

# SOLITARY CONFINEMENT IN SHEEP’S CLOTHING: THE UNLAWFULNESS OF MEDICAL ISOLATION PROTOCOLS DURING THE COVID-19 PANDEMIC IN AMERICAN PRISONS

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## I. INTRODUCTION

“I feel like they are punishing us for having COVID-19,” said Christopher Russell, an incarcerated individual at Northern Correctional Institution (“Northern Correctional”), a maximum security prison in Somers, Connecticut.<sup>1</sup> During the COVID-19 pandemic (“COVID-19”) any individual incarcerated in Connecticut, like Christopher, regardless of their custody status, could have been sent to Northern Correctional if they tested positive for COVID-19.<sup>2</sup> Once at Northern Correctional, incarcerated individuals would then be isolated in concrete seven-by-twelve-foot cells, and forbidden from taking showers.<sup>3</sup> Even though Christopher had not yet officially tested positive for COVID-19 at the time of his relocation to the maximum security facility, his exhibition of symptoms was enough to initiate his transfer.<sup>4</sup> Northern Correctional allowed him thirty minutes outside of his cell each day to make two phone calls, and he reported that his cell was so “freezing cold” that it was difficult for him to breathe.<sup>5</sup>

But aside from his discomfort, Christopher’s conditions also proved to be unsanitary. His “cell[] [had] not been cleaned in a

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<sup>1</sup> Elizabeth Weill-Greenberg, *Prisoners Who Test Positive for COVID-19 in Connecticut Are Sent to a Notorious Maximum Security Prison*, THE APPEAL (May 8, 2020), <https://theappeal.org/connecticut-covid-19-prison-quarantine-northern-correctional-institution>.

<sup>2</sup> *Id.*

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

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

while,” and there was “toilet paper with urine on it on the floor of [his] cell.”<sup>6</sup> Moreover, despite Christopher’s asthma diagnosis, Northern Correctional did not provide him with his inhaler until the second night at the prison, after he woke up unable to breathe.<sup>7</sup> Although there was a buzzer in his room where he could communicate with staff if necessary, he was unable to move or breathe to reach it in his condition.<sup>8</sup> Christopher only received necessary medical care once he alerted staff on their routine tour of the facility.<sup>9</sup>

Even if these conditions did not amount to cruel and unusual punishment—which, as explained below, there is a strong basis for concluding that they did—such conditions did little to stop the spread of disease.<sup>10</sup> In fact, they often did the opposite. According to Dan Barrett, the legal director of the American Civil Liberties Union (ACLU) of Connecticut, individuals incarcerated in Connecticut facilities, like Christopher, avoided disclosing their symptoms for fear of being subjected to these punishing conditions: “[g]uys have gotten the message that unless you want to go to Northern [Correctional], keep your mouth shut if you’re sick . . . . Just stay in your cell. Keep your head down.”<sup>11</sup>

In response to the COVID-19 protocol at Connecticut facilities, the ACLU of Connecticut (along with the ACLU Criminal Law Reform Project and the law firm Dechert LLP) filed a class action lawsuit against Connecticut’s governor and the Connecticut Department of Correction’s commissioner, arguing that Connecticut “ha[d] not protected [incarcerated people] from contracting the virus and ha[d] then punished those who [became] ill.”<sup>12</sup> This lawsuit ultimately resulted in settlement, requiring the Connecticut Department of Correction to create more sanitary conditions, and among other things, “[s]top imposing punitive measures such as loss of housing

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<sup>6</sup> *Id.*

<sup>7</sup> Weill-Greenberg, *supra* note 1.

<sup>8</sup> *Id.*

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

<sup>10</sup> *See id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*; see also Angela Fortuna, *Settlement Reached in Federal Lawsuit About Conditions in Conn. Prisons During COVID-19*, NBC CONN. (Mar. 29, 2021, 2:49 PM), <https://www.nbcconnecticut.com/news/local/settlement-reached-in-federal-lawsuit-about-conditions-in-conn-prisons-during-covid-19/2284176>.

status, program access, work assignments[,] or phone privileges because someone has tested positive or is presumed positive.”<sup>13</sup>

Sadly, Christopher’s experience is not unique. Many individuals who were diagnosed with or exhibited symptoms of COVID-19 reported being subjected to unsanitary, unethical, and, frankly, inhumane conditions while incarcerated nationwide.<sup>14</sup> The reality is that the American prison system is ill-equipped for handling a mass health crisis like COVID-19. This Comment examines the ways in which the state’s use of solitary confinement during COVID-19, rooted in the supposed need of safety and welfare, imposed baseless harm. Specifically, this Comment considers American prisons’ departure from the Centers for Disease Control and Prevention (CDC) guidelines in employing isolation tactics more similar to those imposed on incarcerated people when they are punished for disciplinary infractions, rather than employing the practice of medical isolation, defined by the CDC as “[p]hysical separation of an individual with confirmed or suspected COVID-19.”<sup>15</sup> Even if federal and state governments were legitimately motivated by health and safety concerns—which this Comment argues was often not the case—the use of widespread solitary confinement in response to a public health emergency imposed a great deal of unnecessary suffering on incarcerated people. This Comment is a call to action for courts and prison administrators to learn from the handling of COVID-19 to create a better future for incarcerated individuals in American prisons.

This Comment analyzes the use of solitary confinement, usually disguised as medical isolation, in prisons during COVID-19 as a means of isolating and quarantining incarcerated individuals and its detrimental impact on incarcerated people on a national scale. Part II outlines the nation’s use of solitary confinement as punishment and considers the linkage and overlap between its modern and historical use as a segregation tactic in the medical quarantine context. Part II

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<sup>13</sup> Fortuna, *supra* note 12.

<sup>14</sup> See discussion *infra* Part III.B.

<sup>15</sup> *Guidance on Prevention and Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, CTRS. FOR DISEASE CONTROL & PREVENTION [hereinafter *CDC Guidance*], <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html> [https://web.archive.org/web/20220623140055/https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html?CDC\_AA\_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fcommunity%2Fcorrection-detention%2Fvaccine-faqs.html] (May 3, 2022).

also describes the modern trend towards public and judicial acknowledgement of the adverse mental effects of solitary confinement. Part III highlights the use of solitary confinement as a means of medical isolation and prevention during COVID-19. Specifically, it exposes the pervasive and systemic imposition of harm on incarcerated people, usually under the guise of paternalistic goals of general safety and welfare. Additionally, it analyzes these practices under an Eighth Amendment framework, arguing that they are characteristic of the deliberate indifference that qualifies as an Eighth Amendment violation. Part IV proposes alternatives to the practices that occurred during COVID-19 and presents an argument for the implementation of protocols that actually advance the health and well-being of incarcerated people. Part V begins by calling on the courts to reconsider their responses to conditions of confinement challenges under the Eighth Amendment and urges officials and administrators of American prisons to learn from the detrimental mistakes made during the COVID-19 crisis to avoid future abuse in the next health crisis. Part VI briefly concludes.

## II. HISTORICAL BACKGROUND ON SOLITARY CONFINEMENT

Solitary confinement has become a common practice in American prisons, and the historical background of its use, methodology, and justifications helps inform an analysis of its purpose in the COVID-19 context. Section A discusses the historical progression of solitary confinement in America, starting as an attempted rehabilitation method, and resulting in the commonly used super maximum security (“supermax”) prisons, or long-term segregated housing units. Section B demonstrates the prophylactic use of solitary confinement disguised as medical quarantine in other disease contexts. Section C presents the modern gravitation by both the courts and prison administrators to recognize the detrimental mental health ramifications of solitary confinement.

### A. *Historical Evolution of Modern Punitive Solitary Confinement*

In 2015, the United Nations General Assembly adopted the United Nations Standard Minimum Rules for the Treatment of Prisoners, colloquially known as the Nelson Mandela Rules (“Rules”).<sup>16</sup> The Rules define solitary confinement as “the confinement of

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<sup>16</sup> G.A. Res. 70/175, United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) (Dec. 17, 2015).

[incarcerated people] for [twenty-two] hours or more a day without meaningful human contact.”<sup>17</sup> Upon its initial introduction into the American prison system, solitary confinement had religious roots and rehabilitative intentions. The Quakers, a protestant Christian pacifist group based in Pennsylvania, brought solitary confinement to the prison system in the late eighteenth century and began to experiment with it as early as 1787.<sup>18</sup> The concept originated as an alternative to the lethal corporal punishment or death penalty to which “criminals” of this time period were usually subjected.<sup>19</sup>

As Stuart Grassian, a clinical psychiatrist studying isolation in prisons, has noted, Quakers believed that isolating the incarcerated person would allow them to “become like a monk in a monastic cell, free to come close to God and to their own inner being, and they would naturally heal from the evils of the outside society.”<sup>20</sup> The Quakers believed isolating incarcerated people with nothing but a Bible would result in their rehabilitation and positive reentry into society.<sup>21</sup> Grassian calls the Quakers’ efforts “a noble experiment that was an absolute catastrophe,” since many of the incarcerated people suffered severe psychological effects: “go[ing] insane, [dying by] suicide, or . . . no longer [being] able to function in society.”<sup>22</sup>

In 1831, Alexis de Tocqueville and Gustave de Beaumont, French philosophers who travelled to the United States to investigate its prison system, described solitary confinement’s negative impact on incarcerated people: “this absolute solitude, if nothing interrupt[s] it, is beyond the strength of man; it destroys the [man] without

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<sup>17</sup> *Id.*; see also Wex Definitions Team, *Solitary Confinement*, LEGAL INFO. INST. CORNELL L. SCH., [https://www.law.cornell.edu/wex/solitary\\_confinement](https://www.law.cornell.edu/wex/solitary_confinement) (July 2021) (“[S]olitary confinement [may be] a form of internal discipline for serious infractions (e.g., fighting) and minor infractions (e.g., getting caught with contraband). [Incarcerated people] may be placed in solitary confinement in an attempt to keep the general population safe but also to keep [the incarcerated people] safe from others.”).

<sup>18</sup> Sarah Childress, *A “Noble Experiment”: How Solitary Came to America*, PBS: FRONTLINE (Apr. 22, 2014), <https://www.pbs.org/wgbh/frontline/article/a-noble-experiment-how-solitary-came-to-america>; Laura Sullivan, *Timeline: Solitary Confinement in U.S. Prisons*, NPR (July 26, 2006, 7:52 PM), <https://www.npr.org/templates/story/story.php?storyId=5579901>.

<sup>19</sup> Childress, *supra* note 18.

<sup>20</sup> *Id.*

<sup>21</sup> Sullivan, *supra* note 18.

<sup>22</sup> Childress, *supra* note 18; Sullivan, *supra* note 18.

intermission and without pity; it does not reform, it kills.”<sup>23</sup> Given these ramifications, and the evidence that those employing solitary confinement were not achieving the desired outcomes, the practice slowly declined in the following decades.<sup>24</sup>

Not only have religious groups and philosophers weighed in on the effects of solitary confinement, but also the courts undertook the issue as well. In 1890, the US Supreme Court, in a landmark decision *In re Medley*, addressed the effects of solitary confinement on incarcerated people in Philadelphia.<sup>25</sup> After his conviction, and as he awaited being put to death by hanging for allegedly killing his wife, James Medley spent forty-five days in solitary confinement.<sup>26</sup> The Supreme Court held that the sentence of solitary confinement for the plaintiff was inhumane and “an additional punishment of the most important and painful character.”<sup>27</sup> But this case did not call into question the ability to use solitary confinement as a punitive measure. It instead established that it was a punishment all on its own, akin to the way that execution is also a punishment.<sup>28</sup> Further, the Court opted not to consider the constitutionality of solitary confinement as a practice but rather addressed whether an individual’s experience in solitary confinement was sufficient to constitute punishment for his crime.<sup>29</sup>

Nevertheless, the Court emphasized solitary confinement’s impact on mental health:

A considerable number of the [incarcerated people] fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others still, [died by] suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community.<sup>30</sup>

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<sup>23</sup> GUSTAVE DE BEAUMONT & ALEXIS DE TOQUEVILLE, ON THE PENITENTIARY SYSTEM IN THE UNITED STATES, AND ITS APPLICATION IN FRANCE 5 (Francis Lieber trans., 1833); *see also* Childress, *supra* note 18.

<sup>24</sup> Sullivan, *supra* note 18.

<sup>25</sup> *In re Medley*, 134 U.S. 160, 160 (1890).

<sup>26</sup> *Id.* at 161–62.

<sup>27</sup> *Id.* at 171.

<sup>28</sup> *See id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 168.

Following the ruling, the use of solitary confinement for rehabilitative purposes declined, and it became primarily punitive in nature, as wardens began to use it against incarcerated people for disciplinary infractions.<sup>31</sup>

Nearly fifty years later, in 1934, the US government opened the prison of Alcatraz, beginning to further experiment with the use of solitary confinement.<sup>32</sup> This marked the beginning of the modern use of solitary confinement as synonymous with conditions of prison confinement, and embodied in that condition is an intent to punish.<sup>33</sup> In Alcatraz, most of the incarcerated individuals spent hours outdoors and on required work responsibilities, but a few were kept in the solitary confinement hallway, known as “D Block.”<sup>34</sup> Specifically, one cell referred to as “The Hole” was used for extreme solitary punishment.<sup>35</sup> In this lightless concrete room with nothing but a hole in the floor, incarcerated individuals were kept naked, with bread and water “shoved through a small hole in the door.”<sup>36</sup> Typically, individuals were only kept in “The Hole” for a few days.<sup>37</sup> Although those who spent many years on “D Block” were given clothes and food, they were not allowed contact with other incarcerated individuals and were rarely released from their cells.<sup>38</sup>

Similarly, the use of widespread solitary confinement at the prison in Marion, Illinois, also marked a turning point in the use of solitary confinement. In 1983, some incarcerated individuals at Marion prison killed two correctional officers in separate instances, but on the same day.<sup>39</sup> In response, the warden put the entire prison into “permanent lockdown.”<sup>40</sup> Marion thus became the first prison in the United States to adopt twenty-three-hour-a-day in-cell isolation without access to the communal yard—across the entire prison.<sup>41</sup> Before the transition to permanent lockdown, incarcerated individuals in Marion could work,

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<sup>31</sup> Childress, *supra* note 18.

<sup>32</sup> Sullivan, *supra* note 18.

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

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

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

<sup>38</sup> Sullivan, *supra* note 18.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

“attend educational programs, [and] eat in [the] cafeteria.”<sup>42</sup> But Marion was only an anomaly for a short time; it soon became a model for the US prison system’s collective leap into widespread solitary confinement, as several existing facilities in other states began following suit by adopting permanent lockdown.<sup>43</sup>

At the time of the change at Marion, supermax prisons were still a rare concept.<sup>44</sup> In 1988, a class of incarcerated people at Marion challenged these harsh conditions as Eighth Amendment violations.<sup>45</sup> But in *Bruscino v. Carlson*, the Seventh Circuit declined to find a constitutional violation.<sup>46</sup> Despite characterizing the conditions at Marion as “sordid and horrible,” Judge Richard Posner ultimately found that these conditions could not be unconstitutional because they were necessitated by security.<sup>47</sup>

During this time period, the US Supreme Court considered challenges to the constitutionality of solitary confinement conditions in prisons.<sup>48</sup> For instance, in 1971 people incarcerated in a Mississippi State Penitentiary, known as Parchman, brought suit challenging conditions at the prison including the use of solitary confinement.<sup>49</sup> In *Gates v. Collier*, the District Court for the Northern District of Mississippi declined to enjoin the state from using solitary confinement, but regulated material conditions of solitary confinement.<sup>50</sup> For example, the court enjoined the state from confining any individual in disciplinary segregation without adhering to the following conditions: providing “the same daily ration of food which is provided to the general prison population,” receiving no less than two thousand calories a day; supplying normal institutional clothing, unless the prison physician orders otherwise; providing adequate bedding, including mattresses, clean sheets, and blankets, which may be withheld “only if an [incarcerated person] misuses or destroys the supplies”; supplying “soap, towels, toothbrush[,] and shaving utensils”; ensuring adequate heating, ventilation, and sanitary

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> DANIEL P. MEARS, URB. INST., EVALUATING THE EFFECTIVENESS OF SUPERMAX PRISONS, at ii (2006).

<sup>45</sup> *Bruscino v. Carlson*, 854 F.2d 162, 164 (7th Cir. 1988).

<sup>46</sup> *Id.* at 168.

<sup>47</sup> *Id.* at 164–66.

<sup>48</sup> *See, e.g., Gates v. Collier*, 349 F. Supp. 881 (N.D. Miss. 1972).

<sup>49</sup> *Id.* at 885, 894–96.

<sup>50</sup> *Id.* at 900.



conditions for cells at all times; and preventing dark hole isolation for a period in excess of twenty-four hours.<sup>51</sup>

Following the building of the California Pelican Bay State Prison (“Pelican Bay”) in 1989, which was intended solely to house incarcerated individuals in isolation, the 1990s saw a building boom of supermax facilities.<sup>52</sup> These supermax facilities became freestanding, isolation units that represented a heightened security level of custody.<sup>53</sup> By 1999, the Department of Justice (DOJ) found that more than thirty states were operating a supermax-type facility with long-term isolation and twenty-three-hours-a-day lockdown.<sup>54</sup> Daniel P. Mears, an associate professor at Florida State University, conducted a national study finding that by 2004, forty-four states operated supermax facilities, which collectively imprisoned approximately 25,000 of the United States’ incarcerated people.<sup>55</sup>

Not only were supermax prisons normalizing facility-wide solitary confinement practices, but also punitive solitary confinement trickled down as its use expanded in lower-security level prisons in the form of separate restrictive housing units, or special housing units (SHU).<sup>56</sup> These units are “securely separated from the general [incarcerated] population’s housing.”<sup>57</sup> In August of 2015, the Bureau of Prisons’ (BOP) former director stated that across all BOP operated facilities, incarcerated individuals spent on average about two months in the SHU.<sup>58</sup>

B. *Solitary Confinement and Segregation in Prisons as a Means of Medical Quarantine*

While COVID-19 presented truly unprecedented challenges with respect to the crisis’ scale and reach, health crises have not exactly been foreign to the American prison system. Health crises are particularly difficult to contain in the prison system given the physical

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

<sup>52</sup> Sullivan, *supra* note 18.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> MEARS, *supra* note 44, at 40.

<sup>56</sup> OFF. OF INSPECTOR GEN., U.S. DEP’T OF JUST., REVIEW OF THE FEDERAL BUREAU OF PRISONS’ USE OF RESTRICTIVE HOUSING FOR INMATES WITH MENTAL ILLNESS 2 (2017) [hereinafter REVIEW OF RESTRICTIVE HOUSING], <https://oig.justice.gov/reports/2017/e1705.pdf>.

<sup>57</sup> *Id.* (alteration in original).

<sup>58</sup> *Id.*

proximity of the incarcerated population and the generally unhealthy conditions.<sup>59</sup> In 1918, the nation fell victim to the global influenza pandemic.<sup>60</sup> During that pandemic, the Eastern State Penitentiary in Philadelphia, Pennsylvania, enforced a full quarantine for its prison population.<sup>61</sup> This quarantine proved successful in maintaining the overall health of the prison population.<sup>62</sup> Although the prison continued to receive and discharge individuals throughout the 1918 pandemic, the prison halted all assemblies, meetings, and church services, focusing on limiting the contact between incarcerated individuals at Eastern State.<sup>63</sup>

In her article “Pandemics and Prison Policies: 1918 and Now,” Annie Anderson compares these seemingly successful methods of containing the spread of influenza to those implemented in the present day.<sup>64</sup> According to Anderson, during COVID-19, Pennsylvania state prisons mimicked the strict quarantine that Eastern State Penitentiary implemented over a century ago: barring visitors, restricting contact between members of the incarcerated population, and closing communal spaces.<sup>65</sup> Anderson outlines that, in addition to limiting assembly and visitation in Eastern State Penitentiary during influenza, the prison staff disinfected and cleaned prison cells, and “encouraged [incarcerated people] to ‘get plenty of sleep, plenty of fresh air, [and] plenty of exercise.’”<sup>66</sup> Further, Anderson suggests that US prison systems can look to the past for guidance in the implementation of prison protocols and practices to combat health crises that arise in the future, referencing the steps that Pennsylvania

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<sup>59</sup> Martial L. Ndeffo-Mbah et al., *Dynamic Models of Infectious Disease Transmission in Prisons and the General Population*, 40 EPIDEMIOLOGIC REVS. 40, 40 (2018); see also Tiana Herring & Maanas Sharma, *States of Emergency: The Failure of Prison System Responses to COVID-19*, PRISON POL’Y INITIATIVE (Sept. 1, 2021), [https://www.prisonpolicy.org/reports/states\\_of\\_emergency.html](https://www.prisonpolicy.org/reports/states_of_emergency.html) (“[D]ensely packed prisons and jails . . . presented dangerous conditions for the transmission of COVID-19.”).

<sup>60</sup> Annie Anderson, *Pandemics and Prison Policies: 1918 and Now*, E. STATE PENITENTIARY, <https://www.easternstate.org/about-eastern-state/blog/pandemics-and-prison-policies-1918-and-now> (last visited Dec. 16, 2023).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

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

<sup>66</sup> Anderson, *supra* note 60.

state prisons have taken during COVID-19 with the distribution of free masks and soap to those incarcerated.<sup>67</sup>

Similar to influenza, tuberculosis plagued the national population, making the close proximity of prisons a breeding ground for the disease. In the late 1980s and early 1990s, most prison systems (98 percent of state and federal systems and 85 percent of city and county systems) “reported isolating [incarcerated people] with suspected or confirmed [tuberculosis] disease in negative pressure rooms,” which are isolation rooms designed to prevent the spread of disease.<sup>68</sup> Additionally, the relevant CDC guidelines recommended three consecutive negative sputum smears,<sup>69</sup> leading to “[84] percent of [s]tate/[f]ederal systems and 74 percent of city/county systems report[ing] policies for the duration of isolation that conformed to” these guidelines (while other details of these prison policies often departed from the specific CDC recommendations).<sup>70</sup> Adherence to the CDC’s recommendations for isolation, treatment, and screening of those incarcerated people and staff would have helped reduce the spread of tuberculosis in correctional facilities.<sup>71</sup> Had prisons complied with CDC guidelines for isolation during COVID-19, they would have better limited the spread of COVID-19 and prevented unnecessary solitary confinement practices. But as this Comment discusses, no prison complied fully with the CDC guidelines in handling COVID-19.<sup>72</sup>

Additionally, the acquired immunodeficiency syndrome (AIDS) epidemic led to health crises among prison populations across the country.<sup>73</sup> Because of the public stigma surrounding the disease, the medical field and the public perceived AIDS as far more contagious

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

<sup>68</sup> THEODORE M. HAMMET ET AL., 1996–1997 UPDATE: HIV/AIDS, STDs, AND TB IN CORRECTIONAL FACILITIES 89 (1999); *The Importance of Negative Pressure Rooms*, SLIDELL MEM’L HOSP.: HEALTH SERVS. BLOG, <https://www.slidellmemorial.org/blog/the-importance-of-negative-pressure-rooms> (last visited Dec. 20, 2023).

<sup>69</sup> Sputum smears are saliva tests conducted to reveal the existence of bacteria, often used to confirm a diagnosis of tuberculosis. MUHAMMAD U. ASGHAR ET AL., SPUTUM SMEAR AND CULTURE-NEGATIVE TUBERCULOSIS WITH ASSOCIATED PLEURAL EFFUSION: A DIAGNOSTIC CHALLENGE 3 (2018), <https://doi.org/10.7759/cureus.3513>.

<sup>70</sup> HAMMET ET AL., *supra* note 68, at 89.

<sup>71</sup> *Id.* at 90.

<sup>72</sup> See discussion *infra* Part III.

<sup>73</sup> See generally HUM. RTS. WATCH, SENTENCED TO STIGMA: SEGREGATION OF HIV-POSITIVE PRISONERS IN ALABAMA AND SOUTH CAROLINA I (2010), <https://www.hrw.org/sites/default/files/reports/health0410webwcover.pdf>.

than it was in reality.<sup>74</sup> The false conceptions of its infectiousness led to the belief that isolation and separation would help limit the spread.<sup>75</sup> During this epidemic, though, “[o]nly two [s]tate correctional systems, those in Alabama and Mississippi, segregate[d] asymptomatic” incarcerated people with human immunodeficiency virus (HIV).<sup>76</sup> Generally, courts deferred to correctional facilities and upheld their policies, no matter if they required segregation or integration of their HIV-infected population.<sup>77</sup>

From a comparative perspective, the Mountjoy Prison (“Mountjoy”) in Dublin, Ireland implemented segregation for incarcerated individuals during the AIDS epidemic from 1985 to 1995.<sup>78</sup> The protocols for segregation at Mountjoy were heavily criticized because they allegedly discouraged incarcerated people from seeking medical help, and the small segregation unit was unsuitable as a healthcare environment; as ill-health and the incidence of deaths increased in the unit, Mountjoy’s population succumbed to depression and self-harm.<sup>79</sup>

C. *Modern Trend Towards Recognizing the Negative Mental Effects of Solitary Confinement*

As articulated above, courts acknowledged the psychological impact of solitary confinement on incarcerated individuals as early as 1890 with *In re Medley*.<sup>80</sup> But the judicial system and the federal government did little to remedy these impacts, and even continued to further implement solitary confinement practices on greater scales countrywide. This Part examines the judicial and legislative responses to the psychological consequences of solitary confinement.

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<sup>74</sup> *Id.* at 2.

<sup>75</sup> *See id.*

<sup>76</sup> HAMMET ET AL., *supra* note 68, at 93.

<sup>77</sup> *Id.* at 94.

<sup>78</sup> Janet Weston, *Responding to HIV/AIDS in European Prisons, 1980s–2000s*, in HISTORIES OF HIV/AIDS IN WESTERN EUROPE 82, 92 (Janet Weston & Hannah J. Elizabeth eds., 2022).

<sup>79</sup> Janet Weston, *The Second Sentence: AIDS in Dublin’s Mountjoy Prison*, NURSING CLIO (Oct. 11, 2017), <https://nursingclio.org/2017/10/11/the-second-sentence-aids-in-dublins-mountjoy-prison>; *see also* Simon Doherty, *Tales from Dublin’s Notorious HIV/AIDS Separation Unit*, HUCK MAG. (Dec. 1, 2017), <https://www.huckmag.com/perspectives/reportage-2/tales-dublins-notorious-hiv-aids-separation-unit>.

<sup>80</sup> *See* discussion *infra* Part II.A.

### 1. Judicial Response

In 1995, the District Court for the Northern District of California acknowledged the psychological impact of isolation in prisons in *Madrid v. Gomez*.<sup>81</sup> This case arose out of a class action challenging conditions of confinement at Pelican Bay's SHU, a supermax facility in California.<sup>82</sup> As discussed above, Pelican Bay's SHU isolated those incarcerated in windowless cells for twenty-two-and-a-half hours a day and "denied [them] access to prison work programs and group exercise [in the] yards."<sup>83</sup> Rather than looking to the underlying convictions of those incarcerated, Pelican Bay administrators reserved assignment in the SHU for individuals affiliated with prison gangs or those who committed serious disciplinary infractions *during* their time in prison.<sup>84</sup> According to the court, the SHU consisted of white-concrete-walled, windowless cells designed to reduce visual stimulation.<sup>85</sup> An individual held in the SHU said that his pod was "like a space capsule where one is shot into space and left in isolation."<sup>86</sup>

As for the social isolation aspect of the SHU, individuals could only leave their cells on special occasions.<sup>87</sup> They could leave their pod periodically to go to the law library but were "assigned to an individual library cell and [had] little interaction with other [incarcerated individuals] or library staff."<sup>88</sup> While they could receive visitors and their attorneys, they were only able to speak through thick glass windows via telephone, thereby eliminating any possibility for human contact.<sup>89</sup> Few actually received visitors, though.<sup>90</sup> Pelican Bay permitted privileges to some incarcerated individuals, including the ability to keep televisions and radios, send and receive mail, read books, and participate in Bible correspondence classes.<sup>91</sup>

The plaintiffs' expert concluded that for forty out of fifty incarcerated individuals, the "SHU conditions had either massively

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<sup>81</sup> *Madrid v. Gomez*, 889 F. Supp. 1146, 1216 (N.D. Cal. 1995).

<sup>82</sup> *Id.* at 1155.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 1228.

<sup>86</sup> *Id.* at 1229.

<sup>87</sup> *Gomez*, 889 F. Supp. at 1229.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

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

<sup>91</sup> *Id.* at 1230.

exacerbated a previous psychiatric illness or precipitated psychiatric symptoms associated with [Reduced Environmental Stimulation] conditions.”<sup>92</sup> The expert attributed an incarcerated person’s symptoms to the SHU, but only where: (1) “[their] records indicated that the symptoms, or the exacerbation of mental illness, surfaced after confinement in the SHU”; and (2) “the [incarcerated person] was experiencing a constellation of symptoms . . . rarely found outside conditions of social isolation and restricted environmental stimulation.”<sup>93</sup>

The court analyzed the SHU’s mental health impacts on the plaintiffs and acknowledged solitary confinement’s “deleterious impact on the mental state of [incarcerated individuals].”<sup>94</sup> But Judge Henderson found “no right to recreational, vocational, or rehabilitative programs[,]” and, in the court’s view, the lack of programs did not result in the “infliction of pain” that violated the Eighth Amendment.<sup>95</sup> Further, the court reasoned that “the mental impact of a challenged condition should be considered in conjunction with penological considerations.”<sup>96</sup> Despite its acknowledgment that solitary confinement imposes “psychological *trauma*” on incarcerated people, the court concluded that such extreme conditions did not satisfactorily demonstrate a sufficiently high risk of those incarcerated incurring serious mental illness.<sup>97</sup> Judge Henderson declined to rule “that the conditions constitute[d] a *per se* deprivation of a basic necessity of life.”<sup>98</sup> Thus, the court found that, under these conditions, repeated solitary confinement in the SHU only “constitute[d] cruel and unusual punishment in violation of the Eighth Amendment for two categories of [incarcerated people]: those who [were] already mentally ill and those who . . . [were] at an unreasonably high risk of suffering serious mental illness as a result” of the SHU conditions.<sup>99</sup>

Further, as alluded to in *Gomez*, the Ninth Circuit in *Toussaint v. McCarthy* emphasized that the “psychological pain” resulting from idleness in segregation does not sufficiently implicate the Eighth

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<sup>92</sup> *Id.* at 1232.

<sup>93</sup> *Gomez*, 889 F. Supp. at 1232.

<sup>94</sup> *Id.* at 1262.

<sup>95</sup> *Id.* (quoting *Toussaint v. McCarthy*, 801 F.2d 1080, 1106 (9th Cir. 1986)).

<sup>96</sup> *Id.* (citing *Toussaint*, 801 F.2d at 1108).

<sup>97</sup> *Id.* at 1265 (emphasis added).

<sup>98</sup> *Id.* at 1267.

<sup>99</sup> *Gomez*, 889 F. Supp. at 1267.

Amendment.<sup>100</sup> The court reasoned that psychological pain should be considered against the penological justifications for the mental impact, and thus, the presence of such penological justifications usually outweighs any psychological pain.<sup>101</sup>

## 2. Legislative Action to Remedy the Negative Mental Effects of Solitary Confinement

In the Rules, the United Nations General Assembly provides detailed guidelines on a wide array of issues for protecting the rights of incarcerated individuals, some of which restrict the use of solitary confinement.<sup>102</sup> These Rules “are based on an obligation to treat all [incarcerated people] with respect for their inherent dignity and value as human beings, and to prohibit torture and other forms of ill-treatment.”<sup>103</sup> Importantly, these Rules prohibit prolonged and indefinite solitary confinement (Rule 43)<sup>104</sup> and say that solitary confinement “shall be used only in exceptional cases as a last resort, for as short a time as possible” (Rule 45).<sup>105</sup> Prolonged solitary confinement refers to isolation for a “period in excess of [fifteen] consecutive days.”<sup>106</sup>

The Rules acknowledge the harm imposed on the mental health of those enduring solitary confinement. Specifically, Rule 45(2) states that “[t]he imposition of solitary confinement should be prohibited in the case of [incarcerated individuals] with mental or physical disabilities when their conditions would be exacerbated by such measures.”<sup>107</sup> It also prohibits “the use of solitary confinement and similar measures in cases involving women and children.”<sup>108</sup> Despite this overwhelmingly positive step in the right direction, the Nelson

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<sup>100</sup> *Id.* at 1262 (citing *Toussaint*, 801 F.2d at 1108).

<sup>101</sup> *Toussaint*, 801 F.2d at 1108.

<sup>102</sup> G.A. Res. 70/175, *supra* note 16, at 14.

<sup>103</sup> Andrew Gilmour, *The Nelson Mandela Rules: Protecting the Rights of Persons Deprived of Liberty*, U.N. CHRON., <https://www.un.org/en/un-chronicle/nelson-mandela-rules-protecting-rights-persons-deprived-liberty> (last visited Dec. 16, 2023).

<sup>104</sup> G.A. Res. 70/175, *supra* note 16, at 13.

<sup>105</sup> *Id.* at 14.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

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

Mandela Rules are not binding law, but instead reflect a “powerful global consensus on minimum standards” of solitary confinement.<sup>109</sup>

As demonstrated by the implications of this “global consensus,” solitary confinement has the potential to lead to severe—and sometimes irrevocable—harm on the mental health of incarcerated people. For instance, as recently as 2020, a report analyzing New York’s prison system found a strong connection between suicide and solitary confinement.<sup>110</sup> Between 2015 and 2019, 29 percent of all incarcerated individuals who died by suicide were in solitary confinement, and in 2019 alone, 33 percent of all suicides occurred in solitary confinement.<sup>111</sup>

In order to examine the use of solitary confinement on those with mental illness, the DOJ reviewed the BOP’s use of restrictive housing for incarcerated people with mental illness in 2017.<sup>112</sup> According to this review, the BOP claimed that incarcerated people with diagnosed mental illness, including those with serious mental illness, could be housed in each of three types of restricted housing units (“RHUs”).<sup>113</sup> According to the BOP policy, the mental health staff considered the following factors to determine an incarcerated person’s classification as having serious mental illness: “the [incarcerated person’s] diagnosed mental illness or illnesses, the severity and duration of the symptoms, the degree of functional impairment associated with the illness or illnesses, and the [incarcerated person’s] treatment history and current treatment needs.”<sup>114</sup>

Through this review, the DOJ unearthed the mental health impact of restrictive housing on the prison population. The DOJ concluded that the BOP policies did not “[a]dequately [a]ddress the [c]onfinement of [i]ndividuals [w]ith [m]ental [i]llness” in RHUs, nor

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<sup>109</sup> David Fathi, *Victory! UN Crime Commission Approves Mandela Rules on Treatment of Prisoners*, ACLU (May 27, 2015), <https://www.aclu.org/news/prisoners-rights/victory-un-crime-commission-approves-mandela-rules>.

<sup>110</sup> Noah Goldberg, *Suicide Rate in New York Prisons Last Year Rose to Highest Level in Decade, Data Shows*, N.Y. DAILY NEWS, <https://www.nydailynews.com/new-york/ny-suicide-rate-new-york-prisons-20200525-kfoyixaaqngbt4k4nqeonulba-story.html> (May 25, 2020, 8:38 PM).

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

<sup>112</sup> REVIEW OF RESTRICTIVE HOUSING, *supra* note 56, at 2.

<sup>113</sup> *Id.* at 4. Within BOP institutions, there are three main types of restrictive housing units: special housing units (SHU), special management units (SMU), and U.S. Penitentiary Administrative Maximum Security Facilities (ADX). *Id.* at 2–3.

<sup>114</sup> *Id.* at 4–5.



did the BOP sufficiently track or monitor these individuals.<sup>115</sup> The DOJ directed the BOP to improve its tracking of incarcerated people placed in single-cell confinement given the BOP's lack of awareness of the quantity of individuals housed in RHUs.<sup>116</sup> Also, the DOJ concluded that the BOP did not have adequate policies to address the needs of individuals with mental illness in RHUs or to limit the length of time individuals spent in RHUs, including single-cell confinement.<sup>117</sup> Interestingly, the DOJ found that some state departments of corrections had better limitations for individuals enduring long-term restrictive housing, although state practice varied.<sup>118</sup> For example, the DOJ found that corrections officials from Massachusetts, New York, and Mississippi placed at least a thirty-day limit on housing incarcerated people with serious mental illness in RHUs, while Pennsylvania, Colorado, and Maine did not place individuals with serious mental illness in RHUs at all.<sup>119</sup> In stark contrast to these limitations, the BOP did not monitor the cumulative time in all RHUs for their incarcerated population.<sup>120</sup> According to the DOJ, incarcerated individuals with mental illness were in restrictive housing significantly longer than their peers and significantly longer "than the program's intended duration of [eighteen] to [twenty-four] months."<sup>121</sup> The report also found that the BOP released individuals with mental illnesses people into the community directly from RHUs notwithstanding the risks for public safety, given the "damaged and functionally disabled" condition of incarcerated people when leaving RHUs.<sup>122</sup> The DOJ's findings and concerns about the negative consequences that such confinement had on the mental health of incarcerated people in these facilities exhibit the evolution of the government's acceptance and acknowledgement of the importance of mental illness prevention in the prison setting.

In concluding its review, the DOJ called out the BOP for not taking additional actions to mitigate mental health concerns for

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<sup>115</sup> *Id.* at 15.

<sup>116</sup> *Id.* at 22.

<sup>117</sup> *Id.* at 22–26.

<sup>118</sup> REVIEW OF RESTRICTIVE HOUSING, *supra* note 56, at 27.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 28.

<sup>121</sup> *Id.* at 29–30.

<sup>122</sup> *Id.* at 26–27.

individuals in RHUs.<sup>123</sup> The DOJ then provided a list of recommendations for the BOP, including, but not limited to: establishing policy to determine the circumstances that warrant placement of incarcerated people in single-cell confinement while maintaining safety, and ensuring human contact in appropriate settings as well as out-of-cell opportunities to mitigate mental health concerns; establishing policy for extended placement in measurable terms; tracking the time individuals spend in single-cell confinement; and providing additional guidance and “mental health training to correctional staff who are responsible for monitoring the behavior of [incarcerated individuals].”<sup>124</sup>

Despite the DOJ’s comprehensive review of the BOP’s practices, the report primarily focused on the BOP’s neglect of mental health treatment for individuals who likely already had mental illness diagnoses. The report did not, however, adequately address the use of solitary confinement and its impact on those who may not be predisposed to experience mental health concerns. Still, the DOJ’s call to the BOP to amend its mitigation attempts is a step in the right direction and demonstrates the acknowledgment of the mental health ramifications that solitary confinement has on individuals incarcerated in the federal prison system.

### III. THE USE OF SOLITARY CONFINEMENT AS A MEANS OF PREVENTING THE SPREAD OF COVID-19

Throughout the global pandemic, but especially as COVID-19 began to spread, Americans relied on the CDC’s guidance to ensure that they were doing all they could to protect themselves and others from the spread of the virus. Early on, so much was unknown about the best practices to combat the spread of COVID-19. Prisons also bore the impact of this lack of knowledge.

Correctional facilities across the country relied on the CDC for guidance. When providing advice to prison systems, the CDC defined medical isolation as the “[p]hysical separation of an individual with confirmed or suspected COVID-19 to prevent contact with others and

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<sup>123</sup> *Id.* at 51 (“The BOP has begun diverting [incarcerated people] with serious mental illness from traditional RHUs into alternative programs such as secure residential mental health treatment programs. The BOP also has reduced the use of SHUs and the length of time that [incarcerated people] are placed in them. [But] the BOP needs to further improve . . .”).

<sup>124</sup> REVIEW OF RESTRICTIVE HOUSING, *supra* note 56, at 65–66.

reduce the risk of transmission.”<sup>125</sup> Significantly, this interpretation distinguishes medical isolation from solitary confinement in that medical isolation only urges separation and not the punitive circumstances often accompanying solitary confinement.<sup>126</sup> Despite the CDC’s encouragement of *medical* separation, Solitary Watch and the Marshall Project noted that up to three hundred thousand incarcerated individuals were reportedly held in solitary confinement due to COVID-19.<sup>127</sup> Prior to the pandemic, “the estimated number of people in solitary confinement in [American prisons] ranged from [fifty thousand] to [eighty thousand] on any given day,” though many organizations believe this number to be an underestimation.<sup>128</sup> Indeed, the number of people held in solitary confinement during COVID-19 shows an increase of nearly 500 percent over pre-pandemic levels.<sup>129</sup>

The BOP presented its own comprehensive response plan to combat COVID-19 in the federal prison system.<sup>130</sup> This plan focused on the medical isolation and quarantine of incarcerated people. The plan stated that “[i]deally, medical isolation will be in a single, well-ventilated room with a solid door and an attached bathroom.”<sup>131</sup> When housing incarcerated individuals in medical isolation as a cohort, the BOP states that “[o]nly persons with laboratory-confirmed COVID-19 should be placed under medical isolation together as a cohort”; incarcerated people confirmed to have COVID-19 should not be cohorted with those suspected of having the virus; and prisons should “[e]nsure that cohorted groups of people with confirmed COVID-19 wear cloth face coverings whenever anyone (including staff) enters the

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<sup>125</sup> CDC Guidance, *supra* note 15.

<sup>126</sup> Katja Ridderbusch, *COVID Precautions Put More Prisoners in Isolation. It Can Mean Long-Term Health Woes*, NPR (Oct. 4, 2021, 1:29 PM), <https://www.npr.org/sections/health-shots/2021/10/04/1043058599/rising-amid-covid-solitary-confinement-inflicts-lasting-harm-to-prisoner-health>.

<sup>127</sup> UNLOCK THE BOX, SOLITARY CONFINEMENT IS NEVER THE ANSWER 1, 4 (2020), <https://static.prisonpolicy.org/scans/UTB-Report-62020.pdf>.

<sup>128</sup> Ridderbusch, *supra* note 126.

<sup>129</sup> UNLOCK THE BOX, *supra* note 127, at 4 (pre-pandemic levels demonstrated approximately sixty thousand individuals were incarcerated in some form of solitary confinement).

<sup>130</sup> FED. BUREAU OF PRISONS, COVID-19 PANDEMIC RESPONSE PLAN: MODULE 4. MEDICAL ISOLATION AND QUARANTINE 1 (2020), [https://www.bop.gov/foia/docs/Mod\\_4\\_Inmate\\_Isolation\\_and\\_Quarantine\\_of\\_COVID\\_Pandemic\\_Response\\_Plan\\_08312020.pdf](https://www.bop.gov/foia/docs/Mod_4_Inmate_Isolation_and_Quarantine_of_COVID_Pandemic_Response_Plan_08312020.pdf).

<sup>131</sup> *Id.* at 6 (emphasis added).

isolation space.”<sup>132</sup> But prisons across the country did not abide by the CDC’s guidance and instead took matters into their own hands.

Most strikingly, numerous states departed from the CDC guidelines, albeit in varying degrees. It seems each institution opted to loosely interpret these guidelines and even chose to ignore some or all of the instructions.<sup>133</sup> In a study examining quarantine strategies for prisons, forty-five out of fifty-three prison systems defined quarantine, but not one system published definitions of quarantine that aligned with all recommendations from the CDC.<sup>134</sup> This study compared the elements of the CDC’s recommendations against what was really happening inside prisons; for instance, only 20 percent of states followed the quarantine-in-a-single-cell recommendation, and only two state systems (Hawaii and Oregon) released individuals from quarantine at the end of the allotted time period unless it was medically contraindicated.<sup>135</sup>

As a further example, in order to limit the spread of the virus, one prison union president in Texas pushed for more restrictive lockdowns.<sup>136</sup> Despite employing these restrictive lockdowns, Texas prisons still saw a rise in the COVID-19 case count.<sup>137</sup> For those in charge, the knee-jerk reaction for prevention was a deferral to isolation. But these administrators often did not stop to consider the

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<sup>132</sup> *Id.*

<sup>133</sup> Morgan Maner et al., *COVID-19 in Corrections: Quarantine of Incarcerated People*, PLOS ONE, Oct. 5, 2021, at 1, 4–6, <https://doi.org/10.1371/journal.pone.0257842>.

<sup>134</sup> *Id.* at 1. *Compare CDC Guidance, supra* note 15 (recommending “offer[ing] masks/respirators to all residents and staff who want them” and “requir[ing] masks/respirators indoors”), with Lauren Smith & Larkin White, *Four Testimonies from Santa Rita Jail Recount Horrible Conditions During COVID-19—Rejected Requests for Testing, No Masks or Cleaning Supplies, Solitary-Confinement-Style Quarantines*, DAVIS VANGUARD (Aug. 26, 2020), <https://www.davisvanguard.org/2020/08/testomonies-from-santa-rita-jail-recount-conditions-during-covid-19> (exposing Santa Rita Jail for not providing masks to incarcerated individuals).

<sup>135</sup> Maner et al., *supra* note 133, at 5–6.

<sup>136</sup> Keri Blakinger, *What Happens When More than 300,000 Prisoners Are Locked Down?*, THE MARSHALL PROJECT (Apr. 15, 2020, 6:00 AM), <https://www.themarshallproject.org/2020/04/15/what-happens-when-more-than-300-000-prisoners-are-locked-down> (citing AFSCME Texas Corrections, *Demand Safe Working Conditions*, ACTION NETWORK, <https://actionnetwork.org/letters/corrections-covid-19-response> (last visited Dec. 16, 2023)).

<sup>137</sup> Jolie McCullough, *70% of Texas Prisoners Tested Have Coronavirus. Experts Call for More Testing, Fewer Inmates*, KERA NEWS (May 4, 2020, 11:46 AM), <https://www.keranews.org/news/2020-05-04/70-of-texas-prisoners-tested-have-coronavirus-experts-call-for-for-more-testing-fewer-inmates>.

broader health implications of such isolation, nor did they make the necessary moves to ensure that isolation was not abused by officials on site.

This Part provides a constitutional analysis of Eighth Amendment violations in the context of conditions of confinement and, more specifically, solitary confinement. Next, it applies the standard provided by *Turner v. Safley* to measure the penological interests of COVID-19 prevention in instituting solitary confinement conditions. Subjecting those incarcerated to solitary confinement, despite the alternative means of achieving the penological interest of maintaining health and safety, constitutes cruel and unusual punishment.

A. *The Constitutionality of Solitary Confinement*

The Eighth Amendment prohibits the infliction of “cruel and unusual punishment” but has left courts to determine what cruel and unusual means.<sup>138</sup> In *Rhodes v. Chapman*, the US Supreme Court addressed whether conditions of confinement in the form of two incarcerated people sharing one cell constituted cruel and unusual punishment.<sup>139</sup> It clarified that “[c]onditions must not involve the wanton and unnecessary infliction of pain, nor may they be grossly disproportionate to the severity of the crime warranting imprisonment.”<sup>140</sup> The Court determined that conditions devoid of any penological interest likely may constitute cruel and unusual punishment under the Eighth Amendment.<sup>141</sup> It further implied that courts should consider the penological justifications of conditions of confinement in determining whether a constitutional violation exists.<sup>142</sup> Conditions of confinement, however, may be “restrictive and even harsh,” as they represent these individuals’ penalty for their “offenses against society.”<sup>143</sup>

In determining if conditions of confinement are cruel and unusual, the Court employs a deliberate indifference standard.<sup>144</sup> Deliberate indifference to an individual’s serious medical needs amounts to cruel and unusual punishment prohibited by the Eighth

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<sup>138</sup> U.S. CONST. amend. VIII.

<sup>139</sup> *Rhodes v. Chapman*, 452 U.S. 337, 339 (1981).

<sup>140</sup> *Id.* at 347.

<sup>141</sup> *Id.* at 346.

<sup>142</sup> *Id.* at 346–47.

<sup>143</sup> *Id.* at 347.

<sup>144</sup> *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

Amendment.<sup>145</sup> A prison official violates the Eighth Amendment when two requirements are met: (1) the official is, subjectively, aware of a substantial risk to the individual's safety and (2) the official fails to respond reasonably.<sup>146</sup> Although courts acknowledge the theoretical possibility that incarcerated individuals may have viable claims for "excessive punishment" due to solitary confinement based on this standard,<sup>147</sup> they have hesitated to criticize the use of solitary confinement, leading to the limited judicial regulation of the practice.<sup>148</sup>

Prisons often justify solitary confinement by a penological interest to maintain safety, security, and order in the prison system, thereby allowing officials to lawfully add punishments to imprisonment itself. Courts concur with this characterization. The Supreme Court has held that a prison regulation may impinge on an incarcerated person's constitutional rights, if the regulation "is reasonably related to legitimate penological interests."<sup>149</sup> In determining the reasonableness of a penological interest, the Court considers "the existence of obvious, easy alternatives" as weighing against the reasonableness of a regulation.<sup>150</sup> If an alternative exists that "fully accommodates the [incarcerated individual]'s rights at *de minimis* cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard."<sup>151</sup>

The distinction between solitary confinement that is punitive in nature and medical isolation is crucial. Solitary confinement is often coupled with uncomfortable, and at times harsh living conditions, and limitations on food, water, and clothing.<sup>152</sup> Medical isolation, on the other hand, is meant to be a form of quarantine by isolating sick or at-

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<sup>145</sup> *Id.*

<sup>146</sup> *Farmer v. Brennan*, 511 U.S. 825, 847 (1994).

<sup>147</sup> *See Wilkinson v. Austin*, 545 U.S. 209, 229 (2005).

<sup>148</sup> *See generally* Alexander A. Reinert, *Solitary Troubles*, 93 NOTRE DAME L. REV. 927 (2018) (analyzing the judiciary's apprehension to regulate and reexamine the use of solitary confinement).

<sup>149</sup> *Turner v. Safley*, 482 U.S. 78, 89 (1987).

<sup>150</sup> *Id.* at 90 (identifying an unreasonable regulation as an "exaggerated response" to prison concerns).

<sup>151</sup> *Id.* at 91.

<sup>152</sup> *See, e.g., McCullough*, *supra* note 137.

risk individuals from those who do not have COVID-19.<sup>153</sup> Subjecting individuals at risk of contracting, or already diagnosed with COVID-19, to conditions intended to be uncomfortable and punitive constitutes cruel and unusual punishment because there are more health-conscious and humane ways of segregating individuals to maintain the health and safety of these prison populations.

In the context of COVID-19, the District Court for the District of Oregon, in *Maney v. Brown*, analyzed whether the Oregon Department of Corrections “acted with deliberate indifference towards the health” and safety of people in custody during COVID-19.<sup>154</sup> Although the district court ultimately found that the plaintiffs did not properly establish deliberate indifference, it acknowledged the credibility of the plaintiffs’ evidence.<sup>155</sup> The record showed that those in custody expressed reluctance to get tested or report symptoms.<sup>156</sup> Further, they “believe[d] that if they test[ed] positive, they [would] be quarantined in a segregation unit, which they view[ed] as a punitive measure.”<sup>157</sup> Specifically, John L. Preston stated that he did not report his symptoms because he was “afraid of being sent to the hole (Disciplinary Segregation Unit).”<sup>158</sup> In an interview, an investigative supervisor with the Civil Rights Corps named Alison Horn stated that “[i]f the response to having symptoms is punitive . . . [then] that discourages [incarcerated people] from speaking up about it. You need people to be honest about their symptoms.”<sup>159</sup>

The court in *Maney* is one of many courts that have dismissed claims asserting that solitary-confinement-esque quarantine for COVID-19 amounts to deliberate indifference and cruel and unusual punishment. This issue often arises on motions for compassionate release, which is a form of relief that permits incarcerated people to

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<sup>153</sup> See *Isolation and Precautions for People with COVID-19*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/your-health/isolation.html> (May 11, 2023).

<sup>154</sup> *Maney v. Brown*, 464 F. Supp. 3d 1191, 1196 (D. Or. 2020) (emphasis omitted).

<sup>155</sup> *Id.* at 1211.

<sup>156</sup> *Id.* at 1200.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> Blakinger, *supra* note 136; see also *United States v. Thomas*, No. 14-00045-1, 2022 U.S. Dist. LEXIS 66516, at \*3–4 (S.D. W. Va. Apr. 11, 2022) (where plaintiff alleged individuals incarcerated at Federal Medical Center, Lexington were hesitant to come forward when they felt unwell for fear of placement in solitary confinement).

seek a sentence reduction.<sup>160</sup> In order to obtain a compassionate release sentence reduction, an incarcerated individual must demonstrate that the reasons for such release are “extraordinary and compelling,” and to the extent they are applicable, must demonstrate that the sentencing factors under 18 U.S.C. § 3553(a) support the reduction.<sup>161</sup> The First Step Act of 2018 expanded the process of compassionate release grants by authorizing sentencing judges to evaluate compassionate release requests, instead of the BOP.<sup>162</sup> Despite this expansion, courts have stated that conditions of solitary confinement for preventive health measures do not justify such release.<sup>163</sup> There are exceptions, however. For example, in *United States v. Regas*, the District Court for the District of Nevada held that the defendant’s solitary confinement for prophylactic COVID-19 measures amounted to “extraordinary and compelling reasons” for granting his motion for compassionate release.<sup>164</sup> Finding that the reasons for compassionate release are “extraordinary and compelling” is a very limited—and difficult to meet—standard, demonstrating the severity of the isolation conditions that the district court found in *Regas*.<sup>165</sup> For the purpose of protecting the defendant from contracting COVID-19, the BOP placed him in solitary confinement for “the indefinite future,” where he could leave his cell only one-hour-and-a-half per day.<sup>166</sup> The court considered the defendant’s age of seventy-seven years old and his good behavior after twenty-seven years of incarceration in holding that his isolation was a “severe and extreme

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<sup>160</sup> *Compassionate Release*, NIEMAN L. GRP., <https://niemanlaw.com/compassionate-release> (last visited Dec. 16, 2023).

<sup>161</sup> *Id.*; see also 18 U.S.C. § 3553(a).

<sup>162</sup> *Compassionate Release*, *supra* note 160.

<sup>163</sup> See *United States v. Blackwell*, No. 07-cr-00044, 2020 U.S. Dist. LEXIS 239065, at \*5 (D. Alaska Dec. 18, 2020) (“[M]easures that limit [the] movement [of incarcerated people], including solitary confinement as a COVID-19 prevention measure, do not necessarily justify compassionate release.”); see also *United States v. Carrera*, No. 14-CR-0367-B-40, 2020 U.S. Dist. LEXIS 229727, at \*6–8 (N.D. Tex. Dec. 7, 2020) (finding prolonged solitary confinement for a COVID-19 diagnosis did not justify compassionate release); *United States v. Braxton*, Nos. 09-478, 15-408, 2021 U.S. Dist. LEXIS 49834, at \*4–5 (D. Md. Mar. 16, 2021) (acknowledging the “undoubtedly challenging” circumstances of solitary-confinement-style quarantine but finding that such conditions were not factored into the plaintiff’s qualification for compassionate release).

<sup>164</sup> *United States v. Regas*, No. 91-00057, 2020 U.S. Dist. LEXIS 98402, at \*8 (D. Nev. June 3, 2020).

<sup>165</sup> *Id.* at \*2–3.

<sup>166</sup> *Id.* at \*2.



measure under these circumstances.”<sup>167</sup> Following its determination that the reasons for compassionate release were “extraordinary and compelling,” the court next considered the § 3553(a) sentencing factors and concluded that they weighed in favor of release.<sup>168</sup>

Additionally, federally incarcerated individuals at Lompoc Prison in California filed a class action lawsuit against prison officials, accusing them of cruel and unusual punishment during COVID-19.<sup>169</sup> This settlement set conditions of confinement, one of which was a requirement that “medical isolation using the [SHU] must be ‘operationally distinct’ from disciplinary and administrative” solitary confinement.<sup>170</sup> The agreement further required that individuals subjected to medical isolation have “daily medical visits, access to mental health services[,] and increased access to telephones ‘to maintain health and connection during isolation.’”<sup>171</sup> Though some might argue that these services may be difficult to implement, oftentimes the general population has access to some form of these services. Therefore, it should not be a problem to ensure that an individual placed in medical quarantine has access to the same services they had in the general population, even if modified.

#### B. *Prisons Impose Punishment Without the Intention of Doing So*

Even when segregation in solitary-confinement-style conditions is effective in both limiting the spread and advancing the containment of COVID-19, it often comes with a cost. For instance, Vermont prisons saw a reduction of the number of positive cases due to their restrictive isolation strategies.<sup>172</sup> But even so, there was “at least one suicide and [one] suicide attempt inside the isolation cells” where incoming individuals were assigned to wait in a required fourteen-day quarantine.<sup>173</sup> In this situation, the administrators at the Vermont

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<sup>167</sup> *Id.* at \*2, \*7.

<sup>168</sup> *Id.* at \*9–14.

<sup>169</sup> Dave Minsky, *Settlement Reached in Lompoc Prison COVID-19 Class Action Suit*, SANTA MARIA TIMES, [https://santamariatimes.com/news/local/crime-and-courts/settlement-reached-in-lompoc-prison-covid-19-class-action-lawsuit/article\\_fb8641d6-be54-5e91-ab24-cf4c26af0a53.html](https://santamariatimes.com/news/local/crime-and-courts/settlement-reached-in-lompoc-prison-covid-19-class-action-lawsuit/article_fb8641d6-be54-5e91-ab24-cf4c26af0a53.html) (July 11, 2022).

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> Danya Issawi & Derek M. Norman, *In Vermont, Isolating Inmates Kept Covid at Bay, but at a Price*, N.Y. TIMES (Apr. 21, 2021), <https://www.nytimes.com/2021/04/21/us/vermont-prison-covid.html>.

<sup>173</sup> *Id.*

prisons could have instituted a quarantine while still providing the necessary supervision and support to alleviate the mental health risks of solitary confinement. By sidestepping one harm, the Vermont prisons created another. Is society more comfortable with limiting the spread of COVID-19 in prisons by whatever means necessary, even if those means lead to the psychological demise of undeserving incarcerated people, so much so that they take their own life?

During a public health emergency, the US criminal legal system did the only thing it knows how to do—inflict harm. Even more than typical issues regarding solitary confinement though—where prisons often argue the practice serves penological justifications like general safety and order—it may be argued that, though misguided, the state sought to protect the health and safety of the prison and staff population, not just seeking to protect those outside of confinement but inside of it as well. It may be argued that the intention was to protect and keep the overall prison population safe from the spread of disease. So, though a *Farmer* claim with these circumstances may be difficult to argue in court, since the subjective element of deliberate indifference would be difficult to prove, the very nature of the intention exposes the problem undergirding the prison system. Whether an intent to punish exists, the prison system imposes punishment nonetheless. As Walter Pavlo stated in his article “Bureau of Prisons Using Solitary Confinement as a Means to Curb Covid-19 Contagion,” solitary confinement is “a punishment that is meant to shock those who are incarcerated to get back in line and start following the rules,” but “those same measures are now being used to ‘protect’ [those incarcerated] from contagion of [COVID-19] and the effects of this doomed protocol will be felt for years.”<sup>174</sup> Inflicting unnecessary pain and punishments on incarcerated individuals is a quick fix to the spread of COVID-19, but as Pavlo articulates, with this quick fix will come far more significant harms to the prison population. There are other better methods to achieving a safe and healthy prison environment in times of health crises than infliction of punishment.

Accounts from individuals impacted by COVID-19 policies demonstrate that the conditions were not what the government purported them to be. Christopher Russell, whose experience was described in the introduction of this Comment, was kept in a

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<sup>174</sup> Walter Pavlo, *Bureau of Prisons Using Solitary Confinement as a Means to Curb Covid-19 Contagion*, FORBES (July 16, 2020, 9:41 AM), <https://www.forbes.com/sites/walterpavlo/2020/07/16/bureau-of-prisons-using-solitary-confinement-as-a-means-to-curb-covid-19-contagion/?sh=32c758d3193a>.

windowless, concrete, unsanitary room with little regard for his medical needs.<sup>175</sup> The fear of officials transferring him to a punitive environment accompanied his apprehension to notify them of any potential exposure to or contamination with COVID-19.<sup>176</sup> Not only were the COVID-19 prevention conditions unconstitutional for individuals like Christopher—regardless of their effectiveness at combatting the spread of disease—but also in many cases the spread of disease was worsened by these conditions.<sup>177</sup> In this regard, solitary confinement as a means of prevention potentially increased the spread of disease in addition to inflicting an unwarranted punishment on incarcerated people.<sup>178</sup> For instance, incarcerated individuals across the country allege reluctance to report symptoms or get tested for COVID-19 for fear that they will be subjected to punitive segregation.<sup>179</sup>

During the pandemic, solitary confinement to isolate people suspected of having COVID-19, like Christopher, was the rule, not the exception. Testimony from individuals incarcerated at the Alameda County Santa Rita Jail in California reported similar conditions of isolation.<sup>180</sup> For example, one person under the alias of “John,” described how once incarcerated people tested positive for COVID-19 they were kept in solitary-confinement-style housing units: “[i]t is definitely solitary confinement . . . . You’re in a cell by yourself, you’re coming out for thirty minutes and it’s not every day. It’s approximately every other day if not two days.”<sup>181</sup>

Not only were individuals at Santa Rita confined in solitary-confinement-esque conditions, according to these testimonies, but also they were kept in *unsanitary* conditions of confinement without adequate cleaning supplies.<sup>182</sup> One individual in particular, “Troy,” stated that when they were given cleaning supplies, the supplies were

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<sup>175</sup> See discussion *supra* Part I.

<sup>176</sup> Weill-Greenberg, *supra* note 1.

<sup>177</sup> See discussion *supra* Part III.A.

<sup>178</sup> *Maney v. Brown*, 464 F. Supp. 3d 1191, 1197 (D. Or. 2020).

<sup>179</sup> See *id.* at 1200; see also Robin Blades, *Solitary Confinement May Worsen Covid-19 Transmission in Prisons*, UNDARK (Feb. 15, 2021), <https://undark.org/2021/02/15/solitary-confinement-covid-19>; Joseph Shapiro, *As COVID-19 Spreads in Prisons, Lockdowns Spark Fear of More Solitary Confinement*, NPR (June 15, 2020, 4:53 PM), <https://www.npr.org/2020/06/15/877457603/as-covid-spreads-in-u-s-prisons-lockdowns-spark-fear-of-more-solitary-confinemen>.

<sup>180</sup> Smith & White, *supra* note 134.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

“insufficient to protect them from COVID-19.”<sup>183</sup> Crucially, these testimonies contradict the statement given by the Alameda County Sheriff’s Office, stating that “all [incarcerated people] are provided with free soap and enhanced cleaning supplies.”<sup>184</sup> That office faced two major lawsuits concerning this issue, both of which ended in a settlement.<sup>185</sup> Surely, placing at risk individuals in small rooms with little to no opportunity to sanitize the premises is not the best method of improving or preventing the circumstances of those enduring an ongoing health crisis.

Other states across the country displayed conditions resembling Santa Rita. For instance, New Jersey’s correctional system implemented the “transfer of ill or potentially ill [incarcerated individuals] to units designed for solitary confinement,” which often were unsanitary cells.<sup>186</sup> And even stricter still, individuals incarcerated in some Vermont prisons were placed in solitary lockdown for nothing more than precautionary measures.<sup>187</sup> These individuals, who did not necessarily test positive for—or were even exposed to—COVID-19, were isolated in eight-and-a-half-by-ten-foot cells in near-total isolation.<sup>188</sup> They were not allowed visitors, spent as little as ten minutes a day outside of their cells, and ate their meals mere feet from their toilets.<sup>189</sup>

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<sup>183</sup> *Id.* (“Windex is their sanitation to clean the showers, the toilets, the mirrors . . . . That’s it. That’s all they gave us.”).

<sup>184</sup> Smith & White, *supra* note 134.

<sup>185</sup> *Id.*; see also Nate Gartrell, *Woman Forced to Give Birth in Santa Rita Jail Settles with Alameda County, Medical Contractor*, THE MERCURY NEWS, <https://www.mercurynews.com/2021/11/09/woman-forced-to-give-birth-in-santa-rita-jail-settles-with-alameda-county-medical-contractor> (Nov. 10, 2021, 4:27 AM) (stating a woman who sued Alameda for forced delivery of her child in the prison was set to receive \$250,000 in a court-ordered settlement); *Notice of Class Action Settlement to Address Conditions at Santa Rita Jail, Santa Rita Jail Decree—Babu v. Ahern Information Page*, ROSEN BIEN GALVAN & GRUNFELD LLP, <https://rbgg.com/santa-rita-consent-decree> (Feb. 7, 2022) (stating a district court approved and put into effect a consent decree requiring Alameda to provide, among other things, adequate health care to those incarcerated, and implement limitations on use and duration of restrictive housing).

<sup>186</sup> Jon Hurdle, *COVID-19 Spreads in Women’s Prisons Where Sexual Abuse Prompted Federal Probe, Say Inmates and Advocates*, N.J. SPOTLIGHT NEWS (June 24, 2020), <https://www.njspotlightnews.org/2020/06/covid-19-spreads-in-womens-prison-where-sexual-abuse-prompted-federal-probe-say-inmates-and-advocates>.

<sup>187</sup> Issawi & Norman, *supra* note 172.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

The constitutionality of solitary confinement outside of the COVID-19 schema is beyond the scope of this Comment. Given the Supreme Court's broad construction of what constitutes a penological interest, an Eighth Amendment violation claim based on solitary confinement in the COVID-19 context may be more difficult to make given the sufficient interest in preventing the spread of disease and protecting the overall health of the prison environment. But considering data revealing that these conditions often worsened the health of those in isolation and caused many to avoid seeking assistance for fear of isolation, there is less support for the conclusion that the penological interests of health and safety were demonstrable enough to justify the negative impact such isolation had on incarcerated individuals. Even if some data points to improvements in the overall population, there were better alternatives to achieve the health and safety interests than the methods employed by prisons across the country during COVID-19.

#### V. PROPOSED ALTERNATIVES

The Eighth Amendment compels prison officials to cease the use of solitary confinement for the purpose of quarantining and medical isolation because the very nature of these circumstances does not call for punitive action. Although courts have been apprehensive to refute a penological interest justification and find in favor of an individual enduring cruel and unusual punishment for the purported greater good of the prison community, in the limited context of solitary confinement as a response to COVID-19, the penological interest claim is significantly less convincing. Prison officials may not punish incarcerated individuals for contracting—or potentially contracting—COVID-19 or existing in the time of a global health crisis. Given the likelihood that society, and thus prison systems, will surely face another health crisis at some point in the future, officials must learn from the COVID-19 response to make prisons a safer, healthier, and more humane place for the people within them.

One popular and effective means of containing the spread of COVID-19 in prisons across the country was release. The pandemic prompted significant criminal justice policy changes, often including an increased number of releases, reduction of admissions into prisons, and alterations made to probation and parole protocols.<sup>190</sup>

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<sup>190</sup> See *The Most Significant Criminal Justice Policy Changes from the COVID-19 Pandemic*, PRISON POL'Y INITIATIVE, <https://www.prisonpolicy.org/virus/virusresponse.html> (last visited Dec. 16, 2023).

On March 27, 2020, President Trump signed the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) into law.<sup>191</sup> The CARES Act was meant to provide Americans with economic relief and assistance after the impacts of COVID-19.<sup>192</sup> Under the CARES Act, Attorney General Barr exercised emergency authority to increase home confinement as a response to COVID-19.<sup>193</sup> Since March 2020, “[t]he BOP has increased home confinement by over 40 [percent]” and continues to screen incarcerated individuals for home confinement.<sup>194</sup> The rationale behind releasing people from correctional facilities is that the wider communities, the ones that staff and those incarcerated people will return to, stay protected from the spread of COVID-19.<sup>195</sup> Further, in accordance with the CARES Act, the DOJ called for continued at-home confinement for the incarcerated population, listing in a Memorandum for Chief Executive Officers, various factors to be considered to ensure suitability for home confinement:

- Reviewing the [incarcerated person’s] institutional discipline history for the last twelve months ([incarcerated individuals] who have received a [three hundred] or [four hundred] series incident report in the past [twelve] months may be referred for placement on home confinement, if in the Warden’s judgment [sic] such placement does not create an undue risk to the community);
- Ensuring the [incarcerated person] has a verifiable release plan;
- Verifying the [incarcerated person’s] current or a prior offense is not violent, a sex offense, or terrorism-related;

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<sup>191</sup> Coronavirus Aid, Relief, and Economic Security Act, 116 Pub. L. No. 116-136, 134 Stat. 281 (2020).

<sup>192</sup> *About the CARES Act and the Consolidated Appropriations Act*, U.S. DEP’T OF THE TREASURY, <https://home.treasury.gov/policy-issues/coronavirus/about-the-cares-act> (last visited Dec. 16, 2023).

<sup>193</sup> *See Update on COVID-19 and Home Confinement*, FED. BUREAU OF PRISONS, [https://www.bop.gov/resources/news/20200405\\_covid19\\_home\\_confinement.jsp](https://www.bop.gov/resources/news/20200405_covid19_home_confinement.jsp) (Apr. 5, 2020, 6:40 PM).

<sup>194</sup> *Id.*; *see also* U.S. SENT’G COMM’N, COMPASSIONATE RELEASE: THE IMPACT OF THE FIRST STEP ACT AND COVID-19 PANDEMIC 9 (2022), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220310\\_compassionate-release.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220310_compassionate-release.pdf) (“Courts do not have jurisdiction over requests for home confinement under the CARES Act . . . . The BOP . . . has placed thousands of offenders in home confinement pursuant to its CARES Act authority . . .”).

<sup>195</sup> *See UNLOCK THE BOX*, *supra* note 127, at 9.

- Confirming the [incarcerated person] does not have a current detainee;
- Ensuring the [incarcerated person] is Low or Minimum security;
- Ensuring the [incarcerated person] has a Low or Minimum PATTERN recidivism risk score;
- Ensuring the [incarcerated person] has not engaged in violent or gang-related activity while incarcerated (must be reviewed by [Special Investigative Services]);
- Reviewing the COVID-19 vulnerability of the [incarcerated person], in accordance with CDC guidelines; and
- Confirming the [incarcerated person] has served 50 [percent] or more of their sentence; or has [eighteen] months or less remaining on their sentence and [has] served 25 [percent] or more of their sentence.<sup>196</sup>

By releasing incarcerated individuals and opting for home confinement, the remaining individuals in the prison system will be more easily tended to, managed, and spread out. These releases create more space for social distancing and the provision of necessary health care resources for containing and treating COVID-19.<sup>197</sup>

Further, if isolation must be the method used to best contain the COVID-19 spread and keep the community safe and healthy, there are far better means to achieve this than implementing solitary-confinement-style quarantines. For example, Erica Bryant, writing for the VERA Institute of Justice, proposed isolation conditions that would best curb the spread of COVID-19.<sup>198</sup> Bryant claims that medical isolation should include free access to resources, like television, tablets, radio, and reading materials, to make the isolation psychologically bearable; “vital family support, including free video chatting,” phone calls, or emails; “sanitary living space with sufficient ventilation and temperature”; “easy access to medical and mental health professionals through phone or telemedicine”; supervision from “medical staff rather than corrections officers”; removal “from isolation when medical staff deem it appropriate”; and inclusion of family in their medical care, “including regular updates on their progress and health

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<sup>196</sup> Memorandum from the Dep’t of Just. on Home Confinement to Chief Executive Officers (Apr. 13, 2021), [https://www.fd.org/sites/default/files/covid19/2021.4.13\\_-\\_bop\\_home\\_confinement\\_cares\\_memo.pdf](https://www.fd.org/sites/default/files/covid19/2021.4.13_-_bop_home_confinement_cares_memo.pdf).

<sup>197</sup> See, e.g., UNLOCK THE BOX, *supra* note 127, at 10.

<sup>198</sup> Erica Bryant, *Solitary Confinement Is Torture, Not COVID Medical Care*, VERA INST. JUST. (Mar. 25, 2022), <https://www.vera.org/news/solitary-confinement-is-torture-not-covid-medical-care>.

status as they face COVID-19 exposure or infection.”<sup>199</sup> Most importantly, the conditions of isolation “should never resemble those used for punitive solitary confinement.”<sup>200</sup>

Determining which course or combination of courses of action will be the most effective and humane in containing the spread of COVID-19 and similar diseases is beyond the scope of this Comment. But the presence of alternative courses of action that could have been taken instead of defaulting to solitary confinement as a means of containment further solidify the cruel and unusual nature of such a practice. Particularly, if the penological interest may be met in another less harmful way, or even is not met as effectively as it could be, then the prison violates the Eighth Amendment rights of those incarcerated.

Most crucially, the government must learn from its mistakes. Solitary confinement is not an ethical or successful means of disease prevention in prisons. In preparation for the next health crisis—which is not a question of if, but when—officials must be equipped and prepared. It is imperative that the government applies quarantine ethics to the prison system to ensure that incarcerated individuals have “adequate medical treatment and safe, healthful conditions of confinement” when they happen to be involuntarily confined during a global health crisis.<sup>201</sup>

## VI. CONCLUSION

The human race is no stranger to health crises and likely never will be. Although COVID-19 seemed isolated in nature, diseases are threats that the United States has faced for centuries, and will continue to face in the future. Thus, prison systems must learn from their drastic mistakes during the COVID-19 era. This Comment does not address the extent of the remedies available to those who fell victim to these flaws in the system, but one thing is clear: the constitutional violations should not go unanswered, and at the very least, injunctions against

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<sup>199</sup> *Id.*; see also UNLOCK THE BOX, *supra* note 127, at 11 (“[I]ndividuals placed in medical isolation . . . must have frequent contact with medical and mental health staff; access to reading materials, television, free tablets with email[,] and free phone calls; remote opportunities for rehabilitative and recreational programing; and healthy outdoor exercise. And they should receive frequent updates regarding their condition and the projected length of their isolation.”).

<sup>200</sup> UNLOCK THE BOX, *supra* note 127, at 11.

<sup>201</sup> See Sara D. Schotland, *A Plea to Apply Principles of Quarantine Ethics to Prisoners and Immigration Detainees During the COVID-19 Crisis*, 7 J.L. & BIOSCIENCES 1, 1 (2020), <https://doi.org/10.1093/jlb/ljaa070>.



this form of isolation would be a proper remedy if the future brings with it a similar health crisis. Solitary confinement and medical isolation should *never* resemble one another.<sup>202</sup>

Subjecting individuals to the punitive conditions of solitary confinement as a means of allegedly protecting them and/or the prison population from a disease cannot be a constitutional answer. It frankly demonstrates how little prison administrators care about the true health of the individuals incarcerated at their facilities. It seems they are more concerned with eliminating the problem through concealment, rather than aiming to make the prison environment as safe and healthy as possible. If those running the prisons truly want to implement safe, effective, and humane practices within the prison environment, they should reconsider the knee-jerk, default-use of solitary confinement when crises arise.

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<sup>202</sup> David H. Cloud et al., *Medical Isolation and Solitary Confinement: Balancing Health and Humanity in US Jails and Prisons During COVID-19*, 35 J. GEN. INTERNAL MED. 2738, 2739 (2020), <https://doi.org/10.1007/s11606-020-05968-y>.

