

“AN ATYPICAL AND SIGNIFICANT HARDSHIP”: THE SUPERMAX CONFINEMENT OF DEATH ROW PRISONERS BASED PURELY ON STATUS—A PLEA FOR PROCEDURAL DUE PROCESS

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I. INTRODUCTION: THE STRANGE CASE OF ROBERT COMER

Consider Robert Comer. Whipcord strong, he walks on his toes like a dancer. His hair is cropped short and spattered with grey. He is not a large man, not the hulking gorilla one expects when alerted to his reputation. Only the small, blue-black tears tattooed near his left eye hint at the danger before you. Comer gives off energy—a nervous, shaking light. His gaze is electric and not something most people care to hold. Comer is uncomfortable to be around. That fits. Robert Comer is a convicted murderer.¹ Currently, Comer and 127 other inmates sit on Arizona’s death row.² Comer’s crime was horrible, as are most crimes of those who end up in Special Management Unit II (“SMU-II”)³, Arizona’s death row.⁴

Comer has demonstrated his inability to exist within prison walls.⁵ Comer is described by the Arizona Department of Corrections as their “most dangerous

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1. State v. Comer, 799 P.2d 333, 336 (Ariz. 1990).

2. This was the number of inmates on Arizona’s death row in October 2002. Ariz. Dep’t of Corrections, *ADC Inmates on Death Row* (Oct. 2002), at <http://www.adc.state.az.us/DeathRow/DeathRow.htm#Number>.

3. Special Management Unit II at the Eyman Prison Complex in Florence Arizona. This is where Arizona’s death row is located. Ariz. Dep’t Corr., *Arizona State Prison Complex—Eyman*, at <http://www.adc.state.az.us/eyman.htm> (last visited Apr. 11, 2004).

4. See *Comer*, 799 P.2d at 336 (detailing a complete and graphic description of the crimes that led Comer to Arizona’s death row).

5. *Comer v. Stewart*, 230 F. Supp. 2d 1016, 1020 (D. Ariz. 2002).

prisoner.”⁶ Since he has been inside, Comer has been a constant discipline problem.⁷

When Comer first arrived on Arizona’s death row, he was housed next to Robert Wayne Vickers, the man who wore the “most dangerous”⁸ mantle before Comer’s arrival.⁹ Initially wary of each other, Comer and Vickers discovered a mutual interest in, among other things, Aryanism, and soon became inseparable.¹⁰ In Comer’s words, “[h]e was not just a friend, he was my brother. We spilled blood together.”¹¹

Vickers was executed by lethal injection in 1999,¹² an occasion Comer marked by somehow fashioning a homemade knife from the scant materials in his cell.¹³ On the blade of the knife, he carved Vickers’ name.¹⁴ Comer smuggled the knife into the exercise yard.¹⁵ Before he could harm anyone however, the knife was detected and Comer was subdued with tear gas.¹⁶ Now, in an environment where every other inmate is double shackled before they are moved,¹⁷ prison authorities take greater precautions with prisoners like Comer.¹⁸ When Comer is taken to a visit, a shower, or anywhere else, he is shackled facedown to a gurney, and girded with an electrical shock belt.¹⁹

This seems extreme, but may well be necessary. Comer’s talent for making and concealing weaponry is legendary.²⁰ On May 4, 2001, Comer managed to cut a piece of metal from the desk in his cell with a lighter flint.²¹ Despite repeated searches of Comer, his cell, the entire pod, and the inmates

6. *Id.*

7. *Id.* at 1033; *see also*, Paul Rubin, *Dead Man Talking*, PHOENIX NEW TIMES, June 27, 2002, at <http://phoenixnewtimes.com/issues/2002-06-27/news2.html/1/index.html>. Comer and his friend, Robert Wayne Vickers, were feared inside the prison by both staff and other inmates. As Comer testified, this fear was well borne out. Comer admitted in court that he and Vickers assaulted other inmates and prison staff. Paul Rubin, *Arizona’s Worst Criminal*, PHOENIX NEW TIMES, May 2, 2002, at <http://www.phoenixnewtimes.com/issues/2002-05-02/feature.html/1/index.html>.

8. Rubin, *Arizona’s Worst Criminal*, *supra* note 7.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. ARIZ. DEP’T CORR., DEP’T ORDER MANUAL, ORDER NO. 713 (Dec. 17, 2001), at <http://www.adc.state.az.us/Policies/PolicyTOC.htm> [hereinafter ORDER MANUAL] (specifying that the uniform for death row inmates includes shackles and that uniforms must be worn whenever an inmate is outside his cell).

18. *Id.*

19. Rubin, *Arizona’s Worst Criminal*, *supra* note 7.

20. *Id.*

21. *Comer v. Stewart*, 230 F. Supp. 2d 1016, 1021 (D. Ariz. 2002).

within, a significant portion of the metal was never found.²² Additionally, Comer felt moved to make several “threatening statements to correctional officers.”²³

However deserved Mr. Comer’s spectacular reputation for violence, he’s about to become famous for another reason. Comer has fought a years-long battle with courts and his own attorneys to waive his final appeals and hasten his state-mandated death.²⁴

The only problem is that Mr. Comer’s decision might not be entirely voluntary.²⁵ Certainly his attorneys do not think so.²⁶ Their fear is that modern death row conditions, consisting of long-term supermax²⁷ confinement, are creating situations where many prisoners prefer death over the conditions in which they live.²⁸ This possibility puts lawyers in a difficult position. Attorneys for the condemned are increasingly caught between their responsibility to advocate for their client and their responsibility to keep their client from doing something they believe to be rash.²⁹ This situation is sticky for any lawyer, and one that should not come to pass. This Note proposes that the indefinite supermax confinement of death row prisoners is, in most cases, without penological justification. The U.S. Supreme Court has recognized that prisoners have a liberty interest in remaining free from long-term solitary confinement.³⁰ This Note argues that, by not providing any due process before or after assigning death row inmates to supermax conditions, the State is violating prisoners’ fundamental rights. By violating these

22. *Id.*

23. *Id.*

24. *Id.* at 1019.

25. *Id.*

26. *Id.*

27. HUMAN RIGHTS WATCH, COLD STORAGE: SUPERMAXIMUM SECURITY CONFINEMENT IN INDIANA (1997), available at <http://hrw.org/reports/1997/usind/>. Supermaxes are defined as prisons designed to deliver “extreme social isolation, reduced environmental stimulus, scant recreational, vocational, or educational opportunity, and extraordinary levels of surveillance and control. Prisoners are locked alone in their cells between twenty-two and twenty-three-and-a-half hours a day. They eat and exercise alone.” This general definition includes facilities designed as supermax units such as the Secure Housing Unit (“SHU”) at Pelican Bay State Prison in California and Arizona’s Special Management Units (“SMUs”), as well as facilities that now function as supermax units such as the federal penitentiary in Marion Illinois. *Id.*

28. See *United States v. Hammer*, 226 F.3d 229 (3d Cir. 2000) (prisoner argued that long wait and conditions on death row made death appealing); see also *Miller v. Stewart*, 231 F.3d 1248 (9th Cir. 2000) (inmate preferred death over further confinement in SMU II); *Idaho v. Creech*, 710 P.2d 502 (Idaho 1985) (condemned inmate wished to withdraw guilty plea and request for expedited execution brought on by wish to escape extended solitary confinement); *Groseclose v. Dutton*, 594 F. Supp. 949 (D. Tenn. 1984) (inmate’s guilty plea and request for expedited death penalty were brought on by conditions of solitary confinement on death row); *Massie v. Sumner*, 624 F.2d 72 (9th Cir. 1980) (prisoner alleged that death row conditions violated the Eighth Amendment and precluded the State from delaying his execution).

29. See generally Richard C. Dieter, *Ethical Choices for Attorneys Whose Clients Elect Execution*, 3 GEO. J. LEGAL ETHICS 799 (1990); Christy Chandler, *Voluntary Executions*, 50 STAN. L. REV. 1897 (1998).

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

rights, states are exposing death row prisoners to a known danger.³¹ Arbitrarily exposing death row inmates to tangible harm is anathema to notions of due process.³²

In Part II, the history and purposes of supermax prisons will be reviewed. In Part III, the harmful psychological effects of long-term supermax confinement will be examined. Also in that section, the special psychological problems of death row inmates will be explicated.

In Part IV, this Note will define the liberty interest infringed upon by confining death row inmates to supermax conditions and review Supreme Court case law that has recognized a liberty interest retained by death row inmates. Part IV will show that indefinite solitary confinement infringes on that liberty interest without the protection of procedural due process. This Note argues for greater procedural protection.

Fundamentally, this Note proposes that death row inmates should be evaluated on an individual basis. Those death row inmates known to be a significant threat to inmates or prison personnel should be eligible for confinement in supermax units. Those who do not present a significant threat should be confined in less restrictive environments. Above all, prisons must implement *some* process for supermax confinement other than arbitrarily assigning a large group solely on their status under sentence of death. Our Constitution demands no less.

II. THE HISTORY AND PURPOSES OF SUPERMAX PRISONS

The Control Unit of the Marion, Illinois Federal Prison³³ was the template for the modern supermax.³⁴ In Marion's Control Unit, and supermaxes across the country, solitary inmates are contained in single, seven-by-twelve cells.³⁵ Each cell generally contains a concrete stool, a concrete bed, a desk or table constructed of heavy stainless steel, and an odd toilet/sink combination.³⁶

The doors in Arizona's SMU II are heavy steel planks with a small Plexiglas window through which staff can observe the prisoner at all times.³⁷ The doors have another small opening, large enough to slide trays of food through and just large enough for a prisoner to offer hands and wrists for shackling.³⁸ Prisoners

31. See discussion *infra* Part II. Severe mental and emotional damage is caused by indefinite solitary confinement.

32. See discussion *infra* Part III and IV.

33. 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, 489 (1997).

34. HUMAN RIGHTS WATCH, *supra* note 27.

35. *Id.*

36. See Scott N. Tachiki, *Indeterminate Sentences in Supermax Prisons Based upon Alleged Affiliations: A Reexamination of Procedural Protection and a Proposal for Greater Procedural Requirements*, 83 CAL. L. REV. 1115, 1123–24 (1995) (giving a general description of supermax conditions).

37. *Comer v. Stewart*, 230 F. Supp. 2d 1016, 1034 (D. Ariz. 2002).

38. *Id.*

are shackled before they are moved.³⁹ In Arizona's system,⁴⁰ inmates are usually strip-searched before they are moved.⁴¹

Inmates are contained within their cells day and night.⁴² In Arizona, prisoners are allowed out for three thirty-minute showers a week.⁴³ They are also allowed an exercise period three times a week for an hour.⁴⁴ Many, if not all, death row inmates forgo this opportunity.⁴⁵ The exercise "yard" is a slightly larger version of the inmates' cell, covered with a heavy steel mesh.⁴⁶ For those with no disciplinary problems, a small ball is provided during the exercise period.⁴⁷

Smoking is prohibited in SMUs.⁴⁸ Prisoners without discipline problems are allowed a radio and a television set.⁴⁹ Cells and inmates are routinely searched for weapons and contraband.⁵⁰ In every cell, a small seven-watt bulb burns throughout the night, never leaving an inmate in complete darkness.⁵¹

Inmate visits are strictly monitored.⁵² Contact visits are allowed only by court order.⁵³ All visits must be approved at least a week in advance whether the visitor's relationship to the inmate is familial or legal.⁵⁴ Noncontact visits are conducted in small interview pods where the inmate and visitors converse through a sheet of thick glass.⁵⁵ A small slot allows papers to be passed back and forth.⁵⁶

In sum, these men are confined in rooms not much larger than the average American bathroom for all but four and a half hours per week. Their minimal privileges can be taken away for slight disciplinary infractions.⁵⁷ The death row inmate's average length of incarceration is eleven years and five months.⁵⁸

39. ORDER MANUAL, ORDER NO. 713, *supra* note 17.

40. *Id.*

41. ORDER MANUAL, ORDER NO. 713.2, *supra* note 17.

42. Koch v. Lewis, 216 F. Supp. 2d 994, 997 (D. Ariz. 2001).

43. *Comer*, 230 F. Supp. 2d at 1034.

44. *Id.*

45. *Koch*, 216 F. Supp. 2d at 1004.

46. *Id.* at 1005.

47. *Id.*

48. ORDER MANUAL, ORDER NO. 708.2, *supra* note 17.

49. ORDER MANUAL, ORDER NO. 705, *supra* note 17.

50. ORDER MANUAL, ORDER NO. 708.4, *supra* note 17. Generally, prisoners in SMU II are strip-searched whenever they leave their cells. Inmates' quarters are subject to search at any time for any reason. *Id.*

51. Rubin, *Arizona's Worst Criminal*, *supra* note 7.

52. ORDER MANUAL, ORDER NO. 911.01, *supra* note 17.

53. ORDER MANUAL, ORDER NO. 911.05, *supra* note 17.

54. ORDER MANUAL, ORDER NO. 708.03, *supra* note 17.

55. *Comer v. Stewart*, 230 F. Supp. 2d 1016, 1034 (D. Ariz. 2002).

56. *Id.*

57. ORDER MANUAL, ORDER NO. 803, *supra* note 17.

58. Jeremy Root, *Cruel and Unusual Punishment: A Reconsideration of the Lackey Claim*, 27 N.Y.U. REV. L. & SOC. CHANGE 281, 282 (2001-02) (quoting Bureau of Justice Statistics, U.S. Dep't of Justice, *Capital Punishment 2000*, at 12 (Dec. 2001)).

American supermaxes were originally designed to hold a prison's most dangerous inmates, or to provide short-term discipline.⁵⁹ The federal prison in Marion, Illinois was the first to radically extend supermax conditions to an entire facility.⁶⁰ After a spasm of violence in 1983,⁶¹ supermax conditions were imposed on the entire prison, a sort of permanent lockdown.⁶² At the time, few considered the long-term effects of indefinitely housing inmates in supermax conditions.⁶³ History should have given them pause.

III. INDEFINITE, PUNITIVE, SOLITARY CONFINEMENT CAUSES MEASURABLE PSYCHOLOGICAL DAMAGE

Mental health experts have long suspected that solitary confinement can have deleterious effects on the psyche.⁶⁴ As a chronicler in eighteenth century Netherlands observed, solitary confinement "appeared not to be successful at all. Again and again reports of insanity, suicide, and the complete alienation of prisoners from social life seriously discredited the new form of punishment."⁶⁵ Even so, solitary confinement caught on.⁶⁶

For several decades in the United States, the "Pennsylvania Method" prison was in vogue.⁶⁷ In these prisons, inmates were kept entirely separate from each other.⁶⁸ Often, inmates were not allowed to speak.⁶⁹ The idea was to allow a condemned man the time and quiet needed to reflect on his misdeeds.⁷⁰ Unlike

59. Leena Kurki & Norval Morris, *The Purposes, Practices, and Problems of Supermax Prisons*, 28 CRIME & JUST. 385, 391 (2001).

All express goals of supermaxes relate to safety and security. The main purpose is to separate the most disruptive prisoners from one another and from possibly sympathetic or corrupted staff and to create a new kind of double incapacitation: not only to isolate prisoners from the rest of society but to isolate the worst of them from other prisoners and the staff.

Id.

60. Haney & Lynch, *supra* note 33, at 489.

61. See Michael J. Olivero & James B. Roberts, *The United States Federal Penitentiary at Marion, Illinois: Alcatraz Revisited*, 16 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 21 (1990). Two guards and an inmate were killed in a single incident in 1983. The prison was immediately put on lockdown status, a status that was never lifted. *Id.*

62. *Id.*

63. See discussion *infra* Part III.

64. *Id.*

65. Herman Franke, *The Rise and Decline of Solitary Confinement: Socio-Historical Explanations of Long-Term Penal Changes*, 32 BRIT. J. CRIMINOLOGY 125, 128 (1992).

66. *Id.*

67. See Harry Elmer Barnes, *The Historical Origin of the Prison System in America*, 12 J. CRIM. L. & CRIMINOLOGY 35 (1921).

68. *Id.*

69. *Id.* at 38.

70. *Id.*

modern supermaxes, however, prisoners were allowed two roomy cells and an individual outside yard.⁷¹

By the twentieth century, as the country became more populous, the imprisoned population grew apace.⁷² Thereafter, as prison conditions generally worsened, so did the conditions of solitary confinement.⁷³ Early on, courts had qualms about those committed to solitary confinement. For example, in 1910 the Washington Supreme Court observed:

The effect of solitary confinement on the mind of a person charged with a crime may be imagined. It is a well-known psychological fact that men and women have frequently confessed to crimes which they did not commit. They have done it sometimes to escape present punishment which had become torture to them; sometimes through other motives; and the object of putting the inmates of this jail in this dark cell in solitary confinement is easily understood.⁷⁴

If the motive was easily understood, what actually happened to these prisoners was not. Half a century passed before hard research on solitary confinement was proposed.⁷⁵ The military led the way with studies of aviators captured during the Korean War.⁷⁶ Spurred by these early “brainwashing” studies,⁷⁷ researchers continued to study the effects of solitary confinement.⁷⁸ However, such studies were not directly applicable to prison conditions,⁷⁹ as most were conducted in decidedly artificial environments with volunteer subjects.⁸⁰ Therefore, the environment in these studies was not nearly as bad as later prison conditions.⁸¹ These studies established however, that severely restricting a subject’s activity⁸², together with removing opportunities for social contact and support,⁸³ resulted in measurable psychological damage, even in short periods of time.⁸⁴

71. *Id.*

72. *Id.* at 42.

73. Haney & Lynch, *supra* note 33, at 482–85.

74. *Washington v. Miller*, 111 P. 1053, 1054 (Wash. 1910).

75. Haney & Lynch, *supra* note 33, at 515.

76. *Id.* at 500.

77. *Id.*

78. *Id.* at 515–24.

79. *Id.* at 500.

80. *Id.* at 501–02.

81. *Id.* Generally, these studies were done with volunteer subjects who could look forward with certainty to the moment of their release. Prisoners on the other hand, are not volunteers. Their relationship with their keepers is often antagonistic, and quite often they do not know when their confinement will come to an end. *Id.* at 502.

82. See Albert A. Harrison et al., *The Human Experience in Antarctica: Applications to Life in Space*, 34 BEHAV. SCI. 253, 258 (1989). These authors note that being restricted in one’s movement and activity produces a “stressful” environment that could “lead to poor mental health and negative moods.” *Id.*

83. Haney & Lynch, *supra* note 33, at 504–05.

84. Margaret K. Cooke & Jeffrey H. Goldstein, *Social Isolation and Violent Behavior*, 2 FORENSIC REP. 287, 288 (1989). As two commentators put it:

These results piqued an interest in what was happening in American prisons, where the conditions were much worse.⁸⁵ Autobiographical and anecdotal accounts spoke of the horrors of solitary confinement, including Jack Abbott's legendary book, *In the Belly of the Beast*: "You sit in solitary confinement stewing in nothingness The lethargy of months that add up to years in a cell, alone, entwines itself about every 'physical' activity of the living body and strangles it slowly to death Time descends in your cell like the lid of a coffin."⁸⁶

In 1983, Dr. Stuart Grassian conducted a serious examination of prisoners in solitary confinement.⁸⁷ Grassian observed fifteen prisoners in Walpole State Prison who were kept in solitary confinement for varying lengths of time.⁸⁸ At first, the prisoners were reluctant to speak with Dr. Grassian, afraid their admissions would reveal inherent weakness or be used against them by prison authorities.⁸⁹ After repeated reassurances, however, the prisoners spoke.⁹⁰ The psychological symptoms they described were disturbing and strikingly similar.⁹¹

Dr. Grassian reported that over two-thirds of the prisoners observed had experienced both "massive free floating anxiety" and excessive sensitivity to external stimuli.⁹² Half of the inmates complained of perceptual distortions, including visual and auditory hallucinations.⁹³ The same percentage complained of difficulty with everyday thought processes, including confused states, concentration problems, and notable memory lapses.⁹⁴

A third of the subjects reported paranoia, impulse control problems, and, perhaps most ominous, uncontrollable aggressive fantasies, usually directed at guards.⁹⁵ A fifth of the men had attempted suicide while in segregation.⁹⁶ Notably, only a few reported experiencing any symptoms before their segregation.⁹⁷ All the men also reported the symptoms easing during brief respites from segregation

A socially isolated individual who has few, and/or superficial contacts with family, peers, and community cannot benefit from social comparison. Thus, these individuals have no mechanism to evaluate their own beliefs and action in terms of reasonableness or acceptability within the broader community. They are apt to confuse reality with their idiosyncratic beliefs and fantasies and likely to act upon such fantasies, including violent ones.

Id.

85. Haney & Lynch, *supra* note 33, at 502.

86. JACK HENRY ABBOTT, *IN THE BELLY OF THE BEAST: LETTERS FROM PRISON* 44 (1981).

87. Stuart Grassian, *Psychopathological Effects of Solitary Confinement*, 140 *AM. J. PSYCHIATRY* 1450 (1983).

88. Haney & Lynch, *supra* note 33, at 521.

89. *Id.*

90. *Id.*

91. *Id.* at 521–22.

92. *Id.* at 521.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

required by law every fifteen days.⁹⁸ Grassian effectively described what Craig Haney would later term SHU Syndrome,⁹⁹ named for the Secure Housing Unit in California's notorious Pelican Bay State Prison.¹⁰⁰

Conditions at Pelican Bay were measurably worse than those at Walpole.¹⁰¹ Inmates within Pelican Bay's SHU got no respite from solitary confinement.¹⁰² Not surprisingly, the psychological condition of inmates in Pelican Bay was worse.¹⁰³ Pelican Bay's inmates had even manifested physical symptoms related to their confinement.¹⁰⁴

At Pelican Bay, Haney observed that over eighty percent of the inmates suffered from anxiety, nervousness, severe headaches, and chronic lethargy or tiredness.¹⁰⁵ Over half complained of nightmares, heart palpitations and fear of impending nervous breakdowns.¹⁰⁶ Again, over eighty percent complained of ruminations, over-sensitivity to stimuli, irrational bursts of anger, and social withdrawal.¹⁰⁷ Half reported violent fantasies, mood swings, and chronic depression.¹⁰⁸ Almost half reported hallucinations amongst other perceptual distortions.¹⁰⁹ A quarter of the men at Pelican Bay had seriously contemplated suicide.¹¹⁰

These symptoms manifested themselves in disturbing ways. One inmate ripped the sprinkler head off the ceiling of his cell and tried to swallow it.¹¹¹ The same inmate also attempted to gouge his wrists with a broken plastic spoon.¹¹² When interviewed by Dr. Haney, the inmate said, "I get dizzy spells, scared, nervous, shaking, crying. I hear voices telling me to tear up my mattress. Demons come out. I see them I never saw them before SHU."¹¹³

98. *Id.*

99. *See* Jones'El v. Barge, 164 F. Supp. 2d 1096, 1101-02 (W.D. Wis. 2001). SHU syndrome has been defined by some professionals as a collection of psychological symptoms experienced by inmates confined in cells with little to no sensory stimulus or social interaction for long or indefinite periods of time. *Id.*

100. *See* Madrid v. Gomez, 889 F. Supp. 1146, 1228 (N.D. Cal. 1995). (*Madrid* was a class action suit brought by inmates of Pelican Bay.) In Walpole, inmates were required to be released from solitary confinement periodically. They were also allowed more exercise and interaction with other inmates, and their psychological health was more carefully monitored. *Id.*

101. *Id.* The Secure Housing Unit is a supermax unit with roughly the same conditions as Arizona's SMUs.

102. *Id.* at 1229.

103. *Id.* at 1230.

104. *Id.* at 1234.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 1235.

112. *Id.* at 1234.

113. *Id.*

Another inmate exhibited a fear of “entities” and “demons.”¹¹⁴ He reported to Haney that he had “trouble with entities and demons—evil spirits—comic books I read are about the antichrist. I can see them through the walls, black evil.”¹¹⁵ Haney and Grassian had uncovered an ugly secret.

Ominously, the SMU units in Arizona were the model for Pelican Bay’s SHU.¹¹⁶ Arizona has also seen severe psychological consequences in SMU II inmates.¹¹⁷ The state itself has reported “a significantly greater level of adverse behavioral and psychiatric consequences than [at] the Marion facility. In particular, [F]lorencia cites experiencing problems with their Borderline Personality Disorder inmates, who have an increased frequency of suicidal behavior.”¹¹⁸ Unfortunately, even in the face of its own evidence, Arizona has persisted in exposing death row prisoners, psychically an extremely vulnerable group,¹¹⁹ to the mental dangers of supermax conditions within SMU-II.

Most psychological studies to date have focused on inmates placed in supermax units for disciplinary problems or placed administratively within supermax walls, usually for alleged gang membership.¹²⁰ As has been shown, these inmates suffer a variety of psychological harms. Condemned inmates face far greater initial psychological stress.¹²¹ Administration of the modern death penalty case takes years.¹²² This long wait puts death row inmates under enormous psychological pressure.¹²³ Courts have long noted this fact.¹²⁴ In *California v. Anderson*,¹²⁵ the Supreme Court of California held that:

The cruelty of capital punishment lies not only in the execution itself and the pain incident thereto, but also in the dehumanizing effects of the lengthy imprisonment prior to execution during which the judicial and administrative procedures essential to due process of law are carried out.¹²⁶

In *District Attorney for Suffolk District v. Watson*,¹²⁷ the Supreme Court of Massachusetts observed that:

114. *Id.* at 1233.

115. *Id.*

116. *Id.* at 1236.

117. *Id.*

118. *Id.* at 1235.

119. See discussion *infra* Part III.

120. See *Koch v. Lewis*, 216 F. Supp. 2d 994 (D. Ariz. 2001). As will be seen, placing inmates in supermax units for gang membership in itself has become a bone of contention between administrators and advocates for prisoner’s rights. *Id.*

121. See Note, *Mental Suffering Under Sentence of Death: A Cruel and Unusual Punishment*, 57 IOWA L. REV. 814, 830 (1972) [hereinafter *Mental Suffering*].

122. NAACP, Legal Def. and Educ. Fund, Inc., *Death Row USA*, Fall 2001, at 5–6. Twelve percent of executions in the Post-*Furman* era have been accomplished after death row inmates forfeited their appeals and actively sought death. *Id.*

123. *Mental Suffering*, *supra* note 121, at 830.

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

125. 493 P.2d 880 (Cal. 1972).

126. *Id.* at 894.

127. 411 N.E.2d 1274 (Mass. 1980).

A condemned man knows, subject to the possibility of successful appeal or commutation, the time and manner of his death. His thoughts about death must necessarily be focused more precisely than other people's. He must wait for a specific death, not merely expect death in the abstract . . . Having to face an inevitable death, any man, whatever his convictions, is torn asunder from head to toe. The feeling of powerlessness and solitude of the condemned man, bound up and against the public coalition that demands his death, is in itself an unimaginable punishment.¹²⁸

Inmates have claimed under the Eighth Amendment that the period between sentencing and execution for death row inmates ought to mitigate death sentences.¹²⁹ In *Lackey v. Texas*, Justice Stevens noted that extended stays on death row could result in "the gratuitous infliction of suffering."¹³⁰ Stevens further stated, "when a prisoner sentenced to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it."¹³¹ Other Justices have been troubled by the lag between conviction and execution. Justice Brennan, in his concurrence in *Furman v. Georgia*, observed that "mental pain is an inseparable part of our practice of punishing criminals by death, for the prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death."¹³² Some equate the lengthy death sentence period to living with a gun to one's head.¹³³

Many commentators feel that because of the added stress of a pending execution, indefinite solitary confinement is especially damaging to those on death row.¹³⁴ Commentators in Europe have taken notice of this, terming the psychological consequences of death row confinement "death row phenomenon."¹³⁵ At least one high court of last resort, Britain's Privy Council, found that "death row phenomenon" mandated the overturning of over a hundred death sentences.¹³⁶ Even the U.S. Supreme Court, a century ago, recognized that the condemned inmate's prison experience was fundamentally different from that of other prisoners because:

128. *Id.* at 1292, 1294.

129. *See Lackey v. Texas*, 514 U.S. 1045 (1995).

130. *Id.* at 1422.

131. *Id.*

132. *Furman v. Georgia*, 408 U.S. 238, 288 (1972)

133. *See generally* Jessica Feldman, *A Death Row Incarceration Calculus: When Prolonged Death Row Imprisonment Becomes Unconstitutional*, 40 SANTA CLARA L. REV. 187 (1999).

134. *See* discussion *infra* Part III.

135. *See generally* Florencio J. Luzon, *Conditions and Circumstances of Living on Death Row—Violative of Individual Rights and Fundamental Freedoms?: Divergent Trends of Judicial Review in Evaluating the "Death Row Phenomenon,"* 30 GEO. WASH. J. INT'L L. & ECON. 39 (1996). Commentators in Europe believe that "death row phenomenon" is as violative of human rights as the execution of prisoners. *Id.*

136. Laurence R. Helfer, *Overlegalizing Human Rights: International Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, 102 COLUM. L. REV. 1832, 1872–79 (2002).

[A] prisoner sentenced . . . to death is confined in the penitentiary awaiting the execution of the sentence, [and] one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it . . . as to the precise time when his execution shall take place.¹³⁷

In 1950, Justice Frankfurter noted in his dissent from denial of certiorari in *Solesbee v. Balkcom*¹³⁸ that “the onset of insanity while awaiting execution of a death sentence is not a rare phenomenon.”¹³⁹ Studies have also demonstrated that extended stays on death row undercut most prisoners’ sanity.¹⁴⁰ Hyper-activation of a condemned prisoner’s defense mechanisms is the salient symptom of this insanity.¹⁴¹ All humans use defense mechanisms to cope with stressful stimuli.¹⁴² These defense mechanisms engage a person’s fight or flee instinct, flooding the body with adrenaline and endorphins.¹⁴³ These reactions are among a person’s most basic and intense reactions.¹⁴⁴ These mechanisms can become dominant features of a person’s psyche in extreme cases of anxiety.¹⁴⁵ Impending fear of death is a situation triggering defense mechanisms.¹⁴⁶ Studies confirm that undergoing stress sufficient to trigger these defense mechanisms for long periods leads to aberrant behavior.¹⁴⁷ This behavior includes obsession with conspiracy theories, rampant paranoia, denial of the possibility of being executed, and delusions of martyrdom.¹⁴⁸

As the prisoner wends his way through the appellate process, repeated reprieves and rescheduling only make the long wait worse.¹⁴⁹ One prisoner described the process as “the boring routine of claustrophobic confinement, punctuated by eye-opening dates with death that you helplessly hope will be averted.”¹⁵⁰ One court has characterized the psychic stress undergone by death row

137. *In re Medley*, 134 U.S. 160, 172 (1890).

138. 339 U.S. 9 (1950)

139. *Id.* at 14 (Frankfurter, J., dissenting).

140. *See Mental Suffering*, *supra* note 121, at 829.

141. *Id.* at 827.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*; *see also*, E. de Wind, *The Confrontation with Death*, 49 INT. J. PSYCHO-ANAL. 302 (1968). This defense mechanism phenomenon was observed in concentration camp survivors, people who obviously lived with the threat of impending execution for months and years. *Id.* at 302–03.

147. Bluestone & McGahee, *Reaction to Extreme Stress: Impending Death by Execution*, 119 AM. J. PSYCH. 393, 395 (1962) (detailing the authors’ observations of nineteen prisoners under sentence of death).

148. *Mental Suffering*, *supra* note 121, at 827.

149. *Id.* at 830. So much worse in fact, that direct Eighth Amendment claims have been made, arguing that unreasonably long delay should mitigate capital murder and perhaps lead to the end of the death penalty itself. Such claims are called Lackey claims, after the Texas inmate who first brought one. Before the Lackey claim, Lackey had spent seventeen years on death row. *See Lackey v. Scott*, 885 F. Supp. 958 (W.D. Tex. 1995).

150. Kathleen M. Flynn, *The “Agony of Suspense”: How Protracted Death Row Confinement Gives Rise to an Eighth Amendment Claim of Cruel and Unusual Punishment*,

inmates as psychological torture.¹⁵¹ Torture might indeed be the right word. What else can a procedure or condition be called such that prisoners would rather die than face it?

Health professionals and American courts have recognized that indefinite solitary confinement leads almost inevitably to serious, negative psychological effects for almost any inmate.¹⁵² Courts have also long recognized that placing inmates with preexisting psychological problems in supermax conditions “is like putting an asthmatic in a place with little air to breathe.”¹⁵³ The district court in *Madrid*¹⁵⁴ held that:

[S]ubjecting individuals to conditions that are “very likely” to render them psychotic or otherwise inflict a serious mental illness or seriously exacerbate an existing mental illness can not be squared with evolving standards of humanity or decency, especially when certain aspects of those conditions appear to bear little relation to security concerns.¹⁵⁵

In the face of such certain harm, one would expect states to express a strong justification for the supermax confinement of death row inmates. Regrettably, this is not the case.

IV. THE ARBITRARY CONFINEMENT OF DEATH ROW INMATES IN SUPERMAX CONDITIONS INFRINGES ON A PROTECTED LIBERTY INTEREST

Consigning death row inmates to indefinite supermax confinement exposes them to the real and known danger of significant psychological and

54 WASH. & LEE L. REV. 291, n.30 (1997) (quoting *Turner v. Jabe*, Petition for Writ of Habeas Corpus, at 58 (Va. May 22, 1995) (N. 95-0777)).

151. See *District Attorney v. Watson*, 411 N.E.2d 1274, 1291–92 (Mass. 1980) (Liacos, J., concurring).

[T]he raw terror and unabating stress that [the condemned] experienced was torture; torture in the guise of civilized business in an advanced and humane polity. This torture was not unique, but merely one degrading instance in a legacy of degradation. The ordeals of the condemned are inherent and inevitable in any system that informs the condemned person of his sentence and provides for a gap between sentence and execution. Whatever one believes about the cruelty of the death penalty itself, this violence done to the prisoner’s mind must afflict the conscience of enlightened government and give the civilized heart no rest.

Id.

152. Haney & Lynch, *supra* note 33, at 531 (noting that “[t]here is not a single study of solitary confinement wherein non-voluntary confinement that lasted for longer than ten days failed to result in negative psychological effects”); see also *Mental Suffering*, *supra* note 121, at 830.

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

154. *Id.*

155. *Id.* at 1264.

emotional impairment.¹⁵⁶ Outside the prison context, such a risk would never be tolerated.¹⁵⁷ Of course, prison is a far different situation,¹⁵⁸ and many restraints that would not be tolerated outside prison walls are necessary within.¹⁵⁹ Accordingly, prison administrators are typically allowed great deference in their work, even at the risk of infringing upon fundamental rights.¹⁶⁰ Even so, some commentators have suggested that supermax units, like SMU II, are at the very edge of what the Eighth Amendment will allow.¹⁶¹ Separate from the protection of that Amendment, however, is the protection of procedural due process guaranteed by the Due Process Clause of the Fourteenth Amendment.¹⁶²

The Constitution guarantees that state governments cannot abridge the fundamental liberty, life or property rights of private citizens without providing basic procedural due process protections.¹⁶³ These rights are often referred to as “interests.”¹⁶⁴ Once an interest is determined to exist, the government must provide the procedural protections of due process before that right, or interest, may be infringed.¹⁶⁵ This process insures that that the government cannot infringe upon an interest arbitrarily, or without sound reason.¹⁶⁶ The U.S. Supreme Court has defined a liberty interest relevant to the matter at hand, one retained by those inmates on death row.¹⁶⁷

In *Sandin v. Conner*, the Supreme Court held that a *short* term of solitary confinement did not violate due process.¹⁶⁸ Conner was an inmate in a maximum-security facility in Hawaii.¹⁶⁹ He was placed in segregated confinement as punishment for several disciplinary infractions.¹⁷⁰ The Supreme Court affirmed Conner’s sentence, holding that, “Conner’s discipline in segregated confinement did not present the type of atypical, significant deprivation in which a state might conceivably create a liberty interest.”¹⁷¹ However, the Court further held that states might create a liberty interest in the prison context, but:

156. *Id.* at 1291. A former warden of San Quentin once stated that “[o]ne night on death row is too long and the length of time spent there by (some inmates) constitutes cruelty that defies the imagination. It has always been a source of wonder to me that they didn’t all go stark, raving mad.” *Watson*, 411 N.E.2d at 1291 n.5.

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

158. *Id.* at 556.

159. *Id.* at 555.

160. *Id.*

161. *See generally* Charles Pettigrew, *Technology and the Eighth Amendment: The Problem of Supermax Prisons*, 4 N.C. J. L. & TECH. 191, 198 (2002).

162. U.S. CONST. amend. XIV, § 1. (This Amendment insures that no State shall “deprive any person of life, liberty, or property, without due process of law . . .”).

163. JEROME A. BARRON ET AL., *CONSTITUTIONAL LAW: PRINCIPLES & POLICY*, Ch. 6, § D. (5th ed. 1996).

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. 515 U.S. 472, 486 (1995).

169. *Id.* at 475.

170. *Id.*

171. *Id.* at 486.

[T]hese interests will generally be 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.*¹⁷²

Conner's short period of segregation simply was not an "atypical and significant hardship."¹⁷³ In the Court's eyes, Conner could expect significant punishment for committing a serious disciplinary infraction.¹⁷⁴ For such an infraction, thirty days in solitary confinement was an "ordinary incident of prison life."¹⁷⁵ The Court made the point that prison was a special, obviously restrictive environment.¹⁷⁶ Some infringement upon an inmate's liberty was manifestly necessary to run a prison effectively.¹⁷⁷ To show that a regulation created a liberty interest requiring due process protection, inmates would have to show it was a truly egregious violation.¹⁷⁸

Sandin marked a fundamental shift in prison litigation.¹⁷⁹ Before this decision, due process inquiries in prison contexts were driven by the wording of prison regulations. If the words indicated that a prison *would* do something to a prisoner, or that they *would* provide an inmate a hearing, courts were bound to find a prisoner entitled to the procedural protections of due process.¹⁸⁰ In other words, mandatory language within a regulation gave a prisoner an expectation of a certain result and thus created a protected liberty interest in that result.¹⁸¹ This analysis led to many, many due process claims by prisoners, many of them frivolous. Justice Rehnquist noted in *Sandin*:

[T]he Court has wrestled with the language of intricate, often rather routine prison guidelines to determine where mandatory language and substantive predicates created an enforceable expectation that the State would produce a particular outcome with respect to the prisoner's conditions of confinement.¹⁸²

This procedure "encouraged prisoners to comb regulations in search of mandatory language on which to base entitlements"¹⁸³ and thus discouraged prison officials from codifying regulations.¹⁸⁴ This result had negative effects for both prisoners and prison officials, leading prisons to avoid creating liberty interests by having almost no codified regulation at all,¹⁸⁵ or allowing almost total discretion

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

173. *Id.*

174. *Id.* at 485.

175. *Id.* at 484.

176. *Id.* at 485.

177. *Id.*

178. *Id.* at 484.

179. *Id.* at 493.

180. *Id.* at 482.

181. *Id.*

182. *Id.* at 480–81.

183. *Id.* at 481.

184. *Id.* at 482.

185. *Id.*

on the part of prison employees.¹⁸⁶ This focus on the language of prison regulations also created an oversight problem by involving federal courts in the daily operation of state and federal prisons.¹⁸⁷ In the Court's view, this was incompatible with previous Supreme Court jurisprudence—jurisprudence originally intended to allow prison officials a good deal of leeway in administration, whilst still protecting an inmate's most fundamental rights.¹⁸⁸

The Court in *Sandin* returned to a point that both allowed prison officials the flexibility needed to manage a volatile situation and limited judicial review of inmate due process claims to those of serious merit.¹⁸⁹ *Sandin* gave courts a rule that was subjective enough to allow courts to make determinations based upon the facts of a particular case. At the same time, the *Sandin* rule set the constitutional bar high enough that minor restrictions on inmate's liberty were allowed for prison security.¹⁹⁰

As the literature on solitary confinement was fleshed out and its dangers became more apparent, courts followed *Sandin* and looked closely at long periods of solitary confinement.¹⁹¹ Several courts held that long stays birthed a liberty interest.¹⁹² An indefinite stay in solitary confinement, however, did not come under direct judicial review under a due process violation claim until 2001.

A. Koch v. Lewis: Indefinite Supermax Confinement May Not Be Imposed Because of Status Alone

In *Koch v. Lewis*,¹⁹³ Mark Koch, an Arizona prison inmate, had been named a member of the Aryan Brotherhood, a white supremacist prison gang designated by the Arizona Department of Corrections (“ADOC”) as a Security Threat Group (“STG”).¹⁹⁴ Upon his designation, Koch was confined indefinitely in SMU-II.¹⁹⁵ Nominally, Koch had options. To escape SMU-II, he had merely to admit membership in the proscribed group and submit to debriefing by prison officials.¹⁹⁶ The court in *Koch*, however, recognized this situation as a classic

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.* at 483.

190. *Id.* at 486.

191. See generally Donna H. Lee, *The Law of Typicality: Examining the Procedural Due Process Implications of Sandin v. Conner*, 72 *FORDHAM L. REV.* 785 (2004).

192. See *Colon v. Howard*, 215 F.3d 227, 230–32 (2d Cir. 2000) (holding that 305 day confinement satisfied the *Sandin* standard); *Shoats v. Horn*, 213 F.3d 140, 143–44 (3d Cir. 2000) (holding that segregation for eight years triggered due process rights).

193. *Koch v. Lewis*, 216 F. Supp. 2d 994 (D. Ariz. 2001).

194. *Id.* at 1001. See also ORDER MANUAL, ORDER NO. 806.02, *supra* note 17 (detailing the specific procedure used to validate a member of an STG; ORDER MANUAL, ORDER NO. 801.2, *supra* note 17 (describing how groups themselves are certified as STGs).

195. *Koch*, 216 F. Supp. 2d at 1001.

196. *Id.*; see also ORDER MANUAL, ORDER NO. 806.06, *supra* note 17 (describing the debriefing process and consequences).

Catch-22.¹⁹⁷ Debriefing would open Koch to reprisals from other gang members.¹⁹⁸ If he spoke about the gang to outsiders, other members of the Aryan Brotherhood would kill Koch.¹⁹⁹ In recognition of this fact, prison officials would be “forced” to continue Koch’s supermax confinement, albeit in SMU-I, another supermax facility.²⁰⁰

The court first determined whether Koch’s indefinite detention in SMU-II created a constitutionally-protected liberty interest. The court followed the test articulated in *Sandin*, looking to see whether Koch’s confinement was an “atypical and significant hardship . . . in relation to the ordinary incidents of prison life.”²⁰¹ The court compared conditions in SMU-II to conditions elsewhere in the prison.²⁰² The court found that a short stay in SMU-II might not raise due process concerns.²⁰³ However, it also found that “the indefinite SMU-II detention endured by Koch may well qualify as the sort of extreme deprivation that would give rise to a liberty interest from the Due Process Clause itself.”²⁰⁴ At the very least, the court found that Koch did indeed possess a liberty interest in remaining free of indefinite confinement in SMU-II.²⁰⁵

Having found a liberty interest, the court next looked at the procedural due process protection given that interest.²⁰⁶ The court noted that, generally, inmates designated for solitary confinement should receive adequate notice, an opportunity to be heard, and periodic review.²⁰⁷ The court also held that the Supreme Court generally requires evidentiary protections.²⁰⁸ In other words, evidence must support the decision to segregate an inmate, and that evidence must be at least somewhat reliable.²⁰⁹ Simply put, the decision to up the punitive ante cannot be made without good reason.²¹⁰ The court found this protection lacking in Koch’s case.²¹¹

Prison administrators designated Koch a member of the Aryan Brotherhood largely on the strength of two photographs showing him in the vicinity of other members.²¹² The court noted that deference should be given prison officials in this determination, noting that in most cases, “courts should refrain from re-weighing the evidence when conducting a due process

197. *Koch*, 216 F. Supp. 2d at 1001.

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.* at 1004.

206. *Id.* at 1003.

207. *See* *Wolff v. McDonnell*, 418 U.S. 539, 563–70 (1974).

208. *Koch*, 216 F. Supp. 2d at 1003.

209. *Id.* at 1004.

210. *Id.*

211. *Id.*

212. *Id.*

examination.”²¹³ The court held, however, that the “central lesson of *Sandin* is that courts must “never lose sight of the liberty deprivation that is at stake in the first instance.”²¹⁴

The court held that “indefinite and likely permanent, detention in SMU-II strikes us as one of the most severe deprivations of liberty that can be visited upon an inmate within the ADOC.”²¹⁵ Because of the severe nature of the deprivation, the court found that Koch’s confinement in SMU-II, without evidence of affirmative misconduct, was a violation of due process.²¹⁶ The court noted that this decision was in accord with the Department of Justice’s guidelines for use of solitary confinement which suggest that segregation should be based “solely on actual behavior” because “[a]ttempting to use predictive criteria based on subjective information has led historically to unsatisfactory and possibly indefensible results.”²¹⁷ As will be shown, confining prisoners to supermax conditions based solely on their status as death row inmates is just such an indefensible result.²¹⁸

B. As in Koch, Absent Affirmative Misconduct, Death Row Inmates in Arizona Possess a Liberty Interest in Remaining Free of Indefinite Supermax Confinement

Under the first prong of the *Sandin* test, as articulated by *Koch*, an indefinite stay on death row in supermax conditions probably qualifies as an “atypical and significant hardship.”²¹⁹ As has been shown, and as the court in *Koch* found, such stays expose any inmate to likely psychological damage.²²⁰ Because death row inmates are already under extreme stress due to the nature of their sentence, the additional stress of supermax confinement is almost certain to wreak severe havoc on an inmate’s psychological well-being—certainly an atypical and significant hardship.²²¹ Therefore, following the logic of both *Sandin* and *Koch*, death row prisoners possess a significant liberty interest in remaining free of such confinement.²²²

C. Death Row Prisoners Are Entitled to the Protection of Due Process Before Indefinite Confinement in Supermax Conditions

Under the *Sandin* analysis, after a liberty interest is found, a court should evaluate the procedural due process protection given that interest.²²³ First,

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.* at 1005 (quoting U.S. Dep’t of Justice, Nat’l Inst. of Corr., *Supermax Prisons: An Overview and General Considerations* (Jan. 1999)).

218. See discussion *infra* Part IV.

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

220. *Koch*, 219 F. Supp. 2d at 1001.

221. *Id.*

222. See discussion *supra*.

223. *Sandin*, 515 U.S. at 480.

however, procedural due process in the prison context requires balancing the need to avoid arbitrary deprivations of liberty against the interests of prison administration.²²⁴ As the court in *Koch* held, “*Sandin* was an attempt to return to basic due process principles which stress proportionality and a balancing of the interests involved. More process is due where the deprivation is greatest.”²²⁵ Given the stark realities of state and prison budgets, procedural due process protection must sometimes bow to the special security needs of penitentiaries. A sliding scale is needed, a flexible test that grants procedural protection in direct proportion to an individual facility’s ability to provide them. How can this be accomplished?

One possible approach is presented in *Koch*: simply engage in extensive fact-finding, draw conclusions, and then balance those conclusions against the protection given. However, for those courts in search of a test that seems less subjective, the Supreme Court in *Turner v. Safley*²²⁶ articulated a test that courts could use to make this determination.²²⁷ The Court was called to examine the constitutionality of several prison regulations.²²⁸ To do this, the Court used a four-prong test to quite explicitly balance the interest of the state against the interest of the prisoners.²²⁹ Three of those prongs are relevant to this Note’s inquiry.²³⁰

First, the Court in *Safley* held that even when a prison regulation is found to infringe upon a prisoner’s protected rights, that regulation will still be found valid if it bears a rational relationship to the legitimate governmental interest put forward to justify it.²³¹ A regulation will only be invalidated where the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational.²³² Second, the impact of assertion of the inmate’s right on other prisoners and guards must be considered, as well as the impact on prison resources generally.²³³ When accommodation of an asserted right will have a significant ripple effect on inmates or staff, courts will be particularly deferential to the concerns of prison authorities.²³⁴

Third, and finally, the absence of ready alternatives is evidence of the reasonableness of a prison regulation.²³⁵ This prong takes into account the facts that budgetary and physical realities may make more amenable conditions for prisoners impossible.²³⁶ Even under this relaxed standard of review, the practice of confining death row inmates to indefinite supermax confinement cannot pass

224. *Superintendent v. Hill*, 472 U.S. 445, 454–55 (1985).

225. *Koch*, 216 F. Supp. 2d at 1004.

226. 482 U.S. 78 (1987).

227. *Id.* at 89–90.

228. *Id.* at 78.

229. *Id.* at 89–90.

230. *Id.* The fourth prong is whether the inmate retains some way of exercising the protected right. *Id.* In considering basic conditions of confinement, this prong is irrelevant.

231. *Id.* at 89.

232. *Id.* at 89–90.

233. *Id.* at 90.

234. *Id.*

235. *Id.*

236. *Id.*

judicial scrutiny. To provide an example, the next section applies the *Safley* test to Arizona's system.

1. Arizona Has No Legitimate Interest in Detaining Death Row Inmates in Indefinite Supermax Confinement

The ADOC contends that death row inmates have demonstrated their dangerous tendencies through the very nature of their crimes.²³⁷ As such, they must be placed in supermax units to adequately protect both prison personnel and other inmates.²³⁸ The history of Arizona's death row suggests otherwise.²³⁹

Death row inmates were originally consigned to SMU-II following an escape attempt.²⁴⁰ When they were moved, no mention was made of the individual dangerous tendencies of these inmates.²⁴¹ Rather, it was posited that the escape attempt meant security measures on death row were too lax.²⁴² Sometime afterwards, this rationale was shifted to a determination that all death row prisoners were violent to the extent that they needed to be segregated in SMU conditions.²⁴³

The actual facts about these inmates strongly suggest otherwise.²⁴⁴ While there are certainly those on death row who can and must be considered extremely dangerous,²⁴⁵ it is emphatically untrue that that this is the case for all of them.²⁴⁶ Death row is home to a variety of inmates.²⁴⁷ When death row inmates in Arizona were housed in a regular maximum-security wing, most lived there without serious incident.²⁴⁸ Several were even allowed to perform various maintenance functions virtually unsupervised.²⁴⁹ In any case, it simply cannot be said that because those on death row are murderers, they are then *ipso facto* to be considered a security risk that can only be managed within SMU-II. If that were the case, there would

237. ORDER MANUAL, ORDER NO. 713, *supra* note 17.

238. *Id.*

239. *See* discussion *infra*.

240. Press Release, Ariz. Dep't Corr., Arizona Death Row Moved to SMU-2, at <http://www.adc.state.az.us/News/1997/news0903.htm> (1997) [hereinafter Press Release].

241. *Id.*

242. *Id.*

243. ORDER MANUAL, ORDER NO. 713, *supra* note 17.

244. Ariz. Dep't Corr., *ADC Inmates on Death Row*, at <http://www.adc.state.az.us/DeathRow/DeathRow.htm#Index>. A detailed overview of the individual records of every inmate on death row is impractical in this short space. However, most inmates on death row have refrained from acts of violence while in prison.

245. Included on this list would be men like Robert Comer.

246. *ADC Inmates on Death Row*, *supra* note 244.

247. *Id.* All on Arizona's death row, for instance, have been convicted of murder or felony murder. *Id.*

248. This can be shown by examining the disciplinary records of those who were previously confined to CB-6. *Id.*

249. *Id.*; *see also* discussion *infra*.

not be murderers in the general population of Arizona's prison system. But, of course, there are.²⁵⁰

Besides murderers, there are several groups of prisoners that arguably present a greater security threat than those on death row. Included among these groups are those who have committed several rapes, those with strong gang ties inside prison,²⁵¹ and others who have been convicted of multiple violent crimes.²⁵² However, almost none of these inmates would be confined in the supermax conditions of SMU-II without at least some evidence of affirmative misconduct while they were in the prison.²⁵³

Additionally, a growing body of evidence suggests that indefinite solitary confinement does not have the intended effect of making a prison a safer environment for either prisoners or staff members.²⁵⁴ Placing inmates in the punitive surroundings of SMU-II may actually make them more dangerous instead of less. As one commentator states, "When persons are treated as having certain characteristics, whether they actually have them or not, they are likely to develop such characteristics or have them magnified because of the treatment. This phenomenon frequently occurs when persons are classified as recalcitrant and placed in lockup units."²⁵⁵

Simply put, if a man is told that he must be segregated and subjected to severe punishment because of his dangerous nature, even those who were not originally security risks become such risks.²⁵⁶ This is not an isolated phenomenon.²⁵⁷ Time and again, persons committed to supermax units for indefinite periods "are converted into extremely violent, relatively fearless individuals who profess and conduct themselves as if they do not care whether they live or die."²⁵⁸ Supermax units can be considered not only a holding place for monsters, but one that eventually creates them as well.²⁵⁹ Supermax units are difficult to manage in the best of situations because they are often full of general population inmates who have displayed affirmative dangerous conduct.²⁶⁰ Adding new inmates and making them more dangerous over long periods of time certainly

250. Ariz. Dep't Corr., *Who's In Prison?*, at <http://www.adc.state.az.us/Who.htm> (last visited Mar. 30, 2004). Per the ADOC, there are 2,001 murderers and 483 rapists in the general population of Arizona's various prisons. *Id.*

251. See ORDER MANUAL, ORDER NO. 806.02, *supra* note 17 (detailing the specific procedure used to validate a member of an STG, and the rationale for such procedures).

252. *Id.*

253. See ORDER MANUAL, ORDER NO. 803, *supra* note 17 (at the time of publication, the inmate discipline system was under judicial review and access to specifics was restricted).

254. See *infra* note 260.

255. JAMES AUSTIN & JOHN IRWIN, *IT'S ABOUT TIME: AMERICA'S IMPRISONMENT BINGE* 132 (3d ed. 2001).

256. *Id.*

257. *Id.*

258. *Id.* at 134.

259. *Id.*

260. *Id.* at 117.

is not making the supermax environment any less hazardous either for inmates or staff. This result cannot be termed a legitimate penological objective.

The vast majority of death row inmates are simply not the special security risk that facially entails their confinement in the extreme conditions of SMU-II.²⁶¹ The state's contention that all death row inmates must be arbitrarily confined is simply patently untrue.²⁶² Therefore, the regulation that confines them in SMU-II cannot pass the prong of the *Safley* test that mandates a legitimate governmental interest rationally related to the scrutinized regulation.

2. The Transfer of Death Row Inmates to Less Punitive Conditions Would Have Little or No Effect on Either Other Inmates or Prison Staff

In Arizona at least, moving death row inmates to less punitive conditions would have little to no effect on the rest of the prison population or the prison staff.²⁶³ Before they were moved to SMU-II, death row inmates were confined in Cell Block-6 ("CB-6"), a segregated maximum-security wing of the general prison.²⁶⁴ There, death row inmates had no contact with the general population, much as they have no contact now.²⁶⁵

CB-6 required substantially less staff and cost less than SMU-II.²⁶⁶ Additionally, as previously mentioned, there is growing evidence that indefinitely confining inmates in supermax conditions may make them more dangerous instead of less.²⁶⁷ In any case, there is little evidence that moving the majority of those prisoners currently on death row to another, less punitive facility would have any appreciable effect on other inmates or prison resources in general.²⁶⁸ For that reason, the ADOC regulation that confines death row inmates to SMU-II also fails the second prong of the *Safley* inquiry.

3. Arizona Has Ready Alternatives Available

The third prong of the *Safley* inquiry is whether there are ready alternatives to the regulation.²⁶⁹ Some death row inmates must be contained within SMU-II.²⁷⁰ Inmates that have demonstrated their inability to exist within the general population are certainly found on death row.²⁷¹ Many other prisoners,

261. ORDER MANUAL, ORDER NO. 801.01, *supra* note 17.

262. *See* discussion *infra*.

263. *See* discussion *infra*.

264. Press Release, *supra* note 240.

265. *Id.*

266. Kurki, *supra* note 59, at 390.

267. *See* discussion *supra* Part IV.

268. Interview with Tom Prezelski, Arizona State Representative, in Tucson, Ariz. (Mar. 5, 2003). ADOC is notoriously tight with specific budget figures. Even state legislators have been unsuccessful in requesting itemized budget figures for the state prison system. *Id.*

269. *Turner v. Safley*, 482 U.S. 78, 90 (1987).

270. *See* discussion *supra* Part I. Robert Comer and Robert Wayne Vickers are examples of such inmates.

271. *Id.*

however, lack the violent tendencies that would otherwise consign them to supermax conditions.²⁷² ADOC could sift and divide death row inmates into two groups with little to no additional effort.²⁷³ One group would be those who need to be contained in an environment like SMU-II. The other group would be those who could be housed in a less punitive environment, even one with greater restrictions than the average housing unit.²⁷⁴

When non-death row inmates are initially processed by ADOC, they undergo a threat assessment.²⁷⁵ In this way, prison officials determine the security needed to adequately house a particular inmate.²⁷⁶ The same process should be used for death row inmates; however, the classification for them would be much simpler. Instead of the great variety of housing alternatives available to most inmates, death row inmates would have only two. Either they would be housed in SMU-II, or in a less punitive facility like CB-6.²⁷⁷ Again, this would place no great burden on prison resources. ADOC already individually evaluates thousands of inmates who pass through its gates every year.²⁷⁸ Adding a mere handful of inmates to that yearly total would certainly place no great strain on prison administration.²⁷⁹

Additionally, once a death row inmate is confined to SMU-II, there should be periodic review of that classification. An administrative hearing should be held, and the inmate, assuming his behavior warrants it, should have a reasonable opportunity to escape supermax conditions. Again, this would place no great strain on prison resources. ADOC already holds periodic review hearings for every other inmate in SMU-II.²⁸⁰ This procedure would have the added benefit of returning SMU-II to its original punitive function.²⁸¹ SMU-II would again be a strong deterrent to the condemned to keep their behavior within the bounds of prison regulations. Without such a deterrent, what, if anything, constrains condemned inmates, housed in supermax conditions, from acting out under the current system? With nothing to lose and nothing to gain, there is little incentive for inmates to change their behavior.

272. ORDER MANUAL, ORDER NO. 801.02, *supra* note 17.

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.*

277. Interview with Eugene Doerr, Death Row Inmate, SMU-II, in SMU-II, Florence, Ariz. (Oct. 17, 2002). *Accord* Interview with Barry Jones, Death Row Inmate, SMU-II, in SMU-II, Florence, Ariz. (Aug. 5, 2002); Interview with Kenneth Laird, Death Row Inmate, SMU-II, in SMU-II, Florence Ariz. (Aug. 5, 2002). CB-6 was a separate maximum-security wing where Arizona's death row was located before the move to SMU-II. In CB-6, inmates with no disciplinary problems could mingle with each other, work about their wing and participate in hobby programs.

278. ORDER MANUAL, ORDER NO. 801.02, *supra* note 17.

279. *Id.*

280. *Id.*

281. Kurki, *supra* note 59, at 391.

4. *Arizona Provides Inadequate Due Process Protection Before Arbitrarily Assigning Death Row Inmates to Supermax Confinement*

Whether or not a court decides to adopt the *Safley* test to balance the interests of state and condemned inmate, the balance on the whole seems firmly in favor of the inmate. Given that death row inmates possess a liberty interest in remaining free from indefinite solitary confinement, they are certainly due *some* procedural protection.

At the very least, death row prisoners are entitled to the protections suggested by the Supreme Court in *Wolff v. McDonnell*,²⁸² before they are consigned to supermax conditions. These protections include adequate notice, an opportunity to be heard, and periodic review.²⁸³ Death row inmates are also entitled to evidentiary protections.²⁸⁴ In other words, there must be evidence supporting the decision to segregate an inmate, and that evidence must be at least somewhat reliable.²⁸⁵

V. CONCLUSION: THE STRANGE ODYSSEY OF ROBERT COMER.

In 2002, Comer's case was remanded to district court for a finding of whether he was competent to waive his appeals and be executed.²⁸⁶ Comer's attorneys found the best expert they could, Dr. Craig Haney, the leading authority on SHU Syndrome.²⁸⁷ Haney evaluated Comer at length.²⁸⁸ Unfortunately, on the eve of the hearing, Dr. Haney was called away on a family emergency.²⁸⁹ A less experienced expert took over his duties.²⁹⁰

As his testimony revealed, this new expert was fairly unfamiliar with Mr. Comer.²⁹¹ By comparison, the State's expert was well-prepared, and, since she had Mr. Comer's full support, she was very convincing—more convincing, in the court's eyes, than Comer's expert.²⁹² The court found Comer competent.²⁹³

The decision left many people unsettled. Besides the expert testimony, there was evidence presented that Comer had lived through not only Arizona's SMU-II,²⁹⁴ but the notorious segregation unit in Folsom Prison,²⁹⁵ a place with conditions so bad they were held violative of the Eighth Amendment.²⁹⁶ Given the unconvincing evidence presented by the expert regarding Mr. Comer's

282. 418 U.S. 539 (1974).

283. *Id.* at 563–70.

284. Koch v. Lewis, 216 F. Supp. 2d 994 (D. Ariz. 2001).

285. *Id.* at 1004.

286. Comer v. Stewart, 230 F. Supp. 2d 1016 (D. Ariz. 2002).

287. *Id.* at 1024.

288. *Id.* at 1025.

289. *Id.*

290. *Id.* at 1024.

291. *Id.* at 1039–43.

292. *Id.* at 1060.

293. *Id.* at 1071.

294. *Id.* at 1030.

295. *Id.* at 1031.

296. *Id.*

psychological condition,²⁹⁷ however, the cumulative effects of years in bad conditions were never really established.

There's the small matter of Comer's behavior though. Comer spends his days pacing his cell like some sort of animal.²⁹⁸ In his own estimates, he covers some twenty to thirty miles, back and forth over a ten-foot distance.²⁹⁹ Comer's letters to the court provide even more disturbing evidence of his mental state.

In those letters, Comer repeatedly refers to his lawyers and the court itself as agents of AZOG,³⁰⁰ popularly understood to stand for "Zionist Occupation Government."³⁰¹ Given Mr. Comer's rather radical white supremacist views,³⁰² this is perhaps unsurprising. It would appear to the untrained eye, however, to be at least some evidence of mental disturbance. The court didn't think so.³⁰³ What mattered to the court was the fact that, in its thinking, SHU Syndrome was, at best, a thinly accepted diagnosis.³⁰⁴

Comer's saga isn't over. Comer's case is not likely the last time an attorney claims that conditions of his client's confinement are rendering him insane. In the future, courts should abrogate a need for hearings like this by carefully examining supermax confinement and finding indefinite confinement to those conditions incompatible with our Constitution.

297. *Id.* at 1042–43.

298. *Id.* at 1042.

299. *Id.* at 1064.

300. *Id.* at 1048.

301. *Id.*

302. Rubin, *Arizona's Worst Criminal*, *supra* note 7.

303. *Comer*, 230 F. Supp. 2d at 1043.

304. *Id.* at 1040.