

Indeterminate Sentences in Supermax Prisons Based Upon Alleged Gang Affiliations: A Reexamination of Procedural Protection and a Proposal for Greater Procedural Requirements

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In recent years, the power and pervasiveness of prison gangs have posed substantial problems for prison officials. In response, many states have adopted policies that segregate "known" prison gang members to highly restrictive "supermax" prisons such as California's Pelican Bay State Penitentiary. Federal courts have held that an inmate accused of gang affiliation is entitled to certain procedural safeguards before being transferred to a supermax prison facility. Specifically, alleged prison gang members are afforded the same procedural protections as prisoners facing temporary administrative transfers. This Comment argues that equating the procedural protections due in administrative transfers with those of supermax prison transfers based on gang affiliation disregards the severity of confinement in a supermax facility and the purpose upon which such facilities were built. In response, the author argues that the Due Process Clause of the Fourteenth Amendment necessitates that segregation decisions be based upon evidence of an actual infraction of prison rules, rather than the mere "status" of gang affiliation.

INTRODUCTION

Trying a man is easy, as easy as falling off a log, compared with deciding what to do with him when he has been found guilty.¹

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1. Sir Henry Alfred McCardie, English judge (quoted in CLAUD MULLINS, CRIME AND PUNISHMENT 142 (1st ed. 1943)).

Ever since penitentiaries were first introduced in America during the 1800s, the United States has struggled with the question of how to handle its prison population. The latest chapter in this struggle is *Madrid v. Gomez*,² a recent decision handed down by a United States District Court in San Francisco.

Madrid involved a class of prisoners at the Pelican Bay State Penitentiary ("Pelican Bay") in Crescent City, California. While the complaint alleged several constitutional violations, the majority of the claims concerned a special unit of cells within Pelican Bay specifically designed to house the most dangerous criminals in the state's prison system—"the worst of the worst."³ Due to the extreme conditions imposed upon the prisoners within these special units, such units have been labelled "supermax prisons" or "prisons within prisons."⁴ Pelican Bay's unit is called the Security Housing Unit, or SHU (pronounced shoe).

Assignment to the SHU is not based on the severity of the inmate's original offense; rather, SHU cells are reserved for prisoners who commit serious disciplinary violations once in prison or who are deemed to endanger the safety of others or the security of the prison system.⁵ Due to the power of prison gangs within the prison system, prison gang members fall into the latter category. Consequently, the determination of who is or is not a prison gang member is important because it can represent the difference between a prisoner serving time in the SHU or in a less restrictive prison environment.

This Comment argues that there are many potential problems with the current set of procedures designed to establish prison gang membership. Tony Trujillo's story illustrates just a few of these problems. Trujillo was sentenced for murder in 1983.⁶ Approximately six years into his sentence, Trujillo was called into the Institutional Gang Investigator's office and accused of being a gang affiliate.⁷ He was not allowed to call any witnesses or to present any evidence, nor was he given any staff or legal assistance at this meeting.⁸ Based upon his suspected gang affiliation, a Unit Classification Committee⁹ sentenced Trujillo to an indeterminate sentence

2. *Madrid v. Gomez*, 889 F. Supp. 1146 (N.D. Cal. 1995). One journalist predicts that the *Madrid* decision may "determine the shape of American penology in the 21st century." Claire Cooper, *Prison on trial; inmates allege high-tech torture*, SACRAMENTO BEE, Sept. 18, 1993, at A1.

3. *Madrid*, 889 F. Supp. at 1155.

4. For purposes of this Comment, I will use these terms interchangeably and will most often refer to them according to the terminology used at Pelican Bay.

5. CAL. CODE REGS. tit. XV, § 3341.5(c) (Barclays 1994).

6. Plaintiffs' Proposed Findings of Fact and Conclusions of Law Re: Segregation of Alleged Gang Affiliates at 23, *Madrid v. Gomez*, 889 F. Supp. 1146 (N.D. Cal. 1995) (No. C-90-3094) [hereinafter Plaintiffs' Findings].

7. *Id.*

8. *Id.*

9. The "[Unit Classification Committee] is generally more concerned with the inmate's 'program' and exercise yard assignment than with whether or not he should be assigned to segregation. However, a UCC is empowered to recommend, when appropriate, the convening of an [Institutional

in the SHU.¹⁰ Trujillo protested, claiming mistaken identity, but his protest was dismissed.¹¹ Trujillo's appeals through the Department of Corrections' appeals process were denied at every level.¹² Prison officials told Trujillo that the confidential informants naming him as a gang affiliate had "checked out."¹³ At further classification hearings, Trujillo "was simply asked whether he would debrief."¹⁴

Trujillo was transferred to Pelican Bay when it opened in 1989.¹⁵ He again protested the validation to the Institutional Gang Investigator at Pelican Bay.¹⁶ The Institutional Gang Investigator "replied that he had reviewed the file and investigated it, that he was sure T. Trujillo belonged to a gang, and that debriefing was T. Trujillo's only way out."¹⁷ Trujillo's problem was that he could not debrief because he was not a gang member.¹⁸

Trujillo made a total of five or six appearances before classification committees.¹⁹ The committees simply asked him whether he was ready to debrief, and when he told them he was innocent, they sent him back to his cell.²⁰ He was told that "the only ways out of SHU [are] to debrief, parole, or die."²¹

Trujillo finally instituted a suit in federal district court, and "in the course of responding to T. Trujillo's interrogatories, [the Institutional Gang Investigator] finally discovered that Tony T. Trujillo was not a gang member, but had been confused with a different [inmate named] Trujillo."²² The Institutional Gang Investigator admitted that he had not conducted a proper review of the file until then, and that if the previous Institutional Gang Investigator "had conducted a proper investigation in the first place, none of this would have happened . . ."²³ Trujillo's case was eventually settled for a small amount of money and a promise to expunge his file of all gang related evidence.²⁴

Classification Committee] to consider releasing a prisoner from segregation." Third Special Report of the Monitor at 9, *Toussaint v. Rowland*, 711 F. Supp. 536 (N.D. Cal. 1989) (No. C-73-1422) [hereinafter Monitor's Report].

10. Plaintiffs' Findings, *supra* note 6, at 23.

11. *Id.*

12. *Id.* at 23-24.

13. *Id.* at 24.

14. *Id.* "The basic premise of 'debriefing' is that the prisoner voluntarily leaves the gang to which he formerly belonged." Monitor's Report, *supra* note 9, at 24-25. The prisoner is also required to give a detailed description of the gang's membership, activities undertaken by the gang, and all of the prisoner's gang associations throughout his incarceration. *Id.* at 25.

15. Plaintiffs' Findings, *supra* note 6, at 24.

16. *Id.* at 5, 24.

17. *Id.* at 24.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 25.

23. *Id.*

24. *Id.*

Unfortunately, Trujillo's story is not unique. In *Toussaint v. McCarthy*,²⁵ the Ninth Circuit responded to complaints by other prisoners who were segregated for alleged gang affiliation by establishing a set of general procedural guidelines protecting prisoners' Fourteenth Amendment due process rights. In *Madrid*, the plaintiffs claimed that the procedures in place after *Toussaint* were inadequate to protect the prisoners' liberty interests and lacked the requisite level of reliability under the current California regulations.²⁶ The *Madrid* court dismissed plaintiffs' demands for greater procedural requirements and held that the current procedures were constitutionally adequate so long as such procedures were not applied in "rote fashion."²⁷

This Comment argues that the current procedures established in *Toussaint* and validated in *Madrid* fail to meet the constitutional requirements of due process under the Fourteenth Amendment. A thorough examination of the due process factors at issue suggests that additional safeguards should apply to prisoners transferred to supermax facilities based upon alleged gang affiliation. More specifically, this Comment argues that gang affiliation, in and of itself, should not be constitutionally sufficient to justify the transfer of a prisoner to the SHU. Instead, the procedures for segregating a prison gang member should require evidence of some other kind of infraction, especially those types of infractions normally committed by prison gangs.²⁸

Part I begins with a brief history of supermax prisons, followed by a brief history and description of prison gangs. This information is designed to give the reader some insight into why prison officials have decided to address the prison gang problem through segregation in supermax facilities. This Part will conclude with a brief overview of the process used by the California Department of Corrections to validate inmates as gang members.

25. 926 F.2d 800 (9th Cir. 1990), *cert. denied*, 502 U.S. 874 (1991). *Toussaint* involved a suit by prisoners at four California prisons (although the decisions only apply to Folsom and San Quentin) which, among other things, contested the constitutionality of administratively segregating prisoners in maximum security units. *Id.* at 801. The case resulted in several decisions at both the district court and circuit court levels which "produced basic standards for maximum security confinement, ranging from due process requirements for placing inmates in segregation to adequate cell size." Howard Mintz, *Prison Case Law is Little Guide for Wilson, Sonsini*, THE RECORDER, Sept. 19, 1991, at 10.

This Comment addresses four of the decisions in the series. They are *Toussaint v. McCarthy*, 597 F. Supp. 1388 (N.D. Cal. 1984) (*Toussaint III*); *Toussaint v. McCarthy*, 801 F.2d 1080 (9th Cir. 1986) (*Toussaint IV*); *Toussaint v. Rowland*, 711 F. Supp. 536 (N.D. Cal. 1989) (*Toussaint V*); *Toussaint v. McCarthy*, 926 F.2d 800 (9th Cir. 1990) (*Toussaint VI*), *cert. denied*, 502 U.S. 874 (1991).

The procedural history of the *Toussaint* dispute is itself confusing. For a background of the procedural history, see *Toussaint IV*, 801 F.2d at 1085-86.

26. *Madrid*, 889 F. Supp. 1146, 1274-79 (N.D. Cal. 1995); see CAL. CODE REGS. tit. XV, § 3321(c) (Barclays 1995) (listing five criteria for establishing reliability of confidential sources).

27. *Madrid*, 889 F. Supp. at 1277.

28. See *infra* Part I.C. for a description of typical prison gang activities. Quite obviously, the activities mentioned in Part I.C. violate Department of Corrections' regulations. For example, see CAL. CODE REGS. tit. XV, § 3007 (Barclays 1995) which outlaws certain sexual behavior.

Part II discusses the current legal standards governing prisoners' liberty interests and the protection of those interests under the Fourteenth Amendment. It focuses on the liberty interest created by California state law and the procedural requirements established by the *Toussaint* court to protect the due process rights of California prisoners who are being segregated for alleged gang membership.

Part III of this Comment argues that the court's conclusion in *Madrid v. Gomez*, that the segregation procedures currently used in California to segregate alleged gang members are constitutional, is wrong because of the severity of supermax facilities, and the indeterminate and often arbitrary nature of confinement based on gang affiliation. This discussion is framed within the rubric of *Mathews v. Eldridge*,²⁹ which has been used by the courts to determine the amount of process due to an individual who has been affected by state action.

Finally, Part IV addresses and responds to two policy arguments against a change in the current evidentiary standard used to segregate gang members. In addition, Part IV discusses other alternatives to the segregation problem.

I

BACKGROUND INFORMATION ON SUPERMAX FACILITIES AND PRISON GANGS

A. *Early Incarceration Philosophies and the Rise of the Supermax Facility*

In the late 1800s and early 1900s, the American penitentiary was a place of custody and punishment where rehabilitation was, at best, a secondary goal.³⁰ During the 1950s and 1960s, however, prison riots forced a change in American penal philosophy. This shift in philosophy was evidenced by the closing of Alcatraz Prison in 1963.³¹

Established in 1934, Alcatraz housed "thousands of Federal inmates classified as violent or disruptive" in indefinite solitary confinement.³² However, in 1963, Alcatraz closed down, partly because operating an island prison was extremely costly, "but more importantly because it was regarded as symbolizing a penal philosophy that was outdated in the era when rehabilitation, not punishment, was being espoused as the goal of imprison-

29. 424 U.S. 319 (1976).

30. See DAVID J. ROTHMAN, *THE DISCOVERY OF THE ASYLUM* 240 (rev. ed. 1990); SOL RUBIN, *THE LAW OF CRIMINAL CORRECTION* § 22, at 34 (2d ed. 1973).

31. David A. Ward & Allen F. Breed, *The United States Penitentiary, Marion, Illinois: A Report to the Judiciary Committee, U.S. House of Representatives*, in *MARION PENITENTIARY: OVERSIGHT HEARING BEFORE THE SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE OF THE COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES*, 99th Cong., 1st Session, 9-10 (1985).

32. Selwyn Raab, *Uprising Challenges 'Maxi-Maxi' Prison Idea*, N.Y. TIMES, June 2, 1991, at 20.

ment.”³³ Consequently, prisons like Alcatraz became obsolete as prison officials switched “from harsh treatment to psychological, educational and job-training programs to rehabilitate criminals.”³⁴ Prison officials during this new era of rehabilitation employed the “dispersal model” where all of the so-called “rotten apples” were “distributed to a number of prisons in the hope that the influence of problem prisoners [would] be diluted in populations of generally law abiding inmates.”³⁵

Prison administrators abandoned rehabilitation as a goal in the 1970s, and once again accepted punishment as the primary purpose behind prisons.³⁶ During this time, the federal prison system reverted to a “concentration model,” where all of the “rotten apples” were housed together in a separate facility.³⁷ The chosen facility for this model within the federal system was a special unit within the walls of the prison at Marion, Illinois.³⁸ Marion housed the federal system’s most dangerous prisoners and its “new purpose was to provide long term segregation within a highly controlling setting for inmates from throughout the federal system”³⁹

Between the late 1970s to 1983, violent activity steadily increased at Marion, culminating in October 1983, when two guards and an inmate were murdered.⁴⁰ As a result, Warden Harold Miller declared a state of emergency, and Marion became the first prison to operate on permanent

33. Ward & Breed, *supra* note 31, at 9-10.

34. Raab, *supra* note 32, at 20.

35. See Ward & Breed, *supra* note 31, at 9.

36. “[I]n the new system punishment [was] to be fair and equitable, but the only purpose of imprisonment [was] punishment.” LARRY E. SULLIVAN, *THE PRISON REFORM MOVEMENT: FORLORN HOPE* 126 (1990).

37. Ward & Breed, *supra* note 31, at 9. The concentration model is the antithesis of the dispersal model that prison officials had previously employed. *Id.*

These terms are used to describe the prison system as a whole and should not be confused with the congregate or isolation systems, which describe conditions within a particular prison. General population is similar to the congregate system, in which silence between prisoners was mandated, but inmates were allowed to work together. ROTHMAN, *supra* note 30, at 82; RUBIN, *supra* note 30, at 30 (2d ed. 1973). In contrast, supermax facilities are similar to the isolation system in which institutions sought to “sever almost every tie between the prisoner and his family and friends, and even attempted with some degree of success to block out reports of outside events.” ROTHMAN, *supra* note 30, 94-95.

38. Ward & Breed, *supra* note 31, at 10.

For all intents and purposes, Alcatraz was the first supermax prison. Alcatraz “did not pretend to offer any ‘treatment’ program” *Id.* at 9. Rather, it “was intended to simply incapacitate and punish the nation’s most desperate criminals and the federal prison system’s worst troublemakers.” *Id.* Alcatraz’s island location in the San Francisco Bay, further isolated the prison and its prisoners. Many current articles refer to new supermax prisons as “the Alcatraz of the 90’s.” See, e.g., Leslie V. White, *Inside the Alcatraz of the ‘90’s*, CAL. LAW., Apr. 1992, at 42. Unlike Alcatraz, however, modern day Pelican Bay is “immaculate, spacious . . . [and] so quiet it borders on spooky.” Mintz, *supra* note 25, at 10. “The Security Housing Unit is no Alcatraz. There are no dungeons, no rat-infested cells, no half-starved prisoners shackled to stone walls.” *Pelican Bay: Prison Under Attack*, THE LEGAL INTELLIGENCER, Oct. 5, 1993, at 5.

39. Ward & Breed, *supra* note 31, at 10. As was the case at Pelican Bay, not all of the prisoners housed at Marion were classified at the highest level of classification.

40. *Id.* at 13-15.

"lockdown" status.⁴¹ During a "lockdown," inmates live in solitary confinement, in their cells for up to 23 hours a day.⁴² The lockdown at Marion has never been lifted.⁴³

In sum, the lockdown at Marion provided the model for supermax facilities within the state prison systems. Since Marion implemented its permanent lockdown, thirty-six states have implemented prisons with similar conditions,⁴⁴ though the SHU at Pelican Bay is undoubtedly the most restrictive.⁴⁵ The social impact of these various state facilities is arguably greater than Marion's simply because state prisons confine over ninety percent of the overall prisoner population in the United States.⁴⁶ Moreover, although state prison systems have not, for the most part, built entirely separate structures like Marion, they have always had special "supermax" units within certain prisons which employ permanent lockdown conditions.⁴⁷

B. Life in a Supermax Facility

The cells in a supermax facility are windowless and eight-by-ten feet in size.⁴⁸ They each contain "a concrete stool, concrete bed, concrete writing table, and a toilet and sink made of heavy stainless steel."⁴⁹ The cell

41. *Id.*; Michael Isikoff, *Hard Time: The Mission at Marion*, WASH. POST, May 28, 1991, at A1, A6.

42. Isikoff, *supra* note 41, at A6; see also HUMAN RIGHTS WATCH, PRISON CONDITIONS IN THE UNITED STATES: A HUMAN RIGHTS WATCH REPORT 3 (1991).

43. See HUMAN RIGHTS WATCH, *supra* note 42, at 3; Interview with Edward Rubin, Professor, Boalt Hall School of Law, University of California at Berkeley, in Berkeley, CA (March 29, 1994).

44. See HUMAN RIGHTS WATCH, *supra* note 42, at 3.

45. As one prisoner rights advocate points out, "[m]any states have punishment cells, solitary confinement units, or disciplinary segregation housing [within other prisons], but so far there is no evidence that they have separate facilities designed to lock up prisoners approximately 23-hours per day." Russ Immarigeon, *The Marionization of American Prisons*, THE NAT'L PRISON PROJECT J., Fall 1992, at 1, 2.

46. Patrick A. Langan, *America's Soaring Prison Population*, SCIENCE, Mar. 29, 1991, at 1568, 1568.

47. The Seventh Circuit's finding in *Bruscino v. Carlson*, 854 F.2d 162 (7th Cir. 1988), *cert. denied*, 491 U.S. 907 (1989), paved the way for the imposition of lockdown conditions on a permanent basis. *Bruscino* was a class-action law suit filed by prisoners at Marion in an effort to end the lockdown. The prisoners argued that lockdown conditions were "so savage and brutal as to constitute cruel and unusual punishment." *Id.* at 164. In a very brief opinion, the court held that although the conditions deserve "careful scrutiny" and were admittedly "ghastly," the controls were "a unitary and integrated system for dealing with the nation's least corrigible inmates . . ." *Id.* at 165-66. Consequently, dismantling even a few of the controls would "destroy the system's rationale and impair its efficacy." *Id.* at 166.

The *Bruscino* court found that conditions "must be evaluated against the background of an extraordinary history of inmate violence . . ." *Id.* at 165. Consequently, because prison gangs are considered to be responsible for much of the violence that occurs within prisons, supermax facilities, that impose lockdown conditions similar to Marion's are increasingly popular in countering gang activity.

48. *Facts about Pelican Bay's SHU*, CAL. PRISONER, Dec. 1991, at 1, 1 [hereinafter *Pelican Bay Facts*]. The discussion that follows uses Pelican Bay as an example. Although conditions vary among supermax facilities, one can expect similar, if not identical, conditions at most supermax facilities.

49. Jan Elvin, *Isolation, Excessive Force Under Attack at California's Supermax*, NAT'L PRISON PROJECT J., Fall 1992, at 5, 21.

doors are perforated with 4,094 holes,⁵⁰ which are large enough for the guards to see in, but small enough to prevent prisoners from reaching out.⁵¹ The cells are lined with opaque material to prevent prisoners from seeing outside of the cell,⁵² and nothing is allowed on the bare walls.⁵³ In short, "[t]he cells are stark."⁵⁴

Prisoners are confined to these cells for twenty-two and a half hours a day,⁵⁵ and a closed-circuit camera watches their every move.⁵⁶ For the remaining ninety minutes of the day, inmates have the option to shower or exercise in a "yard."⁵⁷ The "yard", also known as the "dog walk," is made completely of concrete and does not include any exercise equipment.⁵⁸ Heavy mesh and plastic cover the yard's ceiling, filtering the only sunlight the prisoners receive.⁵⁹ Video cameras monitor the yard continuously.⁶⁰

The prisoners are strip-searched before and after visiting the yard, and are put in waist restraints and handcuffs as two guards escort them to and from the yard, to go see a doctor, or to visit the library.⁶¹ The facility allows no training programs, correspondence courses, vocational training, or meetings with other prisoners.⁶² Smoking is prohibited.⁶³ Prisoners are allowed to have a limited number of books in their cells at any one time, and may purchase either a television or a radio.⁶⁴ The television receives six Colorado cable stations⁶⁵ and the radio receives two Crescent City stations.⁶⁶ Prison officials give instructions through loud speakers and open and close cell doors electronically, minimizing contact between the guards and the prisoners.⁶⁷

50. White, *supra* note 38, at 46.

51. *Pelican Bay Facts*, *supra* note 48, at 1.

52. Elvin, *supra* note 49, at 21.

53. Corey Weinstein, *Turning away from Pelican Bay*, CAL. PRISONER, Dec. 1991, at 2, 3.

54. Debra J. Saunders, *The SHU Fits States' Worst Inmates*, S.F. CHRON., Feb. 3, 1993, at A16.

55. *Pelican Bay Facts*, *supra* note 48, at 1.

56. Elvin, *supra* note 49, at 21.

57. *Pelican Bay Facts*, *supra* note 48, at 1.

58. Elvin, *supra* note 49, at 1; Corey Weinstein & Eric Cummins, *The Crime of Punishment at Pelican Bay Maximum Security Prison*, 45 COVERT ACTION 38, 39 (Summer 1993).

59. Elvin, *supra* note 49, at 21.

60. *Id.*

61. *Pelican Bay Facts*, *supra* note 48, at 1; Weinstein & Cummins, *supra* note 58, at 39; Elvin, *supra* note 49, at 21.

62. Elvin, *supra* note 49, at 21.

63. *Id.*

64. *Pelican Bay Facts*, *supra* note 48, at 1; Weinstein & Cummins, *supra* note 58, at 39.

65. Weinstein & Cummins, *supra* note 58, at 39. This is another sore point with the prisoners who argue that this makes it difficult for them to know about current events in California. *Id.*; Weinstein, *supra* note 53, at 3.

66. *Pelican Bay Facts*, *supra* note 48, at 1; see also Weinstein & Cummins, *supra* note 58, at 39.

67. Rex Bossert, *Maximum Security on Trial: Pelican Bay Inmates Claim They're Subject to 'Deliberate Terror'*, CAL. DAILY J., Sept. 17, 1993, at 1.

The inmates receive their food through slots in the cell doors.⁶⁸ Prison officials read all mail before delivering it⁶⁹ and allow personal calls only for verifiable emergencies.⁷⁰

Prison officials routinely conduct cell and strip searches to ensure the environment is free of weapons.⁷¹ When a prisoner violates a rule, like refusing to return his food tray,⁷² officials also execute cell extractions, in which six to eight correctional officers use force and weapons to remove prisoners from their cells.

These conditions and practices may seem harsh, but seemingly nonviolent objects can and have been used to make weapons. For example, food trays have been broken and filed down to make plastic knives; staples from magazines have been attached to the end of a tightly rolled piece of paper or plastic to make darts; inmates have thrown their feces or urine on correctional officers, an act known as "gassing";⁷³ deodorant canisters and styrofoam cups have been melted down and molded into plastic stabbing instruments; and toothbrushes have been melted to razor blades to form slashing devices.⁷⁴ Many of these devices are hidden by prisoners in their tennis shoes, within cracks of their cells, or internally.⁷⁵

C. Description of Prison Gangs

In order to provide understanding of the connection between prison gangs and supermax facilities, this Section briefly describes the nature and history of prison gangs.⁷⁶ The importance of prison gangs and the impact they have on prison management cannot be understated. For example, Professor John DiIulio calls prison gangs "the chief operational fact of life inside California prisons."⁷⁷ Moreover, DiIulio points out that "[i]n California, prison administrators have had to govern largely through broker-

68. Elvin, *supra* note 49, at 21.

69. *Id.*

70. *Id.*

71. See CAL. CODE REGS. tit. XV, § 3287 (Barclays 1995).

72. Weinstein & Cummins, *supra* note 58, at 39; see also Elvin, *supra* note 49, at 21.

73. Howard Mintz, *Is Pelican Bay Too Tough?*, THE RECORDER, Sept. 19, 1991, at 1, 9.

74. Telephone Interview with Timothy A. Rougeux, Correctional Counselor II, Litigation Management Division of the Department of Corrections for the State of California (June 19, 1995).

75. See White, *supra* note 38, at 47; Ward & Breed, *supra* note 31, at 30-31.

76. Prison gangs are to be distinguished from street gangs or ethnic groupings, although in general, prison gangs are drawn along racial lines. The California Department of Corrections defines gangs as

any ongoing formal or informal organization, association or group of three (3) or more persons, which has a common name or identifying sign or symbol whose members and/or associates engage or have engaged, on behalf of that organization, association or group, in two or more activities which include planning, organizing, threatening, financing, soliciting, or committing unlawful acts or acts of misconduct classified as serious

Madrid v. Gomez, 889 F. Supp. 1146, 1240 n.183 (N.D. Cal. 1995) (quoting the California Department of Corrections Operations Manual § 55070.16).

77. JOHN J. DI IULIO, JR., GOVERNING PRISONS: A COMPARATIVE STUDY OF CORRECTIONAL MANAGEMENT 129 (1987).

ing compromises among the system's most powerful four to six prison gangs. California prison officials are understandably touchy about this subject."⁷⁸ Accordingly, a background knowledge of prison gangs and their activities is important in understanding the reasoning behind sentencing prison-gang suspects to indeterminate sentences in supermax facilities.

Prison gangs originated in the 1940s, but did not really begin to gain power in California until the 1960s.⁷⁹ The four prison gangs that emerged during the 1960s "were believed to pose a new type of correctional problem" because they were "larger, younger, more politicized and tended to be organized along racial and ethnic lines."⁸⁰ In addition, outside factors initially prevented prison administrators from breaking them up. "[D]ue process requirements prevented officials from isolating inmates whose gang membership was known but could not be established beyond a reasonable doubt,"⁸¹ while "[o]ther laws hampered officials in their desire to separate inmates on the basis of race even where desegregating the prisons was alleged to pose greater dangers of inmate-on-inmate violence."⁸² Most importantly, prison officials believed that any attempts to dismember gangs were futile because "certain gangs were so powerful and so well rooted that nothing could work to dissolve them."⁸³

The power of prison gangs has steadily grown over the past two decades. In California, prison officials now recognize nine major gangs: the Aryan Brotherhood (AB), the Black Guerilla Family (BGF), the Mexican Mafia (EME), the Mexikanemi, the New Mexico Syndicate, Nuestra Familia (NF), the Northern Structure, the Texas Syndicate, and the Vanguard.⁸⁴ Prison gangs have also spread to other state prison systems, like that of Texas,⁸⁵ and are believed to be responsible for much of the violence in prisons.⁸⁶ In addition to the violence, gangs smuggle and distribute narcotics throughout the prison system,⁸⁷ manufacture and transport weapons, and engage in loan sharking.⁸⁸ In short, prison gangs pose a security threat because they influence other inmates to commit crimes while in prison.

78. *Id.*

79. *Madrid*, 889 F. Supp. at 1240; DiIulio, *supra* note 77, at 132.

80. DiIulio, *supra* note 77, at 132.

81. *Id.* As noted *infra* Part II.B.1, prison officials are no longer under such restrictions.

82. DiIulio, *supra* note 77, at 132.

83. *Id.*

84. *Madrid*, 889 F. Supp. 1146, 1240 (N.D. Cal. 1995).

85. DiIulio, *supra* note 77, at 117.

86. *Id.* at 133.

87. *Id.* at 249; THE AMERICAN PRISON: ISSUES IN RESEARCH AND POLICY 283 (Lynne Goodstein & Doris L. MacKenzie eds., 1989).

88. *Madrid*, 889 F. Supp. at 1241.

D. *The Philosophy Behind Supermax Prisons*

Despite the complexity of the issues surrounding supermax prisons, the rationale behind them is fairly simple: to ensure maximum protection for prison staff and inmates within the supermax prison and throughout the rest of the prison system "by taking a 'pro-active stance in the arena of gang suppression.'"⁸⁹ Prison officials achieve these goals in two ways. First, they isolate the most violent, predatory offenders within the prison system (read: prison gang members), allowing inmates at other facilities within the system to serve their time with less chance and fear of being a victim of violence.⁹⁰ Second, supermax prisons limit an inmate's freedom, making the potential for violence inflicted upon fellow inmates or prison staff practically nonexistent.⁹¹ In short, gang affiliated prisoners are not placed in the SHU merely as a form of punishment for specific behavior, but rather for the safety and security of other inmates and staff.

Supporters of supermax facilities assert two additional benefits. First, by removing prison gang leaders and the most violent inmates from the general prison population, officials at other prisons are able to reduce the amount of control they exert.⁹² Second, because supermax facilities have a reputation among prisoners as a bad place to serve time, prisoners in other prisons are deterred from committing violent acts or joining prison gangs because they do not want to serve time in a supermax facility.⁹³

In response to the protection of inmates argument, critics of supermax facilities charge that violence between prisoners in fact increases because conditions within supermax prisons are so harsh that they emotionally damage and increase the rage of inmates who may well be released into the

89. *Id.* at 1241 (quoting the California Department of Corrections Operations Manual § 55070.1).

90. Jim Doyle, *Pelican Bay Inmates' Rights Case Opens*, S.F. CHRON., Sept. 18, 1993, at B3.

91. See Catherine Campbell, *A house of cards, a pack of lies: Pelican Bay debriefing*, CALIFORNIA PRISONER, December 1991, at 4, 6.

92. Fay Dowker & Glenn Good, *From Alcatraz to Marion to Florence: Control Unit Prisons in the United States*, in *CAGES OF STEEL: THE POLITICS OF IMPRISONMENT IN THE UNITED STATES* 131, 142 (Ward Churchill & J.J. Vander Wall eds., 1992).

93. Isikoff, *supra* note 41, at A6 (noting reduction in gang violence and assaults in federal prisons and quoting John Clark, warden at Marion, as saying, "Guys don't want to come [to Marion], and after they've been here, they don't want to come back."). To some extent, prisoners agree. Inmate Robert Litchfield, who used to pride himself on being able to escape from any prison, admitted that being housed at Marion was "payback time." *Id.* at A1. Jermarr Arnold, considered to be "one of the meanest, most violent men yet to inhabit Pelican Bay" willingly confessed to a murder that, according to his lawyers, he didn't commit, "just to get the hell out of that place" and expressed a preference for dying by lethal injection rather than living in Pelican Bay. Howard Mintz & Mark Ballard, *'He'd Rather Die Than Live in Pelican Bay'*, THE RECORDER, Sept. 19, 1991, at 8. The following passage written by another Pelican Bay inmate further illustrates this feeling:

Before dawn on May 23, 1990, I was taken out of my cell at Folsom Prison and placed on a bus guarded by four heavily armed transportation officers. Sitting in a padlocked cage in the front of the bus, manacled with waist chains and leg irons, I was scared. I was bound for the security housing unit in a new maximum security prison called "the dog pound." Although I was already in the state prison system, the last place I wanted to be headed was Pelican Bay.

White, *supra* note 38, at 43-44.

general population or the streets.⁹⁴ Moreover, critics charge that despite the claims of a system-wide decrease in violence, violence will eventually increase because of the "snitch (or debrief),⁹⁵ parole or die" policy. Under this policy, prisoners accused of gang affiliation must provide information on fellow or rival gang members, or remain in the SHU until they parole or die.⁹⁶ Critics charge that this policy increases distrust and violence among inmates because "[a]ny man who debriefs is in danger from those who know, or even suspect, he has decided to cooperate by naming names."⁹⁷

Critics assert that segregation based upon alleged gang affiliation creates several other negative consequences. Because a gang member who debriefs has no incentive to tell the truth, "the debriefer chooses the solo player, or a child molester, or a rapist, or a nut case, and sends them to Pelican Bay."⁹⁸ By doing so, the debriefer has seemingly protected himself by "cleaning out" an inmate despised by the other inmates, "he has protected his gang (if he has one), and he hasn't aroused the rage of a rival gang."⁹⁹ Consequently, there is a high probability that many prisoners housed at supermax facilities are incorrectly placed there. These falsely accused prisoners are condemned to serve out their time in the SHU until parole or death because they know of nothing to tell, and, therefore, cannot effectively debrief. Falsely accused prisoners are thus condemned to serve out their time in the SHU until parole or death. More importantly, if a wrongly condemned inmate returns to the general population, his safety is in serious danger because other prisoners may assume that he debriefed in order to get out of the SHU.

In response to the assertion that fewer controls are necessary at other prisons, critics point out that more, not fewer, state facilities are being built based upon the Marion model, thereby indicating that the higher levels of repression used in supermax facilities have generally affected all prisons.¹⁰⁰ The Federal system is also opening up more supermax facilities.¹⁰¹ In short, critics argue that "Marion has not improved conditions at other prisons; [instead] its example has dragged them down toward greater brutality."¹⁰²

94. See White, *supra* note 38, at 96; Weinstein & Cummins, *supra* note 58, at 40; Campbell, *supra* note 91, at 4. At the *Madrid* trial, Dr. Stuart Grassian testified that Pelican Bay is "a factory that produces people who are violent and rageful." Maitland Zane, *Psychiatrist Criticizes Pelican Bay Prison*, S.F. CHRON., Oct. 13, 1993, at A17.

95. "Debriefing means giving [correctional officers] your life story highlighted by the names of every criminal associate." Campbell, *supra* note 91, at 5.

96. Elvin, *supra* note 49, at 21.

97. Campbell, *supra* note 91, at 4.

98. *Id.* at 5.

99. *Id.*

100. Dowker & Good, *supra* note 92, at 142.

101. *Id.*

102. *Id.*

In sum, while staff and inmates are probably in less danger within a supermax facility, the conditions within a supermax prison and the "snitch, parole or die" policy may increase distrust and violence among prisoners, thereby defeating the purposes behind segregation based upon alleged gang affiliation. Additionally, critics counter claims of decreased violence by pointing out that violence decreased throughout the system before supermax prisons were introduced¹⁰³ and that the system for accounting for violent incidents is easily manipulated. Accordingly, whether supermax prisons have accomplished their purposes is still in dispute.¹⁰⁴ At the least, it is too soon to determine the actual effects of isolating alleged gang members for indeterminate periods in the severe environment of a supermax facility.

II

THE CURRENT PROCEDURES REQUIRED IN CALIFORNIA FOR GANG-AFFILIATED SEGREGATION

Despite the continued debate over the effectiveness of supermax facilities, "in California, the question of how to manage prisons has resolved itself into the question of how to manage prison gangs."¹⁰⁵ Since at least 1984, the policy of some prisons has been to segregate all "known" prison gang members.¹⁰⁶ Given the power of prison gangs today, state officials defend this policy as a necessary means of protecting corrections officers and other prisoners from injury.¹⁰⁷ However, if the goal really is to control prison gangs and to protect the safety of other inmates and staff through segregation, prison officials must segregate the appropriate individuals. The "validation" process is the tool by which prison officials determine who is to be segregated.

A. *The Validation Process in the California Prison System*

The validation process begins with the Institutional Gang Investigator (or IGI). Every California institution, including Pelican Bay, employs at least one IGI who tracks gang activities and investigates those suspected of

103. In *Madrid*, the state introduced evidence showing "a consistent rate of decline in violence since 1984, five years before Pelican Bay opened" *Madrid v. Gomez*, 889 F. Supp. 1146, 1263 n.204 (N.D. Cal. 1995).

104. There is also a question of whether the conditions within a supermax prison are just plain cruel, regardless of their effectiveness. In *Madrid*, the court held that "the conditions of extreme social isolation and reduced environmental stimulation found in the Pelican Bay SHU will likely inflict some degree of psychological trauma upon most inmates confined there for more than brief periods." *Id.* at 1265. Nonetheless, the court found that the conditions in the SHU were not *per se* violative of the Eighth Amendment's cruel and unusual punishment clause. *Id.*

105. DiLulio, *supra* note 77, at 130.

106. Monitor's Report, *supra* note 9, at 25.

107. In *Madrid*, the prisoners did not dispute that prison gangs "present a serious threat to the safety of California prisons." *Madrid*, 889 F. Supp. at 1240.

gang membership. Any evidence obtained by the IGI is either placed in the inmate's file or noted in a report which is placed in the file.¹⁰⁸

Three "original, independent sources" of documentation are needed to validate someone in a category of gang involvement.¹⁰⁹ The most common form of evidence obtained in the validation process is the statement of another inmate, usually a confidential informant.¹¹⁰ Often, prison officials acquire this information through debriefing,¹¹¹ but they also gather information from various other sources and utilize any evidence that shows an inmate has possible gang ties.¹¹²

In order for prison officials to rely on any information of gang membership, especially that of a confidential informant, the information must satisfy a reliability threshold. Under section 3321(c) of the California Code of Regulations, a confidential source's reliability may be established by one or more of the following criteria: (1) the confidential source has previously provided information that proved to be true; (2) other confidential sources have independently provided the same information; (3) the information provided by the confidential source is self-incriminating; (4) part of the information provided is proven true; or (5) the confidential source is the victim.¹¹³

108. *Id.* at 1241-42. Prison officials gather such information from a variety of different sources. "In cell searches [prison investigators] find enemy lists, lists of gang members, notes related to gang activities, photographs, and drawings connected to gang activity. . . ." Defendants' Amended Findings of Fact and Conclusions of Law at 94, *Madrid v. Gomez*, 889 F. Supp. 1146 (N.D. Cal. 1995) (No. C-90-3094) [hereinafter Defendants' Findings]. In addition, because the correctional officers read all incoming and outgoing mail, they may find information in letters being sent to and from the prisoner. *Id.*

No written rule requires prison officials to rely on recent information when making a validation, although Pelican Bay officials do rely on at least some current information as a matter of practice. *Madrid*, 889 F. Supp. at 1242.

109. *Madrid*, 889 F. Supp. at 1242 (quoting the California Department of Corrections Operations Manual § 55070.19.2). The following passage best explains what is meant by an independent piece of evidence.

Evidence is "independent" if it has a unique source. So, for example, if one prison staff member saw an inmate working-out with a validated gang member and then later saw the inmate visit with the member's wife or girlfriend, that would be two independent pieces of evidence. On the other hand, if two staff members saw the work-out, that would be only one piece of evidence, even if both staff members reported their observation.

Plaintiff's Findings, *supra* note 6, at 11.

110. *Madrid*, 889 F. Supp. at 1242.

111. *See id.* at 1241.

112. Evidence of possible gang ties include the following: admissions; tattoos; written materials, such as gang constitutions and membership lists; photographs; letters; visits by persons with known gang connections; and documented staff observations of actual association, such as exercising together. *Id.* at 1242 & n.188. Investigators also obtain information from other law enforcement agencies, parole officers, and the Prison Gang Task Force. Defendants' Findings, *supra* note 108, at 94.

113. CAL. CODE REGS. tit. XV, § 3321(c) (Barclays 1995). In *Madrid*, plaintiffs challenged the fifth criterion as unreliable and therefore, unconstitutional. As noted in the introduction to this Comment, however, the court in *Madrid* found the evidence in the record too sparse to find any of the five reliability criteria unconstitutional. *Madrid*, 889 F. Supp. at 1277. Instead, the court found that any of the criteria may be appropriate so long as it is "not applied in a rote fashion without regard to the realities of the particular informant" *Id.* (quoting the Monitor's Report at ¶ 58).

In the case of confidential informants, prison officials are required to give notice to the prisoner of the charges against him.¹¹⁴ The form used as the basis for validation is given to the suspected inmate at his meeting with the IGI.¹¹⁵ This form must contain "[a]s much of the information as can be disclosed without identifying its source including an evaluation of the source's reliability; a brief statement of the reason for the conclusion reached; and, a statement of reason why the information or source is not disclosed."¹¹⁶ Practically, this form provides little information to the inmate.¹¹⁷

Once the IGI accumulates the required number of sources, he meets with the inmate. During the meeting, the IGI hands the inmate copies of departmental forms that summarize the evidence of the inmate's suspected gang affiliation.¹¹⁸ Though the inmate is allowed to protest the allegation during the meeting, ordinarily, the inmate is not told of the meeting beforehand, and is therefore unable to present any evidence.¹¹⁹

If the IGI believes that there exists sufficient information to validate a prisoner, he sends the evidence to Sacramento for review by a California Department of Corrections (the "Department") agent,¹²⁰ and the inmate is placed in temporary administrative segregation.¹²¹ The Department approves the vast majority of packages.¹²²

In sum, the rise in power of prison gangs has made supermax facilities increasingly popular. Consequently, the validation process has become increasingly important as the primary means by which prison officials identify prison gang members or affiliates in order to segregate them. In the next Part of this Comment, the discussion shifts to the legal standards protecting prisoners who are segregated based upon alleged gang affiliation.

114. In *Hewitt v. Helms*, 459 U.S. 460 (1983), the Court found that an inmate "must merely receive some notice of the charges against him and an opportunity to present his views to the prison official charged with deciding whether to transfer him to administrative segregation." *Id.* at 476.

115. CAL. CODE REGS., tit. XV, § 3321(b)(B) (Barclays 1995).

116. *Id.*

117. Plaintiff's Findings, *supra* note 6, at 13; *Madrid*, 889 F. Supp. at 1242.

118. *Madrid*, 889 F. Supp. at 1242. In *Hewitt v. Helms*, 459 U.S. 460 (1983), the Court found that an inmate "must merely receive some notice of the charges against him and an opportunity to present his views to the prison official charged with deciding whether to transfer him to administrative segregation." *Id.* at 476; CAL. CODE REGS. tit. XV, § 3321(b)(3) (Barclays 1995).

119. Plaintiff's Findings, *supra* note 6, at 7 (noting, however, that protest is a "hollow gesture"); *Madrid*, 889 F. Supp. at 1242.

120. *Id.*

121. *Id.* at 1142-43 n.189.

122. *Id.* at 1243. For instance, during the first three-year period that Pelican Bay was in service, the special services in Sacramento rejected only two validation packages out of approximately 300 packages submitted. *Id.* While the SSU review is supposedly a "quality review," in reality it is nothing more than a formality. *Id.* at 1243 ("As a practical matter, this review is largely superficial . . .").

B. The Process Required by the Toussaint and Madrid Decisions

The current legal stance regarding segregation for gang affiliation, at least in the Ninth Circuit, is best espoused in the *Toussaint* and *Madrid* decisions. In both cases, prisoners who had been administratively segregated based upon gang affiliation asserted that the procedures in place to initially validate them as gang affiliated prisoners, and those in place to review their status, were unconstitutional under the Fourteenth Amendment.

1. Creation of a Liberty Interest: The Olim and Meachum Decisions and California State Law

In order to make their Fourteenth Amendment claims, the prisoners in *Toussaint* and *Madrid* first had to establish a liberty interest to be protected. Ironically, two cases in which the United States Supreme Court held against the plaintiff prisoner laid the foundation for such a liberty interest.¹²³ In *Olim v. Wakinekona*,¹²⁴ the Supreme Court reversed the Ninth Circuit, which had held that a prisoner who was transferred from a prison in Hawaii to a prison in California had a substantive liberty interest protected by the Due Process Clause of the Fourteenth Amendment. The Supreme Court held that an interstate prison transfer, in and of itself, does not deprive an inmate of any liberty interest protected by the Due Process Clause.¹²⁵ In support of its decision, the Court cited *Meachum v. Fano*,¹²⁶ in which the Court had previously held that an inmate does not have a justifiable expectation that he will be incarcerated in any particular prison within a state so as to implicate the Due Process Clause when an intrastate prison transfer is made.¹²⁷ The Court went on to note, however, that state law could provide a protected liberty interest in remaining free from incarceration in a particular prison if the statute in question provided for sufficient substantive procedures to be followed prior to a transfer.¹²⁸

Thus, under *Olim* and *Meachum*, a prisoner's liberty interest may stem from either the Fourteenth Amendment or state law.¹²⁹ Prior to *Toussaint*

123. These two foundational cases are important to the issues raised in this Comment for several reasons. For instance, although neither case involved a transfer based on alleged gang affiliation, both cases did involve transfers from a lower level institution to a higher security level prison done on an administrative, not punitive, basis. Furthermore, the Court in both cases held that procedural protection greater than that for a normal administrative transfer was not necessary to protect the prisoner's liberty interest under the Fourteenth Amendment.

124. 461 U.S. 238 (1983).

125. *Id.* at 248.

126. 427 U.S. 215 (1976).

127. *Id.* at 225.

128. *See id.* at 226-27. This substantive predicate requirement creates a perverse incentive for states. It encourages a state interested in expanding its discretionary power to provide less, rather than more, rigorous standards for transfer: the more flexible a state's procedural requirements, the less likely a court will find a state created liberty interest which must be accorded due process under the Fourteenth Amendment.

129. *See Toussaint v. McCarthy*, 801 F.2d 1080, 1089 (9th Cir. 1986) (*Toussaint IV*), *cert. denied*, 481 U.S. 1069 (1987).

IV, a district court in California had held that "prisoners possessed liberty interests on both grounds."¹³⁰ The court in *Toussaint IV* rejected the district court's holding that the Due Process Clause itself creates a liberty interest in freedom from arbitrary administrative segregation,¹³¹ but found that a prisoner did retain a liberty interest arising from statutorily created state law.¹³² Before a court will "recognize a constitutionally protected liberty interest, state law must direct that a given action will be taken or avoided only on the existence or nonexistence of specified substantive predicates."¹³³ The *Toussaint IV* court found that in California, the specified substantive predicates arose from three sections of title 15 of the California Code of Regulations: sections 3335, 3336, and 3339.¹³⁴

Section 3335 describes specific circumstances requiring the immediate removal of an inmate from general population, while section 3336 describes specific procedures which must be followed in order to administratively segregate a prisoner.¹³⁵ Specifically, these provisions prohibit prison officials from retaining an inmate in administrative segregation unless one of the following predicates is met: (1) the inmate presents an immediate threat to the safety of the inmate or other; (2) the inmate endangers institution security; or (3) the inmate jeopardizes the integrity of an investigation of an alleged serious misconduct or criminal activity. Section 3339 provides that "[r]elease from segregation status shall occur at the earliest possible time in keeping with the circumstances and reasons for the inmate's initial placement in administrative segregation."¹³⁶

The court in *Toussaint IV* held that, when viewed together, the above regulations create a liberty interest to be free from administrative segregation.¹³⁷ Confronted with a similar due process challenge by prisoners segregated in the SHU for gang affiliation, the court in *Madrid* agreed.¹³⁸

130. *Id.* (citing *Wright v. Enomoto*, 462 F. Supp 397, 402 (N.D. Cal. 1976) (*Wright I*), *aff'd*, 434 U.S. 1052 (1978)).

131. *Id.* at 1091.

132. *Id.* at 1097-98. The court in *Toussaint IV* relied upon *Hewitt v. Helms* in holding that "the due process clause does not of its own force create a liberty interest in freedom from administrative segregation" because "administrative segregation is the sort of confinement that inmates should reasonably anticipate receiving at some point in their incarceration." *Id.* at 1091-92 (quoting *Hewitt*, 459 U.S. 460, 468 (1983)). See also *Olim*, 461 U.S. 238, 244-47 (1983); *Meachum*, 427 U.S. at 224-25. In *Olim* and *Meachum*, the Court found that a prisoner's conviction has "sufficiently extinguished the defendant's liberty interest to empower the State to confine him in any of its prisons," so that no liberty interest is implicated by a transfer, even where the transfer is punitive. *Olim*, 461 U.S. at 244-45 (quoting *Meachum*, 427 U.S. at 224-25). One should note, however, that in both *Olim* and *Meachum*, no state law liberty interest was in place. See *id.* at 249-51; *Meachum*, 427 U.S. at 226-28.

133. *Toussaint IV*, 801 F.2d at 1094.

134. *Id.* at 1097-98.

135. "Specifically, section 3336 requires that a sufficiently senior officer make the segregation decision, that the decision be documented, that the prisoner receive assistance, if needed, in presenting his case, and that the prisoner be informed of the reason for his segregation." *Id.* at 1098.

136. CAL. CODE REGS. tit. XV, § 3339(a) (Barclays 1994).

137. *Toussaint IV*, 801 F.2d at 1098.

138. *Madrid v. Gomez*, 889 F. Supp. 1146, 1271 (N.D. Cal. 1995).

Pointing to the regulations cited in *Toussaint*, the *Madrid* court held that those provisions "sufficiently fetter official decision-making to create a protected liberty interest."¹³⁹ In sum, both courts agreed that California prisoners have a state-law-created liberty interest in remaining free from segregation based on gang affiliation. This predicate established, the *Toussaint* and *Madrid* courts turned to the actual procedures required to protect this interest.

2. *Minimal Due Process Protection Required for Transfers Based on Gang Affiliation*

In determining the quantum of procedural due process required to protect a prisoner's state law created liberty interest, the *Toussaint* and *Madrid* courts focused on two United States Supreme Court cases: *Wolff v. McDonnell*¹⁴⁰ and *Hewitt v. Helms*.¹⁴¹ Both cases established procedural safeguards for prisoners who had demonstrated protected liberty interests.

In *Wolff*, a prisoner alleged that procedures surrounding disciplinary proceedings to revoke his good time credits violated his due process rights. In fashioning certain necessary procedures to protect a prisoner's due process rights, the Supreme Court introduced a balancing test that weighed "institutional needs and objectives" against "the provisions of the Constitution that are of general application."¹⁴² The Court found that certain procedures were necessary if the "minimum requirements of procedural due process [were] to be satisfied."¹⁴³ These procedures include "advance written notice of the claimed violation and a written statement of the factfinders as to the evidence relied upon and the reasons for the disciplinary action taken."¹⁴⁴ The Court also held that "the inmate facing disciplinary proceedings should be allowed to call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals,"¹⁴⁵ but that prison officials "must have the necessary discretion [to deny the calling of

139. *Id.* In addition, the *Madrid* court addressed another California Regulation, § 3341.5(c)(3), which provides that an inmate shall not be required in the SHU for over 11 months unless a classification committee determines that retention is required for one of three specific reasons: the inmate has an unexpired Minimum Eligible Release Date; release of the inmate would severely endanger the lives of inmates or staff, the security of the institution or the integrity of an investigation into suspected criminal activity or serious misconduct; or the inmate voluntarily requested continued retention in segregation. *Id.* The court found that this regulation provided a "separate basis for plaintiffs' liberty interest in being housed in the general prison population with respect to those inmates that have been confined in the SHU for over 11 months." *Id.*

140. 418 U.S. 539 (1974).

141. 459 U.S. 460 (1983).

142. *Wolff*, 418 U.S. at 556.

143. *Id.* at 563.

144. *Id.*

145. *Id.* at 566.

witnesses] without being subject to unduly crippling constitutional impediments.”¹⁴⁶

Furthermore, the Court held that such procedural requirements were not limited to disciplinary proceedings dealing with time credits, but extended to disciplinary proceedings for segregation as well.¹⁴⁷ The above requirements thus establish procedural safeguards to protect a prisoner’s liberty interest when he faces disciplinary, or punitive, segregation.

In *Hewitt*, the Court considered the amount of process due a prisoner when prison officials transfer that inmate to a supermax prison for “administrative” (rather than disciplinary) reasons.¹⁴⁸ Helms alleged that prison officials violated his due process rights when they removed him from the general population and confined him in administrative segregation pending an investigation into his role in a prison riot. Giving greater deference to prison officials than in *Wolff*, the Court considered both public and private interests in modifying the procedural requirements established in *Wolff*. The Court held:

We think an informal, nonadversary evidentiary review is sufficient both for the decision that an inmate represents a security threat and the decision to confine an inmate to administrative segregation pending completion of an investigation into misconduct charges against him. An inmate must merely receive some notice of the charges against him and an opportunity to present his views to the prison official charged with deciding whether to transfer him to administrative segregation So long as this occurs, and the decision-maker reviews the charges and then-available evidence against the prisoner, the Due Process Clause is satisfied.¹⁴⁹

In addition, the Court found that the state’s interest in maintaining prison security required a significant amount of deference to prison officials. As the court in *Toussaint IV* later interpreted *Hewitt*, “[t]he state’s interest in maintaining safety and security weighs heavily in favor of avoiding prolonged and cumbersome administrative proceedings.”¹⁵⁰

Under *Wolff* and *Hewitt*, the amount of process due a prisoner depends on whether the prisoner’s transfer is characterized as disciplinary or administrative. Neither case examined, however, whether sentencing an alleged

146. *Id.* at 566-67.

147. *Id.* at 571 n.19. The Court held that “[a]lthough the complaint put at issue the procedures employed with respect to the deprivation of good time, . . . the same procedures are employed where disciplinary confinement is imposed.” *Id.*

148. This type of administrative segregation is not used to punish a prisoner for a specific reason, but rather to further some legitimate need of the prison. *Taylor v. Koon*, 682 F. Supp. 475, 477 (D. Nev. 1988). Accordingly, administrative segregation can be used to protect a prisoner who is the target of a potential attack, “to break up potentially disruptive groups of inmates,” or, as in this case, to await the completion of an investigation into possible misconduct charges. *Hewitt v. Helms*, 459 U.S. 460, 468 (1983).

149. *Hewitt*, 459 U.S. at 476.

150. *Toussaint v. McCarthy*, 801 F.2d 1080, 1100 (9th Cir. 1986) (*Toussaint IV*).

gang member to an indeterminate sentence in a supermax facility is administrative or disciplinary. In *Toussaint*, the court had "assumed, without deciding," that transferring gang members to supermax facilities was administrative in nature.¹⁵¹ Consequently, in deciding the amount of process due a prisoner who is segregated based upon alleged gang affiliation, the court found that:

when prison officials initially determine whether a prisoner is to be segregated for administrative reasons due process only requires the following procedures: Prison officials must hold an informal nonadversary hearing within a reasonable time after the prisoner is segregated. The prison officials must inform the prisoner of the charges against the prisoner or their reasons for considering segregation. Prison officials must allow the prisoner to present his views.

We specifically find that the due process clause does not require detailed written notice of charges, representation by counsel or counsel-substitute, an opportunity to present witnesses, or a written decision describing the reasons for placing the prisoner in administrative segregation.¹⁵²

Despite the harsh nature of the conditions at the Pelican Bay SHU, the *Madrid* court also declined to resolve whether segregation based on gang affiliation was punitive or disciplinary.¹⁵³ Instead, the court followed the *Toussaint* decision, ruling that segregation based on gang affiliation was administrative and required only the minimal *Hewitt* due process safeguards to survive scrutiny under the Fourteenth Amendment.¹⁵⁴

151. *Madrid*, 889 F. Supp. at 1272.

152. *Toussaint IV*, 801 F.2d at 1100-01 (footnote omitted).

153. *Madrid*, 889 F. Supp. at 1275.

154. *Id.* After deciding that segregation was administrative, the circuit court in *Toussaint IV* then remanded the case to the district court to determine whether the Department of Corrections' procedures met the due process requirements stated above. *Toussaint IV*, 801 F.2d at 1113. The district court referred the proceedings to a monitor who was to review the Department's procedures and recommend certain procedural changes necessary to satisfy prisoner rights under the Fourteenth Amendment.

The monitor found that while the Department's procedures had the *potential* to satisfy the rights of prisoners, in practice, the procedures did not meet several of the requirements of due process. Further, the monitor found that the Department was unlikely to comply voluntarily with the requirements of due process. Accordingly, the monitor recommended court intervention to require the Department to "use special procedures when assigning prisoners to segregation based on gang membership." Monitor's Report, *supra* note 9, at 23.

The district court in *Toussaint V* adopted the findings of the monitor. The court found that although great deference should be given to prison officials in running day-to-day operations, the monitor's report did not imply that the Court "should usurp the role of prison officials." Rather, it suggested that the "difficulties engendered by determining prison gang membership may create a need for special due process procedures to ensure compliance with constitutional requirements." *Toussaint v. Rowland*, 711 F. Supp. 536, 541 (N.D. Cal. 1989) (*Toussaint V*). In addition, the court found that greater procedural protections were justified given that "there may be a greater impact on a prisoner's liberty interest when he is retained in segregation for an indeterminate period, based upon suspected gang membership, than when a prisoner is confined in segregation for a definite short period." *Id.*

The circuit court in *Toussaint VI* reversed the majority of the findings of the monitor and the district court, including the review of a monitor to ensure compliance, thereby upholding the decision in

III

WHY A CHANGE IS NECESSARY: THE CONSTITUTIONAL
SHORTCOMINGS OF THE DUE PROCESS PROTECTION
REQUIRED BY *TOUSSAINT* AND *MADRID*

Part II indicated that in order for prisoners to receive certain due process protections, they must first demonstrate a liberty interest that is threatened. As noted above, state statutes, at least in California, have created a liberty interest for prisoners suspected of gang affiliation in remaining outside of supermax facilities.

One can argue that the procedures established in *Toussaint*, and upheld in *Madrid*, are constitutionally adequate to protect this state-created liberty interest because they mirror the procedures established in *Hewitt*, another administrative transfer case. However, such an analysis fails to consider the important distinctions between a temporary administrative transfer and a transfer to a supermax prison based on alleged gang affiliation. Specifically, equating the procedural protection due in temporary administrative transfers with that required for transfers based upon alleged gang affiliation fails to consider the impact of indeterminate confinement in the severe supermax prison environment, the potential for abuse and misidentification of prisoners transferred solely on the basis of their suspected "status" as gang members, and the government's minimal interest in segregating non-active prison gang members from the general prison population.

More significantly, failing to distinguish between temporary administrative transfers and those based upon gang affiliation completely disregards the unique purpose behind supermax facilities. These facilities were not designed simply to increase prisoner occupancy levels or to segregate prisoners pending an investigation by prison officials. Rather, they were designed and created to house the system's most dangerous prisoners.¹⁵⁵ Consequently, a transfer to a supermax facility should not be equated with a temporary administrative transfer.

This Part analyzes the constitutionality of the *Toussaint/Madrid* requirements. It argues that segregating prisoners for indeterminate periods based on alleged gang affiliation is significantly different from both temporary administrative segregation and punitive or "disciplinary" segregation. As such, this Part argues that this type of segregation warrants a higher level of due process protection than that required under either *Hewitt* or

Toussaint IV. The circuit court held that the "continued appointment of the monitor was not justified under *Toussaint IV*. . . . We hold that there is no justification for continuation of the appointment." *Toussaint v. McCarthy*, 926 F.2d 800, 802 (9th Cir. 1990) (*Toussaint VI*). The court was swayed by the "rate of unintentional constitutional error," finding the rate so low that it did "not show an inability to comply with constitutional norms." *Id.* In fact, the only finding of *Toussaint V* that was maintained was the part of the order requiring the prisoner to be heard by the Institutional Gang Investigator before being segregated. *Toussaint VI*, 926 F.2d at 804.

155. *Madrid*, 889 F. Supp. at 1155.

Wolff, and suggests that this higher level of protection would best be achieved by requiring evidence of an independent prison infraction as a predicate to gang-affiliated segregation.

A. *The Amount of Process Due Under Mathews v. Eldridge*¹⁵⁶

In order to provide a framework by which to structure and analyze the level of procedural protection due prisoners segregated based on gang affiliation, this Section begins with an overview of how courts have determined the amount of process due to individuals who are affected by state action. This framework was developed in *Mathews v. Eldridge*,¹⁵⁷ in which the Supreme Court decided whether a recipient of social security disability payments was entitled to an evidentiary hearing prior to termination of the payments.

The *Eldridge* Court established three distinct factors to be examined when determining the amount of process due to an individual who is affected by a state action.¹⁵⁸ The first factor is whether the official action affects a private interest.¹⁵⁹ The second *Eldridge* factor is the risk of an erroneous deprivation of this interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards to prevent or correct such erroneous deprivations.¹⁶⁰ The final *Eldridge* factor is the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.¹⁶¹ The following sections examine each of these factors in turn.

B. *The First Factor: the Private Interest of the Allegedly Gang Affiliated Prisoner*

As described in Part I, conditions within a supermax facility are extreme and unique. In segregation cases, the private interest of the prisoner is that prisoner's desire to serve time outside of this harsh, supermax facility environment. Given the distinct nature of supermax prison confinement and the potential effects such confinement could have on a prisoner, this interest is very high.¹⁶² Moreover, in the case of prisoners segregated

156. 424 U.S. 319 (1976).

157. *Id.*

158. *Id.* at 334-35; *Toussaint v. McCarthy*, 801 F.2d 1080, 1098 (9th Cir. 1986) (*Toussaint IV*) (citing *Eldridge*, 424 U.S. at 335).

159. *Eldridge*, 424 U.S. at 335.

160. *Id.*

161. *Id.*

162. Both *Toussaint VI* and *Madrid* relied upon the procedural protections developed in *Toussaint IV*. See *Toussaint VI*, 926 F.2d at 801 ("The relevant principles and law of the case have been established in prior decisions, most notably and relevantly in *Toussaint IV* It is not our Sisyphean task to revisit those decisions or revise their holdings. We apply them, determining here only those issues where their application has been challenged."); *Madrid v. Gomez*, 889 F. Supp. 1146, 1271 (N.D. Cal. 1995). *Toussaint IV* was decided in September 1986, one month prior to the Marion lockdown.

for suspected gang affiliation, this interest is increased by two circumstances. First, inmates segregated for alleged gang affiliation are subject to indeterminate confinement. Second, segregation based on gang membership subjects inmates to severe supermax conditions solely because of their alleged "status" as gang members. The impact of each of these circumstances on a prisoner's private interest is examined below.

1. *Indeterminate Sentences Are Harsher than Determinate Sentences*

As discussed above, the Federal District and Circuit courts in California have relied upon *Hewitt*, a case involving temporary administrative segregation,¹⁶³ to establish procedural protection for the segregation of alleged gang members. Such reliance is misplaced because administrative segregation based on alleged gang affiliation, which carries with it an indeterminate sentence, is more harsh than the temporary administrative segregation at issue in *Hewitt*. In addition, prisoners like Helms, who are temporarily placed in administrative segregation pending an investigation into their participation in a serious prison violation, eventually receive a hearing marked by the more rigorous due process protections which accompany punitive segregation. In contrast, prisoners segregated for alleged gang affiliation receive only a single administrative hearing. Accordingly, prisoners subjected to indeterminate administrative segregation based on gang affiliation deserve greater procedural protection than inmates subject to temporary administrative segregation.

Moreover, even reliance on the greater procedural protection accorded to prisoners in *Wolff* would be inequitable. The Court in *Wolff* adopted procedures to protect the liberty interests of prisoners who faced disciplinary or punitive proceedings. Under section 3341.5 of the California Code of Regulations, punitively segregated prisoners have an established release date from the SHU; administratively segregated prisoners do not.¹⁶⁴ Consequently, a prisoner that has been transferred administratively to a

Since then, states have implemented supermax facilities at an increasing rate and have imposed lockdown conditions used at Marion on a permanent basis.

In addition, *Toussaint* pertained to the Folsom and San Quentin prisons, which are considered old in comparison to Pelican Bay. Mintz, *supra* note 25, at 10. Since then, the character of the Department of Corrections has changed considerably concerning the number of inmates within the system and where such inmates are housed. *Id.* The defendants in *Madrid* did not dispute the fact that the conditions at issue in the case were more restrictive than those that were in effect during the *Toussaint* litigation. *Madrid*, 889 F. Supp. at 1265 n.209. As noted above, Pelican Bay's SHU is more restrictive than any other place of administrative segregation. Accordingly, although the constitutionality of prison conditions is an issue requiring a separate analysis, harsher conditions of confinement without a corresponding change in procedural protections ignores the first *Eldridge* factor because a prisoner's interest in serving time outside of the confines of a supermax facility is undoubtedly higher since *Toussaint IV*.

163. *Toussaint v. McCarthy*, 801 F.2d 1080, 1100 (9th Cir. 1986) (*Toussaint IV*). The prisoner in *Hewitt* was segregated because he participated in a riot and was found guilty of two misconduct charges. *Hewitt v. Helms*, 459 U.S. 460, 464-65 (1983).

164. CAL. CODE OF REGS. tit. XV, §§ 3341.5(c)(1)-(2) (Barclays 1994).

supermax facility based upon alleged gang affiliation has a more severe sentence than a prisoner transferred for punitive reasons. Concomitantly, he has a more substantial liberty interest in serving time outside of a supermax facility. As such, greater procedural protections are in order.

In sum, the procedures established in *Hewitt* and followed by the courts in *Toussaint* and *Madrid* are inadequate to protect the liberty interest of prisoners segregated because of alleged gang affiliation. In addition, even the procedures required in *Wolff* may fall short of protecting a prisoner's liberty interest in avoiding indeterminate confinement in the SHU. Instead of viewing the procedures established in *Hewitt* and *Wolff* as a limit to the protection afforded to administratively segregated prisoners, courts should focus on additional procedural requirements that would be consistent with the suspected gang affiliated prisoner's heightened liberty interest.

2. *The Prisoner's Interest in Avoiding Segregation Based Solely on Status*

A second circumstance that arguably impacts the private interest of a prisoner is the basis upon which the prisoner is selected for segregation. In its current form, the California system segregates prisoners based upon their "status" as gang members and not because of any particular action taken by the prisoner. This policy is problematic for several reasons.

First, because prison gangs are a major force throughout the prison system, the number of gang affiliated prisoners in the system outnumbers the housing capacity of the SHU.¹⁶⁵ Consequently, absent some other reason for segregation, status as a prison gang member should not be the sole factor when determining whether or not to transfer a prisoner to the SHU. Instead, it would make more sense to segregate a prisoner who is deemed to be dangerous, regardless of his prison gang status.¹⁶⁶

Second, the policy of segregating prisoners solely because they are alleged gang members is inconsistent with a line of United States Supreme Court decisions holding that laws which seek to punish individuals' "status" are unconstitutional. In *Robinson v. California*,¹⁶⁷ for example, the Court held unconstitutional a California statute making the "status" of narcotic

165. The Department itself is not certain of the percentage of prisoners who are gang members or gang affiliated. On a recent visit to the San Quentin prison, the correctional officer who led our tour estimated that over 80% of the prisoners within the prison system were prison gang affiliated. In contrast, the Department has identified or validated only 2% of the inmate population as gang members and believes that another 13% are unvalidated gang members (i.e. gang affiliated, associates of an identified gang, or gang sympathizers). Telephone Interview with Timothy A. Rougeux, Correctional Counselor II, Litigation Management Division of the Department of Corrections for the State of California (June 19, 1995). In any case, the percentage of gang members is greater than the capacity of the SHU.

166. According to prisoners housed at Pelican Bay, approximately three-fourths of the prisoners are said to be gang members when really only one-third need to be housed in the SHU because they are verifiable gang leaders or are truly dangerous. Campbell, *supra* note 91, at 4.

167. 370 U.S. 660 (1962).

addiction a criminal offense for which the offender may be prosecuted. Similarly, in *Farber v. Rochford*,¹⁶⁸ a lower federal court found an Illinois statute making any person known to be a prostitute or a narcotic addict a criminal to be unconstitutional.¹⁶⁹ While the statutes in *Robinson* and *Farber* pertained to individuals who were not inmates, the reasoning behind the decisions applies equally here. As the court in *Farber* noted, the Constitution is offended when law enforcement officers are given unbridled discretion to pick and choose who to act upon.¹⁷⁰ And like in *Farber* and *Robinson*, the current evidentiary standards for segregating gang members have the potential to transform ordinary or innocent behavior into behavior that is punishable through more restrictive conditions of confinement.¹⁷¹

Finally, as noted above, in California, segregation based on gang affiliation results in an indeterminate sentence, while punitively segregated prisoners receive determinate sentences. Thus, because not all gang members are violent, it is entirely possible that a nonviolent gang member segregated solely on the basis of "status" will receive a harsher punishment than a prisoner who has committed an egregious crime while in prison. Such a result challenges the argument that the SHU deters behavior because, as noted at Part III.C., violent behavior is not required for segregation based upon gang affiliation. More importantly, such a result counteracts the goal of placing the most dangerous criminals in the SHU, thereby jeopardizing the correctional system's ultimate goal of increased safety for inmates and staff.

In sum, several circumstances combine to increase a suspected gang member's private interest in remaining free from segregation in the SHU. The severe environment, the indeterminate nature of the confinement, and the "status" basis for the prisoner's segregation all serve to distinguish transfers to the SHU based on gang affiliation from both temporary administrative and punitive transfers.

C. *The Second Factor: The Risk of Erroneous Deprivation*

As noted earlier, the second *Eldridge* factor is the risk of an erroneous segregation decision, and the probable value, if any, of additional or substitute procedural safeguards to prevent or correct such erroneous deprivations. Thus, while the previous discussion alluded to the effects such decisions could have on a wrongly segregated prisoner, the following discussion addresses specific problems with the validation process.

168. 407 F. Supp. 529 (N.D. Ill. 1975).

169. *Id.* at 533. The statute that was at issue in *Farber* is very similar to the evidentiary standards in question here, in that it imposed punishment for what one was "reputed to be."

170. *Id.* at 532.

171. See *supra* Parts III.C.1. and III.C.2.; *Robinson*, 370 U.S. at 667; *Farber*, 407 F. Supp. at 534.

1. *Difficulty of Conclusively Proving Gang Affiliation*

In his report, the monitor appointed by the *Toussaint* court found that "gang membership . . . is inherently virtually impossible to ascertain or discover with precision. The gang's only tangible existence is in the minds of prisoners and prison officials. It is quite unlikely that any two individuals would independently list the same set of persons as members of the group."¹⁷² Given this difficulty, greater procedural requirements would increase the probability that the appropriate individuals are being segregated, thereby enhancing the interests of innocent inmates and the state.

The current due process requirements demand only that the decisionmaker's determination that a prisoner is gang affiliated be supported by "some evidence."¹⁷³ Such a low standard poses an interesting problem. According to the Department's procedures, three independent pieces of evidence are needed to validate gang affiliation. However, in order to qualify, the three pieces of evidence need not be illegal acts or even violations of prison rules. Consequently, a prisoner may perform three perfectly legal acts and still be validated as a gang member.¹⁷⁴

More importantly, the reliability of confidential informants must be questioned. As one will recall, a confidential informant's reliability may be established by one or more of the following criteria: (1) the confidential source has previously provided information which proved to be true; (2) other confidential sources have independently provided the same information; (3) the information provided by the confidential source is self-incriminating; (4) part of the information provided is proven true; or (5) the confidential source is the victim.¹⁷⁵ Although subsequent courts have used these requirements to determine the reliability of confidential informants,¹⁷⁶ on their face these requirements present some troubling problems.

For example, the first and fourth reliability elements leave open the possibility that a source who provides information that is only partially accurate will be deemed reliable. Although an informant's reliability is

172. Monitor's Report, *supra* note 9, at 22 (omission in original) (quoting Sixth Review Memorandum and Order, Docket No. 1761, Mar. 18, 1985) (footnote omitted).

173. *Toussaint v. McCarthy*, 801 F.2d 1080, 1105 (9th Cir. 1986) (*Toussaint IV*); see also *Superintendent of Mass. Correctional Inst. v. Hill*, 472 U.S. 445, 454 (1985) (holding that revocation of good time does not comport with due process unless the findings of the prison disciplinary board are supported by "some evidence").

174. At least one of the sources must be a direct link to a validated member, such as a validated member or former member identifying the inmate as an associate; correspondence with a validated member; a photograph with a validated member; staff or informant observations of being in company with a validated member; identification as an associate by a validated associate who has a documented direct link. *Madrid*, 889 F. Supp. at 1242 (quoting the California Department of Corrections Operations Manual § 55070.19.3). One should note, however, that some of these "direct links" are not illegal or violations of any prison regulation.

175. CAL. CODE REGS. tit. XV, § 3321(c) (Barclays 1995).

176. See, e.g., *Hernandez v. Marshall*, No. C 92-4608 VRW, 1994 U.S. Dist. LEXIS 7528, at *8-11 (N.D. Cal. June 2, 1994).

technically weighed against exculpatory evidence, the incentive to disregard conflicting evidence in the pursuit of inculpatory evidence of prison gang membership is high.¹⁷⁷ Additionally, the second and third criteria allow confidential informants to cross-validate each other.¹⁷⁸ In fact, the statements of confidential informers are the most common piece of evidence used against inmates in determining gang affiliations.¹⁷⁹ Thus, since corroborated hearsay statements are permissible in prison administrative proceedings,¹⁸⁰ cross-validating can be used by gangs to recruit members by having members of a particular gang lie about the activities of an inmate whom they wish to recruit.¹⁸¹

A further problem is the tendency to ignore exculpatory evidence. One would hope that the Department takes the character of such evidence into consideration when determining gang affiliation. However, given the antagonistic positions of a prison official and a prisoner, and the fact that the three pieces of evidence requirement does not include the consideration of exculpatory evidence, it is highly unlikely that such evidence is considered.¹⁸²

2. *Potential for Abuse of the Gang Affiliated Segregation Process*

The risk of erroneous deprivation is increased by the potential for abuse that exists within the process for segregating gang-affiliated prisoners. There is a strong likelihood that gang membership is not the primary criteria being used to administratively segregate prisoners. Instead, such labelling appears to be used as a pretext for indefinite confinement of inmates who attempt to help other inmates.¹⁸³ According to a study conducted in 1989, the most frequently disciplined group of prisoners is jailhouse lawyers.¹⁸⁴ Gang members were the fourth most disciplined group.¹⁸⁵ Although this study was of prison discipline generally, there is a

177. See *infra* note 182.

178. Plaintiff's Findings, *supra* note 6, at 12.

179. *Id.* at 10.

180. Defendants' Findings, *supra* note 108, at 166.

181. The Monitor designated by the court in *Toussaint IV* to review segregation procedures found that the above criteria could be appropriate safeguards for determining the reliability of confidential information, "provided that they are not applied in rote fashion without regard to the realities of the particular informant report under consideration." Monitor's Report, *supra* note 9, at 35. Accordingly, the Monitor found that each determination must be made on a case-by-case basis. *Id.*

182. The government has admitted that a period of discipline-free behavior, for example, will not always affect the determination of a prisoner's status. Defendants' Findings, *supra* note 108, at 99.

183. Note that whether using administrative segregation for jailhouse lawyers is constitutional or not, the Supreme Court has stated that "administrative segregation cannot be used as pretext for indefinite confinement of an inmate." *Hewitt v. Helms*, 459 U.S. 460, 477 n.9 (1983).

184. The study found that "[j]ailhouse lawyers assist prisoners, many of whom are illiterate, to participate on their own behalf in formal grievance and appeal procedures both within the prison and in the courts." Mark S. Hamm, et al., *The Myth of Humane Imprisonment: A Critical Analysis of Severe Discipline in Maximum Security Prisons, 1945-1990*, at 36 (1990) (copy on file with author).

185. *Id.* at tbl. 9; PRISON DISCIPLINE STUDY, SHATTERING THE MYTH OF HUMANE IMPRISONMENT IN THE U.S. 8 (Prison Discipline Study, Sacramento, CA). The Prison Discipline Study was developed in

high probability that the same groups are also subjected to administrative segregation because it is the most frequent form of punishment used to discipline prisoners.¹⁸⁶

On a practical level, these results make sense. Prison administrators wish to segregate jailhouse lawyers because they help other prisoners file legal challenges against the prisons. In addition, the state has admitted that the most litigious prisoners in California are congregated in Pelican Bay.¹⁸⁷ Accordingly, this evidence suggests that prison administrators are using administrative segregation to "legally" hinder the number of complaints filed against them.

D. The Third Factor: The Government's Interest and the Burden of Additional Procedural Protection

While the first two *Eldridge* factors are relevant, generally courts have not given much weight to a prisoner's private interest affected by the segregation procedures,¹⁸⁸ nor to efforts to correct any mistakes in segregation.¹⁸⁹ Consequently, any proposal for increased due process safeguards must somehow satisfy scrutiny under the third *Eldridge* factor: the government's interest and the administrative and fiscal burden of requiring additional safeguards. The following discussion, therefore, will focus on these two elements.

1. The Government's Interest in Segregating Wrongly Accused, Non-Gang Affiliated Prisoners or Inactive Gang Affiliated Prisoners Is Minimal

Although the government has a legitimate interest in segregating gang members who pose a serious threat to the safety or security of the prison

1988 "to investigate the extent of severe discipline in prisons by allowing prisoners to speak for themselves." *Id.*

186. Hamm et al., *supra* note 184, at tbl. 3. After Pelican Bay opened, prisoners housed there flooded the court in San Francisco with at least 250 civil rights petitions and the lawsuit was instigated at the behest of federal judges who received such petitions. Mintz, *supra* note 73, at 1; Pamela J. Podger, *Prison management blamed for abuse*, FRESNO BEE, Jan. 12, 1995, at B5. Ironically, at the time, prison officials attempted to defend charges of excessive force by insisting that the volume of petitions was due to the congregation of the most litigious prisoners in Pelican Bay. Mintz, *supra* note 73, at 8. Such evidence appears to add credibility to the finding in the study that jailhouse lawyers are the most likely candidates for administrative segregation.

187. Mintz, *supra* note 73, at 8.

188. See, e.g., *Olim v. Wakinekona*, 461 U.S. 238, 245 (1983) (holding that a prisoner "has no justifiable expectation that he will be incarcerated in any particular State").

189. This is best illustrated by looking at the rules regarding subsequent reviews once a prisoner has been segregated. Because retention requirements are much more lax than the requirements to initially house prisoners in the SHU, the opportunities to discover a wrongful validation are slim. In fact, prisoners are given hearings 2-3 times a year by the Unit Classification Committee, which unlike the Institutional Classification Committee, does not have the power to classify prisoners. CAL. CODE REGS. tit. XV, §§ 3339, 3341.5(c)(2) (Barclays 1994).

system, it has little interest in segregating wrongly accused prisoners or inactive, nonviolent gang members.

Evidence of the misuse of the segregation process and the misidentification of gang affiliated prisoners tends to lower the government's interest in segregating an inmate whom it claims is gang affiliated. As noted by the plaintiffs in *Madrid*,

"[w]hile [the state] certainly [has] legitimate interests in punishing illicit gang activities and promoting prison security by separating active gang affiliates . . . , improving the accuracy of the validation process should actually advance these goals. The government has no legitimate interest in punishing an innocent man, and gang communications are unlikely to be disrupted by consigning wrongly accused gang affiliates to SHU."¹⁹⁰

Accordingly, a change in initial segregation procedures would help to ensure that the goal of segregating the appropriate individuals is being realized. At the least, the data suggest that the current procedures may not be adequate to insure that the government's interests are being served.

Similarly, prison officials have little interest in segregating an inactive gang-affiliated prisoner who is non-violent and/or uninvolved in current prison gang activities. As noted in Part III.B.2., it appears that the majority of prisoners are affiliated with prison gangs in some way. Moreover, because the SHU is not an overflow facility, any space taken up by a prisoner who is not dangerous is no longer available for a prisoner who is dangerous. Given that the goal of the SHU is to segregate only the most dangerous prisoners in the system, one of the predicates for gang affiliated segregation should be evidence of some infraction of the law or, at least, a prison rule. Such a requirement would help to ensure that gang-affiliated prisoners who are inactive or non-violent are not segregated in place of more dangerous prisoners.

2. *Requiring Evidence of an Independent Violation of Prison Rules as a Predicate to Gang-Affiliated Segregation Places Little to No Burden on the Government's Finances or Administration*

As discussed above, prison officials desire to segregate gang members in order to decrease overall prison violence. It follows that to achieve this goal, the appropriate individuals must be segregated. Given that it is extremely difficult to prove gang affiliation,¹⁹¹ and that the current set of procedures are subject to abuse,¹⁹² these procedures fail to adequately protect a prisoner's liberty interest in serving time outside of a supermax facility. The procedures are, therefore, unconstitutional under the Fourteenth Amendment. Consequently, the district court's recent decision in *Madrid* is

190. Plaintiff's Findings, *supra* note 6, at 49.

191. See *supra* text accompanying note 172.

192. See *supra* Part III.C.1.

wrong because, in fact, greater procedural requirements are necessary when segregating alleged gang members for indeterminate periods.

Segregation based upon an alleged gang affiliation, by itself, should not be sufficient to place a prisoner in the SHU. Instead, segregation decisions should be based upon evidence of some infraction of prison rules, especially those normally performed by prison gangs. This proposal does not, therefore, advocate a substantive change in prison policy; rather, the proposal is directed at the courts and encourages them to change the procedural policies that have been set forth in *Toussaint* and *Madrid*.

The strength of this proposal is that it imposes no real additional burden on the government. Prison officials are already collecting and documenting evidence of prison infractions; thus, no additional effort will be required of them. The proposal would only affect the IGI, who would be required to obtain greater amounts of evidence before validating a prisoner. In practice, the proposal may decrease the government's burden by decreasing the likelihood that a third party, like a court, will intervene in their decisions.

A greater evidentiary standard will also enhance judicial economy in actions brought by prisoners alleging wrongful segregation. Under the present rule, courts must undertake the arduous task of reviewing pages and pages of confidential information, weighing the volume and reliability of evidence against the deference that appropriately should be given to prison officials. Under this proposal, the court's focus will shift from a prisoner's alleged contacts, to the allegedly illegal actions that the prisoner performed. Thus, while a weighing of the evidence must still take place, the court's ability to focus on better defined criteria undoubtedly will make judicial decisions easier.

Finally, a requirement that at least one piece of evidence be an objective violation of prison rules would limit reliance on problematic confidential source information. Because a violation will already have occurred, the requirement would also decrease the necessity of consulting exculpatory evidence. In turn, the government's interest in segregating a prisoner who has violated a specific prison rule is significantly greater than its interest in segregating a prison gang member who has not actually threatened the security or administration of the prison.

V

REPLYING TO CRITICS

A. *Policy Reasons Against a Change in the Evidentiary Standard*

Besides consideration of the *Eldridge* factors, there are policy reasons against tampering with the current set of procedures. The following discussion acknowledges and responds to these concerns.

1. *The Courts' Historical Hands-Off Policy*

Although courts have become more involved in prison administration over the last twenty years, they still give great deference to prison administrators. In *Hewitt*, the Supreme Court observed, "[b]road discretionary authority is necessary because the administration of a prison is 'at best an extraordinarily difficult undertaking.'" ¹⁹³ In addition, the Court has noted that "to hold . . . that *any* substantial deprivation imposed by prison authorities triggers the procedural protection of the Due Process Clause would subject to judicial review a wide spectrum of discretionary actions that traditionally have been the business of prison administrators rather than of the federal courts."¹⁹⁴ More specifically concerning segregation decisions, the *Toussaint* court found that "the exigencies of prison administration allow prison administrators to make segregation decisions on the basis of 'some evidence,' including the administrator's experience and awareness of general prison conditions" ¹⁹⁵

While prison administrators do deserve great deference, increased procedural requirements would not replace their decision making abilities. More accurately, greater procedural protection coincides with their view that assessing gang membership is a difficult prospect.¹⁹⁶ When potential constitutional violations are riding upon such a determination, it only makes sense to formulate "special due process procedures to ensure compliance with constitutional requirements."¹⁹⁷

2. *Helping Criminals Is Unpopular*

The creation of greater procedural protection to help people who are convicted of crimes, in many cases violent crimes, does not carry much popular appeal. It is difficult to feel sympathy, if anything, towards men and women who have been convicted and incarcerated for breaking the laws upon which we depend for security and order.

However, if the procedures established by the courts to satisfy the goals of the correctional system are not being met, society, and not just a prisoner, loses. Many of the prisoners housed in the SHU will one day be released.¹⁹⁸ If SHU-like conditions have the potential to increase rage in prisoners, such rage can only be magnified in a prisoner, like Tony Trujillo, who is housed there improperly. In the end, it is an innocent person and that person's family who loses, not judges or prison administrators. It is therefore imperative for courts to direct prison officials to implement proce-

193. *Hewitt v. Helms*, 459 U.S. 460, 467 (1983) (quoting *Wolff v. McDonnell*, 418 U.S. 539, 566 (1974)).

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

195. *Toussaint v. McCarthy*, 801 F.2d 1080, 1105 (9th Cir. 1986) (*Toussaint IV*).

196. *See Toussaint v. Rowland*, 711 F. Supp. 536, 541 (N.D. Cal. 1989) (*Toussaint V*).

197. *Id.*

198. Mintz, *supra* note 186, at 9.

dures which would increase the probability that the proper individuals are being segregated.

B. Other Alternatives

Perhaps the feasibility and strength of this Comment's proposal can best be illustrated by looking at the two most widely asserted alternatives. The first alternative is for a disinterested third party monitor who would review the Department's segregation decisions. The second alternative is to simply stop segregating prisoners based upon alleged gang affiliation.

I need not spend a lot of time discussing the second alternative because it fails to address the realities of current prison life. As indicated above in Part I, prison gangs are a major part of prison life and necessarily affect how prisons are managed. To simply disregard this fact would no doubt place the safety of the prison staff and the prisoners in greater jeopardy.

The first alternative, suggested by the court in *Toussaint V*, also has major shortcomings.¹⁹⁹ First, as found in *Toussaint VI*, the rate of misclassifications is not great enough to justify such a measure,²⁰⁰ nor does the number of misclassifications suggest that the Department is willfully violating prisoner's rights. Second, creating a reviewer position would still require the courts to act as a check on the decisions of the reviewer. Thus, the efficiency of such a measure and the fiscal and administrative burdens on the system are arguably negative. Finally, there are many practical concerns that would have to be addressed: How would this position be filled? Could a reviewer remain disinterested while still guaranteeing that he/she has the background and experience necessary to do the job efficiently? Will his/her disinterested state of mind disappear over time as he/she becomes more entrenched in the system?

Unlike the second alternative, the higher evidentiary standard proposal addresses the impact that prison gangs have on prison safety. And unlike the first alternative, the higher standard offers the government potential administrative and fiscal efficiencies that a third party reviewer would not create.

CONCLUSION

The procedures established by the *Toussaint* court and adopted by the *Madrid* court are identical to those required of prison officials when temporarily segregating prisoners for administrative reasons. Although these procedures are less substantial than those required for punitive segregation, this may, at first glance, seem reasonable: one standard applied to all adminis-

199. *Toussaint V*, 711 F. Supp. at 543.

200. *Toussaint v. McCarthy*, 926 F.2d 800, 802 (9th Cir. 1990), *cert. denied*, 502 U.S. 874 (1991) (*Toussaint VI*). Administrators have admitted to seven mistakes since the opening of Pelican Bay. Defendants' Findings, *supra* note 108, at 100.

trative segregation cases gives prison officials only one set of rules to follow.

Such an application is unreasonable, however, when one considers the special problems posed by segregating prisoners based upon alleged gang affiliation. First, alleged gang affiliates are given indeterminate sentences, while prisoners segregated for punitive or disciplinary reasons are given determinate sentences. Consequently, a prisoner who commits a violent crime in prison could receive less harsh punishment and enjoy greater procedural protection than a prisoner who is a gang affiliate but who has not committed a crime. Though the distinction between indeterminate and determinate sentences may appear to be slight, it presents a dichotomy contrary to the principle of proportionality established in our criminal justice system. More importantly, this policy contradicts the underlying purpose of the SHU because the most dangerous criminals are not the ones being segregated.

Second, segregation based on one's "status" as a gang member is arguably unconstitutional and raises several unique problems. Because it appears that the majority of prisoners are gang affiliated in some way, the "safety and security" justification for segregating gang members loses some of its importance. The "status" policy appears merely to give prison officials greater discretion as to who to segregate. In addition, predicated segregation solely on "status" increases the possibility that a prisoner is being punished for non-violent and perfectly reasonable behavior. Finally, the current reliability requirements leave open the possibility for abuse of the segregation process and misidentification of alleged gang members; results that have been indirectly confirmed by the *Madrid* litigation itself.

The proposal for a higher standard requiring independent evidence of a prison infraction is not a criticism of prison officials or the correctional system as a whole. Their jobs are not easy and their safety is often at stake. However, we cannot pretend that procedural protections affecting prisoners in Crescent City (or Marion, Illinois for that matter) do not affect us all in some way.

The segregation procedures established to protect a prisoner's Fourteenth Amendment rights do more than burden prison officials or help prisoners. Such procedures place a much needed check upon the Department of Corrections by ensuring that prison officials carry out their duties in conformity with the public's wishes. If prison administrators are allowed to implement procedures arbitrarily that do not work towards the goals of the criminal justice system, society pays the price. The bottom line is that following the rules established by the legislature and the Constitution is the only way to ensure that society's rights are also protected.

