

Perception Profiling & Prolonged Solitary  
Confinement Viewed Through the  
Lens of the Angola 3 Case:  
When Prison Officials Become Judges,  
Judges Become Visually Challenged, and  
Justice Becomes Legally Blind<sup>1</sup>

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**Introduction**

Incarceration has crept its way into the mainstream of American society. It no longer conjures an emotional reaction. In fact, for

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many populations, it is a predictable destination. For others, it is a fate easily justified. “Since the mid 1990s, the war on drugs, the war on gangs, the war on terror, ‘zero tolerance’ and sentencing policies such as ‘three strikes and you’re out[,]’ ‘mandatory minimum sentences[,]’ and ‘truth in sentencing’ have all contributed to the dramatic increase in the number of people sent to prison in the United States and in the length of sentences they serve.”<sup>2</sup> Simply put, incarceration has become an industry in the United States. “The United States incarcerates more people than any other country in the world, including countries that are much more heavily populated.”<sup>3</sup> “The United States now has five percent of the world’s population, twenty-five percent of its prisoners, and probably the vast majority of prisoners who are in long-term solitary confinement.”<sup>4</sup> “The fastest-growing segment of most state budgets is corrections.”<sup>5</sup>

“[T]oday’s prisons and jails are more dangerous because of the unpredictability of the inmate population, which is composed of a new and highly distilled group of inmates.”<sup>6</sup> “This population is also more alienated, more violent, less afraid of punishment, and more difficult to manage.”<sup>7</sup> Because of this, “there has been a significant shift in the duties and priorities of wardens during the past two decades. One of the foremost changes is the increased attention toward safety and security, and this is a consequence of changing external and internal priorities.”<sup>8</sup>

When making disciplinary and management determinations, prison officials have on their shoulders the enormous weight of maintaining order in the institution; protecting the public, the inmate population, and staff from harm and danger by predatory inmates; and respecting the constitutional rights of inmates, those prone to bad

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2. Sharon Shalev, *Inside a Supermax*, 181 PRISON SERVICE J. 21, 21 (2009), available at [http://www.hmprisonservice.gov.uk/assets/documents/100043E5Inside\\_a\\_Supermax.pdf](http://www.hmprisonservice.gov.uk/assets/documents/100043E5Inside_a_Supermax.pdf).

3. LYNN S. BRANHAM & MICHAEL S. HAMDEN, CASES AND MATERIALS ON THE LAW AND POLICY OF SENTENCING AND CORRECTIONS 3 (8th ed. 2009).

4. 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](http://www.newyorker.com/reporting/2009/03/30/090330fa_fact_gawande).

5. Jess Maghan, *Corrections Countdown: Prisoners at the Cusp of the 21st Century*, in PRISON AND JAIL ADMINISTRATION: PRACTICE AND THEORY 199, 206 (Peter M. Carlson & Judith Simon Garrett eds., Aspen Publishers, Inc. 1999).

6. *Id.* at 201.

7. *Id.*

8. Rick Ruddell & Tommy Norris, *The Changing Role of Wardens: A Focus on Safety and Security*, CORRECTIONS TODAY, Oct. 2008, at 3, <http://www.aca.org/fileupload/177/ahaidar/Ruddell.pdf>.

behavior, as well as those likely to be victimized. Much like parents who, by virtue of domestic intelligence and constant oversight, know of their child's tendencies and capabilities, prison administrators know the propensities of those in their care. This ability is part art and part skill and, admittedly, is a necessary part of institutional management. There is simply no way to remove the essential role of judgment in prison administration. And this is no call to do so.

This Article does, however, challenge the arbitrariness often involved in deciding who is assigned to solitary confinement, the indefinite nature of many solitary confinement assignments, and the hollowness of the periodic review process afforded inmates who are subject to prolonged isolation.<sup>9</sup> The absence of meaningful standards applicable to the periodic review process renders inmates vulnerable to the discretion of prison officials, some of whom cravenly seek to impress inmates with their authority and sense of importance. Both fairness and commonsense call for a change in the way we use isolation as a disciplinary and managerial tool in our prisons. In seeking to maintain order in prisons, prison officials must balance the necessary use of power with respect for inmates' constitutional rights. "[T]hough . . . rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for a crime."<sup>10</sup> "Prisoners may also claim the protections of the Due Process

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9. I recognize that, while the practice of isolation has been longstanding, nomenclature used to describe the practice has been ever changing. Today, many correctional facilities reject the use of the term solitary confinement in favor of administrative segregation, punitive segregation, disciplinary segregation, extended lockdown, closed-cell restriction, special housing unit, special management unit or intensive management unit.

In this work, the terms solitary confinement, segregation and isolation are used interchangeably. These terms are used generically to refer to any of the various forms of segregation practices used in penal institutions where inmates are housed separately from the general population and involuntarily confined to their cells for nearly the entire day; interaction with other humans is nonexistent or severely limited; and meaningful programming is removed as a result of disciplinary or administrative action. This work does not extend to death row inmates who are held in isolation as a result of classification and/or sentencing. The constitutional considerations applicable to death row inmates are radically different from those advanced herein. For this reason, death row inmates, who are also segregated from the general population, are not addressed herein and this work should not be interpreted as having application to them.

In this work, the terms long-term solitary confinement or prolonged isolation is intended to refer to segregated housing that extends four months or more per assignment.

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

Clause.”<sup>11</sup> In a prison setting, due process means a fair process that is meaningful and not routine. The process should be customized, inquiry driven, and object based. It should never look like the rote process one undergoes when a meal is ordered at a fast food establishment: fast, undiscerning, abstracted, and impersonal.

This work, using the Angola 3 as a case study, examines the legal and practical implications of prolonged solitary confinement.<sup>12</sup> Section II explores how the practice of solitary confinement has evolved over time to now include what I term “perception profiling.” Section III introduces the Angola 3 case, a local case with national implications. It is believed that the Angola 3 have been held in isolation for a longer period of time than have any other prisoners in the United States.<sup>13</sup> The Angola 3 case illustrates what can happen when unchecked authority and intolerance become bedfellows. It demonstrates what can happen when a regime, sensing a threat, has the power to shackle organizing efforts in a purgatory where voices of organizers compete with the power of silence and the grip of isolation. Section IV uses the Angola 3 case as a backdrop for discussing legal concerns that have emanated from the modern usage of solitary confinement and prolonged isolation. In particular, the section discusses: (1) meaningful due process in the confines of periodic inmate review hearings intended to determine if an inmate should be released from prolonged isolation; (2) how the current practice of prolonged isolation undermines the Doctrine of Separation of Powers; and (3) how the diminished role of courts in prison affairs can encourage abuses by prison officials. Against this backdrop, a proposal for reform is presented in Section V. This reform proposal comes in the form of a national legislative model for the periodic review process. This legislative model is offered with the hope that it will aid states in ensuring that due process protections are afforded to prisoners subject to isolation. The conclusion is found in Section VI.

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11. *Id.* at 556.

12. Robert Wilkerson King, Herman Wallace, and Albert Woodfox are hereinafter referred to as “the Angola 3.”

13. See Laura Sullivan, *Favors, Inconsistencies Taint Angola Murder Case*, NAT’L PUB. RADIO (Oct. 28, 2008), <http://www.npr.org/templates/story/story.php?storyId=96199165>.

## I. Solitary Confinement

In a world where people are removed from the general public because of an inability to conform to rules in society, it is no surprise that maintaining order behind prison walls comes with a unique set of challenges. In a narrow sense, prison administrators are tasked with doing what parents, schools and law enforcement could not: convert rule breakers to rule followers. The approaches and methodologies for accomplishing this feat have changed and evolved over time.

During colonial times, public humiliation and physical punishment were common ways of punishing those who deviated from societal expectations.<sup>14</sup> “Discipline in the early 1800s was part of a penal philosophy aimed at individual reform through silence, solitude, and repentance.”<sup>15</sup> “Work separation from amoral influences, and strict rules were aids to instill character in the inmates . . . .”<sup>16</sup> “As prisons grew in size and administrative complexity, humanitarian reformists were replaced by state bureaucrats, and individual rehabilitation was replaced by economic efficiency as an institutional goal.”<sup>17</sup> Corporal punishment as a means of discipline followed, but was short-lived.<sup>18</sup> “Although corporal punishment has virtually been eliminated by major reforms that have taken place in the last century, the philosophy of controlling behavior through strict discipline remained critical to the management of penal institutions.”<sup>19</sup> “Today, with the help of high-tech solutions, prisons are now locking up more prisoners using few guards—and at the same time furthering the trend toward less rehabilitation and more punishment.”<sup>20</sup> “In response to the apparent failure of rehabilitative philosophy and policies, the prevailing policy sees prisons as places to incarcerate and punish inmates in an effort to deter crime.”<sup>21</sup> “Corrections officials and guards now take a wholly combative stance toward prisoners, rather than a rehabilitative or even a custodial

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14. See BRANHAM & HAMDEN, *supra* note 4, at 2–3.

15. MARILYN D. MCSHANE, PRISONS IN AMERICA 137 (2008).

16. *Id.*

17. *Id.*

18. *See id.*

19. *Id.*

20. Jim Rendon, *Inside the New High-Tech Lock-Downs*, in THE AMERICAN PRISON SYSTEM 145, 146 (Peter G. Herman ed., 2001).

21. KENNETH J. PEAK, JUSTICE ADMINISTRATION POLICE, COURTS, & CORRECTIONS MANAGEMENT 219 (2d ed. 1998).

one.”<sup>22</sup> “They receive training in military combat techniques and the use of high tech weapons.”<sup>23</sup> Prison administrators have much latitude when it comes to discipline and management.

“Prolonged isolation was used sparingly, if at all, by most American prisons for almost a century.”<sup>24</sup> Prolonged solitary confinement is now prominently used as both a disciplinary tool and as an administrative, or management, tool.<sup>25</sup> One expert has remarked that “segregation is used far more frequently, for far longer periods of time, and under far harsher conditions than is legitimately needed to manage inmate security.”<sup>26</sup> The first supermax prison—an institution specifically designed for mass solitary confinement—was not established until 1983.<sup>27</sup> Over the past two decades, solitary confinement has moved out of the prison basement and into whole facilities built just for isolation.<sup>28</sup> “These places have many names—supermax, intensive-management units, secure housing—but the meaning is the same: years alone, out of the public view and away from public oversight.”<sup>29</sup> The federal government even operates such a facility.<sup>30</sup> Existing alongside these supermax prisons are traditional jails and penitentiaries that offer both dormitory-style housing units, as well as isolation units. The popularity of solitary confinement as a

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22. Cassandra Shaylor, “*It’s Like Living in a Black Hole*”: *Women of Color and Solitary Confinement in the Prison Industrial Complex*, 24 *NEW ENG. J. ON CRIM. & CIV. CONFINEMENT* 385, 406 (1998).

23. *Id.* at 406–07.

24. Gawande, *supra* note 4.

25. Prisoners can be sent to solitary confinement for any of the following reasons: Punishment, protection, prison management, national security, investigatory purposes or lack of other institutional solutions. See SHARON SHALEV, *A SOURCEBOOK ON SOLITARY CONFINEMENT* 25–26 (2008), available at [http://solitaryconfinement.org/uploads/sourcebook\\_web.pdf](http://solitaryconfinement.org/uploads/sourcebook_web.pdf). These distinctions are not pertinent to a conversation about a meaningful review process because, generally, once an inmate is held in isolation for a prolonged period, constitutional standards require that a review process be invoked, despite the reason for the assignment. Accordingly, this work speaks generically of isolation and does not, in every instance, differentiate as to the basis for the isolation.

26. Maria Godoy, *Q&A: Solitary Confinement & Human Rights*, NAT’L PUB. RADIO (July 27, 2006), <http://www.npr.org/templates/story/story.php?storyId=5586937>.

27. See Gawande, *supra* note 4.

28. Laura Sullivan, *In U.S. Prisons, Thousands Spend Years in Isolation*, NAT’L PUB. RADIO (July 26, 2006), <http://www.npr.org/templates/story/story.php?storyId=5582144>.

29. *Id.*

30. See *60 Minutes: Supermax: A Clean Version of Hell* (CBS television broadcast June 19, 2009), <http://www.cbsnews.com/stories/2007/10/11/60minutes/main3357727.shtml> (discussing the United States Penitentiary Administrative Maximum, which opened in Colorado in 1994).

management method has even caught on in other forums, such as psychoeducational schools and programs.<sup>31</sup>

In the prison context, “[t]he imposition of long-term isolation—which can be for months or years—is ultimately at the discretion of prison administrators.”<sup>32</sup> “Most inmates held in solitary have no contact with the outside world other than the U.S. mail.”<sup>33</sup> In some facilities, mail is limited.<sup>34</sup> “Depending on the state, inmates have limited access to visitors,”<sup>35</sup> as well as the prison library<sup>36</sup> and are often housed in small, windowless cells with hardly any natural light.<sup>37</sup> “Most can’t watch television, call anyone on the phone or even touch another person while in the units.”<sup>38</sup> A number of the isolated prisoners “live with extensive surveillance and security controls, the absence of ordinary social interaction, abnormal environmental stimuli, often only three to five hours a week of recreation alone in caged enclosures, and little, if any, educational, vocational, or other purposeful activities (i.e., programming).”<sup>39</sup> In most cases, inmates live alone in cells where they are held for twenty-three hours a day.<sup>40</sup> The will to preserve the practice is strong. Inmates who have attempted hunger strikes as a means of escaping their fate have been force-fed three meals per day.<sup>41</sup>

There is no shortage of information establishing the adverse medical affects of prolonged solitary confinement.<sup>42</sup> “Psychological

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31. See Stephen Gurr, *Georgia Bans School Seclusion Rooms*, GAINSVILLE TIMES (July 9, 2010), <http://www.gainesvilletimes.com/archives/35176/> (reporting the death of a thirteen-year-old student who hanged himself while being held in an eight-by-eight-foot seclusion room for intervals of eight hours at a time).

32. Gawande, *supra* note 4.

33. Sullivan, *In U.S. Prisons, Thousands Spend Years in Isolation*, *supra* note 28.

34. See *60 Minutes: Supermax: A Clean Version of Hell*, *supra* note 30.

35. Sullivan, *In U.S. Prisons, Thousands Spend Years in Isolation*, *supra* note 28.

36. See *Shoats v. Horn*, 213 F.3d 140, 144 (3d Cir. 2000).

37. See *Jones ‘El v. Berge*, 164 F. Supp. 2d 1096, 1099 (W.D. Wis. 2001).

38. Sullivan, *In U.S. Prisons, Thousands Spend Years in Isolation*, *supra* note 28.

39. Jeffrey L. Metzner & Jamie Fellner, *Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for Medical Ethics*, 38 J. AM. ACAD. PSYCHIATRY L. 104 (2010), available at <http://www.jaapl.org/cgi/reprint/38/1/104>.

40. See *Gans v. Rozum*, No. 06-62J, 2007 WL 2571527, at \*4 (W.D. Pa. Aug. 31, 2007); see also *Beard v. Banks*, 548 U.S. 521, 526 (2006) and *Langley v. Coughlin*, 709 F. Supp. 482, 483 (S.D.N.Y. 1989).

41. See *60 Minutes: Supermax: A Clean Version of Hell*, *supra* note 30.

42. See generally Craig Haney, *Mental Health Issues in Long-Term Solitary and “Supermax” Confinement*, 49 CRIME & DELINQUENCY 124, 148 (2003), available at [http://www.capdefnet.org/pdf\\_library/temp/Seminars/12-02/Haney-C&D\\_Final\\_Draft-R.pdf](http://www.capdefnet.org/pdf_library/temp/Seminars/12-02/Haney-C&D_Final_Draft-R.pdf); Craig Haney, *The Social Psychology of Isolation: Why Solitary Confinement Is*

effects can include anxiety, depression, anger, cognitive disturbances, perceptual distortions, obsessive thoughts, paranoia, and psychosis.”<sup>43</sup>

It has been documented that the absence of social interaction one experiences in prolonged isolation can result in the brain becoming as impaired as the brain of a person who has experienced a traumatic brain injury.<sup>44</sup> Interestingly, similar medical findings have been made where animals have been subject to prolonged isolation for research purposes.<sup>45</sup> Unlike with human prisoners, however, groups of people have organized to demand an end to solitary confinement for animals.<sup>46</sup>

The conditions of confinement described herein have been subject to challenges without success.<sup>47</sup> Courts simply do not seem to

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*Psychologically Harmful*, 181 PRISON SERVICE J. 12 (2009), available at [http://www.hmprisonservice.gov.uk/assets/documents/100043E3the\\_social\\_psych\\_of\\_isolation.pdf](http://www.hmprisonservice.gov.uk/assets/documents/100043E3the_social_psych_of_isolation.pdf); SHALEV, *supra* note 25, at 25–26; Open Letter from Trudy Bond, Ph.D., and Stephen Soldz, Ph.D., President, Psychologists for Soc. Responsibility, to Robert M. Gates, Sec’y of Def., on the Solitary Confinement of PFC Bradley Manning (Jan. 3, 2011), <http://www.psyr.org/about/programs/humanrights/gates-manning-letter.php>; Gawande, *supra* note 4; Metzner & Fellner, *supra* note 39; John Gibbons & Nicholas de B. Katzenbach, *Confronting Confinement: A Report of The Commission on Safety and Abuse in America’s Prisons*, 22 WASH U. J.L. & POL’Y 385, 471 (2006) (recommending that penal institutions “stop isolating people and ensure that segregated prisoners have regular and meaningful human contact and are free from extreme physical conditions that can cause lasting harm”); Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH U. J.L. & POL’Y 325 (2006); Lorna Rhodes, *Pathological Effects of the Supermaximum Prison*, 95 AM. J. PUB. HEALTH 1692 (2005), available at 2005 WLNR 16556622.

43. See Metzner & Fellner, *supra* note 39.

44. Gawande, *supra* note 4.

45. See *Chris Adams*, Some Chimps Never Recover from Stresses of Research, MCCLATCHY NEWSPAPERS (April 24, 2011), <http://www.mcclatchydc.com/2011/04/24/v-print/112432/some-chimps-never-recover-from.html> (noting that many chimpanzees housed in isolation for prolonged periods experienced depression and adverse changes in personality or aggression, and also observed that some of the chimpanzees became “chronic hair pluckers,” engaged in self-mutilation, or experienced premature cardiac death).

46. See *id.*

47. See *LeMaire v. Maass*, 12 F.3d 1444 (9th Cir. 1993) (upholding severe restrictions on an inmate held in a disciplinary segregation unit); *Clifton v. Robinson*, 500 F. Supp. 30, 34 (E.D. Pa. 1980) (quoting *Burns v. Swenson*, 430 F.2d 771, 777 (8th Cir. 1970)) (concluding that “segregated confinement in solitary or maximum security is not per se banned by the Eighth Amendment”); *In re Long Term Admin. Segregation of Inmates Designated as Five Percenters*, 174 F.3d 464, 472 (4th Cir. 1999) (quoting *Sweet v. S.C. Dep’t of Corrections*, 529 F.2d 854, 861 (4th Cir. 1975)) (remarking that “‘isolation from companionship,’ ‘restriction on intellectual stimulation[,] and prolonged inactivity,’ inescapable accompaniments of segregated confinement, will not render [solitary] confinement unconstitutional absent other illegitimate deprivations”).

view the conditions of these isolation cells as inhumane.<sup>48</sup> To illustrate this point, one might consider the perspective of a court faced with a constitutional challenge as to the conditions of solitary confinement. This court responded to the inmate's challenge with the following editorial: These conditions are "uncomfortable and upsetting—nothing more."<sup>49</sup> Similarly, another court expressed that "[i]nactivity, lack of companionship and a low level of intellectual stimulation do not constitute cruel and unusual punishment even if they continue for an indefinite period of time . . . ."<sup>50</sup>

Given the level of human involvement in the process of prison management, it goes without saying that there is no way to ensure total objectivity, perfection or scientific accuracy of decision-making. At best, one might hope for a reasoned approach to prison discipline and management once the decision is made to put a prisoner in isolation. The current practice of arbitrarily selecting inmates for prolonged isolation defies reason and ignores peer advice.

The American Bar Association ("ABA") advises that "[s]egregated housing should be for the briefest term and under the least restrictive conditions practicable and consistent with the rationale for placement and with the progress achieved by the

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48. For an illustration of the magnitude of what must be established to convince a court of an Eighth Amendment violation, *see, e.g.*, *Gates v. Collier*, 501 F.2d 1291, 1305 (5th Cir. 1974) (punishment of prisoner by confinement in small, dirty cell without light, hygienic materials, adequate food, heat; prisoner also was punished through administration of milk of magnesia); *LaReau v. MacDougall*, 473 F.2d 974 (2d Cir. 1972) (finding an Eighth Amendment violation where an inmate was confined in small strip cell for five days in total silence with almost no reading materials, light, human interaction or opportunity to exercise and having to eat and sleep in closed confines with his own waste); *Burns v. Swenson*, 430 F.2d 771, 777–78 (8th Cir. 1970), *cert. denied*, 404 U.S. 1062 (1972) (expressing that segregated confinement in solitary or maximum security is not per se banned by the Eighth Amendment); *Williams v. Edwards*, 547 F.2d 1206, 1211 (5th Cir. 1977) (holding that the totality of these circumstances at Angola constitute an Eighth Amendment violation: More than 270 inmate-on-inmate stabbings in three years, numerous inmate-on-inmate rapes, overcrowding, insufficient cell space to segregate dangerous prisoners, a shortage of guards, easy inmate access to machinery resulting in widespread possession of weapons, life threatening fire and safety hazards, unsanitary kitchen conditions, a rodent problem, illiterate and/or undereducated and untrained inmates performing the majority of medical functions, an absence of registered nurses and untrained persons acting as pharmacist, and lack of a psychiatric unit); *Hutto v. Finney*, 437 U.S. 678 (1978) (finding an Eighth Amendment violation where groups of inmates were housed in small, windowless isolation cells containing no furniture, a water source and a toilet that could only be flushed from outside the cell; at night, given mattresses that had been used by inmates suffering from infectious diseases; and fed less than 1000 calories a day by way of a loaf containing several foods blended together and baked).

49. *See Gans v. Rozum*, No. 06-62J, 2007 WL 2571527, at \*6 (W.D. Pa. Aug. 31, 2007).

50. *Bono v. Saxbe*, 620 F.2d 609, 614 (7th Cir. 1980).

prisoner.”<sup>51</sup> Amnesty International has called for an “end to long-term confinement in conditions of isolation.”<sup>52</sup> Juan E. Mendez, the Special Rapporteur of the Human Rights Council On Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, issued a report to the General Assembly of the United Nations calling for an end to indefinite solitary confinement, its use as a disciplinary measure, its use in pretrial detention situations, and its use upon juveniles and persons with mental disabilities. His report also called for greater procedural protections for persons subject to isolation.<sup>53</sup>

The Office of the United Nations High Commissioner for Human Rights advises that “[e]fforts addressed to the abolition of solitary confinement as a punishment, or to the restriction of its use, should be undertaken and encouraged.”<sup>54</sup> The American Correctional Association has also indicated that “[t]otal isolation as punishment for a rule violation is not an acceptable practice.”<sup>55</sup> To say these charges have fallen on deaf ears would be a gross understatement.

As is the current practice, there is no real indicator as to who a likely candidate for isolation is and there is no consistency with respect to how long one might remain in an isolation unit. Prisoners have been put in isolation for having in their cells ink pens with metal in the tip,<sup>56</sup> possessing tobacco,<sup>57</sup> talking back to officers,<sup>58</sup> assisting fellow inmates with legal filings,<sup>59</sup> serving as jailhouse lawyers,<sup>60</sup> filing

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51. *Standards on Treatment of Prisoners*, AM. BAR ASS'N CRIMINAL JUSTICE SECTION, [http://www.americanbar.org/publications/criminal\\_justice\\_section\\_archive/crim\\_just\\_standards\\_treatmentprisoners.html#23-2.7](http://www.americanbar.org/publications/criminal_justice_section_archive/crim_just_standards_treatmentprisoners.html#23-2.7) (last visited April 4, 2012).

52. *Detention and Imprisonment*, AMNESTY INT'L, <http://www.amnesty.org/en/detention> (last visited Oct. 16, 2011).

53. See The Secretary-General, *Interim Report of the Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 22–24, submitted to the General Assembly, U.N. Doc. A/66/268 (Aug. 5, 2011).

54. See *Basic Principles for the Treatment of Prisoners*, OFFICE OF THE UNITED NATIONS HIGH COMM'R FOR HUMAN RIGHTS, <http://www2.ohchr.org/english/law/basicprinciples.htm> (last visited Oct. 16, 2011).

55. AM. CORR. ASS'N, *STANDARDS FOR ADULT CORRECTIONAL INSTITUTIONS* 69 (4th ed. 2003) (referencing standard #4-4249).

56. See *Ferguson v. Cain*, No. 2009 CA 2017, 2010 WL 1838895, at \*1 (La. Ct. App. May 7, 2010).

57. See COMM'N ON SAFETY AND ABUSE IN AMERICA'S PRISONS, *CONFRONTING CONFINEMENT* 53 (2006).

58. *Id.*

59. See *Landman v. Royster*, 333 F. Supp. 621, 633 (E.D. Va. 1971).

60. See Bonnie Kerness, Speech at the U.S. Social Forum (June 25, 2010), in *Voices from the “Torture Chambers”*: Solitary Confinement and Political Repression, Solitary

grievances,<sup>61</sup> instituting legal proceedings against the penal facility,<sup>62</sup> using profane language,<sup>63</sup> having charisma and leadership traits,<sup>64</sup> serving as prison activists<sup>65</sup> or whistleblowers,<sup>66</sup> having militant and/or radical political beliefs,<sup>67</sup> participating in or organizing hunger strikes in prison,<sup>68</sup> and refusing to get out of the shower quickly enough.<sup>69</sup> Muslim and Rastafarian inmates practicing their faith by refusing to cut their hair have been put in prolonged isolation.<sup>70</sup> Inmates have

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Watch (July 11, 2010), <http://solitarywatch.com/2010/07/11/letters-from-the-torture-chambers-solitary-confinement-and-political-repression/>.

61. See Shaylor, *supra* note 22, at 399.

62. See *Landman*, 333 F. Supp. at 636; see also Shaylor, *supra* note 22, at 398–99 (discussing a study that concluded jailhouse lawyers were found to be by far the largest number of those in control units).

63. See *Landman*, 333 F. Supp. at 640.

64. See *60 Minutes: Supermax: A Clean Version of Hell*, *supra* note 30 (Warden Robert Hood explained that inside the supermax facility, there is an even higher level of confinement called ultramax. In these cells, the warden tells “there’s virtually no human contact, not even with guards.” As to why the 1993 World Trade Center bomber Ramzi Yousef is in ultramax, the warden notes a fear that, if allowed to interact with others, he could effectively organize and give orders.); see also Shaylor, *supra* note 23, at 399 (remarking that many prisoners are sent to control units for organizing other prisoners to respond to prison conditions); see also WILBERT RIDEAU, IN THE PLACE OF JUSTICE: A STORY OF PUNISHMENT AND DELIVERANCE 56 (2010) (wherein former inmate Wilbert Rideau reports gaining “martyr” status amongst the inmates after his death sentence was commuted to life. He reports being isolated during one part of his incarceration due to respect he commanded from other inmates.).

65. See Kerness, *supra* note 60.

66. See *Cruel and Usual: US Solitary Confinement*, KASHMIR MONITOR, Mar. 22, 2011, available at 2011 WLNR 7632506 (mentioning that an inmate was placed in solitary confinement for two and one-half months after reporting a sex-for-information racket run by guards and detailing how another inmate ended up in solitary confinement after it was discovered that the inmate was reporting information to a radio station).

67. See MCSHANE, *supra* note 16, at 138.

68. See Lateef Mungin, *Thousands of California Prisoners on Hunger Strike*, CNN (Oct. 4, 2011), <http://www.cnn.com/2011/10/04/justice/california-prison-hunger-strike/index.html>.

69. Gawande, *supra* note 4.

70. It has been reported that a Rastafarian inmate who refused to cut his hair has spent at least ten years in isolation as a result of this decision. See Dena Potter, *Rasta Inmates Spend 10 Years in Isolation for Hair*, SEATTLE TIMES (May 7, 2010), [http://seattletimes.nwsourc.com/html/nationworld/2011807062\\_apusrastafariansegregation.html](http://seattletimes.nwsourc.com/html/nationworld/2011807062_apusrastafariansegregation.html); see also *McRae v. Johnson*, 261 F. App’x 554 (4th Cir. 2008) (unreported) (At issue was a policy requiring that all beards be shaved, that male inmates wear their hair no longer than their shirt collar, and that mustaches extend no further than the corners of the mouth. Regardless of security level and regardless of religious beliefs, inmates who violated this grooming policy were subject to being charged with an infraction, sent to administrative segregation, and possibly reclassified to a higher security level, or could have a reduction in good conduct credit); see also *Ragland v. Powell*, 193 F. App’x 218 (4th Cir. 2006).

been put in isolation for merely having gang affiliations;<sup>71</sup> being new to an institution;<sup>72</sup> being gay,<sup>73</sup> transgendered,<sup>74</sup> or HIV positive;<sup>75</sup> being victims of a prison attack;<sup>76</sup> and for being of Muslim descent.<sup>77</sup>

71. See COMM'N ON SAFETY AND ABUSE IN AMERICA'S PRISONS, *supra* note 58, at 54–55; see also *Koch v. Lewis*, 216 F. Supp. 2d 994 (D. Ariz. 2001), *vacated as moot*, 399 F.3d 1099 (9th Cir. 2005) (wherein an inmate was held in solitary confinement for over five years based on his status as a member of the Aryan Brotherhood, absent any evidence of misconduct. The evidence establishing his membership at the hearing was a photograph of him with other known members, membership lists seized from inmates, and associations with members); see also Scott N. Tachiki, *Indeterminate Sentences in Supermax Prisons Based Upon Alleged Gang Affiliations: A Reexamination of Procedural Protection and a Proposal for Greater Procedural Requirements*, 83 CAL. L. REV. 1115 (1995) (arguing that segregation of gang members should be based upon evidence of an actual infraction rather than status as a gang member); see also *Munoz v. Rowland*, 104 F.3d 1096, 1097 (9th Cir. 1997) (after being validated as an associate of a prison gang, the inmate was assigned to secure housing indefinitely). A subsidiary concern involves the question of how membership in a gang is determined. On this point:

[I]t is the government which gets to define what a “security threat group” is. According to a national survey conducted by the Department of Justice in 1997, the Departments of Corrections of Minnesota and Oregon named all Asians as gangs, which Minnesota further compounds by adding all Native Americans. The State of New Jersey DOC lists the Black Cat Collective as a gang. The Black Cat Collective is my free foster son along with two friends who put on Afro-Centric cultural programs in libraries.

AM. FRIENDS SERV. COMM., SURVIVORS MANUAL: SURVIVAL IN SOLITARY 5–6 (2008), available at [http://realcostofprisons.org/materials/Survivors\\_manual\\_2008-11-24.pdf](http://realcostofprisons.org/materials/Survivors_manual_2008-11-24.pdf). Perhaps there is a historical basis for this conduct. After all, in the late 1960s government officials considered the Black Panther Party (BPP) a “street gang” under the loose meaning they employed. See WARD CHURCHILL & JIM VANDER WALL, *AGENTS OF REPRESSION: THE FBI'S SECRET WARS AGAINST THE BLACK PANTHER PARTY AND THE AMERICAN INDIAN MOVEMENT* 66 (2d ed. 2002).

72. See Tara Young, *Judges' Orders for Solitary Aren't Set In Stone Corrections Department Decides Where Inmates Go*, TIMES-PICAYUNE, Sept. 26, 1999, at B1, available at 1999 WLNR 1179461 (noting that inmates who are new to Angola are held in lockdown for a minimum of three months).

73. See Gabriel Arkles, *Safety and Solidarity Across Gender Lines: Rethinking Segregation of Transgender People in Detention*, in PRISON LAW 2010, at 343, 358–359 (PLI Litig. & Admin. Practice, Criminal Law & Urban Problems Course Handbook Ser. No. 224, 2010); see also *R.G. v. Koller*, 415 F. Supp. 2d 1129 (D. Haw. 2006); see also *In re Jackson*, 895 N.Y.S.2d 633, 635 (N.Y. Sup. Ct. 2010).

74. See Arkles, *supra* note 73, at 358–59; see also *R.G.*, 415 F. Supp. 2d 1129; *In re Jackson*, 895 N.Y.S.2d at 635.

75. See Arkles, *supra* note 73, at 359; see also Margaret Winter & Stephen F. Hanlon, *Parchman Farm Blues: Pushing for Prison Reforms at Mississippi State Penitentiary*, 35 LITIGATION 6 (Fall 2008), available at [http://www.aclu.org/images/asset\\_upload\\_file829\\_41138.pdf](http://www.aclu.org/images/asset_upload_file829_41138.pdf).

76. See *In re Jackson*, 895 N.Y.S.2d at 637 (discussing the case of a New York inmate involuntarily placed in close custody after he was stabbed by an inmate, and the case of a New York inmate voluntarily placed in close custody after claiming she had been assaulted by a correctional officer).

77. See Kerness, *supra* note 60.

Even mentally ill inmates<sup>78</sup> and nonviolent pretrial detainees<sup>79</sup> have been condemned to solitary confinement. Juveniles in adult facilities,<sup>80</sup> as well as juveniles in juvenile facilities awaiting pretrial proceedings,<sup>81</sup> have been held in isolation. Victims of prison rapes<sup>82</sup> or attacks<sup>83</sup> have also been subject to the practice. Some immigration detainees are even said to have been placed in solitary confinement for acting as human rights monitors, who expose inhumane conditions.<sup>84</sup> Many convicted terrorists are also housed in isolation.<sup>85</sup> The practice has even been extended to a disbarred lawyer found in civil contempt of court,<sup>86</sup> and has been used on some of the college

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78. Some courts have prohibited mentally ill prisoners from being housed in certain conditions of isolation. See, e.g., *Perri v. Coughlin*, No. 90-CV-1160, 1999 WL 395374 (N.D.N.Y. June 11, 1999); *Langley v. Coughlin*, 709 F. Supp. 482 (S.D.N.Y. 1989); *Jones 'El v. Berge*, 164 F. Supp. 2d 1096 (W.D. Wis. 2001); *Coleman v. Wilson*, 912 F. Supp. 1282 (E.D. Cal. 1995); *Ruiz v. Johnson*, 154 F. Supp. 2d 975, 984-985 (S.D. Tex. 2001).

For more on the issue of housing the mentally ill in isolated conditions, see generally Metzner & Fellner, *supra* note 39; see also *Standards on Treatment of Prisoners*, *supra* note 51 (which warns against placing inmates who are diagnosed with serious mental illness in long-term segregated housing); see also *Cruel and Unusual: US Solitary Confinement*, *supra* note 66 (mentioning that a significant number of persons held in solitary confinement are the mentally ill who are “isolated for want of needed treatment”); Haney, *The Social Psychology of Isolation: Why Solitary Confinement Is Psychologically Harmful*, *supra* note 42, at 13–15; see also *Landman v. Royster*, 333 F. Supp. 621, 638 (E.D. Va. 1971); see also *Langley*, 709 F. Supp. 482 (observing that, in the Special Housing Unit, mentally balanced inmates were housed with inmates who suffered from chronic mental illness; further observing that inmates suffering from chronic mental illness and housed in isolation were not given adequate medical attention); Jamie Fellner, *Keep Mentally Ill Out of Solitary Confinement*, HUMAN RIGHTS WATCH (July 20, 2007), <http://www.hrw.org/news/2007/07/19/keep-mentally-ill-out-solitary-confinement>.

79. See *Cruel and Unusual: US Solitary Confinement*, *supra* note 66 (noting that Bradley Manning, the United States Army Private accused of leaking confidential military documents to a press source, spent at least ten months in solitary confinement before even being brought to trial).

80. *Id.* (reporting the plight of a fifteen-year-old pretrial detainee held in solitary confinement at an adult facility for a two-year period); see also Jean Casella & James Ridgeway, *Alaska Teen Spends 17-Months in Pre-Trial Solitary Confinement* (July 8, 2010), <http://solitarywatch.com/2010/07/08/alaska-teen-spends-17-months-in-solitary-before-trial>.

81. See James Ridgeway & Jean Casella, *The Lonely Battle Against Solitary Confinement*, THE GUARDIAN, Jan. 19, 2011, available at 2011 WLNR 1144094.

82. See *Cruel and Usual: US Solitary Confinement*, *supra* note 66.

83. See *Williams v. Norris*, 277 F. App'x 647 (8th Cir. 2008).

84. See *Groups Call on Napolitano to Fix Conditions at Louisiana Immigration Detention Facility*, BIOTERRORISM WEEK, Aug. 17, 2009, available at 2009 WLNR 15752789.

85. See *60 Minutes: Supermax: A Clean Version of Hell*, *supra* note 30 (discussing the United States Penitentiary Administrative Maximum, which opened in Colorado in 1994).

86. Richard Fine's law license was revoked. Thereafter, as a defendant in an unrelated proceeding, he was cast in judgment, but he failed to satisfy the judgment. He

students who participated in nonviolent Louisiana civil rights protests,<sup>87</sup> as well as on many of the Black Panther Party (“BPP”) members incarcerated for various offenses during their activist days.<sup>88</sup>

“Solitary confinement has been transmuted from an occasional tool of discipline into a widespread form of preventive detention.”<sup>89</sup> Of utmost concern is the practice of isolating inmates for administrative or management reasons when an actual or imminent threat to prison safety is not at issue, but a perceived one is. Some wardens openly share their view that many inmates are isolated as a result of “perception profiling.” The warden of the prison where 1993 World Trade Center bomber Ramzi Yousef is held explained his decision to isolate him under the extremist conditions allowed at the facility:

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was placed in contempt for refusing to pay or provide a list of his assets. He was confined for eighteen months. Prior to this, Mr. Fine had been outspoken about supplemental benefit payments to Los Angeles County judges. See Jayne Ressler, *Civil Contempt Confinement Policies Should Be Reformed*, DAILY NEWS (July 29, 2010), [http://www.dailynews.com/news/ci\\_15627000](http://www.dailynews.com/news/ci_15627000); see also Victoria Kim, *Jailed L.A. Lawyer Was Freed Because of “Irrational” Conduct*, L.A. TIMES Sept. 21, 2010, <http://articles.latimes.com/2010/sep/21/local/la-me-fine-20100921>.

87. See D’ARMY BAILEY & ROGER EASSON, *THE EDUCATION OF A BLACK RADICAL: A SOUTHERN CIVIL RIGHTS ACTIVIST’S JOURNEY 1959-1964*, at 98 (2009).

88. Elmer “Geronimo” Pratt was a high ranking member of the BPP. He spent twenty-seven years in prison for a crime he did not commit. On his first day in prison, he was placed in solitary confinement where he remained for eight years. See Christopher W. Michaels, *Geronimo Pratt and Inmate Records: Avoiding Injustice by Changing Inmate Record-Keeping in New York State Prisons*, 3 ALB. GOV’T L. REV. 843, 851 (2010); Winston Grady-Willis, *Political Prisoners*, in 2 BLACK PRISON MOVEMENTS USA: THE NOBO JOURNAL OF AFRICANAMERICAN DIALOGUE 126, 132 (Africa World Press 1995) (noting that Assata Shakur spent a significant amount of her incarceration in solitary confinement); *Id.* at 132 (mentioning Dhoruba Bin Wahad, a former BPP member, spent eight of his nineteen years in solitary confinement); Sundiata Acoli, *A Brief History of The New Afrikan Prison Struggle*, in 2 BLACK PRISON MOVEMENTS USA: THE NOBO JOURNAL OF AFRICANAMERICAN DIALOGUE 1 (Africa World Press 1995) (the author, a former BPP member and a part of the Panther 21 case, reports spending a significant part of his incarceration in solitary confinement at various facilities); see generally Jill Soffiyah Elijah, *Special International Tribunal on Human Rights Violations of Political Prisoners in the United States Conditions of Confinement*, in 2 BLACK PRISON MOVEMENTS USA: THE NOBO JOURNAL OF AFRICANAMERICAN DIALOGUE 37 (Africa World Press 1995); see CHURCHILL & VANDER WALL, *supra* note 71, at 95 (indicating that George Jackson, a BPP member, was held in maximum security); WARD CHURCHILL & JIM VANDER WALL, *THE COINTELPRO PAPERS: DOCUMENTS FROM THE FBI’S SECRET WARS AGAINST DISSENT IN THE UNITED STATES 147–148, 308* (2d ed. 2002) (referencing Bobby Seale, the Panther 21, and Assata Shakur as being held in solitary confinement).

89. Colin Dayan, *Barbarous Confinement*, N.Y. TIMES, July 17, 2011, <http://www.nytimes.com/2011/07/18/opinion/18dayan.html>.

He has that Charlie Manson look. . . . He just has the eyes. He has some charisma about him. He's in uniform. But you know that there's a powerful person that you're looking at.<sup>90</sup>

After this explanation, the warden responded in the affirmative when asked, “[y]ou didn’t want him in a place where he could give anybody any orders.”<sup>91</sup>

Analogously, the warden of Louisiana State Penitentiary (also known as Angola),<sup>92</sup> through a deposition, offered this insight into the Angola 3’s prolonged stay in isolation:<sup>93</sup>

Q. Okay. What is it about Albert Woodfox that gives you such concern?

A. The thing about him is that he wants to demonstrate. He wants to organize. He wants to be defiant.

Q. Well, let me ask you this. Let’s just for the sake of argument assume, if you can, that he is not guilty of the murder of [officer] Brent Miller.

A. Okay. I would still keep him in [solitary]. I still know he has a propensity for violence. I still know that he is still trying to practice Black Pantherism, and I still would not want him walking around my prison because he would organize the young new inmates. I would have me all kind of problems, more than I could stand, and I would have the [whites]<sup>94</sup> chasing after them. I would have chaos and conflict, and I believe that. He has to stay in a cell while he’s at Angola.

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90. See *60 Minutes: Supermax: A Clean Version of Hell*, *supra* note 30.

91. *Id.*

92. See GEN. SERVS. ADMIN., *HARD LABOR: HISTORY AND ARCHAEOLOGY AT THE OLD LOUISIANA STATE PENITENTIARY, BATON ROUGE, LOUISIANA 14* (1991) (recognizing that Louisiana State Penitentiary sits on land that was once a plantation named “Angola Plantation”); see also Wilbert Rideau & Billy Sinclair, *Prisoner Litigation: How It Began in Louisiana*, 45 LA. L. REV. 1061, 1066 (1985) (stating that “Louisiana State Penitentiary has always been known simply as ‘Angola’”).

93. INT’L COAL. TO FREE THE ANGOLA 3, *A3 ANNUAL UPDATE 2* (Dec. 2008), <http://angola3.org/uploads/Annual%20Appeal%2008.pdf>. When the Angola 3 were initially placed in isolation, C. Murray Henderson was the warden. See RIDEAU, *supra* note 64, at 78.

94. *Wilkerson v. Stalder*, No. 00-304-RET-DLD, 2010 WL 1293375, at \*1 n.1 (M.D. La. Feb. 22, 2010) (noting that “Warden Cain later changed the word transcribed as ‘blacks’ to ‘whites,’ thus making the phrase read ‘whites chasing after them’”).

Q. Okay. And do you know whether his political views have changed since that time?

A. That is what is scary to me. . . . [I]t seems as though Albert Woodfox and Herman Wallace is locked in time with that Black Panther revolutionary actions they were doing way back when, and that they're still hooked up to that. And that's still their motive and that's still their goal. And from that, there's been no rehabilitation. And even when Robert King Wilkerson came with Congressman Conyers to Angola, he handed out pralines. They gave me a little pack of pralines, Congressman Conyers did, and on that pack of pralines was a Black Panther.

When questioned by Ojure Lutalo, a self-proclaimed anarchist and member of the Black Liberation Army, as to why he was held in isolation, prison officials made the following disclosure to him:

[C]oncern [continues] regarding . . . admitted affiliation with the Black Liberation Army. Your radical views and ability to influence others poses a threat to the orderly operation of this institution.<sup>95</sup>

A California prison administrator recently expressed similar housing fears during an interview concerning a hunger strike organized by Pelican Bay State Prison inmates held in prolonged isolation. She indicated that gang members held in solitary confinement had organized the hunger strike that extended to inmates who were not in isolation, as well as inmates housed at facilities other than Pelican Bay State Prison. The fact that the organizers could galvanize such support, in her view, “showed the need to separate them from the general prison population.”<sup>96</sup> She further remarked, “That so many inmates in other prisons throughout the state are involved really demonstrates how these gangs can influence other inmates, which is one of the reasons we have security housing units in the first place.”<sup>97</sup>

If the candidness of these disclosures has caused an involuntary pause, know that there is good reason for these prison officials to unveil themselves in such a way. They are acting in accordance with the dictates of the United States Supreme Court, which has said that

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95. See Kerness, *supra* note 60.

96. Ian Lovett, *Hunger Strike by Inmates Is Latest Challenge to California's Prison System*, N.Y. TIMES, July 7, 2011, <http://www.nytimes.com/2011/07/08/us/08hunger.html>.

97. *Id.*

isolating an inmate based on predictions of likely future behavior is constitutional:

[P]rison administrators necessarily draw on more than the specific facts surrounding a particular incident; instead, they must consider the character of the inmates confined in the institution, recent and longstanding relations between prisoners and guards . . . and the like. In the volatile atmosphere of a prison, an inmate easily may constitute an unacceptable threat to the safety of other prisoners and guards even if he himself has committed no misconduct; rumor, reputation, and even more imponderable factors may suffice to spark potentially disastrous incidents. The judgment of prison officials in this context, like that of those making parole decisions, turns largely on “purely subjective evaluations and on predictions of future behavior.”<sup>98</sup>

After being put in isolation, it is not unusual for an inmate to remain in isolation for years. Some of the most acclaimed cases include isolation for thirty-eight years,<sup>99</sup> twenty-nine years,<sup>100</sup> twenty-eight years,<sup>101</sup> twenty-two years,<sup>102</sup> twenty years,<sup>103</sup> eighteen years,<sup>104</sup>

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98. *Hewitt v. Helms*, 459 U.S. 460, 474 (1983), *abrogated in part on other grounds by Sandin v. Conner*, 515 U.S. 472 (1995); *see also Shoats v. Horn*, 213 F.3d 140 (3d Cir. 2000) (rejecting the inmate’s argument that his administrative segregation was based on predictions of likely future behavior, but commenting that, were that the case, such would be permissible); *Gans v. Rozum*, 267 F. App’x 178 (3d Cir. 2008), *cert. denied*, 555 U.S. 844 (2008) (commenting that the inmate could be retained in administrative custody merely because of his prior crimes).

99. The Angola 3 were placed in isolation in 1972. *See Wilkerson v. Stalder*, No. 00-304-C, 2008 WL 5210696, at \*1 (M.D. La. Dec. 12, 2008).

100. Robert King Wilkerson of the Angola 3 was placed in isolation in 1972. He was released in 2001. *See id.* at \*1 n.1; *see also* ROBERT HILLARY KING, *FROM THE BOTTOM OF THE HEAP: THE AUTOBIOGRAPHY OF BLACK PANTHER ROBERT HILLARY KING* 173 (2009).

101. While in custody for bank robbery, Thomas Silverstein was convicted of murdering two African-American inmates and a correctional officer in different incidences. He is also accused of having ties to the Aryan Brotherhood. *See Silverstein v. Fed. Bureau of Prisons*, 704 F. Supp. 2d 1077 (D. Colo. 2010); WHITE PRISON GANGS, <http://whiteprisongangs.blogspot.com/2009/06/thomas-silverstein-14634-116.html> (last visited Dec. 3, 2011); Sara Burnett, *Supermax Inmate Suing to Lessen Solitary Confinement*, DENVER POST, Apr. 29, 2011, <http://www.denverpost.com/fdcp?unique=1311218610694>.

102. *See Kerness, supra* note 60.

103. *See Mungin, supra* note 68 (referencing some of the inmates in the California state prison system).

104. *See* Laura Sullivan, *Making It on the Outside, After Decades in Solitary*, NAT’L PUB. RADIO (July 28, 2006), <http://www.npr.org/templates/story/story.php?story>

fifteen years,<sup>105</sup> fourteen years,<sup>106</sup> twelve years,<sup>107</sup> eleven years,<sup>108</sup> ten years,<sup>109</sup> or five years.<sup>110</sup> “In many states, inmates held in solitary confinement have almost no way out.”<sup>111</sup> “Many stay in isolation until their sentences run out.”<sup>112</sup>

While there are sound arguments in support of the practice of prolonged isolation, some scholars have dismissed attempts to legitimize the practice, positing the belief that isolation units exist for illegitimate reasons. These scholars believe that the actual reasons isolation units exist include for “social control against specific prisoners,”<sup>113</sup> “to control revolutionary attitudes in the prison,”<sup>114</sup> for “breaking of the minds,”<sup>115</sup> and for “those perceived as troublemakers

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Id=5589778 (reporting on Daud Tulam, who is said to have spent eighteen of twenty-five years in isolation in New Jersey).

105. Raymond Luc Levasseur reports spending fifteen years in solitary confinement during his eighteen years in federal prison after a conviction for a string of terrorist bombings in the 1970s and early 1980s. See Abigail Curtis, *Is Solitary Confinement Torture? Lawmakers Will Consider Bill on What Some See As a Damaging Punishment*, BANGOR DAILY NEWS, Oct. 24, 2009, available at <http://bangordailynews.com/2009/10/23/politics/is-solitary-confinement-torture/>.

106. See *Williams v. Hobbs*, 662 F.3d 994 (8th Cir. 2011) (where an inmate was held, for his own safety and protection, in administrative segregation after being attacked by another inmate. Incidentally, his attacker spent fifty-six days in administrative segregation as a result of the attack).

107. See *Sheley v. Dugger*, 833 F.2d 1420 (11th Cir. 1987) (where the inmate has deemed an escape risk as a result of an escape many years prior).

108. Convicted terrorist Rami Yousef, the leader of the 1993 World Trade Center attack, has spent in excess of eleven years in isolation. See *60 Minutes: Supermax: A Clean Version of Hell*, *supra* note 30 (discussing the United States Penitentiary Administrative Maximum, which opened in Colorado in 1994).

109. Ray Colgrove, a Texas prisoner, has spent in excess of ten years in administrative segregation. See *Colgrove v. Williams*, 105 F. App'x 537 (5th Cir. 2004). A Rastafarian inmate who refused to cut his hair has spent at least ten years in isolation. See *McRae v. Johnson*, 261 F. App'x 554 (4th Cir. 2008) (unreported). Troy Anderson, an inmate at the all-solitary Colorado State Penitentiary, is said to have spent ten years in isolation due to acting out on the symptoms of untreated mental illness, i.e., ADHD, bipolar disorder, intermittent explosive disorder, anti-social personality disorder, cognitive disorders, a seizure disorder, and polysubstance dependence. See *Cruel and Unusual: US Solitary Confinement*, *supra* note 66.

110. Gawande, *supra* note 5 (referencing Bobby Dellelo, whom the author describes as having spent five years of a life sentence in isolation at a Boston facility).

111. Sullivan, *In U.S. Prisons, Thousands Spend Years in Isolation*, *supra* note 28.

112. *Id.*

113. See Shaylor, *supra* note 22, at 400.

114. *Id.* at 398 (quoting Ralph Arons, former warden of the United States Penitentiary (USP) at Marion, Illinois).

115. See Kerness, *supra* note 60.

or simply disliked by correctional officers, and, most of all, alleged gang members.”<sup>116</sup>

## II. A Case Study: The Angola 3 Case

The case that has been termed the “Angola 3” case involves three separate lives indelibly woven together by circumstance and fused by inertia. From a prolonged isolation standpoint, this case is a compelling prototype of what the United States Constitution does not sanction. All three inmates spent the majority of their confinements in closed cell restriction (also known as extended lockdown) at Angola.<sup>117</sup> An expert in corrections management has described the Angola 3’s stay in extended lockdown as “extraordinarily aberrant.”<sup>118</sup>

Robert Hillary Wilkerson King, the first of the Angola 3, was freed in 2001 after approximately twenty-nine years in extended lockdown.<sup>119</sup> Mr. King was initially incarcerated in New Orleans after being sentenced to thirty-five years for armed robbery.<sup>120</sup> After being convicted of aggravated escape and aggravated battery, he was moved to Angola.<sup>121</sup> Mr. King began his stay at Angola around May of 1972.<sup>122</sup> Two weeks later, he was placed in extended lockdown.<sup>123</sup> Mr. King reports being told that he was being put in isolation because he

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116. See Dayan, *supra* note 89.

117. LA. REV. STAT. ANN. § 15:865 (2012) states: “No prisoner in the state penitentiary shall be placed in solitary confinement, except in enforcing obedience to the police regulations of the penitentiary.”

Angola officials deny the existence of solitary confinement. See Liliana Segura, *Dispatch from Angola: Faith-Based Slavery in a Louisiana Prison*, COLORLINES NEWS FOR ACTION (Aug. 4, 2011), [http://colorlines.com/archives/2011/08/dispatch\\_from\\_angola\\_faith-based\\_slavery\\_in\\_a\\_louisiana\\_prison.html](http://colorlines.com/archives/2011/08/dispatch_from_angola_faith-based_slavery_in_a_louisiana_prison.html) (quoting Assistant Warden Cathy Fontenot, who acknowledged the existence of extended lockdown, but refutes the existence of solitary confinement). Consistent with this point, a Louisiana court expressed that closed-cell restriction is not the same as solitary confinement. See *Wallace v. Teer*, 527 So. 2d 1061, 1062 (La. Ct. App. 1988). In contrast, the Angola 3 expressed that extended lockdown is the “effective equivalent of solitary confinement.” See *Wilkerson v. Stalder*, 639 F. Supp. 2d 654, 675 (M.D. La. 2007); see also *supra* note 9.

118. *Stalder*, 639 F. Supp. 2d at 672 (referencing the opinion of Steve J. Martin, an expert retained by the Angola 3 in an Eighth Amendment action brought by them).

119. See KING, *supra* note 100, at 198–09.

120. See *Wilkerson v. Maggio*, 703 F.2d 909, 910 (5th Cir. 1983).

121. *Id.*

122. See *Stalder*, 639 F. Supp. 2d at 659.

123. See *Maggio*, 703 F.2d at 911 (noting that, at this time, the technical name for the housing assignment was “Controlled Cell Reserve”).

was under investigation regarding the death of correctional officer<sup>124</sup> Brent Miller, despite the fact that Mr. Miller was killed before he arrived at Angola.<sup>125</sup> In 1973, Mr. King was convicted of killing a fellow inmate, and he remained in extended lockdown until his conviction was overturned in early 2001 and he was released from custody.<sup>126</sup>

Herman Wallace, the second of the Angola 3, has been isolated from the general population for approximately thirty-nine years.<sup>127</sup> When he first arrived at Angola in 1969, he was classified as a medium custody inmate and housed in the general population.<sup>128</sup> In April of 1972, he underwent a custody change to extended lockdown immediately following a prison riot that resulted in the death of Officer Brent Miller.<sup>129</sup> In 1974, Wallace was convicted of Officer Miller's murder and sentenced to life in prison without parole, probation, or suspension of sentence.<sup>130</sup>

Albert Woodfox, the third of the Angola 3, has likewise been isolated from the general population for approximately thirty-nine years.<sup>131</sup> When he first arrived at Angola in 1971, he was classified as a medium custody inmate and housed in the general population.<sup>132</sup> In April of 1972, he underwent a custody change to extended lockdown following the same prison riot that led to the death of Officer Miller.<sup>133</sup> In 1973, Mr. Woodfox was convicted of killing Officer

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124. All official documents refer to Brent Miller as a guard. This verbiage is not used in this work because of the American Correctional Association's policy that the term "correctional officer" be used instead of the term "guard." See *Public Correctional Policy on Term "Correctional Officer,"* Am. Corr. Ass'n, [https://aca.org/government/policyresolution/view.asp?ID=46&origin=results&QS='PoliciesAndResolutionsYMGHFREName=correctional+officer&PoliciesAndResolutionsYMGHFREType=Policy&sortfld\\_360=Name&reversesearch=false&viewby=50&union=AND&startrec=1&top\\_parent=360](https://aca.org/government/policyresolution/view.asp?ID=46&origin=results&QS='PoliciesAndResolutionsYMGHFREName=correctional+officer&PoliciesAndResolutionsYMGHFREType=Policy&sortfld_360=Name&reversesearch=false&viewby=50&union=AND&startrec=1&top_parent=360) (last visited June 27, 2011).

125. KING, *supra* note 101, at 173.

126. See *Stalder*, 639 F. Supp. 2d at 659; *Wilkerson v. Cain*, 233 F.3d 886 (5th Cir. 2000).

127. See *Wilkerson v. Stalder*, No. 00-304-C, 2008 WL 5210696, at \*1 (M.D. La. Dec. 12, 2008).

128. See *Stalder*, 639 F. Supp. 2d at 659.

129. *Id.*

130. See Commissioner's Report on Brady Claim Following Remand at 1, Wallace v. State, No. 10-73-6820 (19th Dist. Nov. 7, 2006), <http://www.angola3.org/uploads/Morgans-Report.pdf>.

131. See *Stalder*, 2008 WL 5210696, at \*1.

132. See *Stalder*, 639 F. Supp. 2d at 659.

133. See *id.*

Miller.<sup>134</sup> For his offense, he was sentenced to a mandatory term of life in prison without parole, probation, or suspension of sentence.<sup>135</sup> At the time of this conviction, he was serving a fifty-year sentence at Angola for armed robbery.<sup>136</sup>

Extended lockdown conditions at Angola have been described accordingly:

[They] remain[] alone in individual cells approximately 55 to 60 square feet for 23 hours of each day. During the other hour, [they could] . . . shower and walk alone along the tier . . . . Three times a week, [they could] . . . instead choose to use this hour to exercise alone in a fenced yard, if the weather permits. The[y] . . . also faced additional restrictions on privileges generally available to inmates such as personal property, reading materials, access to legal resources, work, and visitation rights . . . . Each man's cell ha[d] an open front with bars, but vision [was] restricted to what is directly in front of the cell door by side walls. The cell [was] self-contained inasmuch as it ha[d] a toilet, mattress, sheets, blanket, pillow, at least one storage locker and sometimes two, and a small desk attached to the wall which c[ould] be used for eating and for writing. A very small window in the rear allow[ed] some natural light into the cell.<sup>137</sup>

134. See *State v. Woodfox*, 291 So. 2d 388 (La. 1974).

135. See *id.* Along with Mr. Wallace and Mr. Woodfox, Chester Jackson and Gilbert Montegut were accused of killing Officer Miller. Chester Jackson accepted a plea deal and became a witness for the State. Gilbert Montegut was found guilty of a minor charge. See *Sullivan, Favors, Inconsistencies Taint Angola Murder Case*, *supra* note 13.

136. Magistrate Judge's Report at n.1, *Woodfox v. Cain*, No. 06-789-D-M2 (M.D. La. June 10, 2008), <http://www.angola3.org/Uploads/Albert-%20Magistrate-Report.pdf>.

137. *Stalder*, 639 F. Supp. 2d at 659–60. Arguably, Louisiana's "Minimum Standards for Animal Shelters," requires better accommodations for shelter animals than the law requires for solitary confinement cells. LA. REV. STAT. ANN. § 3:2464 (2012) states, in pertinent part:

F. Facilities, indoor.

. . . .

(2) Ventilation. Indoor housing facilities for dogs or cats shall be adequately ventilated to provide for the health and comfort of the animals at all times. Such facilities shall be provided with fresh air either by means of windows, doors, vents, or air conditioning and shall be ventilated so as to minimize drafts, odors, and moisture condensation. Auxiliary ventilation, such as exhaust fans and vents of air conditioning, shall be provided when the ambient temperature is eighty-five degrees Fahrenheit or higher.

(3) Lighting. Indoor housing facilities for dogs or cats shall have ample light, by natural or artificial means, or both, of good quality and well distributed. Such lighting shall provide uniformly distributed illumination of sufficient light intensity to permit routine inspection and cleaning during the entire working period. Primary enclosures shall be so placed as to protect the dogs and cats from excessive illumination.

Gumbo is a famous part of Louisiana cuisine. It is soup made of many ingredients and seasoned with special spices certain to accentuate its palate-soothing goodness. The Angola 3 case is much like a good bowl of gumbo; it is a mix of a lot of strange things. In Mr. King's case, it has been established that his conviction (for killing a fellow inmate) was the result of little more than fabrications.<sup>138</sup> Many questions about the legitimacy of the convictions obtained in Mr. Wallace's and Mr. Woodfox's cases (for the killing of Officer Brent Miller) persist.<sup>139</sup> The Angola 3 case can never be fully

....

H. Primary enclosures for dogs and cats shall meet the following requirements:

....

(5) Primary enclosures shall be constructed and maintained so as to provide sufficient space to allow each dog and cat to turn about freely and to easily stand, sit, and lie in a comfortable, normal position.

....

(9) Primary enclosures for housing dogs shall provide a minimum floor space for each dog equal to the mathematical square of the sum of the length of the dog in inches, as measured from the tip of its nose to the base of its tail, plus six inches expressed in square feet. This requirement shall be computed as follows: (length of dog in inches plus six inches) times (length of dog in inches plus six inches) divided by one hundred forty-four inches equals minimum square footage per dog.

....

138. KING, *supra* note 100, at 188–199.

139. At present, Mr. Wallace and Mr. Woodfox each have two cases pending, the first of which alleges their prolonged isolation violates the Fourteenth and Eighth Amendments to the United States Constitution. May 2012 has been designated as the first trial date. *See Wilkerson v. Stalder*, No. 00-0304 (La. filed Apr. 27, 2000). Additionally, both men continue to challenge their convictions for the murder of Officer Miller. A review of the case history compares to a tennis match between two robust contenders where every victorious move is met with an even more victorious move causing the heads of spectators to rotate rhythmically in observance of each play. Courts have found in favor of Mr. Wallace and Mr. Woodfox; then, on appeal, courts have found in favor of their opponents and the same pattern has continued over the years. *See Stalder*, 639 F. Supp. 2d at 667; *Woodfox v. Foti*, No. 06-0789 (La. filed Oct. 11, 2006); *Woodfox v. Cain*, 609 F.3d 774 (5th Cir. 2010); *Wallace v. Howard Prince*, No. 03-09-1027 (La. filed Dec. 4, 2009).

This work does not visit the question of Mr. Wallace or Mr. Woodfox's culpability for Officer Miller's murder and does not comment on the merits of any pending litigation involving Mr. Wallace or Mr. Woodfox. This work is premised upon the view that the finding of guilt is declarative unless and until reversed by a court of law. This work seeks only to raise a necessary conversation about prolonged isolation. Notwithstanding this fact, pertinent details about the criminal cases follow in the interest of underscoring the complexities that have driven the custody assignments of Mr. Woodfox and Mr. Wallace over the years.

Angola is located in the town of St. Francisville, which "advertises itself as plantation country. It was also Klan country, and until the civil rights movement and the FBI arrived

in the early 1960s, no African American had registered to vote in the parish in more than 60 years.” James Ridgeway & Jean Casella, *Southern Injustice: Herman Wallace of the Angola 3*, PHILLYIMC (Jan. 4, 2010), <http://www.phillyimc.org/en/southern-injustice-herman-wallace-angola-3>. After the murder of Brent Miller, emotions were high at Angola. See ANNE BUTLER & C. MURRAY HENDERSON, *DYING TO TELL: ANGOLA, CRIME, CONSEQUENCE, CONCLUSION AT LOUISIANA STATE PENITENTIARY 20-21* (1992). There was an ongoing internal power struggle. See *id.* at 23–25. There was also pressure that resulted from court oversight. See *id.* at 25. For some, the murder served as a foothold by which those hungry for power could attempt to dethrone those in power. See *id.* at 158. Blame was generously distributed amongst inmates protecting their self-interests, staff who felt the state failed the administration by not allocating sufficient funding for correctional officers, and others who felt court pressure to afford due process to inmates sent to isolation without hearings or any review process which may have caused a certain administrator to unwisely release a mass number of violent inmates from isolation only days before Mr. Miller’s murder. See *id.* at 15–20. Staff was at war with staff, and inmates were at odds with inmates. See *id.* at 158; see also Rideau & Sinclair, *supra* note 93, at 1071 (noting that “[t]he criminal element of the inmate population made their own power moves to isolate the militants, setting them up to be placed in lockdown or having them stabbed during the period of emotional turbulence. Frequently, the criminal and the security power-brokers worked hand-in-hand because they shared a mutual interest of returning the prison to its normal, corrupt keel.”).

“Wallace and Woodfox were convicted by all white juries in less than two hours.” See Sullivan, *Favors, Inconsistencies Taint Angola Murder Case*, *supra* note 13. In the case, there were four primary witnesses at trial, all of whom were inmates. Hezekiah Brown, a serial rapist serving a life sentence was one of those witnesses. During the first trial, he swore under oath that he was not receiving any incentives for his testimony. That was later revealed to be a lie. Not only did he receive a housing change from the dorm with other inmates to an actual house on the property where a few inmates lived and trained dogs for use in rescues, he also received a weekly carton of cigarettes and early release (from a life sentence). See *id.* Proof surfaced that the warden assisted him with a pardon. See *IN THE LAND OF THE FREE* (Mob Film Company, Gold Circle Films & UKTV’s Yesterday Films 2009), available at <http://www.inthelandofthefreefilm.co.uk/index.aspx>; see also *Woodfox v. Cain*, 609 F.3d at 782. The second of the four witnesses was legally blind. See Sullivan, *Favors, Inconsistencies Taint Angola Murder Case*, *supra* note 13. The third of the four witnesses was heavily medicated. See *id.* The final witness recanted and stated that he implicated Mr. Wallace and Mr. Woodfox at the request of prison officials. See *id.* In the original statement, the fourth witness said he observed Wallace burn his bloody clothes in the incinerator. See *id.* No such incinerator ever existed. See *id.*

An inmate reported that someone besides Mr. Wallace and Mr. Woodfox confessed to being the killer. See Laura Sullivan, *Why Did Key Angola Witness Go to the “Dog Pen”?*, NAT’L PUB. RADIO (Oct. 29, 2008), <http://www.npr.org/templates/story/story.php?storyId=96255685>. One inmate who says he was with Mr. Woodfox on the day in question reports being placed in extended lockdown for twenty years after he told prison officials that he was in the dining hall with Mr. Woodfox on the day of the murder and after he testified to such. See *id.* Though a fingerprint was found next to the dead body of the guard, it was never tested despite the fact that prison officials had prints of every inmate on file. See *id.*

During the second trial, Anne Butler served as forewoman of the grand jury that reindicted Mr. Wallace and Mr. Woodfox. See Sullivan, *Favors, Inconsistencies Taint Angola Murder Case*, *supra* note 13. At the time, Ms. Butler lived in the prison community. See *id.* Forging an even closer connection to the case, it is noted that Ms. Butler is the former wife of Murray Henderson, the warden who led the Brent Miller

appreciated unless it is considered in its historical and geographical context.

The setting for most of the Angola 3 case is Angola. By the 1970s, the affairs of Angola were subject to regular litigation.<sup>140</sup> By 1977, two courts had concluded that state and federal constitutional violations were rampant in the facility.<sup>141</sup> The district court said that conditions at Angola “shock the conscience of any right thinking person.”<sup>142</sup> The appellate court remarked that “confinement . . . at Angola [was] terrible.”<sup>143</sup> Corrective action was ordered by the district court and affirmed by the appellate court, but change would come at a slow pace, much like life in south Louisiana.

Painfully coexisting with all of the other malignancies were racial abettors. In the 1960s and 1970s, Angola was segregated.<sup>144</sup> At this point in time, segregation was the official policy,<sup>145</sup> practice, and custom of the state of Louisiana.<sup>146</sup> “White and black inmates lived in

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investigation. *See id.* Ms. Butler reportedly wrote a book about the case and circulated it to fellow jurors. *See id.*; *see generally* BUTLER & HENDERSON, *DYING TO TELL: ANGOLA, CRIME, CONSEQUENCE, CONCLUSION AT LOUISIANA STATE PENITENTIARY, supra*.

140. *See, e.g.*, Sinclair v. Henderson, 331 F. Supp. 1123 (E.D. La. 1971).

141. *See Williams v. Edwards*, 547 F.2d 1206 (5th Cir. 1977) (where the appellate court affirmed the district court’s findings).

142. *Id.* at 1208.

143. *Id.* at 1218.

144. *See* BUTLER & HENDERSON, *DYING TO TELL: ANGOLA, CRIME, CONSEQUENCE, CONCLUSION AT LOUISIANA STATE PENITENTIARY, supra* note 139, at 4; *Doing Time, and Doing Good, in Louisiana’s Angola Prison*, NAT’L PUB. RADIO, Apr. 26, 2011, available at 2010 WL 8626738; *Segregated Prisons*, NEWSDAY, Oct. 29, 1992, available at 1992 WLNR 310956; *Garner v. Louisiana*, 368 U.S. 157, 180 n.1 (1961) (Douglas, J., concurring) (referencing LA. REV. STAT. ANN. § 15:752 (2012), which states: “Segregation by race is required in prisons.”).

145. *See Garner*, 368 U.S. at 180 (revealing segregation to be a state policy and “the intention . . . that such a policy be continued”); *see generally* RACHEL L. EMANUEL & ALEXANDER P. TUREAUD, JR., *A MORE NOBLE CAUSE: A. P. TUREAUD AND THE STRUGGLE FOR CIVIL RIGHTS IN LOUISIANA* (2011).

146. *See Garner*, 368 U.S. at 180 n.1 (Douglas, J., concurring) (making reference to: LA. REV. STAT. ANN. § 4:5 (2012) (required that all circuses, shows, and tent exhibitions have segregated entrances); LA. REV. STAT. ANN. § 4:451 (2012) (required segregation at social functions and sporting events); LA. REV. STAT. ANN. § 4:452 (2012) (required separate seating arrangements and separate sanitary drinking water at public functions); LA. REV. STAT. ANN. § 14:79 (2012) (prohibited interracial marriages); LA. REV. STAT. ANN. § 17:10 (2012) (required that the blind be segregated); LA. REV. STAT. ANN. §§ 17:443, 17:462 (2012) (prohibited public school teachers from advocating desegregation); LA. REV. STAT. ANN. § 17:523 (2012) (prohibited state employees from advocating desegregation); LA. REV. STAT. ANN. §§ 45:528-532 (2012) (required segregation on trains); LA. REV. STAT. ANN. § 45:1301 (2012) (required separate waiting rooms on carriers); LA. REV. STAT. ANN. § 45:1303 (2012) (required separate toilets and separate

separate dormitories, and while they ate in the same dining hall, a wooden partition ran down the center of the huge facility, separating their respective eating areas.”<sup>147</sup> “The prison itself was completely and totally segregated; there were black camps and white camps, black work lines and white work lines.”<sup>148</sup> African-American inmates mostly performed outdoor farming jobs, while white inmates mostly worked indoors as clerks.<sup>149</sup> By the early 1970s, Angola did not have any African-American employees.<sup>150</sup> “Angola . . . had the unfortunate image of having a number of overtly racist employees, perhaps even members of the Ku Klux Klan . . . .”<sup>151</sup> During this era, the Angola administration has been described as being “overly conciliatory towards the white inmates”<sup>152</sup> and as showing “unrestrained contempt for blacks.”<sup>153</sup> Not until 1973, a year after the murder of Officer Brent Miller, did the main complex at Angola become integrated.<sup>154</sup>

“During this time of civil-rights demonstrations, school integrations, Vietnam War protests, and ghetto riots, the nation’s prisons, like the rest of the country, were marked by ferment and turmoil.”<sup>155</sup> Life behind prison walls was not dull at this juncture in history. In the 1970s, inmate litigation forced a change in management philosophy and inmate conduct at Angola.<sup>156</sup> As with any threatened loss of power, resistance surfaced. This coincided with inmates bearing a “new psyche.”<sup>157</sup> “The social and political unrest of the early 1970s that was common in the entire country

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facilities for drinking water on common carriers); LA. REV. STAT. ANN. § 23:971 (2012) (required employers to provide separate sanitary facilities); LA. REV. STAT. ANN. § 23:972 (2012) (required employers to provide separate eating facilities and separate eating and drinking utensils); LA. REV. STAT. ANN. § 33:5066 (2012) (required segregated neighborhood unless integration was approved by the majority of the other race); LA. REV. STAT. ANN. § 13:917 (2012) (required that the race of the parties in a divorce action be made a part of the court docket); and LA. REV. STAT. ANN. § 33:4558.1 (2012) (required that recreational facilities be segregated)).

147. Rideau & Sinclair, *supra* note 92, at 1068.

148. ANNE BUTLER & C. MURRAY HENDERSON, *ANGOLA: LOUISIANA STATE PENITENTIARY A HALF-CENTURY OF RAGE AND REFORM* 127 (1990).

149. KING, *supra* note 100, at 138–39.

150. See BUTLER & HENDERSON, *ANGOLA: LOUISIANA STATE PENITENTIARY A HALF-CENTURY OF RAGE AND REFORM*, *supra* note 148, at 127.

151. *Id.*

152. KING, *supra* note 100, at 138–39.

153. *Id.*

154. See Rideau & Sinclair, *supra* note 92, at 1072.

155. BRANHAM & HAMDEN, *supra* note 3, at 465.

156. See Rideau & Sinclair, *supra* note 92, at 1066.

157. KING, *supra* note 100, at 171.

added to the tension of an already hostile prison environment.”<sup>158</sup> “Throughout the country, prisoners were organizing and demanding their rights.”<sup>159</sup> Prisoners were starting to be defiant instead of subdued<sup>160</sup>—even outspoken and militant.<sup>161</sup> Some prisoners were planning uprisings.<sup>162</sup> During this volatile point in history, Mr. Woodfox and Mr. Wallace founded a prison chapter of the BBP at Angola.<sup>163</sup> Mr. Wilkerson later joined them in their campaign “for fair treatment and better conditions for inmates; racial solidarity between black and white inmates; and an end to the rape and sexual slavery that was then endemic in the prison.”<sup>164</sup>

In a correctional setting, coalition building of any sort is frowned upon. “Prison officials simply do not tolerate prisoners who organize nonviolent protests.”<sup>165</sup> “Prison officials will inevitably become aware of the organizing, and when they do, they immediately lockdown the prison and conduct an investigation.”<sup>166</sup> “Any prisoners who can be identified as organizers will be sentenced to long terms in segregation and transferred, usually to prisons in the federal system or in other states.”<sup>167</sup> One might rightly note a similarity between the way prison officials responded to activists and the way the government responded during the COINTELPRO<sup>168</sup> era of the late 1960s and early 1970s. Perhaps the latter inspired the former.

158. *Woodfox v. Cain*, 609 F.3d 774, 783 (5th Cir. 2010).

159. CHRISTIAN PARENTI, *LOCKDOWN AMERICA: POLICE AND PRISONS IN THE AGE OF CRISIS* 165 (1999).

160. *See* KING, *supra* note 100.

161. *See* BRANHAM & HAMDEN, *supra* note 3, at 465.

162. *See* Elie v. Henderson, 340 F. Supp. 958 (E.D. La. 1972).

163. *See* AMNESTY INT’L, USA: 100 YEARS IN SOLITARY: THE “ANGOLA 3” AND THEIR FIGHT FOR JUSTICE 8 (June 2011), available at <http://www.amnesty.org/en/library/asset/AMR51/041/2011/en/1373c247-9955-41c4-a87a-db89ae161d5f/amr510412011en.pdf>; KING, *supra* note 100, at 171 (Author Robert Hillary King Wilkerson attributes the formation of the Angola prison chapter to fellow inmates Albert Woodfox, Herman Wallace, and Ronald Ailsworth.).

164. AMNESTY INT’L, USA: 100 YEARS IN SOLITARY: THE “ANGOLA 3” AND THEIR FIGHT FOR JUSTICE, *supra* note 163, at 8.

165. *See* Arkles, *supra* note 73, at 352.

166. *Id.* at 351.

167. *Id.* at 351–52.

168. COINTELPRO, a counterintelligence program, had as its purpose the following: “[T]o expose, disrupt, misdirect, discredit, or otherwise neutralize the activities of black nationalist, hate-type organizations and groupings, their leadership, spokesmen, membership, and supporters, and to counter their propensity for violence and civil disorder.” *See* Memorandum from the Fed. Bureau of Investigation to “Personal Attention to All Offices,” captioned “Counterintelligence Program Black Nationalist-

### III. Legal Concerns Viewed Through the Lens of the Angola 3 Case

#### A. Due Process Considerations

##### 1. Overview of Due Process Protections

Due process “is an idea that assumes the existence of conflicts between the government and citizens and the resolution of those conflicts through lawful proceedings.”<sup>169</sup> The United States Constitution guarantees due process protections under both the Fifth and the Fourteenth Amendments. “The Fifth Amendment applies to federal action; the Fourteenth Amendment to state action.”<sup>170</sup> The Due Process Clause has been interpreted as having a substantive component and a procedural aspect.<sup>171</sup> Substantive due process questions if there is a constitutional right that can be protected.<sup>172</sup> “The . . . substantive component ‘provides heightened protection against government interference with certain fundamental rights and

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Hate Groups Internal Security” (Aug. 25, 1967), <http://vault.fbi.gov/cointel-pro/cointel-pro-black-extremists/cointelpro-black-extremists-part-01-of/view>. During the era at issue, the Federal Bureau of Investigation’s official response to groups it viewed as subversive to the government was neutralization. Much like the thinking of some prison administrators, the Federal Bureau of Investigation (FBI) felt that “dissident speech and association should be prevented because they were incipient steps toward the possible ultimate commission of an act which might be criminal.” S. SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, S. REP. NO. 94-755, at 27 (1976). In essence, the FBI also engaged in “perception profiling.” During this era, the FBI showed no regard for constitutionally protected rights. *See id.* at 28. The FBI’s widely cast net included the silencing of people for that which the law allowed. The secret strategy employed by the FBI was highly organized and very methodical. “The unexpressed major premise of the program was that a law enforcement agency has the duty to do whatever necessary to combat perceived threats to the existing social and political order.” *Id.* at 3. While bearing an official name and official governmental support, COINTELPRO was little more than government sanctioned harassment. *See* Memorandum from the Fed. Bureau of Investigation to the Fed. Bureau of Investigation Director, captioned “Buairtel to Albany” (Apr. 3, 1968) (on file with author) (associating counterintelligence techniques with harassment). Under the COINTELPRO program “[p]articular emphasis” was given to leaders of the BPP. *See* Memorandum from Fed. Bureau of Investigation to “Personal Attention to All Offices,” captioned “Counterintelligence Program Black Nationalist-Hate Groups Internal Security,” *supra*. By 1968, FBI agents were given instructions to submit “imaginative and hard-hitting counterintelligence measures aimed at crippling the BPP.” S. REP. NO. 94-755, at 22.

169. Charles Miller, *The Forest of Due Process of Law: The American Constitutional Tradition*, in DUE PROCESS 3 (J. Roland Pennock & John W. Chapman eds., 1977).

170. JOHN W. PALMER, CONSTITUTIONAL RIGHTS OF PRISONERS 108 (2d ed. 1977).

171. *See id.*

172. *See id.*

liberty interests.”<sup>173</sup> “The procedural aspect of due process deals with the procedures or means by which government action can affect the fundamental rights of the individual; it is the guarantee that only after certain fair procedures are followed can the government affect an individual’s fundamental rights.”<sup>174</sup> “The Fourteenth Amendment’s Due Process Clause protects persons against deprivations of life, liberty, or property; and those who seek to invoke its procedural protection must establish that one of these interests is at stake.”<sup>175</sup> If a liberty interest is at issue, then the procedural protections of the Due Process Clause attach.<sup>176</sup>

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173. *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (citing *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)).

174. PALMER, *supra* note 170.

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

176. *Hewitt v. Helms*, 459 U.S. 460, 475–78 (1983), employed a method for identifying state-created liberty interests that emphasized the language of a particular prison regulation. *Sandin v. Conner*, 515 U.S. 472 (1995) changed this approach. The *Sandin* Court decided it was better to look to the nature of the deprivation.

The *Sandin* Court tackled the question of whether an inmate has a liberty interest in remaining free from the punishment imposed and set the legal standard that must be met when deciding if a liberty interest exists. In *Sandin*, an inmate filed a section 1983 action alleging a violation of his procedural due process rights after a prison disciplinary committee denied his request to present witnesses at a disciplinary hearing. The Supreme Court reversed the lower court’s decision, finding error in the practice of analyzing the actual language of state prison regulations rather than considering the nature of the deprivation or restraint itself. The Court observed that the former “encouraged prisoners to comb regulations in search of mandatory language on which to base entitlements to various state-conferred privileges.” *Id.* at 482. The Court then held that a liberty interest, and hence a right to the protection of procedural due process, can arise in two situations: (1) When an inmate is placed in a “restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force . . . nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life”; and (2) a liberty interest is involved when the punishment includes action which necessarily affects the duration of a prisoner’s sentence. *Id.* at 484–87. The court offered that the following factors dictate what constitutes an “atypical and significant” hardship:

- (1) the effect of disciplinary action on the length of prison confinement;
- (2) the extent to which the conditions of the disciplinary segregation differ from other routine prison conditions; and
- (3) the duration of the disciplinary segregation imposed compared to discretionary confinement.

In the end, the *Sandin* Court held that the inmate’s thirty days of disciplinary segregation did not implicate a liberty interest because the conditions of disciplinary segregation were closely akin to the conditions outside of disciplinary confinement.

## 2. *The Process Due an Inmate Subject to Prolonged Isolation*

The scope of this discussion is limited to what “process” is due *after* an inmate has been submitted to solitary confinement for a period longer than four months.<sup>177</sup> “When *prolonged* isolation is at issue, a liberty issue has been found to be at stake.<sup>178</sup> As such, a

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177. In some instances, a “process” is due an inmate *before* an assignment to segregation is made. When considering the process due an inmate *before* an assignment to segregation is made, it is important to distinguish between disciplinary segregation and nondisciplinary segregation (i.e., administrative, protective, investigatory, or discretionary segregation). Disciplinary segregation takes place for a specific time period, unlike administrative segregation, which is not considered punishment and, as such, may continue until the threat is over.

### Nondisciplinary Segregation

Inmates have no liberty interest in avoiding transfer to nondisciplinary segregation because there is nothing “atypical” about discretionary segregation; discretionary segregation is instead an “ordinary incident of prison life” that inmates should expect to experience during their time in prison. For this reason, a very minimal process is due.

When prison officials initially determine whether a prisoner is to be segregated for nondisciplinary reasons, due process requires that they hold an informal, nonadversary hearing within a reasonable time after the prisoner is segregated, inform the prisoner of the charges against him or the reasons segregation is being considered, and allow the prisoner to present his views. *See Hewitt*, 459 U.S. at 476. Due process also requires that there be an evidentiary basis for the prison officials’ decision to place an inmate in segregation for administrative reasons, and due process warrants periodic reviews. *See id.* at 475–78.

### Disciplinary Segregation

Disciplinary segregation requires more of a process than nondisciplinary segregation. A formal hearing is required. In *Wolff v. McDonnell*, 418 U.S. 539, 563–69 (1974), the Supreme Court established certain minimum requirements for procedural due process in an inmate’s disciplinary hearing: (1) That the inmate be given written notice of the charges against him no less than twenty-four hours in advance of the hearing; (2) that the factfinder at the hearing provide a written statement setting forth the evidence relied on and reasons for the disciplinary action; and (3) that the inmate be allowed to call witnesses and present documentary evidence in his defense, as long as doing so is not unduly hazardous to institutional safety or correctional goals.

178. *Sandin*, 515 U.S. 472 speaks to the existence of a liberty interest when a disciplinary proceeding is at issue. Some jurisdictions have extended *Sandin* to nondisciplinary proceedings and others have refused. *See, e.g., Maclean v. Secor*, 876 F. Supp. 695, 701–02 (E.D. Pa. 1995) (holding regulations limiting prison officials’ discretion in administrative detention decisions created a liberty interest); *McClary v. Kelly*, 4 F. Supp. 2d 195 (W.D.N.Y. 1998) (applying *Sandin* where an inmate was held in nondisciplinary segregation for approximately five years and concluding that a liberty interest existed).

Unfortunately, “[j]udicial perceptions of liberty interests cannot be predicated with any confidence or reduced to a logical model.” NAT’L ASS’N OF ATTORNEYS GEN. ET AL., ADMINISTRATIVE SEGREGATION OF PRISONERS: DUE PROCESS ISSUES 13 (1979). There is no definitive explanation of how many years one must remain in isolation before a liberty interest is created. These cases help to illustrate this point.

A liberty instance has been found to exist in the following instances: *Wilkinson*, 545 U.S. 209 (where the Supreme Court held that inmates at a state supermax facility possessed a liberty interest based on the extreme conditions of their confinement, the indefinite duration of their placement, and the fact that transfer to the facility automatically disqualified an otherwise eligible inmate for parole consideration); *Colon v. Howard*, 215 F.3d 227 (2d Cir. 2000) (finding *305 days* in disciplinary isolation an atypical and significant hardship sufficient to implicate a liberty interest); *Clark v. Brewer*, 776 F.2d 226 (8th Cir. 1985) (holding that approximately *seven years* in nondisciplinary isolation gave rise to a liberty interest, which was created by application of the official corrections policy at issue); *Shoats v. Horn*, 213 F.3d 140 (3d Cir. 2000) (ruling that *eight years* in administrative segregation is atypical in relation to the ordinary incidents of prison life); *Gans v. Rozum*, 267 F. App'x 178 (3d Cir. 2008), *cert. denied*, 555 U.S. 844 (2008) (finding, because of the length of time in administrative isolation (*eleven years*), a liberty interest exists); *Sheley v. Dugger*, 833 F.2d 1420 (11th Cir. 1987) (finding a liberty interest, because of the language in the state regulations, where an inmate had been held in isolation for *twelve years* for administrative reasons); *Williams v. Norris*, 277 F. App'x 647 (8th Cir. 2008) (holding that *twelve years* in administrative segregation constituted an atypical and significant hardship in relation to the ordinary incidents of prison life); *Bowen v. Ryan*, 248 F. App'x 302 (3d Cir. 2007) (finding *twenty years* in nondisciplinary isolation an atypical and significant hardship sufficient to implicate a liberty interest); *Silverstein v. Fed. Bureau of Prisons*, 704 F. Supp. 2d 1077 (D. Colo. 2010) (finding, because of the extreme conditions of isolation, a liberty interest where an inmate had been held in isolation for *twenty-seven years*).

Conversely, no liberty interest was found in these cases: *Sandin*, 515 U.S. 472 (finding that *thirty days* in disciplinary isolation did not present the type of atypical, significant deprivation that would trigger due process protections largely because the time in isolation was subsequently expunged from the inmate's disciplinary record and because the inmate's conditions in isolation were not radically different from inmates in administrative custody or segregation); *Marino v. Klages*, 973 F. Supp. 275 (N.D.N.Y. 1997) (finding that *three hundred actual days* spent in disciplinary isolation did not present the type of atypical, significant deprivation that would trigger due process protections); *Magluta v. Samples*, No. Civ.A. 1:94CV2700-TWT, 2006 WL 1071844 (N.D. Ga. Apr. 20, 2006) (holding that a pretrial detainee held in nondisciplinary solitary confinement for *more than five hundred days* did not have a liberty interest); *Riley v. Carroll*, 200 F. App'x 157 (3d Cir. 2006) (holding that nondisciplinary custody for *fifteen months* was not an atypical and significant hardship).

There are particular challenges to consider when fashioning a definite line of demarcation concerning what constitutes an "atypical and significant hardship":

I therefore fully understand Judge Newman's desire to provide an across-the-board resolution of these fact-intensive disputes by fixing a specific duration of normal SHU confinement that triggers procedural due process. But, as a jurisprudential matter, I cannot agree to a solution that amounts to judicial legislation, particularly when the 180-day bright line that Judge Newman proposes is not the line implicated in the case presently before us.

The bright-line solution proposed by Judge Newman is not arrived at by adjudication but by legislative fiat. As judges, we are uniquely charged with interpreting the law and applying it on a case-by-case basis. This mandate, with its attendant limitations, derives from the Constitution's "case and controversy" requirement in Article III, and proscribes us from deciding "ill-defined controversies over constitutional issues, or a case which is of a hypothetical or abstract character." [T]he judiciary "is entitled to decide constitutional issues only when the facts of a particular case require their resolution for a just adjudication on the merits."

“process” is “due” to the inmate. The “process” “due” an inmate *after* he is placed in isolation consists of periodic reviews to determine if the inmate should remain in isolation.<sup>179</sup> This is true of inmates subject to non-disciplinary segregation (i.e., administrative or discretionary), as well as inmates subject to disciplinary segregation.<sup>180</sup>

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Judges are not legislators. Legislators are democratically accountable; federal judges are unelected and hold the office permanently. Legislators can gather facts to decide policy questions; judges are confined to the record of the case at hand. Legislation is usually the result of political and pragmatic compromises, and drawing sometimes arbitrary lines is part of what legislators do. Our task is different. Our task is not to dispense rough or approximate justice in future cases but to apply general legal principles to specific cases as they come before us . . . . While, of course, we are mindful of a rule’s likely future consequences, any rule we announce must be justified as necessary to its present application. When a judge reaches beyond the facts of the case at hand, there is an increased likelihood that the judge’s imagination will fail adequately to contemplate the effects of the ruling on future litigation. That judges sometimes arrive at a bright-line rule does not justify our reaching for it independently of the process of adjudication.

*Colon*, 215 F.3d at 235-236 (Walker, J., concurring) (citations omitted).

179. The periodic-review requirement stems from *Hewitt*, 459 U.S. 460, *abrogated in part on other grounds by Sandin*, 515 U.S. 472. In *Hewitt*, the Supreme Court stated, “administrative segregation may not be used as a pretext for indefinite confinement of an inmate. Prison officials must engage in some sort of periodic review of the confinement of such inmates.” *Hewitt*, 459 U.S. at 477 n.9; *see also* COMM’N ON SAFETY AND ABUSE IN AMERICA’S PRISONS, *supra* note 57 at, 55; NAT’L ASS’N OF ATTORNEYS GEN. ET AL., *supra* note 178, at 29 (observing that “officials must periodically review the need for continuing an inmate’s segregated confinement”); *Gans*, 267 F. App’x 178 (noting that due process was satisfied in the case of an inmate subject to eleven years in administrative custody by the extension of periodic reviews); *McClary*, 4 F. Supp. 2d at 212 (indicating that inmates subject to administrative segregation must still be afforded procedural safeguards); *Kelly v. Brewer*, 525 F.2d 394, 400 (8th Cir. 1975) (holding where an inmate is held in administrative segregation indefinitely or for a prolonged time, “due process requires periodic review in a meaningful way and by relevant standards to determine whether he should be retained in segregation or returned to population”); *Bono v. Saxbe*, 620 F.2d 609, 614 (1980) (the court held, in an administrative segregation, that since the district court had ordered periodic review, indefinite confinement did not constitute cruel and unusual punishment); *Gibson v. Lynch*, 652 F.2d 348 (3d Cir. 1981) (Gibson, who had committed no infraction, who was not a disciplinary or risk prisoner, and who needed no protection for his own well-being, was incarcerated in a type of confinement normally associated with prisoners who are under disciplinary sanction or who require protection due to a cell shortage. The court observed that if a prisoner is a severe risk case, due process requires periodic review). In the case of disciplinary detention, the American Correctional Association requires accredited facilities to have a documented review process and to conduct thirty-day reviews to determine if the reasons for the placement still exist. *See* AM. CORR. ASS’N, *supra* note 56, at 55 (referencing standard #4-4255); *Hoffer v. Comm’r of Corr.*, 589 N.E.2d 1231 (Mass. 1992) (where an inmate was held in disciplinary segregation for over two years, the institution was obligated to conduct meaningful segregation status reviews).

180. *E.g.*, *Hoffer*, 589 N.E.2d 1231; *see also* 28 C.F.R. § 541.26(c) (2012) (requiring thirty-day reviews of federal inmates held in administrative or disciplinary segregation).

No entity or regulatory body has delineated with specificity what an adequate or meaningful post-isolation review hearing is in the confines of a prolonged isolation situation, however.<sup>181</sup> And courts have refused to engage in an explicit conversation along these lines. The absence of any specific guidance is largely to blame for the legal quandary at issue herein. By deduction, a few principles can be congealed in an effort to appreciate what minimal attributes must exist for these reviews to be considered constitutionally firm.

3. *A “Meaningful” “Process” As Envisioned by the Due Process Clause*

As an initial point for determining what makes for a constitutionally sound proceeding, the Supreme Court instructs that “the process due in any given instance is determined by weighing the private interest that will be affected by the official action against the Government’s asserted interest and the burdens the Government would face in providing greater process.”<sup>182</sup> Second to this, “[f]idelity to the ideals of due process shows . . . [a] deep commitment to the values of fair play and fair treatment . . .”<sup>183</sup> “Fairness and impartiality are realized if the hearing is oriented towards fact-finding, defined as the disinterested determination of an inmate’s innocence or guilt, and the provision of a meaningful opportunity to present a defense.”<sup>184</sup>

“Due process . . . will be most effective where there exist reasonably clear, generally understood standards for exercise of the

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181. *Toeys v. Reid*, 646 F.3d 752 (10th Cir. 2011), does define what a meaningful review is in the confines of Colorado’s Quality of Life Level Program, which is a stratified incentive program. The author finds this authority distinguishable. The *Toeys* program has six levels and the conditions at each stage do not involve extreme isolation. At each level, an inmate’s privileges are increased. Levels one, two, and three are administrative. The *Toeys* court defined a meaningful review when one is in nondisciplinary segregation as the following: “[O]ne that evaluates the prisoner’s current circumstances and future prospects, and, considering the reason(s) for his confinement to segregation, determines, without preconception, whether that placement remains warranted.” *Id.* at 758. In the author’s view, for due process purposes, there is a difference in this Colorado program and the general practice of prolonged isolation discussed in the article, that being the fact that Colorado’s program has a minimum length of enrollment, is designed with the opportunity for an inmate to earn his way out, and does not involve extreme isolation for the duration of the program or on an indefinite basis.

182. *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004) (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

183. See David Resnick, *Due Process and Procedural Justice*, in *DUE PROCESS* 218 (J. Roland Pennock & John W. Chapman eds., 1977).

184. Donald F. Tibbs, *Peeking Behind the Iron Curtain: How Law “Works” Behind Prison Walls*, 16 S. CAL. INTERDISC. L.J. 137, 172 (2006).

authority in question, standards which can serve as the background for public justification and defense of decisions.”<sup>185</sup> “As the relevant standards . . . become less and less clear, the constraints on the decision maker in a due process proceeding become progressively weaker, and the power of these decision makers itself comes to seem more and more arbitrary.”<sup>186</sup> For a due process hearing to serve its constitutional function, “the procedures followed should be ones that take the complainants’ objections seriously and place them on a par with the claims of authority.”<sup>187</sup> It is sufficient if a “finding is made on the basis of a showing which meets a specified burden of proof.”<sup>188</sup> The review should not necessarily require that prison officials permit the submission of any additional evidence or statements.<sup>189</sup> “The decision whether a prisoner remains a security risk should be based on facts relating to a particular prisoner . . . and on the officials’ general knowledge of prison conditions and tensions, which are singularly unsuited for ‘proof’ in any highly structured manner.”<sup>190</sup> “And if the relevant circumstances truly have not changed, the fact that the review form says nothing different will not preclude a review from being considered meaningful.”<sup>191</sup> “But the review must be meaningful; it cannot be a sham or a pretext.”<sup>192</sup>

A review of cases reveals great disparity in how these principles have been applied in different jurisdictions. One court reasoned that the “determination of whether an inmate is to be retained in segregation or returned to population is not so much a question of what he has done in the past but of what he is likely to do or have done to him in the future if he is returned to population.”<sup>193</sup> This court seems to have taken a very liberal stance where an evidentiary standard is concerned; perhaps because of the accepted view that “[p]rison authorities’ ability to act to prevent violence and disruption should not be limited to situations of certainty or probability.”<sup>194</sup> A

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185. See T. M. Scanlon, *Due Process*, in DUE PROCESS 99 (J. Roland Pennock & John W. Chapman eds., 1977).

186. See *id.*

187. See *id.*

188. NAT’L ASS’N OF ATTORNEYS GEN. ET AL., *supra* note 178, at 40.

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

190. *Id.*

191. *Toevs v. Reid*, 646 F.3d 752 (10th Cir. 2011).

192. *Id.* at 758.

193. *Finney v. Hutto*, 410 F. Supp. 251, 279–80 (E.D. Ark. 1976), *aff’d*, 548 F.2d 740 (8th Cir. 1977), *aff’d*, 437 U.S. 678 (1978).

194. NAT’L ASS’N OF ATTORNEYS GEN. ET AL., *supra* note 179.

different case offers a very different perspective into what it takes to satisfy an evidentiary standard. In this case involving two inmates convicted of killing two correctional officers, the court advised that “a prison warden may not constitutionally put an inmate in administrative segregation, involving solitary confinement or other rigorous conditions of imprisonment, simply because he dislikes the inmate or desires to punish him for past misconduct.”<sup>195</sup> This court warned that “the reason or reasons for the segregation must not only be valid at the outset but must continue to subsist during the period of the segregation.”<sup>196</sup> According to this court’s reasoning, the absence of such would amount to a finding with no evidentiary support. Lastly, this court noted that a warden may not consider the killing of a correctional officer a preponderant guideline in deciding if the inmate could be returned to the general population.<sup>197</sup> In another case involving an inmate held in isolation for fourteen years and with no disciplinary infractions over a fourteen-year period, prison officials, relying on an unflattering past conduct record, continued denying his release at review hearings, but failed to explain to the inmate, with any reasonable specificity, why he constituted a continuing threat to the security and good order of the institution. In concluding that his review hearings were not meaningful, the court commented:

[W]e do not think it permissible for the Warden to give artificial weight to the convictions or to consider them as determining or preponderant guidelines in deciding whether . . . [an inmate] can safely be returned to population. [Warden] Harmon . . . consistently testified at trial that seven-years’ worth of clean history was irrelevant to him, and Ass’t Warden Moncrief confirmed that, even if [the inmate] proved to be “the perfect model citizen” or “model prisoner,” his vote as Ass’t Warden would always be that [he] remain in Ad. Seg. in light of his past transgressions. This is precisely the type of undue weight accorded to past facts that we explicitly forb[id] . . .<sup>198</sup>

Interestingly and by way of useful analogy, courts hearing parole cases have held that a due process violation occurs when parole is

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195. See *Kelly v. Brewer*, 525 F.2d 394, 400 (8th Cir. 1975).

196. See *id.*

197. See *id.* at 402.

198. *Williams v. Hobbs*, 662 F.3d 994, 1008 (8th Cir. 2011).

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denied solely because of the violent nature of the original offense.<sup>199</sup> These courts have found that the process does not satisfy the “some evidence” standard required in due process proceedings, where there is no reliable evidence in the record to support the conclusion reached.<sup>200</sup> Of the evidentiary threshold, one court has said:

[C]ontinued reliance upon the unchanging facts of petitioner’s crime makes a sham of California’s parole system and amounts to an arbitrary denial of petitioner’s liberty interest. Petitioner had been denied parole on six occasions prior to the determination he now challenges. Continued reliance upon the unchanging characterization of petitioner’s offense amounts to converting petitioner’s sentence of seventeen years to life to a term of life without the possibility of parole.<sup>201</sup>

Thereafter, the court referenced a revealing rhetorical conversation:

[W]hat is it about the circumstances of petitioner’s crime or motivation which are going to change? The answer is nothing. The circumstances of the crimes will always be what they were, and petitioner’s motive for committing them will always be trivial. Petitioner has no hope for ever obtaining parole except perhaps that a panel in the future will arbitrarily hold that the circumstances were not that serious or the motive was more than trivial. Given that no one seriously contends lack of seriousness or lack of triviality at the present time, the potential for parole in this case is remote to the point of non-existence. Petitioner’s liberty interest should not be determined by such an arbitrary, remote possibility.<sup>202</sup>

As a result of there being no exact standards governing periodic review hearings, review hearings are in many instances nothing more than ritualistic exercises in formality.<sup>203</sup> Often, the proceedings are

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199. See *Rosenkrantz v. Marshall*, 444 F. Supp. 2d 1063 (C.D. Cal. 2006); see also *Cerny v. Cal. Bd. of Prison Terms*, No. EDCV 05-1090-R (AJW), 2010 WL 2605965 (C.D. Cal. Apr. 15, 2010).

200. *Rosenkrantz*, 444 F. Supp. 2d 1063; *Cerny*, 2010 WL 2605965.

201. *Rosenkrantz*, 444 F. Supp. 2d at 1081–82.

202. *Id.* at 1082 (citing *Irons v. Warden of Cal. State Prison-Solano*, 358 F. Supp. 2d 936, 947 (E.D. Cal. 2005)).

203. See COMM’N ON SAFETY AND ABUSE IN AMERICA’S PRISONS, *supra* note 57, at 55; Jules Lobel, *Prolonged Solitary Confinement and the Constitution*, 11 U. PA. J. CONST. L. 115 (2008); Robert M. Ferrier, “An Atypical and Significant Hardship”: *The Supermax*

hollow in that they do not genuinely probe into the suitability of an inmate's custody change, and they do not rule based on a measurable evidentiary standard. Many review hearings serve as veils for a predetermined decision to maintain an inmate in isolation on an indefinite or permanent basis. Further complicating the situation is the fact that judicial challenges to such proceedings may fall upon deaf ears because courts, concerned only with procedure and satisfied with the knowledge that a "process" was afforded, feel their work is done.<sup>204</sup> This article strongly asserts that this does not comport with due process. Because inmates have no constitutional right to release from prolonged isolation,<sup>205</sup> it is imperative they be afforded a just process when they are evaluated at periodic intervals. The Angola 3 case is a powerfully instructive example of why these due process protections are so abundantly important.

#### 4. *Due Process Viewed Through the Lens of the Angola 3 Case*

The Angola 3 case forces even a jaundiced eye to see how perfunctory the periodic review process can be. A look at the evidence in the Angola 3 case shows that Mr. Wilkerson's "conduct report, encompassing a time period from 1972 through his 2001 release, reflects a single act of violence for fighting in 1986."<sup>206</sup> "Since they were placed in isolation, Mr. Wallace and Mr. Woodfox 'each have one disciplinary infraction related to violence' and '[e]ach of these incidents occurred over twenty years ago.'"<sup>207</sup> The warden described Mr. Wallace's and Mr. Woodfox's conduct during their

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*Confinement of Death Row Prisoners Based Purely on Status—A Plea for Procedural Due Process*, 46 ARIZ. L. REV. 291 (2004).

204. See Burnett, *supra* note 102 (concerning Thomas Silverstein, said to have been held in solitary confinement longer than any other federal prisoner); Gans v. Rozum, 267 F. App'x 178 (3d Cir. 2008), *cert. denied*, 555 U.S. 844 (2008); Bowen v. Ryan, 248 F. App'x 302 (3d Cir. 2007); Estate of DiMarco v. Wyo. Dep't of Corr., 473 F.3d 1334 (10th Cir. 2007); Rodgers v. Johnson, 56 F. App'x 633 (6th Cir. 2002); McMann v. Gundy, 39 F. App'x 208 (6th Cir. 2002); Shoats v. Horn, 213 F.3d 140, 147 (2000); Sheley v. Dugger, 833 F.2d 1420 (11th Cir. 1987); Clark v. Brewer, 776 F.2d 226 (8th Cir. 1985).

205. See Clark, 776 F.2d at 236; see also Silverstein v. Fed. Bureau of Prisons, 704 F. Supp. 2d 1077, 1095 (D. Colo. 2010).

206. Wilkerson v. Stalder, 639 F. Supp. 2d 654, 660 (M.D. La. 2007).

207. Memorandum in Opposition to Re-Urged Motion for Summary Judgment Dismissing All Eighth Amendment Claims at 37, Stalder, 639 F. Supp. 2d 654 (No. 00-304-C); Stalder, 639 F. Supp. 2d at 667 (finding that Mr. Woodfox and Mr. Wallace, "now in their 60's do not, and have not for some time, presented a threat to 'the safety, security and good order of the facility.' They have had no serious disciplinary incidents in decades . . .").

time in isolation as “good,”<sup>208</sup> and he agreed to Mr. Woodfox being described as a model prisoner.<sup>209</sup> During periods when the men were transferred to other facilities outside of Angola for proceedings, they functioned well and without incident in the populations they temporarily existed in.<sup>210</sup> The numerous cellblock review boards, charged with the task of reviewing Mr. Wallace’s and Mr. Woodfox’s statuses, have all expressed that Mr. Wallace and Mr. Woodfox are not physically dangerous to others.<sup>211</sup> These reviews also classify them as not being an escape risk.<sup>212</sup> Their mental health records are also insightful. Prison social workers opine that neither man poses a danger to others.<sup>213</sup>

Despite all of this, “for three-and-a-half decades, every warden who has run the prison has stamped the same papers keeping them in solitary every 90 days.”<sup>214</sup> As to the reason for their continued isolation, their lockdown review summaries indicate it is “nature of original reason for lockdown.”<sup>215</sup> Under the policy in place when the Angola 3 were placed in solitary confinement, it was permissible for prison officials to consider the original reason for the isolation as the

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208. Memorandum in Opposition to Re-Urged Motion for Summary Judgment Dismissing All Eighth Amendment Claims, *supra* note 207, at 38 (quoting deposition testimony given by Warden Burl Cain).

209. See *Woodfox v. Cain*, No. 06-789-JJB, 2008 WL 5095995, at \*3 n.37 (M.D. La. Nov. 25, 2008).

210. See *Stalder*, 639 F. Supp. 2d at 660–61.

211. See Memorandum in Opposition to Re-Urged Motion for Summary Judgment Dismissing All Eighth Amendment Claims, *supra* note 207, at 38 (quoting deposition testimony given by Warden Burl Cain); In re Albert Woodfox Doc #72148 (Louisiana State Penitentiary) (Lockdown Review Summary, 2000-2005) (on file with author); In re Herman Wallace Doc #76759 (Louisiana State Penitentiary) (Lockdown Review Summary, 1998-2007) (on file with author).

212. See Memorandum in Opposition to Re-Urged Motion for Summary Judgment Dismissing All Eighth Amendment Claims, *supra* note 207, at 38 (quoting deposition testimony given by Warden Burl Cain); In re Albert Woodfox Doc #72148, *supra* note 211; In re Herman Wallace Doc #76759, *supra* note 211.

213. See Memorandum in Opposition to Re-Urged Motion for Summary Judgment Dismissing All Eighth Amendment Claims, *supra* note 207, at 40.

214. See “Angola 2” *Leave Solitary Cells in Louisiana After 36 Years*, NAT’L PUB. RADIO, Mar. 27, 2008, <http://www.npr.org/templates/story/story.php?storyId=89140779>.

215. See Memorandum in Opposition to Re-Urged Motion for Summary Judgment Dismissing All Eighth Amendment Claims, *supra* note 207, at 38 (quoting deposition testimony given by Warden Burl Cain); Ridgeway & Casella, *Southern Injustice: Herman Wallace of the Angola 3*, *supra* note 139; In re Albert Woodfox Doc #72148, *supra* note 211; In re Herman Wallace Doc #76759, *supra* note 211.

board reviewed an inmate for release.<sup>216</sup> In 1996, the policy changed and this language was removed.<sup>217</sup> Despite this, the post-1996 reviews still show “nature of original reason for lockdown” as the reason for the men’s continued isolation. In the way of official reasons for the Angola 3’s prolonged isolation, prison officials offer that they “present[] a serious threat to the safety of the staff, other inmates, the general public, and a threat to the safety, security, and good order of the facility.”<sup>218</sup> The current warden has also expressed fears that Mr. Woodfox is a “predator,”<sup>219</sup> who is “not rehabilitated.”<sup>220</sup>

The Angola 3 case highlights a number of shortcomings in the periodic review process, the first being how critical a meaningful evidentiary standard is to the process. Had prison officials been required to respect an evidentiary standard that required them to show that the isolated housing assignment was connected to a legitimate penological objective, could the Angola 3’s isolation have continued indefinitely? If the Angola 3 were security concerns in the 1970s, could officials, when confronted with a legitimate evidentiary standard, establish they are still security concerns? The next lesson to be learned from the Angola 3 case is that it is inherently unfair to deprive inmates of most programmatic opportunities, but expect them to somehow demonstrate that they are entitled to release from isolation. If a person is held in isolation and is thereby deprived of programmatic opportunities for growth and interaction, how can such an inmate show himself to be reformed?

Another insight to be gained from the review process afforded the Angola 3 is the impact of not having a neutral and detached party as part of the process. Albert Woodfox opines that his isolation is the result of the warden’s discomfort with his political beliefs, and he insists that his isolation does not further any legitimate penological objective.<sup>221</sup> Without the involvement of detached parties, how can his complaints be placed on par with those of prison officials? If

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216. *See* *Wilkerson v. Stalder*, 639 F. Supp. 2d 654, 668 (M.D. La. 2007) (reporting that “LSP Policy Directive 18.002, in 1995, included a statement that ‘the original reason for assignment will play a large role in the board’s decision [whether or not to continue lockdown]’. However, that statement was removed from Policy Directive 18.002 in 1996, and currently is not present.”).

217. *See id.*

218. *Id.* at 660.

219. *See* *Woodfox v. Cain*, No. 06-789-JJB, 2008 WL 5095995, at \*3 n.38 (M.D. La. Nov. 25, 2008).

220. *See id.*

221. *See id.* at \*4.

prison officials erroneously concluded that all BPP involvement is bad, and overlooked the fact that the BPP could serve as a unifying and empowering organization and could, therefore, have value in an institutional setting, how could prison officials be enlightened?<sup>222</sup> If the Angola 3 were wrongfully convicted of Officer Miller's murder, and are guilty of being no more than activists, how can they successfully demonstrate during the existing review process that they are victims of perception profiling? If the Angola 3 did commit a prison murder in the 1970s, but they are now in their criminal menopause and will no longer act violently, how might they make such a showing under the current system? If the Angola 3 are distant or indirect victims of COINTELPRO, will they ever be able to mount

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222. The BPP "made extensive inroads in the southern battle ground of the 1960s civil rights struggle." Charles E. Jones, *Foreword* to ORISSA AREND, *SHOWDOWN IN DESIRE: THE BLACK PANTHERS TAKE A STAND IN NEW ORLEANS* xi, xiii (2009). The BPP operated community centers, a free breakfast program, free health clinics, free busing to prison programs, sickle-cell anemia testing centers, and voter registration programs. See Curtis J. Austin, *Introduction* to ORISSA AREND, *SHOWDOWN IN DESIRE: THE BLACK PANTHERS TAKE A STAND IN NEW ORLEANS* xvii, xvii (2009). BPP member Bobby Rush described the inner workings of the BPP accordingly:

[T]he Panthers organized poor people, primarily blacks, into a structure to correct problems such as housing and education. The[] [BPP] had no military wing. . . . [T]he ordinary Panther day—rising at 5:30 A.M. to go to one of the six Breakfast for Children sites to prepare and serve breakfast to the kids and then clean up. Members would spend their days selling Panther papers, soliciting contributions, including food for the breakfast program, or working in the office. They would eat a communal dinner at Panther headquarters and often have political education classes afterward. For most members, it was a full-time job. The party provided money for food and rent from contributions and speaking honoraria. Friendly doctors provided free medical care.

JEFFREY HAAS, *THE ASSASSINATION OF FRED HAMPTON: HOW THE FBI AND THE CHICAGO POLICE MURDERED A BLACK PANTHER* 283–84 (2010).

Because of their many positive contributions, many saw the BPP as "not [being] racists . . . [but as being] staunch, fearless protectors of the poor, the abused, the disenfranchised and the helpless." ORISSA AREND, *SHOWDOWN IN DESIRE: THE BLACK PANTHERS TAKE A STAND IN NEW ORLEANS* 97 (2009) (citing an interview given in 2002 by Father Jerome LeDoux, an African-American priest who was instrumental in diffusing a shootout between the New Orleans Police Department and the New Orleans Chapter of the BPP in 1970). To others, the Black Panthers were violent and dangerous. This was partly because they bore arms. See *Black Panther Party v. Smith*, 661 F.2d 1243, 1263 (D.C. Cir. 1981) (According to the Panthers, party members were not required to carry or train with firearms, but they were encouraged to do so because of "harassment by law enforcement."). And this was partly because they "made no claim to pacifist piety and did not care whether displays of aggression would alienate white supporters." AREND, *supra*, at 186. The BPP "employed direct defiance of authority, shocking young people out of political fatalism by demonstrating that black salvation lay in black people themselves and not in laws or white largesse." *Id.* at 186.

such a defense?<sup>223</sup> A constitutionally sound review process would account for these things; a perfunctory one would not.

The shortcomings exposed in the Angola 3 case are not limited to just the Angola 3. The Angola 3 case is representative of a practice taking place nationally. Mr. Woodfox has stated, “No matter how well we behave, we don’t have a way to get out of solitary.”<sup>224</sup> There is an uncomfortable degree of truth in this statement. With the shortcomings identified, it is conceivable that any inmate could be subject to the same fate as the Angola 3. This is said because the hearings entirely mute the voice of the inmate, as well as recycle arbitrary decisions that have no evidentiary nexus. This means any inmate can be trapped in the solitary confinement system with no way out. Under the current state of affairs, little is required to place a prisoner in isolation. And once a prisoner is placed in solitary confinement, the absence of a reason to remove the prisoner is considered reason enough to keep him there.

### **B. Separation of Powers Concerns**

Our Constitution vests all legislative Powers in Congress,<sup>225</sup> the executive Power in the President,<sup>226</sup> and the judicial Power in the Supreme Court and such “inferior Courts as Congress may from time to time ordain and establish.”<sup>227</sup> “Under ‘the basic concept of separation of powers . . . that flow[s] from the scheme of a tripartite government’ adopted in the Constitution, ‘the “judicial Power of the United States” . . . can no more be shared’ with another branch than ‘the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto.’”<sup>228</sup> In establishing the system of divided power in the Constitution, the Framers considered it essential that “the judiciary remain[ ] truly distinct from both the legislature and the executive.”<sup>229</sup> On this point, it has been said that “there is no

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

224. See Interview by Kari Lydersen with Albert Woodfox, in Angola, La. (Mar. 30, 2007), available at <http://news.infoshop.org/article.php?story=2007angola3>.

225. See U.S. CONST. art. I, § 1.

226. See U.S. CONST. art. II, § 1.

227. See U.S. CONST. art. III, § 1.

228. *Stern v. Marshall*, 131 S. Ct. 2594, 2608 (2011) (citing *United States v. Nixon*, 418 U.S. 683, 704 (1974)).

229. *Stern*, 131 S. Ct. at 2608 (citing THE FEDERALIST NO. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

liberty if the power of judging be not separated from the legislative and executive powers.”<sup>230</sup>

“In light of ‘[t]he impossibility that one man should be able to perform all the great business of the State,’ the Constitution provides for executive officers to ‘assist the supreme Magistrate in discharging the duties of his trust.’”<sup>231</sup> Corrections administrators serve in this capacity. As an extension of the executive, corrections administrators may not, according to the Doctrine of Separation of Powers, encroach upon the powers of the legislative or judicial branches of government. By design, a warden plays a very different role in the life of an inmate than does a sentencing judge, whose primary function it is to impose sentences.<sup>232</sup> A sentencing judge has authority to remand a defendant to the custody of the corrections department. In most instances, a sentencing judge has no authority over how or where a defendant spends his time in custody.<sup>233</sup> Once a defendant is taken into custody,

230. *Stern*, 131 S. Ct. at 2608.

231. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3146 (2010).

232. GEORGE COLE & CHRISTOPHER E. SMITH, *THE AMERICAN SYSTEM OF CRIMINAL JUSTICE* 29 (8th ed. 1998).

233. For an illustration of this principle, see *Young*, *supra* note 72 (observing that court orders requiring that convicted defendants spend the first six months of their respective sentences in solitary confinement could not be enforced); see also *State v. Yirga*, No. 16-01-24, 2002 WL 1299860, at \*7 (Ohio Ct. App. June 4, 2002) (striking down the portion of a sentence requiring the defendant to spend time in solitary confinement and noting that the authority to define and fix punishment belongs exclusively to the legislature); *U.S. v. Johnson*, 223 F.3d 665, 673 (7th Cir. 2000) (wherein the court stated: “[N]othing in the federal law authorizes a judge to sentence a prisoner to life in the control unit”); *United States v. Corozzo*, 256 F.R.D. 398 (E.D.N.Y. 2009), presents a rare instance where a court might have limited authority to dictate the conditions of confinement. At issue was a request by the prosecutor that the sentencing judge issue an order barring the defendant, a convicted mafia captain and killer, from associating or communicating with any member or associate of organized crime during his incarceration and supervised release. *Id.* at 399. Many of the defendant’s family members were or are members or associates of organized crime families. *Id.* at 400. The provision the prosecutor relied on reads, in pertinent part:

The court, in imposing a sentence to a term of imprisonment upon a defendant convicted of a felony set forth in chapter 95 (racketeering) or 96 (racketeer influenced and corrupt organizations) of this title or in the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 801 et seq.), or at any time thereafter upon motion by the Director of the Bureau of Prisons or a United States attorney, may include as a part of the sentence an order that requires that the defendant not associate or communicate with a specified person, other than his attorney, upon a showing of probable cause to believe that association or communication with such person is for the purpose of enabling the defendant to control, manage, direct, finance, or otherwise participate in an illegal enterprise.

18 U.S.C. § 3582(d) (2012) (emphasis added).

*Corozzo*, 256 F.R.D. at 400–01. The defense argued that imposition of such an order would have the practical result of imposing solitary confinement. *Id.* at 401. After

his relationship with prison officials and administrators begin. What is important is the delineation of power between the two officials. Judges are not equipped with prison administrative authority and wardens are not equipped with sentencing authority.

“It is the obligation of penitentiary officials to insure that inmates are not subjected to any punishment beyond that which is necessary for the orderly administration of (the prison).”<sup>234</sup> When prison officials impose pretextual and/or extreme and prolonged disciplinary or administrative measures that are not absolutely necessary for prison security purposes or genuinely connected to legitimate penological concerns, the prison official leaves the realm of discipline and enters the realm of sentencing/resentencing. In doing so, prison officials not only abuse their authority, but they assume authority they lack.

The Doctrine of Separation of Powers is so sacred to this nation that it was even upheld in *Hamdi v. Rumsfeld*, a case against a man suspected of being an enemy combatant.<sup>235</sup> Hamdi complained about being held over a year in a detention facility despite not having been charged with an offense. He also complained about not being afforded any type of judicial proceeding. Even for Hamdi, the Supreme Court insisted that the executive respect the functions of the judiciary. The Court refused the executive’s argument that it was entitled to great latitude in the instance of national security. National security or not, the Court expressed that one branch may not exceed its authority by assuming the role of the next branch. Of significance to the Court was the fact that there was a judicial vehicle in place to address the executive’s concern about the suspected combatant: a treason charge. As the court cautiously observed, a criminal charge would have broken the government’s monopoly on the accused. The Court strongly spoke against the government’s view that a heavily circumscribed role for the courts was appropriate given the nature of the accusations against the accused.<sup>236</sup> To this, the Court remarked that such an approach would “serve only to condense power into a single branch of government.”<sup>237</sup>

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expressing concerns over the mental health risks posed by extended periods of isolation, the court held: “Assuming the order the government seeks in this case is constitutional, the court elects not to exercise its discretion to issue it.” *Id* at 402.

234. *Williams v. Edwards*, 547 F.2d 1206, 1214 (5th Cir. 1977) (citing *Gates v. Collier*, 501 F.2d 1291, 1309 (5th Cir. 1974)).

235. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004).

236. *See id.*

237. *See id.*

### C. Separation of Powers Through the Lens of the Angola 3 Case

By way of example, one might consider the fictitious case of an individual (hereinafter referred to as inmate #1) sentenced by the courts to a thirty-nine year prison term. At the time of sentencing, it was the intention of the court that inmate #1, less predictable penological occurrences, would emerge from confinement in a state comparable to, better than, or proportionally inferior to the one he entered in. Inmate #1, subject to all the medical, social, and emotional challenges that incarceration imposes, would likely emerge from prison alive. Inmate #1 has a very good chance of leaving prison better socialized and able to reintegrate with skills likely to ensure his success upon release. Compare, now, the Angola 3, assuming them to have been of like health and age as inmate #1 at the beginning of the thirty-nine year term. Consider that the Angola 3 have spent the vast majority of their confinement in prolonged isolation. The fate of the Angola 3 would likely be very different than inmate #1. The Angola 3 would arguably have an increased risk of death during his period of confinement due to the many adverse health effects of solitary confinement. If they survive, the Angola 3 would have an increased risk of serious mental or emotional illness as a result of the prolonged confinement experience. The Angola 3 would also have less of an opportunity to reintegrate into society because the Angola 3 would have been afforded no institutional opportunity to gain a skill, be educated, or pursue a trade, or for refinement of social skills or for spiritual edification. In effect, inmate #1 did the time he was sentenced to, whereas the Angola 3 received far more than the sentencing judge intended. In the case of the Angola 3, the warden can be said to have changed the sentence imposed by the court because a non-death sentence is, in effect, commuted to a possible death sentence; yet a warden lacks sentencing power.

Even conceding that death could befall any inmate due to natural or environmental circumstances, the impetus for death is significant to this dialogue. Deaths induced by prison officials speak to the use of power on the part of officials serving as agents of the executive branch. This implicates constitutional concerns not raised when an inmate's death is induced naturally or as a result of the ordinary prison environment. When prison officials impose or expedite death or decline, they claim power that the Constitution does not grant them; they obliterate the line of demarcation between the judiciary and the executive branch. *Hamdi* reminds us that the Separation of Powers Doctrine cannot be selectively applied. It is equally

applicable to enemy combatants, convicts, and the like. The Angola 3 case forces one to assess this notion.

#### D. Judicial Abstinance & the Potential for Abuses

In the 1900s, courts adopted what has become known as the “hands-off doctrine.”<sup>238</sup> “Under this doctrine, courts refused to adjudicate prisoners’ constitutional claims . . . because . . . the courts felt that they generally had neither the duty nor the power to define and protect those rights.”<sup>239</sup> “Another reason . . . for the lack of court intervention in prison policy [is] the federalist principle that certain aspects of state government should not be interfered with by the federal government.”<sup>240</sup> The idea that prisoners have rights that the courts are bound to protect . . . was finally accepted by courts in the 1960s and 1970s.<sup>241</sup> Nonetheless, “vestiges of the ‘hands-off doctrine’ remain.”<sup>242</sup> Currently, there exists “a policy of minimum intrusion into the affairs of state prison administration”<sup>243</sup> and a belief that state “prison officials . . . be vested with broad discretion . . .”<sup>244</sup> With respect to inmate periodic review hearings, this often results in courts limiting their involvement to ensuring that inmates are afforded the process to which they are entitled. Often, courts will not evaluate or engage in a meaningful review of the process’ substance.<sup>245</sup>

238. See BRANHAM & HAMDEN, *supra* note 3, at 463.

239. *Id.*

240. MCSHANE, *supra* note 15, at 200.

241. BRANHAM & HAMDEN, *supra* note 3, at 464.

242. *Id.* at 469.

243. *Williams v. Edwards*, 547 F.2d 1206, 1212–13 (5th Cir. 1977); *see also* *Turner v. Safley*, 482 U.S. 78, 85 (1987) (indicating that “separation of powers concerns counsel a policy of judicial restraint” where prison administration is concerned). As recent as this year, this longstanding principle was reiterated by the Supreme Court:

Courts must be sensitive to the State’s interest in punishment, deterrence, and rehabilitation, as well as the need for deference to experienced and expert prison administrators faced with the difficult and dangerous task of housing large numbers of convicted criminals . . . Courts nevertheless must not shrink from their obligation to “enforce the constitutional rights of all ‘persons,’ including prisoners.” . . . Courts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration.

*Brown v. Plata*, 131 S. Ct. 1910, 1928–29 (2011) (citations omitted).

244. *Edwards*, 547 F.2d at 1212–13; *see also* *People v. Cole*, 926 N.Y.S.2d 163, 164 (N.Y. App. Div. 2011).

245. This point is illustrated in *Ferguson v. Cain*, No. 2009 CA 2017, 2010 WL 1838895, at \*1–2 (La. Ct. App. May 7, 2010) (wherein a Louisiana inmate, in 2008, sought review of a decision maintaining him in extended lockdown since 2007. The appellate court noted that the screening protocol required a screening officer to reject any administrative

To appreciate the harm that results from this, one might analogize prison management to household management. In a family unit, it is imperative that parents be given freedom and latitude to raise their children. Society gives tremendous deference to parents because they know the frailties, propensities, and vulnerabilities of their children in a way that most others could not. Unless the judgment of the parent endangers the child, courts abstain from drawing interferences regarding parental decision-making.<sup>246</sup> If the daily decisions of parents were subject to review by courts, procreation would likely be halted and courts would no longer be able to meet their daily demands. Because parents know exactly where legal lines are drawn and know that they will be held accountable for transgressions, this paradigm works for society. In the prison model, the warden, like parents, must also have wide latitude when it comes to disciplinary and management decisions. In the case of prisons, it would be a burden to the courts if every judgment of a prison administrator were subject to substantive review. As is with parenting, no one would want to serve as a prison administrator if they knew constant legal entanglement was a hazard of the job. This, however, is where the similarities end.

Unlike parents, prison officials do not know with certainty that they will be held accountable for their transgressions. In fact, one might argue that, in the prison setting, courts have created a layer of immunity for prison officials, by refusing to scrutinize penal decision-making during the periodic review process. What is needed is a firm legal line much like the one that exists for parents. The legal line should memorialize the crossing point into too far. The challenge lies in stopping courts from enabling transgressions by prison officials with their silence, while at the same time ensuring that the courts are

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complaint regarding a lockdown review board decision, unless the inmate alleges that the board gave no reasons for a decision or failed to conduct a review every ninety days. Because the inmate did not allege that the board gave no reasons for its decision or failed to conduct a review every ninety days, the appellate court concluded that the decision denying his petition for judicial review was proper); *see also* Gans v. Rozum, No. 06-62J, 2007 WL 2571527, at \*3 n.1, \*7 (W.D. Pa. Aug. 31, 2007) (refusing to entertain an inmate's plea that he was being held in prolonged isolation as a result of incorrect allegations that he was a sexual predator. Because there was no showing that the review process was constitutionally inaccurate, the court declined involvement).

246. *See* Troxel v. Granville, 530 U.S. 57, 68–69 (2000) (wherein the Supreme Court expressed that “so long as a parent adequately cares for his or her children . . . there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent’s children”).

not put in the position of having to micromanage prison officials. On this point, the Supreme Court has warned: “an unchecked system of detention carries the potential to become a means for oppression and abuse of others.”<sup>247</sup> One could argue the Angola 3 represent how abstinence by courts (insofar as substantive review of the merits of periodic review decisions is concerned) has allowed prison officials to act with impunity.

#### **E. Judicial Abstinence Viewed Through the Lens of the Angola 3 Case**

In 1983, Robert Wilkerson King complained to the court that the lockdown review board’s review of his case was a “mere sham.”<sup>248</sup> The court noted the fact that the lockdown review board met every ninety days as required under Louisiana’s administrative regulations and performed only a cursory review of King’s case before concluding that the board’s decision to maintain his maximum security classification was neither unreasonable nor arbitrary. No attention was paid to the threat Mr. King posed at that point in time to the legitimacy of the administratively produced record of past conduct, or to the institution’s compliance with an evidentiary standard.

In 1988, Herman Wallace unsuccessfully sought, in the state court system, his release from extended lockdown.<sup>249</sup> The court placed great weight on the administrative regulation governing when a prisoner can be put in extended lockdown. The regulation allowed a custody change to extended lockdown when an inmate was a danger to himself or others, an escape risk, in need of protection, a threat to security, or the subject of an internal investigation.<sup>250</sup> The court concluded that this regulation was based on standards as opposed to unfettered discretion. Thereafter, the court explained that “[d]ue process requires only that prison officials ‘engage in an ‘informal, nonadversary review’ of the evidence surrounding an inmate’s restrictive confinement, and that the inmate received ‘some notice of the charges against him and an opportunity to present his views to the prison official . . .’”<sup>251</sup> According to the court, due process did not require the opportunity to present evidence, other than a prisoner’s own statement, or to call witnesses.<sup>252</sup>

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247. *Hamdi v. Rumsfeld*, 542 U.S. 507, 530 (2004).

248. *See Wilkerson v. Maggio*, 703 F.2d 909, 911 (1983).

249. *See Wallace v. Teer*, 527 So. 2d 1061, 1062 (La. Ct. App. 1988).

250. *See id.* at 1063.

251. *Id.* (citation omitted).

252. *Id.*

After a cursory review, this court also reached the conclusion that due process requirements were met because Mr. Wallace was given a full hearing with the right to present evidence and to subpoena and cross-examine witnesses, including the review panel, in a juridical-type atmosphere before an independent hearing officer. Additionally, the court noted that the findings of the hearing officer were subject to review by the district court and the appellate court. No attention was ever given to the difficulties an inmate faces in trying to mount a defense when access to programs and/or interactions with others is virtually nonexistent. Nor did the court address the reliability of the administratively produced record of past conduct, nor the institution's compliance with an evidentiary standard. If courts reviewed substantively and past the superficial to ensure an evidentiary standard was met during the periodic review process, would Mr. Woodfox and Mr. Wallace remain in isolation?

#### **IV. Reform Proposal: Legislative Model for the Periodic Review Process**

There is a need for practical, as well as philosophical, changes on the part of penal institutions, legislative bodies, and courts. These changes would best be undertaken in the form of a legislative model, offering a national framework. A legislative model, such as this, is amenable to modifications, as dictated by the needs and/or shortcomings of the specific jurisdiction. Ideally, such a model would be adopted in substance by jurisdictions across the United States. At the very least, it is hoped, this proposed legislation will be used as a springboard for the discussion of necessary policy changes.

Conceding that prison officials must have liberal charge of an institution, this authority needs to be somewhat less absolute than it currently is. A lack of accountability or oversight corrupts as much as it serves to ratify innocent errors in judgment. The major reform advanced herein is that institutions should no longer have complete authority over decisions regarding inmates' exoduses from solitary confinement. As an alternative, a tiered approach should be implemented, whereby prison officials make the initial decision to place a prisoner in isolation and retain authority over the first periodic review, but where, thereafter, other eyes begin to watch, other ears begin to listen, and other minds begin to ponder the fate of the isolated inmate. This reform is consistent with the aspirations of the Supreme Court, which expressed that, in both civil and criminal proceedings, due process requires an "adjudicator who is not in [the]

situation.”<sup>253</sup> In furtherance of this view, the Court has explained that “[e]ven an appeal and a trial *de novo* will not cure a failure to provide a neutral and detached adjudicator.”<sup>254</sup> Another significant proposed reform is that the process be regulated by actual legislation and not by the administrative rule-making process.<sup>255</sup> The proposed model follows:

### 1. Preliminary Considerations

This model is intended to have both prospective and retroactive application.

This model assumes all players will be trained and informed, as a minimum, on the unique intricacies of penal institutions, solitary confinement, and due process.<sup>256</sup>

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253. *Concrete Pipe and Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 617 (1993).

254. *Id.* at 618.

255. Statutes take priority over regulations because it is legislative bodies that empower agencies to create their regulations, and legislatures can remove or modify that power as well. Because of the potency of legislation, it, as opposed to agency rulemaking, is advocated. This point has been addressed:

[T]he making of rules by an administrative agency pursuant to legislatively delegated rule-making power differs from “legislation” or “law-making” in two essential aspects. First, the source of the power to make the rule is in the Legislature. Second, the concept of “legislation,” in its essential sense, is the power to speak on any subject without any specified limitations.

*Westervelt v. Natural Res. Comm’n*, 263 N.W.2d 564, 576 (Mich. 1978).

Exemplifying this concern is a finding by a New York court that prison officials were not complying with the administrative regulations they enacted. Despite such a finding on the part of the court, the court was uneasy about fashioning a resolution:

The court emphasizes that its holding is only that the DOC must comply with Minimum Standard § 1-05. It is not for the court to weigh correctional policies, to select among different possible means for providing services to close custody inmates outside their cells, or otherwise to supervise the manner in which the Commissioner effects compliance with this Minimum Standard. The manner in which compliance with the Minimum Standard is to be effected implicates the security of the prison facility and the safety of prisoners and staff, matters that are within the expertise of the Commissioner, and will remain subject to his judgment and exercise of discretion.

*In re Jackson*, 895 N.Y.S.2d 633, 641 (N.Y. Sup. Ct. 2010) (citations omitted).

256. Valuable as a juxtaposition is Louisiana legislation enumerating standards for animal shelters. LA. REV. STAT. ANN. § 3:2463(E) (2012) states:

Shelter personnel should be trained as to animal health, disease control, humane care and treatment, animal control and transportation of animals. Shelter workers shall be fundamentally humane, shall be able to identify and understand the principal animal diseases and injuries, and should have good judgment and even temperament.

## 2. Placement into Solitary Confinement

Prison officials should maintain exclusive control over the process employed to place an inmate into solitary confinement.

Prison officials should maintain exclusive control over the periodic review process until completion of the first review.

When being placed in solitary confinement, prisoners should know the reason for the placement<sup>257</sup> and the duration of their sentence to solitary confinement, and should be provided with a case plan enumerating exactly what must be done to earn their exodus.<sup>258</sup>

Placement in solitary confinement as a result of perceptions that are not incident to actual actions or specific, actual, and legitimate security or penological concerns should be prohibited. Continued placement in solitary confinement based on dated security concerns should not be allowed.<sup>259</sup>

Prolonged solitary confinement should be abolished. However, the practice of reassigning an inmate to solitary

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257. This is consistent with Section 4(b) of the Model Act suggested by the American Civil Liberties Union, which reads as follows: “Any time a prisoner is classified, assigned or subject to long-term isolation, there must be a stated, legitimate purpose for such placement in writing.” MODEL ACT: IMPROVING PUBLIC SAFETY, PROTECTING VULNERABLE POPULATIONS & ENSURING PROCESS IN IMPOSING LONG-TERM ISOLATED CONFINEMENT 6 (Am. Civil Liberties Union 2011), *available at* [http://www.aclu.org/files/pdfs/prison/model\\_stop\\_solitary\\_act\\_-\\_7-11.pdf](http://www.aclu.org/files/pdfs/prison/model_stop_solitary_act_-_7-11.pdf).

258. This is consistent with Section 4(d) of the Model Act suggested by the American Civil Liberties Union, which reads:

Determinate sentencing to long-term isolation shall not be allowed. The Department shall institute a program that allows a prisoner subject to long-term isolation to earn his/her way out of such housing through positive behavior. The trajectory for prisoners to earn their way out of such housing shall be graduated and must be less than one year/six months.

*Id.* at 8.

259. This is consistent with Section 4(b) of the Model Act suggested by the American Civil Liberties Union, which reads:

A prisoner may only be subject to long-term isolated confinement if he or she is determined . . . to have committed one or more of the following acts while incarcerated within the preceding five years:

- i. An act of violence that either: (1) resulted in or was likely to result in serious injury or death to another, or (2) occurred in connection with any act of non-consensual sex;
- ii. Two or more discrete acts which caused serious disruption of prison operations;
- iii. An escape, attempted escape, or conspiracy to escape from within a security perimeter or custody, or both.

*Id.* at 6.

confinement for a defined time, following an adverse review, should be allowed.

Once in solitary confinement, inmates must have a means of defending their interests at review proceedings. They must have access to some programs and services so reformation can be established during the review process.<sup>260</sup>

### 3. Periodic Reviews

Reviews should be conducted at regular intervals. Four months is the recommendation.<sup>261</sup>

**Burden of Proof:** At every stage of the review process, the prison should bear the burden of showing: (1) That the case plan could be accomplished; and (2) how the inmate failed to satisfy the case plan.<sup>262</sup>

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260. This is consistent with Section 4(a) of the Model Act suggested by the American Civil Liberties Union, which reads:

[S]uch prisoners shall be offered access to educational and programming opportunities consistent with the prisoners' safety and security and any federal and state law requirements; at least four hours a day of out-of-cell time, including a minimum of one-hour of out-of-cell daily exercise that includes access to outdoor recreation when the weather permits; access to personal property, including TVs and radios; access to books, magazines, and other printed material; access to daily showers; and access to the same number.

*Id.*

261. See *supra* note 9. This recommendation is made with knowledge of the fact that many jurisdictions require ninety day reviews and with knowledge of the fact that such is the recommendation of the ABA. Because of the number of people to serve on the special review board and because such service is uncompensated, a slightly longer period is suggested to minimize burden on board members. Also, it is the author's view that a four-month period affords an inmate a greater opportunity to comply with the case plan. As well, the author feels this is consistent with *Hewitt v. Helms*, 459 U.S. 460, 477 n.9 (1983), where the Supreme Court said periodic reviews were required, but failed to prescribe how often.

262. This suggestion is compatible with a recent Supreme Court pronouncement. In articulating what type of process was due to the accused who had not yet been charged with a crime, the Court explained:

[O]nce the Government puts forth credible evidence that the habeas petitioner meets the enemy-combatant criteria, the onus could shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria. A burden-shifting scheme of this sort would meet the goal of ensuring that the errant tourist, embedded journalist, or local aid worker has a chance to prove military error while giving due regard to the Executive once it has put forth meaningful support for its conclusion that the detainee is in fact an enemy combatant. . . . [P]rocess of this sort would sufficiently address the "risk of an erroneous deprivation" of a detainee's liberty interest while eliminating certain procedures that have questionable additional value in light of the burden on the Government.

Later, the court offered additional insight:

After completion of the first review, prison officials should no longer retain exclusive control over the review process.

The initial review should be conducted by prison officials. If the decision is unfavorable, a seven-member special review board should be empanelled for all future reviews.<sup>263</sup>

The seven-member special review board<sup>264</sup> should be comprised of:

One ethicist or member of the clergy (to serve as Chair).<sup>265</sup>

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Because we conclude that due process demands some system for a citizen-detainee to refute his classification, the proposed “some evidence” standard is inadequate. Any process in which the Executive’s factual assertions go wholly unchallenged or are simply presumed correct without any opportunity for the alleged combatant to demonstrate otherwise falls constitutionally short.

*Hamdi v. Rumsfeld*, 542 U.S. 507, 534–37 (2004).

263. This suggestion is compatible with the Supreme Court’s pronouncement in *Hamdi*, 542 U.S. at 533–35 (wherein the Court specifically indicated that a process was not due in every instance. According to the Court, no process was due when suspected combatants were initially captured in the battlefield. Process, according to the Court, was due only when a suspected combatant would be held continuously).

Consistent with this suggestion, it is worth noting that British authorities, after abandoning its practice of routine use of solitary confinement as a form of discipline, set up an independent body of inspectors to track results and effect adjustments to its new system. See Gawande, *supra* note 4.

A worthwhile comparison can be found in Louisiana legislation governing removal of animals from stables. Under LA. REV. STAT. ANN. § 3:2435 (2012), animals found to be unsuitable shall not be returned to stables until their release is approved by the humane society officer. If the animal’s owner disagrees with the determination of the humane society officer, a veterinarian must be called in. If this does not resolve the owner’s concern, a disinterested, experienced person shall be called in to render a final opinion. What is suggested for note is the fact that, in the case of an animal, one person’s opinion is not acceptable. The process is designed to involve several opinions and multiple reviews by detached parties.

264. The review board is recommended because due process requires a “neutral and detached judge.” See *Concrete Pipe and Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 617 (1992). Due process also requires an “independent tribunal,” “a basic system of independent review,” “a neutral decision maker,” or an “impartial adjudicator.” See *Hamdi*, 542 U.S. at 534–36.

This recommendation is consistent with the ABA’s *Standards on Treatment of Prisoners*. Recommendation 23-2.9(a)(ii) calls for “decision-making by a specialized classification committee that includes a qualified mental health care professional.” See *Standards on Treatment of Prisoners*, *supra* note 51.

As a fiscally conservative measure, thoughts of utilizing a parole board were considered. Feeling a parole board would lack the neutrality and objectivity envisioned, this idea was dismissed.

265. These professionals were selected because it is anticipated that they will (1) bring a general sense of balance and integrity to the process; and (2) act as effective mediators at the onset of impassioned disagreements.

One mental health professional or a social worker.<sup>266</sup>

One prisoner advocate or an exonerated person.<sup>267</sup>

One current academician.<sup>268</sup>

One former military leader or one former prison administrator.<sup>269</sup>

One former member of law enforcement.<sup>270</sup>

One lawyer (familiar with civil due process protections).<sup>271</sup>

The ethicist or clergy member should chair the board, as well as empanel the board from a pro bono list made available by professional organizations or by way of an official call for board volunteers.

Members should not receive remuneration or anything of value in exchange for their service and should not be appointed by the prison.<sup>272</sup> While having local members would be ideal, there would be no opposition to members from across jurisdictional lines. In fact, such would serve to promote national uniformity.

Decisions should be made by the will of four members.

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266. These professionals were selected because of their unique professional ability to (1) make a critical analysis of the impact of isolation on the mental and emotional health of the inmate; and (2) earnestly appreciate the genuineness of the inmate's attempts at compliance with the case plan.

267. These people were included because of their specialized ability to (1) educate the board as to legitimate obstacles that might plague the inmate's compliance with the case plan; and (2) expose uncommon penological concerns that must be understood in order to achieve the best resolution of the matter before the board.

268. This person was selected because it is expected that this professional offers (1) a measured ability to assess a multidimensional situation; (2) a realistic perspective on managing unpleasant situations involving a range of personality types; and (3) knowledge of best practice and current trends as it relates to corrections and/or dispute resolution.

269. It is anticipated that these professionals will offer valuable insights into (1) an authoritarian management model; and (2) security operations and risks.

270. This professional was selected because of (1) an ability to utilize trained instincts; and (2) because of his regular interfacement with the criminal mentality.

271. This professional offers (1) the creativity to fashion workable solutions; (2) understanding of the intricate nature of due process protections; and (3) experiences that serve as a backdrop for appreciating the position of both sides to the proceeding.

272. While work without pay is not the most ideal solution, this recommendation was adopted out of a fear that pay would bring about the incentive to continue the custody assignment to isolation or that pay would burden already stretched corrections budgets. While monetary payment is opposed, an award of professional service hours would not be. On this issue, the most profound consideration is the nobility that surfaces when one serves with no motivation other than good will. The ultimate intent here is to capitalize on the genuineness of this practice.

#### 4. Periodic Review Determinations (by Prison Officials or by Special Review Board)

The aim should be a determination of whether the inmate satisfied the case plan or if the inmate made a genuine attempt at satisfying the case plan.

The inmate's release from confinement should be viewed on par with the prison administration's administrative and management concerns.

The warden must articulate the penological interest at issue and present verifiable reasons for the placement request. The warden's views should be considered. The warden's statement should be treated as equal to the other evidence.

Psychological evaluations should be an integral part of every review proceeding. They should be treated as equal to the other evidence.

The inmate's disciplinary record should be an integral part of every review proceeding. It should be treated as equal to the other evidence. The absence of recent infractions should be persuasive, but not outcome determinative.

Release denials should require a short statement of reasons for continued confinement, as well as articulation of future release criteria in the form of a supplemental case plan.<sup>273</sup>

Decisions should be made upon a showing of a preponderance of actual evidence to justify keeping a person in isolation. Said evidence should establish that the prisoner "poses a credible continuing and serious threat to the security of others or to the prisoner's own safety."<sup>274</sup>

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273. This recommendation is consistent with the ABA's *Standards on Treatment of Prisoners*. Recommendation 23-2.9(b), states:

Within [thirty days] of a prisoner's placement in long-term segregated housing based on a finding that the prisoner presents a continuing and serious threat to the security of others, correctional authorities should develop an individualized plan for the prisoner. The plan should include an assessment of the prisoner's needs, a strategy for correctional authorities to assist the prisoner in meeting those needs, and a statement of the expectations for the prisoner to progress toward fewer restrictions and lower levels of custody based on the prisoner's behavior. Correctional authorities should provide the plan or a summary of it to the prisoner, and explain it, so that the prisoner can understand such expectations.

See *Standards on Treatment of Prisoners*, *supra* note 51.

274. This is consistent with recommendation 23-2.9 of the ABA's *Standards on Treatment of Prisoners*. See *id.* (calling for a showing by a preponderance of the evidence when an inmate is placed in or maintained in segregated housing).

Expert opinions may be considered during the review process. If used, they should be treated as equal to the other evidence.

#### 5. Court's Role in the Review Process

The review should extend to the procedure afforded, as well as to the merits of the adverse finding. When reviewing the merits, the aim should be a determination of whether the inmate satisfied the case plan or if the inmate made a genuine attempt at satisfying the case plan.

When reviewing the merits, courts should ensure:

The burden of proof was met.

The inmate's release from confinement was viewed on par with the prison administration's administrative and management concerns.

Due process was afforded. This means that:

a. Substantively, the inmate had the opportunity to show that no credible continuing and serious threat to the security of others or to the prisoner's own safety exists.

b. A sincere effort was made at determining if the inmate satisfied or genuinely attempted to satisfy the case plan.

c. The current punishment is connected to a current security concern and not a dated one.

d. The current punishment is connected to a legitimate security threat and not a perceived one.

e. The decision was made upon a showing of a preponderance of actual evidence establishing that the prisoner poses a credible continuing and serious threat to the security of others or to the prisoner's own safety.

After six periodic reviews (under the same case/issue), judicial review may be sought by any aggrieved party (prison official or the inmate).

I anticipate dissents based on the notion that implementing this model would unduly burden already overwhelmed corrections officials. A like argument was raised before the Supreme Court in *Hamdi v. Rumsfeld*.<sup>275</sup> The Court rejected the government's claim that imposition of a trial-like system for enemy combatants would

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275. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 534–35 (2004).

create practical difficulties and serve as a distraction to military officials engaged in the serious business of warfare and national security.<sup>276</sup> Not only did the Supreme Court refuse to dispense with due process protections, the Court reiterated that “the process due in any given instance is determined by weighing the private interest that will be affected by the official action against the Government’s asserted interest and the burdens the Government would face in providing greater process.”<sup>277</sup> However, the burden of implementing the proposed model would be minimal because there are no major additional costs to be incurred. In fact, the proposed national model offers many cost-effective advantages including support, relief, and assistance to prison officials.

For those who fear the proposed legislation would diminish agency autonomy and simultaneously result in bureaucratic entanglement, it is worth noting that comparable federal legislation exists in the arena of animal research. This legislation applies to living, as well as dead, animals. Disturbingly, this standard exceeds current protections for living humans subject to isolation.<sup>278</sup> The legislation begins with an official policy expressing: (1) the government’s intent “to ensure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment”<sup>279</sup>; and (2) a finding by Congress that regulation of said industry is essential.<sup>280</sup> Subsequent to this, the legislation requires the Secretary of Agriculture to promulgate “humane standards and recordkeeping requirements” associated with the industry.<sup>281</sup> These standards “ensure that animal pain and distress are minimized.”<sup>282</sup> To craft the standards, the Secretary of Agriculture “is authorized and directed to consult experts, including outside consultants where indicated.”<sup>283</sup> The law requires that a Research Facility Committee exist at each research facility for the purpose of assessing animal care and treatment and research practices from the standpoint of animal welfare.<sup>284</sup> This

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276. *See id.* at 531.

277. *See id.* at 529.

278. *See* 7 U.S.C.A. § 2132(g) (West 2012).

279. *See* 7 U.S.C.A. § 2131(1) (West 2012).

280. *See* 7 U.S.C.A. § 2131 (West 2012).

281. *See* 7 U.S.C.A. §§ 2142–2143 (West 2012).

282. *See* 7 U.S.C.A. § 2143(3)(A) (West 2012).

283. *See* 7 U.S.C.A. § 2143(5) (West 2012).

284. *See* 7 U.S.C.A. § 2143(8)(b)(1) (West 2012).

committee must be composed of a veterinarian and a neutral and detached party, and must conduct semiannual inspections.<sup>285</sup> The law also requires that staff be trained in humane practices and minimal pain methodology,<sup>286</sup> and grants the Secretary of Agriculture authority to investigate and inspect facilities.<sup>287</sup> In cases of suspected abuses, the law equips the Secretary of Agriculture with the authority to seek an injunction.<sup>288</sup> Consistent with the proposed prolonged isolation legislation, the referenced legislation does not cloak one individual with sole decision-making authority. This legislation anticipates a uniform standard and envisions specially trained personnel to ensure its proper implementation. In the final analysis, what might have initially seemed like bureaucratic layers has actually eliminated complication because of the existence of a uniform standard and the delegation of authority.

### Conclusion

Some estimate there to be between 50,000 and 80,000 inmates in solitary confinement in this country on any given day.<sup>289</sup> Given the broad appeal of prolonged isolation, there must exist a uniform and constitutionally sound periodic review process. There is simply no way to refute the urgency of the present. This process should not rob prison officials of needed authority, but also must not mute the voices of inmates subject to the prolonged nature of the confinement for reasons that do not amount to legitimate penological interests or security concerns. Perception profiling and arbitrary use of prolonged isolation and/or abuse of prolonged isolation as a management style is inconsistent with best practices, as well as with constitutional mandates. Incidentally, Louisiana does not allow a veil of secrecy to surround the fate of abused animals after they have been rescued. By the strength of law, the rescuer “shall keep a special book for the purpose of registering any animal entrusted to their care . . . and the book shall be open to inspection at all times.”<sup>290</sup> Under

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285. See 7 U.S.C.A. § 2143(8)(b)(1)(A) (West 2012); see also 7 U.S.C.A. § 2143(8)(b)(3) (West 2012).

286. See 7 U.S.C.A. § 2143(8)(4)(C)(5)(d) (West 2012).

287. See 7 U.S.C.A. § 2146 (West 2012).

288. See 7 U.S.C.A. § 2159 (West 2012).

289. See *Cruel and Unusual: US Solitary Confinement*, supra note 66.

290. See LA. REV. STAT. ANN. § 3:2434.

this legislation, research facilities must be inspected, and they must produce annual reports showing compliance with standards.<sup>291</sup>

When prison officials stop acting as administrators and effectively begin handing down sentences, they, for all practical purposes, become judges. The Separation of Powers Doctrine prohibits prison officials from acting with this authority. When judges abstain from meaningful involvement in the periodic review process, they look, but fail to see the very thing they are uniquely positioned to see. They do not see the need for justice and interpretation of law—due process law. The judge, by his omission, renders justice legally blind as far as the inmate is concerned. The legally blind can innocently be a detriment to those around them.

Incarceration by its very nature invites condescension toward and perhaps even disdain for inmates. But it offers no reason or excuse to diminish the rights or the humanity of the incarcerated. Affording justice to inmates does not and should not depend on the good faith or forbearance of prison officials. It is mandated by our form of government. Mindless insistence on maintaining order in prisons without concern for the rights of inmates is antipodal to democracy.

Due process looks to the “justice of the procedure itself.”<sup>292</sup> A simulated process akin to a hearing, where formalities can be documented, but where no meaningful probing occurs, is unjust and unconstitutional. It amounts to nothing more than procedural automation in a legal assembly line where unfavorable reviews are mass-produced. As a body of citizens, we must declare our legacy. As the inscription near the last guard post at Angola expresses, “[w]e can’t change the past.”<sup>293</sup> Will our legacy be that we got stuck at this place of reflection or will we embark upon a journey to progress, remembering that “[c]ommitment to change must be combined with readiness to confront authority”?<sup>294</sup> Some have begun the process of declaring our legacy. They have done this by picking up the torch and

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291. *See id.*

292. *See* Resnick, *supra* note 183.

293. *See* Sullivan, *Why Did Key Angola Witness Go to the “Dog Pen”?*, *supra* note 139 (observing that “[a]s you leave Angola, you can see the dormitories, the officers in their guard shacks, the men bent over in the cotton fields. It’s the same as it looked 40 years ago, and 100 years ago. At the last guard post, there is an inscription. It’s a Bible verse, Philippians 3:12. It says we can’t change the past; we can only press on to the future.”).

294. DERRICK BELL, *CONFRONTING AUTHORITY: REFLECTIONS OF AN ARDENT PROTESTER* 162 (1994).

moving it in the direction of meaningful change.<sup>295</sup> Others have ignited the legislative fire.<sup>296</sup> Much like those in prolonged isolation, these citizens cry out for the company and support of others.

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295. The Office of the Inspector General for the State of California conducted a special review of the management of administrative segregation units in California adult prisons. Two findings were made and twelve recommendations were offered. Of note, the report identified repeat instances of due process violations. See DAVID R. SHAW, STATE OF CAL. OFFICE OF THE INSPECTOR GEN., SPECIAL REVIEW: MANAGEMENT OF THE CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION'S ADMINISTRATIVE SEGREGATION UNIT POPULATION (Jan. 2009), available at <http://www.oig.ca.gov/media/reports/BOA/reviews/Management%20of%20the%20California%20Department%20of%20Corrections%20and%20Rehabilitation%27s%20Administrative%20Segregation%20Unit%20Population.pdf>.

Joseph Ponte, Maine's new corrections commissioner, has set abuses of solitary confinement as his top priority. He recently made the following significant changes: Included prisoner-rights advocates to a department committee designating reforms, prohibited the mentally ill from being placed in solitary confinement, stopped the practice of putting inmates into solitary confinement based on a single disciplinary infraction, limited the use of solitary confinement only to cases where an inmate is a threat to himself or others, and stopped the use of administrative segregation. Mr. Ponte offers the professional view that solitary confinement did not change behavior whereas the new practice of informal sanctions (i.e., loss of recreation time or loss of commissary privileges) does. He concedes his approach is more labor intensive, but he is sure the benefits outweigh the challenges. See generally, Lance Tapley, *Reducing Solitary Confinement*, PORTLAND PHOENIX (Nov. 2, 2011), <http://portland.thephoenix.com/news/129316-reducing-solitary-confinement/>.

It is reported that Illinois Senator Paul Simon approached corrections officials to express concern for the plight of an inmate who, at the time, was housed in solitary confinement. See Gawande, *supra* note 4.

After learning about the plight of the Angola 3, Cedric Richmond engaged in talks with Louisiana officials concerning classification procedures for inmates held in prolonged isolation. See draft version of LA. REV. STAT. ANN. § 15:828.4 (on file with the author).

On April 6, 2011, Congressmen John Conyers, Bobby Scott, and Cedric Richmond sponsored a Congressional Briefing on the abuses of solitary confinement in the criminal justice system. See CONGRESSMEN JOHN CONYERS, ROBERT SCOTT & CEDRIC RICHMOND, THE ABUSES OF SOLITARY CONFINEMENT IN THE U.S. CRIMINAL JUSTICE SYSTEM (Apr. 6, 2011), <http://solitarywatch.files.wordpress.com/2011/04/congressional-briefing-flyer.pdf>.

In 2009, a documentary examining the Angola 3 case was directed by Vadim Jean and narrated by Samuel L. Jackson. See IN THE LAND OF THE FREE, *supra* note 139.

A New Mexico jury awarded \$22 million to Stephen Slevin after he was arrested and held in solitary confinement without ever having been brought to trial. Ultimately, the charges brought against him were dropped. See Paul Vale, *Stephen Slevin: Man Locked in Solitary Confinement for Two Years Wins \$22m Payout*, HUFFINGTON POST (Jan. 27, 2012), [http://www.huffingtonpost.co.uk/2012/01/27/stephen-slevin-man-locked\\_n\\_1236414.html?](http://www.huffingtonpost.co.uk/2012/01/27/stephen-slevin-man-locked_n_1236414.html?)

296. In Colorado, SB176 was signed by the Governor on June 3, 2011. It requires that an annual report concerning the status of administrative segregation, reclassification efforts for offenders with mental illnesses or developmental disabilities, and any internal reform efforts since July 1, 2011, be provided to the judiciary committees of the Senate and House of Representatives, or any successor committees. It also permits accrual of

earned time after ninety days for offenders housed in solitary confinement provided they meet statutory criteria. Lastly, it stops the practice of placing inmates in solitary confinement for inmates who merely associate with a member of a security threat group. The legislation requires that the offender engage in threatening behavior or participate in actions of a security threat group in order to qualify for solitary confinement, while preserving the discretion of the warden. See COLO. REV. STAT. ANN. § 17-1-113.9 (1) (West 2012), available at [http://www.leg.state.co.us/clics/clics2011a/csl.nsf/fsbillcont3/A88F4FFC795C5C79872578080080E624?open&file=176\\_enr.pdf](http://www.leg.state.co.us/clics/clics2011a/csl.nsf/fsbillcont3/A88F4FFC795C5C79872578080080E624?open&file=176_enr.pdf).

In Maine, a bill to reduce the use of special management units by the Department of Corrections and to reduce the length of time that prisoners in the custody of the Department of Corrections are confined in special management units was proposed. This bill also proposed a mechanism for a person confined in a special management unit for more than thirty days to have that person's case reviewed by an independent third party. See L.D. 963, 125th Leg., 1st Reg. Sess. (Me. 2011), available at [http://www.mainelegislature.org/legis/bills/bills\\_125th/billtexts/HP070701.asp](http://www.mainelegislature.org/legis/bills/bills_125th/billtexts/HP070701.asp). After this bill died, the legislature ordered a review of due process and other policies related to placement of special management prisoners. See L.D. 1611, 124th Leg., 1st Reg. Sess. (Me. 2011).

In March 2011, the Maine Department of Corrections returned a report that included many recommendations to improve due process and other policies related to the use of solitary confinement. See FINAL REPORT OF REVIEW OF DUE PROCESS PROCEDURES IN SPECIAL MANAGEMENT UNITS AT THE MAINE STATE PRISON AND THE MAINE CORRECTIONAL CENTER (March 2011), available at [http://www.nrcat.org/storage/nrcat/documents/usp\\_maine\\_proposed\\_amendment\\_to\\_ld1163.pdf](http://www.nrcat.org/storage/nrcat/documents/usp_maine_proposed_amendment_to_ld1163.pdf).

Subsequently, Maine passed a resolve directing its Department of Corrections to respond to the recommendations contained in the review of due process procedures and other policies related to the placement of special management prisoners. See L.D. 1163, 125th Leg., 1st Reg. Sess. (Me. 2011); see also Judy Harrison, *MCLU to Honor Trio for Work with Prisoners*, BANGOR DAILY NEWS, Oct. 12, 2010, available at 2010 WLNR 20392339 (reporting that the 2010 Roger Baldwin Award was conferred upon Reverend Stan Moody, Dr. Janis Petzel and Emily Posner, currently a law student at Loyola University New Orleans College of Law, for their "extraordinary contributions" towards ending solitary confinement in Maine).

In Mississippi, Unit 32 was an administrative segregation, male housing unit which held men who committed disciplinary infractions, were mentally ill, or were in need of protective custody. Many were held in Unit 32 indefinitely. A settlement resulted in the closure of Unit 32, a new classification system, and implementation of written plans and reviews for those left in solitary confinement. See Winter & Hanlon, *supra*, note 75, at 6–8.

In 2011, New Mexico passed legislation convening a working group to gather information about the use of solitary confinement, its impact on prisoners, and its effectiveness in reducing prison issues and costs. This group will produce an initial report of its findings and recommendations by October 2012, and a final report will be presented to the appropriate interim legislative committee by October 2013. See S.M. 40, 50th Leg., 1st Sess. (N.M. 2011), available at <http://www.nmlegis.gov/sessions/11%20regular/memorials/senate/SM040.html>.

In January 2008, New York signed into effect its Special Housing Unit Exclusion law (enacted July 1, 2011). This law protects seriously mentally ill inmates from being placed in solitary confinement and instead requires that appropriate mental health treatment be provided. See N.Y. LAW § 43:6-137 (McKinney 2011), available at [http://assembly.state.ny.us/leg/?default\\_fld=&bn=A09342&term=2007&Summary=Y&Text=Y](http://assembly.state.ny.us/leg/?default_fld=&bn=A09342&term=2007&Summary=Y&Text=Y); see also Press

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Release, N.Y. Assembly Speaker Sheldon Silver, Assembly Restores Funding in State Budget to Implement Critical Prison Reform for Mentally Ill Inmates (Mar. 30, 2009), *available at* <http://assembly.state.ny.us/Press/20090330f/>.

In Texas, a 2011 bill that would have directed the Texas Department of Criminal Justice to submit an annual report to the Legislature on the use of solitary confinement and to establish a plan to improve the conditions of confinement for those prisoners held in administrative segregation failed. *See* H.B. 3764, 82nd Reg. Sess. (Tex. 2011), *available at* <http://www.capitol.state.tx.us/tlodocs/82R/billtext/pdf/HB03764H.pdf#navpanes=0>.