Kentucky Law Journal

Volume 103 | Issue 4 Article 5

2015

The Depth of Endurance: A Critical Look at Prolonged Solitary Confinement in Light of the Constitution and a Call to Reform

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NOTES

The Depth of Endurance: A Critical Look at Prolonged Solitary Confinement in Light of the Constitution and a Call to Reform

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"The degree of civilization in a society can be judged by entering its prisons."[2]
–Fyodor Dostoyevski

INTRODUCTION

In recent decades, solitary confinement has reemerged as a primary form of punishment within the United States penal system.[3] The use of punitive segregation, or solitary confinement ("solitary"), refers to the practice of isolating prisoners from the rest of the prison system, and from one another, in a closed cell for around twenty-three hours a day.[4] While conditions vary nationwide, prisoners held in "supermax" facilities—units designed exclusively for inmate isolation in the form of solitary confinement—are generally deprived of many basic privileges enjoyed by the rest of the prison population, such as visitation rights and contact with family members,[5] access to reading materials and television,[6] and even small

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[2] THE YALE BOOK OF QUOTATIONS 210 (Fred R. Shapiro ed., 2006).

[3] *See* SHARON SHALEV, MANHEIM CTR. FOR CRIMINOLOGY, A SOURCEBOOK ON SOLITARY CONFINEMENT 2 (2008), *available at* http://solitaryconfinement.org/uploads/sourcebook_web.pdf ("[T]owards the end of the 20th century and at the beginning of the 21st, the use of long term, large scale solitary confinement returned in the form of 'supermax' (short for super-maximum security) and 'special security' prisons."); *see also* JOHN J. GIBBONS & NICHOLAS DE B. KATZENBACH, VERA INST. OF JUSTICE, CONFRONTING CONFINEMENT 14 (2006), *available at* http://www.vera.org/sites/default/files/resources/downloads/Confronting_Confinement.pdf ("Between 1995 and 2000, the growth rate in the number of people housed in segregation far outpaced the growth rate of the prison population overall: 40 percent compared to 28 percent.").

[4] *See* Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 CRIME & JUST. 441, 448 (2006) [hereinafter Smith, *Solitary Confinement*].

[5] *See, e.g.*, Andrew Gumbel, *How Did a Form of Torture Become Policy in America's Prison System?*, ALTERNET (Oct. 11, 2013), http://www.alternet.org/civil-liberties/how-did-form-torture-become-policy-americas-prison-system ("[P]risoners had property confiscated . . . and contact with the outside world—particularly mail from their families—was restricted or cut off altogether."); *see also* Billy Ball, *What Life is Like in Solitary Confinement at North Carolina's Central Prison System*, INDY WEEK (Oct. 31, 2012), http://www.indyweek.com/indyweek/what-life-is-like-in-solitary-confinement-

relief in the form of natural light or time spent outdoors.[7] Originally conceived as an infrequent and short-term form of punishment, the number of prisoners in solitary confinement has risen substantially in recent years.[8] "As of 2006, there were at least fifty-seven supermax prisons in forty states that housed approximately 20,000 prisoners" at any given time.[9] The Federal Bureau of Prisons has reported a seventeen percent increase in its use of solitary confinement between 2008 and 2013.[10] This disturbing increase in the practice is often attributed to the penal system's commitment to "tough-on-crime" policies that were pervasive and garnered substantial support in tandem with the "war on drugs" rhetoric in the latter part of the twentieth century.[11]

As the number of prisoners confined to solitary continues to grow, so does the length of their sentences in isolation. In the Pelican Bay Security Housing Unit in California, prisoners are held for an average of seven and a half years.[12] Of the prisoners in solitary confinement at Pelican Bay, more than half have been there for at least five years.[13] Eighty-nine have been there for at least twenty years, and one inmate has been in solitary confinement for forty-two years.[14] Before being shutdown in 2013 due to budgetary constraints, the Tamms Correctional Facility in Illinois held an estimated twenty-five percent of its prisoners in continuous solitary confinement for over ten years.[15] Furthermore, in many state systems and in the federal system, some prisoners have effectively been sentenced to solitary confinement for the rest of their lives.[16] In Ohio, a group of prisoners held in the supermax prison have been labeled by the state as "long-termers," a group of

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at-north-carolinas-central-prison/Content?oid=3182175 (noting that inmates in solitary confinement at North Carolina's Central Prison "have little contact with others . . . their visitation is limited . . . [and they] may not use the telephone").

[6] *See* SHALEV, *supra* note 3, at 19.

[7] *Id.* at 9.

[8] Michael Montgomery, *This is What Solitary Confinement Does to Your Face*, POLITICO, http://www.politico.com/magazine/gallery/2014/01/this-is-what-solitary-confinement-does-to-your-face/001562-022211.html#BOO.VZ2RVOuZ7jQ (last visited July 4, 2015).

[9] Jules Lobel, *Prolonged Solitary Confinement and the Constitution*, 11 U. PA. J. CONST. L. 115, 115 (2008).

[10] Ron Stief, *Time to Bring an End to Torture in Our Jails*, HUFFINGTON POST (May. 5, 2014, 5:59 AM), http://www.huffingtonpost.com/rev-ron-stief/time-to-bring-an-end-to-t_b_4899502.html.

[11] *See, e.g.*, Dick Durbin, *Reassessing Solitary Confinement: The Human Rights, Fiscal, and Public Safety Consequences*, NAT'L COUNCIL ON CRIME & DELINQ. (Nov. 24, 2014), http://nccdglobal.org/blog/reassessing-solitary-confinement-the-human-rights-fiscal-and-public-safety-consequences (noting that supermax prisons were part of the "tough-on-crime policies that seemed to make sense" in the 1980s).

[12] Shane Bauer, *No Way Out*, MOTHER JONES, Nov.–Dec. 2012, at 22, 24, *available at* http://www.motherjones.com/politics/2012/10/solitary-confinement-shane-bauer.

[13] *Id.*

[14] *Id.*

[15] Amy Fettig, *Tamms "Supermax" Prison, with Its Inhumane and Ridiculously Expensive Solitary Confinement Practices, Is Officially a Thing of the Past!*, AM. CIV. LIBERTIES UNION (Jan. 4, 2013, 11:00 AM), https://www.aclu.org/blog/prisoners-rights/tamms-supermax-prison-its-inhumane-and-ridiculously-expensive-solitary.

[16] Lobel, *supra* note 9, at 115.

inmates who prison officials indefinitely plan to keep in solitary confinement for twenty-three hours a day.[17]

Ultimately, the punitive nature of solitary confinement raises Eighth Amendment considerations, particularly whether prolonged or permanent solitary isolation qualifies as cruel and unusual punishment in light of the well-documented psychological effects it can cause.[18] Additionally, the administration of solitary confinement raises questions regarding the applicability of the Due Process Clause of the Fourteenth Amendment given that prisoners are often deprived of a variety of due process procedural protections.[19]

Part I of this Note will briefly detail the history and current use of solitary confinement in the United States' prison system and examine the conditions under which it is applied. Part II of this Note will discuss the principles of the Eighth Amendment as they apply to solitary confinement and argue that, in cases of prolonged or permanent isolation, the practice violates the constitutional protection from "cruel and unusual punishment." This portion will also look at recent solitary reforms in the state of Mississippi and how these reforms brought the practice in line with the Eighth Amendment. Part III will look at solitary in light of a further constitutional protection: the right to due process provided under the Fourteenth Amendment. This section will also analyze the state of Maine's recent solitary reforms and how prisoners' rights to due process protections are fulfilled by such structural changes. In light of the success of such institutional restructuring, Part IV of this Note will propose federal reform guidelines based on the substantial changes made in Mississippi and Maine, which would bring the practice of solitary confinement within the rights proscribed by the Eighth and Fourteenth Amendments that safeguard prisoners from "cruel and unusual punishment" and the deprivation of procedural due process.

I. THE ORIGINS OF SOLITARY CONFINEMENT IN THE UNITED STATES AND AN OVERVIEW OF CURRENT PRACTICE

One of the first experiments with solitary confinement as a form of punishment occurred in the United States in the early nineteenth century at the Eastern State Penitentiary—widely known as Cherry Hill Prison—in Philadelphia.[20] Prison officials at Cherry Hill saw solitary confinement as a vehicle for the rehabilitation of criminals through segregation,[21] and the practice was viewed as an incentive for

[17] *Id.* at 115–16.

[18] *See generally* Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J.L. & POL'Y 325 (2006) (discussing the severe psychiatric harm caused by solitary confinement).

[19] *See, e.g.*, Jean Casella & James Ridgeway, *Inmates' Due Process Rights Routinely Suppressed in California Prisons*, SOLITARY WATCH (Aug. 3, 2010), http://solitarywatch.com/2010/08/03/inmates-due-process-rights-routinely-suppressed-in-california-prisons.

[20] Lobel, *supra* note 9, at 118.

[21] *See* Thomas L. Hafemeister & Jeff George, *The Ninth Circle of Hell: An Eighth Amendment Analysis of Imposing Prolonged Supermax Solitary Confinement on Inmates with a Mental Illness*, 90 DENV. U. L. REV. 1, 9–10 (2012).

isolated prisoners outfitted only with a Bible to "repent, pray and find introspection"[22] and eventually "return to society as a morally cleansed Christian citizen."[23] However, many of the inmates in isolation at the Eastern State Penitentiary fell victim to mental illness, committed suicide, or became unable to function in society.[24] In 1842, author Charles Dickens condemned the practice of solitary confinement after seeing the conditions at Cherry Hill, stating:

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 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. I hold this slow and daily tampering with the mysteries of the brain, to be immeasurably worse than any torture of the body.[25]

Although many American prisons initially followed the form of Cherry Hill in adopting solitary confinement as a method of punishment, most began to move away from the practice within a few years of implementation due to the psychological and even physical pain it inflicted.[26] Ultimately, the use of solitary fell out of favor in the American prison system and was deserted in the following decades, especially in light of a majority condemnation of the practice in 1890 by the Supreme Court.[27] However, solitary reemerged as a widespread penalty to manage prisoners in the 1980s in response to the "massive growth in prison populations, the abandonment of rehabilitative efforts, and the adoption of increasingly punitive ideologies and strategies,"[28] and the practice has become increasingly popular ever since.[29] A *New York Times* article, published in 2012, noted that:

At least 25,000 prisoners—and probably tens of thousands more, criminal justice experts say—are still in solitary confinement in the United States. Some remain there for weeks or months; others for years or even decades. More inmates are held in solitary confinement here than in any other democratic nation . . . .[30]

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[22] *See* Laura Sullivan, *Timeline: Solitary Confinement in U.S. Prisons*, NPR (July 26, 2006, 7:52 PM), http://www.npr.org/templates/story/story.php?storyId=5579901.

[23] PETER SCHARFF SMITH, WHEN THE INNOCENT ARE PUNISHED: THE CHILDREN OF IMPRISONED PARENTS 22 (2014).

[24] Sullivan, *supra* note 22.

[25] CHARLES DICKENS, AMERICAN NOTES FOR GENERAL CIRCULATION 39 (1842).

[26] Smith, *Solitary Confinement*, *supra* note 4, at 465–67.

[27] *See In re* Medley, 134 U.S. 160, 168 (1890) (noting that "a considerable number" of the inmates in solitary confinement units in Massachusetts, New Jersey, and Maryland "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").

[28] SHARON SHALEV, SUPERMAX: CONTROLLING RISK THROUGH SOLITARY CONFINEMENT 296 (Taylor & Francis ed., 3d ed. 2011).

[29] Atul Gawande, *Hellhole*, NEW YORKER, Mar. 30, 2009, at 36, 42.

[30] Erica Goode, *Rethinking Solitary Confinement*, N.Y. TIMES, Mar. 11, 2012, at A1.

II. THE EIGHTH AMENDMENT AND SOLITARY

A. Why the Constitution Applies to Inmates Generally

In the seminal 1948 case *Price v. Johnston*, the Supreme Court held that "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system."[31] The emphasis on *many* suggested that not *all* of a prisoner's rights are limited or forfeited by virtue of his incarceration, and the Court later noted in *Wolff v. McDonnell* that "[t]here is no iron curtain drawn between the Constitution and the prisons of this country," suggesting that prisoners, by virtue of the fact that they remain citizens of the United States, are still granted the protections of the Constitution, even if they are necessarily limited by the nature of the prison system.[32] More direct acknowledgment of constitutional protection came in 1972 when the Court noted that:

> Federal courts sit not to supervise prisons but to enforce the constitutional rights of all "persons," including prisoners. We are not unmindful that prison officials must be accorded latitude in the administration of prison affairs, and that prisoners necessarily are subject to appropriate rules and regulations. But persons in prison, like other individuals, have the right to petition the Government for redress of grievances . . . .[33]

Ultimately, the courts have long held that prisoners' constitutional rights are tempered by their incarceration; however, prisoners, as citizens of the nation, still fall within the ambit of the Constitution and therefore retain their constitutional protections.

B. The Eighth Amendment and Prisoner's Rights

Given that prisoners still retain their constitutional rights while incarcerated, it necessarily follows that they reserve the protection from "cruel and unusual punishment" provided under the Eighth Amendment while serving their prison sentences.[34] The courts have held that a prison official's action—for purposes of this Note, the placement of the prisoner in solitary confinement—violates the Eighth Amendment when two prongs are met. First, the allegedly unconstitutional violation must be "objectively, sufficiently serious" so that it imposes a "substantial risk of serious harm."[35] Second, the prison official must have the requisite mens rea of "deliberate indifference to inmate health or safety"[36] that results in a denial of

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[31] 334 U.S. 266, 285 (1948).

[32] 418 U.S. 539, 555–56 (1974).

[33] Cruz v. Beto, 405 U.S. 319, 321 (1972).

[34] U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted.*") (emphasis added).

[35] Farmer v. Brennan, 511 U.S. 825, 834 (1994) (quoting Wilson v. Seiter, 501 U.S. 294, 298 (1991)).

[36] *Id.* (quoting Wilson v. Seiter, 501 U.S. 294, 302–303 (1991)).

"the minimal civilized measure of life's necessities."[37] The risk of harm must be "unreasonable" in that the challenged condition (the practice of solitary confinement) is "sure" or "very likely" to cause "serious" damage to the inmate's future health, and the risk must be one that society considers "so grave that it violates contemporary standards of decency to expose anyone unwillingly to such a risk."[38] However, even when an action infringes a specific constitutional guarantee, the courts have noted that it must be weighed against the fundamental objective of prison administration: safeguarding institutional security.[39]

C. Documented Violations of the Eighth Amendment Standard

Applying the above mentioned standards to the conditions of solitary confinement, evidence suggests that a prisoner's Eighth Amendment rights are often breached given the negative mental effects induced by solitary confinement that can qualify as a deprivation of "the minimal civilized measure of life's necessities,"[40] and the fact that inmates are often confined in conditions that impose "a substantial risk of serious harm"[41]—most significantly, the risk of serious mental harm. However, state and federal courts have noted that not all psychological effects stemming from solitary confinement rise to the level of "cruel and unusual punishment." In *Madrid v. Gomez*, the Northern District Court of California noted that:

> The Eighth Amendment simply does not guarantee that inmates will not suffer some psychological effects from incarceration or segregation. However, if the particular conditions of segregation being challenged are such that they inflict a serious mental illness, greatly exacerbate mental illness, or deprive inmates of their sanity, then [prison officials] have deprived inmates of a basic necessity of human existence—indeed, they have crossed into the realm of psychological torture.[42]

One potent example that arguably violates the courts' stated interpretation of activity that amounts to "cruel and unusual punishment" can be seen at the Pelican Bay Security Housing Unit in California. Dr. Craig Haney, a leading authority on the psychological effects of solitary confinement on prisoners, visited Pelican Bay multiple times and conducted a study on the mental health effects solitary confinement can provoke in inmates.[43] One hundred randomly chosen inmates were asked a series of twenty-seven questions "focused on symptoms of psychological distress and the negative effects of prolonged social isolation, including confused thought process, hallucinations, irrational anger, emotional

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[37] *Id.* (quoting Rhodes v. Chapman, 452 U.S. 337, 347 (1981)).

[38] Helling v. McKinney, 509 U.S. 25, 33, 36 (1993).

[39] Bell v. Wolfish, 441 U.S. 520, 547–48 (1979).

[40] Rhodes v. Chapman, 452 U.S. 337, 347 (1981).

[41] *Farmer*, 511 U.S. at 834.

[42] 889 F. Supp. 1146, 1264 (N.D. Cal. 1995) (internal citations omitted).

[43] Craig Haney, *"Infamous Punishment": The Psychological Consequences of Isolation*, NAT'L PRISON PROJECT J., Spring 1993, at 3, *available at* http://www.abolishsolitary.com/uploads/1/8/9/1/18915867/haney_infamous_punishment_nppjournal_8-2.pdf.

flatness, violent fantasies, social withdrawal, oversensitivity to stimuli, and chronic depression."[44] A majority of inmates in solitary reported some or all of these symptoms.[45] At the end of the study at Pelican Bay, Haney concluded that long-term social deprivation in solitary units was "totally and completely enforced."[46] Some men were in isolation deprived of "human contact, touch and affection for years on end"[47] and many still were not privileged to visits from family or friends for years.[48] The prison's mail system was so substandard that it took one inmate over seven weeks to learn that his son had died.[49]

At Pelican Bay, an investigative reporter conceived of a project where he took pictures of inmates in segregation and asked them to comment on the difference in their appearances from photos before they were sent to prison, versus images of themselves after decades in solitary. One prisoner reflected:

To describe the time passed between those photos. Well, you think odd thoughts, scenes from a simpler, freer life – Things like chasing beautiful girls, and getting up in the morning for work. Then the changes both in a mental and physical way, I've grown older, then the weight of its reality breaks your heart and the quest for sanity forces you to your knees, an anguish echoes in your soul, 'will I die here'?[50]

Given that many psychological studies have noted the necessity of human interaction for mental health and wellness, prolonged solitary confinement can be said to violate the "minimal civilized measure of life's necessities" test articulated by the courts. As Dr. Haney noted at the 2014 annual meeting of the American Association for the Advancement of Science: "So much of who we are depends on our contact with other people, the social context in which we function, and when you remove people from that context, they begin to lose their very sense of self."[51] Essentially, human beings are social creatures. To deprive individuals of the fundamental necessity of social interaction for prolonged periods of time certainly violates the low threshold of a "minimum civilized measure" of "life's necessities"—necessities humans require in order to maintain mental wellness and stability and to retain the "sense of self"[52] that social contact breeds.

Furthermore, given that many studies have noted that social isolation is a catalyst for mental illness, the "risk of substantial harm" component of the Eighth Amendment test is also implicated in the conversation surrounding solitary

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[44] *Madrid*, 889 F. Supp. at 1234.

[45] *Id.* at 1234 n.172.

[46] Haney, *supra* note 43, at 7.

[47] *Id.* at 4.

[48] *Id.*

[49] Sally Mann Romano, *If the SHU Fits: Cruel and Unusual Punishment at California's Pelican Bay State Prison*, 45 EMORY L.J. 1089, 1120 (1996) (citing a letter from inmate Daniel Sheets, reprinted in 2 PELICAN BAY PRISON EXPRESS, No. 4, May 1994, at 20).

[50] *See* Montgomery, *supra* note 8, at 19.

[51] Maclyn Willigan, *What Solitary Confinement Does to the Human Brain*, SOLITARY WATCH (Aug. 4, 2014), http://solitarywatch.com/2014/08/04/what-solitary-confinement-does-to-the-human-brain.

[52] *Id.*

confinement.[53] When prisoners are deprived of social interaction, studies indicate that they become "profoundly lethargic in the face of their monotonous, empty existence"[54] and that the lethargy may "shade into despondency and, finally, to clinical depression."[55] Certainly regressing into clinical depression amounts to a "substantial risk" to the prisoner's health and well-being, a risk prohibited by the courts interpretation of the Eighth Amendment protections afforded to prisoners.

Further scientific studies have proven that social isolation in solitary confinement damages the fundamental mechanics of the brain. In an article published by *Aeon* magazine, reporter and researcher Shruti Ravindran amassed recent scientific research to make the assertion that solitary confinement "irrevocably harm[s] the brain."[56] Ravindran used information from formerly incarcerated persons and renowned neuroscientists who are devoted to documenting the negative effects that prolonged isolation can have on a person's psyche. Particularly, Ravindran cited psychiatrist Stuart Grassian's 1982 "Walpole studies," which observed prisoners in solitary in a Massachusetts state prison. Grassian ultimately concluded of inmates in solitary: "These people [are] very sick."[57] He decided that the mental health effects of solitary resembled "anoxic brain injury—the result of an oxygen-starved brain."[58] These studies indicate that prisoners in solitary face a "substantial risk of harm," the threshold articulated by the courts for "cruel and unusual punishment," given that many prisoners devolve into depression upon prolonged periods of isolation, and that many leading researchers in the field deem the mental harm imposed by solitary "irrevocable."[59]

D. How Mississippi's Solitary Confinement Reforms Bring the Practice in Line with the Eighth Amendment

Mississippi is one of several states that has undergone unregulated reforms regarding the conditions of solitary confinement. Before the state's reforms, conditions in Mississippi supermax prisons were bleak and arguably often violated the Eighth Amendment given that prisoners were deprived of the basic necessity of human contact for long periods of time in such a way that would likely cause "substantial harm" in the form of mental degradation.[60] Willie Russell, an inmate in solitary confinement in Mississippi, described the circumstances, noting that he was housed in a "cell with a solid, unvented Plexiglas door. The cells were also sewers, thanks to a design flaw in cellblock toilets that often flushed excrement

[53] *See* Farmer v. Brennan, 511 U.S. 825, 834 (1994).

[54] Haney, *supra* note 43, at 6.

[55] *Id.*

[56] Shruti Ravindran, *Twighlight in the Box*, AEON (Feb. 27, 2014), http://aeon.co/magazine/society/what-solitary-confinement-does-to-the-brain.

[57] *Id.*

[58] *Id.*

[59] *See id.*

[60] *See* Jean Casella & James Ridgeway, *The End of Mississippi's Notorious Supermax Unit*, SOLITARY WATCH (June 12, 2010), http://solitarywatch.com/2010/06/12/the-end-of-mississippis-notorious-supermax-unit.

from one cell into the next. Prisoners were allowed outside—to pace or sit alone in metal cages—just two or three times a week."[61]

In response to these deplorable conditions, the American Civil Liberties Union ("ACLU") brought a lawsuit against the Commissioner of Mississippi's Department of Corrections ("DOC") regarding the state's notorious supermax facility at Parchman Prison, commonly known as "Unit 32."[62] The ACLU alleged that the conditions of solitary confinement in Unit 32 were "so barbaric, the deprivation of medical and mental health care so extreme, and the defects in security so severe, that the lives and health of the men confined there . . . [were] at great and imminent risk."[63] Furthermore, the ACLU noted in their complaint that many prisoners were confined to Unit 32 because they were HIV-positive or had other special medical needs or severe mental illnesses, and that the prisoners had to confront conditions including "pervasive filth and stench; malfunctioning plumbing and constant exposure to human excrement; lethal extremes of heat and humidity; . . . grossly inadequate medical, mental health, and dental care; . . . and the constant pandemonium, night and day, of severely mentally ill prisoners screaming, raving, and hallucinating in nearby cells."[64]

In response to the lawsuit, prison officials agreed to loosen restrictions on the inmates in solitary confinement, particularly in the realm of social engagement. The changes allowed inmates to spend multiple hours outside of their cells each day. The prison also added a basketball court and communal dining area, and implemented a system through which prisoners could work their way towards greater privileges.[65] As a result, violence decreased, inmate behavior improved, and the number of prisoners in solitary confinement decreased from more than 1000 to about 300.[66] The undisputed success of the reforms even swayed prison officials during their fight against the ACLU's lawsuit. Christopher Epps, the Commissioner of Mississippi's DOC against whom the original ACLU lawsuit was brought, stated that he "started out believing that difficult inmates should be locked down as tightly as possible, for as long as possible," but by the end of the process, he realized that "[i]f you treat people like animals, that's exactly the way they'll behave."[67] Ultimately, in 2010, Mississippi no longer required a supermax

[61] John Buntin, *Exodus: How America's Reddest State—and Its Most Notorious Prison—Became a Model of Corrections Reform.*, GOVERNING, Aug. 2010, at 20, 21.

[62] *See generally* Memorandum of Points and Authorities in Support of Plaintiffs' Motion for an Award of Attorneys' Fees, Expert Fees and Other Litigation Expenses, Presley v. Epps, No. 4:05-CV-00148 (N.D. Miss. Nov. 8, 2011).

[63] Complaint at 2, *Presley*, No. 4:05-CV-00148.

[64] *Id.*

[65] Goode, *supra* note 30.

[66] *Id.*

[67] *Id.*

prison as a result of the reforms, and Unit 32 was "permanently shuttered,"[68] saving the state over $5 million in the process.[69]

The focal points of Mississippi's solitary confinement reforms were measures including increased social interaction among prisoners and clear communication to prisoners regarding their opportunities to remove themselves from isolation. As Erica Goode's *New York Times* article details:

[B]y the end of six months, most prisoners were spending hours a day outside their cells or had been moved to the general population of other prisons. A clothing warehouse was turned into a group dining hall, and a maintenance room was converted to an activities center. The basketball court filled with players.[70]

Mississippi's reforms indicate that all parties involved in the prison system benefit when prisoners are removed from prolonged periods of isolation and are given opportunities to engage socially. Beyond the benefit to the prisoners, and the potential fiscal benefits to the state, increased social interaction removes much of the need for an Eighth Amendment violation analysis. Because prospects for increased social interaction embedded in the reforms ameliorate the detrimental mental effects solitary can induce—that is, prisoners no longer anticipate being locked up alone for twenty-three hours a day and can reengage socially—Unit 32's administration of solitary confinement can no longer be said to "impose a substantial risk to the inmate's health" that deprives a prisoner of one of "life's necessities:" social interaction.

III. SOLITARY CONFINEMENT THE FOURTEENTH AMENDMENT AND THE DUE PROCESS CLAUSE: ISOLATION IN LIGHT OF

A. Due Process Standards Articulated by the Courts

Distinct from the analysis of solitary confinement under the Eighth Amendment's guarantee from "cruel and unusual punishment" is a separate constitutional consideration: the protection of procedural due process guaranteed by the due process clause of the Fourteenth Amendment.[71] The Constitution provides that state governments cannot abridge central liberty, life or property rights of private citizens—often referred to as "interests"—without providing basic procedural due process protections.[72] Once an "interest" has been established, the government must provide the procedural protections of due process before that interest may be infringed.[73]

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[68] Margaret Winter, *Mississippi: An Unlikely Model for Reforming Solitary Confinement*, OPEN SOC'Y FOUND. (Mar. 15, 2012), http://www.opensocietyfoundations.org/voices/mississippi-an-unlikely-model-for-reforming-solitary-confinement.

[69] Goode, *supra* note 30.

[70] *Id.*

[71] *See* U.S. CONST. amend. XIV, § 1 (insuring that no State shall "deprive any person of life, liberty, or property, without due process of law").

[72] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 1158–59 (3rd ed. 2009).

[73] *Id.*

A seminal case addressing the due process rights of prisoners is *Wolff v. McDonnell*, in which the Supreme Court established minimum due process requirements for prison disciplinary hearings.[74] Later, in *Sandin v. Conner*, the Supreme Court substantially limited the holding in *Wolff* by ruling that the punishment of short-term solitary confinement does not violate the due process clause of the Fourteenth Amendment.[75] In that case, the petitioner's punishment of thirty days in isolation amounted to one of the "ordinary incidents of prison life" and did not present the type of "atypical, significant deprivation in which a State might conceivably create a liberty interest" that would be afforded due process protections.[76] The Court noted that, given the inherently restrictive nature of a prison, some infringement upon an inmate's liberty is necessary to run the institution effectively and to ensure the safety of the prison.[77] In other words, to prove that a form of punishment, such as solitary confinement, implicates a liberty interest requiring due process protection, prisoners post-*Sandin* must show that the treatment constituted an egregious, "atypical, significant deprivation" [78] —a substantially higher threshold than that articulated by the *Wolff* Court. Applied to the context of prison administration, courts have consistently stated that prisoners retain only the most limited liberty interests, and courts are exceedingly deferential to the decisions of prison administrators.[79]

In *Koch v. Lewis*,[80] Arizona inmate Mark Koch, a designated member of the white supremacist prison gang the Aryan Brotherhood, was confined indefinitely to solitary confinement in an Arizona state prison. Prison officials claimed that the inmate's confinement was a necessity, as he had the option of being released from solitary when he divulged his knowledge of gang culture within the institution to prison officials.[81] However, when Koch complied, his affiliates in the Aryan Brotherhood and members of other gangs would likely have retaliated against him with violence.[82] As such, the inmate's segregation from the rest of the prison population was deemed necessary for his safety.[83] In determining whether Koch had a constitutionally protected liberty interest, the court relied on language in *Sandin* to assess whether Koch's indefinite confinement qualified as an "atypical and significant hardship . . . in relation to the ordinary incidents of prison life."[84] Ultimately, the court determined that Koch's indefinite detention constituted the

[74] 418 U.S. 539, 557–58 (1974).

[75] 515 U.S. 472, 473 (1995).

[76] *Id.* at 472–73.

[77] *Id.* at 485.

[78] *Id.* at 473.

[79] *See, e.g.*, Julia M. Glencer, Comment, *An 'Atypical and Significant' Barrier to Prisoners' Procedural Due Process Claims Based on State-Created Liberty Interests*, 100 DICK. L. REV. 861, 869 (1996) (noting that "judges deferred to the informed judgment of prison officials intimately versed in the maintenance of a secure and effective prison").

[80] 216 F. Supp. 2d 994, 996–97 (D. Ariz. 2001).

[81] *Id.* at 997.

[82] *Id.* at 998.

[83] *Id.* at 996–98.

[84] *Id.* at 999 (quoting Sandin v. Conner, 515 U.S. 472, 484 (1995)).

sort of "extreme deprivation" that would give rise to a liberty interest.[85] Once a liberty interest was established, the court examined the procedural due process protections attached to that interest. The court noted that, generally, inmates designated for solitary confinement should receive "adequate notice, an opportunity to be heard, and periodic review."[86] The court also noted that, in similar cases, the Supreme Court has held that evidentiary protections apply—the evidence against the inmate must support the decision to segregate him, and that evidence must be somewhat reliable.[87]

In tandem with the procedural requirements established in *Koch*, the Supreme Court has found that due process under the Fourteenth Amendment compels a meaningful periodic review to ensure that administrative segregation is not a "pretext for indefinite confinement."[88] Furthermore, in *Austin v. Wilkinson*, a district court in Ohio held that procedural due process obligates prison officials to inform inmates in their reviews what type of behavior or achievements would render them eligible for removal from solitary confinement.[89] Additionally, courts have held that prisoners have a due process right to the be apprised of the reasons for their placement in solitary confinement, which could serve as a "guide for future behavior."[90]

B. Evidence of Due Process Violations in Relation to Solitary Confinement

Given the massive number of prisoners in solitary confinement in the United States and the particularities associated with individual prisons and their administrative processes, it would be impossible to substantiate a sweeping claim that *all* prisons deny *every* prisoner their due process rights where those rights are warranted. However, evidence suggests that, in the absence of meaningful federal guidelines, prisoners confined to solitary confinement nationwide are routinely deprived of their Fourteenth Amendment right to due process in a variety of ways. While most prison systems have a formalized review process through which a prisoner's confinement to solitary is examined on a regular basis to determine whether they should be released (typically every thirty to ninety days), many indications suggest that the review process is usually "*pro forma*, with prison staff rubber-stamping decisions to renew terms of solitary confinement *ad infinitum*."[91] Although these periodic reviews amount facially to minimal due process for

[85] *Id.* at 1007.

[86] *Id.* at 1003.

[87] *Id.*

[88] Hewitt v. Helms, 459 U.S. 460, 497 n.9 (1983).

[89] Austin v. Wilkinson, No. 4:01-CV-71, 2007 WL 2840352, at *6–7 (N.D. Ohio Sept. 27, 2007).

[90] Wilkinson v. Austin, 545 U.S. 209, 226 (2005) (citing Greenholtz v. Inmates of Neb. Penal & Corr. Complex, 442 U.S. 1, 15 (1979)).

[91] *Reassessing Solitary Confinement: The Human Rights, Fiscal, and Public Safety Consequences: Hearing Before the Subcomm. on the Constitution, Civil Rights & Human Rights of the S. Comm. on the Judiciary*, 112th Cong. 7 (2012) (statement of the Human Rights Def. Ctr.), *available at* https://www.prisonlegalnews.org/news/publications/hrdc-congressional-comments-solitary-confinement-june-2012.

prisoners in segregation, in practice "there is no meaningful, independent review of decisions to keep prisoners in solitary for years or even decades."[92] When such decisions are challenged, courts typically defer to the "informed discretion of corrections officials."[93]

As discussed above, when a prisoner is placed in solitary confinement, the Supreme Court has held that prisoners so confined must be accorded meaningful periodic review so that isolation does not serve as a "pretext for indefinite confinement."[94] When a prisoner is placed in a supermax, the due process requirement of meaningful periodic review requires that his or her behavior be reevaluated at regular intervals to determine whether supermax confinement is still warranted. Yet, a trend has emerged in supermax confinement in which prison officials simply designate certain prisoners as long-term solitary inmates for essentially a lifetime or prolonged sentence.[95] In such cases, the due process requirement of periodic review becomes meaningless. While prison officials may still go through the administrative motions of providing review, the decision is predetermined, and the review is a sham. As one legislator laments: "Do we feel comfortable putting a man or woman in a dark hole for decades on end with no additional due process? Is this practice consistent with our values? I don't think so. I know we are better than that."[96]

Mounting evidence demonstrates that prisoners are routinely denied meaningful review and deprived of information that outlines a "guide for future behavior"[97] as well as information regarding the steps necessary to remove themselves from solitary and the evidence against them. These deprivations, standing alone and considered collectively, amount to a clear violation of the due process requirements mandated by the Fourteenth Amendment as interpreted by the courts.

C. Reforms in Maine – Correcting Due Process Violations

Mississippi is not the only state to experience success by restructuring its application of solitary confinement. Prior to reforms in 2010, solitary confinement in Maine's State Prison involved isolation in an eighty-six square foot cell for twenty-three hours each day during the week, and twenty-four hours a day on the weekends.[98] Prisoners did not have access to radios or televisions, medical and

[92] *Id.*

[93] Turner v. Safley, 482 U.S. 78, 90 (1987).

[94] Hewitt v. Helms, 459 U.S. 460, 497 n.9 (1983).

[95] *See, e.g.*, Austin v. Wilkinson, No. 4:01-CV-71 (N.D. Ohio Sept. 27, 2007), 2007 WL 2840352, at *6–7.

[96] *Rep. Richmond Introduces Bill to Reform Solitary Confinement*, RICHMOND.HOUSE.GOV (May 8, 2014), http://richmond.house.gov/press-release/rep-richmond-introduces-bill-reform-solitary-confinement.

[97] Wilkinson v. Austin, 545 U.S. 209, 226 (2005) (citing Greenholtz v. Inmates of Neb. Penal & Corr. Complex, 442 U.S. 1, 15 (1979)).

[98] *Reassessing Solitary Confinement: The Human Rights, Fiscal, and Public Safety Consequences: Hearing Before the Subcomm. on the Constitution, Civil Rights & Human Rights of the S. Comm. on*

mental health screenings were infrequent and often conducted through a closed cell door, and human interaction was restricted to brief communications with correction staff.[99] Prisoners could be confined to solitary as punishment for a wide-ranging variety of infractions, from physical altercations with other inmates to moving too slowly in the lunch line.[100] In terms of the right to due process, "prisoners in disciplinary hearings were rarely provided assistance understanding the process or a meaningful opportunity to present a defense."[101]

However, the Maine division of the ACLU, in conjunction with corrections officials and the Maine Prisoner Advocacy Coalition, pushed for reforms as early as 2006.[102] Between 2011 and 2012, the Maine DOC transformed its application of solitary confinement by sending fewer inmates to solitary, reducing the length of sentences in isolation, improving conditions within the units (e.g., increased access to reading material and heightened opportunities for social interaction such as group recreation and counseling), increasing access to care and services in order to preclude the deterioration of prisoner's mental health, and—most importantly for due process concerns—communicating a clear track, based on obtainable metrics, for prisoners to earn their way out of solitary.[103] As a result, Maine reduced the population of its solitary confinement by over seventy percent, and in August 23, 2012, there were forty-six prisoners being held in solitary—approximately half the number of eighteen months prior.[104]

In terms of correcting due process violations, Maine's State Prison predicated its restructuring on administrative procedures that arguably violate a prisoner's Fourteenth Amendment rights. Before the reforms, prisoners in Maine were often confined to solitary under the guise of "administrative segregation"[105]—a form of confinement with loose guidelines—when they were "deemed a risk to the safety of other inmates or prison staff."[106] Maine's use of administrative segregation was explicitly violative of the Fourteenth Amendment Due Process Clause. In the event of a fight, for example, the prison would send both the aggressor and the victim to solitary confinement while the altercation was considered.[107] As the ACLU report

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the Judiciary, 112th Cong. 1 (2012) [hereinafter Hearing Statement of the ACLU of Maine] (statement of the Am. Civil Liberties Union of Me.), *available at* http://solitarywatch.com/wp-content/uploads/2012/06/aclu-of-maine-testimony_solitary-confinement.pdf.

[99] *Id.*

[100] ZACHARY HEIDEN, AM. CIVIL LIBERTIES UNION OF ME., CHANGE IS POSSIBLE: A CASE STUDY OF SOLITARY CONFINEMENT REFORM IN MAINE 10 (2013), *available at* https://www.aclu.org/files/assets/aclu_solitary_report_webversion.pdf.

[101] *Id.*

[102] *See ACLU Releases Report on Solitary Confinement Reform in Maine*, AM. CIVIL LIBERTIES UNION (Mar. 11, 2013), https://www.aclu.org/prisoners-rights/aclu-releases-report-solitary-confinement-reform-maine.

[103] HEIDEN, *supra* note 100, at 13.

[104] *Id.*

[105] *Id.* at 15.

[106] Kirsten Weir, *Alone in the Hole*, MONITOR ON PSYCHOL., May 2012, at 54, *available at* http://www.apa.org/monitor/2012/05/solitary.aspx (defining "administrative segregation").

[107] HEIDEN, *supra* note 100, at 10.

on Maine's prison system pre-reforms notes: "The timeline for investigation was vague, and the depth and quality were suspect. A prisoner might spend days, weeks, or months in [solitary] as a result of being attacked by another prisoner."[108] The text of the prison policy noted that the confinement of a prisoner to Administrative Segregation was a form of punishment subject to review and was only to be doled out for limited purposes.[109] But, in practice, the policies were "ambiguous enough, and the reviews superficial enough, that prisoners had no real due process protection."[110] Ultimately, despite a policy guarantee that prisoners would be provided with assistance to understand the confinement process and mount a defense in administrative segregation, these measures were not provided and the prisoners' due process rights at Maine State Prison were clearly violated in the absence of "meaningful review."[111]

Post-reforms, administrative segregation at Maine State Prison is only used in extreme circumstances. Under current Policy 15.01, prisoners are first placed under emergency observation status in their usual housing environment among the general prison population.[112] The prisoners may "only be transferred to [solitary] upon approval of supervisory staff, and the reasons for the transfer are documented and reviewed within 72 hours."[113] These administrative changes have lead to a more than fifty percent reduction in the use of solitary confinement at the Maine State Prison, and that reduction has not been accompanied by an increase in violence towards guards or other prisoners.[114] Perhaps more importantly, these measures move away from "mere paper shuffling"[115] towards providing prisoners with "meaningful review" of their punishments, thus comporting with the due process protections provided by the Fourteenth Amendment.

IV. RETHINKING SOLITARY: REFORM UNDER PROPOSED FEDERAL GUIDELINES

In the prison system, the broad application of prolonged solitary confinement is antithetical to the Eighth and Fourteenth Amendments. However, recent state-level systemic reforms, such as those in Mississippi which led to improved prisoner mental health in the absence of prolonged isolation, and reforms in Maine aimed at reconfiguring the administrative process of solitary confinement, make it clear that the institutional inertia that allows for the broad application of solitary confinement can be overcome, and reforms can be implemented to modify the practice so that it comports with the Constitution.

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[108] *Id.*

[109] *Id.* at 15.

[110] *Id.*

[111] *See id.* at 10–11.

[112] ME. DEP'T. OF CORR., POL'Y NO. 15.01, ADMINISTRATIVE SEGREGATION STATUS (2002), *available at* http://www.maine.gov/corrections/policies/15.01.pdf.

[113] Heiden, *supra* note 100, at 15.

[114] *See* Hearing Statement of the ACLU of Maine, *supra* note 102, at 9.

[115] Hewitt v. Helms, 459 U.S. 460, 490 n.19 (1983).

Congress should draw on the accomplishments of these recent state restructurings and issue federal reform guidelines that ensure that the practice of solitary confinement comports with the Eighth and Fourteenth Amendments. Specifically, in order to avoid the deprivation of "life's minimum necessities" that pose a risk of "substantial harm" to the inmate, which the Court has held amount to "cruel and unusual punishment," the proposed guidelines should be rooted in three critical objectives: significant limitations on the length of sentencing in solitary confinement, increased opportunities for social engagement, and heightened attention paid to mental wellness before, during, and after placement in isolation.

In an effort to limit the length of sentencing in solitary confinement, federal guidelines should specify which infractions qualify an inmate for solitary confinement and should place a two-year cap on continuous isolation. Furthermore, prison officials should communicate the pre-determined length of an inmate's confinement to solitary, and provide incentives for positive behavior that could reduce the prisoner's sentence such as increased privileges, enhanced education, and job training. Federal guidelines should also require that each prisoner be given a clear and communicated process for removing himself from solitary altogether.

In order to maintain optimum mental wellness for inmates in isolation, conditions of total social isolation and extreme sensory deprivation such as darkness or severely limited sunlight should be prohibited entirely. Furthermore, inmates should be given opportunities to engage with each other through social activities such as group dining or gatherings devoted to certain interest groups. Isolated inmates should also be given periodic opportunities to participate with the outside world through communication with family members, access to reading and education materials, and/or outdoor exercise. These opportunities to engage outside of their isolation cells would undoubtedly make inmates feel more connected to each other and to reality, greatly reducing the likelihood that they devolve into mental instability.

Lastly, each prison institution should be equipped with a medical team that includes an adequate number of psychiatrists capable of assessing the fitness of each individual mentally. Mandatory screenings should take place in advance of solitary confinement. Those prisoners whose psychological and medical conditions would render them significantly more susceptible to the potentially harmful consequences of the experience should be precluded from it. Additionally, prison mental health staff should be required to articulate explicit diagnostic procedures for screening prisoners who are to be placed in solitary and to specify the diagnostic criteria that would disqualify prisoners for such confinement. Particularly vulnerable prisoners, including those with mental illness, should be placed in "missioned housing" that allows for services targeted to the needs of prisoners. These units provide a smaller community setting for these vulnerable populations without subjecting them to the

complete isolation of solitary confinement that could exacerbate their conditions.[116] Mental health staff should be present and widely available in solitary confinement units, and should evaluate all prisoners at a minimum of once a month, with increased frequency according to each individual prisoner's needs. The mental competence of each prisoner should also be assessed upon release in an effort to identify which prisoners have been significantly impacted by their isolation and to ensure that the lingering trauma attached to prolonged confinement is dealt with sufficiently.

These reforms would serve to move the practice of solitary confinement in line with the Eighth Amendment by reducing the likelihood of mental deterioration that amounts to "cruel and unusual punishment" and giving isolated inmates the opportunity to engage socially, an opportunity that comports with the "minimal civilized measure of life's necessities."

In terms of due process, the proposed federal guidelines should draw from Maine's successful state reforms and prescribe policies ensuring that prisoner's receive meaningful review of the terms of their placement in solitary confinement. Specifically, no prisoner should be isolated in administrative segregation for longer than ten days absent or pending a due process hearing to determine disciplinary segregation status. Furthermore, before placement in solitary confinement, prisoners should be provided with the evidence that prison officials are using as the basis for their confinement and each inmate should be given a meaningful opportunity to respond to the allegations against them and/or appeal the decision in the presence of a prison administrator and an unbiased prison official.

Furthermore, federal guidelines should mandate that each prison institution draft a comprehensive (to the extent possible) list of infractions that warrant placement in solitary confinement, reserving the punishment only for extremely dangerous and outrageous conduct. The guidelines should also outline protocol for periodic review of an inmate's status in solitary, and the preferred procedure for communicating to an inmate the pathway to his or her release from isolation. Lastly, federal guidelines should ensure that an inmate's placement in solitary does not in any way limit or prohibit communication with his or her attorney.

These stated reforms provide the minimum measures for "meaningful review" in an effort to ensure that no prisoner is deprived of his or her right to due process, and that state and federal prisons are acting in accordance with the Constitution.

In addition to the systemic reforms, Congress should craft federal guidelines that incentivize state compliance. Representative Cedric Richmond, a staunch advocate for the overhaul of the practice of solitary confinement, notes that a mechanism should be built-in to federal guidelines to "ensure that states act to

[116] *Reassessing Solitary Confinement II: The Human Rights, Fiscal, and Public Safety Consequences: Hearing Before the Subcomm. on the Constitution, Civil Rights & Human Rights of the S. Comm. on the Judiciary*, 113th Cong. 5 (2014) (testimony of Craig DeRoche, President of Justice Fellowship), *available at* http://www.justicefellowship.org/content/justice-fellowship-president-craig-deroche-testimony-solitary-confinement-prepared-senate (defining "missioned housing" and offering it as a "promising alternative" to solitary).

pursue these important reforms."[117] Richmond advocates that "[f]or each fiscal year, any money that a state would otherwise receive for prison purposes for that fiscal year under a grant program shall be reduced by fifteen percent for non-compliance." However, Richmond notes that "this reduction may be neutralized if the governor of the state submits to the Attorney General a certification that the state has adopted and is in full compliance with the national standards or is on the way to being fully compliant."[118] New guidelines would apply to all federal institutions, while states who chose not to implement new federal standards would lose 15% of their existing federal grant monies for prison, jail and youth detention each year if they failed to comply.[119]

CONCLUSION

Absent more meaningful and informed legal restraints, intervention, and oversight regarding the practice of solitary confinement, the United States will remain in noncompliance with the protections afforded by its own Constitution under the Eighth and Fourteenth Amendments. This failure undermines the nation's commitment to democracy and the sanctity of the Constitution. However, if Congress utilizes recent state reforms to create federal guidelines for the reformation of solitary confinement and the administrative process surrounding it, and if Congress incentivizes states to comply with the regulations, meaningful change can be implemented. Undoubtedly, "inmates must pay their debts to society, but justice demands that we extract these payments only within the limits of our Constitution and accepted standards of human decency."[120]

Prisoners in solitary confinement should not have to confront what Charles Dickens called "the depth of endurance" in their isolation. Instead, Congress should endeavor to enact meaningful reform that brings the practices of prison systems nationwide in line with the Constitution, while reinforcing the rights of prisoners who are citizens deserving of the same constitutional protections and privileges afforded to those outside prison walls.

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[117] Cedric Richmond, *Toward a More Constitutional Approach to Solitary Confinement: The Case for Reform*, 52 HARV. J. LEGIS. 1, 16 (2015).

[118] *Id.*

[119] *Id.*

[120] *Id.* at 1.