

**SERIES ON SOLITARY CONFINEMENT & THE EIGHTH AMENDMENT:  
ARTICLE I OF III**

**SOLITARY CONFINEMENT IN AMERICA**

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*Prisoners are among the most vulnerable people in our society—and the most forgotten and mistreated among them are those living in solitary confinement. Today, nearly 100,000 Americans, including youth and people with serious mental illness, spend 23 hours a day alone in cells smaller than parking spaces, with almost no human engagement. Some live like this for days, others for decades. Over a century ago, the Supreme Court recognized that solitary confinement had been all-but-eliminated because it was “found to be too severe,” but the practice has made a resurgence in the last three decades. And somehow—despite an overwhelming societal and medical consensus today that the harms of solitary confinement are, still, too severe—the practice remains uninhibited by the Constitution in almost all forms, applied to almost all individuals, in almost all jurisdictions in America.*

*Now, however, the tide may be turning. Federal district courts have in recent years shown an increased willingness to question solitary confinement’s permissibility under the Eighth Amendment’s ban on cruel and unusual punishment, starting with particularly harsh forms of confinement against particularly vulnerable groups of people. Moreover, this occurs in the midst of a trend of expansions of Eighth Amendment rights and a growing recognition by state legislatures, professional organizations, and international bodies that solitary confinement is unacceptably harmful by today’s “evolving standards of decency.” And with the retirement of frequent solitary confinement critic Justice Kennedy, the center of gravity for judicial action is set to shift even further to the lower courts.*

*At this potentially pivotal moment, this three-part Article series seeks to provide the first comprehensive overview of the practice of solitary confinement in America and of the Eighth Amendment litigation it has spurred. And building on this context, the series introduces and details two arguments, under two separate Eighth Amendment doctrines, contending that solitary confinement is per se unconstitutional.*

**INTRODUCTION TO THE SERIES ON SOLITARY CONFINEMENT & THE  
EIGHTH AMENDMENT**

I hesitated once, debating with myself, whether, if I had the power of saying ‘Yes’ or ‘No,’ I would allow it to be tried in certain cases, where the terms of imprisonment were short; but now, I solemnly declare, that with no rewards or honours could I walk a happy man beneath the open sky by day or lie me down upon my bed at night, with the consciousness that one human creature, for any length of time, no matter what, lay suffering this unknown punishment in his silent cell, and I the cause, or I consenting to it in the least degree.

– CHARLES DICKENS, *AMERICAN NOTES*<sup>1</sup>

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“Prisoners are shut away—out of sight, out of mind.”<sup>2</sup> This statement goes double for those in solitary confinement. Those subjected to solitary confinement cells across every jurisdiction in America are the most forgotten among the forgotten of our society.<sup>3</sup> They languish in the darkest corners of the darkest places. Up to 100,000 Americans today—including youth, individuals with serious mental illness, and individuals on death row—live in utter isolation, suffering in sub-human conditions. And yet no one—at least, it seems, not many federal courts and not all state legislatures—seems to care enough to make a substantial change. Prisoners, after all, are often hated in bipartisan fashion.<sup>4</sup>

Despite the Eighth Amendment’s ban on “cruel and unusual punishments,”<sup>5</sup> with its foundation of “nothing less than the dignity of man,”<sup>6</sup> no federal court in America has held that solitary confinement is per se unconstitutional. Recent years, however, have seen significant momentum in courts taking action against solitary confinement for particularly vulnerable groups—including youth and individuals with serious mental illness.<sup>7</sup> Yet these marks of progress fall short of deeming solitary confinement unconstitutional when applied to the general population. And although these opinions also condemn solitary confinement as a general matter, they can be interpreted as providing lasting legitimacy to the core practice itself.

Left without a per se rule of unconstitutionality, prisoners (sometimes their family members, as some prisoners commit suicide while in solitary confinement) face next-to-impossible odds in court. When it comes to prison conditions, the Supreme Court has operationalized the high-level principles of human dignity underlying the Eighth Amendment into a very specific and complicated test: the “deliberate indifference” doctrine.<sup>8</sup> This two-part test requires both a showing of an objectively “substantial risk of serious harm”

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piece is dedicated to Brandon Palakovic, described by his parents Renee and Darian as a “funny, vibrant, handsome, intelligent, and loving” young man. Brandon committed suicide in his solitary confinement cell on July 16, 2012, at only 23 years of age.

<sup>1</sup> CHARLES DICKENS, *AMERICAN NOTES* 112 (Patricia Ingham ed., Penguin Books 2000) (1842).

<sup>2</sup> *Davis v. Ayala*, 135 S. Ct. 2187, 2209 (2015) (Kennedy, J., concurring).

<sup>3</sup> *See, e.g.*, Alex Kozinski, *Worse than Death*, 125 *YALE L.J. FORUM* 230, 230 (2016) (“[W]e hear remarkably little about what may be the most severe punishment of all: solitary confinement.”).

<sup>4</sup> *See, e.g.*, John Fitzpatrick, Dir., Harvard Prison Legal Assistance Project, Remarks at Harvard Law School (Mar. 2, 2018) (“Prisoners are hated across the political spectrum.”).

<sup>5</sup> U.S. CONST. amend. VIII.

<sup>6</sup> *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion).

<sup>7</sup> *See, e.g.*, *V.W. ex rel. Williams v. Conway*, 236 F. Supp. 3d 554, 583–85 (N.D.N.Y. 2017); *J.J. v. Litscher*, No. 17-cv-47 (W.D. Wis. July 11, 2017); *Braggs v. Dunn*, 257 F. Supp. 3d 1171, 1235-47 (M.D. Ala. 2017); *Ruiz v. Johnson*, 37 F. Supp. 2d 855, 915 (S.D. Tex. 1999), *rev’d on other grounds and remanded sub nom. Ruiz v. United States*, 243 F.3d 941 (5th Cir. 2001); *Madrid v. Gomez*, 889 F. Supp. 1146, 1265–66 (N.D. Cal. 1995).

<sup>8</sup> *Farmer v. Brennan*, 511 U.S. 825, 829 (1994) (defining the “deliberate indifference” doctrine).

and a subjective level of knowledge, specifically recklessness, toward the risk by prison officials.<sup>9</sup> The latter requirement, as many commentators and even Supreme Court Justices have noticed, leaves litigants with very limited options. Subjective knowledge is difficult to prove as a general matter,<sup>10</sup> and the fact that the practice of solitary confinement is a system-wide, not personal, action raises real concerns about whether the standard even makes sense at all. Ultimately, when this is combined with courts' tendency to defer to management decisions of prison officials, prisoners—those who are somehow able to find representation and are brave enough to step forward—face a very narrow road to success. To add insult to injury, even those few success stories in court lead to enforcement issues in practice, where the lack of a bright-line rule regarding solitary confinement causes issues of prison accountability.

Still, there are promising signs of hope. The Supreme Court has expanded Eighth Amendment protections in recent years, most notably in the context of capital punishment and life-without-parole sentences.<sup>11</sup> Specifically, the so-called “evolving standards of decency” doctrine, which considers several factors to determine whether a type of punishment is consistent with society’s modern values, has been the mechanism for these changes.<sup>12</sup> This is good news in the solitary confinement context, as there is a growing consensus that the practice causes unacceptable harm given today’s societal standards. Moreover, even within the notoriously difficult deliberate indifference doctrine, there is potential. There may be enough consensus about the harms of solitary confinement that it can in all instances be held as a “substantial risk of serious harm,” and this knowledge may now be widespread enough that it can in all instances be held to meet the recklessness standard by its sheer “obviousness.” Either route—the evolving standards of decency doctrine or the deliberate indifference doctrine—could lead to a holding that solitary confinement is a *per se* violation of the Eighth Amendment.

Though the retirement of Justice Kennedy, a frequent critic of solitary confinement,<sup>13</sup> deals a blow to the chances of these arguments convincing the

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<sup>9</sup> *Id.* at 834.

<sup>10</sup> *Id.* at 838.

<sup>11</sup> *See, e.g.*, *Miller v. Alabama*, 567 U.S. 460, 489 (2012); *Roper v. Simmons*, 543 U.S. 551, 578 (2005); *Atkins v. Virginia*, 536 U.S. 304, 321–22 (2002).

<sup>12</sup> *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion); *see, e.g.*, *Atkins*, 536 U.S. at 313–17 (noting state statutes as well as medical expertise in holding that the death penalty for people with mental disabilities is unconstitutional); *Thompson v. Oklahoma*, 487 U.S. 815, 830–31, 838 (1988) (plurality opinion) (citing the views of “respected professional organizations” in addition to international views, in holding that capital punishment of people younger than sixteen years old when committing crime is unconstitutional); *Gregg v. Georgia*, 428 U.S. 153, 176–77 (1976) (plurality opinion) (stating that the constitutionality of the death penalty for individuals convicted of murder is “strongly support[ed]” by its acceptance historically).

<sup>13</sup> *See, e.g.*, *Davis v. Ayala*, 135 S. Ct. 2187, 2209–10 (2015) (Kennedy, J., concurring); Jess Bravin,

Supreme Court in the near-term, it may also be a catalyst for lower federal courts to take greater action as the center of gravity shifts to them. Federal district courts have issued injunctions to curtail the use of solitary with growing frequency,<sup>14</sup> and state and local governments continue to be pushed to sign settlement agreements.<sup>15</sup> Now—fueled by an unprecedented uptick in awareness about solitary, a major consensus against the practice,<sup>16</sup> and pushes in a number of state legislatures to curtail the practice<sup>17</sup>—these courts have an opportunity to take the lead in the push against solitary confinement’s constitutionality.

In light of this moment of potential change, this three-part series seeks to provide two contributions: the first comprehensive analysis of solitary confinement practices and litigation in the United States, and the two most compelling arguments, under the two doctrines noted above, that solitary confinement is a per se violation of the Eighth Amendment.<sup>18</sup> This Article—

*Two Supreme Court Justices Say Criminal-Justice System Isn’t Working*, WALL STREET J. (Mar. 24, 2015), <https://www.wsj.com/articles/two-supreme-court-justices-say-criminal-justice-system-isnt-working-1427197613> (“Solitary confinement literally drives men mad.”) (quoting Justice Kennedy).

<sup>14</sup> See, e.g., *J.J. v. Litscher*, No. 17-cv-47 (W.D. Wis. July 11, 2017); *Doe v. Hommrich*, No. 3-16-0799, 2017 WL 1091864, at \*1–3 (M.D. Tenn. Mar. 22, 2017); *Braggs v. Dunn*, 257 F. Supp. 3d 1171, 1265–67 (M.D. Ala. 2017); *Jones’El v. Berge*, 164 F. Supp. 2d 1096, 1125–26 (W.D. Wis. 2001).

<sup>15</sup> See, e.g., Summary of Settlement Agreement, Cmty. Legal Aid Soc’y, Inc. v. Coup, No. 15-688 (D. Del. 2016), <http://www.declasi.org/wp-content/uploads/2016/09/2016-09-06-CLASI-v-Coupe-Summary-Sheet.pdf>; Settlement Agreement, Disability Law Ctr. v. Mass. Dep’t of Corr., No. 07-10463 (D. Mass. 2007), <https://www.clearinghouse.net/chDocs/public/PC-MA-0026-0004.pdf>.

<sup>16</sup> See, e.g., David H. Cloud et al., *Public Health and Solitary Confinement in the United States*, 105 AM. J. PUB. HEALTH 18, 24 (2015); AM. PUB. HEALTH ASS’N, SOLITARY CONFINEMENT AS A PUBLIC HEALTH ISSUE (2013), <https://apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2014/07/14/13/30/solitary-confinement-as-a-public-health-issue> (“Punitive segregation should be eliminated.”); *ABA Cites Growing Concerns About Solitary Confinement*, AM. B. ASS’N (Sept. 18, 2018), [https://www.americanbar.org/advocacy/governmental\\_legislative\\_work/publications/governmental\\_affairs\\_periodicals/washingtonletter/2014/march/solitary/](https://www.americanbar.org/advocacy/governmental_legislative_work/publications/governmental_affairs_periodicals/washingtonletter/2014/march/solitary/).

<sup>17</sup> Teresa Wiltz, *Is Solitary Confinement on the Way Out?*, PEW CHARITABLE TR. (Nov. 21, 2016), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/11/21/is-solitary-confinement-on-the-way-out> (“In the last five years, Colorado, Delaware, Louisiana, Maine, Massachusetts, Michigan, Nebraska, New Mexico, Oregon, and Texas have passed legislation that either drastically restricts solitary confinement in state prisons, or orders a comprehensive study on potential reforms.”); *id.* (“Just about every state is looking at ways to limit the use of solitary confinement.”) (quoting Sara Sullivan, Sentencing and Corrections Project Manager, Vera Institute of Justice).

<sup>18</sup> Note that potential violations of due process principles of the Fifth and Fourteenth Amendments are at play in the solitary confinement discussion as well. See, e.g., Jules Lobel, *Prolonged Solitary Confinement and the Constitution*, 11 U. PA. J. CONST. L. 115, 125–31 (2008). But this series of Articles seeks to go beyond criticizing the processes used in the assignment of individuals to segregation cells; it seeks to analyze the constitutionality of the practice itself. Due process critiques, in isolation, assume that solitary confinement is a legitimate use of state power, but that there are times when there has not been a full and fair process before an individual is segregated. But the Eighth Amendment per se challenges here state that no amount of process is acceptable, because the punishment is unconstitutional in and of itself. As will be noted, the removal of solitary as a punishment would likely lead to another more humane mechanism for separating inmates from the

Article I—sets the table with a holistic presentation of solitary confinement in America: from its history, to the nature of its conditions and its effects on mental and physical health, to firsthand accounts. In a later publication, Article II will proceed to consider the current constitutional status of solitary confinement under the Eighth Amendment—demonstrating that despite solitary confinement’s persistent status as constitutional according to the courts, district courts’ increasing receptiveness to Eighth Amendment challenges has led to preliminary injunctions and settlement agreements banning the harshest solitary practices. Finally, Article III will offer two arguments—one under the “evolving standards of decency” doctrine and one under the “deliberate indifference” doctrine—that can potentially lead to a holding that solitary confinement in all forms is per se unconstitutional. As courts more carefully consider this issue in the coming years, the hope is that they can utilize these two arguments to determine that solitary confinement, starting with its most egregious forms and extending to the cruel core of the practice itself, is per se unconstitutional.

Opinion editorials<sup>19</sup> and medical literature,<sup>20</sup> especially recently, have helpfully discussed the harms of solitary confinement, both through anecdotes and broader data analysis. In addition, a handful of pieces of legal scholarship have provided surveys of constitutional arguments against the use of solitary confinement,<sup>21</sup> though never with a full presentation of the two Eighth Amendment arguments found in this series of Articles and usually cabined to specific types of solitary confinement. Overall, as is the case with many topics related to the civil rights of prisoners, not a lot has been written—and the fact that solitary has made its return to life in American prisons in only the last thirty or forty years may have a lot to do with it. No literature to-date appears to have brought the components of this series together to provide both a comprehensive descriptive component—an overview of the practices and constitutional state of solitary confinement in the United States in all of its forms—and a normative Eighth Amendment argument—a thorough presentation of Eighth Amendment arguments that could have the potential of swaying federal courts.

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general population, in which case a similar due process analysis is relevant. This discussion, however, is outside the scope of the present series.

- <sup>19</sup> Barack Obama, Opinion, *Why We Must Rethink Solitary Confinement*, WASH. POST (Jan. 25, 2016), [https://www.washingtonpost.com/opinions/barack-obama-why-we-must-rethink-solitary-confinement/2016/01/25/29a361f2-c384-11e5-8965-0607e0e265ce\\_story.html?utm\\_term=.d351419ed263](https://www.washingtonpost.com/opinions/barack-obama-why-we-must-rethink-solitary-confinement/2016/01/25/29a361f2-c384-11e5-8965-0607e0e265ce_story.html?utm_term=.d351419ed263); Editorial, *Pulling Back on the Barbaric Use of Solitary Confinement*, N.Y. TIMES (Aug. 5, 2017).
- <sup>20</sup> See, e.g., Cloud et al., *supra* note 16, at 19–20; Craig Haney, *Restricting the Use of Solitary Confinement*, ANN. REV. CRIMINOLOGY 285, 289 (2018), <https://www.annualreviews.org/doi/pdf/10.1146/annurev-criminol-032317-092326>.
- <sup>21</sup> See, e.g., Ian M. Kysel, *Banishing Solitary: Litigating an End to the Solitary Confinement of Children in Jails and Prisons*, 40 N.Y.U. REV. L. & SOC. CHANGE 675 (2016); Lobel, *supra* note 18.

## I. A DEFINITION

Before delving into the history and many dimensions of solitary confinement, a brief definition of the practice will be helpful to set the stage. Solitary is called by at least fifteen alternative, often euphemistic names, the most common of which is “segregation.”<sup>22</sup> But, although the practice can vary between prisons, it has a few commonalities that make it an easily identifiable type of punishment. The three most distinct features of solitary confinement: extreme lack of human interaction, length of such isolation, and smallness of space. It is the placement of individuals in tiny, barren concrete cells for an average of twenty-three hours a day, with almost no human contact. The first-ever Senate hearing on solitary confinement in 2014 summarizes segregation’s conditions in brief:

Prisoners in solitary typically spend 22 to 24 hours a day locked in small, sometimes windowless, cells sealed with solid steel doors. They lack opportunities for meaningful social interaction with other prisoners; most contact with staff is perfunctory and may be wordless (such as when meals are delivered through a slot in the cell door).<sup>23</sup>

It is difficult to conceive of solitary confinement as a practice—and to determine whether it might constitute “cruel and unusual punishment”—without a better understanding of its history, its magnitude, how it is imposed on certain individuals, its real-life conditions, the effect of those conditions, and—perhaps most importantly—firsthand accounts of those conditions and effects. This Article will discuss each of these elements in turn, so as to build a solid foundation for the evaluation of the practice’s constitutionality.

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<sup>22</sup> This piece will at times refer to solitary confinement as “segregation,” if only to vary the language a bit. The alternate names for solitary confinement, as noted by Yale Law School’s Arthur Liman Center for Public Interest Law and the Association of State Corrections Administrators (ASCA) in their joint report, are: “administrative confinement,” “close supervision,” “behavior modification,” “departmental segregation,” “enhanced supervision housing” (“ESH”), “inmate segregation,” “intensive management,” “special management unit” (“SMU”), “security (or special) housing units” (“SHU”), “security control,” “maximum control units,” “protective custody,” “disciplinary segregation,” and “administrative segregation.” THE LIMAN PROGRAM, YALE LAW SCH. & ASS’N OF STATE CORR. ADM’RS., TIME-IN-CELL: THE ASCA-LIMAN 2014 NATIONAL SURVEY OF ADMINISTRATIVE SEGREGATION IN PRISON 1 (2015), [https://law.yale.edu/system/files/documents/pdf/asca-liman\\_administrative\\_segregation\\_report\\_sep\\_2\\_2015.pdf](https://law.yale.edu/system/files/documents/pdf/asca-liman_administrative_segregation_report_sep_2_2015.pdf) [hereinafter LIMAN/ASCA, TIME-IN-CELL].

<sup>23</sup> *Reassessing Solitary Confinement: The Human Rights, Fiscal, and Public Safety Consequences: Hearing Before the Subcomm. on Constitution, Civil Rights and Human Rights of the S. Comm. on the Judiciary*, 112th Cong. 447 (2012) [hereinafter *Senate Hearing*]; see also *Novak v. Beto*, 453 F.2d 661, 673 (5th Cir. 1971) (Tuttle, J., concurring in part and dissenting in part) (“A person sentenced to solitary is kept in a bare, pitch black cell on a bread and water diet. The cell has a barred iron gate backed up by a wooden door to keep out all light and prevent contact with those in the hall. He is fed only two slices of bread and water each day and one full meal every 72 hours. This treatment can continue for up to fifteen days, at which point he is kept in the *same* cell, but with the solid door open to let in the light and is fed regular meals for two days. This process may then be repeated again.”).

## II. THE HISTORY

The overarching lesson of the history of solitary confinement is that it is not simply “how things have always been”—not by a long shot. Quite to the contrary, it is an American invention that has only taken hold as a common practice in American prisons in recent decades. We will start with the origin story: “Accounts of people confined alone in dungeons or towers abound in stories dating back to ancient times. But solitary confinement as a self-conscious, organized, and widespread prison practice originated in the United States, and was born soon after the nation itself.”<sup>24</sup>

The roots of solitary trace back to the birthplace of prisons in the United States: Walnut Street Jail in Philadelphia, built in 1773 and expanded in 1790.<sup>25</sup> The practice of solitary confinement was piloted there, and in 1829 the Quakers and Anglicans brought the idea to a new prison called Eastern State Penitentiary, also in Philadelphia.<sup>26</sup> There, “every day of every sentence was carried out primarily in solitude,” although wardens visited each cell daily.<sup>27</sup> The goal of solitary confinement was to minimize distractions keeping a prisoner from asking forgiveness from God and experiencing spiritual renewal; put another way, it was to “inspire true regret in the hearts of convicts.”<sup>28</sup> As a result, segregated prisoners were able to see reverends regularly.<sup>29</sup>

It was Eastern State Penitentiary that Charles Dickens visited in 1842, prompting him to write about the horrors he saw. Dickens wrote, “[t]he system here, is rigid, strict, and hopeless solitary confinement. I believe it, in its effects, to be cruel and wrong.”<sup>30</sup> He went on to vividly describe his reflections after touring the prison—again, it is worth a reminder that this outrage was expressed over a century and a half ago:

I believe that very few men are capable of estimating the immense amount of torture and agony which this dreadful punishment, prolonged for years, inflicts upon the sufferers; and in guessing at it myself, and in reasoning from what I have seen written upon their faces, and what to my certain knowledge they feel within, I am only the more convinced that there is a depth of

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<sup>24</sup> Jean Casella & James Ridgeway, *Introduction* to HELL IS A VERY SMALL PLACE: VOICES FROM SOLITARY CONFINEMENT 1, 2 (Jean Casella, James Ridgeway & Sarah Shourd eds., 2016).

<sup>25</sup> Brooke Shelby Biggs, *Solitary Confinement: A Brief History*, MOTHER JONES (Mar. 3, 2009, 12:42 AM), <https://www.motherjones.com/politics/2009/03/solitary-confinement-brief-natural-history/>.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> Tamar R. Birckhead, *Children in Isolation: The Solitary Confinement of Youth*, 50 WAKE FOREST L. REV. 1, 43 (2015) (internal quotation marks omitted); *see also In re Medley*, 134 U.S. 160, 168 (1890) (“The peculiarities of this system were the complete isolation of the prisoner from all human society and his confinement in a cell of considerable size, so arranged that he had no direct intercourse with or sight of any human being, and no employment or instruction.”).

<sup>29</sup> Biggs, *supra* note 25.

<sup>30</sup> DICKENS, *supra* note 1, at 111.

terrible endurance in it which none but the sufferers themselves can fathom, and which no man has a right to inflict upon his fellow creature. . . .<sup>31</sup> Dickens even fashioned a “holding”—condemning solitary confinement in a way that, as we will discuss, no court in America has yet, officially, condemned it: “I hold this slow and daily tampering with the mysteries of the brain, to be immeasurably worse than any torture of the body . . . therefore I the more denounce it as a secret punishment which slumbering humanity is not roused up to stay.”<sup>32</sup>

Around the same time Dickens visited the Eastern State Penitentiary in Philadelphia, Alexis de Tocqueville and Gustave de Beaumont visited Auburn Prison in New York, which held eighty individuals in solitary confinement.<sup>33</sup> They were perhaps equally shocked by the cruelty of the practice, describing what they saw as follows:

[I]n order to reform them, they had been submitted to complete isolation; but this absolute solitude, if nothing interrupt [sic] it, is beyond the strength of man; it destroys the criminal without intermission and without pity; it does not reform, it kills.

The unfortunates, on whom this experiment was made, fell into a state of depression, so manifest, that their keepers were struck with it; their lives seemed in danger, if they remained longer in this situation; five of them, had already succumbed during a single year; their moral state was not less alarming; one of them had become insane; another, in a fit of despair, had embraced the opportunity, when the keeper brought him something, to precipitate himself from his cell, running the almost certain chance of a mortal fall.<sup>34</sup>

By the time Dickens, de Tocqueville, and de Beaumont visited American prisons in the nineteenth century, solitary confinement was becoming, or arguably had become, a dominant form of imprisonment.<sup>35</sup>

But the tide turned away from the use of solitary confinement in the mid-to-late nineteenth century. “By the late [nineteenth] century, most jurisdictions in the United States had, for the most part, restricted solitary confinement to relatively brief periods of punishment that were imposed in response to specified infractions of prison rules.”<sup>36</sup> The Supreme Court in

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 111–12.

<sup>33</sup> Casella & Ridgeway, *supra* note 24, at 3.

<sup>34</sup> GUSTAVE DE BEAUMONT & ALEXIS DE TOCQUEVILLE, ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION IN FRANCE 5 (Philadelphia, Carey, Lea, & Blanchard 1833).

<sup>35</sup> Sarah Childress, *Craig Haney: Solitary Confinement is a “Tried-and-True” Torture Device*, PBS FRONTLINE (Apr. 22, 2014), <https://www.pbs.org/wgbh/frontline/article/craig-haney-solitary-confinement-is-a-tried-and-true-torture-device/> (“Solitary confinement was the imprisonment method of choice in the 17th, 18th and 19th centuries in the United States. When prisons proliferated in the United States in the early 19th century, the model of imprisonment that was in use was basically a solitary confinement model.”).

<sup>36</sup> Craig Haney, *Mental Health Issues in Long-Term Solitary and “Supermax” Confinement*, 49 CRIME & DELINQ. 124, 125 (2003).



1890 recognized that solitary confinement was a serious issue, noting that “[t]his matter of solitary confinement is not . . . a mere unimportant regulation as to the safe-keeping of the prisoner,” and explained that it fell out of favor because of its unacceptable harshness.<sup>37</sup> Quoting an English law from the sixteenth century, the Murder Act of 1751,<sup>38</sup> the Court recognized solitary confinement as a “terror and peculiar mark of infamy.”<sup>39</sup> It explained that the reason solitary confinement had been largely abandoned was that reflection on the practice led to a general conclusion that it was simply “too severe.”<sup>40</sup>

The resurgence of solitary came in the 1980s, and it came swiftly. One catalyst was a shift in philosophy regarding the American criminal justice system. In the middle of the 1970s, this shift resulted in a greater emphasis on punishment, rather than rehabilitation, as a rationale for imprisonment.<sup>41</sup> This lesser focus on rehabilitative initiatives geared toward improving a prisoner’s chances of gainfully contributing to society upon re-entry, and greater focus on punishing them for their crimes, laid the philosophical groundwork for prisons increasing the use of solitary confinement as a further punishment for prisoners, especially those who violated prison rules. Put another way, solitary became the inner ring of punishment—an amplified punishment applied to people who were already being punished.

Beyond the philosophical shift, the main drivers of solitary confinement’s rapid growth in the 1980s were the increase in criminal prosecutions and the deinstitutionalization of individuals with mental illness. These two trends contributed to the overcrowding of prisons.<sup>42</sup> This overcrowding then led to the building of new “supermax” prisons, which are “high-tech prison[s] designed for long-term solitary confinement.”<sup>43</sup> Almost every state built a “supermax” in this timeframe, and the practice of solitary once again became commonplace in American corrections.<sup>44</sup> Along with the infrastructure

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<sup>37</sup> *In re Medley*, 134 U.S. 160, 167 (1890).

<sup>38</sup> 25 Geo. 2 c. 37, § 1 (Eng.).

<sup>39</sup> *Medley*, 134 U.S. at 170.

<sup>40</sup> *Id.* at 168, 170.

<sup>41</sup> Haney, *supra* note 36, at 128 (“In the mid-1970s, the United States formally abandoned its commitment to the rehabilitative ideals that had guided its prison policy for decades. Often at the insistence of the politicians who funded their prison systems, correctional administrators embraced a new philosophy built on the notion that incarceration was intended to inflict punishment and little else.”); *see also* Childress, *supra* note 35.

<sup>42</sup> Haney, *supra* note 36, at 127–28 (“The rate of incarceration in the United States (adjusting for any increases in overall population) remained stable over the 50-year period from 1925 to 1975. Remarkably, it then quintupled over the next 25-year period. Most state prison systems doubled in size and then doubled again during this period. . .”).

<sup>43</sup> Keramet Reiter & Thomas Blair, *Punishing Mental Illness: Trans-institutionalization and Solitary Confinement in the United States*, in *EXTREME PUNISHMENT: COMPARATIVE STUDIES IN DETENTION, INCARCERATION AND SOLITARY CONFINEMENT* 177, 181 (Keramet Reiter & Alexa Koenig eds., 2015); Haney, *supra* note 36, at 127–28.

<sup>44</sup> Haney, *supra* note 36, at 127–28.

development, prison administrators' behaviors shifted as well; more and more, prison officials—attempting to handle the growing populations with limited resources—turned to long-term solitary confinement as a way to manage their prisoners and ensure safety.<sup>45</sup>

And the deinstitutionalization movement in particular, during which more and more mentally ill Americans were returned from mental health institutions into their communities without effective community-based treatment, led to more individuals with mental illness in prisons.<sup>46</sup> As a result, under-resourced prisons, without much of a conception of how to treat mental illness effectively, used solitary confinement as a way to separate individuals with special needs from the rest of the prison community. State prison systems grew dramatically “with no commensurate increase in the resources devoted to corrections in general or to programming and mental health services in particular.”<sup>47</sup>

Since the 1980s, prison populations, and correspondingly the practice of solitary confinement, have continued their growth. But before turning to a view of the magnitude of solitary confinement today, two lessons should be drawn from the historical overview. First, the practice of solitary confinement is not something that should necessarily be blamed, as it so often is, solely on prison guards or administrators. Rather, it is a systemic problem resulting from factors like overcrowding prisons and deinstitutionalization without adequate community-based mental health treatment, no corresponding increase in prison resources, and a shift in criminal justice policy toward an emphasis on punishment rather than rehabilitation.

Second, perhaps the most important lesson to glean is that solitary confinement is not inevitable, and it is not historically accepted. Solitary is not the result of careful determinations by policymakers that it was the only way to separate certain prisoners, nor a democratic decision-making process through which the American people communicated their values about punishment. Rather, its genesis was based on factors unrelated to solitary confinement itself, as supermax prisons were built to accommodate the rapid influx of more and more prisoners. There has been ongoing outrage about solitary—so much so that, as the Supreme Court recollected,<sup>48</sup> the country turned its back on it in the 1800s. Professor Craig Haney, a leading psychologist in the study of prison and solitary confinement in particular, offers an account of solitary's resurgence:

This new kind of prison did not originate as a necessary or inevitable

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<sup>45</sup> *Senate Hearing*, *supra* note 23, at 449 (“Beginning in the 1980s, exploding prison populations . . . limited the ability of officials to operate safe and humane facilities. Many turned to prolonged solitary confinement in an effort to increase their control over prisoners.”).

<sup>46</sup> *See Reiter & Blair*, *supra* note 43, at 180.

<sup>47</sup> Haney, *supra* note 36, at 128 (internal citation omitted).

<sup>48</sup> *See supra* text accompanying note 40.

response or backlash to some sort of “permissive” correctional atmosphere that allegedly prevailed in the 1960s, as some who defend the recent punitive trends in imprisonment have suggested. It was not a badly needed corrective to liberal prison policies or to previous capitulations to the prisoners’ rights movement. Quite the opposite. Supermaxes began in response to the overcrowded and punitive 1980s and came into fruition in the even more overcrowded and more punitive 1990s. They are in many ways the logical extension of a system founded on the narrow premise that the only appropriate response to misbehavior is increased punishment.<sup>49</sup>

### III. THE SCALE OF SOLITARY CONFINEMENT TODAY

Solitary confinement exists in every jurisdiction in the United States.<sup>50</sup> According to a thorough study by Yale Law School’s Arthur Liman Center for Public Interest Law and the Association of State Correctional Administrators (ASCA), between 80,000 and 100,000 people were held in solitary confinement in the fall of 2014.<sup>51</sup> Though it is largely hidden from sight—“the dark secret of the criminal justice system”<sup>52</sup>—solitary is a “regular part of the rhythm of prison life.”<sup>53</sup>

No group of prisoners is immune from solitary confinement. As noted, one reason for the renewal of solitary confinement is the fact that prison officials were, and still are, faced with limited resources and overcrowded prisons; this includes an increase in mentally ill prisoners since the deinstitutionalization movement, and a lack of resources to appropriately treat mental illness. It is not surprising, then, that individuals with serious mental illness are over-represented in solitary confinement.<sup>54</sup> In all, prisoners with serious mental illness make up less than one-quarter of prisoners, but between one-third and one-half of those are in segregation.<sup>55</sup> Without strong alternative methods for treating individuals with serious mental illnesses, prisons often “substitute[] solitary confinement for treatment.”<sup>56</sup> Another particularly vulnerable group is regularly placed in solitary confinement: young people. A 2010 study found that over a third of the 100,000 youths in juvenile justice facilities spent time in solitary confinement.<sup>57</sup> Alone in

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<sup>49</sup> Haney, *supra* note 36, at 129 (internal citation omitted).

<sup>50</sup> LIMAN/ASCA, TIME-IN-CELL, *supra* note 22, at 1. The ASCA/Liman study results are based on a survey on the use of segregation practices in 46 jurisdictions (the federal prison system under the Bureau of Prisons (BOP), 44 states, and the District of Columbia). *Id.* at 11–12.

<sup>51</sup> *Id.* at 3.

<sup>52</sup> Kysel, *supra* note 21, at 679.

<sup>53</sup> John J. Gibbons & Nicholas de B. Katzenbach, *Confronting Confinement: A Report of the Commission on Safety and Abuse in America’s Prisons*, 22 WASH. U. J.L. & POL’Y 385, 405 (2006).

<sup>54</sup> Reiter & Blair, *supra* note 43, at 181 (noting that between one-third and one-half of isolated prisoners have serious mental illnesses).

<sup>55</sup> *Id.*

<sup>56</sup> Palakovic v. Wetzel, 854 F.3d 209, 229 (3d Cir. 2017).

<sup>57</sup> JESSICA FEIERMAN, KAREN U. LINDELL & NATANE EADDY, JUVENILE LAW CTR., UNLOCKING

segregation cells, these young people are deprived of educational and developmental opportunities at a pivotal time in their lives. And solitary confinement has a disproportionate effect on racial and ethnic minorities as well. The Liman-ASCA survey found that, among the twenty-two jurisdictions that reported statistics on race, black prisoners were 40 percent of the total male prison population but 47 percent of the male population in segregation.<sup>58</sup> Hispanic prisoners, too, were overrepresented in solitary confinement cells.<sup>59</sup>

The trend is toward more, not less, solitary. The practice has been labelled “one of the fastest growing forms of punishment imposed by prison administration” in America,<sup>60</sup> and the number of individuals in solitary confinement has only been increasing since its resurgence in the 1980s.<sup>61</sup> Between 1995 and 2000, the total prison population grew by 28 percent, and the use of solitary confinement even outpaced that growth: the number of prisoners held in solitary went up by 40 percent.<sup>62</sup> The lengths of time that individuals are placed in solitary confinement have also extended beyond what we perhaps could have imagined in years past, as it is not uncommon for prisoners at particular locations to spend years in solitary; some prisoners spend decades on end in segregation.<sup>63</sup>

Aside from the primary human dignity concern with solitary confinement, it is worth mentioning another element of today’s segregation regime that is crucial to policy decision-making: the staggering cost. First, the cost of building solitary confinement units is higher than that of building ordinary units.<sup>64</sup> Second, the ongoing cost of housing someone in solitary confinement, \$75,000, is significantly higher than housing someone in the general population.<sup>65</sup>

Finally, while solitary confinement has grown to become a part of the national consciousness, this awareness is a very recent phenomenon. Advocates like the founders of Solitary Watch, a website dedicated to sharing stories about solitary confinement and providing updates about solitary

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YOUTH: LEGAL STRATEGIES TO END SOLITARY CONFINEMENT IN JUVENILE FACILITIES 6 (2017), [http://jlc.org/sites/default/files/publication\\_pdfs/JLC\\_Solitary\\_Report-FINAL.pdf](http://jlc.org/sites/default/files/publication_pdfs/JLC_Solitary_Report-FINAL.pdf).

<sup>58</sup> LIMAN/ASCA, TIME-IN-CELL, *supra* note 22, at 32.

<sup>59</sup> *Id.* (stating that Hispanic prisoners comprise fourteen percent of the male population in segregation yet only eleven percent of the general male population).

<sup>60</sup> Alexa T. Steinbuch, *The Movement Away from Solitary Confinement in the United States*, 40 CRIM. & CIV. CONFINEMENT 499, 500 (2014).

<sup>61</sup> See Shira E. Gordon, Note, *Solitary Confinement, Public Safety, and Recidivism*, 47 U. MICH. J.L. REFORM 495, 500 (2014) (detailing increased use of solitary confinement beginning in the 1980s and continuing through the 1990s and 2000s).

<sup>62</sup> Gibbons & Katzenbach, *supra* note 53, at 405.

<sup>63</sup> Gordon, *supra* note 61, at 496–97.

<sup>64</sup> Jean Casella & Sal Rodriguez, *What is Solitary Confinement?*, GUARDIAN (Apr. 27, 2016), <https://www.theguardian.com/world/2016/apr/27/what-is-solitary-confinement>.

<sup>65</sup> *Id.*

confinement litigation, had significant effectiveness in putting the issue on the national map.<sup>66</sup> A 2013 prisoner hunger strike at Pelican Bay State Prison in California also captured national attention; prisoners across gangs joined together to strike against the use of solitary confinement.<sup>67</sup> Opinion editorials on solitary confinement are not uncommon to see in major newspapers and magazines like the *New York Times*,<sup>68</sup> *Boston Globe*,<sup>69</sup> and others today, but they would have been quite unusual just a decade or so ago.

#### IV. THE DECISION TO PLACE AN INDIVIDUAL IN SOLITARY CONFINEMENT

Why are individuals sent to solitary confinement? The rationales for placing individuals in solitary usually fall into three categories: “protection, discipline, and incapacitation.”<sup>70</sup> Some individuals are placed in solitary purportedly for their own protection from harm in the broader prison population, some are placed in solitary as punishment for breaking prison rules, and others are placed in solitary because they are considered an active harm to others in the general population.<sup>71</sup>

These rationales generally extend a great deal of flexibility on the part of prison guards to determine what constitutes a need for protection, a violation of a prison rule, or a threat to safety, and this discretion is susceptible to abuse. The United Nations (the “U.N.”) Special Rapporteur on Torture issued a report in 2016 studying solitary confinement in eight American states and twenty-five other countries.<sup>72</sup> When it comes to solitary confinement as a means of punishment, the study found that segregation is frequently imposed in the United States for very minor offenses.<sup>73</sup> As an example from one jurisdiction, the Vera Institute of Justice, which was cited in the report,

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<sup>66</sup> See SOLITARY WATCH, <http://solitarywatch.org>.

<sup>67</sup> *How 4 Inmates Launched a Statewide Hunger Strike From Solitary*, NPR (Mar. 6, 2014, 11:00 AM), <https://www.npr.org/2014/03/06/286794055/how-four-inmates-launched-a-statewide-hunger-strike-from-solitary>. The federal court decision that helped spur the strike, *Madrid v. Gomez*, 889 F. Supp. 1146 (N.D. Cal. 1995), held that solitary confinement of individuals with serious mental illness is unconstitutional. *Id.* at 1279–80.

<sup>68</sup> See, e.g., Erica Goode, *Solitary Confinement: Punished for Life*, N.Y. TIMES (Aug. 3, 2015), <https://www.nytimes.com/2015/08/04/health/solitary-confinement-mental-illness.html>.

<sup>69</sup> See, e.g., Adrian Walker, *It's Time to Fix Solitary Confinement, Before More Abuse Occurs*, BOS. GLOBE (Jan. 9, 2017), <https://www.bostonglobe.com/metro/2017/01/08/time-fix-solitary-confinement-before-further-abuses-occur/D0vQGjcbZzAIKypcN1xM5O/story.html>.

<sup>70</sup> LIMAN/ASCA, TIME-IN-CELL, *supra* note 22, at 1.

<sup>71</sup> *Id.*

<sup>72</sup> See JUAN E. MÉNDEZ, UNITED NATIONS SPECIAL RAPPORTEUR OF THE HUMAN RIGHTS COUNCIL ON TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, ET AL., SEEING INTO SOLITARY: A REVIEW OF THE LAWS AND POLICIES OF CERTAIN NATIONS REGARDING SOLITARY CONFINEMENT OF DETAINEES 20 (2016), [https://www.weil.com/~media/files/pdfs/2016/un\\_special\\_report\\_solitary\\_confinement.pdf](https://www.weil.com/~media/files/pdfs/2016/un_special_report_solitary_confinement.pdf).

<sup>73</sup> *Id.* at 21, 23.

found that “85 percent of people held in solitary confinement in Illinois’ state prison system were sent there as punishment for minor infractions, such as abusive language.”<sup>74</sup> Indeed, as Pew Charitable Trusts found in its own prison study, most inmates are placed in solitary for infractions of a nonviolent nature, “such as smoking, refusing to obey an order or possessing low-level contraband like non-prison issue underwear.”<sup>75</sup>

When it comes to solitary confinement for protection and incapacitation, too, the U.N. report found evidence of arbitrary and unnecessary segregation. It provided several examples, including that in California, people can be sent to solitary “just because they are ‘a relative or associate of a staff member.’”<sup>76</sup> It noted that in Pennsylvania, people may be put in solitary “simply because ‘there is no other appropriate bed space.’”<sup>77</sup>

While on the topic of administrative actions regarding solitary, it is worth noting here that there is a general dearth of knowledge about solitary because of poor tracking of decisions to place individuals in solitary and inadequate monitoring of the conditions in solitary. Moreover, there is often limited transparency when that data exists. As an example, the Government Accounting Office (the “GAO”) reported in 2013 that the Bureau of Prisons (the “BOP”), which administers the federal prison system, had not evaluated “the impact of segregated housing units on institutional safety or the impacts of long-term segregation on inmates.”<sup>78</sup> On the lack of transparency front, the Department of Justice (the “DOJ”) Inspector General, in a 2017 review of federal prisons’ use of solitary confinement, found that “[a]lthough the BOP states that it does not practice solitary confinement, or even recognize the term, we found inmates, including those with mental illness, who were housed in single-cell confinement for long periods of time, isolated from other inmates and with limited human contact.”<sup>79</sup>

## V. THE CONDITIONS

A full constitutional analysis of solitary confinement—especially given the Eighth Amendment’s central focus on human dignity—cannot be made

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<sup>74</sup> Joshua Manson, *UN Report Compares Solitary Confinement Practices in the U.S. and Around the World*, SOLITARY WATCH (Oct. 28, 2016), <http://solitarywatch.org/2016/10/28/un-report-compares-solitary-confinement-practices-around-the-world/> (citing MÉNDEZ ET AL., *supra* note 72).

<sup>75</sup> Teresa Wiltz, *supra* note 17.

<sup>76</sup> Manson, *supra* note 74.

<sup>77</sup> *Id.*

<sup>78</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, BUREAU OF PRISONS: IMPROVEMENTS NEEDED IN BUREAU OF PRISONS’ MONITORING AND EVALUATION OF IMPACT OF SEGREGATED HOUSING 33 (2013), <https://www.gao.gov/assets/660/654349.pdf>.

<sup>79</sup> OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, REVIEW OF THE FEDERAL BUREAU OF PRISONS’ USE OF RESTRICTIVE HOUSING FOR INMATES WITH MENTAL ILLNESS, i (2017), <https://oig.justice.gov/reports/2017/e1705.pdf>.

solely from the bench or the ivory tower. It must be made with a real-life understanding of the conditions through which individuals must suffer on a daily basis. Though American prison conditions are harsh as a general matter, the physical conditions of solitary confinement cells are unusually barren, diminished, and empty of hope. Three main elements of the practice—the social isolation, the almost around-the-clock confinement each day, and the unusually small size of the cell—contribute to creating this reality.

#### A. *Isolation from Human Contact*

Perhaps the most distinctive feature of solitary confinement is the utter isolation from human contact. As Dickens put it in the 1800s: “He never hears of wife or children; home or friends; the life or death of any single creature. He sees the prison-officers, but with that exception he never looks upon a human countenance, or hears a human voice.”<sup>80</sup> And human engagement is actually even less frequent in American solitary confinement cells today than when Dickens visited the Eastern State Penitentiary:

They have no contact with the normal social world . . . . Indeed, the only regular physical contact they have with another human being is the incidental brushing up against the guards who must first place them in handcuffs and chains before they escort them out of their cells and housing units. They visit loved ones through thick glass and over phones, and are thus denied the opportunity to ever touch another human being with affection. This has gone on unabated, for years and years, for some of these men for several decades now.<sup>81</sup>

Painstaking efforts are made by prison officials to avoid any kind of interaction among solitary confinement inmates, between solitary confinement inmates and inmates in the general population, and even between solitary confinement inmates and prison staff. Food, for example, is sent to prisoners through a slot in the door.<sup>82</sup> Often, segregated prisoners describe yelling as loudly as they can to try to have some kind of conversation with individuals in surrounding cells;<sup>83</sup> this interaction might be the only thing that keeps a person going.

Meanwhile, individuals with mental illness often receive very limited, if

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<sup>80</sup> DICKENS, *supra* note 1, at 113.

<sup>81</sup> SOLITARY WATCH, SOLITARY CONFINEMENT IN THE UNITED STATES: FAQ 2 (2015), <https://solitarywatch.org/wp-content/uploads/2017/09/Solitary-Confinement-FAQ-2015.pdf> (citing Professor Craig Haney’s testimony to California Assembly Public Safety Committee).

<sup>82</sup> Jason M. Breslow, *What Does Solitary Confinement Do To Your Mind?*, PBS FRONTLINE (Apr. 22, 2014), <https://www.pbs.org/wgbh/frontline/article/what-does-solitary-confinement-do-to-your-mind/>.

<sup>83</sup> *Growing Up Locked Down: Youth in Solitary Confinement in Jails and Prisons Across the United States*, HUMAN RIGHTS WATCH (Oct. 10, 2012), <https://www.hrw.org/report/2012/10/10/growing-locked-down/youth-solitary-confinement-jails-and-prisons-across-united> [hereinafter *Growing Up Locked Down*].

any, interaction with psychiatrists or group therapy programs, despite their need for treatment. In some cases, psychiatrists are instructed to spend very brief amounts of time speaking with individuals with mental illness in solitary confinement; these “mental health interviews” often occur without even opening the cell door, but rather through the narrow slit between the door and the wall.<sup>84</sup> In summary, “[s]olitary confinement reduces meaningful social contact to an absolute minimum. The level of social stimulus that results is insufficient for the individual to remain in a reasonable state of mental health.”<sup>85</sup>

### B. *Length of Time*

The length of solitary confinement—both in terms of hours per day and in terms of consecutive days, weeks, months, years, and even decades on end—is a dimension that is particularly unforgiving.<sup>86</sup> Starting with hours per day, solitary confinement usually means placement of an individual in a cell for twenty-two to twenty-four hours each day. The way in which prisoners are treated in the precious few hours per week in which they are allowed to leave their cell is a telling symbol of just how harsh and inhumane the practice of segregation is: often, solitary confinement inmates are provided their weekly hours of “exercise” within the confines of an “outdoor cage.”<sup>87</sup> In a Wisconsin juvenile facility, young people are allegedly provided their exercise time while chained to a table.<sup>88</sup>

When considering length in terms of consecutive days, the general practice is for placements in solitary confinement to be open-ended in length, rather than for a pre-determined set of time. Without effective transparency requirements and meaningful due process, this has allowed individuals to languish in solitary confinement for years and even decades on end. In the aforementioned 2017 report by the DOJ Inspector General, it was found that federal inmates sometimes spend years or decades in solitary.<sup>89</sup> The report

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<sup>84</sup> *Palakovic v. Wetzel*, 854 F.3d 209, 216–17, 228 (3d Cir. 2017); *Senate Hearing*, *supra* note 23, at 75–77 (statement of Dr. Craig Haney) (describing typical isolating conditions of solitary confinement).

<sup>85</sup> Juan E. Méndez, United Nations Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Interim Report on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 54, U.N. Doc. A/66/268 (Aug. 5, 2011).

<sup>86</sup> LIMAN/ASCA, TIME-IN-CELL, *supra* note 22, at ii (“[I]n most jurisdictions [studied], administrative segregation had no fixed endpoint. . . . In a substantial number, people remained in segregation for more than 3 years.”).

<sup>87</sup> *Palakovic*, 854 F.3d. at 217.

<sup>88</sup> FEIERMAN, LINDELL & EADDY, *supra* note 57, at 8 (“The recent Wisconsin investigation revealed that youth in solitary confinement . . . are forced to spend their one hour of ‘exercise’ chained to a table.”).

<sup>89</sup> OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, REVIEW OF THE FEDERAL BUREAU OF PRISONS’ USE OF RESTRICTIVE HOUSING FOR INMATES WITH MENTAL ILLNESS, ii (2017), <https://oig.justice.gov/reports/2017/e1705.pdf>.



noted, for example, that its sample of individuals with mental illness in a supermax facility in Colorado (USP Administrative Maximum Security Facility, or ADX) had been placed in solitary confinement for an average of about sixty-nine months, or almost six years.<sup>90</sup>

### C. *Size*

The unusually small size of solitary confinement cells is the third distinctive feature of segregation. Segregation cells are generally eighty square-feet in size, or less than the size of a parking space and only a little bigger than a king-sized bed.<sup>91</sup> This severely limited size is tied to the general barrenness of these cells. Solitary confinement inmates have little beyond a bed closely placed next to a toilet, though some “dry cells” have been known to have no beds, toilets, or sinks at all.<sup>92</sup> And these tiny cells become tiny dark boxes; natural light is limited and windows, if any, exist as small slits in the cell doors.<sup>93</sup>

## VI. THE EFFECT ON PRISONERS

### A. *Effect on the General Prison Population*

The conditions themselves are harsh, but the effect of these conditions on prisoners is the most appalling element of solitary confinement. Medical professionals are in near-universal agreement about the psychological harms of solitary confinement. They agree that segregation can cause or exacerbate mental illness for any individual; while some people are more vulnerable than others, studies of segregation show that all people sent to solitary are susceptible to a “significant risk of serious psychological harm.”<sup>94</sup> And even a short stay in solitary can cause lasting damage: “even a few days of solitary confinement will predictably shift the [brain’s] electroencephalogram (EEG) pattern toward an abnormal pattern characteristic of stupor and delirium.”<sup>95</sup> Professor Haney, reviewing the literature on solitary, notes that not a single

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<sup>90</sup> *Id.* at i–ii, 30.

<sup>91</sup> FEIERMAN, LINDELL & EADDY, *supra* note 57, at 8; Joseph Stromberg, *The Science of Solitary Confinement*, SMITHSONIAN (Feb. 19, 2014), <https://www.smithsonianmag.com/science-nature/science-solitary-confinement-180949793/>.

<sup>92</sup> See, e.g., Carimah Townes, *Idaho to Stop Throwing Inmates in Solitary Confinement Cells Without Beds, Sinks or Toilets*, THINKPROGRESS (Sept. 3, 2015, 4:03 PM), <https://thinkprogress.org/idaho-to-stop-throwing-inmates-in-solitary-confinement-cells-without-beds-sinks-or-toilets-a9d98eda6719/>.

<sup>93</sup> Cloud et al., *supra* note 16, at 19–20.

<sup>94</sup> Haney, *supra* note 20, at 289 (“Prisoners may vary in terms of their vulnerability and resilience in response to this risk [of serious psychological harm], but the risk itself is substantial, and it is typically impossible to determine at the outset of a prisoner’s exposure whether and how he or she will survive and at what psychological cost.”).

<sup>95</sup> Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH U. J.L. & POLICY 325, 331 (2006).

study of forced solitary confinement failed to indicate negative psychiatric symptoms after just 10 days.<sup>96</sup> These results of study after study on the effects of segregation are not surprising given what we know about the significance of social interaction on our development: “[M]eaningful social interactions and social connectedness can have a positive effect on people’s physical and mental health and, conversely . . . social isolation, in general, can undermine health and psychological well-being.”<sup>97</sup>

How this psychological harm manifests itself varies depending on the particular prisoner. Often the harm results in maladaptive behaviors. Many solitary confinement inmates describe losing their appetite, their sense of self-identity, and their desire to continue living.<sup>98</sup> Without a sense of motivation, often partly due to no clear timeframe for removal from solitary confinement, individuals may face a cycle of negative thoughts and emotions and no outlet for sharing them. Professor Haney’s survey of 500 inmates held in solitary found that a majority had depression, heart palpitations, and dizziness, and 41 percent reported hallucinations.<sup>99</sup> In his writing and interviews, he describes particularly alarming examples of ways that prisoners respond to their utter isolation: “[Some] smear[] themselves with feces, sit catatonic in puddles of their own urine on the floors of their cells, or shriek wildly and bang their fists or their heads against the walls that contain them.”<sup>100</sup>

And sometimes, tragically, the psychological effects lead to self-harm and even suicide. Studies have shown that spending time in solitary confinement associates significantly with instances of self-harm in prison.<sup>101</sup> A study by former Harvard Medical School Professor Stuart Grassian, who interviewed hundreds of segregated individuals, found that “roughly a third of solitary inmates were actively psychotic and/or acutely suicidal.”<sup>102</sup> Professor Haney’s study similarly found that 27 percent of the prisoners he interviewed had suicidal thoughts.<sup>103</sup>

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<sup>96</sup> *Williams v. Sec’y Pa. Dep’t of Corr.*, 848 F.3d 549, 566 (3d Cir. 2017) (citing Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. REV. L. & SOC. CHANGE 477, 500–01 (1997)).

<sup>97</sup> Haney, *supra* note 20, at 290.

<sup>98</sup> *Id.* at 290–91.

<sup>99</sup> Debra Cassens Weiss, *Solitary Confinement is Associated with Psychological Ills and Self-Harm*, *Studies Find*, ABA J. (Feb. 24, 2014, 11:45 AM), [http://www.abajournal.com/news/article/solitary\\_confinement\\_is\\_associated\\_with\\_psychological\\_ills\\_and\\_self-harm/](http://www.abajournal.com/news/article/solitary_confinement_is_associated_with_psychological_ills_and_self-harm/).

<sup>100</sup> Ruth Marcus, Opinion, *Why Are We Subjecting Our Youths to Solitary Confinement?*, WASH. POST (Oct. 16, 2012), [https://www.washingtonpost.com/opinions/ruth-marcus-why-are-we-subjecting-our-youths-to-solitary-confinement/2012/10/16/76a7bc50-17b6-11e2-9855-71f2b202721b\\_story.html?utm\\_term=.3d10ee2eaa8f](https://www.washingtonpost.com/opinions/ruth-marcus-why-are-we-subjecting-our-youths-to-solitary-confinement/2012/10/16/76a7bc50-17b6-11e2-9855-71f2b202721b_story.html?utm_term=.3d10ee2eaa8f).

<sup>101</sup> See, e.g., Fatos Kaba et al., *Solitary Confinement and Risk of Self-Harm Among Jail Inmates*, 104 AM. J. PUB. HEALTH 442, 445 (2014) (finding that “acts of self-harm were strongly associated with assignment of inmates to solitary confinement”).

<sup>102</sup> Breslow, *supra* note 82 (internal quotation marks omitted).

<sup>103</sup> Weiss, *supra* note 99.

*B. Effect on Individuals with Serious Mental Illness*

Solitary confinement has a heightened damaging effect on individuals with serious mental illness. A “serious mental illness” is a “major mental disorder (e.g., schizophrenia, bipolar disorder, major depressive disorder) that is usually characterized by psychotic symptoms and/or significant functional impairments.”<sup>104</sup> Many individuals without mental illness develop an illness while in solitary confinement, but the harm for individuals with preexisting serious mental illness is twofold: the conditions of solitary confinement exacerbate mental health issues, and the lack of adequate mental health care in solitary provides an added setback. As noted during the Senate hearing on solitary confinement, “[w]hile in segregation, inmates with mental illness rarely receive the mental health services that might ameliorate the symptoms of their illness or improve their ability to cope with incarceration.”<sup>105</sup> Instead, “[m]ental health services in segregation units are typically limited to psychotropic medication, a health care clinician stopping at the cell front to ask how the prisoner is doing (i.e., mental health rounds), and occasional meetings in private with a clinician.”<sup>106</sup>

The case of Brandon Palakovic provides an example of the consequences of inadequate mental health treatment. In 2011, Brandon, a young man with several serious mental illnesses, was placed in a Pennsylvania state prison after being convicted of burglary.<sup>107</sup> He was accurately diagnosed upon entering the prison system.<sup>108</sup> Nonetheless, prison guards repeatedly placed Brandon in solitary confinement for “minor rules violation[s].”<sup>109</sup> Brandon was provided with almost no treatment—no group therapy, and only one-to-two minute mental health interviews across the slit in the steel door of his solitary confinement cell.<sup>110</sup> The brevity and form of these conversations was directly ordered by the prison’s chief psychologist.<sup>111</sup> After about a year of this repeated isolation with sorely inadequate mental health care, Brandon committed suicide, hanging himself while alone in his solitary cell.<sup>112</sup> A DOJ Civil Rights Division investigation into the prison found that this pattern of depriving individuals in solitary of critical mental health treatment was a prison-wide issue.<sup>113</sup>

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<sup>104</sup> Jeffrey L. Metzner & Jamie Fellner, *Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for Medical Ethics*, 38 J. AM. ACAD. PSYCHIATRY & L. 104, 104–05 (2010).

<sup>105</sup> *Senate Hearing*, *supra* note 23, at 448.

<sup>106</sup> Metzner & Fellner, *supra* note 104, at 105.

<sup>107</sup> *Palakovic v. Wetzel*, 854 F.3d 209, 216 (3d Cir. 2017).

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

<sup>109</sup> *Palakovic v. Wetzel*, No. 3:14-145, 2015 WL 3937499, at \*1 (W.D. Pa. June 26, 2015).

<sup>110</sup> *Palakovic*, 854 F.3d. at 228.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 217.

<sup>113</sup> See Letter from Thomas E. Perez, Assistant Attorney General, U.S. Dep’t of Justice, & David J. Hickton, U.S. Attorney, U.S. Attorney’s Office, to Tom Corbett, Governor of Pa., Findings on the

### C. *Effect on Youth*

Youths, like individuals with serious mental illness, have an increased vulnerability to the harms of solitary confinement. The harms of segregation are especially detrimental to youths' neurological and social development.<sup>114</sup> Young people are at a pivotal point in development, as the brain is still developing until the mid-20s, and the brain during adolescence reaches a "second period of heightened malleability."<sup>115</sup> Because of the heightened neuroplasticity of this time period in one's life, "[a] lack of stimulation or aberrant stimulation" can cause "lasting effects on physical and mental health in adulthood,"<sup>116</sup> meaning solitary confinement is particularly damaging. The social isolation is also a major problem, causing the stunting of social development skills critical to emotional support and gainful employment.<sup>117</sup>

## VII. SOLITARY CONFINEMENT, FIRSTHAND

While there are many law review articles that dissect civil rights violations and consider potential remedies, it is unfortunate that very few feature the unfiltered voices of those who are on the receiving end of the mistreatment. Though the six preceding Parts provide a conceptual overview of what solitary confinement looks like and its effects on prisoners, the perspectives of those who have actually lived in confinement are indispensable. Hearing their voices is the only way to get a real-life sense for whether the punishment is "cruel and unusual" or acceptable in today's society. Some jurists and legal academics ignore narratives like this, arguing that they lack legal relevance. Beyond being wrongly dismissive as a general matter—we are, after all, a "government of the people[,] by the people[,] for the people,"<sup>118</sup> so legitimate insight into how the law affects real people is indispensable—this perspective is particularly improper in the present context. The constitutional analysis asks at its core whether a punishment impermissibly violates a person's dignity, and the only way to make a full determination is by considering the lived experiences of prisoners facing such punishment and deciding whether an attack on our collective dignity is indeed taking place.

Adapted from a number of sources—mostly opinion editorials and a

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Investigation of the State Correctional Institution at Cresson and Notice of Expanded Investigation, at 2 (May 31, 2013), [https://www.justice.gov/sites/default/files/crt/legacy/2013/06/03/cresson\\_findings\\_531-13.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2013/06/03/cresson_findings_531-13.pdf).

<sup>114</sup> FEIERMAN, LINDELL & EADDY, *supra* note 57, at 10–13.

<sup>115</sup> *Id.* at 10.

<sup>116</sup> *Id.* at 10–11.

<sup>117</sup> *Id.* at 12.

<sup>118</sup> Abraham Lincoln, Gettysburg Address (Nov. 19, 1863).

book featuring the firsthand accounts of individuals in solitary confinement—see below for snippets of descriptions of solitary confinement by those who have experienced it. Pseudonyms are used in some cases to protect privacy. First, comments especially focused on describing the conditions:

I think [the cell] would . . . look like any other cell. You know, a box. There was a bed—the slab. It was concrete. . . . There was a stainless steel toilet/sink combo. . . . The door was solid, without a food slot or window. . . . It looked like a basement because all I could see was brick walls. There was no window at all . . . I couldn't see a clock . . . the only way I really associated any kind of time—I broke down time: morning, afternoon, evening. I broke it down: breakfast, lunch, and dinner. . . .

– Molly J.<sup>119</sup>

It was all brick walls, metal bed, chrome-looking sink. We was behind a door, not bars. We could see out of the door. There was a little window. You could hear other people screaming out the door, talking to each other. A lot of times it was so loud, people trying to talk to each other.

– Eddie<sup>120</sup>

Next, reflections about people's reactions to these conditions:

Being arrested from school and put into solitary made me not want to go back to school. I kept associating school with being put on hold [for] 72 hours. I had never been in trouble before. I'm not that type of kid, I kind of stay to myself. To be taken from school and put in that situation made me afraid to go to school because any given day they could accuse me of something and I'd have to go back to being alone in that cell for like three days.

– C.H.<sup>121</sup>

The hopelessness and despair . . . is immense. The more time I spend alone, the more I begin to doubt myself, my sanity, my integrity and my identity.

– Anonymous<sup>122</sup>

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<sup>119</sup> *Growing Up Locked Down*, *supra* note 83 (alterations and omissions in original).

<sup>120</sup> FEIERMAN, LINDELL & EADDY, *supra* note 57, at 10.

<sup>121</sup> *Id.* at 12 (alteration in original).

<sup>122</sup> Maria Cramer & Jenna Russell, *Advocates: Mass. Unlawfully Isolates Mentally Ill Inmates*, BOS. GLOBE (Dec. 31, 2016), <https://www.bostonglobe.com/metro/2016/12/31/massachusetts-unlawfully-sending-mentally-ill-inmates-solitary-confinement-prisoner-advocates-charge/cYiQVaNab70z1llVCn4EP/story.html> (omission in original).

I've had these cell walls make me see delusions. I've tried to kill myself a few times. I've smeared my own blood on my cell walls and ceiling. I would cut myself just to see my own blood.

– Shawn<sup>123</sup>

[I felt] doomed, like I was being banished . . . like you have the plague or that you are the worst thing on earth. Like you are set apart [from] everything else. I guess [I wanted to] feel like I was part of the human race—not like some animal.

– Molly J.<sup>124</sup>

I got a 15-minute phone call when my father died. I realized I have family I don't really know anymore, or even their voices.

– Anonymous<sup>125</sup>

Families suffer, too. Some of the gravest suffering is reserved for families of individuals who have committed suicide in solitary. The parents of Brandon Palakovic, for example, wrote a letter explaining why they decided to sue the Pennsylvania prison officials after their son's suicide:

As his parents, we have found it hard to conceive of death being his only way out. So we have spent the last two years trying to heal, understand his final decision and memorialize Brandon for the person that he was, not the animal that we have come to find out he was treated like.

. . . .

The system that we have respected all of our lives and taught our children to respect failed Brandon and feels no remorse for their actions. Instead, they have been cold, non-responsive, rude and evasive at every turn. The evening that we had to identify Brandon's body was the single worst moment of our lives. When there was confusion at the hospital as we arrived, we had to make a call to [the prison] so they could release his body to us. When I identified myself as Brandon's mother, the guard simply yelled to another person "It's the mom of the one who hung up last night. What do you want me to do with her?" They clearly didn't see Brandon as a person. They saw him as a thing; trash that could just be disposed of without a second thought and his death meant nothing to them.

– Renee and Darian Palakovic<sup>126</sup>

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<sup>123</sup> Nathaniel Penn, *Buried Alive: Stories from Inside Solitary Confinement*, GQ (Mar. 2, 2017), <https://www.gq.com/story/buried-alive-solitary-confinement>.

<sup>124</sup> *Growing Up Locked Down*, *supra* note 83 (alterations and omissions in original).

<sup>125</sup> *Solitary Confinement Leads to "Social Death,"* EQUAL JUST. INITIATIVE (Aug. 12, 2015), <https://eji.org/news/solitary-confinement-leads-to-social-death>.

<sup>126</sup> *Statement from the Palakovic Family*, ABOLITIONIST L. CTR. (July 7, 2014), <http://abolitionistlawcenter.org/2014/07/07/statement-from-the-palakovic-family/>.