *supra* note 20, at 37–38; 1 MUSHLIN, *supra* note 21, at 9–10.

38. Before reform changed practices in Mississippi, for instance, consultants found conditions at the Mississippi State Penitentiary at Parchman—a former plantation—to be "philosophically, psychologically, physically, racially, and morally intolerable." Gates v. Collier, 501 F.2d 1291, 1295 (5th Cir. 1974). In Arkansas, a state police investigation found "institutionalized torture, near starvation diets, rampant violence, and widespread corruption." FEELEY & RUBIN, *supra* note 20, at 58. Arkansas inmates were supervised by fellow prisoners armed with rifles; housed in overcrowded barracks with no supervision and no protection from other inmates at night; forced to work outdoors

During reform, the Court declared in *Wolff v. McDonnell*[39] that "there is no iron curtain between the Constitution and the prisons of this country."[40] The Court also established the scope of inmates' First[41] and Eighth Amendment rights,[42] rights of access to the courts,[43] and rights to procedural due process.[44] Alongside these reforms, however, a widespread culture of judicial deference to prison administrators also made its way into the law, replacing the informal "hands-off" policies of the pre-reform period. A combination of Supreme Court precedent, statutes, and self-regulation by the lower federal courts, this culture of deference has become stronger, and now leaves little room for federal courts to intervene in cases challenging prison conditions.

A. The Supreme Court and Deference

The Supreme Court has been particularly active in developing standards of deference to constrain lower courts in prison cases. Throughout the reform period, the Court uniformly counseled judicial restraint. In *Procunier v. Martinez*,[45] the Court explained the policy justifications for federal courts' "[t]raditionally . . . broad hands-off attitude toward problems of prison administration."[46] California prison officials had appealed a district court's invalidation of prison regulations that restricted inmates' mail privileges and

year round, sometimes without shoes; and disciplined with beatings with a thick leather strap and the use of the "Tucker telephone," Holt v. Sarver, 309 F. Supp. 362, 369–71 (E.D. Ark. 1970), "a crank telephone device . . . used to electrically shock prisoners," Jackson v. Bishop, 268 F. Supp. 804 (E.D. Ark. 1967).

39. 418 U.S. 539 (1974).

40. *Id.* at 555–56.

41. *See, e.g.*, Procunier v. Martinez, 416 U.S. 396 (1974) (holding that a prison's censorship of mail implicated inmates' freedom of speech rights); Cruz v. Beto, 405 U.S. 319 (1972) (addressing prisoners' freedom to exercise religion).

42. *See, e.g.*, Estelle v. Gamble, 429 U.S. 97, 104 (1976) ("[D]eliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment . . . ." (citation omitted)); Gregg v. Georgia, 428 U.S. 153, 173 (1976) (stating that punishment that "involve[s] the unnecessary and wanton infliction of pain" violates the Eighth Amendment).

43. *See, e.g.*, Bounds v. Smith, 430 U.S. 817, 828 (1977) (requiring "prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law"); *Martinez*, 416 U.S. at 419 (protecting inmates' "access to the courts in order to challenge unlawful convictions and to seek redress for violations of their constitutional rights").

44. *See Wolff*, 418 U.S. at 556–58 (holding that prisoners have a liberty interest in earned good-time credits and are therefore entitled to notice and an opportunity for a hearing before those credits are revoked).

45. *Martinez*, 416 U.S. 396.

46. *Id.* at 404.

access to legal advice from law students and paralegals.[47] The Supreme Court agreed that the regulations were unconstitutional,[48] holding that "[w]hen a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights."[49] Before coming to this conclusion, however, the Court cited a number of policy justifications for a hands-off stance. These justifications included separation of powers, courts' lack of expertise, administrators' need for flexibility, and federalism:

> [T]he problems of prisons in America are complex and intractable, and . . . not readily susceptible of resolution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. . . . Moreover, where state penal institutions are involved, federal courts have a further reason for deference to the appropriate prison authorities.[50]

Thus, despite "increasingly urgent problems of prison administration and reform" and a "worsening situation,"[51] the Court explained that "courts are ill equipped" to intervene.[52] The Court cited no case law in support of this position. By incorporating previously unexpressed pre-reform policies in its opinion, however, it provided the case law that would support future movement away from reform.[53]

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47. *Id.* at 398.

48. The mail regulation violated the First Amendment rights of both prisoners and their correspondents. *Id.* at 415–16. The legal services regulation "constituted an unjustifiable restriction on [inmates'] right of access to the courts." *Id.* at 419.

49. *Id.* at 405–06.

50. *Id.* at 404–05. The Court also noted:

> Prison administrators are responsible for maintaining internal order and discipline, for securing their institutions against unauthorized access or escape, and for rehabilitating, to the extent that human nature and inadequate resources allow, the inmates placed in their custody. The Herculean obstacles to effective discharge of these duties are too apparent to warrant explication. . . . For all of those reasons, courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of that fact reflects no more than a healthy sense of realism.

Id. (footnote omitted).

51. *Id.* at 405 n.9.

52. *Id.* at 405.

53. *See, e.g.*, Lewis v. Casey, 518 U.S. 343, 386–87 & 387 n.8 (1996); Thornburgh v. Abbott, 490 U.S. 401, 407–08 (1989); Turner v. Safley, 482 U.S. 78, 84 (1987); Rhodes v. Chapman, 452 U.S. 337, 351 n.16 (1981); Bell v. Wolfish, 441 U.S. 520, 531 (1979); Jones v. N.C. Prisoners' Labor Union, 433 U.S. 119, 126 (1977).

Pell v. Procunier, 417 U.S. 817 (1974), decided two months after *Procunier v. Martinez*, reconfigured the Court's observations about the problems of judicial intervention into a more explicit directive to federal courts. Noting again that the details of prison policies justified by appeals to institutional security and rehabilitative goals "are peculiarly within the province and professional

Wolff v. McDonnell came just two months later.[54] In *Wolff*, Nebraska inmates claimed that a prison disciplinary policy violated their due process rights by depriving them of good-time credits without an opportunity for a hearing.[55] The Supreme Court agreed,[56] but it qualified its endorsement of inmate rights: "though his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not *wholly* stripped of his constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this country."[57] Thus, although *Wolff* recognized that prisoners have some constitutional rights, the Court made it clear that those rights are diminished substantially by incarceration. More specifically, prisoners' newly recognized constitutional rights were always to be balanced against the "needs and exigencies" of the prison.

By the time the reform movement drew to a close in the late 1970s and early 1980s, the Supreme Court had no trouble portraying its curtailment of prisoner rights as a natural outgrowth of precedent, rather than as a revival of an older theory of prison jurisprudence. In *Bell v. Wolfish*,[58] often considered to be "the first clear sign" of the end of the reform movement,[59] the Court rejected claims that several practices at a prison in New York City violated pretrial detainees' constitutional rights.[60] Then Justice Rehnquist explained that, although the Court had acknowledged that prisoners have constitutional rights, "our cases have also insisted on a second proposition: simply because prison inmates retain certain constitutional rights does not mean that these rights are not subject to restrictions and limitations."[61] The opinion drew on the same arguments that the Court had relied on in previous prison cases, concluding that "[p]rison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain

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expertise of corrections officials," the Court said that "in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts *should ordinarily defer* to their expert judgment in such matters." *Id.* at 827 (emphasis added).

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

55. *Id.* at 553.

56. *Id.* at 557–58.

57. *Id.* at 555–56 (emphasis added).

58. *Bell*, 441 U.S. 520.

59. FEELEY & RUBIN, *supra* note 20, at 47; *see also* Jack E. Call, *The Supreme Court and Prisoners' Rights*, FED. PROBATION, Mar. 1995, at 36, 38 ("The year 1979 was chosen to begin the period that I have labeled the Deference Period because that was the year the Supreme Court decided *Bell v. Wolfish*.").

60. *Bell*, 441 U.S. 520.

61. *Id.* at 545.

institutional security."[62] Thus, despite the gains of the brief period of prison reform, the Supreme Court transformed the informal policies of the hands-off period into explicit exhortations to the federal courts to defer to prison administrators.

1. The *Turner* Test

The Court further formalized the newly articulated standard of deference by defining a new standard for the evaluation of the constitutionality of prison regulations. *Turner v. Safley*[63] is perhaps the Court's most important doctrinal contribution to the current culture of deference. In *Turner*, the Court finally made explicit what it had suggested for years: "a lesser standard of scrutiny is appropriate in determining the constitutionality of . . . prison rules," even when those rules infringe on fundamental rights.[64] Under this lower standard of scrutiny, "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[65]

Although its adoption of the "reasonably related" standard is itself deferential, the critical aspect of *Turner* lies in the four factors the Court devised to determine whether a given regulatory infringement on inmates' constitutional rights is reasonable. In order for such a prison regulation to withstand judicial scrutiny, there must first be "a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it."[66] All that is needed is a "logical connection," which the Court loosely defined as being more than "arbitrary or irrational."[67] Second, when some "alternative means of exercising the right . . . remain open to prison inmates," the regulation is less likely to be overturned.[68] Third, courts must take into account "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally."[69] The Court noted that "few changes will have no [such] ramifications."[70] And,

62. *Id.* at 547.

63. 482 U.S. 78 (1987). *Turner* was a class action suit challenging Missouri prison regulations relating to prisoners' mail and right to marry. *Id.* at 81–82.

64. *Id.* at 81. Besides *Procunier v. Martinez*, the Court revisited *Pell v. Procunier*, 417 U.S. 817 (1974), *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119 (1977), and *Bell*, 441 U.S. 520 in reaching this conclusion. *See Turner*, 482 U.S. at 84–89.

65. *Turner*, 482 U.S. at 89.

66. *Id.* at 89.

67. *Id.* at 89–90.

68. *Id.* at 90.

69. *Id.*

70. *Id.*

"[f]inally, the absence of ready alternatives is evidence of the reasonableness of a prison regulation."[71] This last factor, however, should not be mistaken for "a 'least restrictive alternative' test."[72] Instead, the burden is on the inmate to "point to an alternative that fully accommodates the prisoner's rights at *de minimis* cost to valid penological interests."[73] Even then, courts are not required to interpret the existence of such an alternative as evidence that the regulation is unreasonable; rather, "a court *may* consider that as evidence that the regulation does not satisfy the reasonable relationship standard."[74]

Applying these factors, the Court upheld a Missouri prison regulation restricting correspondence between prisoners at different facilities, but invalidated a regulation that impinged on inmates' right to marry.[75] The mail restriction did not violate inmates' First Amendment rights because it was "logically connected to . . . legitimate security concerns,"[76] did "not deprive members of all means of expression,"[77] and avoided a substantial "ripple effect" on security measures at several prisons.[78] There were also "no obvious, easy alternatives" that would address the security threats posed by unrestricted correspondence between inmates at different prisons.[79] In contrast, the Court held that a regulation forbidding inmates to marry without the superintendent's permission was "an exaggerated response" to prison administrators' asserted security concerns, and was not "reasonably related" to those concerns.[80]

Thus, *Turner* suggests that courts should defer to prison administrators even when prison regulations infringe on inmates' constitutional rights, as long as the regulations are not illogical, and as long as protection of the right in question would have more than a minimal effect on some aspect of prison management. The implication of this standard is that many regulations infringing on inmates' constitutional rights must be upheld. Moreover, the

71. *Id.*
72. *Id.*
73. *Id.* at 91.
74. *Id.* (emphasis added).
75. *Id.* at 81.
76. *Id.* at 91.
77. *Id.* at 92.
78. *Id.* at 90.
79. *Id.* at 93.
80. *Id.* at 97. The prison administrators argued that "'love triangles' might lead to violent confrontations between inmates," and that "women prisoners needed to concentrate on developing skills of self-reliance . . . ." *Id.* The Court said that "[c]ommon sense . . . suggests that there is no logical connection between the marriage restriction and the formation of love triangles . . . ." *Id.* at 98.

standard makes it impossible for lower courts to disregard the call for deference.[81]

2. Elevated Thresholds for Inmate Claims

The post-reform Court also imposed its standards of deference on lower courts in a less direct way: As the Court defined in more detail the scope of inmates' constitutional rights, it required inmates to meet high thresholds to succeed on their constitutional claims. The rights won by inmates during reform, including First[82] and Eighth Amendment rights,[83] rights of access to the courts,[84] and procedural due process rights,[85] were subject to these high thresholds, which made it more difficult for courts to intervene in prison affairs and grant inmates relief. This part analyzes two of those thresholds: those regulating access to relief for Eighth Amendment conditions of confinement claims, and those regulating Fourteenth Amendment procedural due process claims.

One of the earliest interpretations of the Eighth Amendment established it as a flexible constitutional standard. In 1958, even before the prison reform movement, the Court stated that "the words of the [Eighth] Amendment are not precise, and . . . their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[86] More recently, the Court has

81. In a subsequent case, *Washington v. Harper*, 494 U.S. 210 (1990), the Court reinforced the general applicability of the *Turner* test, explaining that it governs "all cases in which a prisoner asserts that a prison regulation violates the Constitution, not just those in which the prisoner invokes the First Amendment." *Id.* at 224. For a discussion of *Turner*'s applicability in Eighth Amendment cases, see *infra* Part I.C.

82. *See, e.g.*, Procunier v. Martinez, 416 U.S. 396 (1974) (holding that prison's censorship of mail implicated inmates' freedom of speech rights); Cruz v. Beto, 405 U.S. 319 (1972) (addressing prisoners' freedom to exercise religion).

83. *See, e.g.*, Estelle v. Gamble, 429 U.S. 97, 104 (1976) ("[D]eliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment . . . ." (citation omitted)); Gregg v. Georgia, 428 U.S. 153, 173 (1976) (stating that punishment that "involve[s] the unnecessary and wanton infliction of pain" violates the Eighth Amendment).

84. *See, e.g.*, Bounds v. Smith, 430 U.S. 817, 828 (1977) (requiring "prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law"); *Martinez*, 416 U.S. at 419 (protecting inmates' "access to the courts in order to challenge unlawful convictions and to seek redress for violations of their constitutional rights").

85. *See* Wolff v. McDonnell, 418 U.S. 539 (1974) (holding that prisoners have a liberty interest in earned good-time credits and are therefore entitled to notice and an opportunity for a hearing before those credits are revoked).

86. Trop v. Dulles, 356 U.S. 86, 100–01 (1958).

indicated that it is inclined to interpret the "evolving standards" test as a measure of contemporary majority values.[87] Consequently, the "evolving standards" test can become a limit on protection as well as a source of protection, depending on the public's expectations. For example, the Court has found that "because society does not expect that inmates will have unqualified access to health care, deliberate indifference to medical needs amounts to an Eighth Amendment violation only if those needs are 'serious.'"[88] In addition, the Court has looked to state laws to find an emerging consensus against executions of mentally retarded individuals.[89]

Conditions of confinement claims brought under the Eighth Amendment were subjected to the Court's high standards in *Rhodes v. Chapman*.[90] Until then, the Court had not articulated a specific test for analyzing conditions of confinement cases. Instead, lower courts applied general Eighth Amendment standards prohibiting "the unnecessary and wanton infliction of pain."[91] In *Rhodes*, however, although the Court cited these lower court cases, it held that only conditions that "deprive inmates of the minimal civilized measure of life's necessities" can violate the Eighth Amendment.[92] Later, the Court held that prisoners seeking to prove unconstitutional conditions of confinement must also show that prison officials acted with the mental state of deliberate indifference[93]—a standard the Court equated

87. In *Hudson v. McMillian*, 503 U.S. 1 (1992), for instance, Justice O'Connor wrote that "the standard is contextual and responsive to 'contemporary standards of decency.'" *Id.* at 8.

88. *Id.* at 9.

89. *See* Atkins v. Virginia, 536 U.S. 304, 312 (2002) ("We have pinpointed that the 'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.'" (quoting Penry v. Lynaugh, 492 U.S. 302, 331 (1989))); *see also* Sawyer v. Smith, 497 U.S. 227, 250 (1990) (calling state laws "a barometer of contemporary values").

90. 452 U.S. 337 (1981).

91. Coker v. Georgia, 433 U.S. 584, 592 (1977).

92. *Rhodes*, 452 U.S. at 347. The Court reasoned that "the Constitution does not mandate comfortable prisons, and prisons . . . which house persons convicted of serious crimes, cannot be free of discomfort." *Id.* at 349. In order for prison conditions to be unconstitutional, they must "involve the wanton and unnecessary infliction of pain . . . [or] be grossly disproportionate to the severity of the crime warranting imprisonment." *Id.* at 347.

93. Wilson v. Seiter, 501 U.S. 294, 303 (1991). The Court reasoned as follows:

> The source of the intent requirement is not the predilections of this Court, but the Eighth Amendment itself, which bans only cruel and unusual *punishment*. If the pain inflicted is not formally meted out *as punishment* by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify.

Id. at 300. Thus, the mental element is a requirement for the constitutional claim itself, not just for individual liability. *Wilson* also noted that "[n]othing so amorphous as 'overall conditions' can rise to the level of cruel and unusual punishment when no specific deprivation of a single human need exists." *Id.* at 305.

Thus, after *Wilson*, in order to prove an Eighth Amendment violation based on conditions of confinement, prisoners must show not only that their conditions "produce[ ] the deprivation of a

with recklessness.[94] Current law therefore makes it extremely difficult for prisoners to bring successful conditions of confinement claims.[95]

The Supreme Court prescribed a similarly high standard for prisoners' procedural due process claims in *Sandin v. Conner*.[96] Until *Sandin*, prisoners' procedural due process rights had been governed by *Wolff*, which held that prisoners were entitled to written notice and an opportunity for a hearing[97] when prison officials sought to restrict a liberty interest created by state law.[98] *Sandin* put limits on the creation of liberty interests that entitle prisoners to *Wolff*'s procedural safeguards. Citing the confusion created by post-*Wolff* due process cases that defined prisoners' liberty interests in their conditions of confinement, the Court articulated a more specific version of the *Wolff* rule.[99] Agreeing with the *Wolff* ruling that states may create liberty interests for prisoners, the Court held:

> [T]hese interests will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.[100]

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single, identifiable human need such as food, warmth, or exercise," *id.* at 304, but also that this deprivation was the result of prison officials' deliberate indifference, *see, e.g.*, Farmer v. Brennan, 511 U.S. 825, 834 (1994) (describing the two-pronged analysis to be used in Eighth Amendment cases).

94. *Farmer*, 511 U.S. at 836 ("It is, indeed, fair to say that acting or failing to act with deliberate indifference to a substantial risk of serious harm to a prisoner is the equivalent of recklessly disregarding that risk.").

95. *See id.* at 835–37. In *Farmer*, ruling on a prisoner's *Bivens* action against prison officials, the Court further defined deliberate indifference:

> [A] prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.

Id. at 837.

96. 515 U.S. 472 (1995).

97. Wolff v. McDonnell, 418 U.S. 539, 564 (1974).

98. *See id.* at 554–58. The *Wolff* decision expressed concern that courts defer to prison officials and allow them the flexibility to respond to difficult and unpredictable situations within the prison, and resolved that "it is immediately apparent that one cannot automatically apply procedural rules designed for free citizens in an open society, or for parolees or probationers under only limited restraints, to the very different situation presented by a disciplinary proceeding in a state prison." *Id.* at 560. The Court therefore refused to require that prisoners be able to call and cross-examine witnesses. *Id.* at 567–68.

99. *See Sandin*, 515 U.S. at 483 (explaining that the analysis used in previous cases "has strayed from the real concerns undergirding the liberty protected by the Due Process Clause. The time has come to return to the due process principles we believe were correctly established and applied in *Wolff* . . . .").

100. *Id.* at 484 (citations omitted).

If an inmate's conditions of confinement do not constitute an "atypical and significant hardship" in comparison with conditions throughout the prison system, he will not have a liberty interest and will not be entitled even to the limited procedural safeguards set out in *Wolff*.[101]

Higher thresholds such as these make it exceedingly difficult for inmates to succeed on their constitutional claims. They also operate as a check on judicial intervention in prison conditions, by demanding extensive support for any relief courts provide to inmates bringing constitutional claims.

B. The Prison Litigation Reform Act

Congress also joined the Supreme Court's efforts to limit federal court intervention in the regulation of prison conditions. In 1996, Congress passed the Prison Litigation Reform Act (PLRA),[102] which constrained federal courts' ability to grant injunctive relief to prison inmates. Under the PLRA, prison officials are entitled to be free from judicial supervision unless the court's involvement meets certain guidelines:

> Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.[103]

Any relief granted by a court automatically ceases after two years,[104] unless the court makes "written findings based on the record that prospective relief remains necessary to correct a current and ongoing violation of the Federal right," and continues to fulfill the three requirements listed above.[105] The Act thus mandates deference as the default position for federal courts in prison litigation, and supplements the substantial body of case law that already constrains judges facing such cases.[106]

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101. There is some question as to whether the comparison should be made with general population conditions or conditions in other administrative segregation units.

102. 18 U.S.C. § 3626 (2000).

103. *Id.* § 3626(a)(1)(A).

104. *Id.* § 3626(b)(1)(A)(iii).

105. *Id.* § 3626(b)(3).

106. For more information on the effects of the PLRA, see Schlanger, *supra* note 3. Schlanger conducted an empirical investigation of federal filings by inmates before and after the

C. Self-Regulation by Federal Courts

Lower courts' internalization and extension of the Supreme Court's mandates mark the complete transformation of the hands-off tradition into a full-blown culture of judicial deference. This internalization is apparent in some federal courts' conservative interpretations of *Turner*. Although *Washington v. Harper* expanded the application of *Turner* beyond inmates' First Amendment claims, it is unclear whether the *Turner* holding applies to Eighth Amendment cases.[107] Notwithstanding this uncertainty, the Third,[108] Seventh,[109] Eighth,[110] and Eleventh[111] Circuits have all suggested that they are willing to apply the *Turner* analysis to Eighth Amendment claims.

The Eighth and Eleventh Circuits have directly applied *Turner* to inmates' Eighth Amendment claims.[112] In *Divers v. Department of Corrections*,[113] the Eighth Circuit reversed a lower court's determination that a Missouri prisoner's challenges to "numerous practices which he allege[d] violate the Eighth Amendment" were frivolous.[114] The court said that the lower court should have evaluated the claims under *Turner*, and remanded the case. In *Harris v. Ostrout*,[115] the Eleventh Circuit construed a Florida inmate's complaint to allege that a prison official's harassing strip searches

PLRA took effect to determine whether the reasons offered in support of the PLRA were grounded in fact, and what the effect of the PLRA's passage has been. *Id.* at 1562–63. She found that "[t]he statute has been highly successful in reducing litigation, triggering a forty-three percent decline over five years, notwithstanding the simultaneous twenty-three percent increase in the incarcerated population." *Id.* at 1694. She also notes, however, that "the cases remaining after that decline are succeeding less than before," *id.*, which suggests that meritorious inmate claims are being screened out by the PLRA. One reason for this harks back to the pre-reform procedural obstacles to prisoners' suits: "[T]he PLRA's exhaustion provision has effected a major liability-reducing change in the legal standards: inmates who experience even grievous loss because of unconstitutional misbehavior by prison and jail authorities will nonetheless lose cases they once would have won, if they fail to comply with technicalities of administrative exhaustion." *Id.* The PLRA's exhaustion provision states that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a) (2000).

107. *See* Martin A. Geer, *Human Rights and Wrongs in Our Own Backyard: Incorporating International Human Rights Protections Under Domestic Civil Rights Law—A Case Study of Women in United States Prisons*, 13 HARV. HUM. RTS. J. 71, 101 (2000) ("*Turner*'s broad language left uncertainty as to whether the Court intended the rational basis standard to apply to Eighth Amendment claims of cruel and unusual punishment. The lower courts have split on this issue.").

108. *See* Yeskey v. Pa. Dep't of Corr., 118 F.3d 168 (3d Cir. 1997).

109. *See* Johnson v. Phelan, 69 F.3d 144 (7th Cir. 1995).

110. *See* Divers v. Dep't of Corr., 921 F.2d 191 (8th Cir. 1990).

111. *See* Harris v. Ostrout, 65 F.3d 912 (11th Cir. 1995).

112. *See Divers*, 921 F.2d at 193–94; *Harris*, 65 F.3d at 915–16.

113. *Divers*, 921 F.2d 191.

114. *Id.* at 193.

115. *Harris*, 65 F.3d 912.

violated the Eighth Amendment.[116] The court applied *Turner*, and after finding insufficient evidence to rebut a presumption that the security measures were reasonable, affirmed the lower court's grant of summary judgment to the prison official.[117]

The Third and Seventh Circuits have been less direct in applying *Turner* in the Eighth Amendment context but have suggested that they would favor such an application. In *Yeskey v. Pennsylvania Department of Corrections*,[118] the Third Circuit commented in a footnote that the type of claims to which *Turner* applies are "usually [brought] under the Eighth Amendment."[119] And in *Johnson v. Phelan*,[120] the Seventh Circuit claimed that, because the threshold for Eighth Amendment claims is effectively higher than for the *Turner* test, "[a]ny practice allowed under the due process analysis of *Turner* is acceptable under the eighth amendment too."[121]

Despite these courts' apparent assumption that *Turner*'s rigorous test applies to all inmate claims, a Ninth Circuit case, *Jordan v. Gardner*,[122] shows that it is possible for a court to make a coherent argument that *Turner* does not apply to Eighth Amendment cases. In *Jordan*, the Ninth Circuit rejected prison administrators' argument that the court should apply the *Turner* test to inmates' Eighth Amendment claims.[123] Eighth Amendment rights, the court reasoned, are different from other constitutional rights because they apply only to prisoners and therefore "do not conflict with incarceration; rather, they limit the hardships which may be inflicted upon the incarcerated as 'punishment.'"[124] By contrast, the court noted that the *Turner* test "has been applied only where the constitutional right is one which is enjoyed by all persons, but the exercise of which may necessarily be limited due to the unique circumstances of imprisonment."[125] The court acknowledged the Supreme Court's extension of *Turner* in *Washington v. Harper*, but pointed out that, despite that ruling, "the Supreme Court has never applied *Turner* in an Eighth Amendment case."[126]

116. *Id.* at 915–16.
117. *Id.* at 916.
118. 118 F.3d 168 (3d Cir. 1997).
119. *Id.* at 175 n.8.
120. 69 F.3d 144 (7th Cir. 1995).
121. *Id.* at 149.
122. 986 F.2d 1521 (9th Cir. 1993).
123. *Id.* at 1530.
124. *Id.*
125. *Id.*
126. *Id.*

In light of *Jordan*, the willingness of other circuit courts to apply *Turner* to Eighth Amendment claims signals that federal courts are not necessarily resistant to the culture of deference. Instead, these cases show that some federal courts play an active role in extending the Court's deferential policies by applying a standard of review that favors prison administrators when they need not necessarily do so. This dynamic demonstrates that judicial deference in prison cases has become more than just a policy or even a set of rules; it is in fact a culture or ethos to which many lower courts aim to conform their conduct.

II. SUPERMAX PRISONS AND THE EIGHTH AMENDMENT

These various calls for deference to prison administrators combine to create a significant pressure on courts to stay out of prison affairs. Courts therefore face some tension when they evaluate any conditions of confinement that seem to push the limits of the Constitution. When the challenge is to the type of conditions that could arise in conventional prisons, such as an allegation that inmates are being kept in unsanitary cells with open sewage and no running water, courts may generally turn to precedent for guidance as they try to strike a proper balance between enforcement of inmates' rights and the obligation to defer. But when courts face compelling conditions of confinement claims that challenge conditions qualitatively different from those in conventional prisons, the tension is heightened, because it must be resolved without clear precedent. Inmate challenges to the conditions in supermax prisons fall into this second category. As one court noted, a challenge to supermax incarceration "is not a case about inadequate or deteriorating physical conditions. There are no rat-infested cells, antiquated buildings, or unsanitary supplies."[127] Instead, it is a case about "a prison of the future."[128]

Because supermax prisons are significantly harsher than other prisons, they are more likely to push the limits of the Constitution and induce the desire of courts to intervene. Supermax litigation therefore operates as a unique showcase of judicial struggles with the culture of deference, and is the best possible place to examine the present state of inmates' constitutional rights. One writer recently went so far as to identify the question of "whether the Constitution has anything special to say about conditions in (or prerequisites for classification to) 'supermax' facilities" as "the most important

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

new issue in large-scale inmate litigation."[129] Furthermore, because supermax prisons have been deemed prototypes of the "prison of the future,"[130] the manner in which courts resolve the tension in supermax cases provides a glimpse of the vulnerability of inmates' constitutional rights in the face of evolving prison practices.

In this part, after describing the features of supermax prisons that distinguish them from conventional prisons, I show that there is an emerging pattern of courts granting relief to inmates only after shifting the focus of their analysis from the nature of the conditions to the characteristics of the inmates. While this strategy resolves the tension between intervention and deference and allows courts to provide relief to some inmates, it also shies away from an explicit analysis of the constitutionality of the conditions themselves. The use of such a tactic implies that supermax conditions are no different from conditions in conventional prisons and should therefore be subject to the same standards of deference developed for conventional prisons. Such an implication threatens to further entrench the problem that Malcolm Feeley and Edward Rubin call the "constitutional prison."[131] It thereby runs the risk of fixing the scope of the Eighth Amendment at a precise moment in history, making it impossible for the Eighth Amendment to evolve with new types of prison conditions.[132]

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129. Schlanger, *supra* note 3, at 1668.

130. *Madrid*, 889 F. Supp. at 1155.

131. FEELEY & RUBIN, *supra* note 20, at 375.

132. It should be noted that I am not advancing an argument about the constitutionality of supermax prisons. Rather, my focus is on how courts behave when they face challenges to supermax conditions, and what their behavior in those situations reveals about the current state of the culture of deference. A great deal of scholarship, particularly student work, already addresses the question of supermax prisons themselves. For arguments about the constitutionality, morality, and advisability of supermax prisons and solitary confinement, see Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. REV. L. & SOC. CHANGE 477 (1997); Kurki & Morris, *supra* note 6; Holly Boyer, Comment, *Home Sweet Hell: An Analysis of the Eighth Amendment's 'Cruel and Unusual Punishment' Clause as Applied to Supermax Prisons*, 32 SW. U. L. REV. 317 (2003); Nan D. Miller, Comment, *International Protection of the Rights of Prisoners: Is Solitary Confinement in the United States a Violation of International Standards?*, 26 CAL. W. INT'L L.J. 139 (1995); Christine Rebman, Comment, *The Eighth Amendment and Solitary Confinement: The Gap in Protection From Psychological Consequences*, 49 DEPAUL L. REV. 567 (1999); Sally Mann Romano, Comment, *If the SHU Fits: Cruel and Unusual Punishment at California's Pelican Bay State Prison*, 45 EMORY L.J. 1089 (1996); Gertrude Strassburger, Comment, *Judicial Inaction and Cruel and Unusual Punishment: Are Super-Maximum Walls Too High for the Eighth Amendment?*, 11 TEMP. POL. & CIV. RTS. L. REV. 199 (2001); Scott N. Tachiki, Comment, *Indeterminate Sentences in Supermax Prisons Based Upon Alleged Gang Affiliations: A Reexamination of Procedural Protection and a Proposal for Greater Procedural Requirements*, 83 CAL. L. REV. 1115 (1995); Bryan B. Walton, Comment, *The Eighth Amendment and Psychological Implications of Solitary Confinement*, 21 LAW & PSYCHOL. REV. 271 (1997).

A. The Supermax Model

The supermax model is only about twenty years old and traces its lineage to the notorious Marion Federal Penitentiary in Illinois, the successor to Alcatraz as the federal prison with the most comprehensive and advanced security measures.[133] After Marion was put on permanent lock-down in 1983 in response to inmate violence,[134] the model spread throughout the country, and at least thirty-four states now have supermax facilities.[135]

There is no single definition of a supermax prison, but the facilities do tend to share certain characteristics.[136] Leena Kurki and Norval Morris set out four specific identifying features of supermax prisons: First, inmates are usually in supermax facilities for years. Second, prison administrators generally have "wide discretion" in placing inmates in supermax facilities. Third, most supermax prisons rely on solitary confinement. Finally, supermax inmates are rarely offered any educational, religious, or legal programming.[137] The supermax definition advanced by the National Institute of Corrections also emphasizes the characteristics of the inmates, noting that supermax inmates are widely considered to be serious security threats who must be controlled through isolation.[138] Other sources, however, point out that flight

133. *See* Kurki & Morris, *supra* note 6, at 385, 394.

134. *See* Bruscino v. Carlson, 854 F.2d 162, 163–64 (7th Cir. 1988). The warden ordered the lockdown after riots resulted in the deaths of some guards. *Id.* Since then, inmates at Marion have been confined to their cells twenty-three hours every day. *See* COLD STORAGE, *supra* note 7, at 17–18. Encouraged by the security effects of this measure, the federal government used Marion as inspiration for its penitentiary in Florence, Colorado, which was designed and built to keep inmates in locked-down solitary confinement for almost the entire day—the first facility to be built as a supermax from the ground up. *See* Haney & Lynch, *supra* note 132, at 489–90.

135. *See* NAT'L INST. OF CORRECTIONS, *supra* note 5, at 3. Of fifty-five Departments of Corrections that responded to the National Institute of Corrections' 1997 supermax survey, "[t]hirty-four agencies either are operating supermax housing or are opening supermax facilities/units within the next two years," with "at least 57 supermax facilities/units nationwide." *Id.*

136. *See* CHASE RIVELAND, U.S. DEP'T OF JUSTICE, SUPERMAX PRISONS: OVERVIEW AND GENERAL CONSIDERATIONS 3 (1999), http://www.nicic.org/pubs/1999/014937.pdf. Riveland provides the results of a National Institute of Corrections survey that "revealed that jurisdictions do not share a common definition of supermax due to their differing needs, classification criteria and methods, and operational considerations," and remarks that "what may be 'supermax' in one jurisdiction may not be in another." *Id.* He also lists a variety of different names for the facilities, such as "[s]pecial housing unit, maxi-maxi, maximum control facility, secured housing unit . . . intensive management unit, and administrative maximum penitentiary," calling "supermax" the "generic descriptor." *Id.* at 5.

137. *See* Kurki & Morris, *supra* note 6, at 388–90.

138. NAT'L INST. OF CORRECTIONS, *supra* note 5, at 1. According to this definition, a supermax is

> [a] freestanding facility, or a distinct unit within a facility that provides for the management and secure control of inmates who have been officially designated as exhibiting violent or serious and disruptive behavior while incarcerated. Such inmates have been determined to

risks and inmates who present administrative problems are regularly placed in supermaxes.[139] Supermax inmates are characteristically referred to as "the worst of the worst."[140]

Proponents and critics alike consider supermax facilities to be different from other prisons in the United States today, because of both their harshness and the types of deprivations they impose.[141] To accomplish the primary goal of "secure control" of "the worst of the worst," the typical supermax minimizes sensory stimulation and human contact.[142] Facilities achieve this mainly through solitary confinement, but the prison architecture and policies also contribute to the supermax mission.[143] Inmates generally spend almost all day in their cells,[144] which are windowless and stark, behind solid doors that keep inmates from seeing outside their cells or communicating clearly with prison officials or one another.[145] The facilities offer little educational or rehabilitative programming, use heavy restraints during any out-of-cell movement, allow virtually no direct contact with other prisoners or guards,

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be a threat to safety and security in traditional high-security facilities and their behavior can be controlled only by separation, restricted movement, and limited direct access to staff and other inmates.

Id. Kurki and Morris criticize the breadth of this definition. *See* Kurki & Morris, *supra* note 6, at 388–90.

139. *See* Madrid v. Gomez, 889 F. Supp. 1146, 1227 (N.D. Cal. 1995); Kurki & Morris, *supra* note 6, at 392–93, 394.

140. *See, e.g.*, *Madrid*, 889 F. Supp. at 1155.

141. *See, e.g.*, Austin v. Wilkinson, 189 F. Supp. 2d 719, 723 (N.D. Ohio 2002) (observing that conditions at Ohio State Penitentiary, a supermax facility, "are noticeably different than at other Ohio prisons"); Jones'El v. Berge, 164 F. Supp. 2d 1096, 1103 (W.D. Wis. 2001) (citing an expert witness's testimony that he had "never seen an institution with more restrictive conditions than Supermax"); *Madrid*, 889 F. Supp. at 1155 (describing the supermax-like Security Housing Unit in Pelican Bay, California as "a place which, by design, imposes conditions far harsher than those anywhere else in the California prison system").

142. *See* Kurki & Morris, *supra* note 6, at 389; *see also Madrid*, 889 F. Supp. at 1229 (describing "[t]he overall effect of the SHU [as] one of stark sterility and unremitting monotony"); *id.* at 1232 (concluding that "confinement in the Pelican Bay SHU severely deprives inmates of normal human contact and substantially reduces their level of environmental stimulation").

143. *See* Kurki & Morris, *supra* note 6, at 389–90. The architecture of the prisons is particularly closely tied to the facilities' mission. In Maryland, state officials have recently determined that it will be more efficient to destroy a supermax and build another facility than it would be to renovate the prison to adapt it to more conventional methods of incarceration. *See* David Nitkin, *Md. Wants to Demolish Supermax as Obsolete at 14*, BALT. SUN, Oct. 16, 2003, at 1A (quoting a corrections official as saying, "I don't know of any way to rehab the facility because it's a maximum-security prison").

144. *See* NAT'L INST. OF CORRECTIONS, *supra* note 5, at 4 ("DOCs with supermax housing typically require these inmates to spend most of the day in their cells: in 20 DOCs, supermax inmates spend 23 hours per day in their cells, and in four DOCs they are in-cell from 22 to 22.75 hours each day."); Kurki & Morris, *supra* note 6, at 389.

145. *See Madrid*, 889 F. Supp. at 1228.

and impose tight restrictions on visitation and telephone privileges.[146] Different facilities allow varying amounts of exercise, but most require that it be solitary. Exercise often occurs in a slightly larger cell, rather than outdoors.[147] Inmates are not allowed to work.[148] The prisons usually incorporate several different security levels, or "tiers," which vary in the degree of their deprivations, based on the notion that inmates can, through good behavior, work their way out of more restrictive tiers and into more lenient ones.[149] The criteria for transfer and reclassification to supermax and within supermax vary by jurisdiction, but once an inmate is assigned to a supermax facility, he is usually there for years.[150]

Supporters of the supermax model argue that this innovation is vital to the security of general population prisons, because the facilities segregate dangerous or disruptive inmates who would otherwise threaten the safety of other inmates and guards,[151] and allow highly volatile inmates to be supervised more closely.[152] In addition, as a prison within a prison system, supermax purportedly functions as a deterrent to potential discipline problems outside the facility, as well as within it.[153]

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146. *See Austin*, 189 F. Supp. 2d at 724–26; *Jones'El*, 164 F. Supp. 2d at 1099–1101; *Madrid*, 889 F. Supp. at 1227–30; COLD STORAGE, *supra* note 7, at 38–47 (describing a day in the life of an inmate at either of Indiana's two supermaxes); HUMAN RIGHTS WATCH, RED ONION STATE PRISON: SUPER-MAXIMUM SECURITY CONFINEMENT IN VIRGINIA 7–10 (1999) [hereinafter RED ONION].

147. *See Madrid*, 889 F. Supp. at 1228–29.

148. *See* Kurki & Morris, *supra* note 6, at 390.

149. *See Jones'El*, 164 F. Supp. 2d at 1099 ("Inmates at Supermax who are not serving segregation time are part of an incentive program, which operates on a 'level' system."); Berge et al., *supra* note 11, at 107 ("[S]upermax operates on the philosophy of increased incentives for appropriate behavior: Inmates 'earn' their way into the supermax by disrupting the normal operations of other correctional institutions and earn their way out by demonstrating acceptable behavior with increased privileges.").

150. *See* Kurki & Morris, *supra* note 6, at 388.

151. *See, e.g.*, Berge et al., *supra* note 11, at 105 (describing the construction of Wisconsin's supermax as "necessary to securely house the most difficult inmates while keeping staff and the public safe and allowing inmates the chance to change").

152. *See id.* at 106. Technology "gives staff an at-a-glance picture of activity within the entire facility . . . . In addition to central control, each unit has its own local control station in which inmate activity can be monitored, video can be recorded 24 hours per day and cell intercom calls are answered." *Id.*

153. *See* Bruscino v. Carlson, 854 F.2d 162, 165 (7th Cir. 1988) (describing the decline in inmate attacks at the Marion Federal Penitentiary in the years after the prison was put on permanent lock-down); Tachiki, *supra* note 132, at 1127 & n.93 (citing inmates' aversion to placements at the Marion and Pelican Bay supermax facilities); Berge et al., *supra* note 11, at 105 (discussing supermax as "a behavior management tool secure enough to give even the most challenging inmates a reason to pause and change their long-established behavior patterns"). It should be noted, however, that parties on both sides of the debate acknowledge a general lack of empirical data about the effectiveness of supermax. *See, e.g.*, RIVELAND, *supra* note 136, at 2; Kurki & Morris, *supra* note 6, at 392 ("Since there is practically no empirical research, it is difficult to be sure who is assigned to

Critics of the supermax model, on the other hand, object to the harsh conditions and sometimes arbitrary or unnecessary placement of inmates in the facilities, claiming that the prisons threaten prisoners' mental health and human rights.[154] In particular, psychiatrists argue that long-term solitary confinement and lack of stimulation produce negative effects on inmates' mental health, even in cases where inmates manifested no mental health problems before confinement in supermax.[155] They allege that, given these threats, there is insufficient psychological screening of inmates and insufficient treatment for those with mental health problems.[156] Supermaxes have also drawn criticism for excessive use of force[157] and for denying media access to the prisons.[158] Some critics claim that the abandonment of rehabilitative efforts, combined with seclusion, creates angrier inmates who are poorly adapted to society, and who will pose a greater threat to the public upon their release.[159]

Despite these criticisms, and despite the fact that supermax facilities are much more expensive than traditional prisons,[160] this new type of prison has been very popular politically. In some cases, the call to construct a supermax has come from elected officials, rather than from prison administrators, even

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supermaxes, why they go, who gets out, when they get out, and how they get out." (citation omitted)).

154. *See, e.g.*, COLD STORAGE, *supra* note 7, at 10–11; OUT OF SIGHT, *supra* note 12, at 2–3 ("[F]or many [supermax prisoners], the absence of normal social interaction, of reasonable mental stimulus, of exposure to the natural world, of almost everything that makes life human and bearable, is emotionally, physically, and psychologically destructive.").

155. *See* Madrid v. Gomez, 889 F. Supp. 1146, 1230–31 (N.D. Cal. 1995) (discussing the testimony of expert witnesses regarding a collection of symptoms known as "Reduced Environmental Stimulation," which inmates confined in supermaxes may experience).

156. *See* COLD STORAGE, *supra* note 7, at 13–14; Kurki & Morris, *supra* note 6, at 390, 409–10.

157. *See* RED ONION, *supra* note 146, at 17–24.

158. *See Weekend All Things Considered: Massachusetts Becomes Latest State to Restrict Media Access to Correctional Facilities and Prisoners* (NPR radio broadcast, July 21, 2002) ("According to the Society of Professional Journalists, nine states now bar reporters from conducting face-to-face interviews with inmates . . . up from five states in 1994."). When writer Sasha Abramsky tried to tour supermax facilities, he found administrators far from welcoming: "For this article, only Connecticut opened its supermax doors to me; Arizona, New Jersey, Pennsylvania, Texas, and Virginia all refused to do so." Sasha Abramsky, *Return of the Madhouse*, AM. PROSPECT, Feb. 11, 2002, at 26, 29.

159. *See* COLD STORAGE, *supra* note 7, at 2 (arguing that if, before release, inmates "have been abused, treated with violence, and confined in dehumanizing conditions that threaten their very mental health, they may well leave prison angry, dangerous, and far less capable of leading law-abiding lives than when they entered").

160. *See* RIVELAND, *supra* note 136, at 21 ("In most jurisdictions, operating costs for extended control facilities are generally among the highest when compared to those for other facilities. Facilities that have similar or higher costs tend to be other specialized ones, such as medical or psychiatric facilities."); Abramsky, *supra* note 158, at 28 (comparing yearly costs of $50,000 for a supermax inmate to $20,000 to $30,000 for an inmate in a traditional prison).

when the facilities are not needed.[161] Although the model of the supermax prison is barely twenty years old, the prisons have proliferated rapidly in that time, so that some states with a shortage of medium-security beds now have supermax beds lying empty.[162]

Courts considering inmate challenges to supermax conditions thus have a number of compelling reasons to resolve conclusively the question of the prisons' constitutionality. The extremity of supermax conditions is itself a powerful call for careful constitutional analysis. The novelty of these prisons exacerbates this need, as the absence of directly applicable precedent means that courts must fill in a jurisprudential gap. In addition, the popularity of the prisons and the notion that supermax confinement is the future of corrections mean that these constitutional questions will only become more pressing with time. On the other hand, however, to consider whether supermax conditions violate the Constitution, a court must contend with the powerful pressure exerted by the culture of deference.

B. The Shift Toward a Focus on the Characteristics of Inmates

Three supermax cases from the past nine years, *Madrid v. Gomez*,[163] *Ruiz v. Johnson*,[164] and *Jones'El v. Berge*,[165] illustrate that some federal courts have been radically divided between sympathy for supermax inmates' Eighth Amendment claims and respect for standards of deference. The strategies

161. *See* Jones'El v. Berge, 164 F. Supp. 2d 1096, 1102 (W.D. Wis. 2001). The wardens who called for construction of a supermax prison in Wisconsin originally requested the addition of a total of 100 segregation cells throughout the existing prison system; "their second choice was a 200-bed supermaximum security facility. The governor and legislature chose to build a 500-bed prison that would serve as a segregation facility." *Id.*; *see also* Austin v. Wilkinson, 189 F. Supp. 2d 719, 723 (N.D. Ohio 2002) (taking note that the evidence presented at trial "suggest[ed] that Ohio [did] not need a high maximum security prison or [did] not need one with the capacity of the [supermax]"); RIVELAND, *supra* note 136, at 1 ("In some places, these highly focused institutions have been a component of 'tough on crime' agendas touted by elected officials, combating the assertions of many observers that 'prisons are like country clubs.'").

162. *See Austin*, 189 F. Supp. 2d at 723 (describing how the glut of supermax beds combines with the shortage of regular maximum security cells to "cause[] an imbalance in assigning inmates to appropriate confinement"). Some states fill extra supermax beds with prisoners who would not ordinarily be assigned to supermaximum security confinement. *See* RED ONION, *supra* note 146, at 13–14 (quoting a Virginia supermax inmate who claims the DOC called him "an 'in-fill inmate' . . . [indicating that] they did not have enough assaultive disruptive inmates in the prison system to fill Red Onion"); Abramsky, *supra* note 158 (citing a Florida study in which "fully one-third of the correctional departments across the country that operate supermax prisons report placing inmates in them simply because they don't have enough short-term disciplinary housing in lower-security prisons").

163. 889 F. Supp. 1146 (N.D. Cal. 1995).

164. 37 F. Supp. 2d 855 (S.D. Tex. 1999), *rev'd sub nom.* Ruiz v. United States, 243 F.3d 941 (5th Cir. 2001).

165. *Jones'El*, 164 F. Supp. 2d 1096.

these three courts employ to handle this tension are sufficiently similar to indicate an emerging pattern: All three courts defuse the tension by shifting the focus of their analysis from the nature of the challenged conditions to the characteristics of the inmates themselves.

No court has held that a supermax is unconstitutional per se,[166] and few inmate claims relating to supermax conditions make it very far in the courts.[167] All of the supermax conditions cases discussed in this part therefore stand out because they grant some measure of relief to a subset of inmates. In *Madrid v. Gomez*, the Northern District of California faced a straightforward Eighth Amendment challenge to the recently built Pelican Bay Security Housing Unit (SHU), a supermax in California.[168] Inmates at the SHU filed suit shortly after the prison opened and challenged their conditions of confinement.[169] Along with the other facilities at Pelican Bay, the SHU was "[c]onsidered a prison of the future," characterized by its high-tech modernity.[170] The inmates challenged that model, and claimed that the deprivations of the SHU were a violation of the Constitution.[171] *Madrid* was the first suit that challenged a prison built as a supermax from the ground up. The court held that supermax conditions, in themselves, did not violate the Eighth Amendment.[172]

Ruiz v. Johnson, on the other hand, was part of a decades-long case involving Texas prisons. The Southern District of Texas became involved in 1972, and by 1974 the suit had expanded to become a class action encompassing all Texas inmates.[173] After a lengthy trial, the court ruled in 1981 that the contested conditions violated inmates' constitutional rights, and ordered substantial changes throughout the Texas prison system.[174]

166. *See Morning Edition: The Supermax Prison* (NPR radio broadcast, Jan. 8, 2000) (citing Jamie Fellner of Human Rights Watch for the point that "[n]o judge has ever ruled that a Supermax is a violation of the 8th Amendment's protection against cruel and unusual punishment"); FEELEY & RUBIN, *supra* note 20, at 138–43 (analyzing the reasons why the federal government prevailed in all challenges to conditions at Marion Penitentiary).

167. *See* Schlanger, *supra* note 3, at 1591–92 (discussing the small percentage of all inmate claims that survive dismissal and succeed in court).

168. *Madrid*, 889 F. Supp. at 1155.

169. The court noted that "it [was] not a case about inadequate or deteriorating physical conditions. There [were] no rat-infested cells, antiquated buildings, or unsanitary supplies." *Id.* at 1155.

170. *Id.*

171. *Id.*

172. *Id.* at 1261.

173. *See* Ruiz v. Johnson, 37 F. Supp. 2d 855, 860, 862 (S.D. Tex. 1999). The case was originally called *Ruiz v. Estelle*, 503 F. Supp. 1265 (S.D. Tex. 1980).

174. *Ruiz*, 37 F. Supp. 2d at 862. For the consent decree, see *Ruiz v. Estelle*, 679 F.2d 1115, 1165–68 (5th Cir. 1981). The Fifth Circuit affirmed the District Court's ruling that conditions in

Retaining jurisdiction over the case throughout the 1990s,[175] the court in *Ruiz* addressed two motions by prison administrators to terminate the court's oversight.[176] Prison officials claimed that they had remedied all constitutional violations and that judicial involvement was no longer necessary.[177] The inmates, desiring to maintain court oversight, alleged that "prisoners in administrative segregation, especially those with psychiatric illnesses, [were] suffering cruel and unusual punishment by being deprived of a minimal measure of civilized life's necessities."[178] The court reviewed conditions in Texas's administrative segregation (ad-seg) units, which were based on the supermax model, to determine whether they still violated the Eighth Amendment. The court found that ad-seg conditions continued to violate the Eighth Amendment, and thus maintained its oversight.[179]

In *Jones'El v. Berge*, inmates of a supermax prison in Boscobel, Wisconsin, challenged their conditions of confinement under the Eighth Amendment.[180] The court first granted a preliminary injunction in favor of the inmates.[181] The preliminary injunction ordered the removal of seven mentally ill prisoners from the facility, on the ground that they risked irreparable harm by remaining in supermax while the case was pending.[182] It also ordered psychiatric evaluation of all other inmates.[183] Shortly thereafter, the parties settled with the court's approval.[184]

Texas prisons violated the Eighth Amendment. *See* Ruiz v. Estelle, 666 F.2d 854 (5th Cir. 1982); Ruiz v. Estelle, 650 F.2d 555 (5th Cir. 1981).

175. The court continued to oversee the Texas prison system until 2002. The *Ruiz* litigation ended in a settlement on June 7, 2002, "just 12 days before its 30th birthday." *Central Texas Digest*, AUSTIN AM.-STATESMAN, June 18, 2002, at B2.

176. *Ruiz*, 37 F. Supp. 2d at 865. They filed one motion to vacate the court's 1992 final judgment under Rule 60(b)(5) of the Federal Rules of Civil Procedure, and one motion under the PLRA. *Id.*

177. *Id.*

178. *Id.* at 885.

179. *Id.* at 888. The court's decision was overturned by the Fifth Circuit because it failed to comply with the rigorous requirements of the PLRA. *See* Ruiz v. United States, 243 F.3d 941, 951 (5th Cir. 2001); *see also supra* notes 136–140 and accompanying text. On remand, Judge William Wayne Justice justified his findings, stressing that conditions in administrative segregation still violated the Constitution, and refused to relinquish control over the prison system. *See* Ruiz v. Johnson, 154 F. Supp. 2d 975, 991, 1001 (S.D. Tex. 2001).

180. Jones'El v. Berge, 164 F. Supp. 2d 1096, 1098 (W.D. Wis. 2001).

181. *Id.*

182. *Id.*

183. *Id.*

184. *See* Settlement Agrement, *Jones'El* (No. 00-C-421-C), http://archive.aclu.org/court/litscher.pdf.

All three of these Eighth Amendment cases[185] display marked similarities. In each, the court pointedly criticizes the conditions of confinement challenged in the suit, but tempers that criticism with sincere considerations of the need to show deference to prison administrators.[186] This feature identifies the holdings as the products of a compromise between some impulse to intervene and an obligation to stay out of prison affairs. The courts' strategies for achieving this compromise are also similar, and draw on a method set out first in *Madrid*. There, the court split the plaintiff class into subgroups of mentally ill and mentally healthy inmates.[187] It granted constitutional relief to the vulnerable subgroup of mentally ill inmates, but denied all relief to the more resilient remainder.[188] This move, versions of which both the *Ruiz* and the *Jones'El* courts adopt, links any court-ordered relief to the character of the inmates, rather than the nature of the conditions themselves, and thus allows the courts to protect some inmates without even asking whether the conditions themselves violate the Constitution—much less answering that question in the affirmative.

1. The Impulse to Intervene: Public Criticism of Supermax Prisons

The courts in *Madrid*, *Ruiz*, and *Jones'El* all express shock at the supermax conditions and criticize prison administrations for creating those conditions, even with respect to inmates who are not granted constitutional relief. In doing so, they imply that it is at least possible that these conditions violate the Constitution, and indicate some willingness to act as constitutional enforcers, either through closer investigation or outright intervention.[189]

185. For the sake of simplicity, I lump *Madrid*, *Ruiz*, and *Jones'El* into the category of "Eighth Amendment cases," but this should not be taken to elide the procedural distinctions between these three cases. It should be noted, in particular, that the court in *Jones'El* never ruled on the Eighth Amendment claim, because the parties settled before trial.

186. *See Jones'El*, 164 F. Supp. 2d at 1124–25; Ruiz v. Johnson, 37 F. Supp. 2d 855, 915 (S.D. Tex. 1999); Madrid v. Gomez, 889 F. Supp. 1146, 1264–65 (N.D. Cal. 1995).

187. *Madrid*, 889 F. Supp. at 1265.

188. *Id.* at 1263.

189. The courts also draw attention to the duration and scope of their investigations, making it clear that their reactions come after careful study and consideration of the prisons. In *Ruiz*, for example, Judge Justice specifies that, despite a time limit imposed by the court of appeals, "[d]uring the nineteen days of testimony, the court heard from over 60 witnesses and admitted over 330 exhibits." *Ruiz*, 37 F. Supp. 2d at 885. He also notes that the original order mandating judicial oversight of Texas prisons came after a trial that "lasted longer than any prison case—and perhaps any civil rights case—in the history of American jurisprudence." *Id.* at 862 (quoting Ruiz v. Estelle, 503 F. Supp. 1265, 1390 (S.D. Tex. 1980)). Similarly, *Madrid* describes how the court educated itself about the new Pelican Bay facility, noting that the judge spent two days touring the prison. In a trial

These opinions are thorough and judgmental. *Madrid*, for example, provides a highly detailed description of a facility "on the harsh end of the . . . spectrum" compared to other segregation units.[190] Taking ten pages to set out its findings of fact, the court describes minute details of the prison's architecture, scheduling, and policies, and presents current research about the psychological effects of isolation.[191] The court indicates displeasure even before it reaches its legal analysis of these conditions, calling attention to the "stark sterility" and "unremitting monotony"[192] of the SHU, and stating that "confinement in the . . . SHU severely deprives inmates of normal human contact and substantially reduces their level of environmental stimulation . . . ."[193] In its legal conclusions, the court turns to overtly critical language, noting that, despite its holding against the inmates, "in the Court's view, the totality of the . . . conditions may be harsher than necessary to accommodate the needs of the institution."[194]

Both *Ruiz* and *Jones'El* display a similar concern for inmates. In the order granting a preliminary injunction in *Jones'El*, the question before the court solely concerned the welfare of mentally ill inmates at the prison. Nevertheless, the court devotes nearly three pages to an extensive catalog of the conditions experienced by all inmates at the Wisconsin supermax.[195] The description approaches supermax conditions with sensitivity to the inmates' point of view. It focuses on details such as inmates' inability to control the lighting or temperature in their cells or tell the time of day,[196] and calls attention to the lengths to which an inmate must go to see anything of the outside world: "By standing on the bed and craning his neck, an inmate can glimpse the sky through a small sealed skylight."[197] Like *Madrid*, the *Jones'El* court also relies heavily on expert testimony to establish the severe effects of those conditions,[198] and questions the political motivations underlying the

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that lasted nearly three months, the court heard from ten experts and fifty-seven other witnesses, and reviewed "over 6000 exhibits, including documents, tape recordings, and photographs, as well as thousands of pages of deposition excerpts." *Madrid*, 889 F. Supp. at 1156. Thus, these opinions suggest that it is reasonable for well-informed, neutral observers to be disturbed by conditions in supermax prisons.

190. *Madrid*, 889 F. Supp. at 1230.

191. *Id.* at 1227–37.

192. *Id.* at 1229.

193. *Id.* at 1232.

194. *Id.* at 1263.

195. *See* Jones'El v. Berge, 164 F. Supp. 2d 1096, 1099–1101 (W.D. Wis. 2001).

196. *Id.* at 1100.

197. *Id.* at 1099.

198. *Id.* at 1102–05. For example, the court cited expert Terry Kupers twice, referring to his testimony that, despite experiences inspecting supermaxes in four other states, "[h]e ha[d] never seen an institution with more restrictive conditions than [the Wisconsin] Supermax," *id.* at 1103, and that

decision to build the prison in the first place.[199] *Ruiz* adopts a similar stance, in what is perhaps the least detailed but most judgmental of the opinions. Its findings of fact begin by calling ad-seg conditions "virtual incubators of psychoses-seeding illness," even for healthy inmates.[200]

The courts' open criticism of supermax and sympathy for inmates suggest that they entertain some impulse to intervene in these situations.[201] In fact, the administrators of the Wisconsin supermax in *Jones'El* found the preliminary injunction order to be so ominously critical of the supermax that it was cited as a likely influence behind the state's decision to settle the prisoners' claims rather than risk a ruling in favor of the inmates.[202] But these expressions of courts' discomfort with supermax conditions are only half the story of these opinions; the pressure to defer exerts just as powerful a pull on courts as their shock at supermax conditions.

"the conditions at Supermax are so isolating that they are 'toxic' for seriously mentally ill inmates," *id.* Likewise, the court cited the testimony of a second expert, who "consider[ed] the conditions . . . as among the most restrictive he ha[d] ever seen. In his view, they 'border[ed] on barbarism.'" *Id.*

199. *See id.* at 1102.

> Supermax was built to respond to a perceived need by wardens for an increased number of segregation cells for dangerous and recalcitrant inmates. The wardens' first choice was to add 25 segregation cells at each of the four major adult male institutions; their second choice was a 200-bed supermaximum security facility. The governor and legislature chose to build a 500-bed prison that would serve as a segregation facility.

Id.

200. Ruiz v. Johnson, 37 F. Supp. 2d 855, 907 (S.D. Tex. 1999).

201. These features may also serve to distance the judges from the results they reach. As Robert Cover notes:

> [O]ccasionally one finds the judicial opinion used to suggest the immorality of the law. Very often this suggestion is coupled with a statement that the judge is, nevertheless, bound to apply the law, immoral as it may be. . . . The judge may be telling us: I know the result reached is morally indefensible and I wish primarily that you understand the sense in which I have been compelled to reach it.

ROBERT M. COVER, JUSTICE ACCUSED 119 (1975).

202. *See* Phil Brinkman, *Officials Debate Prison Settlement*, WIS. ST. J., Jan. 17, 2002, at B1 (describing a Wisconsin Department of Corrections official Jon Litscher's comment that "the prospect of a [District Judge Barbara] Crabb ruling 'certainly c[ame] into play,'" in the prison administration's acceptance of the settlement, and noting legislators' concerns about Judge Crabb's "judicial philosophy" and perceived liberal stance in prison cases); David Callender, *Supermax Accord Is Defended*, MADISON CAP. TIMES, Jan. 17, 2002, at 1A ("Many interpreted Crabb's ruling as a sign she might order other major changes at the prison and suggested that the settlement was a way to prevent further judicial oversight of the prison's management."); Richard P. Jones, *Governor Wary of Supermax Deal*, MILWAUKEE J. SENTINEL, Jan. 14, 2002, at 1B (citing Wisconsin legislator Scott Walker's indication that "the corrections secretary decided to settle because the state's legal team feared Crabb might close the prison," and quoting Walker's assessment of prison officials' "fear . . . that Judge Crabb was such a liberal judge that she would step in and essentially shut them down").

2. The Impulse to Defer: "Acute Sensitivity" to the Judiciary's Limited Role

The courts in these three cases find supermax conditions severe enough to merit public criticism from the bench, but they temper their criticism with repeated acknowledgments that courts should defer to the decisions of prison administrators.

Again functioning as the paradigmatic supermax case, the *Madrid* opinion is riddled with the court's meditations on the limits of its ability to intervene:

> Throughout these proceedings, we have been acutely sensitive to the fact that our role in Eighth Amendment litigation is a limited one. Federal courts are not instruments for prison reform, and federal judges are not prison administrators. We must be careful not to stray into matters that our system of federalism reserves for the discretion of state officials.[203]

The depth of the court's anxiety about confronting the culture and doctrine of deference appears in repeated reminders,[204] as the opinion asks whether "the evidence . . . demonstrate[s] that the conditions in the Pelican Bay SHU inflict mental harm so serious or severe that they cross the constitutional line."[205]

Even the *Jones'El* court, which was considering only a preliminary injunction, acknowledged that the court owed "due deference" to the defendants, and couched each concession to inmates in language that emphasized the limited nature of the court's interference. Thus, the court's order noted that its refusal to order monthly psychiatric monitoring was "[i]n deference to defendants' independence in prison management."[206] Similarly, the court ruled that only those inmates at risk of developing serious mental illness needed psychiatric evaluation, rather than all inmates.[207] Even in matters as specific as defining which inmates qualified as "at-risk," the court justified its decision in deferential language: "By ordering the evaluation of these segments of the population only, the court interferes in the management of Supermax to a minimal degree yet casts the net wide enough to catch any seriously mentally ill inmates who are stuck at Supermax because of their disability."[208]

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203. Madrid v. Gomez, 889 F. Supp. 1146, 1279 (N.D. Cal. 1995).
204. *See id.* at 1262–63.
205. *Id.* at 1264.
206. Jones'El v. Berge, 164 F. Supp. 2d 1096, 1125 (W.D. Wis. 2001).
207. *Id.* at 1124–25.
208. *Id.* at 1125.

In contrast, the *Ruiz* opinion demonstrates the risk a court faces when it fails to conform to the culture of deference. There, the court gives little regard to standards of deference, and instead emphasizes the elasticity and adaptability of Eighth Amendment standards,[209] pointing out that factors that might not individually violate the Constitution may combine to do so.[210] The opinion stresses a "dynamic" interpretation of the Eighth Amendment that was "dependent not on hard, fast rules, but [on] 'civilized standards, humanity and decency.'"[211] Its tone is more hostile than deferential, criticizing the defendants for trying to avoid evidentiary hearings and accusing them of refusing to acknowledge their shortcomings.[212] When prison administrators appealed, the Fifth Circuit reversed the court's ruling for failing to make the specific findings required by section 3626(b)(3) of the PLRA.[213] The Fifth Circuit remanded the case for the district court to make those findings in support of its initial ruling, or terminate the judgment.[214] On remand, Judge Justice was forced to acknowledge that Supreme Court precedent demanded "wide discretion" for prison officials, though he qualified this realization with a reminder that "'the federal courts have the power, and the duty, to make their intervention effective.'"[215] The district court's initial impetuous dismissal of standards of deference was probably due to the case's reform-era roots, but the Fifth Circuit and the PLRA—two crucial mechanisms enforcing the culture of deference—combined to correct that misstep and pull the court into alignment with contemporary requirements.

3. Strategic Compromise: Shifting the Focus to the Plaintiffs' Vulnerabilities

The dual obligations animating *Madrid*, *Ruiz*, and *Jones'El* appear to be irreconcilable; it seems impossible both to intervene in enforcement of the Constitution and to defer to prison administrators. The relief granted to

209. *See* Ruiz v. Johnson, 37 F. Supp. 2d 855, 914 (S.D. Tex. 1999).

210. *Id.* (citing Rhodes v. Chapman, 452 U.S. 337 (1981), and Wilson v. Seiter, 501 U.S. 294 (1991)).

211. *Id.* (quoting Estelle v. Gamble, 429 U.S. 97, 102 (1976)).

212. In setting out the legal basis for prisoners' Eighth Amendment rights, the court focused on the rights prisoners have to the protection of the Constitution. *Id.* at 886. In a separate part of the opinion dealing with the constitutionality of the PLRA, the court cited arguments made by PLRA advocates in Congress advocating greater judicial deference, but in a bold move proceeded to find the PLRA unconstitutional. *Id.* at 873–82. This finding was reversed by the Fifth Circuit. *See* Ruiz v. United States, 243 F.3d 941, 952 (5th Cir. 2001).

213. *Ruiz*, 243 F.3d at 953.

214. *Id.* at 952.

215. Ruiz v. Johnson, 154 F. Supp. 2d 995, 1000 (S.D. Tex. 2001) (quoting Smith v. Sullivan, 611 F.2d 1039, 1044 (5th Cir. 1980)).

some inmates in all three cases is the result of a decision to shift the focus of analysis from the conditions of confinement to the character of the plaintiffs. Given the scarcity of Eighth Amendment–related rulings that favor supermax inmates, these three opinions together suggest that the repetition of this strategy is not just coincidence, but rather a pattern emerging in response to the intensity of the pressure to defer.

a. *Madrid*

Madrid sets out the paradigmatic solution to the supermax dilemma. After "conclud[ing] that the record and the law do not fully sustain the position advocated by either plaintiffs or defendants,"[216] the court compromised by finding an Eighth Amendment violation, but only for a subset of inmates. To reach this conclusion, the court carved up the plaintiff class into different groups based on their susceptibility to the harsh conditions of supermax. "Certain subgroups" of the population,[217] who were "at a particularly high risk for suffering very serious or severe injury to their mental health,"[218] were entitled to constitutional protection. The remainder of the SHU inmates "cannot prevail on the instant claim by pointing to the generalized 'psychological pain' . . . that inmates may experience by virtue of their confinement in the SHU."[219]

By dividing the plaintiff class into groups and extending protection to one group while denying it to the other, the court was able to indulge both of its competing concerns. On one hand, the strategy allowed it to voice unreservedly its discomfort with the SHU by passionately speaking out for the vulnerable group of mentally ill inmates:

> For these inmates, placing them in the SHU is the mental equivalent of putting an asthmatic in a place with little air to breathe. The risk is high enough, and the consequences serious enough, that we have no hesitancy in finding that the risk is plainly "unreasonable." Such inmates are not required to endure the horrific suffering of a serious mental illness or major exacerbation of an existing mental illness before obtaining relief.[220]

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216. Madrid v. Gomez, 889 F. Supp. 1146, 1261 (N.D. Cal. 1995).

217. *Id.*

218. *Id.* at 1265. This subgroup includes inmates who are "already mentally ill, as well as persons with borderline personality disorders, brain damage or mental retardation, impulse-ridden personalities, or a history of prior psychiatric problems or chronic depression." *Id.*

219. *Id.* at 1263.

220. *Id.* at 1265–66.

On the other hand, the court could also respect the doctrine and culture of deference by refusing to intervene on behalf of the healthy prisoners, dismissively stating that "[t]he Eighth Amendment simply does not guarantee that inmates will not suffer some psychological effects from incarceration or segregation."[221]

Having made this distinction and articulated its double holding, the court used public sympathy for mentally ill inmates in defense of its incursion into prison affairs, stressing the likeliness and severity of the harm facing the subgroup:

> [a] risk this grave—this shocking and indecent—simply has no place in civilized society. It is surely not one 'today's society [would] choose[ ] to tolerate.' Indeed, it is inconceivable that any representative portion of our society would put its imprimatur on a plan to subject the mentally ill and other inmates described above to the SHU, knowing that severe psychological consequences will most probably befall those inmates.[222]

By portraying the violation of mentally ill inmates' rights as an unquestionably egregious offense, the court made regulation of the SHU—at least for certain inmates—look like an obvious necessity. To the extent that the court's interference is necessary, it cannot be an abuse of discretion. Thus, by creating a subgroup of inmates for whom supermax conditions can be characterized as unquestionably "shocking and indecent," the court sanitized the offense of its intervention.

b. *Madrid* Applied: *Ruiz* and *Jones'El*

The *Madrid* reasoning reverberates in *Ruiz*[223] and *Jones'El*, with some variation. Both cases, like *Madrid*, shift the focus of the court's analysis away from confinement conditions and onto the character of inmates.

The *Ruiz* court adapts *Madrid* to suit its more plaintiff-centered ends, using the vulnerability of the mentally ill inmate plaintiffs to infuse the entire plaintiff class with greater vulnerability, thus justifying its grant of relief. The structure of the opinion suggests that the court separates its

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221. *Id.* at 1264.

222. *Id.* at 1266.

223. This may be due in part to the influence of the plaintiffs' brief, which the opinion suggests made an alternative argument that mentally ill inmates should be protected from ad-seg conditions, even if other inmates were not. *See* Ruiz v. Johnson, 37 F. Supp. 2d 855, 885 (S.D. Tex. 1999) ("[P]laintiffs . . . allege that prisoners in administrative segregation, *especially those with psychiatric illnesses*, are suffering cruel and unusual punishment by being deprived of a minimal measure of civilized life's necessities." (emphasis added)).

analysis of ad-seg's effects on the mentally ill from that of the effects on healthy inmates. The opinion's reasoning, however, extensively intermingles its discussions of mentally ill and mentally well prisoners. The court's analysis of the conditions of confinement includes a separate section addressing mentally ill inmates, creating the impression that the court's discussion of mentally ill inmates is confined to an explicitly distinct portion of the opinion. In fact, however, the court frequently uses the behavior of mentally ill prisoners to illustrate ad-seg's effects on the general inmate population. For example, under the heading "The Psychological Effects of Administrative Segregation,"[224] which appears to apply to the inmate population in general, the court identifies the testimony of an expert witness who spoke almost exclusively about mentally ill prisoners as "[t]he most compelling testimony on the appalling world of ad-seg."[225] In fact, only one paragraph in the court's discussion of ad-seg's psychological effects addresses inmates who were not mentally ill. In that paragraph, the court refers to expert testimony establishing that "even psychologically healthy people living in ad-seg under these kinds of deprivations would be negatively affected."[226] The court's use of the conditional "would" signals that the negative effects actually observed were limited to the mentally ill.

The apparently bifurcated structure of the opinion extends to the holding: "[s]eparately from, and independent of, the determination that the conditions of deprivation in administrative segregation violate the constitution, it is found that administrative segregation is being utilized unconstitutionally to house mentally ill inmates—inmates whose illness can only be exacerbated by the depravity of their confinement."[227] But despite the vivid examples it offers of mentally ill inmates suffering under ad-seg conditions, the court provides little support for its holding that mentally healthy inmates suffered actual psychological harm.[228] In addition, although its finding of defendants' deliberate indifference is based on "the obvious severity of [mentally ill] inmates' needs," the court does not discuss the basis for its finding that defendants were also deliberately indifferent toward the harm inflicted on

224. *Id.* at 907.

225. *Id.* at 908. The court cited Haney's observation that "there appear to be people who are housed there who are manifesting signs and symptoms of some form of psychological disorder," *id.* at 909, and the long passages of expert testimony quoted in this part of the opinion all illustrate cases which, according to Haney, "were not subtle diagnostic issues," *id.* at 910.

226. *Id.* at 910 (discussing the testimony of expert Craig Haney).

227. *Id.* at 915.

228. The court did note that "[i]t was testified . . . that most people require social interaction," but provided no further details. *Id.* at 910.

mentally healthy inmates.[229] In essence, the court argues that supermax conditions "clearly violate constitutional standards when imposed on the subgroup of the plaintiffs' class made up of mentally-ill prisoners,"[230] and then elides the differences between this "subgroup" and the class as a whole in order to find that the conditions violated the constitutional rights of all inmates exposed to them. This strategy infuses the entire class with the greater vulnerability of the mentally ill prisoners, which in turn magnifies the harm faced by all inmates. The result is that the conditions of confinement appear to be a clearer violation than they might otherwise appear if analyzed in the context of a mentally healthy population.

In *Jones'El*, the shift of the analysis from supermax conditions to the characteristics of the inmates is even more complete, albeit subtle. Because *Jones'El* did not go to trial, the court faced more narrowly focused questions than those faced by either the *Madrid* or the *Ruiz* courts. As a result, the tension between competing interests appears to be more understated than in the previous cases, as does the resolution of that tension. The court never had the chance to subdivide the plaintiff class, for instance, because the class carved itself into subgroups by asking for a preliminary injunction to exclude certain mentally ill prisoners from the supermax prison. But the court was able to define which plaintiffs could be considered mentally ill and which could not. This definitional question performed an analogous function to *Madrid*'s division of the plaintiff class to protect some inmates but not others.

The *Jones'El* court had two opportunities to define groups of inmates and thereby influence who would remain at the supermax facility and who would go. The first was in an order granting the preliminary injunction that excluded mentally ill inmates from the prison, in which the court defined the "at risk" groups eligible for psychiatric testing, a prerequisite to exclusion.[231] The second came as a result of the parties' settlement agreement, which formalized the court's exclusion of mentally ill inmates from the prison and left to the court the task of defining what constituted "mental illness."[232] Thus, although the pressure to exclude inmates from supermax prison had to do with the facility's harsh conditions, the court's two decisions about whether inmates must live in the prison focused on the characteristics of the inmates.

229. *Id.* at 915.
230. *Id.*
231. Jones'El v. Berge, 164 F. Supp. 2d 1096, 1125 (W.D. Wis. 2001).
232. Settlement Agreement, *Jones'El* (No. 00-C-421-C), http://archive.aclu.org/court/litscher.pdf.

Given these opportunities, the court chose to apply expansive definitions of "at-risk" inmates and "serious mental illness," and thus used group definitions as a way to keep inmates out of the supermax prison. The court first opted for a broad definition of the "at-risk" inmates who were to be psychiatrically evaluated, including even symptom-free inmates whose only risk factor was having spent a certain amount of time in the more restrictive areas of the prison.[233] Then, when it went on to define "serious mental illness" pursuant to the terms of the settlement agreement, the court adopted the definition proposed by the plaintiffs, which was similar to the definition adopted in *Madrid*.[234] The court found that the defendants' definition was inadequate because it could keep "'the evaluators from reaching a conclusion of serious mental illness when everything else in their reports pointed in that direction.'"[235]

As discussed above, however, the *Jones'El* court was attentive to the culture of deference even in these minor issues.[236] This indicates that consciousness of its obligation to defer permeated even those decisions affecting who could be subjected to supermax conditions. In this way, the tension between constitutional enforcement and deference structured the court's analysis away from the constitutionality of conditions themselves, and shifted the court's focus to an inquiry into the vulnerability of the supermax inmate plaintiffs. Thus, in *Jones'El*, the constitutional question of whether the Eighth Amendment tolerates conditions of confinement in the supermax facility gives way to the question of how to define a mentally ill inmate.

Together, *Ruiz* and *Jones'El* demonstrate that *Madrid*'s analysis was not an isolated rhetorical strategy. In all three cases, inmates asked the courts to

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233. *Jones'El*, 164 F. Supp. 2d at 1125. Inmates who were "at-risk" of developing serious mental illness, and therefore eligible for psychiatric screening, included:

> [T]hose prescribed psychotropic medications; those who have been hospitalized in a psychiatric institution at any time; those who have spent longer than 30 days at Level One; those who have spent longer than 90 days at Supermax without progressing beyond Level Two; and those who have been placed in the observation unit on suicide watch.

Id.

234. Kevin Murphy, *Another Win for Supermax Inmates*, MADISON CAP. TIMES, Apr. 16, 2002, at 2A. In *Madrid*, the court identifies as "very serious or severe injur[ies] to . . . mental health" a list of conditions "including overt paranoia, psychotic breaks with reality, or massive exacerbations of existing mental illness." Madrid v. Gomez, 889 F. Supp. 1146, 1265 (N.D. Cal. 1995).

235. Murphy, *supra* note 234 (quoting District Judge Barbara Crabb). The defendants had proposed "a definition that allowed inmates to remain confined even if they had been misdiagnosed or had a temporary disorder." *Id.* The plaintiffs had proposed the definition adopted in *Madrid*. *See id.* The court objected to the defendants' proposal because it required that "the evaluator find that the inmate is unable to conform his behaviors to administrative rules." *Id.*; *see also* Editorial, *Another Win for Inmates*, MADISON CAP. TIMES, Apr. 18, 2002, at 14A.

236. *See supra* notes 206–208 and accompanying text.

consider the constitutionality of supermax's conditions. In all three cases, the courts ended up probing those inmates' fitness to live in supermax. And in all three cases, despite expressions of dismay at the challenged conditions, any relief granted was based not on the severity of those conditions, but on the resilience of the inmates who challenged them.

C. The Problem with the *Madrid* Strategy

Although these Eighth Amendment supermax cases benefit some inmates in the short term, the strategy they use to grant relief has the potential to harm inmates in the long term. The pattern that emerges in these three opinions shows that courts are inclined to make inmates' mental health, rather than the decisions of the prison administrators, the crux of their conditions of confinement analysis. Such a strategy shifts the courts' legal inquiries away from the target of the litigation—supermax conditions—and suggests that even more restrictive conditions could be within constitutional limits, as long as they were applied to more resilient inmates. These cases therefore set a dangerous precedent—and potentially contribute to the narrowing of Eighth Amendment protection—by creating the possibility that future inmates, if portrayed as resilient and unsympathetic, could be beyond the protection of the Eighth Amendment and thus more vulnerable to abuse.[237]

It may at first appear to be an overstatement to claim that these opinions pose a threat to the Eighth Amendment. First, such a claim seems like an ironic side effect of three rare opinions that stand out by granting inmates any relief at all. In addition, similar strategies for resolving tension between conflicting obligations have been documented in other legal contexts, and did not lead to lasting harm.[238] It might seem reasonable to dismiss

237. Craig Haney and Mona Lynch describe this risk as follows:

> Unfortunately, this portion of the opinion could easily be misinterpreted to mean that no prison can be considered psychologically cruel and unusual unless it is highly likely to drive its prisoners crazy. . . . [I]f consistently misapplied, this extraordinary threshold of cognizable Eighth Amendment psychic pain, limited to those things that create a high risk that everyone exposed to them will become seriously mentally ill, could legitimize virtually any form of degrading, inhumane, and psychologically abusive treatment in prison, no matter how extreme and otherwise harmful. This is because no known set of conditions, in prison or out, can create a high probability that everyone who experiences them will suffer serious mental illness as a result. If this were to become the legal standard by which the psychological significance of the pains of supermax and solitary confinement were judged, it would be no standard at all.

Haney & Lynch, *supra* note 132, at 557 (footnote omitted).

238. Robert Cover, for instance, analyzes "the judicial work of conflicted men" through the context of judicial responses to fugitive slave laws, noting "a general, pervasive disparity between

these cases as mere rhetorical posturing unlikely to produce any lingering effects, or even welcome them as innovative ways to grant relief in the face of overwhelming pressures not to do so.[239]

If the behavior of these courts occurred in isolation, it might be less significant. But in the context of prison conditions, this pattern of behavior plays into the larger problem of what Malcolm Feeley and Edward Rubin call the "[m]odern constitutional prison,"[240] and is therefore cause for concern. As Feeley and Rubin explain:

> The modern constitutional prison is a mixed blessing . . . . Conditions and practices are much improved and the constitutionalization of the process assures that these improvements are likely to be permanent. But the mission of prisons and jails remains safety and security by means of a tight system of control. Judicial reform has, on balance, enhanced the ability of officials to pursue this mission: they are now more, not less, effective and efficient. As such, the courts may have contributed to an increased willingness to rely on prisons and even to the increasing oppressiveness that results from the development of supermaximum institutions.[241]

Because supermax prisons were conceived of and built after the prison reform movement ended, they were designed to comply with the law,

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the individual's image of himself as a moral being, opposed to human slavery as part of his moral code, and his image of himself as a faithful judge, applying legal rules impersonally—which rules required in many instances recognition, facilitation, or legitimation of slavery." COVER, *supra* note 201, at 227–28. He shows how antislavery judges called on to enforce fugitive slave laws tended towards certain "patterns" of behavior to reduce the tension between their perceived moral and legal obligations. *Id.* at 229–38. Specifically, he describes how these judges "consistently gravitated to the formulations most conducive to a denial of personal responsibility and most persuasive as to the importance of the formalism of the institutional structure for which they had opted." *Id.* at 229. The behavior of the *Madrid* and *Ruiz* courts appears to have much in common with the behavior Cover describes. Nonetheless, although judges who opposed the fugitive slave laws sometimes upheld them, the fugitive slave laws eventually ceased to exist.

239. In his discussion of judicial behavior in the face of moral conflict, Paul Butler draws a distinction between "creative judging" and "subversive judging." *See* Paul Butler, Subversive Judges (Oct. 31, 2003) (on file with author). A "creative" judge "believes that she is right on the merits of the law, even if her position is not supported by precedent or other traditional authority," and thus "practically invites judicial review." *Id.* A "subversive" judge, on the other hand, "believes that the outcome she desires is unsupported by law," but "pretends otherwise." *Id.* There is some indication that the judges in these three Eighth Amendment supermax cases thought they were being "creative," or even "subversive," in Butler's sense. Their juxtaposition of criticism and deference gives the impression that they felt they were testing a boundary, trying to see how far they could go. As this Comment argues, however, contemporary Eighth Amendment jurisprudence so greatly constrains federal courts that the very strategies they use to test its boundaries inadvertently end up reinforcing it. Because of this dynamic, I argue that it is inaccurate to characterize these supermax cases as "creative," much less "subversive."

240. FEELEY & RUBIN, *supra* note 20, at 375.

241. *Id.*

including Supreme Court precedent relating to conditions of confinement.[242] They are clean, new, and safe—different in every way from the prisons that drew public attention during the reform movement.[243] If any aspect of supermax threatens inmates' welfare, it is the facilities' novel regime of high-tech, systematic psychological and sensory deprivation. But because these features were not contemplated by the prison cases of the reform movement, the case law is silent on their constitutionality.[244] This is precisely the danger of the "constitutional prison": An assumption exists that because the period of prison reform is "over" and the rules for constitutional prisons have already been set, no new development in prison design or management that complies with existing standards can ever be held unconstitutional.[245]

Any strategy for safeguarding inmate welfare against innovative harsh prison conditions in the future must therefore contend with the problem of the "constitutional prison." The Eighth Amendment supermax cases discussed here are dangerous not only because they fail to contend with the problem, but because they actually exacerbate it. By linking their relief to the vulnerabilities of the inmates and avoiding analysis of the conditions themselves, these opinions implicitly assume that conditions in supermax prisons are similar enough to those in conventional prisons that they can be appropriately subjected to the constitutional analysis developed for conventional prisons. As discussed above, though, both corrections professionals

242. Joan Dayan calls Arizona's Special Management Unit, one of the first supermaxes and the model for Pelican Bay, "the least lawful lawful prison," because "[t]he directives for creating [it] . . . were laid out in the law." Joan Dayan, *Held in the Body of the State: Prisons and the Law*, in HISTORY, MEMORY, AND THE LAW 183, 203 (Austin Sarat & Thomas R. Kearns eds., 1999).

243. *See, e.g.*, Madrid v. Gomez, 889 F. Supp. 1146, 1155 (N.D. Cal. 1995) ("This, then, is not a case about inadequate or deteriorating physical conditions. There are no rat-infested cells, antiquated buildings, or unsanitary supplies.").

244. This is not to say that prisons in the United States have never used solitary confinement. *See* Haney & Lynch, *supra* note 132, at 481–88. Haney and Lynch note that "we appear to have come full circle on the issue of solitary confinement, with the emerging supermax prisons form putting a technological spin on an old and long-discredited idea." *Id.* at 569. The first American prisons did rely heavily on solitary confinement, but concerns about the ill effects of the practice led to its abandonment long before the prison reform movement began. *See id.* Solitary confinement continued to be used as a disciplinary measure throughout the reform period, and there are cases that address its constitutionality. *See id.* However, it is supermax facilities' high-tech, systematic reliance on solitary confinement, combined with extreme sensory deprivation, that is new. *See id.* at 569.

245. *See* Margo Schlanger, *Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 MICH. L. REV. 1994, 1998 n.19 (1999).

> I would . . . second Feeley and Rubin's worry that by promoting the comforting idea of the 'lawful prison,' the litigation movement may have smoothed the way for ever-harsher sentences and criminal policies and contributed to the current situation, in which our prisons and jails confine over 1.8 million people at last count—.66% of the nation's total population.

Id.; *see also* Haney & Lynch, *supra* note 132, at 570 ("Ironically, . . . these 'prisons of the future' promise to return us to some of the worst norms of the nineteenth century.").

and human rights activists agree that supermaxes are qualitatively different from conventional prisons.[246] Nonetheless, as this Comment has shown, even the most sympathetic courts refrain from an examination of the legal implications of this difference. These courts could have asked a variety of questions: Does supermax incarceration threaten types of harms or a degree of harm not contemplated by existing conditions of confinement analysis? Does its unusual combination of deprivations merit greater scrutiny? Should the constitutionality of prison conditions depend on the resilience of the inmates? By refusing even to ask these questions, much less answer them, these courts have created legal precedent that reinforces the restrictive nature of Eighth Amendment conditions of confinement jurisprudence. This precedent thus limits the protection of the Eighth Amendment to abuses that existed at the time of reform and makes it more difficult for constitutional protections to evolve with innovations in conditions of confinement.

An element of the *Jones'El* settlement illustrates how the strategy of these cases might, if carried to an extreme, place supermax conditions permanently beyond the reach of the Constitution. The court-approved settlement in *Jones'El* consisted mainly of provisions relating to issues such as lighting, exercise time, and personal possessions. Two of the provisions, however, stood out because they required name changes.[247] The supermax prison could no longer be called "Supermax," and the inmates could no longer be called "the worst of the worst."[248] Supermax supporters ridiculed these changes, interpreting them as an absurd retreat from the mission of the prison.[249] The inmates, however, insisted that the former terms were

246. *See supra* note 141.

247. *See generally* Settlement Agreement, Jones'El v. Berge, 164 F. Supp. 2d 1096 (W.D. Wis. 2001) (No. 00-C-421-C), http://archive.aclu.org/court/litscher.pdf.

248. *See id.* at 4.

249. One Republican legislator called it "a 'politically correct fiasco,'" and "suggest[ed] the prison be renamed the 'Jon Litscher Kittens and Rainbow Suites,' after Corrections Secretary Jon Litscher." Phil Brinkman, *Lawmaker Rips Supermax Deal*, WIS. ST. J., Jan. 5, 2002, at B1. He explained: "'Everyone loves kittens and rainbows, so with that name we should all feel warm and fuzzy toward the worst rapists and murderers in Wisconsin' . . . ." Steven Walters, *Supermax Deal Coddles Prisoners, GOP Lawmakers Say*, MILWAUKEE J. SENTINEL, Jan. 5, 2002, at 1A. A local newspaper publisher came up with another suggestion: "Perhaps we could work a deal with Holiday Inns of America to name the Supermax the Boscobel Holiday Inn . . . . Can't you just see the commercial with the warden yelling at inmates basking in the sun adjacent to the new outdoor recreation facilities, What do you think this is . . . Holiday Inn?" *Why Not Call Prison Boscobel Holiday Inn?*, WIS. ST. J., Jan. 20, 2002, at C1. The same writer "also suggest[ed] that to avoid the harshness of prison terms, inmates be judged 'not-not-guilty,' sentences be changed to 'length of your reservation,' cells be called suites, and guards [be] given the title of concierge." *Id.*

dehumanizing and hindered rehabilitation, and were pleased with these settlement provisions.[250]

Despite inmates' positive reception of these changes, the context of the culture of deference shows that these changes are not beneficial to supermax inmates. The court's endorsement of the name changes demonstrates judicial willingness to deflect attention away from a constitutional consideration of supermax prisons' distinct characteristics. By signing off on a provision that essentially named the prison "not supermax," the court was not only complicit in glossing over the qualitative differences between supermax and conventional prisons, as *Madrid* and *Ruiz* do, but actively engaged in softening the image of the supermax prison without changing the nature of the conditions themselves. Such a move undoubtedly relieves some of the tension facing courts in supermax litigation, as does *Madrid*'s strategy of refocusing on the issue of mental illness. It does so in an intensely deferential way, however, by reducing the likelihood that future courts will note any difference between supermax conditions and conventional prison conditions. The changes are therefore problematic because they carry dissonance-reducing strategy to a new level, eliminating the tension between the harsh conditions and the culture of deference by eliminating a public sign of the supermax prison's distinctiveness: its name.[251]

The logic behind the strategies employed by *Madrid*, *Ruiz*, and *Jones'El*, when carried to an extreme, thus threatens to make the difference between supermax and conventional prisons disappear. It is this tendency that contributes to the problem of the "modern constitutional prison" and threatens to further constrain the use of the Eighth Amendment for future inmates who challenge other innovative conditions of confinement. As a result, it is an unsatisfactory response to the problem of protecting prisoners' constitutional rights in the context of the culture of deference.

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250. *See* Walters, *supra* note 249.

251. For an interesting argument about the role of changing definitions in preserving disfavored practices in prisons, see generally Dayan, *supra* note 242. Dayan argues that "[p]unishment, and the legal assurance that it be *reasonably* sustained, depends on the selective forfeiture of remembrance." *Id.* at 198. As one example, she comments on the transformation of Alcatraz from "the most infamous of maximum-security facilities" to something like a "theme park," as its harsh conditions have been erased and transformed into historical "entertainment." *Id.* at 192. She notes that although "[t]he myth of Alcatraz makes what has never disappeared from the American prison a relic of days gone by," *id.* at 192,

> [c]onsidering the utter deprivation of the new, super, maxi-maximum security prisons—where the isolation once limited to the "disciplinary cell," "solitary," or "dry cell" has been extended to encompass an entire prison complex—the mythification of atrocity in the ruins of Alcatraz ensures the continuation of even harsher practices.

Id. at 193.

III. ANOTHER APPROACH: THE FOURTEENTH AMENDMENT

Because the culture of deference has impinged so dramatically on the scope of the Eighth Amendment in conditions of confinement cases, it may be necessary for prisoners' rights advocates to look to other constitutional provisions for protection. One recent case suggests that the Fourteenth Amendment may provide an alternative form of relief.

In *Austin v. Wilkinson*,[252] after the inmates' Eighth Amendment claim was settled, a federal court found that the conditions of confinement in an Ohio supermax prison were sufficiently different from conditions in conventional prisons to trigger procedural due process protection for inmates. The court therefore required notice and an opportunity for a hearing before inmates could be transferred to the facility.[253]

Because of the heightened threshold set out in *Sandlin v. Conner*,[254] to find that the transfer of inmates to supermax infringed upon a liberty interest, the court had to determine whether supermax conditions represented "an atypical and significant hardship in relation to the ordinary incidents of prison life."[255] The claim thus required the court to conduct a thorough analysis of conditions at the Ohio supermax facility. As in *Madrid*, *Ruiz*, and *Jones'El*, the court made an extensive catalog of conditions, criticized the prison administration, and expressed sympathy for inmates. Overall, the court was "perplexed"[256] by the "troublesome trend[s]" it found.[257] It criticized the political nature of the prison, noting that "evidence at trial suggest[ed] that Ohio does not need a high maximum security prison or does not need one with the capacity of the [supermax]."[258] The court also found fault with the administration for assigning and retaining prisoners in the supermax prison for arbitrary and inconsistent reasons.[259] These criticisms reveal the court's displeasure with the Ohio supermax prison. Based on its analysis, the court concluded that the "nature and duration of restrictions at the [prison]

252. 189 F. Supp. 2d 719 (N.D. Ohio 2002).
253. *Id.* at 743.
254. 515 U.S. 472, 484 (1995); *see also supra* Part I.A.2.
255. *Austin*, 189 F. Supp. 2d at 721 (citing *Sandin*, 515 U.S. at 484).
256. *Id.* at 734.
257. *Id.* at 735.
258. *Id.* at 723. As a result of the surplus beds at the supermax facility, the prison administration operated "from a conflicted position," because "[a]fter the huge investment in the OSP, Ohio risks having a 'because we have built it, they will come' mind set." *Id.* at 724. These concerns are not unique to the Ohio supermax prison. *See* Jerry R. DeMaio, Comment, *If You Build It, They Will Come: The Threat of Overclassification in Wisconsin's Supermax Prison*, 2001 WIS. L. REV. 207.
259. *Austin*, 189 F. Supp. 2d at 726–36.

are conditions not expected by those serving similar incarcerations."[260] In part because these conditions were "qualitatively different,"[261] the inmates held a liberty interest that was implicated by transfer to the supermax facility.[262]

Unlike the three Eighth Amendment opinions, however, *Austin* does not accompany its criticism with statements about the court's obligation to defer. Instead, in the thirty-five-page opinion, the court's discussions of deference are limited to precisely two paragraphs before its analysis of procedural due process,[263] and a short acknowledgment of the constraints imposed by the PLRA in its section on relief.[264] The minimal discussion of deference, together with the plaintiffs' attorney's assessment of the verdict as "a momentous victory,"[265] would seem to suggest that it is inappropriate to use *Austin* as an illustration of the constraints imposed by the culture of judicial deference in supermax litigation. Closer attention to the content of this "momentous victory," however, shows that *Austin* is indeed an important part of the discussion about supermax and judicial deference.

When the inmate plaintiffs in the Eighth Amendment cases challenged their conditions of confinement, the relief they sought was a change in those conditions. Inmates' constitutional rights were thus pitted directly against prison administrators' decisions concerning how to run their prisons. The tension between constitutional enforcement and judicial deference was therefore at its peak. In a Fourteenth Amendment procedural due process case like *Austin*, by contrast, victorious plaintiffs are only entitled to notice and an opportunity for a hearing before they are transferred to supermax facilities. The conditions that make supermax conditions an "atypical and significant hardship,"[266] and therefore trigger this due process right, do not have to change. A successful Fourteenth Amendment claim thus represents much less significant judicial interference with the administration of the prison, and the argument for deference is correspondingly weaker in such a situation, though a court's response to the supermax conditions may be just as strong.[267]

260. *Id.* at 722.
261. *Id.* at 740.
262. *Id.* at 742.
263. *Id.* at 737.
264. *Id.* at 749–50.
265. *Judge Ohio: Prison Violates Rights*, ASSOCIATED PRESS ONLINE, Feb. 26, 2002, *at* 2002 WL 14994774.
266. Sandin v. Conner, 515 U.S. 472, 484 (1995).
267. Haney and Lynch note the appeal of this less conflicted position:

> Perhaps not surprisingly, many . . . cases concerning solitary confinement or disciplinary segregation have focused on alleged violations of procedural due process rather than potentially cruel and unusual conditions. This stance may reflect a compromise; while

Just as it is easier for a court to enforce the Constitution in the face of deferential norms when inmates are particularly vulnerable, it is easier to enforce the Constitution when inmates seek a change that does not appear to be substantial. When one interest is clearly more compelling than the other, or can be presented as such through rhetorical construction, the tension between intervention and deference dissipates. There is less need to resort to rhetorical strategies to shift the focus of its analysis away from the constitutional claim. As a result, it was easier for the *Austin* court to evaluate the harshness of supermax conditions than it was for the courts in *Madrid*, *Ruiz*, and *Jones'El* to do so. It was also easier for the *Austin* court to declare that those conditions were different in a constitutionally significant way.

The lower stakes of a Fourteenth Amendment procedural due process claim entail correspondingly less relief for inmates, however. All the *Austin* plaintiffs received was a guarantee of notice and an opportunity for a hearing before transfer to the supermax prison. Once there, they were still subject to the harsh conditions that made the facility different from other Ohio prisons. The mentally ill inmates who were granted relief in the Eighth Amendment cases, on the other hand, were completely removed from the supermax prisons. Nevertheless, this Comment has argued that in relation to the Eighth Amendment cases, it is misleading to assess outcomes solely in light of their immediate effects. Just as the strategy employed by the courts in the Eighth Amendment cases yields decent gains for some inmates in the short term but threatens conditions of confinement claims in the long term, the Fourteenth Amendment ruling in *Austin* provides fairly meager relief in the short term, but may be valuable in the long term.

Austin may be valuable because it is the only moment in current prison jurisprudence in which a federal court has stated that supermax conditions differ from those of conventional prisons to a constitutionally significant degree. While *Austin* is only a district court opinion limited to a specific supermax facility, and grants only procedural safeguards, the absence of similar rulings in other supermax cases makes it important. *Austin* suggests that there may be more room to explore supermax prisons' relationship to conventional prisons in the context of the Fourteenth Amendment than there is in the context of the Eighth Amendment. If it is possible to establish, even in the context of a different type of claim, that supermax

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> courts are still uncomfortable second-guessing the policies of prison administrators in creating and maintaining psychologically harmful conditions in solitary confinement, they are at least more willing to carefully and critically review the procedures by which prisoners were placed in such conditions.

Haney & Lynch, *supra* note 132, at 551.

conditions are a constitutionally significant departure from conventional prison conditions, it may create a basis for Eighth Amendment conditions of confinement analysis to evolve with the prisons of the future.

As discussed in Part I, given the intensity of pressure on courts to defer to prison administrators, there is less room for the content of the Eighth Amendment to evolve today than there was on the brink of reform, particularly when it comes to new types of deprivations in prisons. In fact, because of the prevailing interpretation of the "evolving standards" test,[268] the rapid proliferation of supermax prisons could conceivably support the position that the political popularity of these prisons means that they do not violate contemporary standards of decency. Thus, the very novelty of an innovative form of punishment might be a factor that counsels against its unconstitutionality under the Eighth Amendment.

The *Sandin* test establishes a standard for the Fourteenth Amendment that appears to be more flexible than the current interpretations of the "evolving standards" test. It requires courts to determine whether challenged conditions represent an "atypical and significant hardship" when compared to "the ordinary incidents of prison life,"[269] so that the protection of the Fourteenth Amendment will change as the "ordinary incidents of prison life" change. Unlike the Eighth Amendment standard, however, this standard directs courts to evaluate new types of punishment from a perspective more closely aligned with that of inmates. The Fourteenth Amendment inquiry is whether inmates face conditions significantly worse than those that came before, rather than whether those conditions exceed a more abstract standard of "decency" determined by public expectations. As a result, Fourteenth Amendment cases such as *Austin* are more likely to act as accurate "barometers"[270] of prison conditions, rather than of contemporary public standards.

Cases from the brink of the prison reform movement show that even before courts felt that they had the authority to intervene in response to inmates' complaints, some pre-reform courts foreshadowed reform by documenting and criticizing conditions in some prisons.[271] While pre-reform courts were limited by a lack of authority for judicial intervention in prison cases, contemporary federal courts face a culture of deference that restricts their intervention in a much more aggressive way. At the beginning of

268. *See supra* Part I.A.2.
269. *Sandin*, 515 U.S. at 484.
270. *See* Sawyer v. Smith, 497 U.S. 227, 250 (1990).
271. *See supra* notes 25–32 and accompanying text.

reform, courts were discouraged from intervening in prison affairs by a long-standing but informal "hands-off" policy. This policy was neither codified in statute nor made binding by precedent, however, so pre-reform courts were free to behave differently when their thinking changed, and involve themselves in prison matters. Now, the ability of federal courts to intervene in prison affairs is checked by Supreme Court opinions, statutes, and lower courts' conservative interpretations of Supreme Court precedent. Thus, although it may seem counterintuitive, today's courts are in many ways more constrained than pre-reform courts were. A case like *Austin* not only provides contemporary courts with an outlet for their concerns about new types of prison conditions, but also provides a mechanism for explicit, continuing constitutional analysis of changes in those conditions—something the pre-reform courts did not have, and something the current culture of deference prevents in Eighth Amendment cases.

Although social sentiment may grow more sympathetic to prisoners at certain times, inmates are never likely to wield much political clout.[272] It is therefore a particular concern when their main constitutional protection—the Eighth Amendment—becomes unavailable to them. Social and political opposition to supermax prisons may effect some relief, but the real concern is that the legal structures designed to protect inmates should not become unavailable to future inmates, who may be subject to deprivations not yet imagined. Because it is easier for courts to acknowledge the constitutional significance of new types of prison conditions in the context of procedural due process claims, the Fourteenth Amendment may be a useful tool for developing precedent that acknowledges the evolution of prison conditions. Subsequent rulings that are similar to *Austin* would make it more difficult for Eighth Amendment jurisprudence to maintain its rigidly backward-looking stance. If such precedent were to combine with a more favorable social context, such as the civil rights movement that provided the backdrop for the prison reforms of the 1960s and 1970s, it might even allow courts to revisit Eighth Amendment conditions of confinement analysis in the future. In this way, *Austin* has the potential to preserve the possibility of future prison reform in a way that appears to be unavailable through current Eighth Amendment conditions of confinement analysis.

272. *See* Atkins v. Virginia, 536 U.S. 304, 315 (2002) (noting the "well-known fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime").

CONCLUSION

The current culture of judicial deference makes it extraordinarily difficult for any inmate to succeed in an Eighth Amendment conditions of confinement claim. When the claim challenges conditions in a supermax facility, the inmate faces an even more difficult task, because both the novelty and the technical legality of these prisons seem to make any judicial intervention violate the norms of deference. The few federal courts that have offered some degree of relief in such cases have done so only after adopting a strategy that avoids the question of the constitutionality of supermax conditions. As this Comment has shown, however, this strategy may create substantial problems for inmates' conditions of confinement claims in the long run, although it does help some inmates in the short term.

Austin suggests that there may be an important role for the Fourteenth Amendment in future prison conditions cases, because the lower stakes in a procedural due process claim make it easier for a court to find that new types of prison conditions are sufficiently different from conventional prison conditions to trigger constitutional protection for inmates. A successful procedural due process claim may not make much immediate difference for inmates. In light of the current operation of the culture of deference, however, any judicial ruling that finds supermax conditions to be constitutionally significant is a victory for inmates. *Austin* may preserve—if only as a spark of an idea that may arise in a future social context more amenable to prison reform—the possibility that new types of conditions of confinement, like supermax incarceration, should be subject to constitutional review.

There are limits to both aspects of this argument. The Eighth Amendment cases discussed here are not useless, nor is *Austin*'s Fourteenth Amendment approach a panacea for inmates. Insofar as the Eighth Amendment cases publicize the minute details of supermax conditions and offer official criticism of those conditions, they represent a positive step for prisoners' rights.[273] At the same time, the limits of the procedural relief offered by the Fourteenth Amendment should not be underplayed. This Comment has tried to show, however, that the constraints that the culture of deference has

273. Even now, *Madrid* and *Ruiz* are still two of the best sources of information about supermax conditions, despite all of the international interest the prisons have generated. *See* Kurki & Morris, *supra* note 6, at 386 (noting that "there is not a single study on supermaxes," and that the available information "tend[s] to be anecdotal newspaper articles or advocacy statements with little research value," but listing *Madrid* and *Ruiz* as two of only a handful of "detailed descriptions" of supermax conditions). Furthermore, in *Jones'El*, the court's public criticism may have contributed to the state's willingness to settle the case, which did improve living conditions for inmates in one supermax prison, at the very least. *See supra* note 202.

imposed on the scope of the Eighth Amendment have become so severe that even courts attempting to maneuver around those limits may inadvertently end up reinforcing them. It may be time for prisoners' rights advocates to look beyond the Eighth Amendment if they hope to preserve certain constitutional protections for inmates in the future, and the Fourteenth Amendment may play a valuable role in this process by allowing courts to respond to evolving conditions of confinement.

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