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Challenging Solitary Confinement Through State Constitutions

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INTRODUCTION

Solitary confinement is a deeply entrenched practice in American prisons, jails, and detention facilities. Despite extensive evidence that the practice is harmful, it has long been a feature of most states' punishment regimes. The Eighth Amendment's prohibition against cruel and unusual punishment has offered inconsistent, and at times limited, scrutiny of solitary confinement.

This Article explores state constitutional provisions and related jurisprudence that offer alternative avenues for challenges to solitary confinement. Various state constitutions prohibit unnecessary rigor or abuse, require safe and comfortable prisons or humane treatment of prisoners, enshrine rehabilitation or reformation as a purpose of punishment, and recognize the dignity of individuals. In addition, state constitutional prohibitions against cruel and unusual punishment have sometimes been interpreted differently from their federal counterpart, even where the language of those provisions is identical or similar. Indeed, as Justice Brennan has observed, state constitutions are "a font of individual liberties."[1]

The notion that state constitutions and state courts may offer greater protection of individual liberties than the Federal Constitution is not new. However, there has been limited recognition to date that state courts can play an influential role in holding prison officials accountable for harmful conditions and practices like solitary confinement. This Article examines the range of constitutional provisions and court decisions that improve scrutiny of these harmful practices. Conversely, it points out where challenges to solitary confinement through constitutional provisions are still uncharted territory.

The Article is divided into four parts. Part I describes the development and current use of solitary confinement in United States

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1. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

prisons. Part II discusses the limited protection against cruel and unusual punishment in the context of solitary confinement as a result of the federal courts' interpretation of the Eighth Amendment. Part III analyzes the wide range of state constitutional provisions and state court decisions that offer different approaches for challenging solitary confinement. Part IV explores the reasons why state constitutional jurisprudence relating to solitary confinement is largely underexplored and offers justifications to support further development in this area.

I. USE OF SOLITARY CONFINEMENT

A. Historical Background

Solitary confinement was promoted in the U.S. in the late 1700s to address "moral corruption"[2] in jails where incarcerated people were "thrown together in one sordid mass of humanity"[3] and not separated by age, gender, or offense committed. Philadelphia's Walnut Street Jail was the first to introduce solitary confinement, constructing individual cells for this purpose in 1790.[4] In the early 1800s, Pennsylvania and New York built new penitentiaries to hold everyone in solitary confinement.[5] Pennsylvania's approach was influenced by the Quakers' philosophy of individual reformation.[6]

Pennsylvania's Eastern State Penitentiary opened in 1829 and consisted initially of 250 individual cells, each furnished with a Bible, where people were held in solitary confinement.[7] They worked in their cells and were permitted to leave only if they were unwell.[8] Nevertheless, they had extensive outside contact with religious instructors and members of a local philanthropic society who conducted thousands of visits; they were also frequently called on by staff and other approved persons.[9]

New York's Auburn Penitentiary opened in 1817 and initially

2. MARK COLVIN, PENITENTIARIES, REFORMATORIES, AND CHAIN GANGS: SOCIAL THEORY AND THE HISTORY OF PUNISHMENT IN NINETEENTH-CENTURY AMERICA, at 4 (1997).

3. *Id.*

4. David M. Shapiro, *Solitary Confinement in the Young Republic*, 133 HARV. L. REV. 544, 561 (2019).

5. ANDREW SKOTNICKI, RELIGION AND THE DEVELOPMENT OF THE AMERICAN PENAL SYSTEM 6 (2000)

6. *Id.*

7. *Id.* at 57.

8. *Id*.

9. Act of April 23, 1829, § 21, *in* Purdon's Digest of the Laws of Pennsylvania from 1700 – 1846, 544 (7th ed. 1852).

featured both solitary and congregate cells.[10] In 1821, eighty people were placed in solitary confinement.[11] They were forbidden to lie down during the day and forbidden from communicating with anyone except the chaplain.[12] This approach proved "disastrous," with many people harming themselves or attempting suicide within the first year.[13] Auburn officials then changed the regime so that everyone at the penitentiary was placed in a solitary confinement cell, but they worked together during the day under the supervision of guards who were authorized to whip people who broke the rule of strict silence.[14] The same model was later introduced at New York's Sing Sing Penitentiary.[15]

These early regimes were copied to varying degrees in other states. By 1833, solitary confinement was used in Maine, New Hampshire, Vermont, Massachusetts, Connecticut, New Jersey, Maryland, the District of Columbia, Tennessee, Kentucky, Louisiana, Missouri, Illinois, and Ohio.[16] The practice was later introduced in even more states, although it was not uniformly imposed for the entire duration of a person's incarceration; in some jurisdictions, a sentence might incorporate, for example, twenty days of solitary confinement with the remainder to be served at hard labor.[17]

Enthusiasm for the early solitary confinement experiments waned, and by the 1850s and 1860s, the practice was becoming less common but not fully discontinued.[18] It continued to be used throughout the following century.[19] In 1983, the maximum-security United States Penitentiary at Marion, Illinois, was placed into lockdown after three

10. COLVIN, *supra*, note 2, at 88; GUSTAVE DE BEAUMONT & ALEXIS DE TOCQUEVILLE, ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION IN FRANCE 4 (Francis Lieber, trans.) (1833).

11. GUSTAVE DE BEAUMONT & ALEXIS DE TOCQUEVILLE, ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION IN FRANCE 5 (Francis Lieber, trans.) (1833).

12. SCOTT CHRISTIANSON, WITH LIBERTY FOR SOME: 500 YEARS OF IMPRISONMENT IN AMERICA 113 (1998).

13. SKNOTNICKI, *supra*, note 5, at 40; W. DAVID LEWIS, FROM NEWGATE TO DANNEMORA: THE RISE OF THE PENITENTIARY IN NEW YORK, 1796-1848, 66-69 (1965).

14. SKNOTNICKI, *supra*, note 5, at 70.

15. COLVIN, *supra*, note 2, at 84.

16. BOSTON PRISON DISCIPLINE SOCIETY, EIGHTH ANNUAL REPORT 6 (1833).

17. *See, e.g.* Howell v. State, 1 Or. 241, 243 (1859) (describing Oregon sentencing statute which provided that "in every case in which punishment in the penitentiary is awarded against any convict, the form of the sentence shall be that he be punished by confinement at hard labor; and he may also be sentenced to solitary confinement for such term as the court shall direct, not exceeding twenty days at one time . . .").

18. Ashley T. Rubin & Keramet Reiter, *Continuity in the Face of Penal Innovation: Revisiting the History of American Solitary Confinement*, 43 LAW & SOC. INQ. 1604, 1617-21 (2018).

19. *Id.*

guards were taken hostage and one was killed.[20] Everyone was confined to their cells for twenty-three hours per day.[21] The lockdown became permanent and lasted for twenty-three years.[22] The Marion lockdown found favor with prison officials and led to the construction of new purpose-built supermax prisons and units throughout the country, which consisted entirely of solitary confinement cells.[23]

B. Current State of Affairs

A nationwide survey conducted by The Correctional Leaders Association and The Arthur Liman Center for Public Interest Law at Yale Law School, of "restrictive housing," an alternative term used to describe solitary confinement, estimated that, as of July 2019, between 55,000 and 62,500 people were held in such conditions in U.S. prisons.[24] That estimate does not include people in restrictive housing in jails or juvenile, military, or immigration detention facilities, for which limited data are available.[25]

At the onset of the COVID-19 pandemic, detention facilities across the country implemented lockdowns; Unlock the Box, a national coalition of organizations working to end the use of solitary confinement in the U.S., estimated that the number of people held in solitary confinement or similar conditions in the U.S. increased by 500% to 300,000.[26]

While conditions vary, solitary confinement units have common features.[27] People are segregated from the general prison population and held in cells that are no larger than eighty square feet, similar in size to a king-size mattress or small bathroom.[28] Some units are not temperature-controlled, and insect infestations can be severe,

20. Bill Dunne, *The U.S. Prison at Marion, Illinois: An Instrument of Oppression*, *in* CAGES OF STEEL: THE POLITICS OF IMPRISONMENT IN THE UNITED STATES 47-48 (Ward Churchill & J. J. Vander Wall eds., 1992).

21. ANGELA DAVIS, ARE PRISONS OBSOLETE? 49 (2003).

22. *Id.*

23. D. A. Ward & T. G. Werlich, *Alcatraz and Marion: Evaluating Super-Maximum Custody*, 5 PUNISHMENT & SOCIETY 53, 59 (2003).

24. THE CORRECTIONAL LEADERS ASSOCIATION & THE ARTHUR LIMAN CENTER FOR PUBLIC INTEREST LAW AT YALE LAW SCHOOL, TIME-IN-CELL 2019: A SNAPSHOT OF RESTRICTIVE HOUSING BASED ON A NATIONWIDE SURVEY OF U.S. PRISON SYSTEMS 5 (2020) [hereinafter *CLA-LIMAN 2020*]. The report defines "restrictive housing" as "holding individuals in a cell for an average of twenty-two hours or more for fifteen days or more." *Id.* at 1.

25. *Id.* at 4.

26. UNLOCK THE BOX, SOLITARY CONFINEMENT IS NEVER THE ANSWER 1 (2020).

27. Elizabeth Bennion, *Banning the Bing: Why Solitary Confinement is Cruel and Far Too Usual Punishment* 90 IND. L. J. 741, 753 (2015).

28. Declaration of Thomas Silverstein at 31, Silverstein v. Fed. Bureau of Prisons, No. 07-CV-02471 (D. Colo. Feb. 4, 2011).

particularly in the summer.[29] People in solitary confinement eat all their meals in their cells, in the same small space in which they sleep and use the toilet.[30] In some units, toilets are flushed on timers that are controlled by prison officers, and people may be forced to eat their meals amid the stagnant smell of an unflushed toilet.[31] The only respite a person in solitary confinement has from these oppressive conditions may be an hour of recreation time per day spent alone in a steel cage or concrete cell without any exercise equipment.[32] Showers may be allowed three times per week.[33] People in solitary confinement can be subjected to strip searches, including body cavity searches, and then handcuffed and shackled before they leave their cells.[34]

The racial and ethnic disparities of America's criminal justice system are reflected in the use of solitary confinement. While the demographic data are not comprehensive, the available statistics reveal troubling inequality. A 2019 report by the Southern Poverty Law Center showed that people of color in Florida's prisons are overrepresented in solitary confinement in relation to their proportion in the general prison population.[35] As of December 2018, over 60% of people in solitary confinement were Black, but Black people constituted only 47% of the total prison population.[36] In contrast, 34.5% of people in solitary confinement were white despite their constituting 40.1% of the total prison population.[37]

In July 2019, thirty-two U.S. jurisdictions provided racial and ethnic data about their male populations in restrictive housing for the nationwide survey conducted by The Correctional Leaders Association and the Arthur Liman Center.[38] Only four of the thirty-two states reported having a higher percentage of white men in

29. Complaint at 11, Presley v. Epps, No. 4:05-CV-00148 (N.D. Miss. June 22, 2005), 2005 WL 1842195.

30. Complaint at 58, Thorpe v. Virginia Dep't of Corr., No. 3:19-CV-00332 (E.D. Va. May 6, 2019).

31. Class Action Complaint for Declaratory and Injunctive Relief at 38, Harvard v. Inch, No. 19-CV-212 (N.D. Fla. May 8, 2019).

32. SIX BY TEN: STORIES FROM SOLITARY 132 (Taylor Pendergrass & Mateo Hoke eds., 2018).

33. *See, e.g.*, KERAMET REITER, 23/7: PELICAN BAY PRISON AND THE RISE OF LONG-TERM SOLITARY CONFINEMENT 26 (2016), AMERICAN FRIENDS SERVICE COMMITTEE, STILL BURIED ALIVE: ARIZONA PRISONER TESTIMONIES ON ISOLATION IN MAXIMUM SECURITY 11 (2014).

34. TERRY ALLEN KUPERS, SOLITARY: THE INSIDE STORY OF SUPERMAX ISOLATION AND HOW WE CAN ABOLISH IT 32 (2017); Class Action Complaint for Declaratory and Injunctive Relief at 34, Harvard v. Inch, No. 19-CV-212 (N.D. Fla. May 8, 2019).

35. SOUTHERN POVERTY LAW CENTER, SOLITARY CONFINEMENT: INHUMANE, INEFFECTIVE, AND WASTEFUL 8 (2019).

36. *Id*.

37. *Id*.

38. CLA-LIMAN 2020, *supra*, note 24, at 30-31.

restrictive housing than the total prison population.[39] In nineteen jurisdictions, on the other hand, Black men constituted a higher percentage of the restrictive housing population than in the general prison population, fifteen jurisdictions reported the same about Hispanic men,[40] and twelve about Native American men.[41] Of thirty-one jurisdictions that provided demographic data about their female prison populations, nineteen reported that Black women constituted a greater percentage of the restrictive housing population than the total prison population, six reported the same about Hispanic women, and eight about Native American women.[42]

C. Harm to Incarcerated People

The harm caused by solitary confinement was clear almost from the outset. One of the first criticisms of the practice arose from its use in Philadelphia's Walnut Street Jail in the 1790s.[43] The purported aim of reformation that was said to have justified Pennsylvania's approach did not succeed, and people held in solitary confinement were reportedly "corrupted by indolence."[44] The results of Auburn's first experiment led the Governor of New York to pardon people in solitary confinement in 1823.[45]

Scientific evidence revealing the harm associated with solitary confinement today is extensive.[46] The risk of physical or psychological damage is so great that it outweighs any claimed penological justification for the practice.[47] Solitary confinement

39. *Id*.

40. The CLA-LIMAN surveys do not collate separate racial and ethnic data, thus no information is available about the racial identity of Hispanic people in restrictive housing.

41. CLA-LIMAN 2020, *supra*, note 24, at 30-31.

42. *Id.* at 33-34.

43. GUSTAVE DE BEAUMONT & ALEXIS DE TOCQUEVILLE, ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION IN FRANCE 3 (Francis Lieber, trans.) (1833).

44. *Id*.

45. FRANCIS GRAY, PRISON DISCIPLINE IN AMERICA 39-40 (1847).

46. *See, e.g.*, Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH U. J. L. & POL'Y 325 (2006); Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 CRIME & JUST. 441 (2006); Craig Haney, *The Science of Solitary: Expanding the Harmfulness Narrative*, 115 NW. U. L. REV. 211, 240 (2020); HUMAN RIGHTS IN TRAUMA MENTAL HEALTH LAB, STANFORD UNIVERSITY, MENTAL HEALTH CONSEQUENCES FOLLOWING RELEASE FROM LONG-TERM SOLITARY CONFINEMENT IN CALIFORNIA (2017); Andrew B. Clark, *Juvenile Solitary Confinement as a Form of Child Abuse*, 45 J. AM. ACAD. PSYCHIATRY & L. 350, 351 (2017); KUPERS, *supra*, note 34, at 32, 99, 115; Lauren Brinkley-Rubinstein et al., *Association of Restrictive Housing During Incarceration With Mortality After Release*, 2(10) J. AM. MED. ASS. 8 (2019).

47. Federica Coppola, *The Brain in Solitude: An(other) Eighth Amendment Challenge to Solitary Confinement*, JOURNAL OF LAW AND THE BIOSCIENCES 1, 36-37 (2019) ("The risk of undergoing brain damage due to extreme isolation is an excessive – and, therefore, extremely unbalanced – cost for any

"induces the bleakest depression, plunging despair, and terrifying hallucinations."[48] It contributes to the onset of psychiatric disorders, self-harm, and suicide attempts.[49] The psychological and psychiatric harm can manifest itself as anxiety, depression, panic, withdrawal, hallucinations, self-mutilation, intolerance of social interaction, obsessional thinking, agitation, irritability and suicidal thoughts and behaviors.[50] The physiological effects of solitary confinement include heart palpitations, insomnia, weight loss, deterioration of eyesight and mental acuity, and aggravation of pre-existing medical problems.[51]

Recent studies also demonstrate that harm caused by solitary confinement can have lasting effects. Neuroscientific studies shed further light on the "traumatic and potentially permanent" harm caused by solitary confinement.[52] Significantly, electroencephalography studies show that as little as a few days of such a regime can produce "an abnormal pattern characteristic of stupor and delirium."[53] Experimental animal research also shows that social and environmental deprivation has "negative repercussions for both brain structure and function"[54] and is associated with high levels of aggression and increased susceptibility to psychiatric and neurodegenerative diseases.[55]

Recent scientific studies demonstrate that there is no rehabilitative justification for solitary confinement.[56] Even the claim that the practice is required for institutional security is dubious in light of reports suggesting that, in prisons where solitary confinement units are disbanded, levels of violence either drop or remain steady.[57] Deterrence is also questionable as a justification because there is no

legitimate penological interest to allegedly justify it."; "No penological interest can counterbalance the damage that solitary confinement risks imposing on incarcerated people.").

48. MARY E. BUSER, LOCKDOWN ON RIKERS: SHOCKING STORIES OF ABUSE AND INJUSTICE AT NEW YORK'S NOTORIOUS JAIL (2015).

49. Francis X. Shen, *Neuroscience, Artificial Intelligence, and the Case Against Solitary Confinement,* 21 VAND. J ENT. & TECH. L. 937, 953-54 (2019).

50. Stuart Grassian, *supra*, note 46, at 332-33.

51. SHARON SHALEV, A SOURCEBOOK ON SOLITARY CONFINEMENT 15 (2008).

52. *See, e.g.*, Federica Coppola, *supra* note 47.

53. Stuart Grassian, *supra*, note 46, at 331. *See also* Paul Gendreau et al., *Changes in EEG Alpha Frequency and Evoked Response Latency During Solitary Confinement,* 79 J. ABNORMAL PSYCHOLOGY 54 (1972).

54. Federica Coppola, *supra*, note 47, at 22-23.

55. *Id.*

56. Elizabeth Bennion, *supra*, note 27, at 779.

57. U.S. DEP'T JUST., REPORT AND RECOMMENDATIONS CONCERNING THE USE OF RESTRICTIVE HOUSING 75-76 (2016) (Colorado Department of Corrections reported no increase in assaults on staff by incarcerated people since implementing reforms to reduce solitary confinement; Washington State Department of Corrections reported less violence and fewer instances where prison staff used force at intensive management units after implementing reforms to reduce restrictive housing population.).

evidence that either short- or long-term solitary confinement reduces subsequent rule violations in prisons.[58]

The risk of lasting harm resulting from solitary confinement is particularly concerning given that most people in prison return to the community.[59] When they do so, they may be "incapable of accommodating to life" due to hypersensitivity and intolerance of the typical noise and chaos of social situations.[60] They also face the risk of leaving prison with fewer life skills[61] and diminished psychological and emotional capacities.[62] A 2019 study of over 200,000 people released from prison in North Carolina found that people who had spent any period of time in solitary confinement during incarceration were more likely to die in the first year after their release from prison than people who had not been in solitary confinement.[63] The risk of death and reincarceration was also higher among people who had been in solitary confinement for more than 14 consecutive days or had been so placed more than once.[64]

D. Reforms

Some states and prisons have introduced reforms that seek to reduce or abolish solitary confinement. The legislatures of Massachusetts, Nebraska, New Jersey, and New York have in recent years enacted reform legislation that prohibits or curtails the practice.[65] In 2017, the Colorado Department of Corrections limited solitary confinement to a maximum of fifteen days, and in July 2020, the Governor of Colorado signed a bill prohibiting the use of solitary confinement for people being treated or evaluated for substance use.[66] In 2011 and 2012, the Maine Department of Corrections adopted new policies to reduce the

58. Federica Coppola, *supra*, note 47, citing Robert Morris, Joseph Lucas & Matthew Jones, *An Analysis of the Deterrent Effects of Disciplinary Segregation on Institutional Rule Violation Rates*, CRIM J. POL. REV. 1 (2017).

59. U.S. DEP'T JUST., BUREAU OF JUSTICE STATISTICS, RE-ENTRY TRENDS IN THE UNITED STATES (2017) ("95% of the prison population today will be released at some point in the future.").

60. Federica Coppola, *supra*, note 47, citing Expert Report of Stuart Grassian, Psychiatric Effects of Solitary Confinement at Northern Correctional Institution on Death Row and in Special Circumstances Under CGS 18-10b in Reynolds v. Arnone, No. 13-CV-1564 (D. Conn. Mar. 30, 2018).

61. KUPERS, *supra*, note 34, at 99 ("In the big picture, the decimation of life skills, destroying a prisoner's ability to cope in the free world, is the worst thing solitary confinement does.").

62. Sharon Dolovich, *Incarceration, American-Style*, 3 HARV. L & POL'Y REV. 237, 249 (2009).

63. Lauren Brinkley-Rubinstein et al., *Association of Restrictive Housing During Incarceration With Mortality After Release*, 2(10) J. AM. MED. ASS. 8 (2019).

64. *Id.*

65. MASS. GEN. LAWS ANN. ch. 127, §§ 39-39H (West 2018); NEB. REV. STAT. ANN. § 83-4,114 (West 2019); N.J. STAT. ANN. § 30:4-82.5 (West 2020); 2021 N.Y. Sess. Laws (2277-A) (McKinney).

66. CLA-LIMAN 2020, *supra*, note 24, at 82.

number of people and length of time spent in solitary confinement and to improve conditions.[67]

Ongoing judicial oversight is often needed to ensure compliance, even in jurisdictions where reforms have been implemented. Virginia provides one such example. In May 2019, a lawsuit was filed in federal court on behalf of men who were held in solitary confinement in the state's supermax prisons for between 2 and 23 years.[68] The complaint referred to a 1985 settlement in a case in which the state had agreed to permanently abolish a "Special Management Unit" ("SMU") where people "spent their entire incarceration in a more draconian form of solitary confinement, without the opportunity to obtain additional privileges, and with additional attendant harms."[69] The state had also agreed that it would not reinstate any similar program in the future.[70] The 2019 complaint alleged that these provisions were violated when the state opened two new supermax prisons where the solitary confinement regime was "the equivalent or is similar to the SMU under the Settlement Agreement."[71]

II. EIGHTH AMENDMENT CHALLENGES TO SOLITARY CONFINEMENT

Though the federal courts were somewhat receptive to the rights of incarcerated people in cases brought during the 1960s and 1970s, that approach was later abandoned in favor of the view that courts should be cautious before interfering with the judgment of prison administrators.[72] Stringent tests were developed to establish Eighth Amendment violations based on conditions of confinement. The high thresholds required to meet these tests, combined with the defense of qualified immunity and the statutory barriers imposed by the Prison Litigation Reform Act (PLRA), render judicial relief based on the Eighth Amendment difficult to obtain in many solitary confinement cases.

The Eighth Amendment's prohibition on cruel and unusual punishments was taken from the English Bill of Rights of 1689.[73]

67. AMERICAN CIVIL LIBERTIES UNION OF MAINE, CHANGE IS POSSIBLE: A CASE STUDY OF SOLITARY CONFINEMENT REFORM IN MAINE 12-13 (2013).

68. Complaint at 2, Thorpe v. Virginia Dep't of Corr., No. 3:19-CV-00332 (E.D. Va. May 6, 2019).

69. *Id.*

70. *Id.* at 34, referring to Settlement Agreement at 1, Brown v. Landon, No. 81-0853-R (E.D. Va. Apr. 5, 1985).

71. *Id.* at 36, 87.

72. Howard Eisenberg, *Rethinking Prisoner Rights Cases and the Provision of Counsel,* 17 S. ILL. U.L.J. 417, 423, 426 (1993).

73. Stuart Klein, *Prisoners' Rights to Physical and Mental Health Care: A Modern Expansion of*

Significantly, the provision in the latter was intended to prohibit punishments not specifically authorized by statute or by a sentencing judge.[74] Despite its derivation, the federal courts have interpreted the Eighth Amendment differently.

In 1958, the Supreme Court in *Trop v. Dulles* stated that the words of the Eighth Amendment "are not precise, and . . . their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[75] In 1962, the Supreme Court in *Robinson v. California* held that the provisions of the Eighth Amendment apply to the states through the Fourteenth Amendment.[76] It was only in 1978 that the Supreme Court first addressed conditions of confinement in *Hutto v. Finney*, holding that conditions of confinement were subject to scrutiny under the Eighth Amendment.[77] In *Hutto*, the Court affirmed a remedial order entered by the District Court for the Eastern District of Arkansas to address cruel and unusual conditions in Arkansas' prison system. One of the provisions of the remedial order was a 30-day limitation on placements in solitary confinement, which the Court upheld. Generally, however, challenges to solitary confinement based on the Eighth Amendment's prohibition against cruel and unusual punishment have mixed success. The courts have taken the position that "the mere fact of solitary confinement does not, in and of itself, violate the Eighth Amendment."[78]

A. Establishing a Violation

The Court has developed a two-part test to assess whether conditions within prisons violate the Eighth Amendment.[79] The test comprises an objective component, namely, proof that a given condition or deprivation is "sufficiently serious," and a subjective component, namely, that it was inflicted with "deliberate indifference."[80] Most challenges to solitary confinement fail to meet these two components such that the federal courts decline to find the

the Eighth Amendment's Cruel and Unusual Punishments Clause, 7 FORDHAM URB. L.J. 1, 2 (1979).

74. COLIN DAYAN, THE STORY OF CRUEL AND UNUSUAL 6 (2007).

75. Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion).

76. Robinson v. California, 370 U.S. 660 (1962) (holding a California statute that imposed a sentence of imprisonment upon conviction of the offense of addiction to narcotics to be cruel and unusual in violation of the Eighth and Fourteenth Amendments).

77. Hutto v. Finney, 437 U.S. 678 (1978).

78. Brown v. Faucher, No. 3:19-CV-00690, 2019 WL 3231205 at *3 (D. Conn. July 18, 2019), (citing Hutto v. Finney, 437 U.S. 678, 686 (1978)).

79. Wilson v. Seiter, 501 U.S. 294, 298 (1991).

80. *Id.*

practice unconstitutional under the Eighth Amendment.[81]

1. Sufficiently Serious Conditions

To establish a sufficiently serious condition or deprivation, proof of serious harm or a "substantial risk of serious harm" is required.[82] The standard is high. In *Rhodes v. Chapman*, the Court held that the Constitution "does not mandate comfortable prisons," and only deprivations that deny "the minimal civilized measure of life's necessities" amount to an Eighth Amendment violation.[83] In *Hudson v. McMillian*, the Court reasoned that "extreme deprivations are required to make out a conditions of confinement claim" because "routine discomfort is part of the penalty that criminal offenders pay for their offenses against society."[84] In one case, a person's having spent thirty years in solitary confinement did not satisfy the objective test.[85] Even the extreme practice of placing people in isolation in "strip cells" without sheets, blankets, or clothing was not regarded by one court as a sufficiently serious deprivation.[86]

The courts have further held that, to establish a violation, the conditions challenged must result in the deprivation of a single need.[87] Solitary confinement rarely presents a single deprivation, unlike conditions such as poor food or inadequate sanitation. The Court in *Wilson v. Seiter* held that a combination of unfavorable conditions may violate the Eighth Amendment when any single one of them would not do so, but the conditions must have a "mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth or exercise—for example, a low cell temperature at night combined with a failure to issue blankets."[88] The Court said that "nothing so amorphous as 'overall conditions' can rise to the level of cruel and unusual punishment" when there is no deprivation of a single need.[89]

The Court's rejection of the broader "totality of conditions" approach is problematic for challenges to solitary confinement. The combination of factors which sustain the practice may result in a range

81. *See* infra II.A.1 and II.A.2.
82. Farmer v. Brennan, 511 U.S. 825, 834 (1994).
83. Rhodes v. Chapman, 452 U.S. 337, 347, 349 (1981).
84. Hudson v. McMillian, 503 U.S. 1 (1992), quoting Rhodes, 452 U.S. at 347.
85. Isby v. Brown, 856 F.3d 508, 522, 524 (7th Cir. 2017).
86. Guinn v. Rispoli, 323 Fed. Appx. 105, 107, 108 (3d Cir. 2009).
87. *Wilson*, 501 U.S. at 304.
88. *Id.*
89. *Id.*

of harms rather than a single deprivation. Because of the Court's narrow approach, many challenges to solitary confinement must focus on a single element of the practice, such as constant lighting,[90] lack of outdoor exercise,[91] or inadequate food.[92] Thus the actual experience of living in solitary confinement becomes diminished due to the artificial focus on a single deprivation.

A further problem with the "sufficiently serious" standard is that it is at odds with another test for harm in Eighth Amendment cases alleging excessive force by prison officials. The Court has held in such cases that proof of "significant injury" is not required.[93] The claimant need only show that the harm was not *de minimis*.[94] The Court explained its rationale for the different tests in *Hudson*:

> In the excessive force context, society's expectations are different. When prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated . . . This is true whether or not significant injury is evident. Otherwise the Eighth Amendment would permit any physical punishment, no matter how diabolic or inhuman, inflicting less than some arbitrary quantity of injury. Such a result would have been as unacceptable to the drafters of the Eighth Amendment as it is today.[95]

Justices Thomas and Scalia, dissenting, called attention to the inconsistency between the two tests.[96] Justice Thomas questioned the majority's reasoning that "society's standards of decency are not violated by anything short of uncivilized conditions of confinement . . . but are automatically violated by any malicious use of force, regardless of whether it even causes an injury."[97] The justice described the distinction as "puzzling":

> I see no reason why our society's standards of decency should be more readily offended when officials, with a culpable state of mind, subject a

90. Obama v. Burl, 477 Fed. Appx. 409 (8th Cir. 2012) (holding allegations of constant lighting stated claim for violation of Eighth Amendment); *but see* Stewart v. Beard, 417 Fed. Appx. 117 (3d Cir. 2011) (holding constant illumination in solitary confinement unit did not violate the Eighth Amendment).

91. Perkins v. Kansas Dept. of Corr., 165 F.3d 803 (1999) (holding plaintiff housed in administrative segregation stated a claim for violation of the Eighth Amendment by alleging that he was denied outdoor exercise for more than nine months).

92. Prude v. Clarke, 675 F.3d 735 (7th Cir. 2012) (holding that an exclusive diet of "nutriloaf," a "bad-tasting food given to prisoners as a form of punishment" could result in hardship that would violate the Eighth Amendment); *but see* Tyler v. Lassiter, WL 866325, (E.D.N.C. March 3, 2016) (holding that a seven-day "nutraloaf" diet did not create a substantial risk of harm and therefore did not meet the objective test).

93. Hudson v. McMillian, 503 U.S. 1 (1992).

94. *Id.* at 9-10.

95. *Id.*

96. The dissenting justices would instead have required proof of significant injury.

97. *Hudson*, 503 U.S. at 25 (Thomas, J., dissenting).

> prisoner to a deprivation on one discrete occasion than when they subject him to continuous deprivations over time. If anything, I would think that a deprivation inflicted continuously over a long period would be of greater concern to society than a deprivation inflicted on one particular occasion.[98]

The dissenting opinion highlights the artificial nature of the objective test for which there is no basis in the text of the Eighth Amendment. However, it would seem that there is equally no basis for the result advocated by the dissent. While the Amendment should be interpreted consistently, it should not obstruct legitimate claims of cruel and unusual punishment arising from prison conditions.[99]

2. Deliberate Indifference

The deliberate indifference test originated from a case challenging the adequacy of medical treatment provided to people in prison. In *Estelle v. Gamble*, the Court held that to state a violation of the Eighth Amendment in relation to medical treatment, incarcerated people must "allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs."[100] The Court remarked that only deliberate indifference offends "evolving standards of decency."[101] In a dissenting opinion, Justice Stevens criticized the imposition of subjective motivation as the criterion for determining whether cruel and unusual punishment had been inflicted.[102] He considered that the constitutional standard should be based on the character of the punishment and not the motivation of the individual who inflicted it.[103]

In *Whitley v. Albers*, the Court reasoned that deliberate indifference was an appropriate standard in claims involving medical treatment because it could "typically be established or disproved without the necessity of balancing competing institutional concerns for the safety of prison staff or other inmates."[104] Nevertheless, in *Wilson v. Seiter*, the same standard was extended to claims regarding prison conditions despite the fact that such conditions are often justified on the basis of institutional concerns.

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98. *Id.*

99. *See* William J. Brennan, Jr., *supra*, note 1, at 498 ("a solution that shuts the courthouse door in the face of the litigant with a legitimate claim for relief, particularly a claim of deprivation of a constitutional right, seems to be not only the wrong tool but also a dangerous tool for solving the problem.").

100. Estelle v. Gamble, 429 U.S. 97, 104 (1976).

101. *Id.* at 106.

102. *Id.* at 116 (Stevens, J., dissenting).

103. *Id.*

104. Whitley v. Albers, 475 U.S. 312, 320 (1986).

In defining "punishment," the majority in *Wilson* reasoned that "if the pain is not formally meted out as punishment by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer."[105] The Court referred to Judge Posner's definition of punishment in *Duckworth v. Franzen* to support its reasoning:

> The infliction of punishment is a deliberate act intended to chastise or deter. This is what the word means today; it is what it meant in the eighteenth century . . . [I]f a guard accidentally stepped on [a] prisoner's toe and broke it, this would not be punishment in anything remotely like the accepted meaning of the word.[106]

Duckworth v. Franzen concerned a fire on an Illinois Department of Corrections bus that was transporting people to different prisons.[107] Thirty-five passengers were handcuffed and chained together on the bus when it caught fire.[108] Only one person managed to get off the bus, and he was subsequently pushed back inside by a prison guard.[109] One person died in the fire and others suffered serious injuries.[110] Judge Posner held that a reasonable and properly instructed jury could not have found the prison officials' behavior to be punishment because there was no evidence of either deliberate or reckless infliction of suffering.[111]

i. Definition of Punishment

The *Wilson* Court's narrow definition of "punishment" as constituting only the specific penalty imposed by statute or the sentencing judge ignores the reality that prison conditions are part of the punishment of incarceration. Justice Blackmun, in his concurring opinion in *Farmer v. Brennan*, took the same view, observing that "[t]he Court's unduly narrow definition of punishment blinds it to the reality of prison life."[112] That definition also disregards the interpretation of the English Bill of Rights that prohibited punishments not authorized by statute or by the sentencing judge. Moreover, it is at odds with the reasoning of *Hutto v. Finney*, where the Court recognized that solitary confinement "is a form of punishment subject

105. *Wilson*, 501 U.S. at 300.
106. Duckworth v. Franzen, 780 F.2d 645, 652 (7th Cir. 1985), *cert. denied*, 479 U.S. 816 (1986).
107. *Id.* at 648.
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.* at 652-53.
112. Farmer v. Brennan, 511 U.S. at 855 (Blackmun, J., concurring).

to scrutiny under Eighth Amendment standards."[113] Finally, the interpretation is inconsistent with decisions outside the Eighth Amendment context. For example, in *Griffin v. Wisconsin*, a Fourth Amendment case, the Court referred to solitary confinement as a form of punishment.[114]

Other federal courts have held that penological justifications for conditions of confinement are relevant to whether those conditions violate the Eighth Amendment.[115] Absent a "legitimate penological purpose for a prison official's conduct, courts have 'presumed malicious and sadistic intent.'"[116] Yet that doctrine is defeated because of courts' deference to the decisions of prison officials. Close examination is rarely given to the asserted justification that solitary confinement is necessary to maintain order and institutional safety.[117]

ii. Conditions of Confinement

The application of the deliberate indifference test to cases involving prison conditions is problematic because, unlike those relating to medical treatment, these cases do not always involve identifiable prison officials to whom this mental element can be attributed.[118] This was recognized by Judge Posner when he criticized the term "deliberate indifference," labeling it "not self-defining."[119] Judge

113. *Hutto*, 437 U.S. at 685.

114. Griffin v. Wisconsin, 483 U.S. 868, 874 (1987).

115. Grenning v. Miller-Stout, 739 F.3d 1235, 1250 (9th Cir. 2014) ("the precise role of legitimate penological interests is not entirely clear in the context of an Eighth Amendment challenge to conditions of confinement," but "the existence of a legitimate penological justification has, however, been used in considering whether adverse treatment is sufficiently gratuitous to constitute punishment for Eighth Amendment purposes.").

116. Wood v. Beauclair, 692 F.3d 1041, 1050 (9th Cir. 2012) (quoting Giron v. Corr. Corp of Am., 191 F.3d 1281, 1290 (10th Cir. 1999)).

117. *See, e.g.* Silverstein v. Fed. Bureau of Prisons, 559 Fed. Appx. 739, 762 (10th Cir. 2014) ("While Mr. Silverstein's thirty-year duration in segregated confinement is an extraordinary length of time, we defer to the [Bureau of Prisons'] judgment that accommodating [his] demands by releasing him into the open prison population or transferring him to a less secure facility would impair its ability to protect all who are inside the prison's walls … [T]he [Bureau of Prisons] has had to strike a delicate balance between reducing the restrictions imposed on Mr. Silverstein … and its legitimate security concerns in ensuring the security of all who come in contact with Mr. Silverstein, as well as his own security, by keeping him in segregated confinement. This is a considered choice for which we should not substitute our judgment."); Talib v. Gilley. 138 F.3d 211 214 (5th Cir. 1998) (holding prison officials had a legitimate penological interest in requiring people in lockdown to kneel on the floor with their hands behind their backs before they were served meals in their cells.).

118. Wilson v. Seiter, 510 U.S. at 310 (White, J., concurring) ("Inhumane prison conditions often are the result of cumulative actions and inactions by numerous officials inside and outside a prison, sometimes over a long period of time. In these circumstances, it is far from clear whose intent should be examined … In truth, intent is simply not very meaningful when considering a challenge to an institution such as a prison system.")

119. Duckworth v. Franzen, 780 F.2d 645, 652 (7th Cir. 1985).

Posner added that, "[i]ndeed, like other famous oxymorons in law—'all deliberate speed' for example, or 'substantive due process'—it evades rather than expresses precise meaning."[120]

In light of these problems, scholars have suggested that deliberate indifference, or actual awareness, of risk of harm could be imputed to prison officials by a showing of the scientific evidence that actual harm exists.[121] The Fourth Circuit took this approach in *Porter v. Clarke*, where it held that prison officials were deliberately indifferent to the "substantial risk of serious psychological and emotional harm" from the long-term solitary confinement conditions of people on death row in Virginia.[122] The court pointed to the "extensive scholarly literature describing and quantifying the adverse mental health effects of prolonged solitary confinement" as "evidence that the risk of such harm 'was so obvious that it had to have been known.'"[123] It agreed with the lower court's finding that "it would defy logic" to suggest that prison officials were unaware of the potential harm that could be caused by lack of human interaction.[124] Knowledge could also be imputed to prison officials in light of legislative findings in preambles to reform bills which expressly recognize the harm caused by solitary confinement.[125]

An alternative to imputing knowledge to prison officials is simply to remove the subjective test altogether.[126] Such an approach finds support in the concurring opinion in *Rhodes*, adopting the view that when determining whether prison conditions are cruel and unusual, the "touchstone is the effect upon the imprisoned."[127] The *Rhodes* concurrence cited *Laaman v. Helgemoe*, which held that when "the cumulative impact of the conditions of incarceration threatens the physical, mental, and emotional health and well-being of the inmates and/or creates a probability of recidivism and future incarceration," the conditions violate the Constitution.[128] If the Eighth Amendment inquiry is focused on the effect of any given condition on the incarcerated person, then the mindset of officials would be irrelevant. To be sure, for such a test to be truly effective, the "totality of

120. *Id.*

121. *See, e.g.*, Christine Rebman, *The Eighth Amendment and Solitary Confinement: The Gap in Protection from Psychological Consequences* 49 DEPAUL L. REV. 567, 618-19 (2000).

122. 923 F.3d 348, 364 (4th Cir. 2019).

123. *Id.* (quoting Makdessi v. Fields, 789 F.3d 126, 136 (4th Cir. 2015)).

124. *Id.* (citing Porter v. Clarke, 290 F.Supp.3d 518, 532 (E.D. Va. 2018)).

125. *See, e.g.*, Sen. Con. Res. 161, 30th Leg., Reg. Sess. (Haw. 2020).

126. *See, e.g.*, Elizabeth Bennion, *supra*, note 27, at 773.

127. Rhodes v. Chapman, 452 U.S. at 364 (1981) (Brennan, J., concurring) (quoting Laaman v. Helgemoe, 437 F. Supp. 269, 323 (D.N.H. 1977)).

128. *Id.* at 364.

conditions" rule would also require revision to reflect the realities of prison life. The touchstone test might be criticized as opening the floodgates of litigation relating to prison conditions. However, other barriers to Eighth Amendment challenges of prison conditions, discussed in the next Section, would prevent frivolous litigation. In any event, the contours of the constitutional prohibition against cruel and unusual punishment should not be determined by concerns about courts' workloads.[129]

B. Barriers to Relief

Limitations on filing and pursuing federal challenges to prison conditions present further difficulties for incarcerated people. These limitations are particularly onerous on people in solitary confinement due to their isolation and vulnerability.

1. Prison Litigation Reform Act

Enacted in 1996, the PLRA imposed a set of barriers on incarcerated people that drastically limits their access to the federal courts. The PLRA bars recovery of damages for mental and emotional harm without a prior showing of physical injury;[130] limits actions by indigent people seeking to proceed *in forma pauperis;* and requires the exhaustion of administrative remedies before commencement of court proceedings.[131] It also limits the scope of relief that courts can order when a violation of rights is established with respect to prison conditions.[132]

i. Bar on Recovery for Mental and Emotional Injury

One of the limitations created by the PLRA that is particularly problematic for people in solitary confinement is that imposed by 42 U.S.C. § 1997e(e), which bars recovery for mental or emotional injury without a prior showing of physical injury or the commission of a sexual act. The statute does not define "physical injury," "mental injury," or "emotional injury."

129. *See* Hudson v. McMillian, 503 U.S. 1, 15 (1992) (Blackmun, J., concurring) ("Perhaps judicial overload is an appropriate concern in determining whether statutory standing to sue should be conferred on certain plaintiffs …. But this inherently self-interest concern has no appropriate role in interpreting the contours of a substantive constitutional right.").

130. 42 U.S.C. § 1997e(e).

131. 42 U.S.C. § 1997e(a).

132. 18 U.S.C. § 3626.

The courts have held that § 1997e(e) does not preclude all remedies for mental and emotional injuries suffered while in custody; it merely bars compensatory damages. In *Zehner v. Trigg*, the Seventh Circuit dismissed a claim for damages for mental and emotional injuries suffered as a result of exposure to asbestos insofar as it sought damages, because compensatory damages are not available under § 1997e(e).[133] The court conceded that an injunction was of little value to the plaintiffs because it could not "save them from the fear that they might one day become ill," and "if these plaintiffs are to be compensated for that fear at all, it must be by damages."[134] However, Congress had decided that damages for such harm should not be awarded, and the court ruled that the statute was constitutional.[135] Other courts have indicated that nominal and punitive damages and declaratory relief are not barred by § 1997e(e).[136]

Imposing an even greater obstacle to relief for people in solitary confinement, courts have held that physical injuries arising from psychological harm do not overcome the bar imposed by § 1997e(e).[137] In *Davis v. District of Columbia*, the D.C. Circuit upheld the dismissal of a claim by a man whose HIV-positive status was disclosed to other incarcerated people without his consent.[138] Mr. Davis claimed mental and emotional harm, and in addition, that he had suffered weight loss, loss of appetite, and insomnia after the unauthorized disclosure. The court rejected the suggestion that these symptoms constituted a physical injury, holding that the statute required that physical injuries arise prior to the mental or emotional harm.[139] In reaching this conclusion, the court noted that the "statutory purpose of discouraging frivolous suits preclude[s] reliance on the somatic manifestations of emotional distress Davis alleges."[140]

Because proof of mental or emotional injury is not required to establish an Eighth Amendment violation, § 1997e(e) does not bar all challenges to solitary confinement. In *Waters v. Andrews*, the District Court for the Western District of New York dismissed prison officials'

133. 133 F.3d 459, 462 (7th Cir. 1997).

134. *Id.*

135. *Id.* at 463.

136. *See, e.g.*, Waters v. Andrews, 2000 WL 16111126 (W.D.N.Y. Oct. 16, 2000) (citing Allah v. Al-Hafeez, 226 F.3d 247 (3d Cir. 2000) (holding that § 1997e(e) did not bar First Amendment claim for punitive and nominal damages); Horne v. Coughlin, 191 F.3d 244, 250 (2d Cir. 1999) (noting availability of injunctive relief for constitutional challenge to prison regulation), *cert. denied*, 120 S. Ct. 594 (1999)).

137. *See, e.g.*, Davis v District of Columbia, 158 F.3d 1342 (D.C. Cir. 1998); Todd v. Graves, 217 F. Supp. 2d 958, 960 (S.D. Iowa 2002); Herman v. Holiday, 238 F.3d 660 (5th Cir. 2001).

138. 158 F.3d 1342 (D.C. Cir. 1998).

139. *Id.* at 1349.

140. *Id.*

application for summary judgment on this basis.[141] Moreover, the court held that there was a question of material fact as to whether conditions in solitary confinement constituted a "physical injury" so as to overcome the bar imposed by § 1997e(e).[142] The plaintiff in *Waters* had been strip-searched, placed in an isolation cell, and given a thin, translucent paper gown which did not fully conceal her body.[143] She had no undergarments, personal hygiene items, toilet paper, or a replacement gown, and her request for a shower was denied.[144] The cell was dirty, and the mattress was blood-stained and smelled of urine.[145] The court concluded that a reasonable jury could find that exposure to noxious body odors and "dreadful conditions of confinement" amounted to physical injury.[146]

ii. Exhaustion of Remedies

Another burdensome component of the PLRA is the requirement in § 1997e(a) that all available administrative remedies be exhausted before challenging prison conditions in federal court. Prior to the enactment of this provision, courts could stay actions brought by incarcerated people for up to 180 days while "plain, speedy, and effective administrative remedies" were exhausted.[147] The PLRA "invigorated the exhaustion prescription" by mandating exhaustion of *all* available remedies and removing the requirement that such remedies be plain, speedy, or effective.[148]

The exhaustion requirement "invites technical mistakes resulting in inadvertent non-compliance . . . and bar[s] litigants from court because of their ignorance and uncounseled procedural errors."[149] Given the complexity of administrative processes, incarcerated people are certainly not encouraged to pursue them. Indeed, by doing so, they face the risk of retaliation which in turn can result in their spending more time in solitary confinement.[150]

141. 2000 WL 16111126 (W.D.N.Y. 2000).

142. *Id.* at *1.

143. *Id.* at *2.

144. *Id.*

145. *Id.*

146. *Id.* at *8.

147. Civil Rights of Institutionalized Persons Act, 94 Stat. 352 (1980), as amended, 42 U.S.C. § 1997e (1994 ed.).

148. Porter v. Nussle, 534 U.S. 516, 524 (2002).

149. John Boston, *The Prison Litigation Reform Act: The New Face of Court Stripping*, 67 BROOK. L. REV. 429, 431 (2001).

150. John Boston, *supra*, note 149, at 429, n. 7 ("One of the dirty secrets of American corrections is the persistence of secret threats and retaliation against prisoners who complain about their treatment, including those who use the grievance systems that the PLRA has now made mandatory. Despite the

iii. Actions in Forma Pauperis

The PLRA limits the extent to which indigent people in prison can pursue litigation without paying filing fees. Unlike most plaintiffs, incarcerated people who are granted *in forma pauperis* status are not exempt from paying court fees.[151] The PLRA instead imposes on them partial payment obligations calculated with reference to the balance in their prison accounts.[152] Court costs cannot be discharged in bankruptcy.[153] Such restrictions affect all incarcerated people, but they are especially burdensome for people in solitary confinement who are seldom able to get prison jobs.[154]

The PLRA imposes a three-strikes provision which prohibits incarcerated people from bringing lawsuits *in forma pauperis* if they have already brought three actions or appeals that have been dismissed for being frivolous or malicious or failing to state a claim.[155] Dismissal on any of these grounds, even if an appeal of the dismissal is pending, counts as a strike.[156] It is uncertain whether failure to exhaust all administrative remedies counts as a strike; courts have arrived at different conclusions given the opacity of internal administrative procedures.[157] The resulting confusion comes at the expense of incarcerated people, who must decide whether to risk pursuing litigation and accruing a strike in the absence of any clear guidance.

iv. Narrowly Drawn Relief

The PLRA limits the relief that federal courts can grant in civil actions relating to prison conditions so that relief must be narrowly drawn and extend no further than necessary to correct the violation of the right.[158] The relief must be the least intrusive means necessary to correct the violation, and courts are required to give substantial weight to "any adverse impact on public safety or the operation of a criminal

enormous difficulty of proving this kind of claim, there is a steady stream of court and jury findings documenting such actions.").

151. 28 U.S.C. § 1915(b)(1) and (2).

152. *Id*.

153. 11 U.S.C. § 523(a)(17).

154. John Boston, *supra*, note 149, at 433.

155. 28 U.S.C. § 1915(g).

156. Coleman v. Tollefson, 575 U.S. 532, 135 S.Ct. 1759, 1763 (2015).

157. Anderson v. Jutzy, 175 F. Supp. 3d 781 (E.D. Mich. 2016) (holding that failure to exhaust administrative remedies did not count as a "strike" under 28 U.S.C. § 1915(g)); *but see* White v. Lemma, 947 F.3d 1373 (11th Cir. 2020) (holding prisoner had accrued a "strike" for failure to exhaust administrative remedies).

158. 18 U.S.C. § 3626(a)(1)(A).

justice system" that might result from the relief.[159] Thus, not only do the federal courts afford deference to prison officials during the course of litigation in determining whether there was a violation, but they must also defer to officials' judgments about safety and operational matters when determining the scope of relief.

This provision limits not only preliminary injunctive relief but also settlements and consent decrees. If a court decides to make a release order, the statute requires that a three-judge panel be convened.[160] The panel must be satisfied that a release order is necessary because overcrowding is the primary cause of the violation, and no other relief will remedy the violation.[161] No release order can be made unless the court has previously entered an order for less intrusive relief that has failed to remedy the violation, and the department of corrections has had a reasonable amount of time to comply with that prior order.[162]

In *Brown v. Plata*, the Supreme Court upheld such an order in a five-four decision.[163] That case concerned overcrowding in California's prisons, which had operated at nearly 200% capacity for over eleven years.[164] A three-judge panel ordered the state to reduce the prison population to 137.5% of the prisons' capacity. Describing the overcrowding in the state's prisons as "exceptional," a majority of the Supreme Court affirmed the reduction order, observing that people were "crammed into spaces neither designed nor intended" to house them.[165] The order was made after the governor had already declared a state of emergency in the prisons, and it followed previous failures to comply with remedial orders entered by the district court to address Eighth Amendment violations.[166] While the order required the state to reduce capacity to 137.5% within two years, the state submitted a proposed plan that would achieve the required reduction over five years.[167] This proposal was rejected, although the Supreme Court suggested that the three-judge panel give "serious consideration" to other modifications proposed by the state.[168]

The *Plata* litigation encapsulates the ways in which federal jurisprudence and statutes combine to prolong challenges to prison conditions and ultimately delay meaningful improvements for as long

159. 18 U.S.C. § 3626(a)(1)(A).
160. 18 U.S.C. § 3626(a)(3)(C).
161. 18 U.S.C. § 3626(a)(3)(E).
162. 18 U.S.C. § 3626(a)(3)(A).
163. 563 U.S. 493 (2011).
164. *Id.* at 502.
165. *Id.*
166. *Id.* at 529.
167. *Id.* at 541.
168. *Id.* at 544.

as possible.

2. Qualified Immunity

Qualified immunity presents another barrier to meaningful relief for people seeking to hold prison officials accountable for constitutional violations. If it is raised by prison officials prior to trial, the burden then shifts to the prisoner to establish lack of immunity.[169] The qualified immunity test imposes a "heavy two-part burden."[170]

A recent Supreme Court decision illustrates the application of qualified immunity in a case concerning conditions of confinement. In *Taylor v. Riojas*, the Court overturned a Fifth Circuit decision granting qualified immunity to prison officials who placed a man in "a pair of shockingly unsanitary cells."[171] One of the cells was covered in human feces and the other was "frigidly cold . . . [and] equipped with only a clogged drain in the floor to dispose of body wastes."[172] Mr. Taylor was forced to sleep naked on the floor, which was covered in sewage.[173]

In the Fifth Circuit, the court explained that, to overcome the qualified immunity defense, Mr. Taylor had to show, first, that the officials violated his right to be free from cruel and unusual punishment, and second, that this right was clearly established at the time of the violation.[174] The court found that the first part of the test had been met given the "paltry conditions" of the cells which exposed him to a substantial risk of harm and denied him a minimal civilized measure of life's necessities.[175] Nevertheless, the court found that Mr. Taylor failed on the second part because the right to be exempt from such conditions was not clearly established at the time of the violation.[176] The court reasoned that "Taylor stayed in his extremely dirty cell for only six days. Though the law was clear that prisoners couldn't be housed in cells teeming with human waste for months on end . . . we hadn't previously held that a time period so short violated the Constitution."[177] The Fifth Circuit held that the prison officials were entitled to qualified immunity because the lack of established

169. Brown v. Callahan, 623 F.3d 249, 253 (5th Cir. 2010).

170. Grissom v. Roberts, 902 F.3d 1162, 1167 (10th Cir. 2018) (citing Casey v. W. Las Vegas Indep. School Dist., 473 1323, 1327 (10th Cir. 2007)).

171. Taylor v. Riojas, 141 S. Ct. 52 (2020).

172. *Id.* at 53.

173. *Id.*

174. Taylor v. Stevens, 946 F.3d 211 (5th Cir. 2019).

175. *Id.* at 222.

176. *Id.*

177. *Id.*

precedent had deprived them of fair warning that the specific acts were unconstitutional.[178]

The Supreme Court disagreed. It held that "no reasonable correctional officer could have concluded that, under the extreme circumstances of this case, it was constitutionally permissible to house Taylor in such deplorably unsanitary conditions for such an extended period of time."[179] It went on to state that "any reasonable officer should have realized that Taylor's conditions of confinement offended the Constitution."[180] In so reasoning, the Court rejected the Fifth Circuit's reliance on the specific period of time in which Mr. Taylor was held in these conditions as the basis for granting qualified immunity and focused instead on the egregious conditions in which he was held. *Taylor* is significant because it signals a move away from the practice adopted by federal courts to date of requiring specific, similar facts—here, the precise period of confinement in squalid conditions—in order to give rise to a clearly established right.

In cases concerning solitary confinement that do not involve quite the same appalling conditions to which Mr. Taylor was subjected, it remains to be seen whether the requirement of a "clearly established right" will continue to favor prison officials. To date, courts have imposed a high standard to show that a right is clearly established. For example, in *Grissom v. Roberts*, the Tenth Circuit granted qualified immunity to prison officials in a case involving a man who had been in solitary confinement for twenty years.[181] Although Mr. Grissom cited four federal cases that recognized that the harm of long-term solitary confinement could violate the Eighth Amendment, the court held these cases were insufficient to show a "clearly established right" because none of them were decided by the Tenth Circuit or the Supreme Court.[182]

III. STATE CONSTITUTIONS AND JURISPRUDENCE

Though many state courts have followed federal jurisprudence, state constitutional provisions and judgments nevertheless provide alternative avenues for challenging solitary confinement. While scholars have examined the jurisprudence of particular states regarding individual rights, and some have discussed the state constitutional rights of incarcerated people, there has been less attention paid to the

178. *Id.*

179. Taylor v. Riojas, 141 S. Ct. 52, 53 (2020).

180. *Id.* at 54.

181. 902 F.3d 1162 (10th Cir. 2018).

182. *Id.* at 1174.

potential these rights offer for challenges to solitary confinement.[183]

A. The Role of State Courts

In 1973, Ohio's Eighth District Court of Appeals recognized that state courts serve an important function in articulating the rights of incarcerated people. In *In Re Lamb*, the court held that placing incarcerated people in "punitive detention" (a form of solitary confinement) violated the Ohio Constitution and the Fifth and Fourteenth Amendments of the U.S. Constitution.[184] The court observed that "primary responsibility for the delineation of prisoners' rights in state and local custodial institutions ought properly to fall upon the state judiciary."[185] The court went on to explain that:

> [I]t is both eminently sensible and infinitely less strain on the delicate balance of federal-state relations in the administration of our federal system of criminal justice to posit such primary responsibility on the state judiciary. Rather than viewing the state judicial system as a delaying but necessary obstacle to be overcome in the exhaustion of state remedies before the consideration of federal constitutional questions is undertaken in the federal courts, . . . it is especially important that both prisoners and prison administrators recognize that the conflict between prison disciplinary action and prisoners' constitutional rights will receive careful scrutiny in the first instance at the state, as well as the federal level.[186]

The court characterized "the failure of the state courts to come to grips with problems in their own custodial institutions" as "astonishing."[187] Due to their role in sentencing, state courts "cannot evade their continuing responsibility to protect [prisoners'] basic rights after conviction."[188] Although the court did not conduct separate analyses

183. See, e.g., Richard P. Bullock, *The Declaration of Rights of the Louisiana Constitution of 1974: The Louisiana Supreme Court and Civil Liberties*, 51 LA. L. REV. 787 (1991); Matthew Clifford & Thomas Huff, *Some Thoughts on the Meaning and Scope of Montana's "Dignity" Clause with Possible Applications*, 61 MONT. L. REV. 301 (2000); Caroline Davidson, *State Constitutions and the Humane Treatment of Arrestees and Pretrial Detainees*, 19 BERKELEY J. CRIM. L. 1 (2014); Lee Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 LA. L. REV. 1 (1974); David C. Hawkins, *Florida Constitutional Law: 1990 Survey of the State Bill of Rights*, 15 NOVA. L. REV. 1049 (1991); Linda Hemphill, *Challenging Conditions of Confinement: A State Constitutional Approach*, 20 WILLAMETTE L. REV. 409 (1984); Robert Keiter, *An Essay on Wyoming Constitutional Interpretation*, 21 LAND & WATER L. REV. 527 (1986); Louis Jenkins, *The Declaration of Rights*, 21 LOY. L. REV. 9 (1975); Robert W. Lough, *Tennessee Constitutional Standards for Conditions of Pretrial Detention: A Mandate for Jail Reform*, 48 TENN. L. REV. 688 (1981); James G. McLaren, *The Meaning of the Unnecessary Rigor Provision in the Utah Constitution*, 10 B.Y.U. J. PUB. L. 27 (1996).

184. 296 N.E. 2d 280 (Ohio Ct. App. 1973).

185. *Id.* at 285.

186. *Id.*

187. *Id.* at 284-285.

188. *Id.* at 285.

of the state and federal provisions that were allegedly violated, it concluded that the petitioners had been illegally held in solitary confinement in violation of both the Ohio and U.S. Constitutions.[189]

The Ohio court's recognition of the need for state courts to take "primary responsibility" for defining the constitutional rights of incarcerated people has been recognized elsewhere. In 1977, Justice Brennan wrote that "state courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law."[190] Justice Brennan suggested that state courts were increasingly "construing state constitutional counterparts of provisions of the Bill of Rights as guaranteeing . . . even more protection than the federal provisions, even those identically phrased."[191] He linked state courts' expanding recognition of these rights with the Supreme Court's turn away from protecting individual rights.[192] In Justice Brennan's view, the Supreme Court's decisions on individual rights are not "mechanically applicable to state law issues, and state court judges and the members of the bar seriously err if they so treat them."[193]

In line with Justice Brennan's comments, many state courts have recognized that their constitutions need not be interpreted in the same manner as the Federal Constitution. In *State v. Rizzo*, the Connecticut Supreme Court held that the state's constitution may offer greater protection of individual rights than the Federal Constitution, subject to six factors: (1) persuasive federal precedents, (2) the text of the relevant provision of the state constitution, (3) the intent of the drafters of the constitution, (4) related state precedents, (5) persuasive precedents from other state courts, and (6) current understanding of economic and sociological norms or public policies.[194] The Washington Supreme Court also looks to textual differences and

189. *Id.* at 288.

190. William J. Brennan, Jr., *supra* note 1, at 491. *See also* Prock v. District Court of Pittsburg County, 630 P.2d 772, 779 (Okla. 1981) (quoting Case v. Nebraska, 381 U.S. 336, 345-346 (1965) (Brennan, J., concurring) "None can view with satisfaction the channeling of a large part of state criminal business to federal trial courts. If adequate state procedures, presently all too scarce, were generally adopted, much would be done to remove the irritant of participation by federal district courts in state criminal procedure.") The court in Prock observed that "This observation is equally apropos with respect to prison discipline cases. Judicial lethargy is unlikely to help the state solve whatever problems may still exist in its penal system." *Id.*

191. *Id.* at 495.

192. *Id.*

193. *Id.* at 502.

194. State v. Rizzo, 833 A.2d 363, 391 (Conn. 2003) (citing City Recycling, Inc. v. State, 778 A.2d 77 (Conn. 2001)).

matters of particular state interest in ruling on the scope of constitutional protections.[195] These approaches give state courts ample latitude to interpret state constitutions to improve conditions in solitary confinement, or even restrict or eliminate the practice altogether.

B. Prohibitions of Cruel and Unusual Punishment

Forty-seven state constitutions contain some form of prohibition against cruel and unusual punishment.[196] Some courts have held that state provisions offer greater protection than the Eighth Amendment, though the parameters are rarely specified with precision. In other cases, state courts have simply adopted the federal two-part test applied in Eighth Amendment jurisprudence.

1. State Provisions that Differ from the Eighth Amendment

The Indiana Supreme Court has recognized that "the language of each provision of the Constitution must be treated with particular deference, as though every word had been hammered into place."[197] Presumably other state courts apply the same attention to the wording of their own constitutions. Nevertheless, most of the states whose constitutions are worded differently from the Eighth Amendment have not actually reached decisions concerning the rights of incarcerated people that differ from those of the federal courts.

Louisiana's Constitution prohibits laws that subject any person to "torture . . . , cruel, excessive, or unusual punishment."[198] Interpretations of this provision have largely focused on the meaning of "excessive punishment," which is broader than the prohibition on "excessive fines" in Louisiana's previous constitution.[199] In *State v. Sepulvado*, the Supreme Court of Louisiana held that "the deliberate inclusion of a prohibition against 'excessive' as well as 'cruel and unusual' punishment adds an additional constitutional dimension to

195. State v. Gunwall, 720 P.2d 808, 811 (Wash. 1986) (the court considers "(1) the textual language; (2) differences in the text; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern.").

196. State v. Gardner, 947 P.2d 630, 636, n.5 (Utah 1997) ("A prohibition against cruel and unusual punishment appears in forty-four of the fifty state constitutions as well as the Constitution of the United States, and similar prohibitions appear in three others . . . Only the constitutions of Connecticut, Illinois, and Vermont do not contain a guarantee that cruel and unusual punishments shall not be inflicted.").

197. City Chapel Evangelical Free Inc. v. City of South Bend ex rel. Dept. of Redevelopment, 744 N.E. 2d 443 (Ind. 2001) (quoting McIntosh v. Melroe Co., 729 N.E.2d 972 (Ind. 2000) (Dickson, J., dissenting)).

198. LA. CONST., art. I, § 20.

199. LA. CONST., art. I, § 12 (1921).

judicial imposition and review of sentences."[200] Louisiana courts have reviewed sentences for alleged excessiveness since *Sepulvado*.[201]

Though Louisiana's prohibition of torture has not been tested in any challenge to solitary confinement, that provision is more relevant to the practice than the excessive sentences the courts did review. The reference to torture was new to the 1974 constitution. Its predecessor prohibited only "treatment designed . . . to compel confession of crime."[202] The current constitution was initially drafted to prohibit "cruel, unusual or excessive *treatments*" but the word "treatments" was removed "not because of any concern related to questioning procedures or punishment but because of fear that it might be construed as preventing physicians from using novel or unusual methods."[203] A member of the Louisiana House of Representatives wrote in 1975 that the prohibition against torture "outlaws virtually all forms of corporal punishment and treatment . . . Clearly this forbids some methods of administering the death penalty, *long periods of confinement in isolation*, highly restrictive diets, forced administration of drugs and, of course, physical abuse of all sorts."[204] Nevertheless, there has been no holding by a court that solitary confinement violates the prohibition against torture under the Louisiana Constitution.

In the Maryland Constitution, the relevant provision is entitled "Avoidance of . . . Cruel and Unusual Punishment," but the provision itself states that "no Law to inflict cruel and unusual *pains and penalties* ought to be made."[205] Despite the different wording, the Court of Special Appeals of Maryland held in *Walker v. State* that the Eighth Amendment and the state provision are *in pari materia* because "both of them were taken virtually verbatim from the English Bill of Rights of 1689."[206] The court has not addressed whether the phrase "pains and penalties" could be interpreted differently from the federal courts' restrictive definition of the word "punishment." The fact that both provisions derive from the same source should not preclude a different interpretation of Maryland's provision, particularly because the English provision sought to prohibit punishments not authorized

200. 367 So. 2d 762, 764 (La. 1979).

201. *See, e.g.*, State v. Perry, 610 So.2d 746 (La. 1992) (holding death penalty for person found guilty but mentally ill not constitutionally excessive); State v. Hamdalla, 126 So.3d 19 (La. 2013) (holding sentence of eighty years at hard labor for rape conviction not constitutionally excessive).

202. LA. CONST., art. I, § 11 (1921).

203. Lee Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 LA. L. REV. 1, 63 (1974), citing *Committee Proposal 25*, § 18 *in* Calendar of the Constitutional Convention of 1973 of the State of Louisiana (emphasis added).

204. Louis Jenkins, *The Declaration of Rights*, 21 LOY. L. REV. 9, 38-39 (1975).

205. MD. CONST. art. 16 (emphasis added).

206. 452 A.2d 1234, 1240 (Md. Ct. Spec. App. 1982).

by statute or the sentencing judge. In contrast, the U.S. Supreme Court discarded this requirement through its narrow definition of the word "punishment."

New Hampshire's Constitution does not explicitly prohibit cruel and unusual punishment. It provides that "all penalties ought to be proportioned to the nature of the offense . . . Where the same undistinguishing severity is exerted against all offenses, the people are led to forget the real distinction in the crimes themselves."[207] In interpreting the provision, the courts have focused on proportionality between the offense and the sentence, rather than the character of the punishment. In *State v. Enderson*, the Supreme Court of New Hampshire held that the provision "provides at least as much protection against disproportionate punishment as does the Eighth Amendment."[208] The court determined in *State v. Dayutis* that the Federal Constitution need only be addressed "insofar as federal law would provide greater protection."[209] In that case, a sentence was held to be disproportionate and violate the state constitution, and consequently, the court did not address the federal prohibition.[210] The state's constitutional provision has not been invoked in any challenge to conditions of confinement, although such conditions also raise the question of proportionality.

South Carolina's Constitution states that neither "cruel, *nor corporal,* nor unusual punishment" shall be inflicted.[211] However, the courts have never interpreted that provision differently from the Eighth Amendment and there are few cases in which both the Eighth Amendment and the state prohibition were considered.[212] The lack of case law on the subject is unfortunate because the wording which places the three prohibitions—cruel, corporal, and unusual—on the same footing may suggest a broader interpretation of the term "cruel and unusual" to include forms of punishment other than corporal, such as oppressive conditions.

Examination of these textual differences between the Eighth Amendment and state constitutional provisions relating to cruel and unusual punishment may allow for a closer alignment of court decisions with state constitutions' intended purposes and provide for

207. N.H. CONST. art. 18th.

208. 804 A.2d 448 (N.H. 2002).

209. 498 A.2d 325, 328 (N.H. 1985) (citing State v. Ball, 471 A.2d 351 (N.H. 1983)).

210. *Id.* at 329.

211. S.C. CONST. art. I, § 15.

212. *See, e.g.,* State v. Wilson, 413 S.E.2d 19 (S.C. 1992) ("the use of the disjunctive 'or' rather than 'and' in the South Carolina Constitution is of no importance in this case, since the analysis we employ is the same under both constitutions.").

different interpretations regarding the constitutionality of solitary confinement.

2. State Provisions that Resemble the Eighth Amendment

Paradoxically, some states with provisions similar to the Eighth Amendment have interpreted their constitutions as conferring broader protection against cruel and unusual punishment than the federal provision.

In California, broader protection was accomplished through emphasis on a small difference in wording. The state constitution prohibits "cruel *or* unusual punishment," in contrast to the federal prohibition against "cruel *and* unusual punishment."[213] In *People v. Anderson*, the Supreme Court of California held that the death penalty violated the state constitution and noted that the drafters of the prohibition "modified [it] before adoption to substitute the disjunctive 'or' for the conjunctive 'and' in order to establish their intent that both cruel and unusual punishments be outlawed in [the] state."[214] Likewise, a California appellate court has held that California's provision provides greater protection by prohibiting cruel *or* unusual punishment.[215] As a result, the courts separately assess violations of the state and federal prohibitions.[216] Nevertheless, the courts have never found that a punishment violates the state constitution but not the Federal Constitution.[217] A different interpretation of the state prohibition is precluded by a separate constitutional provision that states that while the rights guaranteed by the state constitution are not dependent on those guaranteed by the Federal Constitution, the right not to suffer cruel or unusual punishment (as well as other rights relating to criminal procedure) "shall be construed by the courts of this State in a manner consistent with the Constitution of the United States."[218]

The Massachusetts Supreme Judicial Court signaled in *Michaud v. Sheriff of Essex Cty* that the rights guaranteed under the state prohibition against cruel or unusual punishments are "at least equally as broad as those guaranteed under the Eighth Amendment."[219] The

213. CAL. CONST. art. I, § 17.

214. 493 P.2d 880, 885 (Cal. 1972).

215. People v. Haller, 94 Cal. Rptr. 3d 846 (Cal. Ct. App. 2009).

216. People v. Baker, 229 Cal. Rptr. 3d 40 (Cal. Ct. App. 2018).

217. In People v. Anderson, 493 P.2d 880 (Cal. 1972), the court held that the death penalty violated the state prohibition against cruel and unusual punishment and thus the court did not need to consider whether it violated the Federal Constitution.

218. CAL. CONST. art. I, § 24.

219. 458 N.E.2d 702, 708 (Mass. 1983).

court affirmed an order holding that unsanitary conditions in a local jail violated both the Eighth Amendment and the Massachusetts Declaration of Rights. The evidence before the court established that the jail's cells did not have flushing toilets or running water. Instead, one bucket (with no lid) was provided for each cell, including those that housed more than one person.[220] The buckets were only emptied once per day, rinsed with cold water, and the odor was described as "unbearable."[221] People confined in the cells ate their meals and slept near the unemptied buckets.[222] The court discussed federal decisions holding that similar conditions violated the Eighth Amendment but went on to acknowledge that these cases were not the sole basis for determining whether the jail's conditions violated standards of human decency.[223] The court held that state regulations imposing "minimum standards of human habitation in prisons" also provided "an objective standard for assessing whether sanitary conditions at the jail fall below minimum standards of decency."[224]

The view that the state constitutional provision is broader than its federal counterpart was also adopted by an appellate court in Michigan in *People v. Benton*, though the issue was tested under the state constitution first. The court held that if a punishment "passes muster under the state constitution, then it necessarily passes muster under the Federal Constitution."[225] Michigan's provision, like those of California and Massachusetts, prohibits "cruel *or* unusual punishments."[226]

Minnesota's Constitution also prohibits "cruel *or* unusual punishments."[227] In *State v. Vang*, the Minnesota Supreme Court held that the difference in language from the Eighth Amendment is "not trivial."[228] In contrast with the approach taken by the U.S. Supreme

220. *Id.* at 703-704.

221. *Id.*

222. *Id.*

223. *Id.* at 705-706 (citing Chavis v. Rowe, 643 F.2d 1281, 1291–1292 (7th Cir.), *cert. denied sub nom.* Boles v. Chavis, 454 U.S. 907 (1981); Kirby v. Blackledge, 530 F.2d 583, 586–587 (4th Cir. 1976); LaReau v. MacDougall, 473 F.2d 974, 978 (2d Cir.1972), *cert. denied*, 414 U.S. 878; Lovell v. Brennan, 566 F. Supp. 672, 695–696 (D. Me. 1983); Griffin v. DeRobertis, 557 F. Supp. 302, 305–306 (N.D.Ill.1983); Strachan v. Ashe, 548 F. Supp. 1193, 1202–1203 (D. Mass. 1982); Flakes v. Percy, 511 F. Supp. 1325, 1332 (W. D. Wis. 1981); Mitchell v. Untreiner, 421 F. Supp. 886, 894 (N. D. Fla. 1976); Bel v. Hall, 392 F. Supp. 274, 276–277 (D. Mass. 1975); Osborn v. Manson, 359 F. Supp. 1107, 1112 (D. Conn. 1973)).

224. *Id.* at 706-707.

225. 817 N.W.2d 599, 607 (Mich. Ct. App. 2011) (citing People v. Nunez, 619 N.W. 2d 550 (Mich. Ct. App. 2000)).

226. MICH. CONST. art. I, § 16 (emphasis added).

227. MINN. CONST. art. I, § 5 (emphasis added).

228. 847 N.W. 2d 248, 263 (Minn. 2014).

Court, the court in *Vang* conducted separate analyses of whether the sentence was cruel or unusual. It first held that the question of cruelty required a comparison of the gravity of the offense with the severity of the sentence.[229] Next, it considered whether the sentence was unusual by asking whether "a consensus exists among the states that the sentence offends evolving standards of decency."[230] A finding that a mandatory sentence of life imprisonment was neither cruel nor unusual led the court to conclude that there was no violation of the state constitution or the Eighth Amendment.[231]

The Constitution of Washington prohibits "cruel punishment" with no reference to unusual punishment.[232] Nevertheless, this provision has been held to provide more protection than the Eighth Amendment. In *State v. Witherspoon*, the Washington Supreme Court reasoned that if a sentence did not violate the "more protective state provision," no analysis of the Eighth Amendment was required.[233]

New York's constitutional provision is identical to the Eighth Amendment.[234] However, the two constitutions were still analyzed separately in a decision by a lower court in a case challenging the capital punishment statute then in effect.[235] In *People v. Hale*, the court first conducted "an interpretive analysis of the constitutional provision in question, focusing on whether the text of the state constitution specifically recognize[d] rights not enumerated in the Federal Constitution."[236] Because the provisions are identical, the court found no reason to interpret the state prohibition differently from the Eighth Amendment.[237] That conclusion was followed by a "non-interpretive" analysis, requiring "judicial perception of sound policy, justice and fundamental fairness."[238] It explored whether any state statute or the common law had defined the right at issue, the history and traditions of the state, evidence that the right was of particular state concern, and state attitudes toward the definition, scope, or protection of the right.[239] The court's non-interpretive analysis also required a review of the state's historical use of the death penalty. The conclusion

229. *Id.* (citing State v. Juarez, 837 N.W. 2d 473, 482 (Minn. 2013)).

230. *Id.*

231. *Id.*

232. WASH CONST. art. I, § 14.

233. 329 P.3d 888, 894 (Wash. 2014) (citing State v. Rivers, 921 P.2d 495 (Wash. 1996) and State v. Fain, 617 P.2d 720 (Wash. 1980)).

234. N.Y. CONST. art. I, § 5.

235. People v. Hale, 661 N.Y.S. 2d 457 (N.Y. Sup. Ct. 1997).

236. *Id.* at 472.

237. *Id.*

238. *Id.* (citing People v. P.J. Video, 501 N.E.2d 556 (N.Y. 1986)).

239. *Id.*

reached, informed by "New York's contemporary values," was that the death penalty did not violate the state constitution.[240]

Tennessee's prohibition against cruel and unusual punishment is also identical to the Eighth Amendment, but the courts have indicated that the state provision may have broader meaning.[241] In *State v. Black*, the Tennessee Supreme Court held that a "more expansive" interpretation of the state provision was not foreclosed merely because the two provisions are "textually parallel."[242] However, after analysis of the death penalty under the state constitution, the court reached a result consistent with decisions of the U.S. Supreme Court and some other state courts, finding that the death penalty did not violate the state constitution.[243]

Though there has not been a finding to date that solitary confinement is cruel and unusual punishment in violation of a state constitution, the state courts' broader interpretations of state constitutions with language similar to the Eighth Amendment may permit a challenge to the practice in the future. Moreover, some state statutes provide that solitary confinement may only be used for the limited purposes of punishment or protection of vulnerable people.[244] State courts might also draw on these provisions to inform the interpretation of prohibitions against cruel and unusual punishment.

C. Requirement of Safe and Comfortable Prisons and Humane Treatment

In contrast to the U.S. Supreme Court's pronouncement that the Federal Constitution "does not mandate comfortable prisons,"[245] Delaware, Kentucky, Tennessee, and Wyoming all have constitutional provisions requiring safe and comfortable prisons and/or the humane treatment of people in prison.[246]

240. *Id.* at 473.

241. TENN. CONST. art. I, § 16.

242. 815 S.W. 2d 166, 188 (Tenn. 1991) (citing California v. Greenwood, 486 U.S. 35, 50, 108 (1988); California v. Ramos, 436 U.S. 992, 1013-1014 (1983); Doe v. Norris, 751 S.W. 2d 834, 838 (Tenn. 1988); Miller v. State, 584 S.W. 2d 758, 760 (Tenn. 1978)).

243. *Id.*

244. ARIZ. REV. STAT. ANN. § 31.271 (West 1983) ("Facilities shall confine more than one person in each cell or room except as strictly necessary *for the purposes of punishment* or the protection of specific prisoners.") (Emphasis added).

245. Rhodes, 452 U.S. 347 (1981).

246. DEL. CONST. art. I, § 11 (". . . in the construction of jails a proper regard shall be had to the health of prisoners"); KY. CONST. § 254 ("The Commonwealth shall maintain control of the discipline, and provide for all supplies, and for the sanitary condition of the convicts . . ."); TENN. CONST. art I, § 32 ("That the erection of prisons, the inspection of prisons, and the humane treatment of prisoners, shall be

The only substantive case law to discuss any of these provisions is a federal court decision from Tennessee. In *Grubbs v. Bradley*, a federal district court held that Tennessee's provision requiring the humane treatment of incarcerated people did not provide any protection beyond that available under the Eighth Amendment.[247] The court determined that the well-established principle, that incarcerated people must have their basic needs met in accordance with evolving standards of decency, was equivalent to the Tennessee provision.[248] This reasoning, however, failed to consider that Tennessee's Constitution has a separate provision prohibiting cruel and unusual punishment so that, taken together, the two provisions support broader rights than are afforded by the Eighth Amendment. Furthermore, although the U.S. Supreme Court has held that the Eighth Amendment does not permit inhumane conditions, such conditions are deemed to violate the Constitution only if they satisfy the two-part test of a sufficiently serious deprivation and deliberate indifference.[249] There is no justification for this test to determine the parameters of a separate provision that calls for the humane treatment of incarcerated people.

Other courts have recognized a requirement to provide humane treatment even in the absence of a constitutional provision like Tennessee's. In 1860, the Michigan Supreme Court implicitly recognized such a right in a case involving the civil confinement of a man in jail for failure to pay a debt.[250] The court declared the conditions to be solitary confinement and observed that people in the jail who had been charged with crimes were treated with less severity than this debtor.[251] While finding that the sheriff of the jail had discretion regarding the treatment of people confined for both criminal and civil offenses, the court held that the discretion was not unlimited. The sheriff's treatment of the man was both illegal and "contrary to every sentiment of justice and humanity."[252] It is uncertain whether the court would have reached this conclusion, however, if the man had been incarcerated for a criminal offense rather than failure to pay a debt.

provided for"); WYO. CONST. art. I, § 16 (". . . The erection of safe and comfortable prisons, and inspection of prisons, and the humane treatment of prisoners shall be provided for").

247. 552 F. Supp. 1052 (M.D. Tenn. 1982).

248. *Id.* at 1125.

249. Farmer v. Brennan, 511 U.S. at 847 (holding that prison officials may be liable under the Eighth Amendment for denying humane conditions of confinement only if they know that the conditions present a substantial risk of harm and they disregard that risk by failing to take reasonable measures to abate it).

250. Leah v. Whitbeck, 151 Mich. 327 (1908).

251. *Id.* at 335.

252. *Id.* at 336.

Though the provision of safe and comfortable prisons and humane treatment might appear to be enhanced by explicit constitutional language, jurisdictions without these provisions have honored the same obligations by interpreting standards of decency with reference to statutes. In *Good v. Comm'r of Corr.*, a case involving a claim that a prison's water supply was contaminated with carcinogens, the Massachusetts Supreme Judicial Court interpreted constitutional standards with reference to regulations concerning the quality of drinking water.[253] Although those regulations were not "constitutionally required," the court held that "they reflect the public attitude that contemporary society's standards of decency include the availability of safe drinking water."[254]

Like Massachusetts, Wisconsin's Constitution does not contain a provision requiring humane treatment of incarcerated people. However, prison wardens, superintendents and officials are required by statute to "uniformly treat the inmates with kindness."[255] The courts have held that this provision, which is entitled "humane treatment and punishment," does not create a private right of action, but merely authorizes various state regulations. It has not been used successfully in any challenge to prison conditions.[256]

To date, no challenge to solitary confinement has been brought in any of the jurisdictions with a constitutional provision requiring safe and comfortable prisons or humane treatment. Nevertheless, given the evidence of harm from solitary confinement, these rights offer a different basis for challenging the practice.

D. Requirement of Reformation and Rehabilitation

Seven state constitutions refer explicitly to reformation or rehabilitation as principles of criminal law and administration.[257] Courts have considered the right to rehabilitation in challenges to prison sentences and in relation to the provision of programs and education in prison.

The right to rehabilitation has been construed narrowly in challenges to the length of sentences. While the Indiana Supreme Court held in *Fointno v. State* that the criminal justice system "must afford an

253. 629 N.E.2d 1321, 1323 (Mass. 1994).

254. *Id.*

255. WIS. STAT. ANN. § 302.08.

256. *See, e.g.*, Lobley v. Yang, 2019 WL 136693 (E.D. Wis. Jan. 8, 2019).

257. ALASKA CONST., art. I, § 12; ILL. CONST., art. I, § 11; IND. CONST., art. I, § 18; MONT. CONST. art. II, § 28; N.H. CONST., pt. 1, art. 18th; OR. CONST., art. I, § 15; WYO. CONST., art. I, § 15.

opportunity for rehabilitation where reasonably possible,"[258] in *Henson v. State* it concluded that the reformation clause applies to the penal code as a whole and provides no basis for challenging the duration of sentences.[259] Though the issue has not been litigated, presumably the same reasoning would extend to challenges to conditions of confinement that result from those sentences.

The Supreme Court of Illinois has held that the state's reformation clause[260] requires that rehabilitation be considered as one objective of sentencing; it will not suffice simply to consider "rehabilitative factors in imposing a sentence."[261] In *People v. Wendt*, the court upheld a sentence of probation to run consecutively with a prison sentence, holding that to prevent this approach would "unnecessarily restrict courts in fashioning a sentence that is aimed at rehabilitat[ion]."[262] In *People v. Thompson*, the court held that a defendant's potential for rehabilitation should not be accorded greater weight at sentencing than the seriousness of the offense.[263] This approach suggests that rehabilitation is regarded as one of many factors to be balanced, rather than an objective of the sentence.

In four states, the right to rehabilitation has informed interpretations regarding prison programs. In *State v. Evans*, the Supreme Court of New Hampshire held that the "recognition of rehabilitation as a *goal* of confinement does not lead inexorably to the conclusion that inmates have a right to rehabilitation."[264] The court overturned an order by a lower court that directed a prison warden to develop a plan for state-funded college-level programs at the prison. Adopting the same deferential approach to prison administrators as the federal courts, it held that the judiciary is "ill-suited to assume the responsibilities of prison administration."[265]

The Oregon Court of Appeals described the reformation clause then in effect as "significant as a hortative philosophical base for Oregon's penal code and correctional programs."[266] The court went on to state that, absent "extraordinary circumstances of cruel and unusual

258. 487 N.E.2d 140, 144 (Ind. 1986).

259. 707 N.E.2d 792, 796 (Ind. 1999).

260. ILL. CONST., art. I, § 11 ("All penalties shall be determined according to the seriousness of the offense and with *the objective of restoring the offender to useful citizenship* . . .") (emphasis added).

261. People v. Wendt, 645 N.E.2d 179 (Ill. 1994).

262. *Id.* at 184.

263. 168 N.E.3d 934, 954 (Ill. App. Ct. 2020).

264. 127 N.H. 501, 504 (1985).

265. *Id.* (citing Procunier v. Martinez, 416 U.S. 396, 404–05, 94 S. Ct. 1800, 1807, 40 L.Ed.2d 224 (1974); Nadeau v. Helgemoe, 561 F.2d 411, 417 (1st Cir.1977); Breedlove v. Cripe, 511 F. Supp. 467, 469 (N.D.Tex.1981)).

266. Kent v. Cupp, 554 P.2d 196, 198 (Or. Ct. App. 1976).

punishment," the judiciary did not have authority to require implementation of rehabilitation programs.[267] As well as recognizing the principle of reformation, Oregon's Constitution requires that all incarcerated people be "actively engaged full-time in work or on-the-job training," with certain exceptions.[268] However, this separate provision does not provide "a legally enforceable right to a job or to otherwise participate in work, on-the-job training or educational programs," [269] and the clause is focused on generating income for prisons rather than addressing the rehabilitative needs of incarcerated people.

On the other hand, Alaska's reformation clause has been held to create an affirmative right to rehabilitation.[270] In *Ferguson v. State, Dep't of Corr.*, the Alaska Supreme Court reasoned that the constitutional reference to reformation is "not a meaningless guarantee; rather, it creates a right to rehabilitation."[271] Therefore, a plaintiff who had been excluded from a prison rehabilitation program could not be barred from the program without due process.[272] In *Rathke v. Corr. Corp. of Am., Inc.*, the court reiterated that holding.[273] The *Rathke* case involved a man who lost his prison job when he was placed in solitary confinement for failing a drug test. He was informed that he would have to pay $45 for the sample to be retested. He was also informed that he would remain in solitary confinement for a further sixty to ninety days while his appeal challenging the drug test was considered.[274] The court found that he had established a colorable claim based on the right to rehabilitation. In *Antenor v. Dep't of Corr.*, the court held that visitation was part of rehabilitation, and telephone contact was a "crucial component of visitation" because families may find "travel to the correctional facility for in-person visitation prohibitively expensive."[275] The case was remanded for further evidence to ascertain whether the price charged for making prison phone calls was unconstitutionally burdensome on the right to rehabilitation.[276]

267. *Id.*

268. OR. CONST., art. I, § 41.

269. OR. CONST., art. I, § 41(3).

270. ALASKA CONST., art. I, § 12 (". . . Criminal administration shall be based upon the following: the need for protecting the public, community condemnation of the offender, the rights of victims of crimes, restitution from the offender, and the *principle of reformation*." (Emphasis added)).

271. 816 P.2d 134, 139 (Alaska 1991).

272. *Id.*

273. 153 P.3d 303, 309 (Alaska 2007).

274. *Id.* at 307.

275. 462 P.3d 1, 15 (Alaska 2020).

276. *Id.*

Though West Virginia's Constitution does not have a reformation or rehabilitation clause, the Supreme Court of Appeals of West Virginia held in *Cooper v. Gwinn* that incarcerated people have a statutory right to rehabilitation which is guaranteed by the Due Process Clause of the West Virginia Constitution.[277] The Department of Corrections was required by statute to "establish, maintain and direct a varied program of education for inmates in all institutions."[278] The Due Process Clause was deemed to require that incarcerated people "enjoy the benefit of this legislatively enacted rule of law."[279] It was evident, the court found, that the legislature required rehabilitation to be a primary goal of the state's correctional system.[280] The evidence established that the Department had not made a "real and substantial effort to implement appropriate rehabilitative programs" at the state's prison for women.[281] The court ordered the Department to consult standards promulgated by the American Correctional Association and the Commission on Accreditation for Corrections and to prepare a plan to implement education, rehabilitation, and treatment programs.[282]

No challenge has yet been asserted to solitary confinement as an infringement on the right to rehabilitation. Recognition of the right to rehabilitation and its application to visitation, as in the case of Alaska, and to prison programs, as in the case of Alaska and West Virginia, would certainly ameliorate some of the sensory deprivation and isolation caused by solitary confinement. Ultimately, it may also be used to invalidate solitary confinement altogether, namely because evidence about the detrimental effect of the practice on life skills and emotional capacity could be used to bolster a claim that the right has been violated.

E. Prohibition of Unnecessary Rigor

Six state constitutions prohibit "unnecessary rigor"[283] or abuse

277. 298 S.E.2d 781, 788-789 (W. Va. 1982).

278. W.VA. CODE ANN. § 62-13-4 (repealed 2018).

279. 298 S.E.2d at 788.

280. *Id.*

281. *Id.* at 793.

282. *Id.* at 794-795.

283. IND. CONST. art I, § 15 ("No person arrested, or confined in jail, shall be treated with unnecessary rigor"); OR. CONST. art. I, § 13 ("No person arrested, or confined in jail, shall be treated with unnecessary rigor"); TENN. CONST. art. I, § 13 ("[N]o person arrested and confined in jail shall be treated with unnecessary rigor"); UTAH CONST. art I, § 9 (". . . Persons arrested or imprisoned shall not be treated with unnecessary rigor"); WYO. CONST. art I, § 16 ("No person arrested and confined in jail shall be treated with unnecessary rigor . . .").

during arrest or incarceration.[284] While some of the prohibitions refer to jails rather than prisons, the titles of the provisions and judicial interpretations indicate that the protections apply to people in prison as well.

The Oregon Supreme Court has adopted the broadest interpretation of unnecessary rigor. In *Sterling v. Cupp*, the court held that the clause is violated where "a particular prison or police practice would be recognized as an abuse to the extent that it cannot be justified by necessity."[285] In that case, the court held that the unnecessary rigor clause prohibited the practice of subjecting incarcerated men to pat-down searches by female prison officers.[286] Recognizing that the claim involved a privacy interest, the court reasoned that the guarantee against unnecessary rigor was "a more cogent premise than a federal right of privacy."[287] While the prohibition was not restricted to "beatings and other forms of brutality," it did not encompass all methods and conditions of punishment.[288] In the instant case, the court's interpretation did not "disregard the numerous and pervasive conditions intrinsic to the life of prisoners," finding that "even convicted prisoners retain claims to personal dignity, and [that] . . . under the conditions of arrest and imprisonment the relation between the sexes poses particularly sensitive issues."[289] Women in Oregon's prisons were not subjected to frisk searches by male officers, and therefore, the court reasoned that incarcerated men should not be denied the same proprieties.[290] Necessity, which might have justified the practice, was not established by the employment of male or female corrections officers.[291]

One scholar has observed as significant the *Sterling* court's view that the unnecessary rigor clause recognizes harm to dignity because such an interpretation "implicitly recognizes the legitimacy of psychological pain."[292] Psychological damage could thus support an unnecessary rigor challenge to solitary confinement itself.[293] However, the clause has rarely been invoked in challenges to prison

284. GA. CONST. art. 1, § 1, ¶ XVII (". . . nor shall any person be abused in being arrested, while under arrest, or in prison").

285. 625 P.2d 123, 130 (Or. 1981).

286. *Id.* at 137.

287. *Id.* at 129.

288. *Id.* at 129-130.

289. *Id.*

290. *Id.* at 132-133.

291. *Id.* at 136.

292. Linda Hemphill, *Challenging Conditions of Confinement: A State Constitutional Approach*, 20 WILLIAMETTE L. REV. 409, 432 (1984).

293. *Id.*

conditions and has not yet been considered in relation to solitary confinement.[294]

In *Bott v. DeLand*, the Supreme Court of Utah approved the *Sterling* court's unnecessary rigor standard in its interpretation of Utah's unnecessary rigor clause.[295] Mr. Bott alleged negligence and unnecessary rigor on the part of Utah State prison officials as a result of inadequate medical care.[296] He had reported blurred vision and was placed on a waiting list to see an optometrist.[297] His vision continued to deteriorate over the course of four weeks to the point that he lost vision in both eyes and began suffering from severe headaches, nausea, dizziness, and body aches.[298] Despite repeatedly reporting these symptoms to the staff, he was not examined or referred to the prison physician.[299] When he was finally assessed six weeks later, he was diagnosed with malignant hypertension and severe renal failure.[300] By the time of the trial, he was dependent on hemodialysis and had a greatly reduced life expectancy.[301] One of the issues on appeal was whether damages were available for violations of the unnecessary rigor provision. The court emphasized that "unnecessary rigor must be treatment that is clearly excessive or deficient and unjustified, not merely the frustrations, inconveniences and irritations that are common to prison life."[302]

In *Dexter v. Bosko*, the Supreme Court of Utah overturned the dismissal of a claim of unnecessary rigor in a case stemming from a vehicle accident in which a man being transported while in custody became paralyzed and died five years later due to complications from his injuries.[303] The court held that the unnecessary rigor clause "protects persons arrested or imprisoned from the imposition of circumstances on them during their confinement that demand more . . . than society is entitled to require. The restriction on unnecessary rigor

294. *See, e.g.*, Smith v. Dep't of Corr., 182 P.3d 250 (Ct. App. Or. 2008) (holding that restrictions on prisoners' mail were valid and did not violate the unnecessary rigor clause); Barrett v. Peters, 383 P.3d 813 (Or. 2016) (affirming that incarcerated people from Oregon retained their state constitutional rights, including the right not to be subject to unnecessary rigor, when they were transferred to other states under an Interstate Corrections Compact).

295. 922 P.2d 732 (Utah 1996).

296. *Id.* at 735.

297. *Id.*

298. *Id.*

299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.* at 741.

303. 184 P.3d 592 (Utah 2008).

is focused on the circumstances and nature of the process and conditions of confinement."[304]

The court compared the unnecessary rigor clause to the prohibition against cruel and unusual punishment. While the two provisions overlap, the court noted, their purposes are different: "torture may be cruel and unusual but strict silence during given hours may not. Strict silence, however, may impose unnecessary rigor or unduly harsh restrictions."[305] This interpretation indicates that the prohibition of unnecessary rigor is broader than that against cruel and unusual punishment and may cover conditions common to solitary confinement.

In both *Bott* and *Dexter*, the Supreme Court of Utah held that money damages were available for violations of the unnecessary rigor clause. *Dexter* narrowed the holding of *Bott* by confining the availability of damages to cases where officials act with flagrant culpability.[306] The flagrancy standard is similar to the test for qualified immunity because it requires "the contours of the right [to] be sufficiently clear that a reasonable official would understand that what he is doing violates that right."[307] Where the official is unaware of a clear prohibition, the court requires proof that an obvious and known serious risk of harm existed and that the official acted with knowledge of that risk without reasonable justification.[308]

In *State v. Houston*, the Supreme Court of Utah held that the unnecessary rigor provision did not apply to a seventeen-year-old's challenge to a sentence of life without parole.[309] Adopting an interpretation different from the Oregon Supreme Court in *Sterling*, the court in *Houston* held that Utah's provision focuses on prison conditions, while a challenge to the length of a sentence is more appropriately considered under the cruel and unusual punishment clause.[310]

The courts in Indiana have taken a rather narrower view of unnecessary rigor as applied to conditions of confinement, despite dictum in an 1860 Indiana Supreme Court decision which referred to solitary confinement as a form of unnecessary rigor, stating:

304. *Id.* at 596.

305. *Id.*

306. *Id.* at 597-598 (citing Spackman v. Board of Educ., 16 P.3d 533 at 538-539) (Utah 2000) (holding money damages were available for violation of open education and due process clauses in the state constitution)).

307. *Id.*

308. *Id.*

309. 353 P.3d 55, 72 (Utah 2015).

310. *Id.*

> The very essence of punishment, and the sole use of the prison walls, is the confinement of the convict within them; his real exclusion from the rest of the world, rendering him for the time *civiliter mortuus. Humanity indeed forbids, as unnecessary rigor, that his confinement should be absolutely solitary*, or that all his natural and civil rights should be temporarily annihilated …[311]

More recently, that court held in *Ratcliff v. Cohn* that the placement of a fourteen-year-old in an adult prison's special needs unit did not violate Indiana's unnecessary rigor clause.[312] The plaintiff contended that her placement in the unit was inappropriate because she was living with adults with severe psychological disorders who were incapable of functioning in the prison's general population.[313] The court held that the clause prohibited only physical abuse and that the girl's placement in the restrictive and difficult conditions of an adult special needs unit did not rise to the level of unnecessary rigor.[314]

Another Indiana case*, Smith v. Dep't of Corr.*, followed the *Ratcliff* decision and narrowly construed the concept of physical abuse.[315] In that case, Mr. Smith complained to prison staff that his cell was flooding because other people blocked their toilets, so the floor of his cell was covered in water and fecal matter.[316] He kicked his cell door to attract prison officials' attention and requested a mop.[317] The staff told him to remove his shoes, but when he refused to do so they entered his cell, shot mace pellets at him, stripped him down to his underwear, and placed him in full restraints for two hours.[318] Upon returning to his cell, Mr. Smith found the mace had not been cleaned up and caused him further harm.[319] Without providing any explanation, the court concluded that the actions of the prison officers did not constitute physical abuse.[320] The court then found that the prison officials were justified in telling Mr. Smith to remove his shoes because he had kicked his cell door and thus the officials were "acting to maintain order and discipline" in a volatile situation.[321]

The courts of Georgia, Tennessee, and Wyoming have not issued

311. Helton v. Miller, 14 Ind. 577, 585 (1860) (emphasis added).

312. 693 N.E.2d 530, 541 (Ind. 1998).

313. *Id.*

314. *Id.* (citing Kokenes v. State, 13 N.E.2d 524 (Ind. 1938), Bonahoon v. State, 178 N.E. 570 (Ind. 1931) and Roberts v. State, 307 N.E.2d 501 (Ind. 1974)).

315. 871 N.E.2d 975 (Ind. Ct. App. 2007).

316. *Id.* at 981.

317. *Id.*

318. *Id.* at 975.

319. *Id.*

320. *Id.* at 984.

321. *Id.*

substantive rulings on the unnecessary rigor and abuse clauses in their constitutions. In 1898, however, the Wyoming Supreme Court referred to the prohibition against unnecessary rigor as one of several clauses underpinning the "fundamental law that the Penal Code shall be founded upon the humane principles of reformation and prevention."[322]

Unnecessary rigor and abuse prohibitions offer another avenue for additional challenges to conditions within solitary confinement and the practice itself. This is so particularly in jurisdictions that apply the provisions to conditions of confinement, such as Oregon and Utah.

F. Recognition of Dignity

The constitutions of Montana and Puerto Rico explicitly announce that "the dignity of the human being is inviolable."[323] The Puerto Rican courts have not had occasion to interpret the provision.

In Montana, however, the principle has informed the interpretation of the prohibition against cruel and unusual punishment. In *Walker v. State*, the Montana Supreme Court held that carceral conditions imposed on a mentally ill man were "an affront to the inviolable right of human dignity" and constituted cruel and unusual punishment by exacerbating his mental health condition.[324] Mr. Walker had been diagnosed with bipolar disorder and his condition deteriorated after he stopped taking his prescribed medication due to side effects.[325] The prison staff placed him on a series of "behavior management plans," which were described as "tools using a 'carrot-and-stick approach' of withdrawing and returning privileges based on conduct."[326] In accordance with these plans, Mr. Walker was placed in isolation in a bare cell, deprived of all of his clothing and bedding for several days at a time, and the water to his sink and toilet was turned off.[327] He was not given hot meals and instead he received only slices of meat and cheese served with bread.[328] Though the behavior plans were intended to last for a maximum of two days, Mr. Walker was required to have at least twenty-four hours of "clear conduct" before his clothing and other necessities were returned to him.[329] Because of his illness, he

322. State v. Bd. of Comm'rs of Laramie Cty., 55 P. 451 (Wyo. 1898).
323. MONT. CONST. art. II, § 4; P.R. CONST. art. II, § 1.
324. 68 P.3d 872, 885 (Mont. 2003).
325. *Id.* at 885.
326. *Id.*
327. *Id.* at 876.
328. *Id.*
329. *Id.* at 876.

was unable to comply.

A psychiatrist testified that the restrictive behavioral plans were counter-therapeutic, punitive, and cruel.[330] In his opinion, the practice of placing a person "in a bare cell, naked, and forced to sleep on a concrete slab is humiliating, degrading, and extremely painful physically."[331] Evidence was presented that prison staff ignored complaints about the unhygienic state of the unit where Mr. Walker was segregated; the cell walls were said to be encrusted with blood, feces, and vomit.[332]

The court held that the right to dignity was fundamental and triggered "the highest level of scrutiny and . . . protection."[333] While cases alleging cruel and unusual punishment were usually decided without reference to the right to dignity, in this case, the court found the right especially relevant, holding that the state constitution "forbids correctional practices which permit prisons in the name of behavior modification to disregard the innate dignity of human beings, especially in the context where those persons suffer from serious mental illness."[334]

In such circumstances, the court held, the prison had "crossed into the realm of psychological torture."[335] While the cruel and unusual punishment provision did not guarantee that Mr. Walker would not suffer from "some psychological effects from incarceration or segregation," the treatment he experienced violated the dignity clause and amounted to cruel and unusual punishment.

The right to personal dignity was also acknowledged in *Stirling v. Cupp*, discussed above, in the interpretation of Oregon's unnecessary rigor clause, even though the Oregon Constitution does not mention personal dignity.[336] Other state courts have also referred to dignity in relation to aspects of criminal punishment.[337] The absence of an

330. *Id.* at 882.

331. *Id.*

332. *Id.* at 883.

333. *Id.* (citing Dorwart v. Caraway, 58 P.3d 128 (Mont. 2002) (Nelson, J., concurring)).

334. *Id.* at 884.

335. *Id.*

336. Sterling v. Cupp, 290 Or. 611, 620 (1981).

337. Johanna Kalb, *Litigating Dignity: A Human Rights Framework*, 74 ALB. L. REV. 1725, 1730 (2010) ("For example, California, Kansas, and West Virginia test the constitutional validity of criminal punishment by considering whether it is 'so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity'" (citing State v. Gomez, 235 P.3d 1203, 1210 (Kan. 2010) (quoting State v. Freeman, 574 P.2d 950, 956 (Kan. 1978))); In Re Lynch, 503 P.2d 921, 930 (Cal. 1972) and State v. Booth, 685 S.E.2d 701, 708 (W. Va. 2009))). *See also* Cootz v. State, 785 P.2d 163 (Idaho 1989) (Bistline, J., concurring) ("[C]ompetent authority suggests that an inmate is entitled to more rights and a greater degree of dignity than seems to be the present norm" (citing Meachum v. Fano, 427 U.S. 215, 234 (1976) (Stevens, J., dissenting)).

express constitutional reference to dignity has not prevented it from influencing constitutional interpretations. Even in federal courts, though the right to dignity is not explicitly recognized by the Federal Constitution, the principle has been referred to in various Eighth Amendment challenges though its parameters have never been fully articulated.[338] The U.S. Supreme Court has held that dignity is "the basic concept underlying the Eighth Amendment."[339] Thus dignity can inform the interpretation of cruel and unusual punishment and courts have the opportunity to invoke the principle in all cases concerning conditions of confinement. The harm and deprivations of solitary confinement call for even greater recognition of the right to dignity in constitutional interpretation.

G. Barriers to Relief

Some state statutes impose the same barriers on relief as those imposed by the PLRA. The most common are limits on claims by incarcerated people seeking to proceed *in forma pauperis* and the three-strike provision.[340] Another common requirement is that all administrative remedies must be exhausted before court action is pursued.[341]

Notably, only six states prevent people in prison from recovering damages for mental or emotional injury without a prior showing of physical injury as the federal PLRA does.[342] Of these six states, two impose narrower bars on actions for emotional injury than their federal counterpart. In Alabama, the bar on recovery for mental or emotional

338. *See* Hope v. Pelzer, 536 U.S. 730 (2002) (holding that the act of chaining an incarcerated person to a post violated "the basic concept underlying the Eighth Amendment, [which] is nothing less than the dignity of man" (quoting Trop, 356 U.S. at 100)); Roper v. Simmons, 543 U.S. 551, 560 (2005) (holding that imposition of the death penalty on a person under the age of eighteen violated the Eighth Amendment and stating that the Amendment "reaffirms the duty of the government to restrict the dignity of all persons."); Brown v. Plata, 536 U.S. 493, 510 (2011) (finding overcrowding and lack of mental health care in California's prisons grossly inadequate and stating that incarcerated people "retain the essence of human dignity inherent in all persons. Respect for that dignity animates the Eighth Amendment prohibition against cruel and unusual punishment.") *See also* Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169 (2011); Laura Rovner, *Dignity and the Eighth Amendment: A New Approach to Challenging Solitary Confinement*, 9 ADVANCE 3 (2015).

339. Trop v. Dulles, 356 U.S. at 100.

340. DEL. CODE ANN. tit. 10, § 8804 (West 1995); FLA. STAT. ANN. § 57.085(7) (West 2004); LA. STAT. ANN. § 15:1186(F) (West 1997).

341. *See, e.g.* ALA. CODE § 14-15-4 (1975); COLO. REV. STAT. ANN. §13-17.5-102.3 (West 1998); IDAHO CODE ANN. § 19-4206 (West 1999); KAN. STAT. ANN. § 75-52,138 (West 1994); KY. REV. STAT. ANN. § 454.415 (West 2010).

342. ALA. CODE § 14-15-4(g) (2013); IDAHO CODE ANN. § 19-4222 (West 2000); LA. STAT. ANN. § 15:1184E (1997); MICH. COMP. LAWS § 600.5511(1) (1999); OKLA. STAT. ANN. tit. 57 § 566.4A (West 2002); S.D. CODIFIED LAWS § 21-62-3 (2010).

injury applies only to actions filed *pro se* (although most of these claims are brought *pro se*).[343] Meanwhile, Idaho's statute limits civil actions for mental or emotional injury suffered while in custody but allows such actions to be pursued upon a showing of either physical injury or a "diagnosed severe and disabling mental illness."[344] This provision therefore avoids the PLRA's artificial distinction between physical and mental harm.

Some state restrictions on challenges to prison conditions are even more onerous than the PLRA. For example, state courts may be empowered to deduct good time credits for *in forma pauperis* applications that are deemed frivolous, in bad faith, or deficient in material information.[345] Other statutes authorize courts to impose fees and costs, disciplinary segregation, and even revoke access to property such as televisions, radios, and stereos.[346]

However, courts can also limit these barriers through constitutional interpretation. The Alaska Supreme Court held in *Barber v. State, Dep't of Corr.* that while the state may have a legitimate interest in reducing frivolous litigation by people in prison, the due process clause of the state constitution prevents that interest from barring an indigent individual's challenge to a disciplinary penalty.[347] The erroneous conduct of disciplinary proceedings was deemed to be of such importance as to override the state's interest in preventing frivolous litigation.[348]

Notably, no state statutes impose the same limitations on relief as those that constrain the federal courts. Therefore, state courts may grant broader and prompter relief than their federal counterparts. An example of a broader approach to relief granted by a state court can be found in *Harrah v. Leverette*, where the West Virginia Supreme Court held prison officials violated the Due Process Clause and the Eighth Amendment by placing people in solitary confinement without due process and committing severe physical abuse against those people.[349] In considering the appropriate remedy, the court indicated its preference not to interfere with prison management, but it went on to

343. *See, e.g.*, Jennifer Winslow, *The Prison Litigation Reform Act's Physical Injury Requirement Bars Meritorious Lawsuits: Was it Meant To?* 49 UCLA L. REV. 1655, 1665 (2002) (citing ROGER A. HANSON & HENRY W.K. DALEY, U.S. DEP'T OF JUST., CHALLENGING THE CONDITIONS OF PRISONS AND JAILS, A REPORT ON SECTION 1983 LITIGATION 21-22 (1995) (noting that in 1995, 96 percent of prisoner lawsuits were filed pro se)).

344

345. MASS. GEN. LAWS ANN. ch. 261 § 29(f).

346. ARK. CODE ANN. § 16-106-203 (West 1997); MINN. STAT. ANN. § 244.035 (West 1995).

347. 314 P.3d 58 (Alaska 2013).

348. *Id.* at 65-66.

349. 271 S.E.2d 322 (W.Va. 1980).

state that:

> Prison does not strip an individual of all human dignity. This court is dedicated to the preservation of the rights vested in every person by our constitution and the federal constitution. Any attempt by the government to abridge those rights is anathema to us; repeated infractions, despite clear proscriptions by this court and federal courts, are unforgivable.[350]

Referring to a previous opinion concerning Eighth Amendment violations at a juvenile detention facility, the court remarked that "when the state is guilty of extraordinary dereliction, discharge is a remedy. We warned prison officials about its possible use in previous opinions … We will not continue to witness cruel and unusual punishment and blatant due process violations by prison officials and respond with injunctions and admonitions."[351]

Emphasizing that the Department of Corrections "must understand that abuse of the constitutional rights of prisoners may result in release of the victims," the court ordered the implementation of a plan tailored to each person affected by the violations to reduce the degree of restraint to which they were subject. The court suggested that the plans might include release from parole or prison, reduction in sentence length, or transfer to a less restrictive facility.[352] The court described this remedy as a "compromise . . . between unconditional release and continuation of present status."[353] While the court was reluctant to release people for constitutional deprivations that did not relate to the charges for which they were incarcerated, it reiterated that the prison's activities "must be permanently corrected or else the government may be enjoined from putting any convicted criminals in jail or prison."[354]

Though *Harrah v. Leverette* was decided prior to the enactment of the PLRA's limitation on the scope of federal courts' remedies, that statute would not have restricted the West Virginia court in any event. Moreover, at the time this case was decided, federal courts were generally not issuing orders that were similar in breadth to this court's order.

Qualified immunity is available in some states to counter claims of violations of state constitutional rights.[355] Nevertheless, there has been some movement to restrict the immunity. In 2007, the California Court

350. *Id.* at 331.

351. *Id.* at 332 (referring to State ex rel. K.W. Werner, 242 S.E.2d 907 (W.Va. 1978)).

352. *Id.* at 332-333.

353. *Id.* at 333.

354. *Id.*

355. *See, e.g.* Duarte v. Healy, 537 N.E.2d 1230, 1232 (Mass. 1989) (holding that while the Massachusetts Civil Rights Act did not expressly provide for qualified immunity, the state legislature intended to incorporate the defense as recognized by the federal courts.).

of Appeal declined to allow qualified immunity as a defense to a state civil rights claim on the basis that the doctrine was "entirely a creation of the United States Supreme Court."[356] The court held that if the state legislature had intended to incorporate qualified immunity into state law, it would have done so.[357] Other states, including Colorado and Connecticut, have passed legislation to abolish or limit the qualified immunity of police officers.[358]

IV. THE CASE FOR STATE CONSTITUTIONAL JURISPRUDENCE TO CHALLENGE SOLITARY CONFINEMENT

The jurisprudence and constitutional provisions discussed in this Article show that state courts and state constitutions offer different avenues to pursue challenges to solitary confinement that have been largely unexplored to date. There are different justifications for state courts to develop their own constitutional jurisprudence separate from federal jurisprudence. In his analysis of Justice Brennan's 1977 article that called on state courts to increase constitutional protections for individual rights, California Supreme Court Justice Goodwin Liu suggests that the legitimacy of state constitutional jurisprudence "does not primarily depend on the development of a distinctive, state-centered jurisprudence."[359] Rather, in Justice Liu's view, state courts may depart from federal precedent because of distinctive constitutional language, or because they disagree with federal constitutional reasoning.[360] The precise contours of constitutional provisions, Justice Liu writes, are "open to vigorous debate, often with no easy resolution."[361] Judge Jeffrey Sutton of the Sixth Circuit has suggested that some state courts diminish their constitutions by interpreting them in lockstep with the Federal Constitution. He describes as "inexplicable" the notion that "the meaning of a federal guarantee proves the meaning of an independent state guarantee."[362]

There are good reasons to support the development of state constitutional jurisprudence relating to solitary confinement that does not simply follow the federal jurisprudence. The first is the locus of

356. Venegas v. Cty. of Los Angeles, 63 Cal. Rptr. 3d 741, 750 (Cal. Ct. App. 2007).

357. *Id.* at 753.

358. COLO. REV. STAT. ANN. § 13-21-131(1)(b) (West 2020) and CONN. GEN. STAT. ANN. § 52-571k(d)(1) (West 2020).

359. Goodwin Liu, *State Constitutions and the Protection of Individual Rights: A Reappraisal*, 92 N.Y.U. L. REV. 1307, 1312 (2017).

360. *Id.*

361. *Id.* at 1338.

362. Jeffrey Sutton, *What Does – and Does Not – Ail State Constitutional Law*, 59 U. KAN. L. REV. 687, 707-708 (2011).

incarceration and the dominant role played by state courts in sentencing, as recognized by Ohio's Eighth District Court of Appeals in the case of *In Re Lamb*.[363] As of December 2018, approximately 88% of people incarcerated in prisons were held in state custody.[364] Given their central role in sentencing the vast majority of incarcerated people in the country, state courts should independently scrutinize the conditions of confinement in state prisons.

A second reason is that state courts may be better fora than federal courts for pursuing claims of violations of constitutional rights specifically relating to prison conditions. Justice Liu and Judge Sutton both address this issue in the context of claims for violations of constitutional rights generally. Justice Liu contends that federal courts may decline to enforce constitutional rights to their "full conceptual boundaries" because such an interpretation would potentially bind not only the federal government but also the states.[365] Of course, the same consideration does not apply in reverse to state courts' interpretations.

Further, Justice Liu notes that while most state court judges face greater electoral accountability, in contrast to the life tenure of federal judges, the claim that state courts are less responsive than federal courts to individual rights claims is not clear cut.[366] This can certainly be seen in the context of constitutional claims relating to prisons, where both state and federal courts vary in terms of receptivity to the rights of incarcerated people. While there is an argument that majoritarian pressures are thought to make state courts less responsive, it could also be said that recent moves toward reforming solitary confinement in some state legislatures may influence state judges to be more receptive to the need for closer scrutiny of the practice.

Moreover, as both Justice Liu and Judge Sutton acknowledge, nearly all state constitutions are easier to amend than their federal counterpart.[367] While Justice Liu suggested that the prospect of a constitutional decision being overruled, in effect by an electoral initiative, could lead to judicial restraint, on the other hand, he recognized that such accountability "may aid rather than diminish the legitimacy of counter-majoritarian decision-making by state courts."[368] Describing the different methods by which constitutional

363. 296 N.E. 2d 280 (Ohio Ct. App. 1973).

364. U.S. DEP'T OF JUST., BUREAU OF JUST. STATISTICS, PRISONERS IN 2018 3 (2020).

365. Goodwin Liu, *supra*, note 359, at 1330.

366. Judge Sutton has pointed out that eighty-seven percent of state judges throughout the country face some form of election during their careers, though the timing and methods of elections vary in each state. Jeffrey Sutton, *supra*, note 362, at 700.

367. Goodwin Liu, *supra*, note 359, at 1331; Jeffrey Sutton, *supra*, note 362, at 692-693.

368. Goodwin Liu, *supra*, note 359, at 1331.

amendments may take place, Judge Sutton noted that the most common method of amending a state constitution is legislative, but constitutional conventions and popular initiatives are also used in some states, all subject to different requirements and limitations.[369]

A further reason for state courts to continue developing their own constitutional jurisprudence separate from federal jurisprudence is the role of state-specific influences on constitutional interpretation and the fact that the drafters of the Federal Constitution looked to the language of states' constitutions and experiences when tasked with drafting the federal version. Some state provisions, for example, predate the Eighth Amendment or its application to the states.

Given that these justifications weigh in favor of state courts developing separate constitutional jurisprudence without simply adopting the federal jurisprudence, the question arises as to why so few challenges concerning solitary confinement have been pursued in state courts to date. It may simply be that, as Justice Liu observes, judges, and indeed law school graduates, "are primarily trained in federal law and find it familiar."[370] The body of federal case law relating to solitary confinement is certainly "abundant and well-developed," albeit flawed.

In addition, most state courts have chosen to follow federal precedent when ruling on state constitutional challenges to excessive sentences, with the result that few sentences are overturned on the basis of disproportionality.[371] Given that there have been significantly more state constitutional challenges to excessive sentences than prison conditions, and these challenges have often been unsuccessful, litigants seeking to challenge prison conditions may be dissuaded from bringing such challenges in state courts.

There may be further practical reasons as to why cases concerning solitary confinement are not based on state constitutional arguments. Many challenges to prison conditions are brought by *pro se* litigants who rely on litigation handbooks based on federal jurisprudence. Even when litigants have legal representation, they are often represented by national non-profit organizations whose expertise and experience is in the federal courts.

This is not to say that state courts and state jurisprudence are not

369. Jeffrey Sutton, *supra*, note 362, at 693-698.

370. Goodwin Liu, *supra*, note 359, at 1315.

371. William W. Berry III, *Cruel and Unusual Non-Capital Punishments*, AM. CRIM. L. REV. forthcoming (October 20, 2020); William W. Berry III, *Cruel State Punishments*, 98 N.C. L. REV. 1201, 1205-06 (2020) ("[A]lmost all states have an analogue to the Eighth Amendment. In most states, the application of such provisions has not exceeded the scope of the Eighth Amendment, meaning that the state constitutional provisions have not added any further restrictions beyond that of the federal provision.").

worthy of further exploration as an alternative avenue for future challenges. The absence of the PLRA's limitations on the scope of relief that state courts can grant weighs in favor of pursuing litigation in state courts, particularly in those jurisdictions that have adopted broader interpretations of constitutional provisions that may be favorable to people seeking to challenge solitary confinement. Recent state court decisions ruling on habeas and mandamus petitions concerning prison officials' failures to protect incarcerated people from the risks posed by COVID-19 may raise awareness of the potential for incarcerated people to obtain broader and quicker relief in these venues than they otherwise might in federal courts.[372]

CONCLUSION

Incarcerated people seeking to challenge conditions in solitary confinement as a violation of state constitutional rights still face some of the same barriers that apply to federal challenges. Nevertheless, state jurisprudence offers a range of alternatives to improve judicial scrutiny of such conditions. State courts can determine to what extent conditions comport with their state's conception of individual rights. In interpreting state constitutional provisions, these courts can look to statutes, common law, and state values to incorporate principles like dignity, humane treatment, and the prohibition of unnecessary rigor. Indeed, even in the absence of relevant constitutional provisions or state-specific values or history, state jurisprudence permits such an exploration, and courts need not be constrained by the limitations of federal constitutional jurisprudence.

Given that most incarcerated people are held in state prisons, and many state legislatures are currently addressing solitary confinement reform, the time is ripe for state courts to take a more active role in interpreting individual rights, examining solitary confinement

372. In the case of *In re Von Staich*, 270 Cal.Rptr.3d 128 (Cal. Ct. App. 2020), the California Court of Appeal ordered a fifty percent reduction in the population at San Quentin State Prison to mitigate a Covid-19 outbreak. That relief has since been frozen by the State Supreme Court and the Court of Appeal has been directed to consider the necessity of an evidentiary hearing to investigate whether prison authorities took any steps that would contradict the court's earlier finding that officials acted with deliberate indifference by failing to follow public health advice. Order Granting Petition for Review, *In Re Von Staich*, 477 P.3d 537 (Cal. 2020). *See also* North Carolina Conference of the NAACP et al. v. Cooper et al. (N.C. Sup. Ct. June 16, 2020) (granting preliminary injunction based on a finding that plaintiffs were likely to establish deliberate indifference to substantial risk of serious harm created by overcrowding and cohort-based social distancing, transfers, and disparate levels of Covid-19 protections in different state correctional facilities. The court declined to decide the legal standard that applied under the State Constitution, concluding that the plaintiffs were likely to satisfy the Eighth Amendment standard of showing that prison officials had been deliberately indifferent to a substantial risk of serious harm.).

practices, and developing independent constitutional jurisprudence in this area.