

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

**SOLITARY CONFINEMENT AS PER SE UNCONSTITUTIONAL**

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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.*

[W]e have no duty more important than that of enforcing constitutional rights, no matter how unpopular the cause or powerless the plaintiff.

– *Madrid v. Gomez*<sup>1</sup>

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<sup>1</sup> 889 F. Supp. 1146, 1279 (N.D. Cal. 1995).

With a background on solitary confinement in American prisons (Article I of this Series) and on solitary's established-but-weakening constitutional status (Article II), we can now turn to the two most powerful and likely-to-succeed arguments that solitary, in all cases, is a violation of the Eighth Amendment. First, solitary confinement as a type of punishment violates the "evolving standards of decency" doctrine, and second, the conditions of solitary confinement violate the "deliberate indifference" doctrine.

## I. ROUTE ONE: THE "EVOLVING STANDARDS OF DECENCY" DOCTRINE

The first route to a *per se* holding that solitary confinement is unconstitutional is through a determination that it is a type of punishment that violates the "evolving standards of decency" doctrine. This Part will apply each of the factors determined relevant by the Supreme Court to the practice of solitary confinement, and then consider recent trends in the application of the doctrine.

### A. *Factors Applied to Solitary Confinement*

Over time, the Supreme Court has added helpful detail to its analysis in determining whether a practice violates the Eighth Amendment by developing the so-called "evolving standards of decency" doctrine.<sup>2</sup> Under this doctrine, the Court has emphasized the consideration of several factors to decide if a type of practice violates "evolving standards of decency" and thus the Eighth Amendment. The Court has primarily looked to state legislative action, while also looking to factors like professional consensus, history, and international norms, as well as the perspectives of religious organizations on occasion.<sup>3</sup> (It has also emphasized the actions of juries in the sentencing context,<sup>4</sup> but because juries have nothing to say about the conditions of a

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<sup>2</sup> *Id.* at 1245 (citing *Patchette v. Nix*, 952 F.2d 158, 163 (8th Cir. 1991)) (the scope of the constitutional protections afforded to detainees "draw[s] its meaning from the evolving standards of decency that mark the process of a maturing society").

<sup>3</sup> See *Atkins v. Virginia*, 536 U.S. 304, 312–17, 316 n.21, 321 (2002) (noting state statutes as well as medical expertise, religious views, and international norms in holding that the death penalty for people with mental disabilities is unconstitutional); *Thompson v. Oklahoma*, 487 U.S. 815, 830–31 (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>4</sup> See, e.g., *Gregg*, 428 U.S. at 181 (noting that jury behavior "is a significant and reliable objective index of contemporary values" because it "maintain[s] a link between contemporary community values and the penal system").

convicted individual while in confinement, this consideration is not relevant here.) Relying on these indicia of societal values, the Court ultimately exercises “its own independent judgment” to determine whether a given punishment violates the Eighth Amendment.<sup>5</sup> This section will explore the Court’s evaluation of each of these relevant factors—by considering the development of the jurisprudence about each factor in the context of capital punishment, and then applying each factor to the context of solitary confinement.

#### i. State Legislative Action

The factor the Supreme Court has tended to place the most weight on is state legislative action. The Court has noted that state legislative action is the “clearest and most reliable objective evidence of contemporary values.”<sup>6</sup> The reasoning for this, it has said, is that legislatures are “constituted to respond to the will and consequently the moral values of the people.”<sup>7</sup>

The trend matters almost as much as, if not more than, the number of states. In striking down capital punishment of individuals with mental disability, for example, the Court in *Atkins v. Virginia*<sup>8</sup> placed significant weight on state legislative action.<sup>9</sup> There, importantly, the Court asserted a nuance to the focus on state legislative action: “It is not so much the number of these States that is significant, but the consistency of the direction of change.”<sup>10</sup> It recognized that eighteen states passed laws limiting the eligibility for capital punishment of individuals with mental disability in recent years, noting particularly the years in which the statutes were passed and the fact that six states passed statutes in the previous year before the decision (and even noting states that were in the process of passing such legislation).<sup>11</sup> It also recognized that this amount of state action is particularly forceful given the inertia against such reforms: “anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime.”<sup>12</sup>

Taking these principles and mapping them onto solitary confinement leads to the conclusion that a similar trend is at play. The dominant trend

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<sup>5</sup> *Graham v. Florida*, 560 U.S. 48, 61 (2010).

<sup>6</sup> *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989).

<sup>7</sup> *Gregg*, 428 U.S. at 175.

<sup>8</sup> 536 U.S. 304 (2002).

<sup>9</sup> *Id.* at 314–15.

<sup>10</sup> *Id.* at 315.

<sup>11</sup> *Id.* at 321–22 (Rehnquist, C.J., dissenting). As for the sheer number of states required to be considered a “consensus,” in *Graham v. Florida*, 560 U.S. 48 (2010), the Supreme Court struck down life-without-parole sentences for juveniles convicted of non-homicide crimes under the “evolving standards of decency” doctrine when only thirteen states had banned or restricted the practice at the time. *Id.* at 62.

<sup>12</sup> *Atkins*, 536 U.S. at 315.

has been a swift reconsideration and rebuke of solitary confinement in the states. The Pew Charitable Trusts, citing the National Conference of State Legislatures, notes the actions of ten states in the last several 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.”<sup>13</sup> This only provides part of the picture of the movement to end or sharply curtail segregation across states: beyond legislation, “[j]ust about every state is looking at ways to limit the use of solitary confinement.”<sup>14</sup> Further, when it comes to juveniles, legislatures in at least twenty-one states have banned or restricted solitary confinement;<sup>15</sup> this is in addition to President Obama ending the practice of juvenile solitary confinement in federal prisons, calling solitary “an affront to our common humanity.”<sup>16</sup> And the same trend holds when it comes to segregation of individuals with serious mental illness.<sup>17</sup>

## ii. International Perspectives

International comparisons have also taken on a growing significance in Eighth Amendment jurisprudence.<sup>18</sup> This emphasis on international law started in the cornerstone case on the “evolving standards of decency” doctrine itself: *Trop v. Dulles*.<sup>19</sup> Even in that first case in 1958, the Court stressed that the United States was a global outlier in using denationalization as a

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<sup>13</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>.

<sup>14</sup> *Id.* (quoting Sara Sullivan, Sentencing and Corrections Project Manager, Vera Institute of Justice).

<sup>15</sup> See *V.W. ex rel. Williams v. Conway*, 236 F. Supp. 3d 554, 584 (N.D.N.Y. 2017); see also Wiltz, *supra* note 13 (mentioning relevant legislation in Alaska, California, Connecticut, Maine, Nevada, New York, North Carolina, Oklahoma, Texas, and West Virginia); S.B. 1143, Chapter 726 (Cal. 2016); *State Prison System Announces End to Solitary Confinement for Inmates Under 18*, N.C. DEP’T OF PUB. SAFETY (June 15, 2016), <https://www.ncdps.gov/press-release/state-prison-system-announces-end-solitary-confinement-inmates-under-18>.

<sup>16</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).

<sup>17</sup> See, e.g., *Coleman v. Brown*, 28 F. Supp. 3d 1068, 1105–06 n.50 (E.D. Cal. 2014) (listing seven states that had banned or severely restricted the placement of individuals with serious mental illness in solitary confinement, or had begun doing so, by 2014).

<sup>18</sup> See, e.g., *Atkins v. Virginia*, 536 U.S. 304, 347–48 (2002) (Scalia, J., dissenting) (“[The] views of professional and religious organizations and the results of opinion polls are irrelevant. Equally irrelevant are the practices of the ‘world community,’ whose notions of justice are (thankfully) not always those of our people.”).

<sup>19</sup> 356 U.S. 86 (1958).

punishment, noting that “the civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime.”<sup>20</sup> It referenced a United Nations (U.N.) survey of eighty-four nations, finding that only two used denationalization as a punishment at the time, as support for striking the practice down as unconstitutional here at home.<sup>21</sup> As the Court in *Coker v. Georgia*<sup>22</sup> noted in itself considering international opinions to hold that imposing the death penalty for rape not leading to death is unconstitutional, “the plurality [in *Trop*] took pains to note the climate of international opinion concerning the acceptability of a particular punishment.”<sup>23</sup>

The trend toward considering international opinions has increased and was perhaps most famously displayed when the Supreme Court struck down the juvenile death penalty on Eighth Amendment grounds in 2005.<sup>24</sup> The Court observed that “the overwhelming weight of international opinion against the juvenile death penalty . . . [is] not controlling . . . , [but] does provide respected and significant confirmation for [the Court’s determination that the penalty is a disproportionate punishment for offenders under 18].”<sup>25</sup> Through the several Court decisions considering international opinions in determining “evolving standards of decency,” a consistent thread is evident: though surely not determinative, international opinion is a significant supporting factor that can help the Court determine whether a practice flouts contemporary values.

Taking into account international opinion in the context of solitary confinement puts another weight on the scales in favor of striking the practice down as unconstitutional. First, there is considerable agreement by the international community that segregation can be a form of torture when it results in severe harm, as it demonstrably does in the United States, even in relatively short amounts of time.<sup>26</sup> The U.N. Special Rapporteur on Torture issued a report stating that segregation can violate the Convention Against Torture and the International Covenant on Civil and Political Rights (two treaties to which the United States is a party):

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<sup>20</sup> *Id.* at 102 (plurality opinion).

<sup>21</sup> *Id.* at 103.

<sup>22</sup> 433 U.S. 584 (1977).

<sup>23</sup> *Id.* at 596 n.10 (citing *Trop*, 356 U.S. at 102).

<sup>24</sup> See *Roper v. Simmons*, 543 U.S. 551, 575 (2005) (indicating that while overwhelming international opinion against the juvenile death penalty was not controlling on the Court, it was instructive for interpreting the Eighth Amendment).

<sup>25</sup> *Id.* at 578.

<sup>26</sup> See, e.g., 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*, ¶ 74, U.N. Doc. A/66/268 (Aug. 5, 2011).

Where the physical conditions of solitary confinement are so poor and the regime so strict that they lead to severe mental and physical pain or suffering of individuals who are subjected to the confinement, the conditions of solitary confinement amount to torture or to cruel and inhuman treatment as defined in articles 1 and 16 of the Convention [against Torture], and constitute a breach of article 7 of the [International] Covenant [on Civil and Political Rights].<sup>27</sup>

As a result, the U.N. has stated that the treaties point toward a complete end to the practice: “[b]ecause of its potentially deleterious effects on prisoners’ mental and physical health,” the governing body of the Convention Against Torture (the Committee Against Torture) “has recommended that [solitary confinement] be *abolished* altogether.”<sup>28</sup> Meanwhile, another U.N. report found that the use of solitary in American prisons is “akin to torture and . . . a human rights crisis”<sup>29</sup> and that “[f]ull isolation of 22 to 23 hours a day in super-maximum security prisons is *unacceptable*.”<sup>30</sup>

To supplement these treaties, the U.N. has also promulgated international rules for prison operations globally, adopting the “Standard Minimum Rules for the Treatment of Prisoners” in 1955.<sup>31</sup> The so-called “Standard Rules” were incorporated by the United States seven years later, and they “have been increasingly recognized as a generally accepted body of basic minimal requirements.”<sup>32</sup> These rules reflect European standards in staking a position against solitary confinement, including by prohibiting punishment “by placing in a dark cell.”<sup>33</sup>

Beyond their importance as a symbol of the international community’s solid rejection of solitary confinement, these international treaties and rules are also abided by in practice around the world. In most countries, the practice of solitary confinement has been “largely discontinued.”<sup>34</sup> As a particularly salient example of the difference in principles about segregation, Ireland recently refused to extradite an individual to the United States on the

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<sup>27</sup> *Id.*; see also *Solitary Confinement Should Be Banned in Most Cases, UN Expert Says*, UN NEWS (Oct. 18, 2011), <http://news.un.org/en/story/2011/10/392012-solitary-confinement-should-be-banned-most-cases-un-expert-says>.

<sup>28</sup> Jules Lobel, *Prolonged Solitary Confinement and the Constitution*, 11 U. PA. J. CONST. L. 115, 123 (2008) (emphasis added).

<sup>29</sup> Wiltz, *supra* note 13.

<sup>30</sup> Adelle M. Banks, *Interfaith Activists Call Solitary Confinement Immoral, Ineffective*, RELIGION NEWS SERV. (May 13, 2015), <https://religionnews.com/2015/05/13/interfaith-activists-call-solitary-confinement-immoral-ineffective/> (emphasis added).

<sup>31</sup> Elizabeth Vasiliades, *Solitary Confinement and International Human Rights: Why the U.S. Prison System Fails Global Standards*, 21 AM. U. INT’L L. REV. 71, 83 (2005).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> Joseph Stromberg, *The Science of Solitary Confinement*, SMITHSONIAN.COM (Feb. 19, 2014), <https://www.smithsonianmag.com/science-nature/science-solitary-confinement-180949793/>.

grounds that he might be placed in a solitary confinement cell in Colorado, which would amount to an impermissible violation of Irish law.<sup>35</sup>

Some Justices in the past have criticized the use of international opinion in determining constitutional meaning. Chief Justice Rehnquist, in his dissent in *Atkins*, advocated for only using the actions of state legislatures and the decisions of juries as elements to gain insight into the contemporary values of American society, as he believed these features to be more reflective of the will of the people and their values.<sup>36</sup> But notwithstanding their consternation, the reality is that in the Eighth Amendment “evolving standards of decency” context, international opinion is an entrenched factor. That is not to say it is at all decisive; Chief Justice Rehnquist rightly argued in his *Atkins* dissent that the Court has stated in the past that international opinion should not be dispositive—it should not “serve to establish the first Eighth Amendment prerequisite, that [a] practice is accepted among our people.”<sup>37</sup> But the use of international opinion as a helpful supporting factor has become well-established within the “evolving standards of decency” doctrine, more so than any other factor outside of state legislative action and the decisions of juries.

### iii. Professional Consensus

A third element considered by the Court in its quest to define the boundaries of our “evolving standards of decency” is the views of professional organizations with relevant expertise. In *Thompson v. Oklahoma*,<sup>38</sup> for example, the Court cited the views of “respected professional organizations,” as well as other nations, in striking down capital punishment of people younger than sixteen years old at the time of offense.<sup>39</sup>

This factor, too, cuts sharply in favor of striking down solitary confinement. Today there is overwhelming professional consensus that solitary confinement causes severe psychological harms. This consensus about the harm will be discussed in more detail in the analysis of the “deliberate indifference” test’s first prong (whether there is a “substantial risk of serious harm”) in Part II; for the purposes of the “evolving standards of decency” doctrine, what matters most is whether there is a professional consensus on the normative

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<sup>35</sup> Derek Gilna, *Irish High Court Bars Extradition of Terror Suspect to U.S., Citing Inhumanity of Solitary Confinement*, PRISON LEGAL NEWS (Apr. 1, 2016), <https://www.prisonlegalnews.org/news/2016/apr/1/irish-high-court-bars-extradition-terror-suspect-us-citing-inhumanity-solitary-confinement/>.

<sup>36</sup> *Atkins v. Virginia*, 536 U.S. 304, 323–24 (2002) (Rehnquist, J., dissenting).

<sup>37</sup> *Id.* at 325.

<sup>38</sup> 487 U.S. 815 (1988).

<sup>39</sup> *Id.* at 830–31, 838 (plurality opinion).

view that, because of these grave harms, solitary confinement does not align with our nation's values.

Though this is a slightly different determination, there is general consensus here as well. When it comes to health-professional organizations, the American Public Health Association (APHA), as one example, has stated that “[p]unitive segregation should be eliminated.”<sup>40</sup> When it comes to prison administration organizations, the bipartisan Commission on Safety and Abuse in America's Prisons has issued a recommendation that prisons “[e]nd conditions of isolation.”<sup>41</sup> And when it comes to legal-professional organizations, the American Bar Association (ABA) spoke out against solitary confinement to the Senate Subcommittee on the Constitution, Civil Rights, and Human Rights, with its spokesman stating that “while it may necessary physically to separate prisoners who pose a threat to others, that separation does not necessitate the social and sensory isolation that has become routine.”<sup>42</sup>

#### iv. History

The Supreme Court has, albeit in a more limited fashion, noted that historic acceptance of a practice can suggest that it fits within the bounds of “evolving standards of decency.” In *Gregg v. Georgia*,<sup>43</sup> the Court noted the historic acceptance of capital punishment for murder as “strongly support[ing]” the practice's constitutionality.<sup>44</sup> This rationale can be construed as quite contrary to “evolving standards,” which is a benchmark that changes over time. But there is a way to read it as compatible: if the nation has many opportunities to change a practice but continually allows it to remain, the absence of a strong trend against the practice might be an indication that the nation is comfortable with it.

History, like the other factors discussed, points to grave concerns about solitary confinement's harms. Far from an implied historical acquiescence with solitary confinement, there is, as the Third Circuit noted recently, a “growing consensus—with roots going back a century—that [segregation] can cause severe and traumatic psychological damage . . . [a]nd the damage

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<sup>40</sup> *Solitary Confinement as a Public Health Issue*, AM. PUB. HEALTH ASS'N (Nov. 5, 2013), <https://apha.org/policies-and-advocacy/public-health-policy-statements/policy-data-base/2014/07/14/13/30/solitary-confinement-as-a-public-health-issue>.

<sup>41</sup> John J. Gibbons & Nicholas de Belleville 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>42</sup> *ABA Cites Growing Concerns About Solitary Confinement*, AM. B. ASS'N (Sept. 18, 2018). See also STANDARDS FOR CRIMINAL JUSTICE: TREATMENT OF PRISONERS 23-2.6, 50 (AM. BAR ASS'N 2011) (stating that “[s]egregated housing should be for the briefest term and under the least restrictive conditions practicable”).

<sup>43</sup> 428 U.S. 153 (1976).

<sup>44</sup> *Id.* at 176.



does not stop at mental harm.”<sup>45</sup> A slightly less compelling “evolving standards of decency” argument might relate to a practice that was generally agreed to be humane decades ago but is now beginning to see detractors, from state legislatures to the international community to the professional community, speak out against it. But in solitary confinement we have a practice that drew significant institutional and societal outrage from the outset—outrage that has grown over the decades to its potential tipping point today.

Back in 1890, the Supreme Court in *In re Medley*<sup>46</sup> detailed the “serious objections” to solitary confinement, stemming from its original development in the late 1700s.<sup>47</sup> It went further, noting that in the mid-1850s prisons “attracted the general public attention,” and solitary confinement was found by the public to be “too severe.”<sup>48</sup> In addition to retracing these two major historic points of concern with solitary confinement in the late 1700s and mid-1850s—the second of which led to all-but ending the practice—the Court also relayed its own contemporary concerns:

But experience demonstrated that there were serious objections to [solitary confinement]. A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community. It became evident that some changes must be made in the system, and the separate system was originated by the Philadelphia Society for Ameliorating the Miseries of Public Prisons, founded in 1787. . . . [I]t is within the memory of many persons interested in prison discipline that some 30 or 40 years ago the whole subject attracted the general public attention, and its main feature of solitary confinement was found to be too severe.<sup>49</sup>

As put by Judge Tuttle of the Fifth Circuit Court of Appeals in 1971, “As long ago as 1890 the United States Supreme Court clearly saw and clearly articulated the vice of solitary confinement even for a relatively short period of time . . . .”<sup>50</sup> So the period from solitary confinement’s inception as a systemic practice in the late 1700s to the Supreme Court’s decision in 1890 was marked by major concerns with solitary confinement and a general agreement that the practice was “too severe,” and it nearly ended with a

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45 Palakovic v. Wetzel, 854 F.3d 209, 225–26 (3d Cir. 2017) (citing Williams v. Sec’y Pa. Dep’t of Corr., 848 F.3d 549, 566–67 (3d Cir. 2017)).

46 134 U.S. 160 (1890).

47 *Id.* at 167–68.

48 *Id.* at 168.

49 *Id.*

50 Novak v. Beto, 453 F.2d 661, 676 (5th Cir. 1971) (Tuttle, J., concurring in part and dissenting in part).

holding of unconstitutionality. The virtual end to the use of solitary confinement from then until the late 1900s may have allowed the issue of solitary confinement to fall to the backburner; a holding of per se unconstitutionality in *In re Medley* may have seemed unnecessary at the time, given that three or four decades earlier solitary confinement had been rejected in practice.<sup>51</sup> But the period from its resurgence in the late 1900s until today's unprecedented use of the practice has seen renewed and even greater criticism than a century ago. And surely today's values reflect a greater concern for human dignity than those of the late 1800s.

Put simply, given the Court's acknowledgement that solitary was deemed by the public to be "too severe" over 100 years ago and was roundly rejected, it would seem to follow that determining the practice's illegitimacy would be an easy call under today's generally more humane societal standards, built by recent decades' civil and human rights progresses. At the very least, though, in the context of the history factor of the "evolving standards of decency" doctrinal test, this lengthy history of national concern about the use of solitary confinement cuts against the counterargument that the practice does not contravene the "evolving standards of decency of a maturing society."

#### v. Views of Religious Organizations

One other factor the Court has considered, albeit less frequently, to determine the day's "standards of decency" is religious views. In *Atkins*, the Court placed weight on the fact that "representatives of widely diverse religious communities . . . reflecting Christian, Jewish, Muslim, and Buddhist traditions . . . share a conviction that the execution of persons with mental retardation cannot be morally justified."<sup>52</sup>

In the context of solitary confinement, religious institutions in the United States that have spoken on the subject are in agreement that it should be stopped or significantly curtailed. As Professor Craig Haney notes, the New York State Council of Churches and the Rabbinical Assembly have both spoken out against solitary confinement.<sup>53</sup> The American Friends Service Committee, a Quaker organization, and T'ruah, a Rabbinical organization advocating for human rights, have done the same.<sup>54</sup>

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<sup>51</sup> See Alexander A. Reinert, *Solitary Troubles*, 93 NOTRE DAME L. REV. 927, 954 (2005) ("Several states through the nineteenth century briefly flirted with the use of extreme isolation only to abandon it after it proved too harmful to prisoners.").

<sup>52</sup> *Atkins v. Virginia*, 536 U.S. 304, 325–26 (2002) (Rehnquist, J., dissenting).

<sup>53</sup> 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>54</sup> Banks, *supra* note 30.

#### vi. Factors Taken Together

Ultimately, each of the factors weighs against the constitutionality of solitary confinement, with three of the four “primary” factors (international opinion, professional consensus, and history) weighing heavily. The state legislative action factor, admittedly, is not a slam dunk; the sheer number of states does not portray majority agreement to end solitary confinement. But the trend, as the Supreme Court has noted, is the most critical element to consider, and that trend has been an overwhelming push to rid prisons of a practice that has been decried for over a century. Meanwhile, as was noted in relation to sheer numbers, virtually every state is considering curtailing or ending confinement generally, and twenty-one states have severely restricted or banned solitary confinement of juveniles. This trend in recent years and near-unanimous agreement among states that solitary confinement must be at least curtailed—when combined with overwhelming disapproval by the international community, professionals across related health, legal, and prison administration groups, religious groups, and the American public itself well over a century ago—points to solitary confinement as being profoundly out of step with today’s “evolving standards of decency” in America.

#### *B. Trend of Judicial Action Regarding “Evolving Standards of Decency” Doctrine*

Beyond the multi-factor analysis itself, another element pushing toward a holding that solitary contravenes “evolving standards of decency” is the trend of this concept’s recent usage in Supreme Court opinions. The Court has spurred recent expansions of Eighth Amendment rights under the “evolving standards of decency” doctrine, including for people with mental disability.<sup>55</sup> More generally, as Justice Thomas noted in *Hudson v. McMillian*,<sup>56</sup> though with disapproval, the Supreme Court has taken a more expansive view of the Eighth Amendment since the 1970s.<sup>57</sup>

Such a trend cuts against the hesitation from some judges that a holding of per se unconstitutionality might be impermissibly imposing their own moral codes on prisons across the country.<sup>58</sup> The increasing use of “evolving standards of decency” indicates a growing recognition from the courts that the use of solitary confinement in prisons is something that is not only within their scope to determine, but a responsibility of theirs to determine. Rather

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<sup>55</sup> See, e.g., *Atkins*, 536 U.S. at 321.

<sup>56</sup> 503 U.S. 1 (1992).

<sup>57</sup> *Id.* at 28 (Thomas, J., dissenting).

<sup>58</sup> *Cf. Novak v. Beto*, 453 F.2d 661, 673 (5th Cir. 1971) (Tuttle, J., concurring in part and dissenting in part) (quoting Justice Frankfurter and Judge Learned Hand to describe the nexus between the common law and societal conscience).

than imposing their own values, the federal courts are instructed by Supreme Court precedent to, as objectively as possible, ascertain the values of the nation as it relates to punishment practices. Beyond the doctrinal trend placing this decision in the laps of federal judges, there remains the central point that the Eighth Amendment right to be free from “cruel and unusual punishment” is a fundamental constitutionally endowed right, and the highest role of the federal courts is to ensure such rights are not violated. As Judge Tuttle put it:

For this court to tell the prisoner to look to the legislature and an administrator who has condoned, and still excuses them, would seem to me but an empty gesture, and calls to mind an answer right out of Aeschylus: ‘Hollow words, I deem are worst of ills.’ In sum, I think this is an area in which the court should move. Such action by us is not only justified, it is called for if the Anglo-Saxon system of justice is to remain living and vigorous.<sup>59</sup>

The courts have assumed their role in determining the “evolving standards” of decency more and more in recent years, and this trend adds contextual support to the multi-factor arguments pointing toward solitary confinement as contravening “evolving standards of decency.”

## II. ROUTE TWO: THE “DELIBERATE INDIFFERENCE” DOCTRINE

Should challenging solitary confinement as a type of punishment under the “evolving standards of decency” doctrine prove unconvincing to federal courts, the second argument with force is that the specific conditions of solitary confinement always violate the “deliberative indifference” doctrine. This would mean that there is per se satisfaction of both prongs of the test, regardless of the underlying circumstances of the specific case. As such, it means that there must be enough evidence that in all cases solitary confinement has too high a risk of serious harm to be acceptable and that this risk is sufficiently obvious such that disregarding it amounts to recklessness. This argument under the “deliberative indifference” doctrine has a heightened practical importance given that, as discussed, federal courts often move straight to this analysis without considering the “evolving standards of decency” doctrine.<sup>60</sup>

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<sup>59</sup> *Id.* at 672–73 (internal citations omitted).

<sup>60</sup> See Andrew Leon Hanna, *The Present Constitutional Status of Solitary Confinement (Article II)*, 21 U. PA. J. CONST. L. ONLINE 1, 12 (2019).

*A. Prong One: Substantial Risk of Serious Harm*

First, the court must agree that there is per se satisfaction of the first prong, which is the easier of the two prongs for plaintiffs to meet: the existence of a “substantial risk of serious harm.” This would be a determination that there is a substantial risk of harm *inherent* in placing individuals in solitary confinement.

The holding that there is per se satisfaction of the first prong of the “deliberate indifference” test is likely not far off. One piece of evidence in this direction is that courts in several solitary confinement cases have sharply and decisively ruled in favor of plaintiffs on the first prong.<sup>61</sup> This is because there is quite clearly a strong case that segregation comfortably meets the standard for “substantial risk of serious harm.” To begin the analysis, it is worth remembering that the Supreme Court has made clear that all that is required is a *risk* of harm, not actual harm, which lowers the burden on the plaintiff. An actionable claim “does not require proof that the plaintiff suffered an actual injury[;] [i]nstead, it is enough that the defendant’s actions exposed the plaintiff to a substantial *risk* of serious harm.”<sup>62</sup> Indeed, “a remedy for unsafe conditions need not await a tragic event.”<sup>63</sup> Conditions posing a substantial risk of serious harm to prisoners therefore violate the Constitution, even if no prisoner has suffered actual harm at the time the violation is found.

So the question is whether it can be sufficiently stated that solitary confinement, as a general matter, poses a substantial risk that prisoners subjected to it will be seriously harmed. The Court has made clear that psychological harm qualifies here. In adding color to what elevates to the level of serious harm, the Court has noted that a prisoner must not be deprived of “the minimal civilized measure of life’s necessities,” and as such that she must be protected from physical harm.<sup>64</sup> Psychological well-being, the most vulnerable feature of a human spending even short time periods in solitary confinement, has been identified as deserving of the same protections that relate to physical harm:

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<sup>61</sup> See, e.g., *Madrid v. Gomez*, 889 F. Supp. 1146, 1265–66 n.209 (N.D. Cal. 1995); *Palakovic v. Wetzel*, 854 F.3d 209 (3d Cir. 2017).

<sup>62</sup> *Heyer v. U.S. Bureau of Prisons*, 849 F.3d 202, 210 (4th Cir. 2017); see also *Helling v. McKinney*, 509 U.S. 25, 33 (1993); *Rish v. Johnson*, 131 F.3d 1092, 1096 (4th Cir. 1997) (stating that a prisoner must “produce evidence of a serious or significant physical or emotional injury resulting from the challenged conditions, or *demonstrate a substantial risk of such serious harm* resulting from the prisoner’s unwilling exposure to the challenged conditions”) (emphasis added) (internal citations omitted).

<sup>63</sup> *Helling*, 509 U.S. at 33 (“That the Eighth Amendment protects against future harm to inmates is not a novel proposition. . . . It would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them.”).

<sup>64</sup> *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

It goes without question that an incarceration that inflicts daily, permanently damaging, physical injury and pain is unconstitutional. Such a practice would be designated as torture. Given the relatively recent understanding of the primal necessity of psychological well-being, the same standards that protect against physical torture prohibit mental torture as well—including the mental torture of excessive deprivation. . . . As the pain and suffering caused by a cat-o'-nine-tails lashing an inmate's back are cruel and unusual punishment by today's standards of humanity and decency, the pain and suffering caused by extreme levels of psychological deprivation are equally, if not more, cruel and unusual. The wounds and resulting scars, while less tangible, are no less painful and permanent when they are inflicted on the human psyche.<sup>65</sup>

Indeed, as put by District Judge Henderson in *Madrid v. Gomez*,<sup>66</sup> “Mental health, just as much as physical health, is a mainstay of life. Indeed, it is beyond any serious dispute that mental health is a need as essential to a meaningful human existence as other basic physical demands our bodies may make for shelter, warmth or sanitation.”<sup>67</sup> And as a final instruction to courts in determining what constitutes serious harm, the deprivation must be considered in light of the “totality of conditions” facing a prisoner; thus, conditions must, “alone or in combination,” reach such a deprivation.<sup>68</sup>

With this standard of “serious harm” outlined, the rest of the analysis is a factual inquiry, and courts have been very comfortable in recent years deferring to the growing medical consensus that, yes, there is a real and substantial risk of grave harm in placing an individual in solitary confinement. Historically, courts were deferential to corrections officials when evaluating the constitutionality of solitary confinement,<sup>69</sup> but they have grown to rely more on outside professionals to understand this objective harm prong. They have increasingly leaned on the consensus among medical professionals, academics, and even many national correctional organizations that segrega-

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<sup>65</sup> Ruiz v. Johnson, 37 F. Supp. 2d 855, 914 (S.D. Tex. 1999), *rev'd on other grounds and remanded sub nom.* Ruiz v. United States, 243 F.3d 941 (5th Cir. 2001).

<sup>66</sup> 889 F. Supp. 1146 (N.D. Cal. 1995).

<sup>67</sup> *Id.* at 1261.

<sup>68</sup> Rhodes v. Chapman, 452 U.S. 337, 363 n.10, 368 (1981) (Brennan, J., concurring). *See also, e.g.,* Walker v. Schult, 717 F.3d 119, 125 (2d Cir. 2013) (stating that, to succeed, plaintiffs must “show that the conditions, either alone or in combination, pose an unreasonable risk of serious damage to his health”).

<sup>69</sup> Federalism elements come into play here when discussing state prisons, which house the vast majority of prisoners, in that federal courts are concerned with intruding on state law. *See, e.g., Madrid*, 889 F. Supp. at 1279 (“Federal courts are not instruments for prison reform, and federal judges are not prison administrators. We must be careful not to stray into matters that our system of federalism reserves for the discretion of state officials.”). As will be discussed, however, protection of citizens against the violation of constitutional rights is a grave role of federal judges that cannot be comprised or set aside.

tion, especially long-term segregation, causes and exacerbates serious psychological damage.<sup>70</sup> And the “totality of conditions” analysis is particularly relevant to solitary confinement, where the combination of lack of human interaction, length of time alone each day, and size and other conditions of the cell itself add up to a particularly harmful practice. Further, severe lack of exercise is another feature of solitary confinement, and exercise has been considered a “life necessity” by the courts, “a deprivation [of which] may constitute an impairment of health forbidden under the [E]ighth [A]mendment.”<sup>71</sup>

As an example of this judicial recognition that solitary imparts a “substantial risk of serious harm,” the Third Circuit recently noted “the judiciary’s increasing recognition of the scientific evidence of the harms of solitary confinement” and included in its opinion a detailed discussion on the state of scientific research around solitary confinement’s risk of harm:<sup>72</sup>

A comprehensive meta-analysis of the existing literature on solitary confinement . . . found that “[t]he empirical record compels an unmistakable conclusion: this experience is psychologically painful, can be traumatic and harmful, and puts many of those who have been subjected to it at risk of long-term . . . damage.” . . . [T]he researchers found that virtually *everyone* exposed to such conditions is affected in some way. They further explained that “[t]here is not a single study of solitary confinement wherein non-voluntary confinement that lasted for longer than 10 days failed to result in negative psychological effects.”<sup>73</sup>

The court concluded, “with the abundance of medical and psychological literature, the ‘dehumanizing effect’ of solitary confinement is firmly established. . . . That is to say, the evidence shows that the psychological trauma associated with solitary confinement is caused by the confinement itself.”<sup>74</sup> In *Madrid*, the court spoke in condemning terms about the risks of harm inherent in solitary confinement as it relates to all people: “[T]he conditions . . . may press the outer bounds of what most humans can psychologically tolerate . . . .”<sup>75</sup>

Finally, it is worth noting that the courts have not limited their emphasis on the medical literature to only certain types of solitary, like “long-term” confinement or confinement as it applies to only particularly vulnerable

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<sup>70</sup> See, e.g., VERA INST. OF JUSTICE, SOLITARY CONFINEMENT: COMMON MISCONCEPTIONS AND EMERGING SAFE ALTERNATIVES 28 (2015), <https://www.vera.org/publications/solitary-confinement-common-misconceptions-and-emerging-safe-alternatives> (“A large body of evidence has now well established that the typical circumstances and conditions of segregated housing [ . . . ] damage, sometimes irreparably, the people thus confined and the communities to which they return.”).

<sup>71</sup> *Valigura v. Mendoza*, 265 Fed. Appx. 232, 235 (5th Cir. 2008).

<sup>72</sup> *Williams v. Sec’y Pa. Dep’t of Corr.*, 848 F.3d 549, 573 (3d Cir. 2017).

<sup>73</sup> *Id.* at 566 (internal citations omitted).

<sup>74</sup> *Id.* at 567.

<sup>75</sup> *Madrid v. Gomez*, 889 F. Supp. 1146, 1267 (N.D. Cal. 1995).

groups—rather, the courts have been capacious in their declarations that there is a major risk at play. Though courts do sometimes limit their specific arguments or citations to long-term solitary,<sup>76</sup> they almost always decry the practice generally; all of the above opinions from circuit and district courts speak of the excessive harms without limiting their criticism to a particularly harsh brand of solitary confinement or solitary confinement of a group particularly susceptible to harm.<sup>77</sup>

### *B. Prong Two: Reckless Indifference*

The recklessness prong is the more difficult hurdle for plaintiffs. But an understanding of the meaning of the “deliberate indifference” doctrine’s knowledge standard under Supreme Court precedent—specifically that the standard is one of recklessness that can be met if prison officials ignore “obvious” risks of harm—together with a consideration of court opinions pointing out the “obviousness” of the harm of solitary leads to the conclusion that this prong is satisfied in any solitary confinement case.

A reading of *Farmer v. Brennan*,<sup>78</sup> the leading case on Eighth Amendment jurisprudence in the context of prison conditions and the one that established the “deliberate indifference” doctrine, provides the definitive understanding of the knowledge standard at play. The Court in *Farmer* stated that the knowledge standard is recklessness: “It is, indeed, fair to say that acting or failing to act with deliberate indifference to a substantial risk of serious harm to a prisoner is the equivalent of recklessly disregarding that risk.”<sup>79</sup> It noted that another term that can be used is gross negligence; the knowledge standard, in other words, is “somewhere between the poles of negligence at one end and purpose or knowledge at the other.”<sup>80</sup> Correspondingly, there is no requirement that prison officials act maliciously or with bad faith in inappropriately responding to the risk.<sup>81</sup> Ultimately, then, such a standard ensures that “[p]rison officials may not simply bury their heads in the sand and

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<sup>76</sup> See, e.g., *Hutto v. Finney*, 437 U.S. 678, 688 (1978) (affirming a district court order’s thirty-day time limit for segregation).

<sup>77</sup> See, e.g., *Peoples v. Annucci*, 180 F. Supp. 3d 294, 299 (S.D.N.Y. 2016) (“After even relatively brief periods of solitary confinement, inmates have exhibited systems such as . . . hallucinations, increased anxiety, lack of impulse control, severe and chronic depression, appetite and weight loss, heart palpitations, sleep problems, and depressed brain functioning.”).

<sup>78</sup> 511 U.S. 825 (1994).

<sup>79</sup> *Id.* at 836.

<sup>80</sup> *Id.*

<sup>81</sup> See *Gilland v. Owens*, 718 F. Supp. 665, 687 (W.D. Tenn. 1989) (stating that “[t]he deliberate indifference standard does not require a showing of bad faith or malicious conduct on the part of jail officials . . . . Rather, plaintiffs can meet the standard by showing that officials through their own intentional and deliberate decisions and procedures did not protect inmates’ rights to personal safety.”).



thereby skirt liability”<sup>82</sup>; they can be held accountable for ignoring significant risks.

How can one prove that prison officials were reckless in disregarding a substantial risk of serious harm? Importantly, the Court in *Farmer* noted that the determination that a prison official had the requisite knowledge can be “subject to . . . inference from circumstantial evidence,”<sup>83</sup> and “a factfinder may conclude that [the] official knew of a substantial risk from the *very fact that the risk was obvious*.”<sup>84</sup> As such, the requirement is merely that it be “made . . . reasonable to believe that the defendants were aware of a serious risk to the plaintiff[.]”<sup>85</sup> As a result of this language regarding circumstantial evidence and obviousness, circuit courts have held that “a prison official cannot hide behind an excuse that he was unaware of a risk, no matter how obvious.”<sup>86</sup> Rather, “the very fact that a risk was obvious” can be sufficient to satisfy the knowledge standard for prison officials—without proof of facts that show any sort of actual knowledge, like officials having read an article on the topic, been exposed to the issue in training, or something of this elusive sort of evidence about subjective mindset.<sup>87</sup> As an example, in *Heyer v. U.S. Bureau of Prisons*,<sup>88</sup> a deaf prisoner was provided with a translator who did not actually provide sign language interpretation during medical care.<sup>89</sup> Applying the “deliberate indifference” test, the Fourth Circuit noted that a factfinder could reasonably conclude that using an interpreter who cannot communicate in the inmate’s language for medically-related conversations creates an “obvious” risk of harm.<sup>90</sup> As such, the “very obviousness could support a factfinder’s conclusion that [the Bureau of Prisons] knew” that a

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<sup>82</sup> *Makdessi v. Fields*, 789 F.3d 126, 129 (4th Cir. 2015).

<sup>83</sup> *Farmer*, 511 U.S. at 842.; *see also Makdessi*, 789 F.3d at 133 (“[E]ven a subjective standard may be proven with circumstantial evidence[.]”).

<sup>84</sup> *Farmer*, 511 U.S. at 842 (emphasis added); *see also Hope v. Pelzer*, 536 U.S. 730, 738 (2002) (“[W]e must ascertain whether the officials involved acted with ‘deliberate indifference’ to the inmates’ health or safety . . . . We may infer the existence of this subjective state of mind from the fact that the risk of harm is obvious.”); *Hearington v. Pandya*, 689 Fed. Appx. 422, 426 (6th Cir. 2017); *Beers-Capitol v. Whetzel*, 256 F.3d 120, 135 (3d Cir. 2001); *Collignon v. Milwaukee Cty.*, 163 F.3d 982, 989 (7th Cir. 1998) (“A trier of fact can conclude that the professional knew of the need from evidence that the serious medical need was obvious.”).

<sup>85</sup> *Makdessi*, 789 F.3d at 135.

<sup>86</sup> *Brice v. Virginia Beach Corr. Ctr.*, 58 F.3d 101, 105 (4th Cir. 1995).

<sup>87</sup> *Makdessi*, 789 F.3d at 133 (“[A]lthough the obviousness of a particular injury is not conclusive of an official’s awareness of the injury, an injury might be so obvious that the factfinder could conclude that the guard *did* know of it because he could not have failed to know of it.” (quoting *Brice*, 58 F.3d at 105)).

<sup>88</sup> 849 F.3d 202 (4th Cir. 2017).

<sup>89</sup> *Id.* at 206–07.

<sup>90</sup> *Id.* at 210.

translator who did not know sign language was “inadequate” to relay medical communications.<sup>91</sup> Here, as will be argued is the case with solitary confinement, the obviousness of the risk was sufficient to impute the requisite knowledge standard.

Assuming, as has been argued, that there is a substantial risk of serious harm in solitary confinement (i.e., that the first prong of the “deliberate indifference” test has been met), the question thus becomes whether that risk of harm is sufficiently “obvious” to prison officials in all situations. Given the overwhelming professional consensus of the severe harms of solitary,<sup>92</sup> the recognition of these harms for well over a century,<sup>93</sup> and the national consciousness of the issue given recent media coverage,<sup>94</sup> it is hard to contend realistically that the risk of harm is anything but obvious to prison officials across the country. The fact that every state is considering reform in some fashion points to the general knowledge of solitary’s risks of harm.<sup>95</sup> And if the risk is not obvious enough to a member of the general American population based on these external elements, prison officials have a front-row seat to witnessing and hearing about the harms of solitary confinement on individuals’ well-being; if the risk were not already obvious before entering a prison with solitary confinement cells, any amount of experience in such a prison would make it obvious. Further, the language in recent court opinions tends to agree that the risk is indeed obvious. As just one example, in *Palakovic*, the Third Circuit characterized the risk of harm inherent in the practice of solitary confinement as “increasingly obvious.”<sup>96</sup>

Building on observations from Justices and commentators, one contention is that the knowledge standard should be lowered to negligence, allowing for prison officials to be more readily held liable for ignoring risks of harm. This would likely lead to more accountability for prison officials, but it is a jurisprudential change that is not necessary for a per se holding that solitary confinement is unconstitutional under the “deliberate indifference” doctrine. As noted throughout this Series, the overwhelming evidence about segregation’s harms and this information’s dissemination throughout the criminal justice community and beyond, combined with the personal experiences of prison officials and the intuitive understanding that isolation can be mentally damaging, makes a compelling case that the harms of solitary are uniquely obvious such that the recklessness standard is always met.

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<sup>91</sup> *Id.* at 212.

<sup>92</sup> See Andrew Leon Hanna, *Solitary Confinement in America (Article I)*, 21 U. PA. J. CONST. L. ONLINE 1, 17–20 (2019).

<sup>93</sup> See *id.* at 7–11.

<sup>94</sup> See *id.* at 12–13.

<sup>95</sup> See *supra* text accompanying note 15.

<sup>96</sup> *Palakovic v. Wetzel*, 854 F.3d 209, 226 (3d Cir. 2017).

### III. MOVING TOWARD A PER SE HOLDING

Before Justice Kennedy announced his retirement in the summer of 2018, it appeared very plausible and perhaps even likely that the Supreme Court would consider a case to determine the constitutionality of solitary confinement, probably as an initial matter in its long-term form. Justice Kennedy—who was considered by some “the single most powerful public official in the United States”<sup>97</sup>—clearly objects to the practice. In a speech shortly after his retirement, he stated unequivocally that “[s]olitary confinement is wrong.”<sup>98</sup> And his recent calls for test cases, along with Justice Breyer’s,<sup>99</sup> fueled hope among advocates that the Court was ready to cut into the constitutional status of solitary, with a majority of Justices in favor of reform.

Now, Justice Kennedy’s retirement could become a catalyst for lower federal courts to more proactively advance the nationwide momentum against solitary confinement. His retirement from and replacement on the Court likely means a minority of the Justices will be disposed to interpret the Eighth Amendment as providing additional protections to prisoners, thus shifting the center of gravity for the issue of solitary confinement’s constitutionality to lower courts. As discussed in Article II of this Series, there has been significant positive momentum in chopping at the edges of solitary confinement by questioning the constitutionality of its most excessive forms against the most vulnerable individuals.<sup>100</sup> Federal district courts have issued injunctions to prisons with growing frequency, and state and local governments continue to agree to settlement agreements instigating major reforms.<sup>101</sup> Further, the growing momentum from state legislatures puts greater pressure on courts to take a progressive stance on an issue that seems to a broad swath of organizations and individuals to be unacceptable. And the unprecedented media coverage of solitary confinement provides a groundswell of outrage that never existed before.<sup>102</sup>

If and when confinement of particularly vulnerable groups or long-term confinement are rejected consistently by courts, we will not be a far cry from the core practice of solitary confinement, regardless of timeframe or type of

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<sup>97</sup> Bob Egelko, *Anthony Kennedy Has Major Incentive to Stay on US Supreme Court*, S.F. CHRON. (July 1, 2017), <https://www.sfchronicle.com/nation/article/Anthony-Kennedy-has-major-incentive-to-stay-on-US-11260497.php>.

<sup>98</sup> Matthew Renda, *Kennedy Defends Rule of Law, Europe in Ninth Circuit Speech*, COURTHOUSE NEWS SERV. (July 26, 2018), <https://www.courthousenews.com/kennedy-defends-rule-of-law-europe-in-ninth-circuit-speech/>.

<sup>99</sup> See Hanna, *supra* note 60, at 7.

<sup>100</sup> See *id.* at 5–12.

<sup>101</sup> See *id.*

<sup>102</sup> See Hanna, *supra* note 92, at 12–13.

individual confined, following suit. The harm of solitary to vulnerable groups like youth and those with serious mental illness is certainly more pronounced, and there may be some limited staying power to drawing a line defining “long-term” at thirty days, like the ABA does.<sup>103</sup> However, as has been raised throughout this Series, the foundational concern animating the arguments under the “evolving standards of decency” and “deliberate indifference” doctrines—the infliction of severe, lasting psychological harm—is present whenever solitary confinement is imposed. Accordingly, the rulings should logically be expanded from per se rules regarding certain groups or certain forms of solitary to a full per se rule.

Finally, hope still remains at the highest Court. The fact that the Court’s current composition is unlikely to be convinced by these legal arguments does not take away from their validity, nor does it mean they will not take hold at the Court in the future. The history of American constitutional law is rife with arguments that once seemed distant and unrealistic, but now retain the force of law and seem like foregone conclusions in hindsight.<sup>104</sup> As demonstrated in this Article, American prisons’ use of solitary confinement is out of step with the opinions of a variety of domestic and international organizations; it is not hard to imagine that future generations will one day look back at its use as barbaric and backwards, and wonder why courts were once complicit. If this is true, a legal argument under established Eighth Amendment doctrine will be needed for the Court to hold the practice unconstitutional at some point in the future, and the arguments in this Article hopefully offer a useful reference point.

#### IV. THE AFTERMATH OF A PER SE HOLDING

Should a holding of per se unconstitutionality in a lower court be issued, it would mean prisons in the relevant jurisdiction would need to wipe out the practice of solitary confinement for good. Such a holding would provide a much-needed bright-line rule that ensures any placement of an individual in what is identified as solitary confinement—by its three main features of isolation, length of time per day, and smallness of space—will be successfully litigated against with only minimal evidence needed to establish that solitary was indeed applied.

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<sup>103</sup> STANDARDS FOR CRIMINAL JUSTICE: TREATMENT OF PRISONERS 23-1.0(O) (AM. BAR ASS’N 2011).

<sup>104</sup> See, e.g., Lana Birbrair, *Harvard Law School: The Road to Marriage Equality*, HARV. L. TODAY (June 26, 2015), <https://today.law.harvard.edu/feature/harvard-law-school-the-road-to-marriage-equality/> (discussing the changes in legal opinion on the constitutionality of same-sex marriage).

A per se constitutional holding would lead to significant change in behavior for prison systems. Without solitary confinement as an option, prisons would need to find better ways to engage with individuals they would normally simply send off to solitary; this would encourage prisons to offer improved rehabilitative services to prisoners. And prisons would have some freed-up capital to do so. Removing all 80,000 to 100,000 prisoners from the confines of solitary confinement and placing them in the general prison population would gain back the American prison system between about \$3.5 and \$5 billion of taxpayer money per year.<sup>105</sup> (This amount does not take into account that some of the prisoners will require a different, more humane form of separation housing, the development of which would cost more than simple removal to the general inmate population; these separation alternatives will be discussed in a moment.) This funding could go toward rehabilitative and mental health treatment efforts focused on improving the conditions of inmates. Given that up to one-half of prisoners in solitary confinement suffer from serious mental illness,<sup>106</sup> greater investment in treatment programs like group therapy would be a promising starting point.

The numbers cited above, as noted, assume that all individuals in solitary confinement can be placed back in the general population; of course, there may be a need for some prisoners to remain, at least temporarily, separated from other prisoners. Indeed, perhaps the most common policy argument for why abolishing solitary confinement would be problematic is that it would lead to more dangerous prisons—by intending to protect the rights of the most vulnerable (those currently in solitary confinement), it would actually expose other vulnerable prisoners to greater violence thanks to more dangerous prisoners engaging with the broader population. As the district court argued in *Ruiz v. Johnson*<sup>107</sup> as grounds to not wholly strike down solitary confinement, “segregation ‘may be a necessary tool of prison discipline, both to

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<sup>105</sup> The cost of placing an individual in the general prison population is, on average, about \$31,000. Martha Teichner, *The Cost of a Nation of Incarceration*, CBS NEWS (Apr. 23, 2012), <https://www.cbsnews.com/news/the-cost-of-a-nation-of-incarceration/>. The cost of placing an individual in solitary confinement is, on average, \$75,000. Jean Casella & Sal Rodriguez, *What is Solitary Confinement?*, THE GUARDIAN (Apr. 27, 2016), <https://www.theguardian.com/world/2016/apr/27/what-is-solitary-confinement>. When figuring in the 80,000 to 100,000 Americans in solitary confinement today, this means the total cost of solitary is between \$6 billion and \$7.5 billion; the total cost of placing these individuals in the general prison population is between \$2.48 billion and \$3.1 billion. The money saved, then, is between \$3.52 billion and \$5.02 billion.

<sup>106</sup> Keramet Reiter & Thomas Blair, *Punishing Mental Illness: Trans-institutionalization and Solitary Confinement in the United States*, in EXTREME PUNISHMENT 177, 181 (Keramet Reiter & Alexa Koenig eds., 2015).

<sup>107</sup> 37 F. Supp. 2d 855 (S.D. Tex. 1999), *rev'd on other grounds and remanded sub nom.* *Ruiz v. United States*, 243 F.3d 941 (5th Cir. 2001).

punish infractions and to control and perhaps protect inmates whose presence within the general population would create unmanageable risks.”<sup>108</sup> And in some cases the prisoners in solitary confinement do prefer to be separated because they themselves would be vulnerable to harm in the broader population.

However, this argument, while superficially compelling and a successful rebuttal to prison reformers in legislatures across the country, makes a fundamental mistake: *it confuses separation from the general inmate population with solitary confinement.* The two do not have to be the same. The benefits of separating certain individuals from the rest of the inmates in a prison can be achieved through other measures of separation—measures that do not involve the three primary features of solitary confinement: limited human contact, extensive time in confinement per day, and insufferably small size:

A decision to segregate a prisoner need not inevitably result in isolating conditions. Just as different reasons exist for segregation, so too could the forms of segregation vary. Indeed, the many terms that prison officials use for segregation . . . could reflect a variety of ways in which prisoners are treated while in restricted settings.<sup>109</sup>

As Professor Jules Lobel puts it, “While there is undoubtedly a small core of violent prisoners who, for the protection of the general population, should be separated from them, such separation does not require social isolation.”<sup>110</sup>

There is no shortage of ideas for separation alternatives to solitary confinement. As Professor Lobel notes, state prison systems have begun to model these alternatives.<sup>111</sup> Colorado provides an incomplete example. There, after spending time in solitary himself, the head of corrections banned solitary confinement of over fifteen days.<sup>112</sup> For another incomplete example—one of keeping individuals in the physical solitary confinement cells but significantly increasing social interaction—we can turn to Ohio. After a 2011 prisoner hunger strike, “prison officials provided . . . significantly increased opportunities for social interaction, including daily phone calls, numerous contact visits, and small group recreation with one other prisoner.”<sup>113</sup> As

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<sup>108</sup> *Id.* at 915 (quoting *Young v. Quinlan*, 960 F.2d 351, 364 (3d Cir. 1992)).

<sup>109</sup> 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).

<sup>110</sup> Jules Lobel, *The Liman Report and Alternatives to Prolonged Solitary Confinement*, 125 YALE L.J.F. 238, 243 (2016), <https://www.yalelawjournal.org/forum/alternatives-to-prolonged-solitary-confinement>.

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

<sup>112</sup> Rick Raemisch, *Why We Ended Long-Term Solitary Confinement in Colorado*, N.Y. TIMES (Oct. 12, 2017), <https://www.nytimes.com/2017/10/12/opinion/solitary-confinement-colorado-prison.html>.

<sup>113</sup> Lobel, *supra* note 110, at 243–44.

Lobel summarizes the results, “[t]hus far, the arrangement has worked without any serious incident.”<sup>114</sup>

A more complete example can be found in several European nations, which separate prisoners deemed dangerous in small groups rather than in isolation.<sup>115</sup> These prisoners “are provided family and legal contact visits, telephone calls, access to education, gym facilities, payment for work, association with other prisoners, and in-cell activities.”<sup>116</sup> Another example is Grendon prison in England, which—despite housing the most “dangerous” prisoners in the English prison system—“provides small group therapy and daily community meetings and has produced, in the words of its Governor, ‘extraordinary outcomes.’”<sup>117</sup>

While these efforts tackle the human contact and time elements of solitary confinement, the size of the cell remains a problem. Efforts to design alternative separation mechanisms that also reform the size component would require infrastructure changes that would take more time to develop. Until then, however, the more deeply cutting elements of social isolation and time can be adjusted through programming.

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<sup>114</sup> *Id.* at 244.

<sup>115</sup> *Id.* (naming England, Scotland, and Wales as examples).

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

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

CONCLUSION TO THE SERIES ON SOLITARY CONFINEMENT & THE  
EIGHTH AMENDMENT

The degree of civilization in a society can be judged by entering its prisons.

– Fyodor Dostoyevski<sup>118</sup>

Pearl S. Buck, the first American woman to win the Nobel Prize for Literature, once wrote that “the test of a civilization is in the way that it cares for its helpless members.”<sup>119</sup> When looking carefully at the situation facing our most vulnerable prisoners—those held in solitary confinement—the clear-eyed conclusion is that the practice of segregation offends our most basic notions of human dignity. More than a policy or moral view, this argument is fundamentally based in our Constitution and judicial precedent; two different arguments soundly rooted within Supreme Court jurisprudence lead to the conclusion that placing any individual in solitary confinement is a violation of the Eighth Amendment’s prohibition against “cruel and unusual punishment.”

Ultimately, the constitutionality of solitary confinement is a debate that is central to our nation’s ideals and commitment to civil rights. As the parents of Brandon Palakovic, a young man who committed suicide in his solitary confinement cell on July 16, 2012, wrote last year, “The system that we have respected all of our lives and taught our children to respect failed Brandon and feels no remorse for [its] actions.”<sup>120</sup> Efforts of state legislatures have been promising, but solitary confinement is too fundamental to our Constitution and the rights it endows to be ignored by federal courts. It is not something that the judiciary can wash its hands of and defer to policymakers, because, as the district court noted in *Madrid*, the courts “have no duty more important than that of enforcing constitutional rights, no matter how unpopular the cause or powerless the plaintiff.”<sup>121</sup> Indeed, “the crowning glory of American federalism is . . . the protection the United States Constitution gives to the private citizen against *all* wrongful governmental invasion of fundamental rights and freedoms.”<sup>122</sup> An adoption of one or both of this Series’

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<sup>118</sup> THE YALE BOOK OF QUOTATIONS 210 (Fred R. Shapiro ed. 2006).

<sup>119</sup> PEARL S. BUCK, MY SEVERAL WORLDS 337 (1954).

<sup>120</sup> *Statement from the Palakovic Family*, ABOLITIONIST L. CTR. (July 7, 2014), <http://abolitionistlaw-center.org/2014/07/07/statement-from-the-palakovic-family>.

<sup>121</sup> *Madrid v. Gomez*, 889 F. Supp. 1146, 1279 (N.D. Cal. 1995); *see also* *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) (“[W]hen the remedial powers of a federal court are invoked to protect the constitutional rights of inmates, the court may not take a ‘hands-off’ approach.”).

<sup>122</sup> *Dombrowski v. Pfister*, 227 F. Supp. 556, 570 (E.D. La. 1964) (Wisdom, J., dissenting).



arguments against solitary confinement's constitutionality would be a positive step toward ensuring that all Americans—even the most vulnerable and condemned by society—are treated with the dignity they deserve.

Voices from across the nation, from advocates to medical professionals to corrections administrators to courts to Supreme Court Justices, have called out the severe harms of solitary confinement and expressed a desire for reform. It would be a mark of progress and hope in our society if the federal courts took it upon themselves to raise their voices, on behalf of some of the most silent among us, by finally holding that solitary confinement is *per se* unconstitutional in America.