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EXTENDING HOPE INTO "THE HOLE": APPLYING *GRAHAM V. FLORIDA* TO SUPERMAX PRISONS

Joseph B. Allen*

INTRODUCTION

In 2000, a twenty-year-old inmate named David Tracy hung himself in a Virginia "supermax" facility with only a few months left on a two-and-a-half year prison sentence for a minor drug charge.[1] As alleged in a lawsuit brought by Tracy's parents, a prison guard happened on the scene as the suicide attempt began and called for assistance.[2] Three medical workers arrived but made no immediate effort to save Tracy's life, instead waiting until a team of eight guards assembled outside the cell, placed an electro-shield over Tracy's body, and shackled his legs in iron chains.[3] The Virginia prison in question, Wallens Ridge State Prison, and its counterpart, Red Onion State Prison, are both notorious for causing criminals much more hardened than Tracy to "crack[ ] up."[4]

This Note proposes expanding the reach of the Cruel and Unusual Punishment Clause to prohibit extended detentions in supermax prisons for nonviolent offenders, such as Tracy, on the basis of *Graham v. Florida*[5] and minimal culpability. The harsh isolation techniques Tracy experienced are part of the common United States practice of employing supermax prisons to house a substantial portion of an overcrowded inmate population in solitary confinement.[6] In the words of the Supreme Court, supermax

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[1] Alan Elsner, *Supermax Prisons: A Growing Human Rights Issue*, CHAMPION MAGAZINE, Aug. 2004, at 36, *available at* http://www.nacdl.org/Champion.aspx?id=1331; David Fathi, *Supermax Prisons: Cruel, Inhuman, and Degrading*, AMERICAN CIVIL LIBERTIES UNION: BLOG OF RIGHTS (July 9, 2010, 2:39 PM), http://www.aclu.org/blog/prisoners-rights/supermax-prisons-cruel-inhuman-and-degrading.

[2] Laurence Hammack, *$750,000 Settlement for Prison Suicide*, THE ROANOKE TIMES, Apr. 11, 2002, http://www.koskoff.com/news/detail.cfm?aID=51.

[3] *Id.*

[4] Craig Timberg, *At Va.'s Toughest Prison, Tight Controls*, WASH. POST, Apr. 18, 1999, at C1.

[5] 130 S. Ct. 2011 (2010).

[6] *See* Tracy Hresko, *In the Cellars of the Hollow Men: Use of Solitary Confinement in U.S. Prisons and its Implications Under International Laws Against Torture*, 18 PACE INT'L L. REV. 1, 3, 7–8 (2006); Elizabeth Vasiliades, *Solitary Confinement and International Human Rights: Why the U.S. Prison System Fails Global Standards*, 21 AM. U. INT'L L. REV. 71, 73–75 (2005).

prisons are "maximum-security facilities with highly restrictive conditions, designed to segregate the most dangerous prisoners from the general prison population."[7] Once placed in a supermax, "[i]nmates are deprived of almost any environmental or sensory stimuli and of almost all human contact,"[8] often restricted to small cells for up to twenty-three hours a day.[9] 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.[10]

Other legal approaches to the issue of prolonged solitary confinement have failed to move the debate in recent years,[11] with the split occurring roughly along political lines in classic legal realist fashion.[12] On the left, the constitutional issue is framed as whether Supermax prisons constitute torture,[13] and legal challenges focus on the "wanton infliction of pain" line of Eighth Amendment jurisprudence, as well as international laws against torture.[14] These challenges collide with the Right's practical deference to prison administrators in the trenches and staunch hostility to foreign influence over domestic legal decisions.[15] The Left has argued that the use of such extreme punishments should be limited to higher-profile inmates whose atrocious crimes have arguably left the correctional system little choice other than a supermax.[16] The Right

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[7] Wilkinson v. Austin, 545 U.S. 209, 209 (2005).

[8] *Id.*

[9] Jerry R. DeMaio, Comment, *If You Build It, They Will Come: The Threat of Overclassification in Wisconsin's Supermax Prison*, 2001 WIS. L. REV. 207, 207 (2001).

[10] *See* Jamie Fellner, *Red Onion State Prison: Super-Maximum Security Confinement in Virginia*, *Admission and Release*, HUMAN RTS. WATCH,(Apr. 1999), http://www.hrw.org/reports/1999/redonion/Rospfin-04.htm#P209_39730 (quoting former Virginia Governor James Gilmore as stating in 1999 "that felons caught with guns who qualify for a five-year mandatory sentence would be eligible for incarceration" in the state's two Supermax facilities).

[11] *See infra* Part II.D (discussing other attempted legal causes of action from inmates challenging solitary confinement).

[12] *See generally* Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831, 838 (2008) (observing that judges are more likely to cast votes in the same political direction as the party that appointed them).

[13] *See* Atul Gawande, *Hellhole: The United States Holds Tens of Thousands of Inmates in Long-Term Solitary Confinement. Is This Torture?*, THE NEW YORKER, Mar. 30, 2009, http://www.newyorker.com/reporting/2009/03/30/090330fa_fact_gawande; Sonja Starr, *Solitary Confinement: Possibly Torture, Definitely Hell*, CONCURRING OPINIONS (Apr. 1, 2009, 10:43 PM), http://www.concurringopinions.com/archives/2009/04/solitary_confin_1.html.

[14] *See* Jules Lobel, *Prolonged Solitary Confinement and the Constitution*, 11 U. PA. J. CONST. L. 115, 119–25 (2008).

[15] *See* Wilson v. Seiter, 501 U.S. 294, 297, 303 (1991). In this majority opinion, Justice Scalia requires inmates challenging the conditions of their confinement to prove "deliberate indifference" on behalf of prison officials to their plight before a court can allow an Eighth Amendment claim to move forward. *Id.* at 297.

[16] *See* Stephanie Chen, *'Terrible Tommy' Spends 27 Years in Solitary Confinement*, CNN.COM (Feb. 25, 2010), http://articles.cnn.com/2010-02-25/justice/colorado.supermax.silverstein.solitary_1_solitary-confinement-federal-prison-system-cell?_s=PM:CRIME

has an easy foil to this argument in the Supreme Court's general acceptance of capital punishment[17]—if the Eighth Amendment permits the imposition of the death penalty, certainly extended solitary confinement is acceptable.[18] Meanwhile, the Right's emphasis on prison safety has no application to nonviolent inmates such as Tracy, who pose no real threat to the safety of those around them.

A recent Supreme Court decision may show a constitutional route through this judicial roadblock, however, and potentially bring relief to inmates undeservedly housed in supermax prisons. In *Graham v. Florida*, the Supreme Court noted that "cases addressing the proportionality of sentences fall within two general classifications," with the latter constituting rulings that impose "categorical restrictions on the death penalty."[19] In *Graham*, however, the Court addressed a lawsuit seeking a categorical restriction on a mere term-of-years sentence, which the Court admitted was "an issue [it had] not considered previously."[20] The Court ultimately ruled in favor of the petitioner and created a categorical restriction prohibiting life sentences without parole for juvenile offenders convicted of crimes other than homicide.[21]

This Note proposes a similar categorical restriction challenge for inmates assigned to supermax prisons that would prohibit prolonged solitary confinement as cruel and unusual punishment for individuals either below the age of majority and/or convicted of a nonviolent crime. The narrow scope of the argument acknowledges the extremely small likelihood that the Supreme Court will come anywhere close to declaring prolonged solitary confinement facially unconstitutional as long as the more severe alternative of capital punishment remains legal. The proposed new route addresses the more immediate problem of over-classification—the assignment of prisoners to supermax prisons who neither require nor deserve the brutal conditions of solitary confinement[22]—and thus attempts to inject more proportionality into the United States' system of incarceration and imprisonment. The new route has the added benefit of a closer alignment with international laws concerning torture and prisoner treatment, with which the United States' practice of solitary confinement is increasingly out of line.[23]

Part I of this Note briefly describes the history and current practice of solitary confinement within the United States, as well as the problem of over-classification. Part II analyzes relevant Eighth Amendment precedent and past attempts at alleviating the

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(describing the incarceration of convicted murderer Tommy Silverstein, who has been under a no-human-contact order for 27 years).

[17] Gregg v. Georgia, 428 U.S. 153, 169 (1976).

[18] *See id.* at 188 (noting that "the penalty of death is different in kind from any other punishment imposed under our system of criminal justice").

[19] Graham v. Florida, 130 S. Ct. 2011, 2021 (2010).

[20] *Id.* at 2022.

[21] *Id.* at 2033–34.

[22] DeMaio, *supra* note 9, at 209.

[23] *See* Hresko, *supra* note 6, at 16–19; Vasiliades, *supra* note 6, at 79–85, 91–95.

worst supermax conditions, demonstrating why a new proportionality-based approach is necessary. Part III lays out the proposal for a categorical restriction on over-classification of inmates, tracing the route a future reviewing court may take with a step-by-step analysis of *Graham*. Part III also illustrates the advantages of the categorical restriction approach relative to a given-all-circumstances approach[24] and addresses potential counter-arguments from both practical and legal perspectives.

I. SUPERMAX PRISONS AND SOLITARY CONFINEMENT

A. History of Solitary Confinement

Solitary confinement has attracted controversy since its introduction to the United States in the early 1800s.[25] Quakers in Pennsylvania made the practice central to their system of incarceration, constructing facilities such as Cherry Hill State Prison in Philadelphia where all inmates began their incarceration in isolation.[26] Several prominent visitors, including Charles Dickens, Charles Darwin, and Alexis de Tocqueville, universally described the practice as a complete failure at rehabilitation.[27] Dickens stated, "I hold this slow and daily tampering with the mysteries of the brain, to be immeasurably worse than any torture of the body";[28] Darwin was quoted as saying the inmates were "dead to everything but torturing anxieties and horrible despair";[29] and de Tocqueville noted the practice "does not reform, it kills."[30]

The use of solitary confinement gradually declined for a long period in the later 1800s;[31] this trend accelerated after the Supreme Court in *In re Medley*[32] set free an inmate, convicted of murder, who had been held in solitary confinement on ex post facto grounds.[33] The Court briefly discussed the practice of isolation in its opinion, noting the terrible sufferings of prisoners and the then-recent decision of Great Britain to abolish the punishment.[34] In 1922, Justice Brandeis further emphasized the drastic nature of solitary confinement as a punishment in his dissent to *United States v. Moreland*,[35] observing that state officials in the early American republic considered

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[24] *See Graham*, 130 S. Ct. at 2021.

[25] Hresko, *supra* note 6, at 6.

[26] *Id.*; Lobel, *supra* note 14, at 118.

[27] Hresko, *supra* note 6, at 6; Lobel, *supra* note 14, at 118.

[28] Lobel, *supra* note 14, at 118.

[29] Hresko, *supra* note 6, at 6.

[30] Lobel, *supra* note 14, at 118.

[31] *Id.*; Hresko, *supra* note 6, at 7.

[32] 134 U.S. 160 (1890).

[33] *Id.* at 161, 173.

[34] *Id.* at 168–70 (noting that "a considerable number of the prisoners . . . became violently insane, others, still, committed suicide . . . .").

[35] 258 U.S. 433 (1922).

"solitary confinement without labor" to be the "most severe punishment inflicted," with the exception of death.[36]

The practice was revived in 1983 after a prison riot at a federal maximum-security prison in Marion, Illinois, took the lives of two guards and an inmate.[37] Immediately thereafter, prison officials at the facility initiated the practice of holding every inmate in solitary confinement indefinitely to maintain order.[38] This policy achieved success as a disciplinary method in immediately reducing violence and formed the model for the modern supermax prison.[39]

B. Modern Supermax Practice

The Supreme Court has noted the large increase in the use of supermax prisons over the past twenty years;[40] the number now stands at thirty-six states operating such institutions, as well as a federal facility in Florence, Colorado.[41] The Supreme Court attributed the increase to a "rise in prison gangs and prison violence,"[42] though groups such as the ACLU give credit to "the perpetual 'tough on crime' political bidding war."[43] Regardless, all groups are in relative agreement on the severity of prison life in the modern version of solitary confinement.[44] In *Wilkinson v. Austin,* Justice Kennedy wrote of an inmate's daily life at Ohio State Penitentiary:

> 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.[45]

The federal facility in Florence, Colorado, in operation since 1994, attracts much attention, possibly due to the notoriety of prisoners sent there.[46] Cells in the facility are

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[36] *Id.* at 448–49 (Brandeis, J., dissenting).

[37] Hresko, *supra* note 6, at 7.

[38] *Id.*

[39] *Id.* at 7–8.

[40] Wilkinson v. Austin, 545 U.S. 209, 213 (2005).

[41] Hresko, *supra* note 6, at 8.

[42] *Wilkinson*, 545 U.S. at 213.

[43] Fathi, *supra* note 1.

[44] The Supreme Court has unanimously taken notice of the extreme conditions imposed on inmates in solitary confinement. *Wilkinson*, 545 U.S. at 214 ("Incarceration at OSP is synonymous with extreme isolation . . . . It is fair to say OSP inmates are deprived of almost any environmental or sensory stimuli and of almost all human contact.").

[45] *Wilkinson*, 545 U.S. at 214.

[46] *See, e.g.*, Jeffrey Smith McLeod, Note, *Anxiety, Despair, and the Maddening Isolation of Solitary Confinement: Invoking the First Amendment's Protection Against State Action That*

twelve feet by seven feet and contain a very small hole near the ceiling for inmates to see the sky.[47] An inmate is allowed one hour a day for exercise in a small fenced area and receives food through a slot in the cell door without any contact from the guard.[48] All inmates sent to Florence are required to go through an introductory period of two years without human contact.[49]

There are several instances of inmates spending incredibly long periods of time in isolation at such facilities. At Louisiana State Penitentiary in Angola, two inmates have been isolated in non-air-conditioned cells for twenty-three hours a day since they were accused of killing a prison guard in 1972.[50] One prisoner is reported to suffer from osteoarthritis, memory loss, and insomnia, whereas the other experiences claustrophobia, anxiety, and insomnia.[51] Another inmate, Tommy Silverstein, has been held in several federal prisons in solitary confinement under a strict no-human-contact order since 1983.[52] Prison officials transferred him to the supermax in Marion, Illinois, after he was convicted of the murder of another inmate; the conviction was later overturned on the basis of faulty witness testimony.[53] Once at Marion, however, Silverstein was charged and convicted for murder again, although this time the victims were a prison guard and two inmates, and the evidence was uncontroverted.[54] Silverstein has described his conditions as "an endless toothache" and a "slow constant peeling of the skin";[55] in a letter to a friend, he compared his situation to being intentionally buried alive.[56]

Claims of such devastating psychological and physical injury resulting from prolonged solitary confinement are well known and often form the legal basis for distinguishing solitary confinement from normal prison conditions.[57] In 1997, Craig

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Invades the Sphere of the Intellect and Spirit, 70 U. PITT. L. REV. 647, 654 (2009) (listing several recent high-profile inmates admitted to the federal facility in Florence, Colorado, including 9/11 conspirator Zacarias Moussaoui and Unabomber Ted Kaczynski).

[47] Gertrude Strassburger, Comment, *Judicial Inaction and Cruel and Unusual Punishment: Are Super-Maximum Walls Too High for the Eighth Amendment?*, 11 TEMP. POL. & CIV. RTS. L. REV. 199, 203 (2001).

[48] *Id.*

[49] *Id.*

[50] Hresko, *supra* note 6, at 10; *Angola 3: 36 Years of Solitary Confinement in the US*, AMNESTY INTERNATIONAL (Dec. 2006), http://www.angola3.org/uploads/A3_Booklet_FINAL.pdf.

[51] Stephen Lendman, *The Angola Three: 38 Years in Prison Hell*, COUNTERCURRENTS.ORG (May 7, 2010), http://www.countercurrents.org/lendman070510.htm.

[52] Chen, *supra* note 16.

[53] *Id.*

[54] *Id.*

[55] Lobel, *supra* note 14, at 116.

[56] Chen, *supra* note 16.

[57] *See* Holly Boyer, Comment, *Home Sweet Hell: An Analysis of the Eighth Amendment's 'Cruel and Unusual Punishment' Clause as Applied to Supermax Prisons*, 32 SW. U. L. REV. 317, 327 (2003).

Haney and Mona Lynch published an article analyzing the psychological and social effects of solitary confinement upon inmates.[58] The authors concluded that "distinctive patterns of negative effects have emerged clearly, consistently, and unequivocally from . . . systematic research on solitary and punitive segregation."[59] Such symptoms include "anxiety, panic, rage, loss of control, appetite and sleep disturbances, [and] self-mutilations . . . ."[60] The authors further observed that these symptoms held firm even when controlling for pre-existing mental disorders.[61] The authors compare the condition of inmates in solitary confinement to trauma victims and "victims of deprivation and constraint torture techniques."[62]

The end results of this extended psychological trauma have been vividly brought to light in two recent federal court cases. While deciding *Madrid v. Gomez* in federal district court in Northern California, District Court Chief Judge Henderson toured the Security Housing Unit (SHU) at Pelican Bay State Prison to inspect the conditions of isolation which inmates had challenged for Cruel and Unusual Punishment violations.[63] Henderson noted that "some inmates spend the time simply pacing around the edges of the pen; the image created is hauntingly similar to that of caged felines pacing in a zoo."[64] Henderson further detailed some physical and mental characteristics of various members of the plaintiff class.[65] One inmate had a "history of childhood sexual abuse, intermittent paranoia, periods of depression, and prior psychiatric hospitalization."[66] Additionally, while in prison the same inmate suffered from hallucinations and "believed that his body had been transported . . . to a place where it was invaded and mutilated."[67] A visiting medical doctor found another inmate "in an acute catatonic state requiring immediate hospitalization" and found "no consistency regarding the clinicians who saw him, nor was there adequate supportive psychotherapeutic contact . . . ."[68] Indeed, many of the psychological effects reported here are so common among isolated inmates that some experts have started labeling the condition "SHU Syndrome."[69]

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[58] Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. REV. L. & SOC. CHANGE 477 (1997).

[59] *Id.* at 530.

[60] *Id.*

[61] *Id.* at 532–33.

[62] *Id.* at 530.

[63] Madrid v. Gomez, 889 F. Supp. 1146, 1229–32 (N.D. Cal. 1995) (finding Eighth Amendment violations in operations of Security Housing Unit at Pelican Bay Prison only for inmates known to have pre-existing mental illnesses).

[64] *Id.* at 1229.

[65] *Id.* at 1223–27.

[66] *Id.* at 1223.

[67] *Id.*

[68] *Id.* at 1224.

[69] *See* 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*

In the 1999 case of *Ruiz v. Johnson*,[70] plaintiff-inmates enlisted the help of academic and expert witness Craig Haney in their suit against the Texas prison system over its isolation practices.[71] On his tour of solitary confinement units in the Texas facilities, Haney described witnessing "people who had smeared themselves with feces . . . people who had urinated in their cells . . . on the floor."[72] Haney attempted to speak with several inmates, and generally found such conversations could be classified into a few categories. First, he noted the inmates "who were incoherent . . . babbling, sometimes shrieking, [and another group of] . . . people who appeared to be full of fury and anger and rage and were . . . banging their hands on the side of the wall."[73] A final group "would be huddled in the back corner of the cell and appeared incommunicative when [Haney] attempted to speak with them."[74] Other experts reported "that incidents of self-mutilation and incessant babbling and shrieking were almost daily events."[75]

C. The Problem of Over-Classification

Over-classification arises when inmates are sent to a supermax prison despite not requiring or deserving the strict regimen of solitary confinement.[76] For purposes of this Note, overclassified inmates may be found in one or both of two forms.[77] First, the inmate may be a juvenile, either at the moment he commits the sentence-triggering offense or when he is sent to the supermax prison. Second, the inmate may have committed a relatively minor, nonviolent crime.[78] Studies indicate inmates convicted of

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Process, 46 ARIZ. L. REV. 291, 298–99 (2004) (citing Jones'El v. Barge, 164 F. Supp. 2d 1096, 1101–02 (W.D. Wis. 2001)).

[70] 154 F. Supp. 2d 975 (S.D. Tex. 2001).

[71] *Id.* at 985; *see supra* notes 58–62 and accompanying text (summarizing Haney and Lynch's 1997 article in the *NYU Review of Law and Social Change*).

[72] *Ruiz*, 154 F. Supp. 2d at 985.

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *See* DeMaio, *supra* note 9, at 209.

[77] Inmates sent to Supermaxes with pre-existing mental illnesses also qualify as overclassified due to their increased capacity to suffer severe trauma. Haney & Lynch, *supra* note 58, at 532–33. Challenges from such inmates are more likely to fall under *Wilson*'s two-part test, however. This is because: 1) the attribute which triggers their Eighth Amendment review—the mental illness—is not directly related to the gravity of their criminal offense; and 2) the decision of prison officials to send such an inmate to a supermax facility instinctively raises the question of deliberate indifference. *See* Wilson v. Seiter, 501 U.S. 294, 302 (1991). Therefore, this Note will focus solely on juvenile and nonviolent offenders.

[78] *See generally* Chambers v. United States, 555 U.S. 122, 127–28 (2009). The Supreme Court interpreted the definition of a 'violent felony' under the federal Armed Career Criminal Act. *Id.* The statute defines a violent felony as a "crime punishable by imprisonment for a

drug sentences constitute an ever-larger portion of our nation's prison population, even though drug possession and/or distribution alone do not necessarily involve violence or coercion against another human being.[79] Additionally, to be overclassified, an inmate must not have committed acts of violence or aggression while in police custody that would give prison officials a legitimate reason to pursue stricter living conditions.[80]

Scholar Jerry DeMaio has observed that several characteristics of America's modern prison system tend to encourage over-classification.[81] One factor is that the extreme overcrowding of many lower-security facilities encourages officials to utilize the full capacity of Supermaxes, though many state Supermaxes were originally built to house only particularly troublesome inmates.[82] Additionally, prison officials have a related financial motive to fill Supermaxes with less-deserving inmates: a common metric of the efficiency of prison facilities is the annual cost-per-prisoner, which improves if a facility's operations are scaled over a larger inmate population.[83] These causes combine with the general "attractiveness of moving problem inmates" out of lower-security facilities and into Supermaxes to create an environment in which individuals, such as David Tracy, fall through the cracks.[84]

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term exceeding one year" that either "has as an element the use, attempted use, or threatened use of physical force against the person of another," or "is burglary, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B) (2006).

[79] *See* Heather C. West & William J. Sabol, *Bureau of Justice Statistics Bulletin: Prisoners in 2007*, DEPARTMENT OF JUSTICE: OFFICE OF JUSTICE PROGRAMS, 21, tbl. 10 (Feb. 12, 2009), http://bjs.ojp.usdoj.gov/content/pub/pdf/p07.pdf. Appendix Table Ten of this study shows 609,000 out of approximately 1.3 million state prisoners in 2007 were sentenced for nonviolent crimes. *Id.* The authors of the study categorize violent crimes as murder, manslaughter, rape, sexual assault, robbery, assault, and "other violent [crimes]." *Id.* Nonviolent crimes include drug abuse offenses, public-order offenses, and property offenses. *Id.*

[80] The arrest and incarceration of Pfc. Bradley Manning in connection with the leak of classified material to Wikileaks has generated renewed debate on the merits of extended solitary confinement. *See* Glenn Greenwald, *The Inhumane Conditions of Bradley Manning's Detention*, SALON (Dec. 15, 2010, 1:15 PM), http://politics.salon.com/2010/12/15/manning_3/singleton/. Though Greenwald and others make persuasive arguments against the conditions of Manning's incarceration, the proposal of this Note is unlikely to help Manning directly due to the seriousness of his alleged crimes. *See* Charlie Savage, *Soldier Faces 22 New Wikileaks Charges*, N.Y. TIMES, Mar. 3, 2011, http://www.nytimes.com/2011/03/03/us/03manning.html (noting the charges against him include "aiding the enemy" and could result in life imprisonment). Judicial recognition of the objective classification in this Note, however, could lead to broader changes in the legal treatment of solitary confinement which may help Manning, who has yet to be convicted of any charge and is not considered to pose a threat to those around him. *See* Greenwald *supra*.

[81] DeMaio, *supra* note 9, at 209–10.

[82] *Id.*

[83] *Id.* at 216.

[84] *Id.* at 222.

The current number of overclassified inmates in supermax prisons is tough to gauge. Out of a general United States prison population of 7.3 million in 2007,[85] estimates of the current number in solitary confinement range from 60,000[86] to 120,000.[87] Atul Gawande, in a 2009 essay in *The New Yorker*, estimated 25,000 inmates reside in supermax prisons, whereas another 50,000–80,000 are held in "restrictive segregation units" in otherwise non-Supermax facilities.[88] An official tally by the Commission on Safety and Abuse in America's Prisons in 2000 found 80,870 inmates in solitary confinement;[89] using different definitions, several legal scholars found fifty-seven Supermaxes in forty states housing approximately 20,000 prisoners.[90] States follow different procedures for assigning inmates to Supermaxes, making the process of counting the exact number of overclassified inmates nationwide very difficult.[91]

Some anecdotal evidence of the problem is possible, however. A 2009 investigation into the inmate population at Illinois's Supermax facility in Tamms found sixteen inmates at the facility had been convicted of nonviolent crimes, such as car theft, forgery, burglary and drug offenses, though these inmates committed other crimes after incarceration.[92] In 2006, the *St. Petersburg Times* reported on an inmate in Florida's prison system who was sent to solitary confinement for talking back to a guard in 1992 when he was fifteen years old and has been kept there ever since.[93] The article also found forty-seven other inmates in solitary confinement in Florida under the age of eighteen, and noted seventy-seven percent of women and thirty-three percent of men in solitary were diagnosed as mentally ill.[94] Finally, the case of David Tracy exemplifies the terrible outcomes that may result from the problem of over-classification.[95] The existence of anecdotal evidence such as this, combined with his own direct research

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[85] *Study: 7.3 Million in U.S. Prison System in '07*, CNN JUSTICE (Mar. 2, 2009), http://articles.cnn.com/2009-03-02/justice/record.prison.population_1_prison-system-prison-population-corrections?_s=PM:CRIME.

[86] Hresko, *supra* note 6, at 3.

[87] Jean Casella & James Ridgway, *No Evidence of National Reduction in Solitary Confinement*, SOLITARY WATCH (June 15, 2010), http://solitarywatch.com/2010/06/15/no-evidence-of-national-reduction-in-solitary-confinement/.

[88] Gawande, *supra* note 13.

[89] *See* Kevin Johnson, *States Start Reducing Solitary Confinement to Help Budgets*, USA TODAY (June 14, 2010, 1:56 PM), http://www.usatoday.com/news/nation/2010-06-13-solitary-confinement-being-cut_N.htm.

[90] Lobel, *supra* note 14, at 115 (citing Daniel P. Mears & Jamie Watson, *Towards a Fair and Balanced Assessment of Supermax Prisons*, 23 JUST. Q. 232, 232–33 (2006)).

[91] *See* Gawande, *supra* note 13.

[92] George Pawlaczyk & Beth Hundsdorfer, *Trapped in Tamms: In Illinois' Only Supermax Facility, Inmates Are in Cells 23 Hours a Day*, BELLEVILLE NEWS-DEMOCRAT, Aug. 2, 1999, http://www.bnd.com/2009/08/02/865377/trapped-in-tamms-in-illinois-only.html.

[93] Meg Laughlin, *Does Separation Equal Suffering?*, THE ST. PETERSBURG TIMES, Dec. 17, 2006, http://www.sptimes.com/2006/12/17/State/Does_separation_equal.shtml.

[94] *Id.*

[95] *See supra* Introduction.

into the inhabitants of solitary confinement units, led Gawande to state in the same *New Yorker* essay that "only a subset of prisoners currently locked away for long periods of isolation would be considered truly dangerous."[96]

II. RELEVANT PRECEDENT IN UNITED STATES AND ABROAD

Judges, scholars, and defense attorneys have dealt with solitary confinement in a number of legal contexts.[97] Subsection A describes the relatively recent advent of proportionality review, the constitutional theory from which this proposal is derived. The rest of this Section, however, argues that past attempts—both more and less inclusive than this proposal—have failed to help overclassified inmates. The picture painted is one of idealistic, left-leaning advocates and defenders—pursuing sweeping arguments of facial violations of the Eighth Amendment and international laws against torture—running into the roadblock of entrenched conservatism within the judiciary and legislatures. By exploring these past failures, this Note hopes to make clear the case for a *Graham*-style proportionality approach.

A. Cruel and Unusual Punishment: General Standards

The slow changes and gradual incorporation of nuances into the Supreme Court's jurisprudence regarding the Eighth Amendment, especially in the proportionality line of review, raises the hope that a challenge to solitary confinement based on culpability can succeed. The Eighth Amendment to the United States Constitution prohibits "cruel and unusual punishments," but gives no further guidance to courts on what constitutes such punishments.[98] Many early decisions interpreted the Cruel and Unusual Punishment Clause to prohibit punishments involving the cruel infliction of pain but did not consider whether punishments were disproportionate to the crime.[99] One of the first Supreme Court cases to invalidate a sentence solely on the grounds of disproportionality was *Weems v. United States*[100] in 1910. The Court voted to throw out a sentence of fifteen years of chained, hard labor for the crime of making a false entry in

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[96] Gawande, *supra* note 13 ("Many are escapees or suspected gang members; many others are in solitary for nonviolent breaches of prison rules.").

[97] *See* Haney & Lynch, *supra* note 58 at 499, 539–40.

[98] U.S. CONST. amend. VIII. In *Roper v. Simmons*, the majority observed that the Court has interpreted the Eighth Amendment through consideration of "history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design." 543 U.S. 551, 560 (2005). Another case often cited is *Trop v. Dulles*, which states that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." 356 U.S. 86, 100–01 (1958).

[99] Haney & Lynch, *supra* note 58, at 541 (citing Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted": The Original Meaning*, 57 CALIF. L. REV. 839 (1969)).

[100] 217 U.S. 349 (1910).

a naval cash book to defraud the U.S. government of 616 Philippine pesos,[101] declaring that "it is a precept of justice that punishment for crime should be graduated and proportioned to [the] offense."[102]

Modern Eighth Amendment jurisprudence plainly establishes proportionality as a requirement for criminal sentences.[103] In *Gregg v. Georgia*,[104] the Court further developed the standard for adjudicating excessive punishment claims by making two inquiries: whether the punishment involves "unnecessary and wanton infliction of pain," and whether the punishment is "grossly out of proportion to the severity of the crime."[105] Several scholars have noted that the Court often determines a sentence to be disproportionate to the offense only after a majority of states have made the same determination, however.[106]

B. Graham—*Classifying Proportionality Jurisprudence*

In 2010, the Court extended proportionality review and analysis of categorical restrictions in a manner easily applicable to supermax prisons. In *Graham v. Florida*, the Supreme Court considered an Eighth Amendment challenge asking for a clear line to be drawn prohibiting life-imprisonment-without-parole sentences for juvenile offenders committing non-homicide crimes as violations of the Cruel and Unusual Punishment Clause.[107] The Supreme Court began with the observation that "cases addressing the proportionality of sentences"—including the potential case envisioned in this Note—"fall within two general classifications."[108] The first group of cases concerns term-of-years sentences and the Court considers "all the circumstances in a particular case," whereas the second group concern capital punishment cases and the Court applies a "proportionality standard by [imposing] certain categorical restrictions."[109] The Court proceeded to outline the proper judicial inquiry for cases arising under each category.

For cases falling under the all-relevant-circumstances approach, the Court first compares "the gravity of the offense and the severity of the sentence."[110] If this analysis

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[101] *Id.* at 357–58, 382.

[102] *Id.* at 367.

[103] Haney & Lynch, *supra* note 58, at 541; *see also* Solem v. Helm, 463 U.S. 277, 284 (1983) ("The [Cruel and Unusual Punishment] clause prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed.").

[104] 428 U.S. 153 (1976).

[105] *Id.* at 173.

[106] *See, e.g.*, Corinna B. Lain, *The Unexceptionalism of "Evolving Standards,"* 57 UCLA L. REV. 365, 366 (2009).

[107] Graham v. Florida, 130 S. Ct. 2011, 2018 (2010).

[108] *Id.* at 2021.

[109] *Id.*

[110] *Id.* at 2022.

yields "an inference of gross disproportionality,"[111] the Court will conduct both intra- and inter-jurisdictional analyses.[112] This consists of comparing the defendant's sentence with those of criminals convicted of different crimes in the same jurisdiction, as well as sentences for criminals convicted of the same crime in different jurisdictions.[113] The Court then vacates the sentence as unconstitutional "if this comparative analysis 'validates [the] initial judgment that the sentence is grossly disproportionate.'"[114]

In *Graham*, the Court described the process for adjudicating categorical restriction cases as making two inquiries: "one considering the nature of the offense, the other considering the characteristics of the offender."[115] The Court's first step is a determination of "whether there is a national consensus against the sentencing practice at issue."[116] The Court uses "objective indicia," including "legislative enactments and state practice" in criminal sentencing, when considering the existence of any national consensus.[117] A lack of national consensus as expressed in legislative enactments is insufficient to draw any definite conclusions; the Court considers "[a]ctual sentencing practices [to be] an important part of [its] inquiry into consensus" and, in *Graham*, found such a consensus against life sentences for non-homicidal juveniles solely on this basis.[118]

The Court describes the next step in categorical restriction cases as an "exercise of [the Court's] own independent judgment whether the punishment in question violates the Constitution."[119] This step carries great weight in the constitutional analysis; the Court acknowledges the existence of a national consensus as an important factor but cautions that such a fact "is not itself determinative."[120] This independent judgment considers "the culpability of the offenders . . . the severity of the punishment," and "whether the challenged sentencing practice serves legitimate penological goals."[121]

The Court in *Graham* addressed a cross-over objective classification: a "categorical challenge to a term-of-years sentence."[122] The Court settled on the categorical restriction approach, previously reserved for death penalty challenges, as the proper method of adjudication.[123] The majority found a consensus against life sentences for non-homicidal

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[111] *Id.* (quoting Harmelin v. Michigan, 501 U.S. 957, 1005 (1991) (Kennedy, J., concurring)).
[112] *Id.*
[113] *Id.* (citing *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring)).
[114] *Id.* (quoting *Harmelin*, 501 U.S. at 1005).
[115] *Id.* at 2022.
[116] *Id.* (citing *Roper*, 543 U.S. at 572).
[117] *Id.*
[118] *Id.* at 2023.
[119] *Id.* at 2022 (citing *Roper*, 543 U.S. at 572).
[120] *Id.* at 2026.
[121] *Id.*
[122] *Id.* at 2022 (acknowledging that the challenge in *Graham* brought up new issues for the Court).
[123] *Id.* at 2022–23. In his concurrence, Chief Justice Roberts argued the all-relevant-circumstances approach was the better method of resolving the legal question at issue. *Id.* At 2041 (Roberts, C.J., concurring). Roberts reached the same outcome as the majority on the

juvenile offenders in actual sentencing practices, despite a nominal consensus for the practice as judged by criminal statutes nationwide.[124] Addressing culpability, the majority found that defendants in the petitioner's situation have a minimal amount due to a "'lack of maturity and an underdeveloped sense of responsibility'" common with juveniles;[125] the majority also found their offenses to be less severe than those involving the extinguishing of human life.[126] Addressing sentence severity, the *Graham* majority found "[l]ife without parole is an especially harsh punishment for a juvenile" when compared to an adult offender more advanced in age.[127] Finally, the Court found no justification for the sentence based on legitimate penological goals,[128] leading to the ultimate holding that a sentence of life imprisonment without possibility of parole is unconstitutional for juvenile offenders convicted of non-homicidal crimes.[129]

C. Wilson*'s Two-Part Prison Conditions Test*

For a categorical test based on *Graham* to be implemented, overclassified inmates must first succeed in escaping judicial analysis under the prison conditions test. In *Wilson v. Seiter*[130] the Supreme Court formalized a two-part test for inmates challenging the constitutionality of the *conditions* of their imprisonment.[131] To succeed on such an Eighth Amendment claim, inmates must pass both an objective test of a sufficiently serious deprivation of a life necessity, and a subjective test of deliberate indifference on the part of prison officials.[132] The Court emphasized the importance of making this standard difficult to meet, declaring that "[n]othing so amorphous as 'overall conditions'

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immediate sentence of the plaintiff, but did not support any categorical rules. *Id.* at 2036 (Roberts, C.J., concurring).

[124] *Id.* at 2023 ("Although these statutory schemes contain no explicit prohibition on sentences of life without parole for juvenile non-homicide offenders, those sentences are most infrequent.").

[125] *Id.* at 2026 (quoting *Roper*, 543 U.S. at 569–70).

[126] *Id.*

[127] *Id.* at 2028.

[128] *Id.* (reading past precedents as observing four purposes for criminal punishment: retribution, deterrence, incapacitation, and rehabilitation).

[129] *Id.* at 2033. The Court found confirmation for this holding in its observation that no other country besides Israel actually imposes such a sentence for non-homicidal juvenile offenders, though the majority was quick to note: "This observation does not control our decision." *Id.* Chief Justice Roberts's concurrence reached the same result but applied the usual, non-categorical method of inquiry for term-of-years challenges. *Id.* at 2036 (Roberts, C.J., concurring). Justice Thomas's dissent challenged the majority regarding their claims of the existence of both a national consensus against the sentencing practice and an inference of gross disproportionality when considered in light of the petitioner's crime. *Id.* at 2043–46 (Thomas, J., dissenting).

[130] 501 U.S. 294 (1991).

[131] *Id.* at 296.

[132] *Id.* at 298, 302.

can rise to the level of cruel and unusual punishment when no specific deprivation of a single human need exists."[133]

Several scholars have persuasively argued that the *Wilson* standard is an excessively high standard for inmates to meet.[134] Especially problematic for inmates is establishing the subjective standard of deliberate indifference, which requires plaintiffs to prove prison officials entertained a state of mind equivalent to "criminal recklessness" before their Eighth Amendment claim can move forward.[135] One author has attributed this judicial deference to a reluctance to second-guess the decisions of prison administrators "on the ground," especially when such administrators make strident arguments that certain procedures are necessary for security.[136] Overclassified inmates are not completely without hope, however; *Wilson* and its two-part test can be distinguished from the proposed Supermax-proportionality claim on the grounds that the sentence at issue in *Wilson* was "not . . . the penalty formally imposed for a crime."[137]

D. Other Potential Legal Avenues for Supermax Inmates

1. Permanent vs. Temporary Solitary Confinement

The importance and necessity of a Supermax-proportionality claim becomes all the more clear upon analyzing the myriad of other approaches that scholars, litigators, and inmates have attempted without success. One scholar speculates that courts may treat permanent assignments to solitary confinement in a different manner than previous Eighth Amendment claims.[138] Jules Lobel finds two recent Supreme Court cases involving prison conditions and the Eighth Amendment in which the Court ruled on behalf of prison officials, but only on the narrow basis that the specific restrictions in question were of a limited duration.[139] In both opinions the Court noted that a permanent restriction may change the analysis.[140] Lobel extrapolates from these cases the notion that "to confine someone in such isolation for the rest of his or her life . . . seems

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[133] *Id.* at 305.

[134] *See, e.g.,* Haney & Lynch, *supra* note 58, at 551; Vasiliades, *supra* note 6, at 95.

[135] Haney & Lynch, *supra* note 58, at 551.

[136] Strassburger, *supra* note 47, at 216.

[137] *Wilson,* 501 U.S. at 302.

[138] Lobel, *supra* note 14, at 120 ("Several recent Supreme Court decisions suggest that claims by prisoners confined in a supermax permanently ought to be accorded different Eighth Amendment scrutiny.").

[139] *Id.* at 120 n.28 (citing Overton v. Bazzetta, 539 U.S. 126, 134 (2003)); *see also* Beard v. Banks, 548 U.S. 521, 536 (2006).

[140] *Beard*, 548 U.S. at 536 (affirming Pennsylvania's ban on newspapers, magazines, and personal reading materials for inmates placed in the state's long-term segregation unit, reserved for inmates repeatedly displaying dangerous behavior); *Overton*, 539 U.S. at 136–37 (affirming Michigan's two-year visitation ban for inmates convicted of narcotics offenses).

extreme—akin to a death sentence for life."[141] She believes that a punishment of this nature "ought to be recognized as violative of the Eighth Amendment."[142]

Although Lobel's argument is persuasive, it runs into the judicial roadblock emanating from the death penalty, as argued in this Note.[143] As long as the Supreme Court upholds the death penalty as consistent with the Cruel and Unusual Punishment Clause, permanent placement in a supermax prison will be seen as less harsh by comparison.[144] Moreover, many inmates placed permanently in a supermax facility committed serious crimes before their admission to prison, with some proceeding to commit additional crimes while incarcerated.[145] Rather than arguing that solitary confinement should be categorically barred for all inmates, this Note aims to propose a realistic legal avenue to bring relief to the most deserving inmates—those sent to supermax prisons due to over-classification without a history of violent crimes.

2. Focus on a Single Aspect of Life in Solitary Confinement

Another strategy focuses on a single restriction inmates face as part of their solitary confinement routine, rather than challenging their placement in isolation generally. In the Seventh Circuit case *Davenport v. DeRobertis*,[146] a class of isolated prisoners sued Illinois correctional officials on the grounds that the prison's practice of restricting inmates to only one hour of out-of-cell exercise and one shower per week violated the Eighth Amendment.[147] Regarding the limit on out-of-cell exercise, the Court of Appeals affirmed the lower court's ruling that only one hour "is too little," observing that, combined with other activities, the inmates were forced to spend "165 out of 168 hours [a week] in a 90-square-foot cage."[148] The court reversed the ruling requiring at least three showers a week, however, writing that "many millions of Americans take fewer than three showers (or baths) a week without endangering their physical or mental health."[149] In *Thomas v. Ramos*,[150] the Seventh Circuit upheld the district court's finding of summary judgment for prison officials on an inmate suit challenging the practice of allowing only two hours of outdoor exercise.[151] The Circuit Court distinguished *Davenport*

[141] Lobel, *supra* note 14, at 122.

[142] *Id.*

[143] *See supra* Introduction.

[144] *See* Gregg v. Georgia, 428 U.S. 153, 188 (1976) (noting that the death penalty "is different in kind from any other punishment. . . .").

[145] *See* Chen, *supra* note 16 (detailing the extensive criminal record of long-term supermax prison resident Tommy Silverstein).

[146] 844 F.2d 1310 (7th Cir. 1988).

[147] *Id.* at 1312.

[148] *Id.* at 1314.

[149] *Id.* at 1316. The court also noted that "the record shows . . . that isolating a human being from other human beings . . . month after month can cause substantial psychological damage." *Id.* at 1313.

[150] 130 F.3d 754 (7th Cir. 1997).

[151] *Id.* at 762, 765.

on the grounds that the inmates in *Davenport* were held in solitary for much longer periods of time, whereas the inmate in *Thomas* had a cellmate and thus was not completely isolated. Further, the inmate in *Thomas* sought *outdoor* exercise whereas the inmates in *Davenport* sought only *out-of-cell* exercise.[152]

As these two Seventh Circuit decisions illustrate, inmates narrowing their challenge to only one aspect of their solitary confinement have had some success in ameliorating the worst-of-the-worst conditions. Judges continue to exhibit substantial deference to prison officials in their rulings, however, and often find numerous ways to distinguish past precedent, which appears to support the immediate inmate challenge.[153] This narrow strategy should be considered a useful tool in specific situations, but it cannot be relied upon to bring overall relief to overclassified inmates.[154]

E. Recent Direct Eighth Amendment Challenges to Supermax Prisons

1. *Madrid v. Gomez*

Two recent federal court challenges to supermax practices have continued to employ the *Wilson* standard, yet both exhibit more recognition of the terrible conditions inmates face in isolation. In *Madrid v. Gomez*, Chief Judge Henderson of the Northern District of California conducted an extremely thorough investigation, review, and analysis of the solitary Security Housing Unit (SHU) of California's Supermax prison, Pelican Bay State Prison.[155] Plaintiffs constituted the entire class of prisoners

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[152] *Id.* at 763.

[153] *See, e.g.*, *id.* (distinguishing an inmate housed in segregation for seventy days from successful class-action plaintiffs who all served more than ninety days in segregation).

[154] Another potential legal avenue for overclassified inmates is found in the protections of the Due Process Clause. U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."). In *Wilkinson v. Austin*, the Supreme Court held for the first time that inmates had a constitutionally protected liberty interest in avoiding transfer from a lesser-security prison facility to a supermax, and thus state transfer policies had to meet standards of Due Process. 545 U.S. 209, 218–24 (2005). Further, one author has argued for greater Due Process protections for death-row prisoners assigned to solitary confinement while awaiting their execution date, with judges conducting more thorough hearings on whether a supermax assignment is proper for inmates with mental illness. Ferrier, *supra* note 69, at 293–94, 315. Though Due Process is a valuable protection against arbitrary and possibly indefinite assignment to supermax facilities, judges accord deference to the state in such challenges and thus provide only minimal help to overclassified inmates. *See Wilkinson*, 545 U.S. at 230; Hewitt v. Helms, 459 U.S. 460, 472 (1983) (quoting Bell v. Wolfish, 441 U.S. 520, 547 (1979)) (declaring "'[p]rison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices . . . .'").

[155] 889 F. Supp. 1146, 1146 (1995). Pelican Bay State Prison is located 363 miles north of San Francisco. *Id.* at 1155; *see also* Haney & Lynch, *supra* note 58, at 557.

assigned to the SHU, a separate facility within Pelican Bay.[156] Inmates in the SHU were confined in cells without windows for approximately twenty-two-and-a-half hours a day.[157] The inmates challenged the overall conditions at SHU on Eighth Amendment grounds, putting forth the argument that conditions in the solitary confinement cells were "inhumane," along with other claims, including excessive force from prison guards, lack of adequate access to courts, and lack of adequate access to medical and mental health care.[158]

Applying *Wilson*, the judge found for the inmates on two of their claims;[159] ultimately, however, the plaintiffs lost on their primary claim of overall conditions constituting cruel and unusual punishment.[160] The judge noted inmates were typically assigned to the SHU because of behavior violations, gang affiliations, or "general concerns regarding assaultive or disruptive behavior," though officials acknowledged placing a few inmates in the SHU for their own protection against assault from other prisoners.[161] Regarding a deprivation of life necessity and wanton infliction of pain standard, the judge drew a line separating SHU inmates with previous incidences of mental illness from those without such a history. The court ruled that conditions did not create a risk of psychological injury of "*sufficiently serious magnitude*" for all inmates in the SHU, but did find such an Eighth Amendment violation for inmates "at a particularly high risk for suffering very serious . . . injury to their mental health . . . ."[162]

Scholarly reaction to the *Madrid* opinion was mixed. Haney and Lynch praised the court for the consolidation of prisoner complaints and an "unusually sophisticated psychological analysis of an especially elaborate factual record," but believed the court should have found constitutional violations on behalf of all inmates housed in the SHU.[163] Haney and Lynch noted that the two-part conditions test forced the judge "to articulate a standard of psychological harm that will be very difficult for future plaintiffs to meet."[164] Other scholars have made similar observations, praising the court for its broad analysis and emphasis on mental illnesses but arguing the standard for finding a constitutional violation is too high.[165] Nonetheless, the court applied the high standard from *Wilson* faithfully, illustrating the need for a different legal strategy for overclassified supermax inmates.[166]

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[156] *Madrid*, 889 F. Supp. at 1155.

[157] *Id.*

[158] *Id.* at 1156.

[159] The court held that the inmates did not receive constitutionally adequate medical and mental health care and that the prison officials subjected inmates to wanton inflictions of pain in violation of the Eighth Amendment. *Id.* at 1279–80.

[160] *Id.* at 1247–70.

[161] *Id.* at 1228.

[162] *Id.* at 1265.

[163] Haney & Lynch, *supra* note 58, at 556–57.

[164] *Id.* at 557.

[165] *See* Strassburger, *supra* note 47, at 215–16.

[166] *See Madrid*, 889 F. Supp. at 1246 (citing Wilson v. Austin, 501 U.S. 209, 297–98 (2005)).

2. *Ruiz v. Johnson*

In *Ruiz v. Johnson*, a class of inmates in the general population of the Texas correctional system brought an Eighth Amendment claim, similar to the plaintiffs' action in *Madrid*, against prison officials.[167] The district court applied *Wilson*'s two-part prison conditions test and found that both the overall conditions of the segregated units, as well as the practice of placing mentally ill prisoners in solitary confinement, violated the Eighth Amendment.[168] The court held the "extreme social isolation and reduced environmental stimulation" constituted a deprivation of a basic human need, and prison officials showed deliberate indifference through their placement of mentally ill inmates in solitary confinement for long periods of time.[169] The court held that prison conditions violated "'evolving standards of decency that mark progress of a maturing society.'"[170] The court ended its opinion with the conclusion that "[n]ew relief must . . . be fashioned to correct the continuing violations of the plaintiffs' constitutional rights."[171]

Ruiz represents a rare success for isolated inmates challenging the conditions of their imprisonment. The inmates were able to elicit a finding of ongoing Eighth Amendment violations, even though the court employed the difficult prison conditions test of *Wilson*.[172] *Ruiz* may be an outlier, however, given the extremely severe conditions in the Texas prison system as described above.[173] The court also found Eighth Amendment violations in prison officials' failure to protect inmate safety and in excessive use of force by prison guards; such findings may have contributed to the court's holding on solitary confinement.[174] As this Note argues, overclassified inmates in solitary confinement should not have to experience conditions akin to those in *Ruiz* before they can obtain relief from the courts.

F. International and Foreign Treatment of Solitary Confinement

International and foreign law regarding this topic is important for three main reasons. First, the Supreme Court has stated international and foreign legal practices have potential relevance in modern interpretations of the Cruel and Unusual Punishment

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[167] 154 F. Supp. 975, 980–81 (S.D. Tex. 2001) (citing Ruiz v. Estelle, 503 F. Supp. 1265 (S.D. Tex. 1980)).

[168] *Id.* at 985–86 ("Based on all the evidence, it was found that current and ongoing Eighth Amendment violations had been established as to the conditions of confinement in administrative segregation . . . and regarding the practice of using administrative segregation to house mentally ill prisoners.").

[169] *Id.* at 986.

[170] *Id.* (quoting Rhodes v. Chapman, 452 U.S. 337, 346 (1981)).

[171] *Id.* at 1001.

[172] *Id.* at 985–86.

[173] *See id.* at 983–88; *supra* Part I.B.

[174] *Ruiz*, 154 F. Supp. at 986–87.

Clause.[175] In *Roper v. Simmons*, the Supreme Court gave international and foreign laws a non-determinative yet confirmatory nod when it prohibited the imposition of the death sentence for crimes committed while the defendant was under the age of eighteen.[176] Second, several European countries have taken stronger legal stands against solitary confinement, and scholar Tracy Hresko has identified three international treaties and declarations, which the United States has recognized, that all contain potential ramifications relating to supermax prisons.[177] Finally, several scholars have made international law the basis of their proposals to alleviate the plight of isolated prisoners.[178] Delving into recent applications of international laws and European legal decisions, however, one finds the international legal opinion regarding solitary confinement and supermax prisons to be relatively muddled. This Section argues that a more robust application of international criminal law norms to domestic solitary confinement practices is not the panacea supermax critics may have hoped it to be.

1. International Laws and Treaties

On December 10, 1948, the UN General Assembly adopted the Universal Declaration of Human Rights (UDHR)—not as a binding treaty, but rather as a set of legal norms towards which member countries should strive.[179] Article Five of the document states that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[180] Hresko observes that several U.S. courts have considered the Declaration in the process of interpreting domestic laws;[181] additionally, in 2004, the Supreme Court noted the domestic legal significance of the Declaration, as well as its "substantial indirect effect on international law."[182] United States courts have not, as of yet, interpreted Article Five of the Declaration to affect supermax prison practices, however, and the close resemblance between the language of the UDHR and the Cruel and Unusual Punishment Clause makes it questionable whether such a ruling would have any marginal impact.[183]

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[175] *See* Roper v. Simmons, 543 U.S. 551, 578 (2005) ("The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.").

[176] *Id.* at 575.

[177] Hresko, *supra* note 6, at 17–19.

[178] *See*, *e.g.*, *id.* (discussing possible violations of international laws against torture); Vasiliades, *supra* note 6, at 72–73 (discussing possible violations of international standards regarding treatment of prisoners).

[179] Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948); *see* Hresko, *supra* note 6, at 17–18.

[180] Universal Declaration of Human Rights, *supra* note 179, at art. 5.

[181] Hresko, *supra* note 6, at 18 (citing Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1388 (10th Cir. 1981); Mojica v. Reno, 970 F. Supp. 130, 147 (E.D.N.Y. 1997)).

[182] Sosa v. Alvarez-Machain, 542 U.S. 692, 735 n.23 (2004).

[183] *Compare* U.S. CONST. amend. VIII, *with* Universal Declaration of Human Rights, *supra* note 179, at art. 5.

Also potentially applicable to supermax prisons, Hresko cites the International Covenant on Civil and Political Rights, which the United Nations adopted on December 19, 1966.[184] Though the Covenant entered into force on March 23, 1976 and President Jimmy Carter signed the document in 1977 on behalf of the United States, the Senate did not officially ratify the Covenant until 1992.[185] Upon ratification, the Senate attached five reservations to the international treaty, including one to Article Seven.[186] Article Seven closely resembles the Universal Declaration of Human Rights, stating, "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[187] One Senate reservation declared that Article Seven binds the United States only to the extent that "cruel, inhuman or degrading treatment or punishment" tracks the Cruel and Unusual Punishment Clause as interpreted in U.S. courts.[188] Additionally, the Senate labeled the treaty as non-self-executing, an action United States courts subsequently interpreted as removing any binding authority from the agreement.[189]

Even if the treaty were to gain binding authority in the United States, it is uncertain whether common solitary confinement practices would be affected. In 1992 the Human Rights Committee issued a general comment to Article Seven for the purpose of providing further clarification on the definition of torture under the treaty.[190] General Comment Twenty states only that "prolonged solitary confinement of the detained or imprisoned person *may* amount to acts prohibited by article 7."[191] The Comment further states that Article Seven refers to acts causing "mental suffering" as well as the physical infliction of pain.[192] Such statements may be interpreted as indicating that the Committee will keep an eye on the solitary confinement practices of member countries, but such practices must be more extreme than usual to violate the standards of Article Seven.

The last source of international law Hresko cites is the Convention Against Torture, which the United Nations General Assembly adopted on December 10, 1984 and

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[184] International Covenant on Civil and Political Rights, Dec. 16, 1966, S. EXEC. DOC. E, 95-2, 999 U.N.T.S. 171; Hresko, *supra* note 6, at 17–18.

[185] Kristina Ash, Note, *U.S. Reservations to the International Covenant on Civil and Political Rights: Credibility Maximization and Global Influence*, 3 NW. U. J. INT'L HUM. RTS. 7, 9 (2005).

[186] *Id.*

[187] *Compare* International Covenant on Civil and Political Rights, *supra* note 184, at art. 7, *with* Universal Declaration of Human Rights, *supra* note 179, at art. 5.

[188] Hresko, *supra* note 6, at 18.

[189] *See* Hain v. Gibson, 287 F.3d 1224, 1243 (10th Cir. 2002).

[190] Human Rts. Comm., CCPR General Comment No. 20: Article 7 (Prohibition of Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment), U.N. Doc. HRI/GEN/1/Rev.9, 44th Sess. (Mar. 10, 1992).

[191] *Id.* at ¶6 (emphasis added).

[192] *Id.* at ¶5.

entered into force on June 26, 1987.[193] The United States signed the treaty in April 1988 and the Senate followed with ratification in 1994.[194] The Convention establishes a Committee Against Torture to enforce the treaty,[195] which defines torture as:

> [A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as . . . punishing him for an act he or a third person has committed . . . when such pain or suffering is inflicted by . . . or with the consent . . . of a public official.[196]

Article One also states, however, that torture "does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."[197] The potential impact the Convention may have on United States supermax practices is therefore likely to be minimal, as current United States laws generally allow for prolonged solitary confinement.[198]

The international declarations and treaties discussed above are likely not instruments capable of bringing full relief to overclassified inmates in supermax facilities. Each document either lacks binding force in the United States, provides exceptions for lawfully sanctioned punishments, or is ambiguous at best as to whether its definition of torture pertains to solitary confinement. Thus scholars should look elsewhere for law sufficiently robust to bring about relief to inmates undeservedly languishing in prolonged isolation.

2. European Judicial Treatment of Solitary Confinement

European legal bodies have dealt with solitary confinement on occasion, including a European Court of Human Rights (ECHR) action to delay the extradition of suspected

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[193] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (1984), 1465 U.N.T.S. 85 (June 26, 1987) [hereinafter Convention Against Torture]; Hresko, *supra* note 6, at 18.

[194] *See* Hresko, *supra* note 6, at 18–19.

[195] Convention Against Torture, *supra* note 193, at art. 17.

[196] *Id.* at art. 1(I).

[197] *Id.*

[198] *See* Starr, *supra* note 13; *see*, *e.g.*, Wilkinson v. Austin, 545 U.S. 209, 213, 229 (2005) (noting the large increase in supermax facilities in the US between 1985–2005 and refusing to make any holding regarding the practice under the Eighth Amendment). In 2008, the Committee against Torture issued a report on the Philippines's prison practices. U.N. Comm. Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Philippines*, U.N. Doc. CAT/C/PHL/2 (Sept. 9, 2008). The report cited, with approval, a bill pending in the Philippines's legislature which outlawed and defined mental torture as including solitary confinement of prisoners "in public places," "against their will or without prejudice to their security." *Id.* at art. 1.

terrorists to the United States due to concerns over a possible lengthy sentence in a federal supermax in Colorado.[199] The ECHR enforces the European Convention on Human Rights (European Convention),[200] of which Article Three prohibits "torture or . . . inhuman or degrading treatment or punishment."[201] Similar to the application of international criminal law treaties to prolonged isolation,[202] the ECHR's treatment of solitary confinement cases under Article Three is mixed.[203]

One scholar has praised the European Court, however, for providing more specifics than the United States Supreme Court on what constitutes legal solitary confinement techniques.[204] In a 2005 case, the ECHR identified "complete sensory isolation coupled with total social isolation" as the elements of some solitary confinement practices that constitute inhumane treatment.[205] Mere "prohibition of contact with other prisoners for security, disciplinary or protective reasons," on the other hand, is not *per se* inhuman or degrading treatment and thus does not incur the intervention of the ECHR.[206] For example, in 2006 the ECHR rejected an appeal from Ilich Ramirez-Sanchez, a.k.a. "Carlos the Jackal," ruling his assignment to solitary confinement for eight years did not constitute "inhumane treatment."[207] The ECHR held that his long period of solitary confinement—instituted because of his nature as a dangerous flight risk with the potential to disrupt order in the prison—did not violate any of his human rights.[208]

The case of Ramirez-Sanchez above illustrates that the ECHR does not consider the length of an inmate's detention in solitary confinement as determinative, but rather weighs the length of isolation against the reasons for the detention.[209] Further, the ECHR gives strong consideration to the conditions of the inmate's solitary confinement in its analysis; in Ramirez-Sanchez's case, greater amounts of access to exercise,

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[199] *See* Dominic Casciani, *Abu Hamza US Extradition Halted*, BBC NEWS (July 8, 2010), http://www.bbc.co.uk/news/10551784.

[200] European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 19, 213 U.N.T.S. 221, 234.

[201] *Id.* at art. 3.

[202] *See supra* Part II.F.1 (discussing the applicability of prominent international human rights treaties to U.S. solitary confinement practices).

[203] *See generally Execution Judgment* Ramirez Sanchez v. France, EUROPEAN COURT OF HUMAN RIGHTS NEWS (Jan. 1, 2011), http://echrnews.wordpress.com/2011/01/01/ramirez/ (observing the ECHR may take two-and-a-half years to adjudicate appeals of improper solitary confinement).

[204] Vasiliades, *supra* note 6, at 92–93 (stating the ECHR has "outlined specific instances of legitimate segregation techniques . . . which cumulatively represent significant strides ahead of U.S. jurisprudence").

[205] Ocalan v. Turkey, 2005-IV Eur. Ct. H.R. ¶191.

[206] *Id.*

[207] Ramirez-Sanchez v. France, 2006-IX Eur. Ct. H.R. ¶86; *see also* Jan Sliva, *Human Rights Court Dismisses Carlos the Jackal's Appeal Over Solitary Confinement*, THE SAN DIEGO UNION-TRIBUNE, July 4, 2006, http://legacy.signonsandiego.com/news/world/20060704-0808-carlosthejackal.html.

[208] *Ramirez-Sanchez*, 2006-IX Eur. Ct. H.R. at ¶¶60, 62, 150.

[209] *Id.* at ¶150.

reading materials, and sensory stimulation likely weighed against his arguments on appeal.[210] Therefore, though the ECHR is similar to United States courts in holding prolonged solitary confinement does not generally constitute cruel and unusual punishment or torture, the European Court conducts a more nuanced analysis of the conditions of the inmate's confinement.[211] This Note hopes to achieve a similarly nuanced treatment of supermax prisons in U.S. courts but on the basis of the characteristics of isolated inmates.

III. A NEW APPROACH—*GRAHAM*-STYLE CATEGORICAL RESTRICTION

A. The Case for Different Standards for Overclassified Inmates

Part II above chronicled past efforts of inmates to have their detentions in solitary confinement and supermax prisons deemed cruel and unusual punishment.[212] The main obstacle for many Eighth Amendment challenges to supermax facilities is the two-part prison conditions test the Supreme Court established in *Wilson v. Seiter*, which requires inmates to prove both an objective deprivation of a basic human need and a subjective mindset of deliberate indifference on the part of prison officials.[213] The targets of this Note—overclassified inmates detained in supermax facilities—are generally treated identically to more violent inmates once inside a supermax facility.[214] These juvenile and nonviolent offenders have significantly less culpability for their conduct, however, and, accordingly, their claims for relief from supermax conditions should be adjudicated under different standards than those laid out in *Wilson*.[215]

Overclassified inmates do not carry the same levels of culpability and threat to prison safety as older criminals with a history of committing violent felonies, which justifies their isolation in the eyes of those on the political Right.[216] At least in the case of juveniles, such prisoners are less likely to be hardened into their criminal lifestyle and thus present a greater opportunity for rehabilitation.[217] As the cases and descriptions of supermax facilities above indicate, conditions in prolonged solitary confinement

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[210] *Id.* at ¶¶127–28, 135–36.

[211] *See* Starr, *supra* note 13 ("In general, an international law theory based on 'cruel, inhuman, or degrading treatment' might be an easier sell—it's similar to torture, but less aggravated, and is also prohibited by international law.").

[212] *See supra* Part II.

[213] Wilson v. Seiter, 501 U.S. 294, 298, 303 (1991).

[214] *See* Herrera v. Williams, 99 F. App'x. 188, 189–90 (2004).

[215] *See* DeMaio, *supra* note 9, at 218–22 (discussing the concerns inherent in overclassification).

[216] *See generally* Graham v. Florida, 130 S. Ct. 2011, 2026 (2010); DeMaio, *supra* note 9, at 209.

[217] *See generally Graham*, 130 S. Ct. at 2026–27. The Court noted juvenile offenders are less culpable than adults due to a "lack of maturity and an undeveloped sense of responsibility," and further drew a line distinguishing the culpability of criminals intending to extinguish human life from other offenders. *Id.* (citations omitted).

units can be extremely traumatic and present little chance for inmates to mend their lifestyles.[218] Therefore, a categorical restriction can be a vital safeguard in preventing overclassified inmates from ever entering a supermax facility, further ensuring such prisons remain the destination of solely the "worst of the worst."[219]

B. The Categorical Restriction Challenge

The exact shape and language constituting the desired categorical restriction may depend on the facts of the case giving rise to the challenge, but generally the proposed rule should shadow the majority's holding in *Graham*.[220] In a hypothetical case, an inmate assigned to a supermax facility files an Eighth Amendment challenge to his sentence, petitioning the court to declare his prolonged solitary confinement cruel and unusual punishment for an offender either below the age of eighteen, sentenced for a crime committed while below the age of eighteen, and/or sentenced for a relatively minor, nonviolent crime. This challenge would be both a natural and significant extension of *Graham*: the proposal asks for a categorical restriction relating to a term-of-years sentence, but focuses on the location of imprisonment instead of the length of imprisonment alone.[221] This Subsection describes each step in the Eighth Amendment analysis of the *Graham* majority, accompanied by a corresponding analysis of overclassification and solitary confinement.

Justice Kennedy delineated the procedure a court follows upon being presented with a request for a categorical restriction in his majority opinion in *Graham*.[222] First, a court considers "'objective indicia of society's standards, as expressed in legislative enactments and state practice.'"[223] Kennedy analyzed the number of state statutes prescribing the sentencing practice at issue in *Graham*—life-without-parole for juvenile non-homicide offenders—and found a substantial majority permitted the practice.[224] Justice Kennedy did not find this analysis sufficiently thorough, however, and continued to examine actual sentencing practices regarding juvenile non-homicide offenders.[225]

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[218] *See supra* Part II.E (describing conditions in Pelican Bay and Texas's Supermax facility).

[219] DeMaio, *supra* note 9, at 222 (quoting former Wisconsin Governor Tommy Thompson in his description of the purpose of the state's supermax prison facility).

[220] *Graham*, 130 S. Ct. at 2030 (holding "those who were below [the age of 18] when the offense was committed may not be sentenced to life without parole for a nonhomicide crime").

[221] *Id.* As noted previously, *Graham* itself was both a natural extension and significant departure from previous Eighth Amendment proportionality precedents. *See supra* Part II.B.

[222] *See Graham*, 130 S. Ct. at 2022–23.

[223] *Id.* at 2022 (quoting Roper v. Simmons, 543 U.S. 551, 563 (2005)).

[224] *Id.* at 2023 (observing thirty-seven states, the District of Columbia, and federal law allowed life-without-parole sentences for juvenile non-homicide offenders).

[225] *Id.* Referring to Florida's proposition that a substantial majority of states permitting the sentencing practice alone demonstrates a favorable national consensus, Justice Kennedy responded that their "argument is incomplete and unavailing" and further noted that "[a]ctual sentencing practices are an important part of the Court's inquiry into consensus." *Id.*

The Court in *Graham* found 123 juvenile, non-homicide offenders serving life-without-parole sentences in only eleven states nationwide, and observed that this data indicated "how rare these sentences are."[226] Although a comprehensive study has yet to be conducted on the number of juvenile and/or nonviolent offenders in supermax prisons, the more limited studies cited above provide evidence indicating the numbers may be similar to those found in *Graham*.[227] One study identified fifty-seven supermax facilities in the nation holding approximately 20,000 prisoners.[228] From that number, several journalists have identified small numbers of overclassified inmates in specific facilities. Journalists identified sixteen nonviolent offenders at the Tamms Supermax facility in Illinois in 2009,[229] and a Florida journalist discovered forty-seven juvenile inmates in solitary confinement in that state's prison system in 2006.[230] Though admittedly only anecdotal, such investigations are evidence that the ultimate number of overclassified inmates is significant enough to be an issue, but low enough to aid a court in finding a national consensus against the practice.

As Justice Kennedy noted, however, such a finding of national consensus "is not itself determinative of whether a punishment is cruel and unusual"—the court must exercise its own "independent judgment."[231] Kennedy described this step as considering "the culpability of the offenders . . . in light of their crimes and characteristics, along with the severity of . . . punishment," as well as "whether the challenged sentencing practice serves legitimate penological goals."[232] The majority found reduced culpability for both juveniles relative to adults and offenders committing non-homicide crimes relative to homicide offenders.[233] The Court further ruled life-without-parole to be "'the second most severe penalty permitted by law'"[234] and "an especially harsh punishment for a juvenile" relative to an older offender.[235] The Court concluded the independent judgment phase of inquiry with the finding that the sentencing practice in *Graham* served none of the recognized goals of the penal system.[236]

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[226] *Id.* at 2024. Kennedy further observed that 77 of the 123 inmates—"a significant majority"—are imprisoned in Florida. *Id.*

[227] *See supra* Part I.C (summarizing recent anecdotal evidence on the number of juvenile, nonviolent offenders imprisoned in supermax facilities).

[228] Lobel, *supra* note 14, at 115 (citing Daniel P. Mears & Jamie Watson, *Towards a Fair and Balanced Assessment of Supermax Prisons*, 23 JUST. Q. 232, 232–33 (2006)).

[229] Pawlaczyk & Hundsdorfer, *supra* note 92.

[230] Laughlin, *supra* note 93.

[231] *Graham*, 130 S. Ct. at 2026.

[232] *Id.* (citing Roper v. Simmons, 543 U.S. 551, 568, 571–72, 575 (2005); Solem v. Helm, 463 U.S. 277, 292 (1983)). Kennedy lists retribution, deterrence, incapacitation, and rehabilitation as the four "legitimate penological goals." *Id.* at 2026, 2028–29.

[233] *Id.* at 2026–27.

[234] *Id.* at 2027 (quoting Harmelin v. Michigan, 501 U.S. 957, 1001 (1991)).

[235] *Id.* at 2028.

[236] *Id.* at 2030 ("In sum, penological theory is not adequate to justify life without parole for juvenile nonhomicide offenders.").

An exercise of the Court's independent judgment should lead to similar conclusions when the sentencing practice is juvenile and/or nonviolent offenders assigned to supermax prisons. Inmates in either category of over-classification are far from the worst of the worst that prison officials originally target with Supermaxes; to paraphrase the Court, such inmates have "twice diminished moral culpability"[237] relative to more mature offenders committing violent crimes.[238] The Court observed in *Roper* that juvenile crimes rarely "reflect[ ] irreparable corruption,"[239] and the commission of such crimes is more likely the result of external pressures and a lack of maturity.[240] The Court's comparison of homicide with non-homicide crimes is easily transmitted to the comparison of violent crimes with nonviolent crimes, including property and drug offenses; an identical result of less culpability for the latter is self-evident.[241]

The Court recognizes four penological goals in *Graham*: retribution, deterrence, incapacitation, and rehabilitation.[242] The Court perceives retribution as justifying a sentence only if it is "'directly related to the personal culpability of the . . . offender'";[243] thus, the retribution justification must be based on the culpability analysis conducted above. For juvenile and/or nonviolent offenders with relatively low culpability, an assignment to a small, solitary cell for twenty-three hours a day without external stimuli goes well beyond what the goal of retribution would suggest.[244]

Both goals of deterrence and incapacitation also require an adequate level of culpability to be justified as legitimate penological goals for a sentence,[245] and in this case neither serves to sufficiently support assignment to supermax facilities for an over-classified inmate. The possibility of an assignment to a supermax facility is too low and too dependent on the actions of prison officials after court sentencing to deter an individual's decision to commit a crime. This is especially true if the crime is relatively minor and nonviolent; such offenders have little reason to believe they will be sent to a facility that politicians describe as housing the "worst of the worst."[246] The marginal increase in incapacitation from a lower-security prison to a supermax consists

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[237] *Id.* at 2027.

[238] *See id.*

[239] Roper v. Simmons, 543 U.S. 551, 573 (2005).

[240] *Id.* at 569–70.

[241] *See Graham*, 130 S. Ct. at 2027.

[242] *Id.* at 2028.

[243] *Id.* (quoting Tison v. Arizona, 481 U.S. 137, 149 (1987)).

[244] Meghan J. Ryan, *Judging Cruelty*, 44 U.C. DAVIS L. REV. 81, 101–03, 105, 113 (2010) (discussing the goals of retribution and lack of culpability for juvenile offenders).

[245] *See Graham*, 130 S. Ct. at 2028–29. The Court quoted *Roper* as observing, "The same characteristics that render juveniles less culpable than adults suggest . . . that juveniles will be less susceptible to deterrence." *Id.* at 2028 (quoting *Roper*, 543 U.S. at 571). The Court in *Graham* additionally quoted *Roper* regarding the impact a juvenile's "transient immaturity" has on an incapacitation analysis for a given sentencing practice. *Graham*, 130 S. Ct. at 2029 (quoting *Roper*, 543 U.S. at 572).

[246] *See* DeMaio, *supra* note 9, at 222.

only of increased protection against prisoner escape and crimes committed in prison; an offender is kept away from the public equally in each type of facility. Thus, unless the overclassified inmate is a danger to the safety of the specific prison facility—thus removing his status as overclassified—incapacitation does not justify assignment to a supermax.

The final recognized penological justification is rehabilitation, and in this regard the failure of Supermaxes is greatest. Paraphrasing the Court in *Graham*, assignment to a supermax "forswears altogether the rehabilitative ideal."[247] As mentioned above, the Quakers of the early nineteenth century initially believed solitary confinement would produce improved rehabilitative results but quickly learned otherwise.[248] The research of Haney and Lynch, also cited above, details the long list of negative psychological effects an inmate experiences in prolonged isolation without any external stimuli.[249] Such psychological injuries may be greater if imposed on juvenile offenders, a group the Supreme Court acknowledges "are more vulnerable or susceptible to negative influences and outside pressures."[250] Rehabilitation, therefore, cannot be plausibly claimed as a justification for the assignment of anyone to a supermax facility.

A court conducting this analysis is likely to conclude that a prolonged assignment to a supermax for an overclassified inmate violates the Cruel and Unusual Punishment Clause as grossly disproportionate to the crime. Following the path the Supreme Court cleared in *Graham*, a judge should that find this punishment is commonly rejected in actual sentencing practices and is disproportionately severe as to the culpability of the offenders. Additionally, the punishment finds no legitimate justification from recognized penological goals, and thus an assignment to a supermax for an overclassified inmate is not in accordance with the Eighth Amendment.

C. The Remedy

Despite finding for juvenile offenders on the legal question, the Court in *Graham* did not require Florida to immediately release all juvenile offenders serving life-without-parole sentences, nor did it demand that the state reduce all such sentences to a limited term of years.[251] Rather, the *Graham* majority required Florida and other states to provide such offenders with "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[252] The Court further noted that "[i]t is for the State, in the first instance, to explore the means and mechanisms for compliance."[253]

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[247] *Graham*, 130 S. Ct. at 2030.

[248] *See supra* Part I.A; *see also* Lobel, *supra* note 14, at 118. Lobel quotes from Alexis de Tocqueville as stating the practice of solitary confinement "does not reform, it kills." *Id.*

[249] Haney & Lynch, *supra* note 58, at 530.

[250] *Roper*, 543 U.S. at 569.

[251] *Graham*, 130 S. Ct. at 2030 ("A State is not required to guarantee eventual freedom to a juvenile offender convicted of a non-homicide crime.").

[252] *Id.*

[253] *Id.*

Similarly, courts should not require states and the federal government to immediately release all overclassified inmates from prison or guarantee they will never enter a supermax institution. Such a ruling falls on the other extreme and removes too much discretion from prison administrators, possibly signaling to juvenile and nonviolent inmates that they cannot be punished for bad prison behavior. Rather, jurisdictions should configure procedures that would bar an overclassified inmate from entering a supermax as long as he remains overclassified. Under this proposal, nonviolent and/or juvenile offenders could not be transferred to a supermax prison unless they commit an act in prison which removes this classification. In addition to preventing the imposition of a cruel and unusual punishment, this rule would provide an incentive for such offenders to behave well and not become the hardened criminals for which supermax prisons are designed. Moreover, officials should move with reasonable speed to transfer all currently overclassified inmates to less-restrictive facilities proportional to their threat level and culpability.

Proper procedures for entry and release into a supermax facility can act as a safeguard against potential Eighth Amendment violations,[254] and courts should delineate a baseline standard for incarceration officials to follow when adjusting their penal systems. First, a jurisdiction's prison assignment system should ensure that no juvenile or nonviolent convict is sent to a supermax prison at the start of his sentence. This outcome flatly and directly violates the categorical restriction on assignment of overclassified inmates to Supermaxes and provides these inmates with no opportunity for rehabilitation. Second, prison regulations should devise alternative disciplinary measures for this class of inmates to correct misbehavior that does not cross the line into violence or the threat thereof. A transfer to a supermax for a minor infraction is excessive because supermax assignments tend to last for an extended time period.[255]

Finally, courts should prevent jurisdictions from narrowing their definition of an overclassified inmate too far, as a robust standard helps to limit Supermaxes to their proper function as home for solely the worst of the worst. The definition of juvenile offenders is fairly straightforward—such an inmate is overclassified if his sentence is for a crime he committed under the age of eighteen. A similarly clear definition of violent crime is not as easy to obtain, however, and therefore courts should allow legislatures and corrections officials some discretion in devising standards, which may vary

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[254] *See* DeMaio, *supra* note 9, at 222 (observing "these 'gatekeeper' functions—the substantive and procedural requirements for admission to and release from [a supermax]—are the logical place to begin" when preventing over-classification of inmates). *See generally Institutions by Security Levels*, VIRGINIA DEPARTMENT OF CORRECTIONS (2010), http://www.vadoc.state.va.us/facilities/security-levels.shtm (detailing Virginia's separation of prison facilities into categories representing levels of security with corresponding standards of entry into each category).

[255] *See* DeMaio, *supra* note 9, at 236 (noting Wisconsin's Supermax prison has "an intended total length of stay from twenty-four to thirty-six months"); *Institutions by Security Levels*, *supra* note 254 (noting assignment to Virginia's Supermax facility is "long-term").

across state lines. If states press the issue too far, courts can fall back on federal statutes and agency regulations as guidelines, including the definition of violent felony in the federal Armed Career Criminal Act, as well as the Department of Justice's Bureau of Justice Statistics definition of violent offenses.[256]

D. Practical Impact of Categorical Restriction and Remedy

Implementation of this proposal is likely to generate two areas of concern for prison administrators: cost and prison safety. First, prison officials are likely to point to the large investments states make in building and operating supermax facilities.[257] A court ruling preventing the assignment of large classes of inmates to the facilities on constitutional grounds may lead to lower utilization and generate less return on the facilities for states. States may have to construct additional disciplinary housing units at lower-security prisons to accommodate inmates with relatively minor behavioral infractions. Prison officials may also argue that removing any options from their arsenal of disciplinary methods will hamper their ability to punish misbehavior effectively and embolden problem inmates. Finally, staff at supermax facilities often have special training to work with problem inmates,[258] and housing more inmates with even small behavior issues in lower-security facilities may pose threats to the safety of staff and other inmates. This Subsection describes how the categorical restriction proposal adequately accounts for all of these concerns.

1. Cost Concerns

Under the proposed categorical restriction, prison officials would have some valid concerns regarding cost, at least as they relate to under-utilization of supermax facilities.[259] As the anecdotal studies above indicate, however, supermax prisons do not appear to have large populations of overclassified inmates.[260] The effect on utilization rates will therefore be small, and resources spent on the variable costs of housing an additional inmate at a supermax can be reallocated to guarding against behavior

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[256] *See infra* text accompanying notes 292–95; *see also* Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B) (2006); West & Sabol, *supra* note 79, at 21.

[257] *See* DeMaio, *supra* note 9, at 215–16. The author cites several reasons for the high cost of operating supermax prisons, including a higher staff-to-inmate ratio, a prohibition on employing inmates for low wages, special training for staff, and expensive improvements to the facility.

[258] *Id.* at 215.

[259] *See id.* at 248 (noting if standards for admission "are applied strictly, [Wisconsin's Supermax] would likely end up with a large number of empty beds").

[260] *See supra* Part I.C (detailing recent investigative work uncovering anecdotal evidence of only a few overclassified inmates at supermax facilities). *But see* Gawande, *supra* note 13 (stating most inmates in prolonged solitary confinement are not highly dangerous).

issues of the worst of the worst.[261] If the number of truly dangerous inmates is less than the number of overclassified inmates at Supermaxes, states may actually save money on variable costs of incarceration due to the restriction. Moreover, if supermax utilization is adversely impacted more than originally expected, states can follow the lead of Virginia and downgrade a supermax to a lower-security facility.[262]

Moreover, such a discussion of cost does not consider the costs to overclassified inmates, which in turn impose externalities on society. As DeMaio notes, an inmate assigned to a supermax, despite being more deserving of a lower-security institution, loses "valuable opportunities for work, education and rehabilitative treatment."[263] Work and education opportunities at Supermaxes are severely limited and often nonexistent,[264] and the psychological toll of prolonged solitary confinement negates any rehabilitative effect incarceration might otherwise have.[265] For overclassified inmates—more likely to be re-released into society earlier than prisoners with a history of violent crime—this represents a potentially significant opportunity cost, with the inmate re-entering society having experienced an atrophy of any interpersonal or economic skills he may have once possessed.[266] Aggregated over the entire class of overclassified inmates, these opportunity costs could represent a significant loss of productivity for society. Finally, society may face additional costs from antisocial behavior resulting from the psychological toll of long periods of isolation.[267] A constitutional prohibition on housing juvenile and nonviolent offenders at Supermaxes avoids these individual and society-level costs.

2. Prison Safety Concerns

The second area of concern for prison administrators—prison safety—is also unlikely to be significantly impacted. This proposal removes one option from the toolbox of disciplinary methods for, at best, marginally problematic inmates; however, the

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[261] *See* DeMaio, *supra* note 9, at 219 (describing the high variable cost of filling a bed at a supermax facility).

[262] *See Institutions by Security Levels*, *supra* note 254 (noting the downgrade of Wallens Ridge State Prison from supermax to a "Level Five" Security Facility).

[263] DeMaio, *supra* note 9, at 218.

[264] *See supra* Part I.B (observing inmates at many supermax facilities are confined to their small cells for up to twenty-three hours a day).

[265] *See* Haney & Lynch, *supra* note 58, at 530–33.

[266] *See* DeMaio, *supra* note 9, at 219. The author observes the inmate may also carry "the stigma of having been a 'supermax' inmate" with him, either in society or at a lower-security prison facility. *Id.*

[267] *See* Jessica Pupovac, *Torture in Our Own Backyards: The Fight Against Supermax Prisons*, THE REAL COST OF PRISON WEBLOG (Mar. 24, 2008, 9:36 AM), http://realcostofprisons.org/blog/archives/control_unitsshusupermax/index.html (discussing legislative and academic commentary pointing out the lack of evidence to corroborate rehabilitative effectiveness of supermax prisons).

removed option is the most extreme and is made unavailable only for low-risk inmates committing minor infractions. The proposal for a categorical restriction is founded on a rationale of proportionality and culpability. Thus, due to the potential for great harm to overclassified inmates, the new approach applies constitutional standards to the choice prison officials should make anyway on grounds of effective administration of prisons and inmates. For nonviolent and juvenile offenders with only minor disciplinary problems, prison officials retain a wide array of punitive methods at their disposal. And if such inmates wrongly believe themselves to be untouchable due to the new constitutional protection and exhibit dangerous and/or violent behavior, prison officials are then free to transfer the inmate to a supermax at their discretion.

E. Legal Counter-Arguments

Legal scholars and practitioners favorably disposed to *Wilson*'s two-part conditions test[268] and harsher punishments for criminals as a means of deterrence and retribution may raise several objections to this proposal. One possible challenge posits that judges inexperienced with the administration of prison facilities should not be substituting their judgments for those of incarceration officials on the ground.[269] A second possible legal challenge would contend that a punishment such as assignment to a supermax prison is not the official "penalty formally imposed for a crime,"[270] thus requiring a challenge of general prison conditions under different standards than adjudication of a Cruel and Unusual Punishment claim.[271] The Supreme Court held in *Wilson* that a challenge aimed at general conditions "require[s] inquiry into [the] state of mind"[272] of prison officials, finding an Eighth Amendment violation only if said officials acted with deliberate indifference to the inmate's plight.[273] This Subsection lays out the counterpoints to each argument.

1. Judicial Deference

Regarding the first argument on the value of judicial deference, this Note does not dispute the principle that courts should not unnecessarily tie the hands of officials on the ground. Prison administrators are in the best position to make decisions to protect the safety of inmates and staff, and any sound Eighth Amendment categorical restriction

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[268] Wilson v. Seiter, 501 U.S. 294, 298, 302 (1991).

[269] Justice Scalia, in his majority opinion in *Wilson*, cautions that "officials act in response to a prison disturbance, [and thus] their actions are necessarily taken 'in haste, under pressure,' and balanced against 'competing institutional concerns for the safety of prison staff or other inmates.'" *Id.* at 302 (quoting Whitley v. Albers, 475 U.S. 312, 320 (1986)).

[270] *Id.*

[271] *Id.*

[272] *Id.*

[273] *Id.*

on supermax assignments should account for this fact.[274] The response to this argument, however, is similar to the response to prison administrators concerned with the potential impact on prison safety.[275] The categorical restriction against assigning overclassified inmates to Supermaxes finds inherent support from the existence of over-classification itself—such inmates do not deserve to be sent to Supermaxes yet end up there anyway. This administrative decision, previously made on practical grounds of efficiency and inmate outcomes, is only evaluated under constitutional standards due to the severe psychological harm that prolonged solitary confinement in a supermax inflicts on over-classified inmates.[276] To paraphrase Justice Scalia, when emergency conditions arise that threaten the safety of persons inside a prison, prison officials retain the option to transfer dangerous and violent inmates to supermax regardless of their previous state of less culpability, as the inmates have now lost their status as overclassified.[277]

Therefore, the proposed categorical restriction cannot be said to be an instance of judicial overreach into an area properly reserved for the executive branch of states or the federal government.[278] Rather, the court would be acting within its proper role as the protector of an individual's rights against the power and coercion of the government. A court would step in and make requirements of prison officials only if an inmate has been unnecessarily sent to a supermax prison and is experiencing punishment grossly disproportionate to the gravity of his offense.

2. Supermax Is Not the Formal Penalty Imposed for the Crime

The argument that an assignment to a supermax is not the formal penalty imposed for a criminal conviction—and thus that related Eighth Amendment challenges should be decided under a different framework—is more complex and may depend on the circumstances surrounding the inmate's original prison assignment. The Court in *Wilson* states that "[i]f the pain inflicted is not formally meted out *as punishment* by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify."[279] This rule appears to be applicable at least in cases in which incarceration officials transfer inmates to Supermaxes based on disruptive behavior.

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[274] The Supreme Court has noted another likely concern of prison administrators—the possibly high cost of improving facility conditions—has *not* been advanced as a factor or defense to a "cruel and unusual punishment" claim regarding conditions of confinement. *Wilson*, 501 U.S. at 301–02 ("At any rate, the validity of a 'cost' defense as negating the requisite intent is not at issue in this case . . . . Nor, we might note, is there any indication that other officials have sought to use such a defense . . . .").

[275] *See supra* Part III.D.

[276] *See* Haney & Lynch, *supra* note 58, at 530.

[277] *See Wilson*, 501 U.S. at 302; *supra* text accompanying note 282.

[278] *See generally* U.S. CONST. art. II, § 3 (granting to the executive branch the duty to "take care that the laws be faithfully executed").

[279] *Wilson*, 501 U.S. at 300.

The response is twofold. First, an overclassified inmate assigned to a supermax directly after sentencing experiences the supermax as the formal penalty for his crime for all practical purposes. The inmate never had an opportunity to demonstrate his lower level of culpability, along with acceptance of responsibility for his actions and good behavior, at a less restrictive facility. In the federal system, the final decision of prison placement rests with the Bureau of Prisons within the Department of Justice; defendants and sentencing judges generally make only requests and recommendations for specific facilities or locations.[280] Courts have previously found a significant distinction between Supermaxes and less restrictive facilities,[281] however, and thus they should exercise their judicial power to declare certain facilities off-limits for juvenile and nonviolent offenders.

Second, if an overclassified inmate is transferred to a supermax for disciplinary reasons, Justice Scalia's majority opinion in *Wilson* notes that such transfers are the punishment imposed for a crime and are thus subject to proportionality review.[282] In a footnote, Scalia describes the concurring opinion's argument that all prison conditions constitute punishment regardless of the intent of prison officials.[283] Scalia finds "no basis for that position in principle,"[284] moving on to analyze the case law the concurrence cites.[285] Discussing *Hutto v. Finney*,[286] Scalia finds the only element at issue is "punitive isolation" or solitary confinement.[287] Punitive isolation, Scalia observes, "is self-evidently inflicted with punitive intent"[288] and is thus punishment to which the Eighth Amendment fully applies.[289]

In the situation of an overclassified inmate transferred to a supermax for minor behavioral infractions, the transfer is effectively a sentence formally imposed for a crime and does not require inquiry into the state of mind of relevant prison officials. Thus, the only remaining situation not covered above, whereby an overclassified inmate finds himself at a supermax, is if the inmate is transferred from a lower-security facility to the supermax for administrative reasons such as overcrowding. The Supreme Court in *Wilson*, however, noted in dicta that concerns regarding fiscal constraints could not

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[280] *See* David Anders, *Off to Prison—But Where?*, ANTI-BRIBERY COMPLIANCE BLOG (Aug. 17, 2009, 7:30 AM), http://wrageblog.wordpress.com/2009/08/17/off-to-prison-but-where/.

[281] *See generally supra* Part II.E (noting district judges' awareness of the stark realities of everyday life in supermax facilities in *Madrid v. Gomez*, 889 F. Supp. 1146 (1995), and *Ruiz v. Johnson*, 154 F. Supp. 2d 975 (2001)).

[282] *Wilson*, 501 U.S. at 301 n.2.

[283] *Id.*

[284] *Id.*

[285] Scalia also argues the position of the concurrence "is contradicted by our cases." *Id.*

[286] 437 U.S. 678 (1978).

[287] *Wilson*, 501 U.S. at 301 n.2.

[288] *Id.*

[289] *Id.*

"control the meaning of 'cruel and unusual punishment' in the Eighth Amendment"[290] and, as such, a "'cost' defense" is likely never valid.[291]

CONCLUSION

Any skepticism that the proposed categorical restriction would be too soft on hardened criminals or endanger prison safety is hopefully alleviated after the discussion of counter-arguments above. The targets of this proposal are not, for example, terrorist suspects the United States seeks to extradite for prosecution;[292] rather, they are undeserving inmates such as David Tracy[293] and the inmate sent to Wisconsin's Supermax at the age of sixteen.[294] These inmates do not have the level of culpability that justifies confinement in a supermax, and thus the potential costs resulting from the severe psychological trauma inherent in prolonged solitary confinement are much higher. Proper safeguards should be in place to prevent these inmates from experiencing such brutal conditions.

Graham opened the door to extending proportionality-based categorical restrictions to punishments beyond the death penalty, granting courts the ability to help more prison inmates facing punishments grossly disproportionate to their crimes.[295] Past attempts to help these inmates—including challenges grounded in international law, facial challenges against all Supermaxes, and due process claims challenging procedures for transfer to Supermaxes—have only partially succeeded at best.[296] Courts should recognize the validity of the underlying goals of such claims, and protect the individuals most in need of help in these cases through a categorical restriction on assigning overclassified inmates to supermax prisons.

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[290] *Id.* at 301.

[291] *Id.* at 302. Another possible legal counter-argument is that the drafters of the Eighth Amendment did not intend to have courts engage in proportionality review, and alternatively that the proposal in this Note carries proportionality review too far. *See* Graham v. Florida, 130 S. Ct. 2011, 2044 (2010) (Thomas, J., dissenting). Regarding the former argument, a broad discussion of the inclusion of proportionality review in the Cruel and Unusual Punishments Clause is beyond the scope of this Note; it is sufficient to observe that six members of the Supreme Court in *Graham* engaged in proportionality review in one form or another. *See id.* at 2036 (Roberts, C.J., concurring). Regarding the latter argument, extending categorical restrictions to cover prolonged solitary confinement flows directly out of the principle of proportionality review—"a precept of justice that punishment for crime should be graduated and proportioned to [the] offense." Weems v. United States, 217 U.S. 349, 367 (1910). Quoting the majority in *Graham*, imposing a categorical rule "avoids the risk that . . . a court or jury will erroneously conclude that a particular juvenile [or nonviolent offender] is sufficiently culpable to deserve" imprisonment in a supermax. *Graham*, 130 S. Ct. at 2032.

[292] *See* Casciani, *supra* note 199.

[293] *See supra* Part I.

[294] *See* Fathi, *supra* note 1.

[295] *See* Rachel E. Barkow, *Categorizing Graham*, 23 FED. SENT'G REP. 1, 49–50 (2010); *supra* Part II.B.

[296] *See supra* Part II.