
COMMENT

TOWARD A STANDARD OF MEANINGFUL REVIEW:
EXAMINING THE ACTUAL PROTECTIONS AFFORDED TO
PRISONERS IN LONG-TERM SOLITARY CONFINEMENT

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INTRODUCTION 1160

I. PROCEDURAL PROTECTIONS IN THE PRISON CONTEXT1165

 A. *Determination of Process Due: An Outline of the
 Constitutional Framework* 1165

 B. *Recent Developments in Due Process Jurisprudence in the
 Prison Context* 1168

 1. Prong One: Finding a Liberty Interest 1168

 a. *Before Sandin: The Rise of the State Positive Law
 Approach* 1168

 b. *Sandin v. Conner and the Move Away from
 Statutory Interpretation*1170

 c. *Long-Term Confinement Post-Sandin:
 What is Atypical and Significant?*1172

 2. Prong Two: Process Due1175

 a. *The Court’s Approach to Prison Procedure and the Difference
 Between Administrative and Punitive Segregation*1175

 b. *Periodic Review and Adequate Notice:
 What Does It Actually Mean?*1179

II. *ASHKER* AND THE DAWN OF A NEW ERA OF PRISONER
 PROCEDURAL DUE PROCESS 1181

 A. *Challenges to Segregation Post-Wilkinson: Two Recent Cases* 1181

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|------|--|------|
| 1. | <i>Proctor v. LeClaire, Selby v. Caruso, and the Problem with the Periodic Review Standard</i> | 1182 |
| a. | <i>Proctor v. LeClaire</i> | 1182 |
| b. | <i>Selby v. Caruso</i> | 1183 |
| 2. | <i>Proctor, Selby, and the State of Meaningful Review</i> | 1184 |
| B. | <i>New Approach: Ashker v. Brown</i> | 1184 |
| 1. | Background..... | 1184 |
| 2. | Legal Argument..... | 1187 |
| 3. | Implications..... | 1190 |
| III. | DEVELOPING A MEANINGFUL ALTERNATIVE..... | 1191 |
| A. | <i>The Standard Must Acknowledge the Harm at Stake</i> | 1191 |
| B. | <i>Courts Must Scrutinize the Procedures Employed by Prisons</i> | 1194 |
| C. | <i>A Meaningful Balancing Test</i> | 1195 |
| | CONCLUSION..... | 1197 |

INTRODUCTION

The unprecedented trend of lengthy incarceration in the United States has produced a disturbing byproduct: the use of long-term solitary confinement. The precise number of people held in solitary confinement is notoriously difficult to determine due to a lack of reliable recordkeeping within institutions and varied terminology among states, but experts believe that tens of thousands of people are held in “restricted housing.”¹ Of those people, many reside long-term in so-called segregation—a practice that removes an inmate from the general prison population to a segregated housing unit and is justified as an administrative measure to maintain safety for inmates and prison officers alike.² Segregation placement severely restricts an inmate’s contact with other people and with the outside world.³

Although prisons employ various types of segregation placements and different states term segregation differently, this Comment addresses the

¹ See Angela Browne et al., *Prisons Within Prisons: The Use of Segregation in the United States*, 24 FED. SENT’G REP. 46, 46 (2011) (citing JAMES J. STEPHAN, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 222182, CENSUS OF STATE AND FEDERAL ADULT CORRECTIONAL FACILITIES, 2005 (2008)). Experts believe about 80,000 people are held in restricted housing. See *id.*

² This Comment addresses facilities in which an inmate is placed in an isolated unit, separated from the general prison population, and deprived of normal prison privileges and activities. Segregated housing units (SHUs) may also be called “secure housing units,” “special housing units,” and “security housing units.” Supermax prisons have the same characteristics for the purposes of this analysis. For a basic overview of different types of facilities and segregation categories, see *id.* at 47. For a description of the general conditions within these units, see *infra* note 17 and accompanying text.

³ See *infra* note 17 and accompanying text (describing the typical conditions of segregated confinement).

use of segregated housing that consists of the “housing of a prisoner in conditions characterized by substantial isolation from other prisoners” due to disciplinary or administrative findings.⁴ Segregation falls within two general categories depending on the stated reason for the placement decision: disciplinary and administrative.⁵ Placement in disciplinary segregation occurs when a prisoner is temporarily removed from the general prison population as punishment for bad behavior.⁶ Although definitions vary among facilities,⁷ courts and scholars generally use the term “administrative segregation” to mean segregation placement for a reason other than bad behavior.⁸ In contrast with disciplinary segregation, long-term administrative segregation—and extended long-term segregation in particular—is justified not on the grounds of disciplinary action, but instead by a perceived threat that the prisoner poses to himself or others. Administrative segregation decisions are justified not by an inmate’s past conduct, but rather by predictions about an

⁴ Margo Schlanger, *Regulating Segregation: The Contribution of the ABA Criminal Justice Standards on the Treatment of Prisoners*, 47 AM. CRIM. L. REV. 1421, 1430 (2010) (quoting ABA CRIMINAL JUSTICE STANDARDS ON THE TREATMENT OF PRISONERS § 23-1.0(r) (2010)). For the purposes of this Comment, segregation and solitary confinement are interchangeable terms.

⁵ See Fred Cohen, *Isolation in Penal Settings: The Isolation–Restraint Paradigm*, 22 WASH. U. J.L. & POL’Y 295, 299-300 (2006) (“Administrative segregation terms generally are indefinite, although some administrative review process may be required. On the other hand, . . . disciplinary segregation terms tend to be definite [and last for a shorter amount of time].”). Although these categorical terms invoke different legal doctrines and standards, administrative segregation and disciplinary segregation often involve the same restrictive conditions of confinement. For a description of the general differences between the two classifications, see *infra* note 8. See generally *infra* subsection I.B.2.a (discussing due process protections for punitive segregation).

⁶ Disciplinary segregation is a common punitive tool prison officials use. For a critical analysis of the use of disciplinary segregation in California, see Zafir Shaiq, Note, *More Restrictive Than Necessary: A Policy Review of Secure Housing Units*, 10 HASTINGS RACE & POVERTY L.J. 327, 337 (2013) (“[T]he application of . . . [disciplinary SHU placement] is less than logical. Qualifying offenses include tattooing, possession of over five dollars without authorization, gambling, throwing anything on a nonprisoner, and theft.”).

⁷ States try to draw distinctions between disciplinary segregation, imposed as punishment for rules violations, and administrative segregation, imposed when a facility determines that the inmate’s “presence in general [prison] population would pose a threat to the safety and security of the facility.” Cohen, *supra* note 5, at 299 (quoting N.Y. COMP. CODES R. & REGS. tit. vii, § 301.4(b) (2002)).

⁸ See, e.g., *Hewitt v. Helms*, 459 U.S. 460, 468 (1983) (“The phrase ‘administrative segregation’ . . . appears to be something of a catchall: it may be used to protect the prisoner’s safety, to protect other inmates from a particular prisoner, to break up potentially disruptive groups of inmates, or simply to await later classification or transfer.”); see also John J. Gibbons & Nicholas de B. Katzenbach, *Confronting Confinement: A Report of the Commission on Safety and Abuse in America’s Prisons*, 22 WASH. U. J.L. & POL’Y 385, 462-63 (2006) (distinguishing disciplinary segregation from administrative segregation).

inmate's future behavior.⁹ Inmates placed in administrative segregation belong to some of the most vulnerable populations within a prison, including people struggling with substance abuse and mental illness.¹⁰

Assignment to administrative segregation occurs when a prison administrator deems a person a threat to himself, other inmates, or prison officials. Prison administrators often use gang affiliation as a proxy for dangerousness, frequently resulting in the administrative segregation placement of individuals solely due to their affiliation with gangs.¹¹

Although officials justify indefinite segregation as a last resort for the most dangerous inmates, the security classification processes, discussed at length in subsection II.B.1, are imperfect.¹² Once a determination is made, the inmate is removed from the general prison population and placed into segregated housing of some form—either in a facility that exclusively houses segregated prisoners,¹³ or a special unit within the prison dedicated to segregated prisoners. In the segregated facility, the inmate is “deprived of almost any environmental or sensory stimuli and of almost all human contact”¹⁴ and restricted to small, bare cells, often lacking windows or access

⁹ See James E. Robertson, *The Constitutional Rights of an Inmate at an Administrative Segregation Proceeding: Hewitt v. Helms and the Withdrawal of Prisoners' Rights*, 11 OHIO N.U. L. REV. 57, 59 (1984) (noting the theoretical predictive basis for administrative segregation decisions but suggesting that predictive capacity is limited in practice).

¹⁰ See Sharon Dolovich, *Exclusion and Control in the Carceral State*, 16 BERKELEY J. CRIM. L. 259, 323 (2011) (“The people slated for supermax, having been culled from the prison’s general population, are already disproportionately likely to be grappling with incapacities like drug addiction, mental illness, and learning disabilities.”). For a disturbing account of the placement and treatment of mentally ill prisoners in solitary confinement, see Elizabeth Alexander & Patricia Streeter, *Isolated Confinement in Michigan: Mapping the Circles of Hell*, 18 MICH. J. RACE & L. 251, 257-62 (2013). For an overview of expert commentary on the impact of solitary confinement on an inmate’s mental health, see Emily Coffey, *Madness in the Hole: Solitary Confinement and Mental Health of Prison Inmates*, 18 PUB. INT. L. REP. 17, 19 (2012).

¹¹ See Cohen, *supra* note 5, at 320 (“The explicit predicate for separating and isolating gang members is a prediction of future violence and the need for preventative action.”). Cohen argues, however, that segregation placement based on gang affiliation is improper, noting that “‘gang’ is a rather loose term encompassing just about any group whose members commit crimes” and that separation is not necessarily the best strategy for gang control. *Id.*; see also *infra* Section III.A.

¹² See Joseph B. Allen, Note, *Extending Hope Into “The Hole”: Applying Graham v. Florida to Supermax Prisons*, 20 WM. & MARY BILL RTS. J. 217, 218 (2011) (“Although states originally designed the facilities for only the most dangerous and violent inmates, lower threat-level inmates occasionally find themselves assigned to supermax facilities for prolonged periods of time.”).

¹³ California’s Pelican Bay SHU, discussed at length in Section II.B, *infra*, and supermax prisons, such as the Ohio State Penitentiary at issue in *Wilkinson v. Austin*, are examples of this approach. See *Wilkinson v. Austin*, 545 U.S. 209, 213 (2005) (“Supermax facilities are maximum-security prisons with highly restrictive conditions, designed to segregate the most dangerous prisoners from the general prison population.”).

¹⁴ *Wilkinson*, 545 U.S. at 214.

to natural light, for twenty-two to twenty-four hours per day.¹⁵ Confinement is typically indefinite and may last for a prolonged period of time.¹⁶ Inmates are deprived of meaningful human contact; they have only “fleeting” interactions with prison staff and rarely have contact with other inmates or visitors because “[v]irtually no outsiders have access to the parts of correctional facilities that house . . . segregated inmates.”¹⁷

Long-term prison segregation, unlike disciplinary segregation, therefore assumes a unique role: prison administrators are empowered to remove people from the general prison population (and therefore distinguish their punishment from the normal prison experience), often without an affirmative action on the part of the prisoner. Mere affiliation with a group or even general disposition can warrant placement in a severely restrictive and isolated confinement setting. This Comment focuses on administrative placements based on “affiliation”—that is, placements of individuals alleged to be affiliated with groups that prison officials deem dangerous.

Placement in segregation, particularly when it is indefinite and prolonged, not only curtails an inmate’s access to other prisoners, mental and physical stimulation, and, in many instances, natural light, but it also

¹⁵ See, e.g., Lorna A. Rhodes, *Changing the Subject: Conversation in Supermax*, 20 CULTURAL ANTHROPOLOGY 388, 406 n.6 (2005) (“The essential features are isolation, intensive surveillance, and elaborate precautions against assault and escape whenever prisoners are out of their cells.”); Lorna A. Rhodes, *Dreaming of Psychiatric Citizenship: A Case Study of Supermax Confinement* (“Supermax prisoners are confined for twenty-three or more hours a day in small single cells and removed—cuffed, tethered and under escort—only for brief showers or solitary exercise. Their lives are characterized by lack of physical and mental stimulation, minimal social contact, and extreme dependence on prison staff”), in A READER IN MEDICAL ANTHROPOLOGY: THEORETICAL TRAJECTORIES, EMERGENT REALITIES 181, 184 (Byron J. Good et al. eds., 2010).

Although some aspects of solitary confinement have changed since the early nineteenth century when the practice was introduced in the U.S. penal system, many elements remain the same. See Cohen, *supra* note 5, at 301; John F. Cockrell, Note, *Solitary Confinement: The Law Today and the Way Forward*, 37 LAW & PSYCHOL. REV. 211, 212-13 (2013). Indeed, the primary difference between the solitary confinement of the past and the segregation of today is in its justification: in the nineteenth century facilities, inmates could work and “there was, however misguided, a reformatory ideal upon which the practice was predicated. . . . Penal isolation today offers no pretense of reformation and provides no vocational options” Cohen, *supra* note 5, at 301 (footnotes omitted).

¹⁶ In this Comment, I adopt a definition of long-term segregation that reflects the plaintiff class in *Ashker v. Brown*: confinement in a segregated housing unit for a decade or longer. See Plaintiffs’ Second Amended Complaint at 2, *Ashker v. Brown*, No. 09-5796 (N.D. Cal. Sept. 10, 2012), ECF No. 136 (describing the class members’ confinement of at least a decade as “unconscionably long”).

¹⁷ Michele Deitch, *Special Populations and the Importance of Prison Oversight*, 37 AM. J. CRIM. L. 291, 297 (2010); see also Plaintiffs’ Second Amended Complaint, *supra* note 16, at 11 (“The remote location of Pelican Bay means that most SHU prisoners receive no visits with family members or friends Many prisoners have thus been without face-to-face contact with people other than prison staff for decades.”).

significantly alters the prisoner's carceral experience. In addition to Eighth Amendment concerns,¹⁸ placement into administrative segregation also implicates the due process protections of the Fifth and Fourteenth Amendments.¹⁹

The harshness of segregation placement as an administrative safety tool is generally grossly disproportionate to the threat that many prisoners—including alleged gang members—pose to themselves or others.²⁰ This reflects not only the imperfect and inadequate classification tools prison officials employ to determine inmate threat levels,²¹ but also the overly restrictive conditions of segregated confinement that far surpass any danger an inmate may pose.²² As a result of these failures, “[t]he segregation units of American prisons are full not of Hannibal Lecters but of the young, the pathetic, the mentally ill.”²³

In light of these extreme conditions and the great impact they can have on a prisoner's confinement experience, the procedures regarding placement that are afforded to prisoners placed in segregated housing are of the utmost importance. Unfortunately, the Supreme Court's longstanding tradition of deferring to prison officials has limited the procedural protections prisoners can demand under the Due Process Clause of the Fourteenth Amendment.²⁴ By emphasizing that the procedural guarantee of due process is flexible, the Court has sanctioned segregation decisions as long as the placement involves some form of “meaningful review.”²⁵ The Court has refrained from defining the requisite process or investigating how a prison's stated procedures actually function on an individual inmate level, however, rendering meaningful review meaningless.

The Court's doctrinal reluctance to articulate a bright line rule regarding the process due to prisoners placed in administrative segregation has therefore encouraged creative litigation strategies regarding long-term segregation

¹⁸ Although outside the scope of this Comment, there are significant Eighth Amendment concerns relating to long-term solitary confinement. See Jules Lobel, *Prolonged Solitary Confinement and the Constitution*, 11 U. PA. J. CONST. L. 115, 117-25 (2008); see also Plaintiffs' Second Amended Complaint, *supra* note 16, at 36.

¹⁹ U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

²⁰ See Cohen, *supra* note 5, at 300 (“[T]he harm caused by extended isolation under the most straightened or barbaric conditions is not related to any rationale for the isolation.”); Schlanger, *supra* note 4, at 1421 (“Too many prisoners are housed in [segregation units] for too long, in conditions whose harshness stems more from criminal-justice politics than from correctional necessity or even usefulness.”).

²¹ See *infra* Section III.A.

²² See *supra* note 20 and accompanying text.

²³ Schlanger, *supra* note 4, at 1432 (internal quotation marks omitted).

²⁴ See *infra* notes 32-34 and accompanying text.

²⁵ See *infra* subsection I.B.2.b.

placement and review.²⁶ This Comment examines these strategies and the implications that these approaches have on the current state of Supreme Court doctrine. Through analysis of a pending class action suit, *Ashker v. Brown*,²⁷ this Comment examines the current state of the due process doctrine for prisoners seeking to challenge their placement and prolonged confinement in the severely restrictive environment of administrative segregation.

This Comment considers the actual procedural due process protections afforded to prisoners placed in segregated housing for nondisciplinary reasons. Part I examines the procedural protections afforded to inmates generally and prisoners placed in administrative segregation in particular. In addition, Part I explores the doctrinal limitations on due process challenges relating to administrative segregation. Part II chronicles recent developments in inmate litigation, in which litigants have alleged due process violations despite these limitations. Part II also evaluates the state of the doctrine through an analysis of recent litigation strategies, highlighting *Ashker v. Brown* as a model. Finally, Part III recommends changes to the Court's approach to administrative segregation due process challenges.

I. PROCEDURAL PROTECTIONS IN THE PRISON CONTEXT

A. Determination of Process Due: An Outline of the Constitutional Framework

There are two key steps in assessing an alleged due process violation. First, a court must determine whether the government conduct in question impairs a liberty interest protected by the Due Process Clauses of the Fifth and Fourteenth Amendments.²⁸ The Court has explained that “[a] liberty interest may arise from the Constitution itself, by reason of guarantees implicit in the word ‘liberty,’”²⁹ or through guarantees derived from state law—even when the right would not otherwise command constitutional protection.³⁰ Second, if the government conduct implicates a protected

²⁶ See *infra* Section II.B.

²⁷ Plaintiffs' Second Amended Complaint, *supra* note 16.

²⁸ The Court has determined that the range of directly protected liberty interests is narrow. See, e.g., *Hewitt v. Helms*, 459 U.S. 460, 466 (1983) (“[I]t is well settled that only a limited range of interests fall within [the due process] provision.”); *Meachum v. Fano*, 427 U.S. 215, 224 (1976) (“We reject . . . the notion that *any* grievous loss visited upon a person by the State is sufficient to invoke the procedural protections of the Due Process Clause.”).

²⁹ *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005).

³⁰ See *Hewitt*, 459 U.S. at 466 (“Liberty interests protected by the Fourteenth Amendment may arise from two sources—the Due Process Clause itself and the laws of the States.”); see also

liberty interest, the court must weigh the three factors in the *Mathews v. Eldridge* balancing test:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.³¹

The Court has emphasized that "due process is flexible" and requires a situation-specific determination of necessary procedural safeguards.³² As a result, when assessing prisoners' due process challenges, the Court has noted the unique posture of inmates' procedural guarantees.³³ The Court has refrained from finding a liberty interest directly implicated by the Due Process Clause "in itself" for most liberty interests asserted by inmates, instead locating protectable liberty interests in state-created rights.³⁴ The Court has repeatedly demonstrated its reluctance to interfere with states' decisions in the prison context, holding that "[t]he Due Process Clause standing alone confers no liberty interest in freedom from state action taken

Wolff v. McDonnell, 418 U.S. 539, 558 (1974) ("[A] person's liberty is equally protected, even when the liberty itself is a statutory creation of the State.").

³¹ *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

³² *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) ("It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands."); see also *Mathews*, 424 U.S. at 333 ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965))).

³³ See *Wilkinson*, 545 U.S. at 212 ("[C]ourts must give substantial deference to prison management decisions before mandating . . . elaborate procedural safeguards . . ."); see also Myra A. Sutanto, Note, *Wilkinson v. Austin and the Quest for a Clearly Defined Liberty Interest Standard*, 96 J. CRIM. L. & CRIMINOLOGY 1029, 1032, 1041-42 (2006) (discussing the more relaxed approach to due process guarantees afforded to inmates and explaining that unlike free citizens, inmates have presumably received procedural due process already—namely, a trial).

³⁴ See *Montanye v. Haymes*, 427 U.S. 236, 242 (1976) ("As long as the conditions or degree of confinement to which the prisoner is subjected is within the sentence imposed upon him and is not otherwise violative of the Constitution, the Due Process Clause does not in itself subject an inmate's treatment by prison authorities to judicial oversight."); see also *Greenholtz v. Inmates of the Neb. Penal & Corr. Complex*, 442 U.S. 1, 7 (1979) (finding "no constitutional or inherent right" to the initial grant of parole); *Moody v. Daggett*, 429 U.S. 78, 88 n.9 (1976) ("We have rejected the notion that every state action carrying adverse consequences for prison inmates automatically activates a due process right."); *Meachum v. Fano*, 427 U.S. 215, 225 (1976) (finding no constitutional protection against prison transfers within the same state prison system); *Wolff*, 418 U.S. at 557 (finding no constitutional guarantee of good time credits earned for good behavior in prison).

within the sentence imposed.”³⁵ The court then must assess whether the procedures the prison administrators have in place are adequate, applying the standard *Mathews* balancing test.³⁶

Even if a court determines a liberty interest is at stake, the procedures required to constitutionally infringe upon it are modest at best: “In the prison context . . . due process is satisfied by providing ‘notice of the factual basis’ for an inmate’s placement and ‘allowing the inmate a rebuttal opportunity.’”³⁷ These limited procedural protections reflect the Court’s decision that an inmate’s interest in the specific conditions of his confinement are narrow in comparison to the state’s interest in maintaining safety and preserving resources.³⁸

Prison imposes a unique restraint on individual liberty. Individuals in prison have already lost much of their liberty after judicial proceedings and have benefited from the strict procedural guarantees attached to criminal trials.³⁹ Prisoners, the Court has repeatedly emphasized, are individuals whose liberties have been intentionally curtailed and whose current positions are the very articulation of that constitutionally secured curtailment.⁴⁰ Within this unique context, the Court has often granted broad deference to prison officials to manage a prisoner’s confinement as prison officials see fit.⁴¹

³⁵ *Sandin v. Conner*, 515 U.S. 472, 480 (1995) (internal quotation marks omitted) (citing *Hewitt*, 459 U.S. at 468).

³⁶ *Mathews*, 424 U.S. at 334-35; see also *Prieto v. Clarke*, No. 12-1199, 2013 WL 6019215, at *9 (E.D. Va. Nov. 12, 2013) (“[A prisoner’s] constitutional rights are not violated by the imposition of the . . . hardship itself, but by the imposition of that hardship without sufficient procedural protections.”).

³⁷ *Prieto*, 2013 WL 6019215, at *10 (quoting *Wilkinson*, 545 U.S. at 225-26).

³⁸ See *Wilkinson*, 545 U.S. at 225-29 (applying the *Mathews* analysis to justify the limited procedural protections afforded to inmates); *Hewitt*, 459 U.S. at 467 (“We have repeatedly said both that prison officials have broad administrative and discretionary authority over the institutions they manage and that lawfully incarcerated persons retain only a narrow range of protected liberty interests.”).

³⁹ See Kaitlin Cassel, Note, *Due Process in Prison: Protecting Inmates’ Property After Sandin v. Conner*, 112 COLUM. L. REV. 2110, 2118 (2012) (“[A] prison sentence, imposed after a full criminal trial, greatly restricts a prisoner’s liberty.”).

⁴⁰ See *Montayne v. Haymes*, 427 U.S. 236, 242 (1976) (granting deference to prison officials “[a]s long as the conditions or degree of confinement to which the prisoner is subjected is within the sentence imposed upon him and is not otherwise violative of the Constitution”); see also *Vitek v. Jones*, 445 U.S. 480, 493 (1980) (“Undoubtedly, a valid criminal conviction and prison sentence extinguish a defendant’s right to freedom from confinement.”).

⁴¹ See, e.g., *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) (holding that a prisoner’s limited due process guarantees are still “subject to restrictions imposed by the nature of the regime to which they have been lawfully committed”). Some courts have narrowly interpreted the deference afforded prison officials. The Sixth Circuit, for example, concluded in *Gibbs v. Hopkins* that while prison officials are permitted some latitude in prison administration, the courts “may not simply

B. *Recent Developments in Due Process Jurisprudence in the Prison Context*

The two-pronged approach the Court uses to assess due process protections has undergone substantial modification over the past two decades. This Section examines those changes for each prong of the analysis.

1. Prong One: Finding a Liberty Interest

a. *Before Sandin: The Rise of the State Positive Law Approach*

The threshold inquiry that a court must answer when deciding a due process question is whether the state action in question implicates a protected liberty interest.⁴² A liberty interest must meet a high bar for the Court to find it protected under the Due Process Clause itself.⁴³ In the prison context in particular, the Due Process Clause protects most liberty interests asserted by prisoners when the state has created a right or guarantee for prisoners.⁴⁴ The original approach to finding a state-created liberty interest, adopted by the Court in a flurry of decisions in the 1970s and 1980s,⁴⁵ required courts to assess state statutory or regulatory language

defer to [prison officials'] judgment on the basis of administrative discretion" and that "the Due Process Clause requires at the very least some minimal inquiry by the courts sworn to enforce its guarantees." 10 F.3d 373, 379 (6th Cir. 1993).

⁴² See *Hewitt*, 459 U.S. at 466 (noting that "only a limited range of interests" enjoy protection under the Due Process Clause); Scott F. Weisman, Note, *Sandin v. Conner: Lowering the Boom on the Procedural Rights of Prisoners*, 46 AM. U. L. REV. 897, 901-02 (1997) (explaining the development of the two-pronged approach).

⁴³ See *supra* notes 29-30 and accompanying text; see also Donna H. Lee, *The Law of Typicality: Examining the Procedural Due Process Implications of Sandin v. Conner*, 72 FORDHAM L. REV. 785, 786 (2004) ("The scope of the constitutional prohibition against any state taking of life, liberty, or property, without due process of law, depends on the meaning of life, liberty and property, and courts have traditionally used state law to inform and expand the definition of these concepts." (internal quotation marks omitted)).

⁴⁴ Cf. *supra* note 34 and accompanying text. But see *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973) (holding that "a probationer . . . is entitled to a . . . revocation hearing"); *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972) (holding that a parolee is entitled to "some orderly process" before revocation of parole because "the liberty of a parolee . . . includes many of the core values of unqualified liberty and its termination inflicts a grievous loss on the parolee" (internal quotation marks omitted)).

⁴⁵ According to James Robertson, this trend, which he terms the "entitlement analysis" approach, gained force after *Meachum v. Fano* and throughout the late 1970s, culminating in the Supreme Court's endorsement of the approach in 1983 in *Hewitt v. Helms*. Robertson, *supra* note 9, at 62-68. Robertson argues that the lower courts "had begun to erode the long-standing barrier between administrative segregation decisions and due process of law," but that *Hewitt* limited this expansion of prisoners' access to procedural due process. *Id.* at 64-70. In *Sandin v. Conner*,

to determine whether such an interest existed.⁴⁶ The Court reasoned that a state creates a liberty interest when the language of a regulation or statute is sufficiently mandatory as to encourage reliance upon its guarantees.⁴⁷

In *Hewitt v. Helms*, the Court rejected the existence of a prisoner's liberty interest in "being confined to a general population cell, rather than the more austere and restrictive administrative segregation quarters" as a right implied in the Due Process Clause.⁴⁸ Instead, the Court looked to the statutory measures regarding administrative segregation,⁴⁹ ultimately concluding that the prisoner did "acquire a protected liberty interest in remaining in the general prison population."⁵⁰

The Court's positivist approach, as the reasoning in *Hewitt* demonstrates, turned on whether the state statutory language was sufficiently compulsory to create a liberty entitlement.⁵¹ Thus, the existence of a state-created liberty interest depended upon the precise statutory language at issue. Courts had to analyze the language of state regulations and statutes to discern whether the measure was permissive or discretionary (rendering an entitlement claim invalid), or sufficiently mandatory (supporting a liberty interest claim) as a touchstone of its due process analysis.⁵² Under this approach, the Court found that an inmate had a state-created liberty interest in remaining in the general prison population⁵³ and in earned good-time credits⁵⁴ but did not find a liberty interest in a prisoner's initial grant of parole⁵⁵ or the

discussed in subsection I.B.1.b, *infra*, the Court implied that this trend arose from a misreading of dictum in *Meachum*. 515 U.S. 472, 479 (1995).

⁴⁶ For a description of this process, see *Hewitt*, 459 U.S. at 469, which explains that "a State may create a liberty interest protected by the Due Process Clause through its enactment of certain statutory or regulatory measures."

⁴⁷ *Id.* at 472.

⁴⁸ *Id.* at 466-67.

⁴⁹ See *id.* at 469-70 (examining a Pennsylvania statute to determine whether it created a liberty entitlement).

⁵⁰ *Id.* at 470-71.

⁵¹ See Lee, *supra* note 43, at 796-98 (describing the Court's use of state law to analyze prisoners' due process rights and arguing the approach came to "full fruition" in *Hewitt*).

⁵² Cf. *id.* at 799 (pointing out that "the *Hewitt* decision contained a blueprint for limiting state-created liberty interests" by directing state administrative agencies to "substitute permissive language such as 'may' or 'should' for the mandatory language flagged by the Court as giving rise to liberty interests").

⁵³ *Hewitt*, 459 U.S. at 470-71.

⁵⁴ *Wolff v. McDonnell*, 418 U.S. 539, 556-57 (1974); see also *Hewitt*, 459 U.S. at 469 ("[I]n *Wolff*, where we rejected any notion of an interest in good-time credits inherent in the Constitution, we also found that Nebraska had created a right to such credits.").

⁵⁵ *Greenholtz v. Inmates of the Neb. Penal & Corr. Complex*, 442 U.S. 1, 7 (1979) ("There is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence.").

transfer from one institution to another within the same state prison system.⁵⁶ The distinguishing feature of the latter two interests was the discretionary language within the relevant state regulatory measures.⁵⁷

b. *Sandin v. Conner and the Move Away from Statutory Interpretation*

The Court revisited the threshold inquiry due process analysis in *Sandin v. Conner*.⁵⁸ *Sandin* involved a due process claim by DeMont Conner, a prisoner who had been placed in thirty-day disciplinary segregation for misconduct.⁵⁹ Conner alleged that he was deprived of procedural due process in the disciplinary hearing that resulted in his segregation placement.⁶⁰ Conner argued that he was entitled to procedural due process before facing any punitive actions by the state.⁶¹

The Court began its analysis by chronicling the state of the prisoner procedural due process doctrine.⁶² Noting that the widespread adoption of the *Hewitt* approach had erroneously encouraged “the search for a negative implication from mandatory language in prisoner regulations” as the primary concern of the due process inquiry, the Court in *Sandin* signaled a change of course.⁶³ Indeed, the Court concluded that the *Hewitt* approach had “produced at least two undesirable effects.”⁶⁴

The first effect, as the Court explained, was that the approach “create[d] disincentives for States to codify prison management procedures in the interest of uniform treatment.”⁶⁵ The second effect, according to the *Sandin* Court, was that “the *Hewitt* approach . . . led to the involvement of federal courts in the day-to-day management of prisons, often squandering judicial resources with little offsetting benefit to anyone.”⁶⁶

⁵⁶ *Meachum v. Fano*, 427 U.S. 215, 225 (1976).

⁵⁷ *See Lee*, *supra* note 43, at 799 (explaining that the Court’s state-created liberty interest-based analysis incentivized states’ use of discretionary language to avoid creating constitutionally protected liberty interests).

⁵⁸ 515 U.S. 472, 482 (1995) (explaining the need for an alternative approach given the “undesirable effects” of *Hewitt*).

⁵⁹ *Id.* at 474-76.

⁶⁰ *Id.* at 475-77.

⁶¹ *Id.* at 484.

⁶² *See id.* at 477-83 (discussing the due process framework for a prisoner’s procedural challenges, beginning with the standards set forth in *Wolff* and concluding with the problematic results of *Hewitt*).

⁶³ *Id.* at 483.

⁶⁴ *Id.*

⁶⁵ *Id.* at 482 (“States may avoid creation of ‘liberty’ interests by having scarcely any regulations, or by conferring standardless discretion on correctional personnel.”).

⁶⁶ *Id.* This sentiment reflects growing frustration with the amount of time spent on prison litigation and the perception that prison litigation was flooding the federal court system. For a

Although the Court in *Sandin* declined to overrule *Hewitt* to the extent that it sanctioned state positive-law analysis,⁶⁷ it began a paradigmatic shift in the standard for prisoner procedural due process. The Court rejected the notion that mandatory language in prison regulations is the touchstone for whether an inmate has a liberty interest at stake.⁶⁸ Further, the Court held that discipline by prison officials “falls within the expected perimeters of the sentence imposed by a court of law” and that Conner’s interest in avoiding disciplinary segregation was therefore unprotected by the Due Process Clause.⁶⁹

As a result, the *Sandin* Court redefined the standard for the liberty interest inquiry in the prison context. Rather than look to statutory language, the Court directed courts to instead examine whether the state action “imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life” so as to create a liberty interest in its avoidance.⁷⁰ The Court reached its conclusion by comparing disciplinary segregation conditions with other segregated confinements (such as administrative segregation), noting that general population prisoners commonly experienced some period of segregated confinement during their incarceration and explaining that Conner’s placement did not impact the duration of his incarceration.⁷¹ In its holding, the Court signaled a return to an examination of the “nature of the deprivation” at issue, rather than the regulatory language.⁷²

Sandin, while an attempt to clarify—and limit—the due process protections available to prisoners, created its own problems.⁷³ The Court announced a standard requiring a comparative analysis, but failed to define

thorough examination of inmate litigation and the “sea change” that occurred in 1996 with the passage of the Prison Litigation Reform Act (PLRA), see Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1633-44 (2003).

⁶⁷ See *Sandin*, 515 U.S. at 483 n.5 (“Such abandonment of *Hewitt*’s methodology does not technically require us to overrule any holding of this Court.”).

⁶⁸ See *id.* at 483.

⁶⁹ *Id.* at 485-86 (“We hold 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.”).

⁷⁰ *Id.* at 484.

⁷¹ *Id.* at 483-87. The Court discussed the possible impact of disciplinary segregation on Conner’s parole eligibility, but concluded that any impact was “too attenuated” to invoke the procedural guarantees described in *Wolff*. *Id.* at 487.

⁷² See *id.* at 480-81 (recounting the shift in focus from the “nature of the deprivation” to analysis of the language of state regulations and announcing a return to the original approach).

⁷³ For a critique of *Sandin*, see Michelle C. Ciszak, Note, *Sandin v. Conner: Locking Out Prisoners’ Due Process Claims*, 45 CATH. U. L. REV. 1101, 1139-41 (1996).

what exactly the Court wanted lower courts to compare.⁷⁴ The Court failed to define the baseline for “atypical and significant hardship,”⁷⁵ leaving the task of determining the baseline comparison and defining typical and insignificant deprivations to the lower courts.⁷⁶

c. *Long-Term Confinement Post-Sandin: What is Atypical and Significant?*

Ten years later, the Court revisited the *Sandin* standard in *Wilkinson v. Austin*.⁷⁷ The Court held that an inmate had a liberty interest in avoiding assignment to the state’s supermax prison, the Ohio State Penitentiary (OSP).⁷⁸ In its unanimous opinion, the Court noted that incarceration in OSP is for an indefinite period, “synonymous with extreme isolation,” and deprives inmates “of almost any environmental or sensory stimuli and of almost all human contact.”⁷⁹ An inmate placed at OSP is not only subjected to these conditions, but also rendered ineligible for parole for the duration of the inmate’s incarceration at the supermax facility.⁸⁰

⁷⁴ See Philip W. Sbaratta, Note, *Sandin v. Conner: The Supreme Court’s Narrowing of Prisoners’ Due Process and the Missed Opportunity to Discover True Liberty*, 81 CORNELL L. REV. 744, 766-67 (1996) (highlighting the vagueness of the Court’s “atypicality” standard).

⁷⁵ *Sandin*, 515 U.S. at 484.

⁷⁶ This predictably led to disagreement over the appropriate baseline. Compare *Beverati v. Smith*, 120 F.3d 500, 504 (4th Cir. 1997) (“[A]lthough the conditions [of administrative segregation] were more burdensome than those imposed on the general prison population, they were not so atypical that exposure to them for six months imposed a significant hardship in relation to the ordinary incidents of prison life.”), with *Brooks v. DiFasi*, 112 F.3d 46, 49 (2d Cir. 1997) (indicating that administrative segregation provides a benchmark against which to compare disciplinary segregation). See generally *Hatch v. Dist. of Columbia*, 184 F.3d 846, 851 (D.C. Cir. 1999) (highlighting the difficulty of applying the *Sandin* standard).

⁷⁷ 545 U.S. 209 (2005). For an outline of the procedural posture of the case, see Andrew J. Theis, Note, *The Gang’s All Here: How the Supreme Court’s Unanimous Holding in Wilkinson v. Austin Utilizes Supermax Facilities to Combat Prison Gangs and Other Security Threats*, 29 HAMLINE L. REV. 145, 152-56 (2006).

⁷⁸ *Wilkinson*, 545 U.S. at 223-24.

⁷⁹ *Id.* at 214. The Court began its opinion with a detailed description of life at OSP:

Inmates must remain in their cells, which measure 7 by 14 feet, for 23 hours per day. A light remains on in the cell at all times, though it is sometimes dimmed, and an inmate who attempts to shield the light to sleep is subject to further discipline. During the one hour per day that an inmate may leave his cell, access is limited to one of two indoor recreation cells.

. . . OSP cells have solid metal doors with metal strips along their sides and bottoms which prevent conversation or communication with other inmates. All meals are taken alone in the inmate’s cell instead of in a common eating area. Opportunities for visitation are rare and in all events are conducted through glass walls.

Id.

⁸⁰ *Id.* at 224 (“[P]lacement disqualifies an otherwise eligible inmate for parole consideration.”).

Noting the standard announced in *Sandin*, the Court in *Wilkinson* concluded that assignment to OSP “imposes an atypical and significant hardship under any plausible baseline.”⁸¹ While many of the individual features of confinement that the Court highlighted at OSP are shared by other solitary confinement facilities, the Court found that they satisfied *Sandin*’s comparative standard when combined—particularly the indefinite duration of the placement (compared with the thirty-day segregation placement in *Sandin*) and the resulting disqualification for parole consideration.⁸²

The conclusory language of the *Wilkinson* holding provided little guidance for lower courts.⁸³ The Court failed to clarify the standard announced in *Sandin* or provide specific guidance for conducting the “atypical and significant hardship” comparative analysis.⁸⁴

Not surprisingly, the circuit courts disagree about the appropriate baseline from which to apply the *Sandin* standard: the Fourth and Ninth Circuits consider general prison conditions;⁸⁵ the Sixth Circuit focuses on “typical segregation conditions;”⁸⁶ the Seventh Circuit looks at prison conditions throughout the state;⁸⁷ the Second, Third, and D.C. Circuits look

⁸¹ *Id.* at 223.

⁸² *Id.* at 223-24 (“While any of these conditions standing alone might not be sufficient to create a liberty interest, taken together they impose an atypical and significant hardship within the correctional context.”). The Court’s emphasis on the combination of these two factors to satisfy the *Sandin* standard suggests an implicit move away from the doctrinal stance of the “parole cases.” See Sutanto, *supra* note 33, at 1044 (“The reasoning of the parole cases (*Wolff*, *Morrissey*, and *Greenholtz*) suggests that the loss of parole eligibility is independently sufficient to invoke a liberty interest, separate from the atypical hardship imposed by the confinement rule articulated in *Sandin*. Instead, in *Austin*, the Court ruled that the loss of parole eligibility was merely an important factor to consider when determining whether a liberty interest existed.” (footnote omitted)).

⁸³ See Sutanto, *supra* note 33, at 1046 (detailing the circuit split that arose after *Sandin* and remarking that *Wilkinson* failed to resolve the dispute). But see Sharif A. Jacob, Note, *The Rebirth of Morrissey: Towards a Coherent Theory of Due Process for Prisoners and Parolees*, 57 HASTINGS L.J. 1213, 1234 (2006) (arguing that the rejection of the state positive law approach “provides a coherent theory of due process that expands protections for prisoners”).

⁸⁴ See Sutanto, *supra* note 33, at 1046.

⁸⁵ *Beverati v. Smith*, 120 F.3d 500, 504 (4th Cir. 1997); *Keenan v. Hall*, 83 F.3d 1083, 1089 (9th Cir. 1996) (“The *Sandin* Court seems to suggest that a major difference between the conditions for the general prison population and the segregated population triggers a right to a hearing.”).

⁸⁶ *Austin v. Wilkinson*, 372 F.3d 346, 353 (6th Cir. 2004) (“The district court . . . properly made factual findings as to the conditions in OSP compared to the conditions in other Ohio prisons, specifically in the segregated units of maximum-security prisons, the most severe non-OSP conditions in the Ohio system.”), *rev’d in part on other grounds*, 545 U.S. 209, 230 (2005).

⁸⁷ *Wagner v. Hanks*, 128 F.3d 1173, 1175 (7th Cir. 1997) (“We do not think that comparison can be limited to conditions in the same prison, unless it’s the state’s most secure one.”).

to administrative segregation conditions;⁸⁸ and the Fifth Circuit assesses only whether segregation placement will lengthen the prisoner's sentence.⁸⁹

Sandin's and *Wilkinson's* vaguenesses, however, permit creative readings of the standard. In a recent decision, for example, a district court granted summary judgment to an inmate plaintiff, Alfredo Prieto, who had been confined in segregation for five years without any process or review.⁹⁰ Unlike the plaintiffs in *Wilkinson*, however, Prieto was placed in segregation automatically because he was facing a death sentence.⁹¹ The court applied the "atypical and significant" standard to conclude that Prieto had a liberty interest in avoiding placement in the segregation conditions of death row.⁹² The court emphasized that "[t]here is no futility exception to the Due Process Clause"⁹³ and found that the state's automatic placement policy for capital offenders "fails to provide even the most basic procedural protections."⁹⁴

Because the Court declined in *Sandin* and again in *Wilkinson* to articulate the appropriate baseline for typical and insignificant confinement conditions, the question of whether placement in segregated confinement implicates a liberty interest varies based on federal jurisdiction, which produces absurd differences across circuit lines.⁹⁵

Furthermore, even though *Wilkinson* provided an outline of the general features of segregated confinement that could possibly serve as a guide for future prisoner due process claims regarding segregation placements, the

⁸⁸ See *Hatch v. Dist. of Columbia*, 184 F.3d 846, 856 (D.C. Cir. 1999) (using as a baseline "the most restrictive confinement conditions that prison officials, exercising their administrative authority to ensure institutional safety and good order, routinely impose on inmates serving similar sentences"); *Griffin v. Vaughn*, 112 F.3d 703, 708 (3d Cir. 1997) (indicating that normal segregation conditions should be the baseline for comparison when segregation is within the expected parameters of a prison sentence); *Brooks v. DiFasi*, 112 F.3d 46, 49 (2d Cir. 1997) (suggesting that the appropriate comparison for disciplinary segregation is administrative segregation).

⁸⁹ *Orellana v. Kyle*, 65 F.3d 29, 31-32 (5th Cir. 1995) (indicating that segregation did not implicate the Due Process Clause because it did not affect the length of an inmate's time in prison).

⁹⁰ *Prieto v. Clarke*, No. 12-1199, 2013 WL 6019215, at *7, *11 (E.D. Va. Nov. 12, 2013).

⁹¹ *Id.* at *1.

⁹² *Id.* at *9.

⁹³ *Id.* at *11.

⁹⁴ *Id.* at *10.

⁹⁵ *Sutanto*, *supra* note 33, at 1047 ("[T]he liberty to which a prisoner may be entitled depends on the federal judicial jurisdiction in which the prison is found." (emphasis omitted)). For an alternative balancing test that draws on state practices, a de minimis threshold, and state positive law, see *Lee*, *supra* note 43, at 835-37.

murky bounds of typicality remain unclear.⁹⁶ The Court failed to provide any guidance—even for prisoners similarly situated to the inmate–plaintiffs in *Wilkinson*—as to how common a confinement practice must be before it becomes typical—and therefore unrestricted—under the *Sandin* standard.

2. Prong Two: Process Due

If a court determines that the deprivation alleged by the prisoner implicates a protectable liberty interest, the court must proceed to the second prong of the *Mathews* due process analysis: an inquiry into what procedure is constitutionally necessary before depriving a person of the liberty interest and whether the process in place, if any, is sufficient. As discussed above, the Supreme Court has limited the spectrum of protectable liberty interests for prisoners.⁹⁷ Furthermore, even in cases where the Court has found a liberty interest, the Court has all but precluded prisoners from succeeding on due process claims.⁹⁸ For example, the Court’s deference to prison officials and limited requirement of process for prison decisions prevented the inmates in *Wilkinson* from succeeding on their claim, even though their segregation placement constituted a deprivation severe enough to meet the threshold liberty interest inquiry.⁹⁹ This subsection outlines the standard for procedural due process in the prison context and highlights the Court’s decisions granting broad discretion to prison officials in handling administrative procedures.

a. *The Court’s Approach to Prison Procedure and the Difference Between Administrative and Punitive Segregation*

The Supreme Court has suggested that the procedural due process required by the Fourteenth Amendment for prisoners seeking relief from segregation placement varies depending upon the nature of the segregation categorization.¹⁰⁰ The Court has maintained that “[t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.”¹⁰¹ This emphasis on flexibility with

⁹⁶ See Lindsey Webb, *The Procedural Due Process Rights of the Stigmatized Prisoner*, 15 U. PA. J. CONST. L. 1055, 1071-73 (2013) (discussing the problems with the atypical and significant hardship standard and the inconsistencies resulting from its varied application).

⁹⁷ See *supra* subsection I.B.1.

⁹⁸ See *supra* subsection I.B.2.

⁹⁹ See *Wilkinson v. Austin*, 545 U.S. 209, 228 (2005) (“[C]ourts must give substantial deference to prison management decisions before mandating . . . elaborate procedural safeguards . . .”).

¹⁰⁰ See *infra* notes 119-123 and accompanying text.

¹⁰¹ *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)) (internal quotation marks omitted).

respect to procedural standards highlights the Court's reluctance to require strict per se procedures for various deprivations, especially in the prison context.¹⁰² Instead, the Court examines particular procedures using the balancing test that it announced in *Mathews v. Eldridge*.¹⁰³ Accordingly, in the prison context, due process is satisfied if the prison administration provides "notice of the factual basis for an inmate's placement and allow[s] the inmate a rebuttal opportunity."¹⁰⁴

The *Mathews* framework requires consideration of three factors: (1) the (inmate's) private interest affected by the state action; (2) the risk of "erroneous deprivation" of that interest through the current procedures employed by the state; and (3) the state's interest in the action, including the function of the deprivation and the "fiscal and administrative burdens" that additional or different procedures would require.¹⁰⁵ In the prison context, the Court has consistently found that notice of the factual basis for a placement decision and an opportunity to rebut that basis are "among the most important procedural mechanisms for purposes of avoiding erroneous deprivations."¹⁰⁶ The Court has relied upon the third *Mathews* factor to justify this minimal procedural requirement, finding in *Wilkinson*, for example, that the state's strong interest in prison security and the "problem of scarce resources" were reason enough to find that due process had been met.¹⁰⁷

The peak of procedural protections afforded to prisoners arose in the parole context. In *Morrissey v. Brewer*, the Court held that due process compels specific procedural requirements before parole revocation.¹⁰⁸ The

¹⁰² See *Wilkinson*, 545 U.S. at 224 ("[W]e generally have declined to establish rigid rules and instead have embraced a framework to evaluate the sufficiency of particular procedures.").

¹⁰³ 424 U.S. 319, 335 (1976).

¹⁰⁴ *Prieto v. Clarke*, No. 12-1199, 2013 WL 6019215, at *10 (E.D. Va. Nov. 12, 2013) (quoting *Wilkinson*, 545 U.S. at 225-26) (internal quotation marks omitted).

¹⁰⁵ *Mathews*, 424 U.S. at 335.

¹⁰⁶ *Wilkinson*, 545 U.S. at 226; see also *Greenholtz v. Inmates of the Neb. Penal & Corr. Complex*, 442 U.S. 1, 15 (1979) (accepting procedures at parole hearings that allow an inmate to review the facts regarding his case for accuracy and present additional information on his own behalf because they "adequately safeguard[] against serious risks of error and thus satisf[y] due process"); *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (noting that the "central meaning of procedural due process" is that affected parties "are entitled to be heard" and that notice is necessary for a hearing).

¹⁰⁷ *Wilkinson*, 545 U.S. at 227-28.

¹⁰⁸ See 408 U.S. 471, 481-82 (1972). To satisfy due process, the *Morrissey* Court required procedures including:

- (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse

Court contextualized its heightened procedural standard in terms of the “grievous loss” involved in parole revocation, noting the strong similarity between a parolee’s liberty and that of a free citizen.¹⁰⁹

Two years later, in *Wolff v. McDonnell*, the Court expanded upon the heightened procedural requirements announced in *Morrissey* when it addressed procedural requirements for the punitive revocation of good-time credits.¹¹⁰ At issue in *Wolff* was a decision by prison authorities to revoke—as punishment—an inmate’s good-time credits when good-time credits would otherwise yield a sentence reduction.¹¹¹ The Court held that to satisfy the Due Process Clause, prison officials must provide written notice to an inmate facing loss of good-time credits informing him of the charges.¹¹² The Court also held that prison officials must allow an inmate a period of time—specifically, no less than twenty-four hours after receiving notice—to prepare a defense.¹¹³ Echoing the requirement announced in *Morrissey*, the Court required the factfinders to produce a written statement explaining their decisions.¹¹⁴ *Wolff* thus established heightened procedural requirements for prison officials undertaking disciplinary action.¹¹⁵

The Court retreated from its strong procedural stance in *Wolff* two years later, when it decided *Meachum v. Fano*.¹¹⁶ *Meachum* examined the procedures required for the transfer of an inmate from one institution to another.¹¹⁷ The Court declined to find a constitutional liberty interest at

witnesses . . . ; (e) a “neutral and detached” hearing body such as a traditional parole board . . . ; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.

Id. at 489.

¹⁰⁹ *Id.* at 481-82.

¹¹⁰ 418 U.S. 539, 558 (1974); see also Julia M. Glencer, Comment, *An “Atypical and Significant” Barrier to Prisoners’ Procedural Due Process Claims Based on State-Created Liberty Interests*, 100 DICK. L. REV. 861, 878 (1996) (“The *Wolff* Court revolutionized prisoners’ rights litigation by clarifying that the *Morrissey* due process requirements did reach inner-prison disciplinary proceedings.”); Jacob, *supra* note 83, at 1219 (calling *Wolff* “the first major case after *Morrissey* to examine the due process [rights] of prisoners”).

¹¹¹ *Wolff*, 418 U.S. at 547 (noting that forfeiture of good-time credits “affects the term of confinement,” while confinement in a disciplinary cell is only an “alteration of the conditions of confinement”).

¹¹² *Id.* at 564.

¹¹³ *Id.* The inmate’s defense could include presenting witnesses and documentary evidence, as long as doing so is not “unduly hazardous.” *Id.* at 566.

¹¹⁴ *Id.* at 564-65.

¹¹⁵ See Lee, *supra* note 43, at 794 (discussing the Court’s approach in *Wolff* and noting that it “narrowly prescribed specific procedures that it deemed necessary to protect prisoners’ due process rights in disciplinary proceedings”).

¹¹⁶ 427 U.S. 215, 226 (1976).

¹¹⁷ *Id.* at 216-17.

stake and held that a prisoner is not entitled to any procedural measures before a transfer between prisons in the same state.¹¹⁸ Moreover, the Court distinguished *Meachum* from *Wolff* and *Morrissey* by noting the administrative, rather than punitive, nature of the state action.¹¹⁹ Accordingly, the Court implied that administrative decisions involving prisoners face lower procedural hurdles than punitive decisions.¹²⁰

The Court expressly affirmed this distinction in *Wilkinson*.¹²¹ The Court distinguished an administrative segregation decision from the punitive deprivations in *Morrissey* and *Wolff*, which called for “more formal, adversary-type procedures.”¹²² Concluding that an administrative decision to place an inmate in segregation “draws more on the experience of prison administrators” and “implicates the safety of other inmates and prison personnel,” the Court was satisfied with the “informal, nonadversary” procedures already in place.¹²³

Even though the *Wilkinson* Court found that inmates had a protectable liberty interest in avoiding placement in administrative segregation, the Court found that only minimal procedural protections are required.¹²⁴ Indeed, the *Wilkinson* Court affirmed the procedural requirements for administrative segregation placement articulated in *Hewitt*—namely, that officials provide “some sort of periodic review”¹²⁵ of an inmate’s placement, along with notice and a rebuttal opportunity for the initial placement decision.¹²⁶

The *Wilkinson* Court endorsed the segregation procedures used by Ohio prison administrators, concluding in part that additional safeguards would be difficult and costly to implement.¹²⁷ The outcome in *Wilkinson* suggests

¹¹⁸ *Id.* at 225-26.

¹¹⁹ *See id.* at 225-27 (“Transfers between institutions . . . are made for a variety of reasons and often involve no more than informed predictions as to what would best serve institutional security or the safety and welfare of the inmate.”).

¹²⁰ *See id.* at 228-29 (expressing skepticism of judicial involvement in “the day-to-day functioning of state prisons”).

¹²¹ *See Wilkinson v. Austin*, 545 U.S. 209, 228 (2005) (“Ohio is not . . . attempting to remove an inmate from free society for a specific parole violation . . . or to revoke good-time credits for specific, serious misbehavior . . . , where more formal, adversary-type procedures might be useful.” (citations omitted)).

¹²² *Id.*

¹²³ *Id.* at 228-29.

¹²⁴ *Id.* at 225 (“Prisoners held in lawful confinement have their liberty curtailed by definition, so the procedural protections to which they are entitled are more limited than in cases where the right at stake is the right to be free from confinement at all.”).

¹²⁵ *Hewitt v. Helms*, 459 U.S. 460, 477 n.9 (1983).

¹²⁶ *Wilkinson*, 545 U.S. at 229 (affirming the procedural requirements set forth in *Hewitt*).

¹²⁷ *See id.* at 228 (concluding that establishing more formal procedures would be difficult and add “obvious costs”).

that the actual liberty interest has minimal significance: the procedural process due is so flexible—so minimal—that a prisoner’s claim will rarely satisfy the second prong of the due process inquiry when alternative procedures would require additional cost.

b. *Periodic Review and Adequate Notice: What Does It Actually Mean?*

In light of the Court’s standards-based explanation of procedural due process for administrative segregation decisions, lower courts and scholars have been left to interpret the meaning of the periodic review and adequate notice guarantees announced in *Wilkinson* and *Hewitt*.¹²⁸ They rely on the Supreme Court’s repeated refrain that “[t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.”¹²⁹ Courts have thus rejected annual reviews, concluding that they are “likely too infrequent to satisfy the [periodic review] requirements of *Hewitt*.”¹³⁰

Scholars argue that due process requires meaningful procedural review of administrative segregation placement.¹³¹ The Court’s clarification in *Hewitt* that “administrative segregation may not be used as a pretext for indefinite confinement of an inmate” supports this claim.¹³² Lower courts have therefore rejected procedures that facially satisfy the Court’s mandate in *Wilkinson* when they are perfunctory in application.¹³³ The process for

¹²⁸ *Wilkinson*, 545 U.S. at 224-25; *Hewitt*, 459 U.S. at 477 n.9.

¹²⁹ *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (internal quotation marks omitted).

¹³⁰ *Alston v. Cahill*, No. 07-473, 2012 WL 3288923, at *9 (D. Conn. Aug. 10, 2012); see also *Toussaint v. McCarthy*, 801 F.2d 1080, 1101 (9th Cir. 1986) (noting that annual reviews are inadequate), *overruled on other grounds by Sandin v. Conner*, 515 U.S. 472 (1995).

¹³¹ See *Williams v. Hobbs*, 662 F.3d 994, 1009 (8th Cir. 2011) (upholding the district court’s ruling that a particular review process for administrative segregation placement was unconstitutional because it was not meaningful).

¹³² *Hewitt*, 459 U.S. at 477 n.9.

¹³³ See Angela A. Allen-Bell, *Perception Profiling & Prolonged Solitary Confinement Viewed Through the Lens of the Angola 3 Case: When Prison Officials Become Judges, Judges Become Visually Challenged, and Justice Becomes Legally Blind*, 39 HASTINGS CONST. L.Q. 763, 795-99 (2012) (criticizing as inadequate current review procedures of administrative confinement decisions and arguing that the periodic but cursory evaluations used by most prisons constitute schemes that “do[] not comport with due process”); Gibbons & Katzenbach, *supra* note 8, at 465-66 (highlighting the need for meaningful reviews and reporting that prisoners and families lack confidence in current procedures); Lobel, *supra* note 18, at 125 (criticizing the typical review process as a “sham”); Robert M. Ferrier, Note, “*An Atypical and Significant Hardship*”: *The Supermax Confinement of Death Row Prisoners Based Purely on Status—A Plea for Procedural Due Process*, 46 ARIZ. L. REV. 291, 314 (2004) (arguing that Arizona’s practice of placing death row inmates in supermax confinement conditions is arbitrary and procedurally inadequate); see also *Williams*, 662 F.3d at 1009 (holding that a district court did not clearly err in finding existing review procedures were insufficient); *Sourbeer v. Robinson*, 791 F.2d 1094, 1101 (3d Cir. 1986) (noting that the

analyzing the meaningfulness of periodic review, however, remains unclear. Despite formal review of administrative segregation placement, many prisoners remain in administrative solitary confinement for prolonged periods of time.¹³⁴ Indeed, “the decision is predetermined, the review is a sham, and there is nothing the prisoner can do to get out of solitary confinement.”¹³⁵

Similarly, the minimal requirement that an inmate have notice of his administrative segregation placement is not a mere formality. As the Supreme Court explained in *Wilkinson*, segregated prisoners are entitled to a statement of the reasons for their placement and retention as “a guide for future behavior.”¹³⁶ In the solitary confinement setting, therefore, meaningful notice of placement or retention in segregation requires more than a general statement of the prisoner’s perceived threat level.¹³⁷ Instead, as Lobel suggests, the statement must provide information about how the prisoner can realistically leave segregated confinement and return to the general prison population.¹³⁸

Wilkinson jeopardized procedural due process protections for prisoners placed or kept in segregated confinement for an administrative purpose. Prisoners facing the severe conditions of segregated placement¹³⁹ are not entitled to formal hearings like those the Court required for revocation of good-time credits in *Wolff*. Prisoners are, however, entitled to notice of their placement, timely and meaningful review, an opportunity to rebut the basis for that placement, and information about how they can lower their security threat level to leave segregated confinement.¹⁴⁰ Despite requiring at least

monthly review procedures were “facially adequate” to protect the inmates’ liberty interests, but that they did not satisfy due process because they were only perfunctory).

¹³⁴ According to solitary confinement expert Jules Lobel, “the trend in prolonged supermax confinement is for the federal or state government to simply designate certain prisoners for essentially lifetime or very long solitary confinement. In such cases, the due process requirement of periodic review becomes meaningless.” Lobel, *supra* note 18, at 125.

¹³⁵ *Id.* at 125-26.

¹³⁶ *Wilkinson v. Austin*, 545 U.S. 209, 226 (2005); *see also* *Greenholtz v. Inmates of the Neb. Penal & Corr. Complex*, 442 U.S. 1, 15 (1979) (finding that notice of the reasons for parole revocation serves as a “guide to the inmate for his future behavior”); *Benitez v. Wolff*, 985 F.2d 662, 664-65 (2d Cir. 1993) (explaining that an inmate did not have adequate time to review the notice of charges against him, despite receiving the notice more than twenty-four hours in advance, because he was moved shortly after receiving the notice and was not allowed to take the notice with him).

¹³⁷ *See* Lobel, *supra* note 18, at 127.

¹³⁸ *Id.* This requirement is addressed in the *Ashker* complaint, *see* Plaintiffs’ Second Amended Complaint, *supra* note 16, at 44-45, and discussed in Section II.B, *infra*.

¹³⁹ *See supra* subsection I.B.1.c.

¹⁴⁰ *See* *Hewitt v. Helms*, 459 U.S. 460, 477 (1983) (highlighting the features of a satisfactory process); *see also* *Wilkinson*, 545 U.S. at 225-26 (same).

some procedural safeguards, the broad deference the Court has repeatedly afforded to administrative segregation decisions has rendered the procedures perfunctory and meaningless. They are a protection in name only.¹⁴¹

II. *ASHKER* AND THE DAWN OF A NEW ERA OF PRISONER PROCEDURAL DUE PROCESS

In light of the limitations the Supreme Court has imposed on a prisoner's assertion of a protectable liberty interest¹⁴² and the minimal procedural protections afforded prisoners with a valid liberty interest,¹⁴³ prisoner-litigants in solitary confinement are adopting new litigation strategies to work creatively within the narrow framework. This Part first outlines two recent lower court decisions in which prisoners alleged due process violations in segregated confinement conditions. It then examines a pending class action suit, *Ashker v. Brown*,¹⁴⁴ and the implications of the *Ashker* strategy for prisoner procedural due process protection. This Part concludes by considering the actual utility of the Supreme Court's current approach to prisoner procedural due process claims in light of the reaction in the lower courts.

A. *Challenges to Segregation Post-Wilkinson: Two Recent Cases*

The following two cases highlight two recent approaches by prisoner-litigants in administrative segregation. They involve prisoners placed in segregation for prolonged periods of time and subjected to the severe deprivations that accompany solitary confinement. In both cases, the plaintiff-prisoners challenged the procedures relating to their placement in harsh confinement conditions and relied on creative interpretations of the Supreme Court's case law to make their arguments. In their opinions, both courts highlight the *Hewitt* Court's caution that "administrative segregation may not be used as a pretext for indefinite confinement of an inmate,"

¹⁴¹ See Lobel, *supra* note 18, at 128 (discussing *Austin v. Wilkinson*, 189 F. Supp. 2d 719 (N.D. Ohio 2002), a class action filed after the *Wilkinson* decision, in which prisoners alleged that OSP was not following the procedures required by the Supreme Court).

¹⁴² See *supra* subsection I.B.1.c.

¹⁴³ See *supra* subsection I.B.2.a.

¹⁴⁴ See Plaintiffs' Second Amended Complaint, *supra* note 16, at 3 (seeking declaratory judgment and injunctive relief compelling defendants to provide prisoners with meaningful review).

suggesting a revival of the *Hewitt* procedural framework left intact by the *Wilkinson* Court.¹⁴⁵

1. *Proctor v. LeClaire, Selby v. Caruso*, and the Problem with the Periodic Review Standard

a. *Proctor v. LeClaire*

*Proctor v. LeClaire*¹⁴⁶ involved a procedural due process claim regarding the nature of the periodic review of an inmate's administrative segregation placement.¹⁴⁷ Patrick Proctor, the plaintiff, had been in administrative segregation since 2003 and in disciplinary segregation for nine years before that.¹⁴⁸ Proctor brought suit in 2009, alleging that his continued confinement in the severe conditions of administrative segregation violated his due process rights because he only received "sham, perfunctory and meaningless [p]eriodic [r]eviews."¹⁴⁹

Proctor acknowledged that he had been receiving reviews of his placement every sixty days, as required by New York law.¹⁵⁰ He argued, however, that these reviews were not conducted meaningfully, despite his efforts to challenge his confinement.¹⁵¹ Proctor alleged that the reviews were not only perfunctory, but also "based on evidence that should have been expunged from his record."¹⁵² In addition, Proctor argued that the reasons given by prison officials for his continued placement in administrative segregation were "false or misleading."¹⁵³

¹⁴⁵ See *Selby v. Caruso*, 734 F.3d 554, 560 (6th Cir. 2013) (citing the "indefinite confinement" language from *Hewitt*, 459 U.S. at 477 n.9); *Proctor v. LeClaire*, 715 F.3d 402, 405 (2d Cir. 2013) (same); see also *Wilkinson v. Austin*, 545 U.S. 209, 229 (2005) ("Although *Sandin* abrogated . . . *Hewitt's* methodology for establishing the liberty interest, [*Hewitt*] remain[s] instructive for [its] discussion of the appropriate level of procedural safeguards."). Prisoner-litigants' reliance on the statement in *Hewitt* is perhaps unexpected because, despite finding that the inmate had a protectable liberty interest, the *Hewitt* Court ultimately concluded that the "informal, nonadversary" review of the placement decision was sufficient. *Hewitt*, 459 U.S. at 476.

¹⁴⁶ 715 F.3d 402 (2d Cir. 2013).

¹⁴⁷ See *id.* at 404-05. The resolution of the case is still pending. Although the district court originally dismissed the action on issue and claim preclusion grounds, the Second Circuit vacated the judgment on April 25, 2013, see *id.* at 417, and the substantive legal issues currently remain unresolved.

¹⁴⁸ *Id.* at 405-06.

¹⁴⁹ Civil Rights Complaint at 18, *Proctor v. LeClaire*, No. 09-1114 (N.D.N.Y. Oct. 5, 2009).

¹⁵⁰ See *Proctor*, 715 F.3d at 405, 408.

¹⁵¹ See Civil Rights Complaint, *supra* note 149, at 18, exh. A (describing and reflecting Proctor's efforts to obtain meaningful review).

¹⁵² *Proctor*, 715 F.3d at 414.

¹⁵³ *Id.*

b. *Selby v. Caruso*

Selby v. Caruso similarly involved a procedural due process challenge regarding the nature of review afforded to an inmate placed in administrative segregation for a prolonged period.¹⁵⁴ Charles Selby sued Michigan Department of Corrections officials in 2009 for violating his procedural due process rights.¹⁵⁵ He alleged that during his nearly thirteen years in administrative segregation, he did not receive any meaningful review of his placement.¹⁵⁶ He was placed in administrative segregation based on a determination that he posed a “serious escape risk.”¹⁵⁷ Like Proctor, Selby received regular “[r]eports about [his] confinement in administrative segregation.”¹⁵⁸ Selby alleged, however, that the reports were a “sham,” because the outcome of the review was “preordained” given a hold placed on him by a prison administrator.¹⁵⁹ He claimed he never received information about the nature of the hold, and prison administrators denied that the hold had any impact on their reviews.¹⁶⁰

In reversing the district court’s grant of summary judgment and remanding for trial,¹⁶¹ the Sixth Circuit concluded that “[g]enuine issues of material fact exist on this record concerning whether Selby received meaningful periodic reviews and whether the prison officials’ decision to continue Selby’s confinement in administrative segregation for nearly thirteen years was supported by ‘some evidence.’”¹⁶² The court noted that if Selby’s allegations about the hold were correct, the reviews, although periodic, would be “perfunctory and meaningless.”¹⁶³ The court suggested, relying on *Hewitt*, that the meaningful review requirement meant something more than just periodic review.¹⁶⁴

¹⁵⁴ 734 F.3d 554, 556-57 (6th Cir. 2013).

¹⁵⁵ *Id.* at 556.

¹⁵⁶ *Id.* at 556-57. Selby was released into the general prison population in 2011, approximately eighteen months after he filed suit. *Id.* at 557.

¹⁵⁷ *Id.* at 556.

¹⁵⁸ *Id.* at 557. In contrast with the reviews provided to the plaintiff in *Proctor*, Selby’s reviews occurred monthly. *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ This procedural posture pertains specifically to Selby’s due process claim. *See id.* at 559-61.

¹⁶² *Id.* at 559.

¹⁶³ *Id.* at 560.

¹⁶⁴ *Id.* at 559 (“We know from longstanding Supreme Court jurisprudence that prison officials must engage in some sort of periodic review . . . and that the officials’ decision to continue such confinement must be supported by ‘some evidence.’”).

2. *Proctor, Selby*, and the State of Meaningful Review

Both *Proctor* and *Selby* highlight the problem with courts' current treatment of procedural due process protections in the context of segregation. Even though states are required to provide meaningful review of segregation decisions, the Supreme Court has not specified what sort of review satisfies the standard.¹⁶⁵ As a result of the Court's deference to prison officials and reliance on the "flexibility" of the constitutional requirement, meaningful review has become meaningless. State prison officials, such as the officials overseeing the New York segregated housing unit in *Proctor* and the Michigan administrative segregation unit in *Selby*, argue that the facilities satisfy this procedural requirement so long as reviews are "periodic." This seems to mean more often than annually, but the specific frequency is left up to the institutions themselves.

As *Proctor's* argument demonstrates, however, there seems to be room within this procedural requirement for litigators to make out a due process challenge. By focusing on the review itself, litigators can push courts to interpret and define the meaningful review requirement beyond simply specifying its frequency. The Sixth Circuit's observation in *Selby* that perfunctory reviews—regardless of their frequency—are insufficient, lends weight to this position.

Courts ought to scrutinize the nature of the review processes that keep inmates like *Proctor* and *Selby* confined for such long periods of time. Equipped with the directive of the *Hewitt* Court—namely, that administrative segregation must not be a pretext for indefinite solitary confinement—litigants experiencing prolonged administrative solitary confinement have additional authority backing their meaningful review claims. Through cases challenging the quality of prison officials' review of prolonged administrative segregation, courts should define the nature of the procedural guarantee and cease granting deference to prison officials.

B. *New Approach: Ashker v. Brown*

1. Background

The pending California case, *Ashker v. Brown*, demonstrates a new litigation approach available to prisoners in prolonged administrative solitary confinement who seek procedural due process relief.¹⁶⁶ The case involves a class of inmates currently housed in Pelican Bay State Prison's

¹⁶⁵ See *supra* subsection I.B.2.b.

¹⁶⁶ See Plaintiffs' Second Amended Complaint, *supra* note 16.

Security Housing Unit (SHU), a supermax prison located in a remote area of California.¹⁶⁷ The inmates have been held in the SHU for prolonged periods, ranging from eleven to twenty-two years.¹⁶⁸ Some of the plaintiffs were transferred from other segregation units and have therefore spent even longer periods of time in isolated confinement, with one plaintiff having been held in isolation for a total of twenty-eight years.¹⁶⁹ Pelican Bay's SHU is considered one of the most restrictive facilities in the country.¹⁷⁰

Alleged gang members form the largest group of Pelican Bay SHU inmates and constitute the class members in the case.¹⁷¹ The California Department of Corrections and Rehabilitation (CDCR) classifies their segregation placements as administrative.¹⁷² Despite the CDCR's conclusions, the perceived threat of the plaintiffs is unfounded: the plaintiffs' incarceration records lack a history of violent behavior (presumably an indicator of future violence),¹⁷³ and their alleged gang associations "have hardly any predictive value for a prisoner's likelihood to be violent."¹⁷⁴ Furthermore, the CDCR's definition of gang affiliation is so broad that "anyone who plans with anyone else on breaking a prison rule can be deemed a gang member."¹⁷⁵

Inmates are assigned to the SHU after being identified as gang affiliates by the CDCR through a process called "prison gang validation."¹⁷⁶ Rather

¹⁶⁷ *Id.* at 8-9.

¹⁶⁸ *Id.* at 1.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 8.

¹⁷¹ See Shaiq, *supra* note 6, at 337 (noting alleged gang members "compris[e] two out of every three SHU prisoners" and are the largest group of SHU inmates); see also Plaintiffs' Second Amended Complaint, *supra* note 16, at 2-6.

¹⁷² See Jesse Wegman, Op-Ed., *Climbing Out of the Hole*, N.Y. TIMES, July 21, 2013, § 4, at 10 ("The inmates are isolated because prison officials have determined that they pose a threat to the safety of the guards and other prisoners, . . . despite the fact that such [gang] associations have hardly any predictive value for a prisoner's likelihood to be violent.").

¹⁷³ See Plaintiffs' Second Amended Complaint, *supra* note 16, at 24 ("[M]any plaintiffs have demonstrated their ability to follow prison rules by avoiding any significant prison misconduct.").

¹⁷⁴ Wegman, *supra* note 172.

¹⁷⁵ Shaiq, *supra* note 6, at 338. Shaiq explains that the California Code of Regulations considers a gang to be "any ongoing formal or informal organization, association or group of three or more persons which has a common name or identifying sign or symbol whose members and/or associates' engage 'on behalf of that organization, association or group, in two or more acts which include, planning, organizing, threatening, financing, soliciting, or committing unlawful acts or acts of misconduct.'" *Id.* at 337-38 (quoting CAL. CODE REGS. tit. 15, § 3000 (2013)). Shaiq points out that tattoos, photographs, lists, and visits from documented gang members are all sufficient evidence of an inmate's membership in a gang. *Id.* at 338.

¹⁷⁶ See Plaintiffs' Second Amended Complaint, *supra* note 16, at 19; see also CAL. DEP'T OF CORR. & REHAB., OPERATIONS MANUAL § 52070.20 (2009), available at <http://www.cdcr.ca.gov/>

than looking to the prisoner's actual behavior, the validation analysis merely requires some evidence that the individual has associated with a gang.¹⁷⁷ In fact, both inmates validated as gang members and inmates validated as gang "associates" (defined by the CDCR as someone who interacts with members or associates of a gang "periodically"), are similarly "subject to indefinite SHU placement."¹⁷⁸ Once validated, these prisoners serve an indefinite term in the SHU, with review of their active gang status occurring every six years.¹⁷⁹

A classification committee reviews the prisoner's segregation status every 180 days.¹⁸⁰ Although the articulated purpose for this state-mandated review is to consider the inmate's suitability for release into the general population,¹⁸¹ in practice, the review merely consists of an examination of the paperwork in the inmate's file and a request for the inmate to "debrief"—in other words, snitch on other prisoners.¹⁸² No review of the inmate's gang association or conduct occurs at these reviews of the inmate's validation.¹⁸³

At the end of an inmate's six-year term in the SHU, the classification committee reviews the inmate's gang affiliation to determine whether the inmate's status is still active.¹⁸⁴ The plaintiffs, however, allege that "the six-year review results in SHU retention even though the prison can produce no evidence (or even allegations) of gang activity."¹⁸⁵ According to the complaint, the committee has based a decision to deny inactive status on as little as finding artwork containing Aztec symbols in an inmate's cell.¹⁸⁶ In another instance, officials sought to consider evidence that an inmate had been seen talking with a validated member of a *different* gang.¹⁸⁷ Two of the

Regulations/Adult_Operations/docs/DOM/dom%202014/2014%20DOM.pdf (explaining the definition of and purpose of "[v]alidation of [g]ang [a]ffiliates").

¹⁷⁷ See Plaintiffs' Second Amended Complaint, *supra* note 16, at 19.

¹⁷⁸ *Id.*

¹⁷⁹ See *id.* ("CDCR places prisoners who have been validated as gang affiliates into the above conditions in SHU for an indefinite term, served in repeatedly renewed six-year increments.")

¹⁸⁰ *Id.* at 20.

¹⁸¹ *Id.* (citing CAL. CODE REGS. tit. 15, § 3341.5(c)(2)(A)(1) (2012)).

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ See *id.* at 21 (noting also that the "CDCR routinely and regularly denies inactive status to prisoners even where there is no evidence . . . of any gang activity").

¹⁸⁶ *Id.* at 25.

¹⁸⁷ *Id.* at 22. For a description of other evidence allegedly used by the committee to deny inactive status, see *id.* at 22-25.

plaintiffs allege that the CDCR will continue to deny them inactive status unless and until they debrief.¹⁸⁸

In light of these policies, the plaintiffs believe that their only way out of the SHU is either to debrief or die.¹⁸⁹ As the *Wilkinson* Court acknowledged in its description of the dangers of the prison system, however, “[t]estifying against, or otherwise informing on, gang activities can invite one’s own death sentence.”¹⁹⁰ As a result, confinement in the SHU is not only assigned for an indefinite period, but also results in an unconscionably long stay.¹⁹¹

2. Legal Argument

The plaintiffs allege the procedures in place to assign them to the SHU and the review process that keeps them there violate their due process rights.¹⁹² The plaintiffs will likely meet the first prong of the due process analysis—establishing a constitutionally protectable liberty interest—which requires demonstrating atypical and significant hardship compared with the regular incidences of prison life.¹⁹³ As the plaintiffs allege in their complaint, the harsh solitary confinement conditions that inmates at Pelican Bay SHU experience are atypical and significant, especially when compared with the conditions of solitary confinement in other states and countries.¹⁹⁴

Although the *Wilkinson* Court did not find that placement in solitary confinement itself constitutes an atypical and significant hardship, the Court found a liberty interest given the distinguishing features of the

¹⁸⁸ *Id.* at 21.

¹⁸⁹ *Id.* at 26.

¹⁹⁰ *Wilkinson v. Austin*, 545 U.S. 209, 227 (2005).

¹⁹¹ See Plaintiffs’ Second Amended Complaint, *supra* note 16, at 8-9 (detailing the various lengths of time the plaintiffs have spent in the Pelican Bay SHU and noting that the Pelican Bay planners assumed prisoners would spend at most eighteen months there).

¹⁹² *Id.* at 43-45.

¹⁹³ See *Sandin v. Conner*, 515 U.S. 472, 483 (1995) (announcing “atypical and significant hardship” as the standard against which alleged liberty interests must be measured when they do not derive from the Due Process Clause itself).

¹⁹⁴ See Plaintiffs’ Second Amended Complaint, *supra* note 16, at 2 (“The solitary confinement regime at Pelican Bay . . . renders California an outlier in this country and in the civilized world . . .”). Jules Lobel, the lead attorney for the *Ashker* plaintiffs and former attorney for the plaintiffs in *Wilkinson*, argues that international law requires a meaningful periodic review of long-term solitary confinement. Lobel, *supra* note 18, at 129-30. In other contexts, the Supreme Court has recognized international law as persuasive authority. See *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (“[T]he overwhelming weight of international opinion against the juvenile death penalty . . . provide[s] respected and significant confirmation for our own conclusions.” (citation omitted)).

isolation experience at OSP.¹⁹⁵ Despite its remark that the severe isolation conditions at OSP “likely would apply to most solitary confinement facilities,” the Court found a liberty interest under the *Sandin* standard because OSP placement was indefinite, was reviewed only annually, and disqualified otherwise eligible inmates from parole consideration.¹⁹⁶

The plaintiffs in *Ashker* point to the indeterminate, indefinite duration of their confinement at the Pelican Bay SHU and the lack of actual periodic review of their gang status as evidence implicating a liberty interest similar to that at issue in *Wilkinson*.¹⁹⁷ In addition, the plaintiffs, seemingly relying on the Court’s remarks in *Wilkinson*, allege that an “unwritten policy prevents any prisoner held in the SHU from being granted parole.”¹⁹⁸ The plaintiffs explain that five of the class members are parole-eligible but have been informed that they will not be granted parole while housed at the SHU.¹⁹⁹ The presence of both of the factors that the *Wilkinson* Court used to find a liberty interest suggests that the plaintiffs should similarly succeed in satisfying the first prong of the due process test.

Notably, the plaintiffs also allege that SHU assignment prolongs their sentence of incarceration by denying them the ability to earn good-time credit or qualify for parole eligibility during their time in the SHU.²⁰⁰ The plaintiffs therefore appear to argue, in the alternative, that the Court’s separate parole case law applies. Under this theory, any extension of sentence length or negative impact on parole eligibility directly implicates the Due Process Clause.²⁰¹

The *Ashker* plaintiffs make two arguments to address the second prong of the due process analysis. First, plaintiffs argue that the review process currently in place is, as was argued in *Selby* and *Proctor*, perfunctory and

¹⁹⁵ See *Wilkinson v. Austin*, 545 U.S. 209, 224 (2005) (describing the distinguishing features of OSP placement and confinement that satisfied the atypical and significant standard).

¹⁹⁶ *Id.*; see also *supra* notes 78-82 and accompanying text (discussing the potentially novel position the *Wilkinson* court took regarding parole eligibility and the procedural due process framework).

¹⁹⁷ See Plaintiffs’ Second Amended Complaint, *supra* note 16, at 43. The Ninth Circuit, in *Serrano v. Francis*, declined to find that placement in administrative segregation implicates a liberty interest, but used segregation conditions as a reference for the *Sandin* analysis. 345 F.3d 1071, 1078-79 (9th Cir. 2003). The plaintiffs emphasize that for the prisoners who cannot or do not debrief, “defendants’ policies result in effectively permanent solitary confinement.” Plaintiffs’ Second Amended Complaint, *supra* note 16, at 3 (internal quotation marks omitted).

¹⁹⁸ Plaintiffs’ Second Amended Complaint, *supra* note 16, at 18.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ See *supra* subsection I.B.2.a.

meaningless.²⁰² Alternatively, plaintiffs argue that the implications of placement on their parole eligibility and good-time credits renders such placement punitive and entitles them to the heightened procedures announced in *Wolff*.²⁰³

In their first argument, the plaintiffs emphasize the lack of meaningful review of their placement—even under the minimal procedures required in *Hewitt*.²⁰⁴ In fact, the plaintiffs argue that the current review process fails to satisfy even the frequency requirement of periodic review.²⁰⁵ The plaintiffs note that the only actual review of their gang status—the very classification justifying their placement in the SHU—occurs every six years.²⁰⁶ Given the allegations, the court seems obliged to examine the actual review procedures the CDCR employs.

In addition, the plaintiffs explain the lack of real opportunities to leave the SHU, arguing that the CDCR's pressure to debrief—an unrealistic requirement²⁰⁷—and failure to detail the basis for their placement decisions violate the adequate notice requirement of meaningful review.²⁰⁸ The plaintiffs point to decisions denying them gang-inactive status to demonstrate that the review is “misleading and meaningless.”²⁰⁹

The plaintiffs' second argument regarding their process due is that the punitive nature of their SHU placement entitles them to the heightened protections announced in *Wolff*. The plaintiffs point out that their confinement is extended by placement in the SHU, because they are unable

²⁰² Plaintiffs' Opposition to Defendants' Motion to Dismiss Second Amended Complaint at 12, *Ashker v. Brown*, No. 09-5796 (N.D. Cal. Jan. 17, 2013), ECF No. 178 [hereinafter Plaintiffs' Opposition to Defendants' Motion to Dismiss]; Plaintiffs' Second Amended Complaint, *supra* note 16, at 44-45.

²⁰³ Plaintiffs' Opposition to Defendants' Motion to Dismiss, *supra* note 202, at 12; Plaintiffs' Second Amended Complaint, *supra* note 16, at 44-45.

²⁰⁴ Plaintiffs' Second Amended Complaint, *supra* note 16, at 20-26.

²⁰⁵ *Id.* at 20-21, 43.

²⁰⁶ *Id.* at 20-21.

²⁰⁷ See *supra* note 190 and accompanying text. As the *Ashker* plaintiffs argue, CDCR's single opportunity to leave the SHU is purely theoretical. Debriefing is not an option for most of the SHU inmates who do not want to risk their lives. See Plaintiffs' Second Amended Complaint, *supra* note 16, at 40. CDCR's policy simply provides SHU inmates with a catch-22: remain in the harsh conditions of solitary confinement at Pelican Bay or debrief and risk their lives in the general prison population.

²⁰⁸ Plaintiffs' Second Amended Complaint, *supra* note 16, at 26, 43-44.

²⁰⁹ Plaintiffs' Opposition to Defendants' Motion to Dismiss, *supra* note 202, at 15. The lawsuit appears to have had some impact on the CDCR's approach to SHU placement and review already. See, e.g., Sharon Bernstein, *Amid Criticism, California to Modify Solitary Confinement Rules*, REUTERS, Feb. 12, 2014, available at <http://www.reuters.com/article/2014/02/13/us-usa-california-prisons-idUSBREA1C02220140213> (discussing a proposal to overhaul SHU assignment that would eliminate SHU placement based on gang association alone).

to earn good-time credits or qualify for parole—despite otherwise being parole-eligible.²¹⁰ Plaintiffs argue that in light of the punitive effects of their segregation placements, they ought to receive the procedural guarantees that attach to punitive sanctions in the prison context.²¹¹ The plaintiffs compare the deprivations they face with those at issue in *Wolff*—specifically, the loss of good-time credit—and assert their right to the formal adversary-type hearings the *Wolff* Court required.²¹² Further, the plaintiffs argue that the loss of good-time credits, the “extraordinary length of time Plaintiffs have been confined” at the Pelican Bay SHU, and the harsh conditions involved in placement there combine to make “clear that P[elican] B[ay]-SHU assignment is a punitive rather than administrative measure.”²¹³

3. Implications

By adopting the meaningless review strategy used in both *Selby* and *Proctor*, the *Ashker* plaintiffs reaffirm the role that interpretation of “meaningful review” can have in the development of solitary confinement case law. Even within the minimal procedures afforded to prisoners in the administrative segregation context, the plaintiffs’ argument could gain traction. The court is faced with a set of facts that evokes the *Hewitt* instruction that segregation must not be a “pretext for indefinite confinement.”²¹⁴ As a result, the plaintiffs’ focus on the inadequacy of the review process can invoke the court’s scrutiny of the actual procedures afforded to prisoners. Similarly, by highlighting that their only option for relief from SHU placement is to debrief, the plaintiffs invite the court to provide a more substantive formulation of the meaningful review requirement—beyond a mere frequency standard. This task would require the court to examine the actual practicability of the procedures in place.

The plaintiffs’ alternative argument—that the disqualifying effects of SHU placement render it punitive—highlights the problems with the current distinction between administrative and disciplinary segregation. Indeed, the punitive nature of the plaintiffs’ placement suggests that the current doctrinal approach to prisoner procedural due process challenges to solitary confinement placement improperly distinguishes between administrative and disciplinary segregation classifications.

²¹⁰ Plaintiffs’ Second Amended Complaint, *supra* note 16, at 18.

²¹¹ Plaintiffs’ Opposition to Defendants’ Motion to Dismiss, *supra* note 202, at 12-13.

²¹² *Id.* at 12.

²¹³ *Id.* at 13.

²¹⁴ *Hewitt v. Helms*, 459 U.S. 460, 477 n.9 (1983).

The plaintiffs' argument challenges the current approach, which permits courts to rely on a prison's internal classifications for segregated confinement without scrutinizing the basis for the categorizations or the opportunities for return into the general prison population. As *Ashker* implies, prison administrators may be aware of the disciplinary-administrative distinction and take advantage of the lesser protections afforded to administratively segregated prisoners.²¹⁵ This suggests that the problems that plagued the state positive-law era can similarly infect solitary confinement due process jurisprudence today.

Rather than rely on the state's classification of segregation, courts ought to look to the nature of the conditions and the impact that the placement has on the prisoner's experience and sentence. The plaintiffs' experiences in administrative segregation illustrate the harsh tactics that prisons officials use in even a nondisciplinary context. The lack of proportionality between the alleged threat an inmate poses and the tactics that prison officials employ to counter the purported threat casts doubt on the assumptions that courts have made in distinguishing between administrative and disciplinary segregation procedures. Indeed, the punitive implications of plaintiffs' segregation suggest that the deference that courts have traditionally granted to prison officials is not well-suited to administrative segregation.

III. DEVELOPING A MEANINGFUL ALTERNATIVE

The *Ashker* complaint highlights the limitations of the current due process framework for prisoners serving effectively indefinite periods in solitary confinement for "administrative" reasons and serves as an example of the legal creativity that the prisoners must use to advocate for heightened procedural fairness. Given this doctrinal limitation and the creativity it has encouraged, this Part proposes an alternative procedural framework for long-term solitary confinement placement and review.

A. *The Standard Must Acknowledge the Harm at Stake*

The science is clear: solitary confinement causes permanent psychological and physiological damage.²¹⁶ Harms from prolonged solitary confinement

²¹⁵ Focusing on the context of criminal procedure, Carol Steiker argues, that when "decision rules"—that is, rules properly known by the courts, such as standing doctrine—become known to the state agents they regulate, the state agents may alter their conduct. Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2543 (1996).

²¹⁶ See SHARON SHALEV, A SOURCEBOOK ON SOLITARY CONFINEMENT 15-16 (2008), available at http://www.solitaryconfinement.org/uploads/sourcebook_web.pdf (listing various

include “florid delirium” or “a confusional psychosis with intense agitation, fearfulness, and disorganization” and serious psychological damage even in inmates who enter prison with higher-than-normal psychological resiliency.²¹⁷ Predictably, the psychological harm is even greater when inmates enter solitary confinement with existing mental illness or emotional fragility, as is the case with many inmates in segregation in general and in Pelican Bay’s SHU in particular.²¹⁸

Courts should consider the permanent harm that solitary confinement causes when determining whether a liberty interest exists in the administrative segregation context and when identifying the appropriate level of procedural due process. Even if an inmate is placed in solitary confinement for an administrative reason—itsself a problematic distinction²¹⁹—courts cannot ignore the permanent harm the placement causes to the inmate.

Even under the Court’s current formulation of the liberty interest standard, the permanent harm inherent in solitary confinement must be a primary consideration. Indeed, there is space within the “atypical and significant hardship” standard (although it arguably strays from the liberty-interest-as-hardship approach) for courts to recognize the permanent harm caused by solitary confinement as a significant hardship under *Sandin*.²²⁰ The science is conclusive, and courts must not ignore it when considering

physiological and psychological effects of solitary confinement, including heart palpitations, insomnia, perceptual distortions, paranoia, and psychosis); Allen-Bell, *supra* note 133, at 769 (“There is no shortage of information establishing the adverse medical affects of prolonged solitary confinement.”); Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J.L. & POL’Y 325, 353 (2006) (discussing the long-term effects of solitary and small group confinement, including “persistent symptoms of post traumatic stress . . . [and] lasting personality changes—especially including a continuing pattern of intolerance of social interaction, leaving the individual socially impoverished and withdrawn, subtly angry and fearful when forced into social interaction”); Craig Haney, *Mental Health Issues in Long-Term Solitary and “Supermax” Confinement*, 49 CRIME & DELINQ. 124, 132-37 (2003) (evaluating the specific harms from confinement in the Pelican Bay SHU and noting that “there is not a single published study of solitary or supermax-like confinement in which nonvoluntary confinement lasting for longer than 10 days, where participants were unable to terminate their isolation at will, that failed to result in negative psychological effects”).

²¹⁷ See Grassian, *supra* note 216, at 354.

²¹⁸ See *id.* at 349 (explaining the findings from an examination of forty-nine inmates at Pelican Bay in the early 1990s and observing a “high incidence of preexisting central nervous system dysfunction” among inmates in the Pelican Bay SHU); Craig Haney, *Solitary Confinement Is a “Tried-and-True” Torture Device*, FRONTLINE (Apr. 22, 2014, 9:42 PM), <http://www.pbs.org/wgbh/pages/frontline/criminal-justice/locked-up-in-america/craig-haney-solitary-confinement-is-a-tried-and-true-torture-device/>, archived at <http://perma.cc/PG7A-CZC8> (reporting that Haney was “taken aback by the number of prisoners who appeared to be mentally ill” at Pelican Bay, even though “Pelican Bay was not supposed to be a place that was designed to house the mentally ill”).

²¹⁹ See *supra* subsection I.B.2.a.

²²⁰ For a discussion of the standard, see *supra* subsection I.B.1.b.

whether a constitutionally protectable liberty interest exists in avoiding administrative segregation placement.²²¹ But the atypical and significant hardship analysis should not apply to solitary confinement placement and review. Given the extent of the injury wrought upon the inmate, the liberty interest analysis must focus only on the significance of the harm and not the typicality of the practice. Like prison practices that extend an inmate's sentence, the determination of a constitutionally protected liberty interest in avoiding solitary confinement should remain distinct from the *Sandin* approach. By focusing on the nature and extent of the deprivation at stake and not on its typicality or significance among prisoners, courts would be better able to consider the crux of the interest at stake in solitary confinement placement: the permanent harm it causes.

Even if the *Sandin* standard is not abandoned, however, the extent of the injury caused by solitary confinement must remain a principal consideration. Because the practice is inherently harmful, it should not be dismissed as simply a common experience of imprisonment, as the Supreme Court did in *Sandin*.²²² The rising outcry against solitary confinement challenges the Court's view that some solitary confinement is a common and expected element of the carceral experience.²²³ Activists and international commentators have decried America's widespread use of solitary confinement as torture.²²⁴ But prison rights advocates are no longer alone; prison administrators have begun to condemn the practice as well. Mississippi closed its supermax unit in 2010; Illinois, Maine, Ohio, and Washington have begun to rethink long-term isolation incarceration.²²⁵ The Executive Director of the Colorado Department of Corrections has committed to lowering the percentage of the state's prison population

²²¹ Advocates for the abolition of solitary confinement have adopted the term "SHU syndrome" to describe the various types of permanent damage caused by solitary confinement. *See, e.g.,* Haney, *supra* note 216, at 137 (explaining that some of the permanent effects of "SHU syndrome" include heightened anxiety, memory impairment, and paranoia).

²²² *See Sandin v. Conner*, 515 U.S. 472, 484-86 (noting that segregation is not unlike the common conditions of confinement for most inmates at the prison in question).

²²³ *See id.* at 486 (explaining that placement in segregation did not constitute a "major disruption" in the prisoner's environment).

²²⁴ *See, e.g.,* Shane Bauer, *No Way Out*, MOTHER JONES, Nov.-Dec. 2012, at 22, 23-24 (comparing solitary confinement in Iran with placement in the Pelican Bay SHU); Atul Gawande, *Hellhole*, NEW YORKER, Mar. 30, 2009, at 36, 44 (characterizing solitary confinement as torture); *cf. Grassian, supra* note 216, at 343-46 (revealing the similar conditions of sensory deprivation that incarcerated inmates and prisoners of war face while held in solitary confinement).

²²⁵ *See* Erica Goode, *Rethinking Solitary Confinement*, N.Y. TIMES, Mar. 11, 2012, at A1 ("The transformation of the Mississippi prison has become a focal point for a growing number of states that are rethinking the use of long-term isolation and re-evaluating how many inmates really require it, how long they should be kept there and how best to move them out.").

housed in solitary confinement to three percent,²²⁶ and he recently published an op-ed in the *New York Times* describing his own twenty-hour experience in a Colorado solitary confinement unit.²²⁷ Similarly, a recent agreement between the New York Civil Liberties Union (NYCLU) and the State of New York bars solitary confinement for minors, pregnant women, and the developmentally disabled in the state's prison system.²²⁸ Given these recent developments, even when courts apply the "atypical and significant" standard articulated in *Sandin*, they can no longer take the typicality of solitary confinement for granted.

If the *Sandin* liberty interest standard persists, however, courts and segregated inmates should no longer rely on the vague application of the standard to administrative segregation articulated by the *Wilkinson* Court.²²⁹ Instead, states' reduction in solitary confinement, combined with data showing the permanent psychological damage inherent from the practice, renders solitary confinement firmly within the *Sandin* conception of a constitutionally protected liberty interest.

B. Courts Must Scrutinize the Procedures Employed by Prisons

Given the inherent harm solitary confinement causes, the courts must no longer afford prison administrators the traditional deference in segregation decisions. Courts must scrutinize both the procedures for administrative segregation placement and review, as well as the actual threat that the inmate facing segregation placement poses. Deference to prison administrators' guarantees of process cannot suffice.

Courts must evaluate the procedures prison officials use to place an inmate in solitary confinement. Because many prison officials point to an inmate's dangerousness as justification for placement in administrative segregation, courts should scrutinize the method used to deem inmates dangerous. For placement based on gang affiliation, as is the case with the

²²⁶ See Allison Sherry, *Prisons Chief in D.C. to Push for Solitary Reform*, DENVER POST, Feb. 26, 2014, at 4A (reporting on Colorado Department of Corrections Executive Director Rick Raemisch's administrative segregation reforms).

²²⁷ Rick Raemisch, *My Night in Solitary*, N.Y. TIMES, Feb. 21, 2014, at A25 ("When I finally left my cell at 3 p.m., I felt even more urgency for reform. If we can't eliminate solitary confinement, at least we can strive to greatly reduce its use.").

²²⁸ See Katie Rose Quandt, *Is This the Beginning of the End for Solitary Confinement?*, MOTHER JONES (Feb. 26, 2014, 8:10 PM), <http://www.motherjones.com/moj/2014/02/children-pregnant-women-developmentally-disabled-solitary-confinement-reform-new-york>, archived at <http://perma.cc/A253-JYRJ> (discussing the agreement reached between New York State's Department of Community Corrections and the NYCLU on February 19, 2014).

²²⁹ See *supra* subsection I.B.1.c.

Ashker plaintiffs,²³⁰ courts should require prison officials to produce an explanation for their decision that an inmate is a gang member or associate and to provide additional information about how the particular inmate is a threat in the general prison population. A sufficient explanation would reference specific actions and characteristics of an individual inmate. For example, prison officials should not be able to remove an inmate to segregation based solely on the inmate's possession of drawings that suggest gang affiliation. Mere affiliation is not strongly correlated with future violence,²³¹ and prison officials should distinguish between gang *members* and gang *associates*.²³²

To take seriously the *Hewitt* Court's instruction that segregation must not be a "pretext for indefinite confinement,"²³³ courts must also investigate the review process for an inmate's return to the general prison population. A court scrutinizing the Pelican Bay procedures, for example, should ask whether the six-year and 180-day review processes actually afford inmates a meaningful opportunity to return to the general prison population. As the *Ashker* plaintiffs argue, the current process does not: the 180-day review process, required by state law, is entirely pro forma, and the six-year review results in continued segregation placement unless an inmate decides to snitch.²³⁴ Snitching, as even the Supreme Court is aware, is not a realistic opportunity to return to the general prison population.²³⁵ Moreover, courts should scrutinize the evidence used to conclude that an inmate is a threat. For example, a drawing with Aztec symbols—evidence used to support one Pelican Bay plaintiff's classification as an active gang member²³⁶—cannot constitute sufficient grounds to retain an inmate in harsh and harmful conditions of segregation.

C. A Meaningful Balancing Test

Courts using the *Mathews* balancing test in the segregation context must abandon the traditional deference given to prison administrators and place greater weight on the harm to individuals. The government's remedy of severe isolation to counter the alleged threat posed by an inmate is often

²³⁰ See *supra* subsection II.B.1.

²³¹ See *supra* note 172 and accompanying text.

²³² Cf. *supra* notes 175-79 and accompanying text (describing the blunt methods with which prison officials categorize prisoners based on purported gang involvement).

²³³ *Hewitt v. Helms*, 459 U.S. 460, 477 n.9 (1983).

²³⁴ See *supra* subsection II.B.2.

²³⁵ See *supra* note 190 and accompanying text.

²³⁶ See *supra* note 186 and accompanying text.

disproportionate. Courts must no longer simply accept the notion that administrative segregation promotes prison safety and preserves prison resources. Instead, courts should consider whether alternative, less-restrictive measures are available. As Rick Raemisch, the Executive Director of the Colorado Department of Corrections, has explained, “just because an offender needs to be in [a]dministrative [s]egregation for safety reasons, that doesn’t mean they should sit in a windowless, tiny cell for twenty-three hours a day. There are other solutions. There are other options.”²³⁷ Indeed, the perceived danger of a prisoner is generally much less than the prison’s remedy is harmful; the burden therefore should be on the prison to explain why alternative, less-restrictive measures are inappropriate on an individual basis.

In addition to examining less-restrictive alternatives to solitary confinement, courts must consider the permanent harm caused by long-term isolation as part of the interest-balancing analysis. As the Supreme Court has explained, due process is flexible and must adapt based on the nature of the deprivation.²³⁸ For solitary confinement—a deprivation that is inherently harmful and permanently damaging—the court must require heightened protections. This includes not only a close examination into whether the prison’s procedures provide an inmate with meaningful process in practice, but also a reformulation of the current doctrinal approach—particularly the current reliance on the categorization of an inmate’s placement (administrative versus punitive or disciplinary) in solitary confinement as a determinant of the procedure constitutionally required.

Prison administrators should no longer use administrative segregation as a categorical runaround to avoid the additional procedural requirements for disciplinary placement. Indeed, courts must require heightened standards for any segregation placement in accordance with due process—even if they are unwilling to impose specific requirements. As the *Ashker* plaintiffs explain, the distinction between administrative and disciplinary segregation is improper in two ways. First, in terms of the isolation experience, both placements result in the same restrictions. Second, in terms of procedural due process, disciplinary placement is limited to a specific term but requires heightened process, while administrative placement is often functionally indefinite yet involves minimal process.²³⁹ The initial placement decision

²³⁷ *Reassessing Solitary Confinement II: The Human Rights, Fiscal, and Public Safety Consequences: Hearing Before the Subcomm. on the Constitution, Civil Rights, & Human Rights of the S. Comm. on the Judiciary*, 113th Cong. (forthcoming 2014) (statement of Rick Raemisch, Executive Director of the Colorado Department of Corrections).

²³⁸ See *supra* note 32 and accompanying text.

²³⁹ See, e.g., *supra* subsection II.B.1.

should be accompanied by formal, adversary-style procedures and should include inmate-specific evidence proving that solitary confinement is necessary. The procedural protections in punitive segregation decisions can provide a helpful model. A meaningful, constitutional standard of procedure, though, must protect all prisoners facing the harm and severity of solitary confinement.

In the context of administratively segregated gang-affiliated inmates whose alleged threat is based on gang affiliation and not mental illness or behavioral harm, prison officials would have to prove certain conditions to the court. First, prison officials would have to show that they had a specific reason for the inmate's initial placement in solitary confinement. Next, prison officials would have to show that they have provided a realistic opportunity for the inmate to leave solitary confinement, conducted an in-depth individualized review assessing the inmate's continued threat level, and found that alternative measures would be inappropriate. By requiring prison officials to prove these elements in a formal, adversary-style hearing, courts will be able to prevent inmates from being placed in the inherently harmful, severely restrictive solitary confinement environment unless absolutely necessary.

CONCLUSION

The current approach to solitary confinement is inappropriate. In light of the discrepancy between the seriousness of the deprivation at stake and the state interests of conserving prison resources and maintaining security, courts must examine solitary confinement decisions with a critical eye. A proper approach to constitutional due process challenges to solitary confinement placement and review would involve the following: (1) abandon the *Sandin* liberty-interest analysis for solitary confinement and find a constitutionally protectable liberty interest in any solitary confinement placement, especially for a prolonged duration; (2) consider all categorizations of solitary confinement under a single standard by focusing on the harshness of the conditions rather than the nature of the classification; (3) place the burden on the state to prove that placement is necessary by pointing to inmate-specific, behavioral information and showing that alternative, cost-effective remedies are not appropriate; (4) require specific, adversary-style procedures that afford a prisoner meaningful opportunities to return to the general prison population beyond mere requests to debrief; (5) conduct a modified *Mathews* balancing test by giving greater weight to the deprivation at stake and requiring additional procedural protections as an inmate's stay in solitary confinement lengthens;

and (6) examine the way the state's formal procedures for placement and review actually function for individual inmates, taking the duration of an inmate's solitary confinement into account. These changes are essential, given the permanent psychological harm from solitary confinement, the severity of the isolation, and the overbroad invocation of the government interest.