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# Supermax's Kryptonite? *Wilkinson v. Austin*: The Due Process Challenge to Ohio's Super-Maximum Security Prison

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# Supermax's Kryptonite? *Wilkinson v. Austin*: The Due Process Challenge to Ohio's Super-Maximum Security Prison

ADAM MILLER

## I. INTRODUCTION

The most dangerous criminals in the United States are housed across the nation in highly restrictive and extremely isolated super-maximum security prisons known as Supermax prisons.<sup>1</sup> Society's most notorious and feared villains including Theodore Kaczynski (the Unabomber), Terry Nichols (conspirator in the Oklahoma City bombing), Lee Boyd Malvo (conspirator in the 2002 Beltway sniper attacks), John Allen Muhammed (implementer of the Beltway sniper attacks), and Eric Robert Rudolph (implementer of the 1996 Centennial Olympic Park bombing) are all imprisoned indefinitely in a Supermax prison.<sup>2</sup> The recent increase in prison population and difficulty in preventing prison violence has resulted in the widespread use of Supermax facilities.<sup>3</sup>

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<sup>1</sup> See generally Chase Riveland, *Supermax Prisons: Overview and General Considerations*, U.S. Dept. of Justice, National Institute of Corrections, Jan. 1999, available at <http://www.nicic.org/pubs/1999/014937.pdf> (explicating Supermax prisons remove prisoners who are assaultive or violent, attempting to escape, preying on other inmates, or exhibiting disruptive behavior from general population).

<sup>2</sup> See generally Supermax Prisons and the Constitution: Liability Concerns in the Extended Control Unit, National Institute of Corrections, Nov. 2004; See also, Wikipedia, Supermax, [http://en.wikipedia.org/wiki/Supermax\\_prison](http://en.wikipedia.org/wiki/Supermax_prison) (noting Theodore Kaczynski (the Unabomber), Terry Nichols (conspirator in the Oklahoma City bombing), Lee Boyd Malvo (conspirator in the 2002 Beltway sniper attacks), John Allen Muhammed (implementer of the Beltway sniper attacks), and Eric Robert Rudolph (implementer of 1996 Centennial Olympic Park bombing) are imprisoned in Supermax prison).

<sup>3</sup> See Charles A. Pettigrew, *Technology and the Eighth Amendment: The Problem of Supermax Prisons*, 4 N.C. J.L. & TECH. 191, 191-92 (2002) (noting that the United States, one of the world's largest incarcerators, leads in development of state of the art, Supermax prisons,

The Bureau of Justice Statistics reports, at the end of 2003, 6.9 million people were under correctional supervision in the United States, almost a three hundred percent increase since 1980.<sup>4</sup> The dramatic increase in correctional populations has resulted in widespread prison crowding, forcing most correctional facilities to operate above their designed capacity.<sup>5</sup> The overcrowding of prisons, the “toughening” of the inmate population, and the increase in gang activity have made it difficult for corrections administrators to maintain order.<sup>6</sup> In response to the

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with one figure putting the number of Supermax prisoners between 25,000 and 100,000).

<sup>4</sup> See U.S. Dept. of Justice Bureau of Justice Statistics 2003, Correctional Populations Chart, <http://www.ojp.usdoj.gov/bjs/glance/tables/corr2tab.htm> (showing three hundred percent increase in correctional supervision from 1,842,100 persons under correction supervision in 1980 to 6,924,500 persons in 2003); See, e.g., Prison Reform Advocacy Center, Critical Facts about the Nations Prisons, [http://www.prisonreform.com/usprison\\_main.shtml](http://www.prisonreform.com/usprison_main.shtml) (“the three strikes laws—mandating that any person convicted of three felonies must be sentenced to life without parole, proposes to end or severely limit parole, escalation of the war on drugs, mandatory minimum sentencing for non-violent crimes, and increased federalization of certain categories of crimes” all contributed to the dramatic growth in prison population. *Id.*); See also Riveland, *supra* note 1, at 5 (reporting that National Institute of Corrections attributes increased prison crowding partly to “increase in street gang members, drug offenders, mentally ill, and youthful offenders” *Id.*).

<sup>5</sup> See Correctional Populations Chart, *supra* note 4 (indicating increase of over 5 million people under correctional supervision from 1980 to 2003). Prison crowding has forced correctional administrators to house and manage far more offenders than their facilities are designed to hold with fewer staff than needed to manage the institutions safely and humanely. Crowding creates severe management problems for state and local officials. See also Policy: Options for Addressing Prison Crowding, National Criminal Justice Association, (July 22, 2003) (detailing how prison populations have reached historic high levels).

<sup>6</sup> See Riveland, *supra* note 1, at 7 (reporting use of such facilities allows for the correctional use of “dispersion” to handle troublesome inmates) (Corrections officials have defended the need for such facilities based on the perceived toughening of the inmate population, increased gang activity, the difficulty of maintaining order in severely crowded prisons, and from experience gained over time that suggests such units are beneficial.).

increasing difficulties to maintain inmate control, jurisdictions throughout the nation have built Supermax facilities as highly restrictive and state of the art security prisons.<sup>7</sup>

Due to the harsh and restrictive conditions within Supermax prisons, various questions have been raised regarding the constitutionality of the facilities.<sup>8</sup> *Wilkinson v.*

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<sup>7</sup> In recent years, prison administrators have placed persons exhibiting disruptive behaviors into separate housing units. This “concentration” approach creates specific units or facilities to manage this troublesome type of inmate in a high-security environment, generally isolated from all other inmates. The premise is that general population prisons will be more easily and safely managed if the troublemakers are completely removed. *See id.* at 1. (explicating that this approach allows for dispersal of problem inmates and prevents them from uniting in their misconduct by enabled prison officials to break up cliques and gangs); *see also* Human Rights Watch, Supermax Prisons: An Overview, <http://www.hrw.org/reports/2000/supermax/Sprmx002.htm#P40391> (claiming exploding prison populations, meager budgets, and punitive political climates have overwhelmed corrections professional’s ability to operate safe, secure, and humane facilities resulting in administrator’s use of prolonged supermax confinement in effort to increase their control over prisoners).

<sup>8</sup> *See, e.g.,* Madrid v. Gomez, 889 F. Supp. 1146 (N.D. Cal. 1995) (The District Court for the Northern District of California reviewed allegations that California’s Pelican Bay State Prison’s Security Housing Unit [SHU], a Supermax facility, “imposed inhumane conditions” on its mentally ill inmates. The court determined that the conditions within the Supermax prison created a level of cruelty that violated the mentally ill inmates’ Eighth Amendment rights. The Court found the conditions of confinement in SHU resulted in severe isolation of inmates which inflicted serious mental injury to inmates. Not all inmates in the SHU were found to be sufficiently at risk of developing serious mental health problems as a result of their confinement. Those inmates who demonstrated a “particularly high risk for suffering very serious or severe injury to their mental health” *id.*, were removed from incarceration in the SHU.); *See also* Jones ‘El v. Berge, 164 F. Supp. 2d 1096 (W.D. Wis. 2001) (The Court held that the extreme isolation and solitary nature of Supermax prisons inflicts unconstitutional hardship on mentally ill inmates. The court determined that there was sufficient evidence to find that both the objective and subjective components of the Eighth Amendment’s analysis were met, granting an injunction prohibiting mentally ill inmates from being housed in Wisconsin’s Supermax facility.).

*Austin* is the most recent constitutional challenge of Supermax prisons to reach the United States Supreme Court.<sup>9</sup> In *Wilkinson*, the Court reviewed allegations that the inmate selection process for the Ohio State Penitentiary [hereinafter “OSP”], a Supermax facility, violated the Fourteenth Amendment Due Process Clause.<sup>10</sup> The Court unanimously held that, although inmates of OSP have a protected liberty interest in avoiding assignment to the facility, the procedures set forth in Ohio’s new policy dictating the inmate selection process satisfied the due process requirements of the Fourteenth Amendment.<sup>11</sup>

This note discusses the Supreme Court’s holding in *Wilkinson* that OSP’s system for inmate placement in its Supermax facility does not violate the Equal Protection Clause.<sup>12</sup> Part II will summarize OSP’s purpose and condition, and will focus on Ohio’s New Policy regarding inmate placement.<sup>13</sup> Part III will examine Supreme Court precedent and the Court’s conclusions of law in determining whether inmates have a protected liberty interest in avoiding assignment to OSP and the due process implications of the inmate selection process to OSP.<sup>14</sup> Part IV will question the Supreme Court’s disregard of the adverse mental effects in inmates subjected to the extreme isolation conditions within Supermax prisons.<sup>15</sup> Finally, Part V will analyze the likely impact of the *Wilkinson* decision on other jurisdictions in their development of fair inmate placement procedures for their Supermax facilities.<sup>16</sup>

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<sup>9</sup> See *infra* notes 88-96, 100-104, 107-120 and accompanying text (discussing *Wilkinson v. Austin* Supreme Court decision).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> See *infra* notes 18-68 and accompanying text.

<sup>14</sup> See *infra* notes 96-127 and accompanying text.

<sup>15</sup> See *infra* notes 67-123 and accompanying text.

<sup>16</sup> See *infra* notes 124-149 and accompanying text.

## II. OHIO STATE PENITENTIARY: A SUPERMAX FACILITY

As a result of a 1993 riot at the Southern Ohio Correctional Facility, Ohio's first and only supermax prison was opened in Youngstown in April of 1998.<sup>17</sup> OSP has the capability of housing 504 male inmates in single occupancy cells and is designed to separate the "most predatory and dangerous prisoners" from the rest of Ohio's general prisoner population.<sup>18</sup> The following section serves as background for the overall purpose of supermax prisons as well as the placement procedures and environmental conditions of OSP specifically.<sup>19</sup>

### A. Purpose of Supermax Prisons

Supermax facilities are intended to house and control the "worst of the worst."<sup>20</sup> These facilities are maximum-

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<sup>17</sup> See Correctional Institutional Inspection Committee, OSP Inspection Report, Jan. 29, 2004, <http://www.ciic.state.oh.us/reports/osp.pdf> [hereinafter *OSP Inspection Report*] (detailing that OSP, a \$65 million project, was reported to have been a "vision" in response to the Lucasville riot); See also Ohio Department of Rehabilitation and Correction, The Institutions, <http://www.drc.state.oh.us/web/prisprog.htm> (outlining OSP's annual operating budget of \$28,595,868).

<sup>18</sup> See Department of Rehabilitation and Correction, Institution Information: Ohio State Penitentiary, <http://www.drc.state.oh.us/Public/osp.htm> (describing OSP's facility mission is "to protect Ohio's citizens, employees, and inmates by confining those inmates who pose a threat to staff, other inmates, or institutional security in a controlled setting that is conducive to self-improvement" *Id.*). See *id.* (graphical display of OSP's population, racial distribution and institutional information, detailing 454 inmates were incarcerated in OSP as of September 2005).

<sup>19</sup> See *infra* notes 20-70 and accompanying text.

<sup>20</sup> See Supermax prisons and the Constitution, *supra* note 2 (claiming Supermax prisons are designed to controlling the most dangerous, recalcitrant, aggressive, and antagonistic inmates in a prison); See e.g. Wikipedia, Supermax, [http://en.wikipedia.org/wiki/Supermax\\_prison](http://en.wikipedia.org/wiki/Supermax_prison) (claiming notable inmates currently incarcerated in Supermax facilities include: Terry Nichols, Theodore Kaczynski, Lee Boyd Malvo, John Allen Muhammed, and Eric Robert Rudolph.).

security prisons with highly restrictive conditions designed to segregate the most dangerous prisoners from the general prison population.<sup>21</sup> The National Institute of Corrections defines Supermax prisons as correctional facilities “that provide for the management and secure control of inmates who have been officially designated as exhibiting violent or seriously disruptive behavior while incarcerated.”<sup>22</sup> The inmates in OSP are a “threat to safety and security in traditional high-security facilities and their behavior can only be controlled by separation, restrictive movement, and limited access to staff and other inmates.”<sup>23</sup> The use of Supermax facilities has increased over the last twenty years, in response to the rise in the amount of prison gangs and prison violence.<sup>24</sup> By isolating the penitentiary system’s most violent prisoners, supermax prisons are intended to ensure the safety of the guards and other prisoners and to produce “behavioral modification” within the inmates.<sup>25</sup>

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<sup>21</sup> See Pettigrew, *supra* note 3, at 193 (describing Supermax prisons as “highly restrictive, high-custody housing unit within a secure facility, or an entire secure facility, that isolates inmates from the general prison population and from each other due to grievous crimes, repetitive assaultive or violent institutional behavior, the threat of escape or actual escape from high-custody facility(s), or inciting or threatening to incite disturbances in a correctional institution” *Id.*)

<sup>22</sup> Riveland, *supra* note 1, at 3. Prisons have historically had “jails within prisons.” Simply because people are in the controlled environment of a prison does not stop some of them from being assaultive or violent, attempting to escape, inciting disturbances, preying on weaker inmates, or otherwise exhibiting disruptive behavior. Such people must be removed from the general population of the prison environment while they threaten any of those behaviors. See *id.* at 7 (explicating that order and safety are priority objectives of any correctional facility).

<sup>23</sup> See *id.* at 9.

<sup>24</sup> See *Wilkinson v. Austin*, 125 S.Ct. 2384, 2389 (2005) (citing Riveland, *supra* note 1, at 5) (claiming that most prisons across the country have been operating at well over 100% of design capacity due to increases in street gang members, drug offenders, mentally ill, and youthful offenders).

<sup>25</sup> See Jerry R. DeMaio, *If You Build It, They Will Come: The Threat of Overclassification in Wisconsin’s Supermax Prisons*, 2001 WIS. L. REV. 207, 208 (2001) (claiming that the “purpose of a Supermax prison is twofold: to help maintain order within the prison population as a whole

Approximately thirty states now have supermax facilities in operation.<sup>26</sup>

### B. Placement Into OSP

When OSP opened, the procedures used to assign inmates to the facility were inconsistent and undefined.<sup>27</sup> For a time, no official policy governing placement existed and inmates were placed in the OSP based solely on warden recommendations.<sup>28</sup> In an attempt to establish consistent guidelines for the selection and placement of inmates into

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and to ensure the safety of inmates and staff” *Id.*); *See also* Alice Lynd, What is a “Supermax” Prison?, The Spunk Press Archive, March 1996, <http://www.spunk.org/library/prison/sp001611.txt> (explicating that supermaxes are designed to house violent prisoners or prisoners who might threaten security of the guards or other prisoners).

<sup>26</sup> *See* Leena Kurki and Norval Morris, *The Purpose, Practices, and Problems of Supermax Prisons*, 28 CRIME & JUST. 385, 387 (2001); *See also* Joan Biskupic, *High Court Upholds Ohio’s ‘Supermax’ Prison Policy*, USA TODAY (June 13, 2005) (finding that approximately 30 states run highly restrictive “Supermax” facilities, and the federal government operates two).

<sup>27</sup> *See Wilkinson*, 125 S. Ct. at 2386 (determining that when OSP first became operational, no official policy governing placement there was in effect resulting in inconsistent and undefined procedures and haphazard and erroneous placements); *See also* OSP Inspection Report, *supra* note 17 (explicating that OSP placement decisions were alleged to be arbitrary and inconsistent, with near total discretion afforded to decision-makers but the “department has since refined and improved upon policies and practices to ensure due process, and to ensure that each level 5 placement is necessary and appropriate” and finding that “haphazard placements were not uncommon, and some individuals who did not pose high-security risks were designated, nonetheless, for OSP.” *Id.*).

<sup>28</sup> Under the Old Policy, 111-07, the classification committee made up of a deputy warden and a mental health professional from the inmate’s current institution, and a third official designated by the warden, would receive a written statement from the prisoner as well as information provided by staff, and make a recommendation to the warden. The warden then approved or disapproved the recommendation, and sent the information along to the Bureau of Classification. Even if both the classification committee and the warden agreed that high-maximum-security classification was inappropriate for an inmate, the Chief of the Bureau could still assign the inmate to OSP. *See Austin v. Wilkinson*, 372 F.3d 346 (6th Cir. 2004) [hereinafter *Austin II*].



OSP, Ohio issued Ohio Department of Rehabilitation and Corrections [hereinafter “ODRC”] Policy 111-07.<sup>29</sup> This policy has been revised and now contains two relevant versions: the “Old Policy” and the “New Policy.”<sup>30</sup> The problems with inmate placement that persisted under the Old Policy were corrected in the New Policy by providing more guidance on OSP inmate selection and affording inmates more procedural safeguards against erroneous and undeserved OSP placement.<sup>31</sup>

Upon entering the correctional system, all Ohio inmates are assigned a numerical security classification ranging from level 1 through level 5, with 1 being the lowest security risk and 5 the highest.<sup>32</sup> This initial risk classification is based on various factors including the nature of the underlying offense, criminal history, and gang affiliation.<sup>33</sup> The inmates sent to

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<sup>29</sup> See *Wilkinson*, 125 S.Ct. at 2390 (citing Ohio Department of Rehabilitation and Corrections Policy 111-07 (Aug. 31, 1998)).

<sup>30</sup> See *id.* (indicating that the Old Policy took effect on January 28, 1999, but problems with the Old Policy lead to the creation of the New Policy which took effect in early 2002).

<sup>31</sup> See *id.* (declaring that the New Policy was promulgated after forming a committee to study the matter and retaining a national expert in prison security, resulting in the a policy that provided more guidance on the factors to be considered in placement decisions and afforded inmates more procedural protection against erroneous placement at OSP).

<sup>32</sup> See *Austin II*, 372 F.3d at 350 (citing Ohio Department of Rehabilitation and Corrections Policy 53-CLS-01 § V and Ohio Department of Rehabilitation and Corrections Policy 111-07 § VI(B)–(D), App. 125a–131a) (explicating that all prisoners in Ohio are assigned a rating from Level 1 [lowest risk] to Level 5 [highest risk] based on a predictive assessment of the likely security risk the prisoner presents “based on a variety of characteristics about the prisoner’s offense, any previous criminal conduct, his gang affiliation, etc” *Id.*); See also *Wilkinson*, 125 S.Ct. at 2390 (noting Level 5 inmates are placed in the OSP and levels 1 through 4 inmates are placed at lower security facilities throughout the State).

<sup>33</sup> See *Wilkinson*, 125 S.Ct. at 2390 (finding that a classification for review for OSP placement can occur either (1) upon entry into the prison system if the inmate was convicted of certain offenses or (2) during the term of incarceration if an inmate engages in specified conduct); See also *Petition for Writ of Certiorari, Austin v. Wilkinson*, 372 F.3d 346 (6th Cir. 2004) (No. 04-495) available at <http://docket.medill.northwestern.edu/archives/002123.php> (explaining that pursuant to ODRC Policy 111-

OSP are those who fall into Classification Level 5, which is a “security level for inmates who commit or lead others to commit violent, disruptive, predatory, riotous actions, or who otherwise pose a serious threat to the security of the institution as set forth in the established Level 5 criteria.”<sup>34</sup> This classification is subject to modification at any time during the inmate's prison term if the inmate engages in any misconduct that is deemed a security risk.<sup>35</sup>

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07, the procedure for classifying inmates as Level 5 is triggered by: (1) an independent finding that the inmate has committed a serious violation of prison rules, or (2) the inmate's conviction for a new crime committed while in prison).

<sup>34</sup> See *Wilkinson*, 125 S.Ct. at 2390 (citing Ohio Department of Rehabilitation and Correction 53-CLS-04; See also OSP Inspection Report, *supra* note 17 (outlining Level 5 placement criteria) (The criteria governing Level 5 placement considers:

(1) Whether the inmate has demonstrated physically or sexually assaultive and/or predatory behavior resulting in either serious physical injury or death to any person...; (2) the nature of the criminal offense committed prior to incarceration constitutes a current threat...; (3) the inmate has lead, organized, or incited a serious disturbance or riot that resulted in the taking of a hostage, significant property damage, physical harm, or loss of life; (4) the inmate has conspired or attempted to convey, introduce or possess major contraband which poses a serious threat or danger to the security of the institution...; (5) the inmate functions as a leader, enforcer, or recruiter of a security threat group, which is actively involved in violent or disruptive behavior; (6) the inmate escaped, attempted to escape or committed acts to facilitate an escape from a level three or four or equivalent close or maximum security facility...; (7) the inmate has demonstrated an ability to compromise the integrity of staff, which resulted in a threat to the security of the institution; (8) the inmate knowingly exposed others to the risk of contracting a dangerous disease, such as HIV or hepatitis; and (9) the inmate, through repetitive and/or seriously disruptive behavior, has demonstrated a chronic inability to adjust to level 4B as evidenced by repeated class II rule violations. *Id.*

<sup>35</sup> See *Petition for Writ of Certiorari, Austin v. Wilkinson*, 372 F.3d 346 (6th Cir. 2004) (No. 04-495) available at <http://docket.medill.northwestern.edu/archives/002123.php> (defining how although prisoners receive initial classification upon incarceration, that

On an unannounced inspection of OSP in January 2004, the placement of inmates, according to the offenses they were convicted of, classified as level 5 were reported as follows:

Table 1.1<sup>36</sup>

Reasons for Level 5 Placement	Percent
Serious Assault of an Inmate	29%
Serious Assault of an Employee	26%
Murder of an Inmate	23%
Murder of Employee	8%
Hostage/Kidnapping of Employee	7%
Rape of an Inmate	3%
Serious Escape related Offense	1%
Conspiracy to Murder Inmate	1%
Pre-Incarceration Offenses	1%

The New Policy provides inmates with more procedural safeguards against erroneous and undeserved OSP placement through the ODRC inmate review process.<sup>37</sup> This protection is initiated by a “Security Designation Long Form” [hereinafter “Long Form”], which details the inmate's recent violence, escape attempts, gang affiliation, underlying offense, and other pertinent details.<sup>38</sup> The New Policy provides inmates with forty-eight hours notice of their

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classification is subject to change at any point during prisoner’s term, based on prison conduct).

<sup>36</sup> See OSP Inspection Report, *supra* note 17.

<sup>37</sup> See *Wilkinson*, 125 S.Ct. at 2390 (declaring New Policy provides more guidance on factors to be considered in placement decisions and afforded inmates more procedural protection against erroneous placement at OSP).

<sup>38</sup> *Id.* (explicating review process begins when prison officials prepare “Security Designation Long Form,” three-page form detailing inmate recent violence, escape attempts, gang affiliation, underlying offense, and other pertinent details).

hearing, where a three-member committee will review the inmate's proposed security classification level.<sup>39</sup> Inmates are provided with their Long Form in advance. They are then permitted to attend the hearing and may submit a written statement or offer any pertinent information, explanation, and/or objection to their OSP placement.<sup>40</sup>

The committee must recommend placement and the inmate's current warden must approve the placement, for an inmate to be placed in OSP.<sup>41</sup> The inmate has fifteen days to file an objection to their placement with the Bureau of Classification, a body of Ohio prison officials vested with the final decision making authority over all Ohio inmate assignments.<sup>42</sup> If any of these three administrative bodies finds placement at the OSP inappropriate the process terminates.<sup>43</sup> If the Bureau approves the warden's recommendation, however, the inmate is transferred to

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<sup>39</sup> *Id.* (describing how three-member classification committee convenes to review proposed classification and to hold hearings after inmate receives at least forty-eight hours written notice of hearing, summarizing the conduct or offense triggering placement review).

<sup>40</sup> *Id.* (noting that inmates may not call witnesses); *See also* Petition for Writ of Certiorari, *Austin v. Wilkinson*, 372 F.3d 346 (6th Cir. 2004) (No. 04-495) available at <http://docket.medill.northwestern.edu/archives/002123.php>, (citing Policy 111-07 § VI(C), App.127a–130a; Notice of Hearing Form, App. 144a (explaining that inmates are permitted to make written and oral submissions at hearing)).

<sup>41</sup> *See Wilkinson*, 125 S.Ct. at 2390 (citing Policy 111-07 § VI(C), App. 127–130a; Classification Committee Report Form, App. 144a (requiring that if Committee does recommend OSP placement, it documents decision on a “Classification Committee Report” setting forth “the nature of the threat the inmate presents and the committee's reasons for the recommendation,” as well as summary of any information presented at hearing. *Id.*)).

<sup>42</sup> *See Wilkinson*, 125 S.Ct. at 2391 (citing Policy 111-07 § VI(C), App. 127a–130a (detailing that if Warden approves placement recommendation, Warden forwards it to ODRC's Bureau of Classification for final approval but inmate has 15 days to file any objections with Bureau of Classification)).

<sup>43</sup> *See id.* at 2390 (finding if any one reviewer declines to recommend OSP placement, process terminates).

OSP.<sup>44</sup> Inmates assigned to OSP receive another review within the thirty days prior to their arrival.<sup>45</sup> Designated OSP staff members review the inmate's file to determine if the inmate's placement was appropriate.<sup>46</sup> If the review board finds the placement proper, then the inmate remains in OSP.<sup>47</sup>

After initial placement at OSP, the classification committee notifies the inmates, at least twice a year, to inform them of their progress toward security level reduction.<sup>48</sup> The committee must advise the inmate of any specific conduct necessary for Level 5 classification reduction, as well as the committee's estimate of the amount of time before the inmate's security level is likely to be reduced.<sup>49</sup> The classification committee evaluates several factors in accordance with ODRC policy 53-CLS-04, to determine if an inmate's reduction from Level 5 security classification is appropriate.<sup>50</sup>

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<sup>44</sup> *Id.* at 2391 (explaining that if the Bureau of Classification deems inmate is properly placed, inmate remains in OSP).

<sup>45</sup> *See id.* (detailing how inmates assigned to OSP receive placement review within 30 days of their arrival).

<sup>46</sup> *Id.* (explaining that designated OSP staff member examine inmate files to determine if placement was appropriate).

<sup>47</sup> *See id.* (showing that If OSP staff member deems inmate is inappropriately placed, the reviewer prepares written recommendation to OSP warden that inmate be transferred to lower security institution).

<sup>48</sup> *See id.* (citing ODRC Policy 53-CLS-04, mandating that "inmates classified into Level 5B shall have an assessment completed every three months; inmates classified as Level 5A shall have an assessment every six months." *Id.*).

<sup>49</sup> The annual review focuses on a variety of factors that are designed to allow a predictive assessment of the risk the prisoner presents including: "the prisoner's underlying criminal offense, the time left on his sentence, the reasons for his Supermax placement, the time that has elapsed since the incident prompting placement, his conduct at OSP, the extent to which he has taken advantage of programming and his interaction with staff." *Petition for Certiorari, Austin v. Wilkinson*, 372 F.3d 346 (6th Cir. 2004) (No. 04-495), *available at* <http://docket.medill.northwestern.edu/archives/002123.php> (citing Policy 111-07 § VI(F), (H) & (I); Privilege/Security Level Review Form, App. 144a.).

<sup>50</sup> *See Wilkinson*, 125 S.Ct. at 2391 (citing ODRC Policy 53-CLS-04); *See also* OSP Inspection Report, *supra* note 17 (detailing classification committee considerations in determining security

### C. Conditions at OSP

Supermax prisons are designed to exercise complete control over inmates through social isolation and restricting mobility.<sup>51</sup> OSP inmates are subject to more restrictions than prisoners at other Ohio correctional facilities, including those in maximum-security prisons.<sup>52</sup> OSP detains inmates in their

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classification level reduction) In considering the reduction in security classification level, the classification committee will consider:

Reason for placement in Level 4 or 5 and relevant circumstances; Conduct Reports; Current Privilege Level; Time Served in current privilege level; Total time spent in Level 5 and/or Level 4; Time left to spend on current sentence; Time since last incident that resulted in inmate being designated Level 5 or 4; Program Involvement; Behavior in last five years; including prior to Level 4 or 5 classification; Security level prior to placement; Adjustment/behavior after placement; Factors which indicate a risk of future violence; Interaction with others (staff and/or inmates); Recognition and acknowledgement of the factors contributing to the commission of the placement offense and nature; The findings and recommendations of the previous assessment committees; Previous review committees; and the findings and recommendations of all assessment committees subsequent to the placement in Level 4 or 5. *Id.* at 10-11

<sup>51</sup> See MacArthur Justice Center, *Supermax Prisons*, <http://macarthur.uchicago.edu/supermax/index.html> (finding that Supermax prisons exercise control over inmates through extreme social isolation, severely restricting movement, and environments restricting stimulation); For a graphical display of the privileges and restrictions on OSP inmates, see OSP Inspection Report, *supra* note 17, at 13 (outlining privileges and restrictions of Level 5 inmates in areas of telephone use, recreation amounts and facilities, visitation, attorney visits, clergy visits, library visits, reading materials, meals, hygiene, media and education programs).

<sup>52</sup> See *Wilkinson*, 125 S.Ct. at 2388 (claiming OSP conditions are more restrictive than any other form of incarceration in Ohio, including conditions on its death row or in its administrative control units); See also OSP Inspection Report, *supra* note 17, at 13 (comparing privileges of OSP inmates and non-OSP inmates in areas of telephone use, recreation amounts and facilities, visitation, attorney visits, clergy visits, library visits, reading materials, meals, hygiene, media and education programs).

cells for twenty-three hours a day.<sup>53</sup> These single occupancy cells measure roughly 89.7 square feet and are sealed with a solid metal door.<sup>54</sup> The door contains a small, thick glass window and a food slot through which all meals are served.<sup>55</sup>

OSP cells are designed to be highly restrictive, with minimal amenities and personal items available.<sup>56</sup> Each cell has a “narrow outside window that cannot be opened [and is smaller than] the square footage standard established by the American Correctional Association.”<sup>57</sup> Inmates have no control over the temperature of the cells or the circulation of air through the cell.<sup>58</sup> Each cell is scarcely furnished with a

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<sup>53</sup> See Rachel Kamel and Bonnie Kerness, *The Prison Inside the Prison: Control Units, Supermax Prisons and Devices of Torture*, 2 (2003) (explaining that prisoners are confined for twenty-three or twenty-four hours a day, often in what they describe as an “eerie silence”); See also Correctional Institutional Inspection Committee: Inspection Report, Nov. 20, 1999, available at [http://www.ciic.state.oh.us/publications/osp\\_page.html](http://www.ciic.state.oh.us/publications/osp_page.html) (detailing that inmates are locked in their solid door-front cells 23 hours each day).

<sup>54</sup> See Correctional Institutional Inspection Committee, *supra* note 53 (explicating that inmates are locked in their solid door-front cells 23 hours each day).

<sup>55</sup> See Kamel, *supra* note 53, at 2 (detailing how food trays arrive in small slots in the door to further OSP design for inmates to rarely leave their cells); See also Correctional Institutional Inspection Committee, *supra* note 53 (describing each cell as having a solid-front cell door has one small, thick glass window and key controlled “food slot” hatch).

<sup>56</sup> OSP inmates have no contact visits: prisoners sit behind a plexiglass window, phone calls and visitation privileges are strictly limited, books and magazines may be denied and pens restricted, TV and radios may be prohibited or, if allowed, are controlled by guards. Prisoners have little or no personal privacy: guards monitor the inmates' movements by video cameras, communication between prisoners and control booth officers is mostly through speakers and microphones, an officer at a control center may be able to monitor cells and corridors and control all doors electronically. Lynd, *supra* note 25 (detailing limited interaction and restricted OSP environment).

<sup>57</sup> See *Austin v. Wilkinson*, 189 F.Supp.2d 719, 724 (N.D. Ohio 2002) [hereinafter *Austin I*] (overturned as to due process analysis but not as to description of OSP; finding that cell small windows do not comply with square footage standard established by American Correctional Association).

<sup>58</sup> *Id.*

“sink, toilet, small desk, and an immovable stool.”<sup>59</sup> Inmates sleep on a “narrow concrete slab with a thin mattress.”<sup>60</sup> The department strictly limits the amount of personal property allowed to an inmate.<sup>61</sup> Additionally, a light remains on in the cell at all times.<sup>62</sup> Although the light can be dimmed, an inmate who attempts to shield the light to sleep is subject to further discipline.<sup>63</sup>

OSP inmates are allowed to leave their cell one hour a day to access a two room recreational area.<sup>64</sup> After reviewing the recreation rooms at OSP, the American Correctional Association found the facility did not meet the ceiling height standard and “did not comply with its standards for outdoor recreation.”<sup>65</sup> The solitary recreation policy for all inmates has recently been changed to allow a limited number of inmates to have recreation with one other prisoner.<sup>66</sup>

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<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* (finding OSP has extra limitations on personal property rights); *See also* Correctional Institutional Inspection Committee, OSP Inspection Report, at 13 (Jan. 29, 2004), <http://www.ciic.state.oh.us/reports/osp.pdf> (outlining privileges and personal property restrictions on OSP inmates).

<sup>62</sup> *Austin I*, 189 F.Supp.2d at 724 (explicating that cell light remains on at all times, although light can be dimmed); *See also* Kamel, *supra* note 53 at 4 (describing that when prisoners are confined in their cells they are subjected to either an “eerie silence” or constant unpleasant noise, or by “having lights on twenty-four hours per day.”).

<sup>63</sup> *Austin I*, 189 F.Supp.2d at 724 (explaining how inmates who attempt to shield cell’s light on 24 hour per day before sleeping is subject to further discipline).

<sup>64</sup> *See* Correctional Institutional Inspection Committee, *supra* note 53 (detailing how inmates are given one hour of recreation per day at least five times per week and that inmate movement to recreation area is conducted by escort of at least two Correctional Officers while inmate is in full restraints); *See also* Everett Hoffman, Background on Super Maximum Security (Supermax) Isolation Units, THE ADVOCATE: AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY, (Jan. 1999) (detailing that inmates are allowed one hour of solitary recreation in a concrete enclosure, but their movements are monitored by video cameras and they are required to be visually searched by standing naked before control booth window).

<sup>65</sup> *See Austin I*, 189 F.Supp.2d at 724.

<sup>66</sup> *Id.*



Inmate interaction at OSP is strictly limited.<sup>67</sup> OSP inmates eat alone, exercise alone, and are not allowed to share books, magazines or other personal property.<sup>68</sup> Until the recent introduction of group counseling sessions, inmates were not permitted to communicate with others.<sup>69</sup> The “group counseling sessions are conducted by placing inmates in adjacent bar-fronted cells so that each inmate can see the counselor and hear the other inmates.”<sup>70</sup>

### III. THE DUE PROCESS CHALLENGE IN *WILKINSON*

In *Wilkinson*, a class of current and former OSP inmates filed suit for equitable relief under 42 U.S.C. § 1983, alleging that Ohio’s policy for selecting inmates for incarceration in OSP violated the Fourteenth Amendment’s Due Process Clause.<sup>71</sup> The Supreme Court granted certiorari to consider

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<sup>67</sup> For a further description of the limited interaction and restrictive conditions, see Correctional Institutional Inspection Committee, *supra* note 53.

<sup>68</sup> See generally OSP Inspection Report, *supra* note 17, at 13 (outlining privileges and personal property restrictions on OSP inmates); See generally Kamel, *supra* note 53.

<sup>69</sup> See *Austin I*, 189 F.Supp.2d at 725; The program booths observed in the inspection provide the inmates with the opportunity for out of cell programming and interaction with staff and inmates that otherwise would not be possible. Programming and counseling is offered in education, substance abuse, religion, personal and emotional health, and community service. OSP Inspection Report, *supra* note 17, at 13 (explicating that OSP was not designed to accommodate out of cell programming so potential programming space is extremely limited).

<sup>70</sup> See *Austin I*, 189 F.Supp.2d at 725 n.7 (citing expert testimony that there was no communication between inmates as “inmates were almost always being brought out in isolation” and there was no contact with other inmates except for those situations in housing units where they could recreate together. *Id.*).

<sup>71</sup> *Wilkinson v. Austin*, 125 S.Ct. 2384, 2391 (2005) (citing class of current and former OSP inmates brought suit under 42 U.S.C. § 1983 against various Ohio prison officials alleging that Ohio’s Old Policy violated due process); For a discussion on the selection procedures for OSP placement see *infra* notes 27-50 and accompanying text (detailing OSP placement under New Policy); See also 42 U.S.C. §1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the

what process an inmate must be afforded under the Due Process Clause when he is considered for placement at OSP.<sup>72</sup> The Court concluded that inmates have a protected liberty interest in avoiding assignment to OSP. The

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District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. *Id.*

*See also* U.S. CONST. Amend. XIV §1, which states:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

<sup>72</sup> *Wilkinson*, 125 S.Ct. at 2386-87 After an eight-day trial, the District Court found that (1) based on the Supreme Court decision in *Sandin v. Conner*, the inmates have a liberty interest in avoiding assignment to OSP and (2) Ohio denied the inmates due process by failing to give inmates adequate notice regarding the basis for their incarceration at OSP and by failing to provide inmates sufficient opportunity to understand the reasoning and evidence for their retention at OSP. The Court further found that although Ohio's New Policy provided more procedural safeguards than its Old Policy, it was nonetheless inadequate to meet procedural due process requirements. The District Court ordered extensive substantive and procedural modifications to the policy in an attempt to narrow the grounds that Ohio could consider in recommending OSP placement. The Court of Appeals for the Sixth Circuit affirmed the District Court's conclusion that the inmates had a liberty interest in avoiding placement at OSP. The Court also affirmed the District Court's procedural modifications in their entirety, but set aside the District Court's far-reaching substantive modifications, holding the modifications "exceeded the scope of the District Court's authority." *Id.*

procedures set forth in the New Policy are sufficient to satisfy the Constitution's requirements.<sup>73</sup>

### A. Existence of a Liberty Interest

In *Sandin v. Conner*, the Supreme Court considered due process protections of prisoners' claiming liberty deprivation under the Due Process Clause.<sup>74</sup> The Fourteenth Amendment's Due Process Clause protects persons against deprivations of life, liberty, and property.<sup>75</sup> Those who seek to invoke the Fourteenth Amendment must establish that one of the protected interests is at stake.<sup>76</sup> A liberty interest can

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<sup>73</sup> See *id.* at 2398 (holding that Court of Appeals was correct to find inmates possessed a liberty interest in avoiding assignment at OSP, however, lower court was incorrect to sustain procedural modifications); For an example of the history of prisoners and the Due Process Clause, see *Morrissey v. Brewer*, 92 S.Ct. 2593 (1972) (where the Court addressed the question of whether due process required a hearing before a parolee's status could be revoked properly. In discussing for the first time the liberty interests of convicted prisoners under the new due process analysis, the Court noted that parolees have a liberty interest in remaining free from restraint while abiding lawfully by the terms of their parole, and that the Constitution required due process protection in such a situation.); See also *Wolff v. McDonnell*, 94 S.Ct. 2963 (1975) (creating the "state-created liberty interest doctrine," for cases in which prisoners claimed a violation of a liberty interest without due process) (The Court held that prisoners deserved due process protection in situations where the state had created a specific entitlement through its statutes and regulations. The court held that prisoners are deserving of due process sufficient to "insure that the state-created right [was] not arbitrarily abrogated." *Id.*); See also *Meachum v. Fano*, 97 S.Ct. 191 (1976) (This case held that prison officials had absolute authority to make decisions concerning where to house convicted prisoners and when to transfer prisoners from prison to prison, as long as objective law did not grant prisoners rights limiting such official discretion and found that, unless a deprivation of liberty within prison could be tied to the Constitution itself, only the loss of a specific state-created liberty interest would entitle a prisoner to protection under the Due Process Clause.).

<sup>74</sup> See *infra* notes 84-127 and accompanying text.

<sup>75</sup> U.S. CONST. Amend. XIV § 1.

<sup>76</sup> The "consideration of a due process claim goes through two steps. First, the Court asks whether a liberty or property interest exists with which the state has interfered. Second, the Court determines whether the

be created within the Constitution itself, by reason of guarantees implicit in the word “liberty” or from an expectation or interest created by state laws or policies.<sup>77</sup>

### 1. *Sandin v. Conner*

The issue of whether the Due Process Clause requires prisons to establish formal procedures in its administration of discipline is not a new issue for the Supreme Court.<sup>78</sup> In *Sandin*, the Court addressed the legal standards that courts apply in considering prisoner claims of liberty deprivation under the Due Process Clause.<sup>79</sup> Specifically, *Sandin* required the Court to determine whether an inmate had been deprived of his due process rights when Hawaii prison officials selected the inmate for placement in solitary confinement for thirty days without a formal selection

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procedures attendant upon that deprivation were constitutionally sufficient.” *Austin v. Wilkinson*, Case No. 4:01-CV-71 (ND Ohio, November 21, 2001).

<sup>77</sup> See, e.g., *Wolff*, 94 S.Ct. at 2963 (1974) (finding liberty interest in avoiding withdrawal of state-created system of good-time credits).

<sup>78</sup> See *infra* notes 84-127 and accompanying text; See *Meachum v. Fano*, 96 S. Ct. 2532 (1976) (history of prior Supreme Court holdings considering inmates’ liberty interests and due process) (finding there was no liberty interest arising from Due Process Clause inherent in transfers from low to maximum-security prison because “confinement in any of the State’s institutions is within the normal limits or range of custody which the conviction has authorized the State to impose”). See also *Kentucky Dept of Corr. v. Thompson*, 490 U.S. 454, 464-65 (1989) (holding that no procedures need accompany suspension of visitation privileges); See also *Sandin v. Conner*, 115 S. Ct. 2293 (1995). See also *Wolff*, 94 S. Ct. at 2963 (holding that states may under certain circumstances create liberty interests which are protected by Due Process Clause, but these interests will “be limited to restraints on freedom which impose ‘atypical and significant hardship on inmates in relation to ordinary incidents of prison life’” and concluding that due process applies prior to revocation of good time credits.). See also *Bd. of Pardons v. Allen*, 482 U.S. 370, 378-81 (1987) (concluding that due process applies to denial of parole); See also *Hewitt v. Helms*, 459 U.S. 461, 471-72 (1983) (finding that due process applies prior to administrative segregation).

<sup>79</sup> See *Sandin*, 115 S.Ct. at 2293 (involving a procedural due process protection claim before placement in segregated confinement for thirty days, imposed as discipline for disruptive behavior).

procedure.<sup>80</sup> The Court altered its methodology for determining when such formal procedures are required and found the inmate's due process rights had not been violated.<sup>81</sup> Under the Court's new methodology, prison officials acting in violation of specific regulations often gives rise to a liberty interest worthy of procedural due process protection.<sup>82</sup>

Prior to *Sandin*, courts relied heavily on state statutes and prison rules in cases involving questions of prisoner's procedural due process rights.<sup>83</sup> According to *Sandin*, the

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<sup>80</sup> *Id.* at 2301-02 (the Court held that the prisoner's "discipline in segregated confinement [for thirty days] did not present the type of atypical, significant deprivation in which a state might conceivably create a liberty interest." The segregated confinement did not "present a dramatic departure from the basic conditions of [the inmate's] sentence," as inmates in the general population experienced "significant amounts of 'lockdown time'" and the severity of confinement in disciplinary segregation was not excessive. *Id.* at 2301.); *See id.* (holding that states may under certain circumstances create liberty interests that are protected by the Due Process Clause.)

<sup>81</sup> *See id.* at 2300; *See also* Scott F. Weisman, *Sandin v. Conner: Lowering the Boom on the Procedural Rights of Prisoners*, 46 AM. U.L. REV. 897, 909 (citing *Kentucky Dept. of Corr. v. Thompson*, 490 U.S. 454, 462-63 (1989) (claiming that before *Sandin*, Supreme Court recognized state-created liberty interests when a statute or prison regulation contained: (1) substantive predicates or specific criteria to guide prison officials in deciding whether to alter conditions or length of inmates' confinement; and (2) mandatory language, earmarked with words such as "shall" or "must," permitting adverse change in confinement only if substantive predicates were met)).

<sup>82</sup> Michael Z. Goldman, *Sandin v. Conner and Intraprison Confinement: Ten Years of Confusion and Harm in Prisoner Litigation*, 45 B.C. L. REV. 423, 425 (2004) (noting that for twenty years prior to *Sandin*, Supreme Court recognized that prisoners possessed liberty interests protected by Due Process Clause if prisoners could point to specific state or federally created right that prison officials had violated).

<sup>83</sup> *See* *Wilkinson v. Austin*, 125 S.Ct. 2384, 2408 (2005) (citing *Sandin*, 115 S. Ct. 2293 (noting earlier Supreme Court cases had employed methodologies for identifying state-created liberty interests that emphasized "the language of a particular [prison] regulation" instead of "nature of the deprivation" *Id.*)); *See also* Weisman, *supra* note 81, at 909 (citing *Kentucky Dept of Corr.*, 490 U.S. at 462-63 (explaining that before *Sandin* Supreme Court recognized state-created liberty interests when a statute or prison regulation contained: (1) substantive predicates or specific criteria to guide prison officials in deciding whether to alter

proper inquiry should focus on whether a violation caused an “atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.”<sup>84</sup> The *Sandin* Court shifted due process analysis to the severity of the proposed punishment when it held that formal procedures are required for those punishments that pose an “atypical and significant hardship” on the inmate.<sup>85</sup> In determining whether the conditions of the inmate’s confinement constitute an “atypical and significant hardship,” courts must consider the nature of the restrictive conditions themselves “in relation to the ordinary incidents of prison life.”<sup>86</sup> Under the new

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conditions or length of inmate's confinement and (2) mandatory language, earmarked with words such as “shall” or “must,” permitting an adverse change in confinement only if substantive predicates were met)).

<sup>84</sup> *Sandin*, 115 S.Ct. at 2300 (holding prior analysis focused on finding “negative implications from mandatory language in prisoner regulations has strayed from the real concerns undergirding the liberty protected by the Due Process Clause” in attempts to return to due process principles established in *Wolff* and *Meachum*. *Id.*).

<sup>85</sup> *See id.* at 2301-02 (illustrating that after *Sandin*, courts inquired into “existence of a protected, state-created liberty interest in avoiding restrictive conditions of confinement is not found in regulation language regarding those conditions but in nature of those conditions themselves in relation to ordinary incidents of prison life” *Id.*); *See also* Julia M. Glencer, *An ‘Atypical and Significant’ Barrier to Prisoners’ Procedural Due Process Claims Based on State-Created Liberty Interests*, 100 DICK. L. REV. 861, 894 (disapproving of prior methodologies because of two undesirable effects resulting from its application). The prior methodology was resulting in two undesirable effects from its application:

First, states were reluctant to codify guidelines for prison management for fear of creating liberty interests that invited litigation. Supreme Court precedent under *Hewitt* actually militated against written standards, even though guidelines were sorely needed to moderate prison officials' unbridled discretion. Second, the use of the old methodology drew federal courts into daily prison administration. The traditional leeway given prison officials in maintaining order inside the country's prisons had been usurped by the courts.

*Id.*

<sup>86</sup> *See Sandin*, 115 S.Ct. at 2296 (describing how states may create liberty interests, when “atypical and significant hardship [would be borne by] the inmate in relation to the ordinary incidents of prison life” *Id.*).

methodology, the Court found thirty days of solitary confinement was not an “atypical and significant hardship.”<sup>87</sup>

In *Wilkinson*, the Court applied the *Sandin* methodology to determine whether the harsh conditions within OSP imposed an “atypical and significant hardship” that created a liberty interest in avoiding placement to OSP.<sup>88</sup> The Court noted, despite the severe limitations on human interaction, OSP’s conditions would likely be similar to most solitary confinement facilities and not be an “atypical or significant hardship.”<sup>89</sup>

The Court found, however, there were two additional restrictions placed on OSP inmates, which increased the amount of hardship beyond the normal course of prison confinement.<sup>90</sup> First, the duration of placement at OSP was indefinite and only reviewed annually.<sup>91</sup> Second, placement

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<sup>87</sup> See *id.* at 2300 (noting court record showed that solitary punishment, was similar to conditions imposed upon inmates in administrative segregation and protective custody and that inmates in general populations experienced “significant amounts of ‘lockdown time’” and degree of confinement in disciplinary segregation was not excessive).

<sup>88</sup> See *Wilkinson*, 125 S.Ct. at 2394 (reasoning that *Sandin* standard required courts “to determine if assignment to OSP ‘imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life’” *Id.*); To determine whether the inmate has endured an atypical and significant hardship, courts must compare the conditions of confinement in the Supermax facility to those an inmate would ordinarily expect in prison. See Maximilienne Bishop, *Supermax Prisons: Increasing Security or Permitting Persecution?*, 47 ARIZ. L. REV. 461. (2005) (explaining that in determining if liberty interests exist, courts must find that conditions constitute “atypical and significant hardship” on inmates).

<sup>89</sup> See *Wilkinson*, 125 S.Ct. at 2394 (noting that for OSP inmates, almost all human contact is prohibited, even cell to cell conversation; cell lights are on for 24 hours and only one hour of exercise in small indoor rooms is permitted per day).

<sup>90</sup> *Id.* (holding that OSP conditions would likely apply to most solitary confinement facilities, except for two added components: duration and that placement disqualifies an otherwise eligible inmate for parole consideration).

<sup>91</sup> See *id.* at 2394-2395 (noting that unlike 30-day placement at issue in *Sandin*, placement at OSP is indefinite and, after OSP’s initial 30-day review, is reviewed just annually).

in OSP disqualifies an otherwise eligible inmate for parole consideration.<sup>92</sup> The Court acknowledged the disagreement among the Courts of Appeals as to the proper baseline to define an “atypical or significant hardship.”<sup>93</sup> The *Wilkinson* Court opted not to resolve the disagreement as the Court found, under any plausible baseline, the OSP’s harsh conditions imposed an “atypical and significant hardship” within the correctional context which creates a liberty interest in avoiding placement to OSP.<sup>94</sup>

### **B. How Much Process is Due? The *Mathews v. Eldridge* Test**

Having found the existence of a liberty interest, the *Wilkinson* Court turned to the question of what due process is due to an inmate that Ohio seeks to place in OSP.<sup>95</sup> The Court noted that because the proper procedural protections depend on the nature of the particular situation, the requirements of due process are flexible.<sup>96</sup> In evaluating the sufficiency of Ohio’s selection procedure, the Court

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<sup>92</sup> See *id.* at 2395 (finding that OSP placement disqualifies an otherwise eligible inmate for parole consideration is unlike restrictions in *Sandin*.)

<sup>93</sup> See *Sandin*, 115 S.Ct. at 2300; See also *Wagner v. Hanks*, 128 F.3d 1173, 1177 (7th Cir. 1997) (explaining this divergence indicates difficulties in locating appropriate baselines, however, need not be resolved as assignment to OSP imposes an atypical and significant hardship under any plausible baseline).

<sup>94</sup> See *Sandin*, 115 S.Ct. at 2300 (noting that despite Ohio’s interest in decreasing dangerous high-risk inmates on both prison officials and other prisoners, under *Sandin*’s standard, OSP’s harsh conditions impose atypical and significant hardships within correctional context that creates inmate liberty interest in avoiding placement to OSP.)

<sup>95</sup> See *Wilkinson*, 125 S.Ct. at 2395 (explicating that since inmate liberty interest in avoiding OSP has been established, inquiry now turns to question of what process is due inmates whom Ohio seeks to place in OSP).

<sup>96</sup> See *id.* (citing *Morrissey v. Brewer*, 92 S. Ct. 2593 (1972)) (declining to establish rigid rules and instead embraced a flexible framework to evaluate the sufficiency of particular procedures).



continued the framework established in *Mathews v. Eldridge*.<sup>97</sup>

### 1. *Mathews v. Eldridge*

In *Mathews*, the Supreme Court created a three prong balancing test to determine the proper amount of due process required under a particular set of facts and circumstances.<sup>98</sup> In determining that no evidentiary hearing is required before termination of disability benefits and that present administrative procedures fully satisfy due process guarantees, the Court expounded the three due process factors.<sup>99</sup> The Court's balancing test required the consideration of:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.<sup>100</sup>

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<sup>97</sup> *Mathews v. Eldridge*, 424 U.S. 319 (1976).

<sup>98</sup> *Id.* (determining whether Due Process Clause of Fifth Amendment provides opportunities for evidentiary hearings to Social Security disability benefit recipient prior to termination of his benefits).

<sup>99</sup> *Id.* at 336 (quoting 42 U.S.C. § 423(d)(3)) (holding unsatisfied worker must provide medical assessments of physical or mental conditions stating that he is unable "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment" *Id.*); See also Matthew Q. Ammon, *Constitutional Law—Procedural Due Process—Employment—Suspension—State Employees*, 36 DUQ. L. REV. 951, 957 (1998) (explaining Court found small risk of wrongful deprivation under facts while government's interest was great in avoiding increased costs associated with hearings prior to termination of benefits and required payments while decisions are pending).

<sup>100</sup> See *Wilkinson*, 125 S.Ct. at 2395 (addressing nature and extent of hearing procedures that are required to protect against erroneous or

In applying the three factors set forth in *Mathews*, the Supreme Court found Ohio's New Policy provides a sufficient level of process for Ohio inmates being considered for placement in OSP.<sup>101</sup> Under the first *Mathews* factor, the Court considered the significance of the Ohio inmate's interest in avoiding improper placement at OSP.<sup>102</sup> The Court noted that lawfully confined prisoners have their liberties curtailed, so the proper amount of procedural protections afforded to inmates are more limited than in cases where the right to be free from total confinement is at stake.<sup>103</sup> Here, the inmate's private liberty interest is at stake

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arbitrary deprivation of any property interest and "recognizing that at some point the costs of additional procedural safeguards may outweigh their benefits" *Id.*); *See also* Matthew J. Macario, *Recent Decisions: Constitutional Law—Punitive Damage Awards and Procedural Due Process in Products Liability Cases*, 68 TEMP. L. REV. 409, 414 (1995) (stating *Mathews* test requires "utilitarian balancing of the interests at stake: When the private interest is not outweighed by the government's interest in preserving its procedural framework, procedural due process is satisfied" *Id.*); *See also* Bradley J. Wyatt, *Even Aliens Are Entitled to Due Process: Extending Mathews v. Eldridge Balancing to Board of Immigration Appeals Procedural Reforms*, 12 WM. & MARY BILL RTS. J. 606 (2004) (explaining *Mathews*' Court created a balancing test to determine whether administrative procedures conform to procedural due process laws. In order to determine what process is due, the Court called for "a balancing of private interests, the probable value of additional safeguards, and the government interest, including the cost of the procedure." *Id.*).

<sup>101</sup> *See Wilkinson*, 125 S.Ct. at 2395 (Supreme Court rejected the District Court's procedural modifications by finding the court improperly found that *Sandin* altered the first *Mathews* factor and increased the amount of due process protection required under the balancing test. Because the *Sandin* Court found there was no liberty interest at stake, "*Sandin* had no occasion to consider whether the private interest was weighty vis-à-vis the remaining *Mathews* factors." *Id.*).

<sup>102</sup> *See generally id.*; *see also* David Kauffman, *Procedures for Estimating Contingent or Unliquidated Claims in Bankruptcy*, 35 STAN. L. REV. 153, 165 (1982) (detailing that "to estimate the risk of an erroneous deprivation, courts must make intuitive judgments as to whether the procedures at issue will yield an accurate result" *Id.*).

<sup>103</sup> *See Wilkinson*, 125 S.Ct. at 2395 (citing *Gerstein v. Pugh*, 420 U.S. 103 (1975)); *See also* *Wolff v. McDonald*, 94 S.Ct. 2963 (1975)

and must be considered within the norms of the prison system and its infringement on the liberty of inmates.<sup>104</sup>

The second factor focuses on the “fairness and reliability” of the existing procedures, and the “probable value, if any, of additional procedural safeguards.”<sup>105</sup> Supreme Court procedural due process cases have consistently observed that notice and a fair opportunity for rebuttal are among the most important procedural mechanisms for purposes of avoiding erroneous deprivations.<sup>106</sup> The *Mathews* Court noted that Ohio’s New Policy provides for an inmate to receive both procedural requirements before being placed in OSP.<sup>107</sup> In addition to these safeguards, the Court noted Ohio’s New Policy provided further requirements that reduced the possibility of an erroneous OSP placement.<sup>108</sup> The New Policy: (1) allows inmates the opportunity to be heard at the Classification Committee stage and affords inmates the right to submit objections prior to the final level of review; (2) allows a subsequent reviewer to overturn a recommendation for placing an inmate in OSP and mandates the termination of the selection process if any one reviewer does not

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(noting that prisoners held in lawful confinement have their liberty curtailed by definition, so procedural protections to which they are entitled are more limited than in cases where questioned right is to be free from confinement completely).

<sup>104</sup> See *Wilkinson*, 125 S.Ct. at 2395 (holding “the private interest at stake here, while more than minimal, must be evaluated, nonetheless, within the context of the prison system and its attendant curtailment of liberties” *Id.*).

<sup>105</sup> *Mathews v. Eldridge*, 424 U.S. 319, 343 (1976).

<sup>106</sup> See, e.g., *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 99 S. Ct. 2100 (1979); See also *Cleveland Bd. of Educ. v. Loudermill*, 105 S. Ct. 1487 (1985); See also *Fuentes v. Shevin*, 92 S. Ct. 1983, 1993 (1972) (quoting *Baldwin v. Hale*, 68 U.S. 223 (1864) (explicating that “for more than a century the central meaning of procedural due process has been clear: ‘Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified’” *Id.*).

<sup>107</sup> See *Wilkinson*, 125 S.Ct. at 2396 (noting Ohio’s New Policy required officials to provide brief summaries of factual basis for inmate’s review and allows prisoners rebuttal opportunity implemented to prevent placement of inmates in OSP by mistake or bias).

<sup>108</sup> *Id.*

recommend OSP placement; (3) requires that a final recommendation for placement in OSP be accompanied by a short statement of the reasons from the decision maker and (4) provides a review of the prisoner's placement "within thirty days of the inmate's initial assignment to OSP."<sup>109</sup>

The final, and most influential, *Mathews* factor addresses the State's interest.<sup>110</sup> With Ohio's prison population reaching nearly 44,000 inmates, "the State's first obligation must be to ensure the safety of the guards and the prison personnel, the public, and the prisoners themselves."<sup>111</sup> The State's interest in maintaining prison security is threatened by the persistence of prison gangs and violence.<sup>112</sup> Prison gangs routinely engage in acts of violence as a means of gang discipline and control, as membership rituals, or as punishment against inmates who have testified against the gang.<sup>113</sup>

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<sup>109</sup> *Id.* (explaining that "this requirement guards against arbitrary decision making while also providing the inmate a basis for objection before the next decision maker or in a subsequent classification review" and "serves as a guide for future behavior" and finding that subsequent reviewer's ability to overturn recommendations for placing inmates in OSP "avoids one of problems apparently present under the Old Policy, where, even if two levels of reviewers recommended against placement, a later reviewer could overturn their recommendation without explanation" *Id.*).

<sup>110</sup> *Id.* (finding that in "the context of prison management, and in the specific circumstances of this case, this interest is a dominant consideration" *Id.*).

<sup>111</sup> *Id.* (citing Austin, 189 F. Supp. 2d 719, 727 (N.D. Ohio 2002)); *See also id.* at 2397(citing *Hewitt v. Helms*, 459 U.S. 461, 473 (1983) (noting "the safety of the institution's guards and inmates is perhaps the most fundamental responsibility of the prison administration." *Hewitt*, 459 U.S. at 473).

<sup>112</sup> *Id.* at 2396 (noting gangs are "clandestine, organized, fueled by race-based hostility, and committed to fear and violence as a means of disciplining their own members and their rivals" and "seek nothing less than to control prison life and to extend their power outside prison walls" *Id.*).

<sup>113</sup> *Id.* at 2396-97(detailing that murder of inmates, guards, or one of their family members on the outside is common form of gang discipline and control, as well as condition for membership in some gangs; testifying against, or otherwise informing on, gang activities can invite one's own death sentence; and prison gang members serving life

The State also has an interest in the efficient allocation of limited prison funding.<sup>114</sup> The high cost of the State's penitentiary system makes it difficult to fund more effective education and vocational assistance programs to improve the lives of the prisoners.<sup>115</sup> The Supreme Court noted, in *Wilkinson*, that courts must give "substantial deference to prison management decisions before mandating additional expenditures for elaborate procedural safeguards,"<sup>116</sup> when correctional officials have determined that an inmate has been involved in disruptive behavior.<sup>117</sup> In light of these economic constraints, the Court rejected the District Court's recommendation that inmates should be allowed to call witnesses at their OSP selection hearings.<sup>118</sup>

Ultimately, the Supreme Court found that after balancing the three *Mathews* factors, Ohio's New Policy in selecting

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sentences, without possibility of parole, have diminished deterrent effects); *See also* *United States v. Santiago*, 46 F.3d 885, 888 (9th Cir. 1995) (involving inmate gang members' being required to kill someone in prison before the inmate could become member of Mexican Mafia prison gang); *See also* *United States v. Silverstein*, 732 F.2d 1338, 1341 (7th Cir. 1984) (explaining that to qualify for membership in Aryan Brotherhood prison gang you must "make bones"— or kill somebody and detailing that Aryan Brotherhood and Mexican Mafia are allied, among other things in their hostility to black inmates, who have their own gangs.).

<sup>114</sup> *See Wilkinson*, 125 S.Ct. at 2397; *See also* Ohio Department of Rehabilitation and Correction, *The Institutions*, <http://www.drc.state.oh.us/Public/osp.htm> (outlining OSP's annual operating budget of \$28,595,868).

<sup>115</sup> *See Wilkinson*, 125 S.Ct. at 2397 (noting cost of keeping single prisoner in Ohio's ordinary maximum-security prisons is \$34,167 per year, while cost to maintain each inmate at OSP is \$49,007 per year).

<sup>116</sup> *Id.* at 2388

<sup>117</sup> *Id.* (holding that State's interest must be considered in light of State's limited resources and if Ohio were to allow inmates "to call witnesses or provide other attributes of an adversary hearing before ordering transfer to OSP, both the State's immediate objective of controlling the prisoner and its greater objective of controlling the prison could be defeated" *Id.*).

<sup>118</sup> *Id.* at 2397 (explaining that altering New Policy to permit calling witnesses is both economically infeasible and "the danger to witnesses, and the difficulty in obtaining their cooperation, make the probable value of an adversary-type hearing doubtful in comparison to its obvious costs" *Id.*).

inmates for OSP provided enough safeguards to insure against arbitrary assignment.<sup>119</sup> The Court noted that when the inquiry “draws more on the experience of prison administrators, and where the State’s interest implicates the safety of other inmates and prison personnel, the informal, non-adversary procedures”<sup>120</sup> applied provide the proper methodology.<sup>121</sup> Ohio’s New Policy provides “informal, non-adversary procedures” sufficient to satisfy the due process clause under the *Mathews* test and no further procedural modifications were necessary.<sup>122</sup>

#### IV. CRITICAL ANALYSIS OF *WILKINSON* OPINION

In balancing the *Mathews* factors in *Wilkinson*, the Court found that inmates’ private interests in avoiding placement into OSP did not outweigh the government’s interest in maintaining an orderly and safe penitentiary system.<sup>123</sup>

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<sup>119</sup> *Id.* at 2398 (holding balance of the *Mathews* factors reveals that Ohio’s New Policy is adequate to safeguard inmate liberty interests in not being assigned to OSP); *See also* *Morrissey v. Brewer*, 92 S. Ct. 2593 (1972) (finding Ohio is not attempting to remove inmates from free society for specific parole violation or to revoke good time credits for specific, serious misbehavior); *See also* *Wolff v. McDonald*, 94 S. Ct. 2963 (1975) (involving more formal, adversary-type procedures as useful).

<sup>120</sup> *Wilkinson*, 125 S.Ct. at 2397 (discussing *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979)).

<sup>121</sup> *See, e.g., Greenholtz*, 442 U.S. 1 (holding that the amount of process due for inmates being considered for release on parole includes opportunity to be heard and notice of any adverse decision); *See also* *Hewitt v. Helms*, 459 U.S. 460 (1983) (finding amount of process due for inmates being considered for transfer to administrative segregation includes some notice of charges and opportunity to be heard).

<sup>122</sup> *See Wilkinson*, 125 S.Ct. at 2397 (rejecting District Court and Court of Appeals order to alter New Policy).

<sup>123</sup> *See generally id.* (holding that in applying *Mathews* three factors, Ohio’s New Policy demonstrates it provides sufficient level of process); for a contrary balance of the *Mathews* factors, *see* *Cleveland Bd. of Educ. v. Loudermill*, 105 S. Ct. 1487 (1985) (finding government’s interest in limiting administrative burdens and delays, did not outweigh private interests even though government has interest in avoiding disruptions in

Inmates' interests were considered under the first factor of the *Mathews* test, which weighs the "private interest that will be affected by the official action."<sup>124</sup> The Court's opinion, however, focuses on the second and third *Mathews*' factors, hardly discussing the inmates' individual interests, thereby tipping the balance in favor of Ohio.<sup>125</sup> Traditionally, when determining the weight of the threatened individual interest, courts consider four major criteria: the severity of the deprivation, the duration of deprivation, the reversibility of the deprivation, and the access of claimants to private alternatives.<sup>126</sup> In the *Wilkinson* due process analysis under the *Mathews* test, the Court did not discuss any of these criteria.<sup>127</sup>

Additionally, in determining the weight of an inmate's interest in avoiding OSP selection, the Court chose not to

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its workplace, as it is better to keep skilled employees than to train new replacements).

<sup>124</sup> See *Mathews v. Eldridge*, 424 U.S. 335, 335 (1976); see also Macario, *supra* note 100, at 414 and accompanying text (stating *Mathews* test requires "utilitarian balancing of the interests at stake: When the private interest is not outweighed by the government's interest in preserving its procedural framework, procedural due process is satisfied" *Id.*).

<sup>125</sup> See *Wilkinson*, 125 S.Ct. at 2384.

<sup>126</sup> For a discussion on the severity of the property deprivation see *Bd. of Curators v. Horowitz*, 435 U.S. 78, 86 n.3 (1978); For a discussion on the duration of the deprivation see *Mackey v. Montrym*, 443 U.S. 1, 12 (1979) (describing that "duration of any potentially wrongful deprivation of a property interest is an important factor in assessing the impact of official action on the private interest involved"); see also *North Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 606 (1975); see also *Fusari v. Steinberg*, 419 U.S. 379, 389 (1975); For a discussion on reversibility of deprivation, see *Mathews*, 424 U.S. at 340 (1976) (explicating that availability of full retroactive relief for recipient whose social security benefits were wrongfully terminated greatly influenced Court's decision); see also *Bell v. Burson*, 402 U.S. 535, 539 (1971) (detailing that it is impossible to recompense driver for lost time during which driver could not drive and for resulting burdens on performance of his duties due to improperly revoked license); for a discussion on the access of claimants to private alternatives see *Mathews*, 424 U.S. at 342 (1976) (terminating disability recipient has the "possibility of access" to private resources or welfare assistance.).

<sup>127</sup> See generally *Wilkinson*, 125 S.Ct at 2394.

discuss the physical and mental consequences of placement into OSP.<sup>128</sup> A number of psychological studies have been conducted which indicate that the isolation and lack of activity within Supermax facilities leads to mental health problems with its inmates.<sup>129</sup> By ignoring the potentially hazardous mental health effects of Supermax facilities, the Supreme Court chose to exclude a relevant component of the first *Mathews* factor.<sup>130</sup>

Professional research indicates that inmates subjected to long-term solitary confinement have an increased risk of developing potentially serious psychiatric problems.<sup>131</sup> The high rate of mental health problems in the general prison population is exacerbated by the extreme isolation of supermax inmates.<sup>132</sup> As greater restrictions and social deprivations are placed on inmates, their levels of social

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<sup>128</sup> *Id.*

<sup>129</sup> For a history of inmate isolation studies see Hans Toch, *The Future of Supermax Confinement*, 81 PRISON J. 376, 376-88 (2001) (finding “early U.S. experiments with isolation in Pennsylvania and New York in the 1800s demonstrated the severe impact that isolation has on inmates’ psychological and physical health” resulting in “prison administrators quickly abandoned solitary confinement as a general correctional tool and used isolation as only a temporary form of punishment.” *Id.*).

<sup>130</sup> See *Mathews*, 424 U.S. 319; see also *infra* note 131 and accompanying text (outlining traditional Supreme Court considerations in determining proper weight of threatened individual interest).

<sup>131</sup> See Stanley Brodsky & Forrest R. Scogin, *Inmates in Protective Custody: First Data on Emotional Effects*, 1 FORENSIC REP. 267 (1988); see also Stuart Grassian, *Psychopathological Effects of Solitary Confinement*, 140 AM. J. PSYCHIATRY 1450 (1983); see also Stuart Grassian and Nancy Friedman, *Effects of Sensory Deprivation in Psychiatric Seclusion and Solitary Confinement*, 8 INT’L J. L. & PSYCHIATRY 49 (1986); see also Holly A. Miller, *Reexamining Psychological Distress in the Current Conditions of Segregation*, 1 J. CORRECTIONAL HEALTH CARE 39 (1994); see also Scott, G. and Paul Gendreau, *Psychiatric Implications of Sensory Deprivation in a Maximum Security Prison*, 14 CANADIAN PSYCHIATRIC ASSOC. J. 337 (1969).

<sup>132</sup> See generally Paula M. Ditton, *Mental Health and Treatment of Inmates and Probationers*, U.S. Dept. of Justice Bureau of Justice Statistics, 1999, available at <http://www.ojp.usdoj.gov/bjs/pub/ascii/mhtip.txt>.



withdrawal and psychological problems dramatically increase.<sup>133</sup>

The psychological effects on supermax inmates can manifest in varying mental disorders.<sup>134</sup> Specifically, recent studies suggest that the added restrictions of inmate isolation and segregation result in depression, hostility, severe anger, sleep disturbances, physical symptoms, and anxiety among inmates.<sup>135</sup> Isolation can produce emotional damage, declines in mental functioning, depersonalization, hallucinations, and delusions.<sup>136</sup> Inmates in isolation also suffer from numerous physical symptoms, such as perceptual changes, difficulties in thinking, concentration and memory problems, and problems with impulse control.<sup>137</sup> Interviews with inmates in high-security facilities have demonstrated similar findings.<sup>138</sup>

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<sup>133</sup> Imposing more restrictions without appropriate activity programming is detrimental to inmates' health and rehabilitative prognoses. Potentially beneficial programming includes educational, recreational, and psychological services. See Jesenia Pizarro and Vanja M.K. Stenius, *Supermax Prisons: Their Rise, Current Practices, and Effects on Inmates*, 84 PRISON J. 248, available at <http://tpj.sagepub.com/cgi/reprint/84/2/248> (claiming that "increasing inmates' restrictions by limiting human contact, autonomy, goods, or services requires more intense activity programming to counteract the adverse effects of these restrictions" *Id.*).

<sup>134</sup> For a discussion on the various mental disorders found within Supermax inmates, see Lynd, *supra* note 25.

<sup>135</sup> See Pizarro, *supra* note 131 (citing Brodsky, *supra* note 129; also citing Miller, *supra* note 129) (noting that although "types of restrictions and outcomes measured vary across studies, the general consensus is that increasing the level of restrictions increases the risk for psychological and emotional problems." *Id.*)

<sup>136</sup> See generally Brodsky, *supra* note 129; see also Grassian, *supra* note 129. See also Miller, *supra* note 129. See also Scott, *supra* note 129.

<sup>137</sup> See generally Brodsky, *supra* note 129. See also Grassian, *supra* note 129; see also Grassian & Friedman, *supra* note 129. See also Miller, *supra* note 129.

<sup>138</sup> These inferences about the impact of these facilities on inmates' mental and physical health are based primarily on research examining the effects of temporary solitary confinement or administrative segregation within regular prisons. The differences in the scope of restrictions and deprivations, as well as the duration of the isolation, have the potential of increasing the adverse effects. Clearly, spending a specified number of

In particular, one study found that women living in a high-security unit experienced claustrophobia, chronic rage reaction, depression, hallucinatory symptoms, defensive psychological withdrawal and apathy.<sup>139</sup>

Although neglected by the Court in *Wilkinson*, the potentially hazardous mental health effect of Supermax facilities is a relevant component of the first *Mathews* factor.<sup>140</sup> Under the first *Mathews* factor, the inmate's interest in avoiding placement at OSP—the inmates' interest in avoiding an environment that is potentially physically dangerous—should be considered.<sup>141</sup> Although it is true that lawfully confined prisoners have curtailed liberties and less procedural protections, evidence that supermax inmates suffer from increased mental problems strengthens the argument that further procedural safeguards are necessary.<sup>142</sup>

As stated in *Wilkinson*, an inmate's private liberty interest is at stake and must be considered within the norms of the prison system and its infringement on the liberty of inmates.<sup>143</sup> Research indicates greater health problems are placed on supermax inmates as compared to those of normal

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days in isolation is quite different from serving the remainder of one's sentence, possibly years, in a Supermax facility. Similarly, spending 23 hours a day in isolation with no activities is not comparable to spending 23 hours a day in isolation with meaningful activities. See Pizarro, *supra* note 131.

<sup>139</sup> See also Grassian, *supra* note 129 (attributing these problems to factors such as “depersonalization, the denial of individuality, the denial of personal initiative, and humiliation” *Id.*).

<sup>140</sup> See generally *Mathews v. Eldridge*, 424 U.S. 319 (1976). See also *supra* note 129 and accompanying text (outlining traditional Supreme Court considerations in determining proper weight of threatened individual interest).

<sup>141</sup> For a discussion on the first *Mathews* factors see David Kauffman, *Procedures for Estimating Contingent or Unliquidated Claims in Bankruptcy*, 35 STAN. L. REV. 153 (1982) (detailing that “to estimate the risk of an erroneous deprivation, courts must make intuitive judgments as to whether the procedures at issue will yield an accurate result” *Id.*).

<sup>142</sup> See *id.*

<sup>143</sup> *Wilkinson v. Austin*, 125 S.Ct. 2384, 2395 (2005) (holding that “the private interest at stake here, while more than minimal, must be evaluated, nonetheless, within the context of the prison system and its attendant curtailment of liberties” *Id.*).

prison inmates.<sup>144</sup> Due to the possibility that an OSP inmate will become mentally unhealthy, those pending placement have a greater liberty interest in avoiding OSP placement than placement in a standard prison.<sup>145</sup>

From the Court's unanimous decision in *Wilkinson*, it is clear that the severe conditions and adverse effects on OSP inmates' do not outweigh Ohio's interest in maintaining an orderly and safe penitentiary system.<sup>146</sup> It is not clear whether more due process would be owed to inmates under the *Mathews* test if the negative health effects of OSP inmates were considered.<sup>147</sup> If the Court had considered the adverse mental effects of OSP in its application of the *Mathews* balancing test, perhaps it would have been less inclined to find that the "fairness and reliability" of the existing procedure provided sufficient procedural safeguards.<sup>148</sup>

## V. WILKINSON DECISION'S NATIONAL IMPACT

*Wilkinson* had an impact on Ohio's New Policy for OSP inmate selection because it can now continue to operate under its current procedures.<sup>149</sup> However, the larger, more important, impact of the Court's decision is Ohio's New Policy will be used as a guide for states to follow regarding their Supermax prisons.<sup>150</sup>

The positive impact of the *Wilkinson* ruling will be the implementation of constitutionally permissible selection procedures for Supermax prisons that will decrease the number of wrongful and arbitrary inmate placements.<sup>151</sup> Additionally, the use of Supermax prisons will facilitate the penal systems obligation to ensure the safety of guards,

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<sup>144</sup> See *id.* at 2396.

<sup>145</sup> See *id.*

<sup>146</sup> See *id.*

<sup>147</sup> See *id.*

<sup>148</sup> See *Mathews v. Eldridge*, 424 U.S. 319, 343 (1976); see also *Wilkinson*, 125 S.Ct. at 2396.

<sup>149</sup> See generally *Wilkinson*, 125 S.Ct. at 2396.

<sup>150</sup> See generally *id.*

<sup>151</sup> See generally *id.*

prison personnel, the public, and the prisoners.<sup>152</sup> Through the proper use of Supermax facilities, the threat of persistent prison gang violence will have a diminished effect on the state's interest in maintaining prison security.<sup>153</sup>

In the wake of the Supreme Court's *Wilkinson* decision, rejecting the due process challenges of Supermax prisoners, it is likely that additional Supermax facilities will be constructed throughout the country. As professional research indicates, inmates subjected to long-term solitary confinement have an increased risk of developing potentially serious psychiatric conditions.<sup>154</sup> This may impede the prisoner rehabilitation process and lead to problems in society from mentally effected inmates released from Supermax prisons.<sup>155</sup> Additionally, the Court attempted to narrow its holding by citing the specific procedural safeguards implemented in Ohio's New Policy.<sup>156</sup> However, because the Court was unanimous in its upholding of the New Policy, some states may choose to provide fewer procedural safeguards than the Ohio New Policy.<sup>157</sup> At such an early stage, it remains to be seen how the *Wilkinson* holding will impact Supermax prisons, state's prison selection procedures, and inmates. But for now it remains clear: Terry Nichols, Theodore Kaczynski, Lee Boyd Malvo, John Allen Muhammed, and Eric Robert Rudolph will continue to call a supermax prison home for a very long time.<sup>158</sup>

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<sup>152</sup> See *Hewitt v. Helms*, 459 U.S. 461(1983) (discussing "the safety of the institution's guards and inmates is perhaps the most fundamental responsibility of the prison administration" *Id.*).

<sup>153</sup> See *Wilkinson*, 125 S.Ct. at 2397 (noting gangs are disruptive, functioning as "clandestine, organized, fueled by race-based hostility, and committed to fear and violence as a means of disciplining their own members and their rivals" and "seek nothing less than to control prison life and to extend their power outside prison walls" *Id.*).

<sup>154</sup> See sources cited *supra* note 129, and accompanying text.

<sup>155</sup> See *supra* note 136, and accompanying text (indicating that inmates subjected to long term solitary confinement have increased risk of developing potentially serious psychiatric problems).

<sup>156</sup> See generally *Wilkinson*, 125 S.Ct. at 2396.

<sup>157</sup> See generally *id.*

<sup>158</sup> See generally Supermax Prisons and the Constitution, *supra* note 2. See also Riveland, *supra* note 1.