

STARVATION OF THE SPIRIT: SOLITARY CONFINEMENT AND THE 8TH AMENDMENT

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Abstract

Solitary confinement has had a long history in the United States. While it has evolved over time, it remains an important part of the American criminal justice system. Typically, the practice is used to discipline inmates who commit serious rule infractions or who are involved with prison gangs. However, litigation in recent decades has revealed that highly limited social interactions and “reduced environmental stimuli” can lead to severe consequences such as psychosis and suicidal tendencies, especially for mentally ill prisoners. In such cases, some courts have found that solitary confinement is unconstitutional for the severely mentally ill constitutes deliberate indifference under the Eighth Amendment. This paper considers the history and modern facts of solitary confinement in the United States, the various Eighth Amendment challenges which it presents (including analysis through two case studies), and the possible constitutional answers. It concludes that while state action is preferable, the Supreme Court may be justified in ruling that solitary confinement is an unconstitutional practice when applied to severely mentally ill prisoners.

Introduction

In 1842, Charles Dickens described solitary confinement in the United States:

... I am only the more convinced that there is a depth of terrible endurance in which none but the sufferers themselves can fathom, and which no man has a right to inflict upon his fellow creature. I hold this slow and daily tampering with the mysteries of the brain to be immeasurably worse than any torture of the body; and because its ghastly signs and tokens are not so palpable to the eye and sense of touch as scars upon the flesh; because its wounds are not upon the surface, and it extorts few cries that human ears can hear; therefore the more I denounce it, as a secret punishment which slumbering humanity is not roused up to stay. (p. 81)

Of course, to say that the solitary confinement of 2018 resembles the conditions of the same punishment in 1842 is to make a faulty comparison. The prison reform of the 19th and early 20th centuries had its effects, and the modern use of electricity cannot be ignored either.

But it is equally faulty to say that there is nothing harsh about the nature of solitary confinement which permeates its every rendition. Solitary confinement is, by definition, the separation of a prisoner from the general prison population—a population already removed from the rest of society (Solitary Confinement, n.d.). In other words, a prisoner in solitary confinement is in a state of total or near-total isolation. It is no revelation to say that this is an unnatural and difficult state of existence for even the most socially-averse of persons. It might even be described as “cruel.”

The Eighth Amendment to the US Constitution famously prohibits punishments which are “cruel and unusual.” Likewise, if there are instances where solitary confinement is cruel, it is possible that this could render it an unconstitutional form of punishment. However, the Supreme Court has never ruled on the facial merits of solitary confinement in light of this constitutional provision. The term “solitary confinement” appears in 69 separate cases under the Supreme Court’s jurisdiction: but in each case, the merits of the punishment are either unaddressed, or considered only on a narrow, as-applied level, almost always for constitutional provisions unrelated to the Eighth Amendment.

Yet the question of the constitutionality of solitary confinement is an important and relevant one today. While the Federal Bureau of Prisons reports that it has made efforts in the last several years to reduce the number of federal prisoners in solitary confinement, the most recent estimates suggest that some 80,000 prisoners find

themselves in “restrictive housing” in the United States (Casella & Ridgeway, 2012; Department of Justice, 2016). If indeed there is a constitutional question surrounding solitary confinement, it is worth considering at the present time.

In light of these facts and considerations, the remainder of this paper will address the constitutionality of solitary confinement as it is practiced today. The hypothesis advanced at the outset of this research is that the practice of solitary confinement becomes unconstitutional at the point at which it deprives inmates of the opportunity to meaningfully interact with other persons at regular intervals, or when it deprives inmates of the opportunity to access adequate mental health treatment. This hypothesis will be tested against the constitutional literature available on this issue. This study will also compare the variety of prison practices across the US against past, current, and proposed standards in Eighth Amendment jurisprudence.

This study is divided into three sections. Section 1 gives a background on the issue. It discusses available literature on the subject, and the history of solitary confinement in practice and at law through the United States. Section 2 discusses current solitary confinement conditions, recent litigation, and laws and regulations in the US and through the world. Section 3 analyzes the constitutional issues pertaining to the Eighth Amendment.

Literature Review: A Brief History of Solitary Confinement

Literature on the constitutionality of solitary confinement is broad enough that a true review of the literature would merit an entire paper in itself. Approaches vary broadly, and the arguments have changed over time along with the constitutional history. Because of this breadth, this space will be used to cite a few pertinent examples from recent years. The remainder of the literature review will focus on the constitutional literature itself, as this is what will ultimately inform any potential court decision.

Some recent articles focus on prisoner outcomes upon release from solitary confinement. For instance, one study notes that recidivism rates tend to be lower among those who were not in solitary confinement, and cites the harsh conditions of solitary as the likely reason for this difference (Gordon, 2014).

Others focus on systemic problems within criminal justice systems and advocate for their reform over constitutional solutions. For instance, one article suggests that juvenile solitary confinement can only end if attorneys general are proactive about it (Cooper, 2017). Rademacher (2016) article proposed statutory changes to achieve the same effect.

Some take an international approach to the problem. For instance, Hresko

(2006) attempted to use international laws against torture to fault the U.S.'s practices.

Still others look at the psychological impact of the solitary confinement as a justification for reform (Walton, 1997). This is the approach taken in this study.

A History of Solitary Confinement in the United States

In the 1890 Supreme Court case *In re Medley*, Justice Miller cited the American Cyclopaedia when he described the early history of solitary confinement in the United States:

[T]he first plan adopted when public attention was called to the evils of congregating persons in masses without employment, was the solitary prison connected with the Hospital San Michele at Rome, in 1703, but little known prior to the experiment in Walnut Street Penitentiary in Philadelphia in 1787. The peculiarities of this system were the complete isolation of the prisoner from all human society, and his confinement in a cell of considerable size, so arranged that he had no direct intercourse with or sight of any human being, and no employment or instruction. Other prisons on the same plan, which were less liberal in the size of their cells and the perfection of their appliances, were erected in Massachusetts, New Jersey, Maryland and some of the other States. But experience demonstrated that there were serious objections to it. A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others, still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community. It became evident that some changes must be made in the system, and the separate system was originated by the Philadelphia Society for Ameliorating the Miseries of Public Prisons, founded in 1787. (*In re Medley*, 1890, at 167)

But the replacement system proved to be nearly as bad as the system it was designed to improve. The Philadelphia Society based its new theory upon the idea of penitence: if prisoners were in solitary confinement, they could think about the wrongs which they had committed and become penitent. Prisoners were taken into confinement wearing a hood so that they could not see any other prisoners on their way, and they were removed from confinement in the same way. In fact, the only real “reform” was that prisoners were now allowed to work in their cells (a part of their

penance), rather than sitting in the space, completely bored. It was these conditions of which Charles Dickens wrote in 1842.

By the time the Supreme Court took up the Medley case in 1889, the once-widespread use of solitary confinement seems to have decreased. However, the case law from the end of the 19th and beginning of the 20th centuries suggests that solitary was common while a prisoner sentenced to death awaited their execution. The application of this practice was at issue in multiple cases including Medley, for various reasons extending beyond the scope of the Eighth Amendment (*In re Medley*, 1890; *Holden v. Minnesota*, 1890; *McElvaine v. Brush*, 1891; *Rooney v. North Dakota*, 1905; *Rogers v. Peck*, 1905). As noted in the literature review, most cases, like the Medley case, were questions of whether the applicable law was applied in an ex post facto manner.

The next trend highlighted in Supreme Court case law is the early 20th century trend of sentencing prisoners to “solitary confinement at labor” for lengths of time varying from eighteen months to indefinite confinement. The crimes warranting this punishment include embezzlement and conspiracy in fraud (*Shoener v. Pennsylvania*, 1907; *Ex parte Spencer*, 1913).

For nearly half a century the Court remained silent on any form of long-term solitary confinement, commenting only on cases where solitary was a temporary measure for a matter of days.

Then, in 1950, the Court took up the case of *Quicksall v. Michigan*. This case is notable because it is the first time that a life sentence to solitary confinement appears in the High Court. The Court did not consider the merits of solitary confinement, as the case was a procedural due process challenge. In this case, as well as the subsequent 1957 case of *Moore v. Michigan*, the petitioner did not have the assistance of counsel at trial. The Moore case was an application of the same sentence to “solitary confinement at hard labor for life without opportunity for parole”—and in that case the petitioner was only 17 years old at the time he was sentenced (*Moore v. Michigan*, 1957, at 155). A similar claim was raised in *Carnley v. Cochran* (1962), thought this was a case where a man was allegedly in solitary confinement for five months while awaiting a sentence.

The final “historical” contribution of the Supreme Court’s record comes from *Brooks v. Florida* (1967), where solitary confinement (among other tools) were used to extort confessions to rioting from petitioners. The Court held their sentence unconstitutional on a unanimous decision.

How Solitary Confinement is Used Today

As noted at the outset, solitary confinement has changed significantly over the past two centuries—its purposes, design, and conditions are all different today.

While there are many different terms and sets of conditions associated with “solitary confinement” in the modern U.S., there are three primary iterations of the practice. All three fall under the broad category of “restrictive housing.”

The first of these iterations is the use of solitary confinement as a disciplinary practice in a variety of prison contexts. This practice is employed when a prisoner violates prison regulations (Department of Justice/Federal Bureau of Prisons, 2011). The inmate is removed from the general prison population for a matter of days, and the precise conditions of his confinement vary—but he will certainly be released back into the general prison population after he has served his brief disciplinary sentence. “Double-celling” may be employed, as well: two “solitary confinement” prisoners are placed together, and in general will only see one another for the duration of their time in restrictive housing (*Rhodes v. Chapman*, 1981).

The second practice is the temporary placement of a prisoner in solitary confinement at a maximum security or “supermax” prison. The majority of state prison systems have a supermax prison, and there is one federal supermax prison in Florence, Colorado (Department of Justice, 2011). This option is triggered when a prisoner at a “normal” state or federal prison commits a violent offense or becomes involved with a prison gang. These confinement periods can vary from a couple of weeks to a year or more. In some cases, the time served is dependent on the prisoner’s behavior while in prison.

These two practices have both raised significant due process concerns. It has been common practice to place prisoners in disciplinary solitary confinement without a disciplinary hearing, or with a disciplinary hearing where the prisoner is not able to call witnesses or an attorney. Despite these concerns, this has been previously held constitutional, at least under some circumstances (*Montanye v. Haymes*, 1976).

The third major practice of solitary confinement is a process in which convicts are automatically sentenced to a period of solitary confinement in a supermax prison—in many cases an indefinite period. The average length of time served is seven to eight months (American Civil Liberties Union, 2014). This occurs because the convict committed a particularly violent offense, has a history of disciplinary issues within the correctional system, or (most commonly) is thought to be connected with a known gang (American Civil Liberties Union, 2014).

While practices vary within the supermax prison structure, there are certain commonalities between penitentiaries. A prisoner sentenced to solitary confinement in a supermax prison can expect to spend between 22 and 24 hours a day in complete isolation. Depending on the prison, he may have access to a recreational cell of his own which he can use during certain hours, or he may be permitted to share a corporate recreational cell during the precious few hours when he is not cut off from the rest of the prison population. The prisoner will be able to communicate with

the outside world via censored letters, and, depending on the penitentiary, through monitored electronic communications. He will be able to communicate in person with his lawyer and will have access to a religious counselor and medical personnel upon request, but these interactions may not always be in-person.

Other visitors are typically proscribed. If the prisoner is lucky, he may also be able to use his limited out-of-cell time to visit prison facilities like a library (American Civil Liberties Union, 2014).

Within his cell, a prisoner has a bed, a toilet, and a sink. He may have very limited exercise equipment (depending on the penitentiary), and he may have access to a screen of some kind which he can use to conduct the communications described above. Sometimes a prisoner has access to sunlight (American Civil Liberties Union, 2014).

While juveniles do not comprise a majority of prisoners in solitary confinement in the US, the practice certainly does exist. The ACLU (2014) noted that “in juvenile facilities, more than 50% of all suicides occur in isolation” (p. 8).

Case Study: Pelican Bay State Prison

Though solitary confinement may have harsh consequences, it may be hard to say at first blush that this is “cruel and unusual.” These prisoners may be deprived of normal social interactions most of their days: but they are otherwise in comfortable conditions, and are afforded an escape from the infamously rough “gen pop.” But anything can look nice on paper, so it is worth a look at a case study.

California’s Pelican Bay State Prison is an oft-discussed case in discussions of solitary confinement, primarily because it has been the subject of much discussion, primarily due to major litigation involving its prisoners. The investigations that occurred in that case were more extensive than much information available from other locations, making it a useful case study.

It is important to note that at Pelican Bay there are three types of prisoners: those in “minimum security,” those in “maximum security” but still a part of the general population, and those in the “Secure Housing Unit” (SHU), which serves as the prison’s solitary confinement unit. In this unit, prisoners spend 22.5 hours each day isolated. They are not permitted to participate in the general recreation area. Before looking at the litigation surrounding this prison, it is also helpful to note that there were seven claims raised, including claims about excessive force used in the general population (*Madrid v. Gomez*, 1995). In the fact-finding, it was revealed that prisoners were sometimes subjected to such harsh (and at times, arbitrary) punishments as the placement of naked prisoners in outside cages in the cold (*Madrid v. Gomez*, 1995). Given these facts, it is possible that Pelican Bay is a hyperbolic example: any inferences drawn from it must be taken in that context.

The claims affecting the SHU in the case, *Madrid v. Gomez* (1995), were many. There were claims about lack of access to mental health care, inhumane conditions, negligence in assigning inmates to the SHU, and lack of access to the Courts.

The lack of access to mental health care in the SHU was so severe that even the expert hired by the prison testified that he “could not represent to the Court that the mental health care delivery system was ‘adequate’ or met constitutional standards” (*Madrid v. Gomez*, 1995). One official estimated that of the 1,500 persons housed in the SHU, 200 to 300 were in need of psychiatric intervention at any given time (*Madrid v. Gomez*, 1995). Another psychiatrist examined 40 inmates at random, and found that about one-third “suffered from what appeared to be psychotic symptoms or had been placed on anti-psychotic medication” (*Madrid v. Gomez*, 1995).

In spite of this acute need for mental health services at Pelican Bay, it was two-and-a-half years before the prison hired any resident psychiatrist (*Madrid v. Gomez*, 1995). And it was not until litigation put pressure on prison officials that they hired sufficient support staff to handle the psychiatric case load (*Madrid v. Gomez*, 1995). Even so, a prison official still testified in deposition that “the provision of services is still primarily crisis-oriented, with emphasis on crisis intervention stabilization” (*Madrid v. Gomez*, 1995, at 1217).

Screening and referrals for mental health care also were lacking at the prison. For three years, the prison did not have any screening at all (*Madrid v. Gomez*, 1995). Even once the prison incorporated mental health screenings, an expert for the prison reported that the people “who briefly screen incoming inmates typically do not have the necessary training and background to recognize psychiatric illnesses” (*Madrid v. Gomez*, 1995, at 1219). And for those inmates already in the system, they relied solely upon these same untrained officials to recognize mental illnesses (*Madrid v. Gomez*, 1995). This in turn led to problems in psychiatric recordkeeping.

This combination of factors led to acute situations like the one that affected “Inmate A:”

There are also inmates who need and would benefit from involuntary medication, but who are not transferred to a facility offering such treatment on account of security concerns. For example, Inmate A is an inmate who was suffering from delusional beliefs and auditory command hallucinations telling him to commit violent acts. When Dr. Grassian interviewed the inmate in September 1992, he found him to be “severely mentally ill, incompetent to appreciate his need for treatment, and a danger to himself and others.” ... Dr. Grassian was informed, however, that the inmate’s security needs required him to remain at Pelican Bay. Inmates like Inmate A are essentially trapped in a Catch-22: they are too

psychotic to consent to treatment, yet their psychosis makes them too “dangerous” for a transfer to a facility where they could receive treatment that would potentially reduce their security risk. (*Madrid v. Gomez*, 1995, at 1221)

The list of stories like this one is extensive within the *Madrid* record. Stories include an inmate hallucinating that the guards were growing marijuana and killing people, an inmate sitting in “a fixed, immobile posture,” and inmates experiencing suicide ideation (*Madrid v. Gomez*, 1995).

However, the claim raised here was not simply that inmates were experiencing psychotic episodes: it was that the prison was deliberately indifferent to these harms. The prison was aware of the various problems highlighted above (*Madrid v. Gomez*, 1995). The court wrote:

Defendants’ response to the lack of adequate mental health care—and particularly the response of defendant Gomez, who has overall responsibility for the California Department of Corrections—reflects a deplorable, and clearly conscious, disregard for the serious mental health needs of inmates. For example, defendants suggest that, despite lacking a staff psychiatrist—or any semblance of a mental health care program—they were nonetheless justified in opening Pelican Bay, given their ‘contingency plan’ of providing mental health services through periodic visits from psychiatrists at other institutions. However, this plan was so clearly and grossly deficient that it only highlights defendants’ striking indifference to the mental health of thousands of persons in their custody. (*Madrid v. Gomez*, 1995, at 1226).

The next claim concerned the conditions of the SHU—including the fact that those conditions may have been responsible for the concerns just described. These were much like the conditions described earlier as typical of a supermax prison, described by the court as having an overall effect of “stark sterility and unremitting monotony” (*Madrid v. Gomez*, 1995, at 1229). Each prisoner also maintained access to “a small exercise pen with cement floors and walls...[which] preclude any view of the outside world. ... the pens are more suggestive of satellite cells than areas for exercise or recreation” (*Madrid v. Gomez*, 1995, at 1229).

The lack of social interaction was equally typical: inmates spent all but 1.5 hours of each day entirely alone or if they were double-celled then with their cellmate. Interaction between inmates and staff were “essentially precluded” (*Madrid*

v. Gomez, 1995, at 1229), and inmates could (as is typical) request a visit with a chaplain. Inmates could receive visitors or their attorney, by visiting through a thick glass wall by telephone. But the Court noted that due to the removed location of Pelican Bay, “many inmates get either few visitors or none at all” (*Madrid v. Gomez*, 1995, at 1229). Even those who were double-celled were likely to become violent toward their cellmates, as this was the only person with whom they could regularly interact (*Madrid v. Gomez*, 1995).

As an important aside, experts who testified in the case acknowledged that the conditions at Pelican Bay were harsher than most other SHUs across America. One described it as more isolated than any of the other 20 to 25 locations he had visited (*Madrid v. Gomez*, 1995). This is important for the sake of comparison: while this is one of the few opportunities to conduct a true case study, it is also not wholly representative of the state of affairs in maximum security prisons today.

Despite the differences between Pelican Bay and other penitentiaries, the fact remains that the purpose of solitary confinement is to reduce the interactions that an inmate has with other inmates and the outside world. The penal reasons for this may vary from maintaining security to punishing heinous deeds—both reasons will be discussed in a later section of this paper. But whatever the reason a person is in solitary confinement, it is to some degree, precisely that: solitary. And that design itself may have treacherous consequences for the mind, as the court in *Madrid* noted:

Social science and clinical literature have consistently reported that when human beings are subjected to social isolation and reduced environmental stimulation, they may deteriorate mentally and in some cases develop psychiatric disturbances. These include perceptual distortions, hallucinations, hyper-responsivity to external stimuli, aggressive fantasies, overt paranoia, inability to concentrate, and problems with impulse control. This response has been observed not only in the extreme case where a subject in a clinical setting is completely isolated in a dark soundproofed room or immersed in water, but in a variety of other contexts. For example, similar effects have been observed in hostages, prisoners of war, patients undergoing long-term immobilization in a hospital, and pilots flying long solo flights. While acute symptoms tend to subside after normal stimulation or conditions are returned, some people may sustain long-term effects. This series of symptoms has been discussed using varying terminology; however, one common label is “Reduced Environmental Stimulation,” or “RES.” According to Dr. Grassian, the complex of symptoms associated with RES is rarely, if ever, observed in other psychotic syndromes or in humans

not subject to RES. (*Madrid v. Gomez*, 1995, at 1230-1231)

The Court also referenced the *In re Medley* (1890) case cited earlier in this work, as an example of the historicity of RES producing these severe symptoms in individuals subjected to solitary confinement conditions. To demonstrate this point, the aforementioned Dr. Grassian interviewed 50 inmates and reviewed their medical interviews. He found that “in forty of the fifty inmates, SHU conditions had either massively exacerbated a previous psychiatric illness or precipitated psychiatric symptoms associated with RES conditions” (*Madrid v. Gomez*, 1995, at 1232). The Court further cited a 7th Circuit case, *Davenport v. DeRobertis* (1984), which noted the psychological damage that prolonged social isolation can incur.

As with the mental health access claim, the claim in *Madrid* was that the prison treated the inmates with deliberate indifference in allowing RES-induced conditions to incur, while being aware of this relationship and having the ability to remedy the situation. The CDC released a memorandum about this, mentioning Pelican Bay specifically. It recommended “excluding from the SHU all inmates who were either seriously mentally ill or assessed as likely to suffer a serious mental health problem if subject to RES conditions” (*Madrid v. Gomez*, 1995). This recommendation was based on the contrast between a similar prison in Marion, Illinois—where the recommended practice was enforced and effectively minimized the results of RES—and in Florence, Arizona—where the status quo was more akin to Pelican Bay, as were the prisoner’s mental health outcomes (*Madrid v. Gomez*, 1995).

In regard to these two claims (mental health access and inhumane conditions), the Northern District of California found the conditions unconstitutional and offered remedies. The reasoning for the unconstitutionality was grounded in the Eighth Amendment. The court extensively quoted the humanitarian language of the Supreme Court and various Circuit Courts in interpreting the Eighth Amendment (*Madrid v. Gomez*, 1995). The court also cited various Supreme Court decisions which establish the “deliberate indifference” standard, by which prisons and prison guards can be held liable for negative actions and outcomes toward prisoners, of which the actors were aware but for which they chose either to ignore or to exacerbate. On this basis, the court in *Madrid* determined that this was what had occurred at Pelican Bay. The remedies included appropriate mental health training, staffing, screening, and treatments, as well as cooperation with the guidelines set forth in the CDC memorandum.

Case Study: How Pelican Bay Compares

As already noted, Pelican Bay may be an especially egregious case of solitary confinement, but there are still comparisons that can be drawn between that prison

and others of its kind across the United States.

Jones-El v. Berge was a 2001 case before a Wisconsin District Court involving prisoners with severe mental illness who requested relief to be placed in special housing instead of the solitary confinement in which they found themselves. Prisoners spent 23-24 hours per day in solitary confinement. They had a light on at all hours, and would be awakened if they “covered their faces in such a way that the guards [could not] see any of the inmate’s skin. For seriously mentally ill inmates, the constant illumination [disrupted] their diurnal rhythm and [added] to the sense of disorientation” (*Jones-El v. Berge*, 2001, at 1100). To make matters worse, prisoners were not allowed to wear any kind of watch to keep track of time, and were kept in cells with only small skylights and with large boxcar doors that were rarely opened (*Jones-El v. Berge*, 2001). The temperature could not be regulated by inmates, meaning that on one occasion, inmates’ cells reached a heat index of 100 degrees (*Jones-El v. Berge*, 2001). This fact alone was cause for further litigation in the 7th Circuit (*Jones-El v. Berge*, 2004). Inmates were shackled at almost all times when they were outside their own cells: including in the law library and in transportation to the unequipped “exercise room” (*Jones-El v. Berge*, 2001, at 1100).

There was also a distinct lack of human interaction at the prison. Inmates could only have face-to-face visits with their lawyers, and any other visitors would be “received” through poor quality video cameras. Some mentally ill prisoners came to believe these images were manipulated and thus refused to receive visitors (*Jones-El v. Berge*, 2001). The most severely restricted inmates were only allowed one six-minute telephone call each month. While inmates could in theory move from such a restricted situation, the court noted that “seriously mentally ill inmates have difficulty following the rules necessary to advance up the level system and, as a result, find themselves ‘stuck’” (*Jones-El v. Berge*, 2001, at 1101).

Mental illness was prevalent in *Jones-El* in a similar manner to *Madrid*. The court in that case identified RES as “SHU Syndrome,” referring to paranoia, dissociative disorders, schizophrenia, and panic disorders, as well as breakdowns and suicide attempts, as symptoms of the confinement-induced syndrome (*Jones-El v. Berge*, 2001). An expert in the case also noted that mental health staff responsible for evaluating these inmates routinely described the inmates as “malingerer.” However, he also observed that many of these inmates had long histories of admission to psychiatric hospitals to treat serious mental illnesses. He observed that “an inmate can malinger and have a serious mental illness at the same time. In settings with insufficient staff, prisoners may discover that they have to manipulate to a certain extent in order to get the attention they need” (*Jones-El v. Berge*, 2001, at 1107).

The prisoners sought relief from solitary confinement on the grounds of deliberate indifference to serious medical needs and defendants attempted to treat this as a very narrow issue. However, the judge noted the issue was much broader

than that, calling the intake of seriously mentally ill inmates “an Eighth Amendment violation in and of itself” (*Jones-El v. Berge*, 2001, at 1116). While the judge chose not to grant a request for monthly mental health evaluations, preliminary injunction was granted (*Jones-El v. Berge*, 2001).

Situations like this are daily life for the many of the thousands of prisoners in solitary confinement. Before turning to the constitutional issues, consider a few more related circumstances: the amount of information which is available, Federal Bureau of Prisons requirements, and a brief summary of solitary confinement as it is viewed and handled in the rest of the Western world.

Lack of Information

There is a distinct lack of information surrounding solitary confinement. Much of this is owed to the type of prisons in which solitary takes place: it is not a place where a well-wisher can go take a tour and visit with inmates. These are places where the guards themselves are at such a high risk of being harmed by the inmate population that most operations are controlled by remote and any interactions can be expected to involve two or more officers to any one inmate. The individuals in solitary confinement were already dangerous criminals—then they joined a prison gang or murdered someone in prison. It is no wonder that there has been a lack of investigation into these prisons.

Still, there must be more systematic investigation into the state of these prisons to more fully understand what happens there. Currently, the best information available is what this paper has already cited: anecdotal evidence that arises from litigation and post-release memoirs, and high-level overviews based on whatever information prisons do release about their practices.

Federal and State Laws and Regulations

There are some federal and state regulations governing the way these prisons are to operate. Some regulations are legislative, but most are regulated by the relevant agencies.

Federal regulations surrounding solitary confinement are minimal. In fact, the Bureau of Prisons insists it does not practice solitary confinement (Department of Justice/Office of the Inspector General Evaluations and Inspections Division, 2017). But after a 2016 inspection of the nearly 10,000 inmates in federal restrictive housing, the Department of Justice disagreed:

[W]e found inmates, including those with mental illness, who were housed in single-cell confinement for long periods of time, isolated from other inmates and with limited human contact. For example, at the ADX, we observed an RHU that held two inmates, each in their own cell, isolated from other inmates. The

inmates did not engage in recreation with each other or with other inmates and were confined to their cells for over 22 hours a day. Also, in five SHUs, we observed single-celled inmates, many with serious mental illness. One inmate, who we were told was denied ADX placement for mental health reasons, had been single-celled for about 4 years. (Department of Justice/Office of the Inspector General Evaluations and Inspections Division, 2017, p. i)

The report continued by noting that though the Bureau of Prisons routinely sets minimum sentences in restrictive housing, maximums are not used, and mental health is not routinely monitored. As a result, prisoners with mental illness typically spent anywhere from 2.5 to more than 5.5 years in restrictive housing without being moved to special housing (Department of Justice/Office of the Inspector General Evaluations and Inspections Division, 2017).

The federal regulations that do exist are not as harsh as they could be—but they are certainly “restrictive” in accordance with their name. For example, an inmate may only have 5 paperback books, 10 personal letters, and 25 photos in a photo album. Other allowed personal items are equally restricted (Department of Justice/Federal Bureau of Prisons, 2011). Phone calls are restricted to one per month. While inmates may receive a visit from “program staff” within “a reasonable time” upon request, they may only guarantee immediate contact by use of an optionally-installed duress button, which may only be used in an emergency (violation subject to disciplinary action). Medical evaluations occur daily as needed, and mental health evaluations occur every 30 days. Prisoners may receive visitors up to four hours out of each month, subject to restriction for disciplinary or safety reasons (Department of Justice/Federal Bureau of Prisons, 2011).

Solitary Confinement and the Western World

It is critical to understand how the rest of the Western world handles the issue of solitary confinement. This is because it is a consideration in the “contemporary standards of decency” Eighth Amendment test which will be discussed in the second half of this paper (*Roper v. Simmons*, 2004, at 551).

Most notable in this regard is the United Nation’s (UN) reaction toward solitary confinement. The UN recommended in a 2011 memorandum that States should “re-evaluate and minimize [solitary confinement’s] use and, in certain cases, abolish the practice of solitary confinement. The practice should be used only in very exceptional circumstances, as a last resort, for as short a time as possible” (United Nations, 2011, p. 2). The same governing body later condemned the US’s widespread use of solitary confinement (UN Committee Against Torture, 2014). Furthermore, the United Nations has condemned the use of solitary confinement for juveniles. This was a key point in its condemnation of the United States’ practice of solitary confinement (UN Committee Against Torture, 2014).

The United Nations is not the only Western entity to condemn the practice of solitary confinement. The Inter-American Commission on Human Rights, and the European Court of Human Rights have both issued similar statements and rulings (Inter-American Commission on Human Rights, 2013; Peers v. Greece, 2001).

Research and Analysis

The Possible Constitutional Questions

With a broad overview of the facts surrounding solitary confinement now established, it is appropriate to turn to the question this paper seeks to answer: what are the constitutional limits of solitary confinement? There are a number of constitutional questions that frequently arise around the issue.

Ex post facto and double jeopardy claims should be first on this list. These are the issues around which the majority of the Supreme Court's solitary confinement jurisprudence has arisen. Naturally, this is like any other ex post facto or double jeopardy claim: the convict was wrongfully sentenced either due to doubly-damning statutes for the same instance of crime, or the convict was wrongfully convicted or sentenced under a law passed after the crime was committed. These issues are largely null today, and where they may exist would not be unique to the solitary confinement question.

The second set of issues is due process—both substantive and procedural. There have been a number of more recent cases which dealt with this issue. In *Wolff v. McDonnell* (1974), the Court established minimum procedural due process requirements for prisoner disciplinary hearings. However, the Court prescribed that this issue must be resolved “consonant with the unique institutional environment ... therefore involving a more flexible approach reasonably accommodating the interests of the inmates and the needs of the institution” (*Wolff v. McDonnell*, 1974, at 540). Two years later, the Court clarified that prison inmates did not have a right to counsel in disciplinary hearings, and that adverse inference could be drawn from a prisoner's silence at such hearings—but that prisoners could have witnesses unless they would not be used in a normal court setting (*Baxter v. Palmigiano*, 1976). Furthermore, in *Meachum v. Fano* (1976) and *Montanye v. Haymes* (1976), the Court held that a prisoner was not entitled to a fact-finding hearing simply because he was being transferred to a less favorable prison.

The final major category of constitutional challenge to solitary confinement is the question of cruel and unusual punishment. While this may be the most substantively significant question—given the widespread practice of solitary confinement and weight of the claim—it has also been the least-addressed by the Supreme Court or any court until recent decades.

In order to understand this question, it is necessary to delve into Eighth Amendment jurisprudence. But at the outset of the discussion, a note must be made: “cruel and unusual” jurisprudence has a very fluid history, and to date the rules surrounding its interpretation are anything but clear. In fact, the Supreme Court itself observed in *Rhodes v. Chapman* (1981) that there is no “static” test for determining whether any particular punishment is “cruel and unusual.” No such test can exist, for the Eighth Amendment “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society” (*Trop v. Dulles*, 1958, at 101).

This fact is evident in the very history of the Cruel and Unusual Punishments Clause. Early interpretations of the clause, in the words of one scholar, “curbed only torturous punishments as defined at the time of the amendment’s ratification” (Forte, 2014). This led to decisions like *In re Kemmler* (1890), which upheld execution by electrocution. Over time, though, the meaning has broadened as modern ideas about justice have expanded as well, pointing to the subjectivity inherent in the jurisprudence.

At the same time as there is subjectivity, the Court held in *Rummel v. Estelle* (1980, at 274) that “Eighth Amendment judgement should neither be nor appear to be merely the subjective views’ of judges.” Inevitably, there will be some degree of subjective interpretation that is unique to the language of the Eighth Amendment (*Rhodes v. Chapman*, 1981). But such “[judgments] should be informed by objective factors to the maximum possible extent” (*Coker v. Georgia*, 1977, at 592). In other words, while this is inevitably a subjective matter of investigation, the evidence of a potential violation must itself be objectively grounded, and any constitutional bounds must find their source in that evidence.

The standards that do exist can be thought of in three categories as they relate to solitary confinement. The first category is the “evolving standards of decency” category, by which the “unusual” nature of a punishment is measured, as well as its cruelty in comparison with contemporary norms. The second is the “proportionality” category, which as its name suggests measures the proportionality of a given punishment to a particular crime. Both of these first two categories pertain primarily to the sentencing phase of a criminal proceeding. The final category, conditions of confinement, relates to the prisoner’s post-sentencing situation. Consider each broad category in turn.

The “evolving standards of decency” test has been a consistent theme since its official introduction in 1958, but it has taken a number of forms since then. The first use of that precise term was in *Trop v. Dulles* (1958), where the Supreme Court ruled found a statute that expatriated military deserters to be unconstitutional. The decision was based primarily on the fact that the punishment violated “evolving standards of decency that mark the progress of a maturing society” (*Trop v. Dulles*,

1958, at 101). The rationale was that a decent modern society would not so easily strip a person of their very nationality, making this punishment cruel and unusual. The comparison in this case was both abstract and international. Similar analysis appeared in the earlier *Weems v. United States* (1910), but in that case the punishment was examined in comparison to other punishments in the same jurisdiction. That same reasoning was applied in *Solem v. Helm* (1983), which included that analysis as part of a tripartite proportionality test. (*Solem* was later overturned in *Harmelin v. Michigan* (1991) because of its overbroad approach on proportionality). In *Coker v. Georgia* (1977), the comparison was between different states' punishments for rape. Because the states tended to lean away from capital punishment, the court relied on that fact in their reasoning and decision.

This analysis has become even broader recently. In *Roper v. Simmons* (2005), the Court referenced international standards (including a citation to the United Nations) in its determination that capital punishment was unconstitutional for minors. This was based on the "contemporary standards of decency" among the international community, and the "trend" of the states away from the practice. Additionally, it is worth noting that the language of "standards of decency" has been used to mean more broadly "idealistic concepts of dignity, civilized standards, humanity, and decency" (*Jackson v. Bishop*, 1968, at 579).

Proportionality is the second category of Eighth Amendment jurisprudence, and one that may be most intuitively associated with the Cruel and Unusual Punishments Clause. Perhaps as a result of this intuitive connection, proportionality has long been discussed in the Supreme Court's decisions. However, despite its clear relation to the clause, it is almost as hard to define as the "evolving standards of decency" test, because whether a punishment is deemed proportional must depend in part on the penal justification offered up for the punishment.

Penal justification is paradoxically at the heart of the Eighth Amendment's issue set, and one of the least-considered issues in Eighth Amendment jurisprudence. To a certain degree, the question must be raised in such cases: if there a possibility that a certain punishment might be cruel and unusual, it is important to ask why the state feels justified in taking that action against the convict. But in Court opinions, this question is deliberated to a surprisingly small extent. The reason for this was articulated by a district court, which was later cited in a footnote to *Hutto v. Finney* (1978, at 700): "A practice that may be bad from the standpoint of penology may not necessarily be forbidden by the Constitution." The bar, then, is generally no higher than a test of rationality (*McCulloch v. Maryland*, 1819).

However, there are several penal justifications which the Court has still highlighted in its determinations. Justice Brennan succinctly noted the categories of justification in his concurrence to *Trop v. Dulles* (1958, at 111), writing, "Of

course, rehabilitation is but one of the several purposes of the penal law. Among other purposes are deterrents of the wrongful act by the threat of punishment and insulation of society from dangerous individuals by imprisonment or execution” Rehabilitation as a legitimate interest was also affirmed in *Sandin v. Conner* (1995). Relevant to the solitary confinement question, security and maintaining internal order have both been cited by the Court as legitimate legislative justifications (*Rhodes v. Chapman*, 1981; *Bell v. Wolfish*, 1979; *Jones v. North Carolina Prisoners’ Labor Union*, 1977; *Pell v. Procunier*, 1974; *Cruz v. Beto*, 1972).

It was largely because penal justification is so dependent on legislative prerogative that Justice Scalia believed proportionality should not be a serious Eighth Amendment question. He wrote in his joint opinion to *Harmelin v. Michigan* (1991, at 958) that “[i]t is particularly telling that those who framed and approved the federal Constitution chose not to include within it the explicit guarantee against disproportionate sentences that some State constitutions contained.” In a footnote to the same opinion, Scalia added, “If cruel and unusual punishments included disproportionate punishments, the separate prohibition of disproportionate fines (which are certainly punishments) would have been entirely superfluous” (*Harmelin v. Michigan*, 1991, at 996).

Because the question of where to draw the line on disproportionate sentences is a hard one to define—and perhaps one best left to state legislatures—the Court has evolved to using the “gross disproportionality” standard (*Rhodes v. Chapman*, 1981; *Coker v. Georgia*, 1977; *Weems v. United States*, 1910). While vague, this at least still suggests that there must be a seriousness about the degree to which the punishment and the crime are mismatched. In practice, this has been used in the aforementioned decision to prohibit the use of capital punishment for rape. It has also been rejected in cases like *Rhodes v. Chapman* (1981), where Ohio utilized double-celling to accommodate its overcrowded prisons. However the Court viewed that as a legislative, and not a judicial determination of proportionality.

Rhodes is important for a discussion about solitary confinement because it informs three key considerations in this discussion. First, *Rhodes* leaves us with the understanding that even extremely undesirable punishments or arrangements in prisons, if not truly “cruel and unusual” by some other standard, are questions best left to the legislature. The Court in that case wrote in a footnote:

The problems of prisons in America are complex and intractable and, more to the point, they are not readily susceptible of resolution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. For all of those reasons, courts are ill-equipped to deal

with the increasingly urgent problems of prison administration and reform. Judicial recognition of that fact reflects no more than a healthy sense of realism. (*Rhodes v. Chapman*, 1981, at 352)

Next, *Rhodes* leaves us with a practical understanding that double-celling in restricted housing is not inherently unconstitutional. Even though those conditions may have been “uncomfortable,” they were not unconstitutional. This was ultimately a legislative determination on how to address a problem. The state’s bar is low in a case like this. Finally, *Rhodes* is insightful because it is one of the cases which led to a clearer distinction between “sentencing” claims and “conditions of confinement” claims.

“Conditions of confinement” claims first began to be clearly distinguished in the 1960s (*Cooper v. Pate*, 1964; *Houghton v. Shafer*, 1968; *Wilwording v. Swenson*, 1971). One case, *Haines v. Kerner* (1972), explicitly dealt with solitary confinement. An inmate was disciplined with 15 days in solitary confinement because he aggressively attacked another inmate. Despite a foot disability which the inmate alleged worsened from his time in solitary, he was still made to spend the allotted time in solitary. He alleged this was cruel and unusual punishment and Illinois moved to dismiss the case because Haines failed to state cause of action. The Supreme Court held this action of Illinois to be unconstitutional, though it did not rule on the merits of solitary confinement itself.

However, this fit into a larger framework of “conditions of confinement” cases, such as *Hutto v. Finney* (1978). Though *Hutto* was an 11th Amendment case involving payment of attorney’s fees, the payment was tied with a determination at the District Court level that the conditions in a prison system were cruel and unusual. The Court reflected on this extensively in the early part of its opinion, affirming the District Court’s determination on that question. Here the conditions were so abhorrent as to make it no surprise that this was the genesis of such claims. Homosexual rape occurred so often that prisoners would not sleep for fear of being raped. Prisoners were made to do labor with mule-drawn tractors, beatings occurred, and the food prisoners were fed was virtually inedible (*Hutto v. Finney*, 1978).

Hutto was also important for solitary confinement. In this case the District Court imposed a 30-day maximum sentence on solitary confinement for inmates at the prison—and the Supreme Court affirmed this action, noting that “the length of confinement cannot be ignored” (*Hutto v. Finney*, 1978, at 686).

Hutto’s concerns would be “traditional” conditions of confinement claims, often brought as a “1983” suit, referring to 42 U.S.C. § 1983. The Court clarified in *Preiser v. Rodriguez* (1973, at 489) that these “1983” suits were not meant to challenge the “fact or duration of that confinement itself,” thus drawing a meaningful

constitutional distinction between a challenge to the fact of a sentence and the resulting conditions of confinement incurred by that sentence.

“Conditions of confinement” claims are most often raised under the “wanton infliction of pain” standard set under *Whitley v. Albers* (1986, at 320-321). This asks the question of whether in the use of prison force there was a good faith effort to maintain or restore discipline, or “maliciously and sadistically to cause harm” (*Hudson v. McMillian*, 1992, at 1). It also tends to focus on pain inflicted “totally without penological justification” (*Gregg v. Georgia*, 1976, at 183). This has evolved into both “excessive force” claims, and other “unnecessary/wanton infliction of pain” claims. It also can bear into “deliberate indifference” claims on some level.

Excessive force was famously discussed in *Hudson v. McMillian* (1992). This was a case where prison guards unnecessarily beat inmates into compliance – and it was held to be “cruel and unusual punishment” because it was unnecessary for accomplishing the intended goal. The important fact of the case was that the inmate did not sustain any serious injury—and still the actions exercised against him were held unconstitutional under the *Whitley* rule (*Hudson v. McMillian* (1992)). Also notable in *Hudson* is Justice Blackmun’s concurrence, which suggested that psychological pain, as well as physical pain counts as pain for the purposes of the Eighth Amendment (*Hudson v. McMillian*, 1992). This naturally could become important in solitary confinement cases.

Over time, “wanton infliction of pain” also evolved into a nuanced “deliberate indifference” test. This first came to be in *Estelle v. Gamble* (1976), where the Court held that deprivation of treatment for an inmate’s serious medical needs constitutes the wanton infliction of pain. Though prison guards were aware of the serious medical need, they refused to provide care. Hence this was established as “deliberate indifference” to those needs. With time, this became more clearly defined. In *Wilson v. Seiter* (1991), the Court established that there is both an objective component and a subjective component in determining whether a conditions of confinement claim would stand. The “objective component,” the Court held, was the question of whether a deprivation was “sufficiently serious” to merit constitutional concern (*Wilson v. Seiter*, 1991, at 298). The language of deprivation is derived from *Rhodes v. Chapman* (1981, at 347), where the Court noted that prison conditions “alone or in combination, may deprive inmates of the minimal civilized measure of life’s necessities.” The “subjective” component asks whether prison officials acted with a culpable state of mind (*Wilson v. Seiter*, 1991, at 298). This rationale was applied and extended in *Helling v. McKinney* (1993), where an inmate who shared a cell with a heavy smoker alleged a serious risk of future harm from the second-hand smoke. The Court in that case held the prison’s non-action in the situation to be deliberate indifference to health and safety, thus establishing that serious risk of future harm could be grounds for constitutional claims. This was reaffirmed the following year

in *Farmer v. Brennan* (1994), where prison guards were aware of a strong likelihood of a medical need, but refused even to investigate it, thus acting in a deliberately indifferent manner.

Deliberate indifference was also applied in the already discussed case of *Madrid v. Gomez* (1995). In *Madrid*, the deliberate indifference test was applied in regard to the prisoners' mental health. In several cases, the prisoners were either known to have a serious mental health condition, or would likely have been found to have such a condition had they received an intake screening. No such screening was undertaken, so under the *Farmer* standard, the prison warden was held liable, as placing prisoners with severe mental health challenges in solitary confinement exacerbated their pre-existing condition (*Madrid v. Gomez*, 1995).

In the earlier discussed case of *Jones-El v. Berge*, the District Court there also identified important lower court cases which elaborated on these rules, relevant to the unique concerns of solitary confinement. Though not nationally binding, they are insightful. For instance, in *Estate of Cole by Pardue v. Fromm* (1996), the Seventh Circuit held that suicide is a serious harm. The Seventh Circuit also affirmed the importance of mental health (*Meriwether v. Faulkner*, 1987). And one Texas District Court considered "mental torture" among possible forms of deprivation (*Ruiz v. Johnson*, 1999).

Applying the Constitution to Solitary Confinement

Thus far, the history and modern facts of solitary confinement have been established, along with an array of tests used in Eighth Amendment cases. Both categories are varied and at times difficult to define. However, for the purposes of this paper's inquiries, each of the key Eighth Amendment tests will be discussed and compared against the facts of solitary confinement which were raised earlier in this paper.

Solitary Confinement and Evolving Standards of Decency

The first test to apply is the "evolving standards of decency" test applied in *Trop v. Dulles* (1958). As noted earlier, this looks at what society broadly accepts. In *Trop*, the idea was that no decent society would strip someone of their nationality, especially under the circumstances prescribed by that law. It is important to recognize, then, that this focus was on the actual sentence—not on the conditions which it would produce. Of course, those were discussed for the sake of understanding what the sentence meant in real terms. But the focus was on sentence, not on conditions.

Is it a fact that no decent society would permit solitary confinement? Not necessarily. It is true that the United Nations has denounced the use of solitary in most cases—it has even called for the elimination of solitary confinement where

possible. However, the United Nations has never called for a wholesale abolition of the practice, because there is a recognition that occasionally this practice must be used in the short term for disciplinary and safety reasons. What the United Nations has denounced is the United States' widespread use of long term solitary confinement, and solitary confinement for juveniles. But while this may be indicative of what an "decent" society would do, it is certainly not the dictate of American constitutional theory. The Constitution is the highest law in the land, unless the United States signs an international treaty, which then becomes the law of the land, as well (U.S. Const. Art. VI, cl. 2). This is no treaty—it is only one consideration among many, to use the language of the Supreme Court in *Hutto v. Finney* (1978).

Within this test—the vaguest and most loosely applied among Eighth Amendment tests—one must look at intra-jurisdiction punishments. A strong majority of states (38) permit the use of solitary confinement in some fashion. This suggests that there is nothing facially unconstitutional about solitary confinement on these grounds. Again, there has been a move among the states away from solitary confinement for juveniles, and smaller moves against the practice applied to the mentally ill and for indefinite periods of time (American Civil Liberties Union, 2014). This "trend" may be indicative of an ongoing evolution—but it is not the same kind of trend as was used in *Roper*, where the vast majority of states had banned capital punishment for minors. Thus, by this test, solitary confinement could only possibly be unconstitutional for juveniles, as that is the point where there is the strongest trend within and across jurisdictions.

Proportionality and Solitary Confinement

The issue of proportionality in solitary confinement may most closely relate to the Due Process issues which have previously arisen surrounding the punishment. This is because the most common reason a person is in solitary confinement is discipline for prison rule infractions, where they are placed after constitutionally suspect disciplinary hearing—and there may be a proportionality question as to the response of complete isolation in reaction to various prison infractions.

As noted earlier, proportionality is not reducible to a mere retributive calculus. If that were so, then a prison would need only apply an "eye for an eye and a tooth for a tooth" approach to discipline, and everything would be "proportional." But our modern sensibilities tell us that is no constitutionally "proportional" approach to punishment. No, there is a reason that proportionality analysis is often tied to the question of penological justification. And in the case of solitary confinement, the penological justifications are often clear: a prisoner has posed a threat to another inmate or in some cases to society at large, and the prison has determined that the best way to ensure he does not harm others is to keep him in solitary confinement. This is punishment for the sake of security, which has been recognized by the Court

as legitimate on multiple occasions. There may be a question as to the proportionality of long sentences in solitary confinement, but there is no strong proportionality argument against it on grounds of “gross proportionality,” which is the primary test used. Thus, on this count, as well, solitary confinement clocks in as probably constitutional. However, the length of confinement may need to be raised on other grounds.

Length of confinement is something which, in the context of solitary confinement, the Court has previously viewed as a “condition of confinement” (*Hutto v. Finney*, 1978). Here, the Court affirmed a 30-day maximum limit for solitary confinement which was imposed by the District Court in the case proceedings. While this does not provide a constitutional rule, it does bring some insight to the issue: limits on the length of solitary confinement terms are not de facto unconstitutional. That may even seem like an obvious statement, but it is not so given the substantial deference the Court tends to afford state legislatures and local prison officials. Thus, this “rule” could be easily extended to include its inverse meaning: sentence lengths in solitary confinement for disciplinary reasons are not de facto exempt from judicial scrutiny.

“Excessive force,” as mentioned earlier, is a standard which would not ordinarily apply to solitary confinement. As seen in *Madrid v. Gomez* (1995), it can certainly apply in particular circumstances—but prison brutality is neither an essential feature nor a typical characteristic of solitary confinement, so it can be mostly disregarded in this analysis, at least in the way it is traditionally applied.

The one area where the more traditional “wanton infliction of pain” standard applies is in regard to psychological pain. This was emphasized in a concurrence: however, as noted earlier, it has appeared in lower Court decisions, including in relation to the effects of solitary confinement. However, there has been no clear definition of what constitutes “pain.” Surely pain is at times a part of punishment—and this may especially include psychological pain. But the “wanton” infliction of this psychological pain could possibly apply in the case of someone who, for example, is severely mentally ill but is sentenced to solitary confinement (and prison guards are aware or reasonably should be aware of the mental illness).

Ultimately, then, even the “wanton” infliction of pain in the solitary confinement context must fold into the deliberate indifference test under current Court jurisprudence. This is where the most meaningful discussion can occur around this topic.

First, consider the objective component of the deliberate indifference standard. This measures whether the deprivation is “sufficiently serious” to merit constitutional concern. It seems that any case which drives a prisoner to the point of suicide attempts, psychosis, or any similarly serious mental illness should merit such

concern. In fact, even the risk of this kind of harm may merit constitutional concern under the *Helling v. McKinney* standard. While lung disease may threaten to take someone's life after a long exposure to secondhand smoke, suicide could threaten to take someone's life after just a short time in solitary confinement, particularly if that individual was predisposed to severe mental illness. That may be worth discussion.

The second, or "subjective" component of the Eighth Amendment is a question of prison culpability. If a prison is aware of an inmate's illness, and refuses to look into that mental illness—or to take action if a screening reveals harsh results—then that likely fails constitutional scrutiny under *Farmer v. Brennan* (1994). There is a blatant culpability issue, and if the harm is severe enough as to threaten the prisoner's physical health or safety, then there is almost certainly a constitutional standard. The Court stated in *Helling v. McKinney* (1993, at 33) that "a remedy for unsafe conditions need not await a tragic event."

Under the "deliberate indifference" standard, the more complex constitutional question may be whether the practice of placing severely mentally ill prisoners in solitary confinement is facially unconstitutional. This is more complex on three counts. First, this is generally not comparable to something like the death penalty. While the death penalty has been ruled unconstitutional when applied to the mentally handicapped, that has to do with an actual handicap, which may be different from the mental illness faced by many prisoners in solitary confinement. But even if the difference was meaningless, the stage in proceedings is different, because in most cases prisoners are not sentenced to solitary confinement: they are instead sentenced to prison, and during their time as inmates an infraction lands them in solitary confinement. Insofar as convicts are sentenced to solitary confinement and their severe mental illness is established prior to such sentence (perhaps even prior to conviction), it very well may be unconstitutional to place that individual in solitary confinement, as it would likely exacerbate that known condition. Any court imposing such a standard would do well to consider the likely surge in claims to mental illness for prisoners facing such a sentence, but it certainly could be unconstitutional to impose such a sentence.

Second, if a prisoner's removal to solitary confinement does occur when they are already inmates, then the "culpability" issue makes it difficult to say that such sentences are facially unconstitutional. That would essentially force prison systems to preliminarily screen inmates for mental illness prior to sending them to solitary confinement, and to continue routine screenings thereafter, to avoid litigation. Again, this certainly could be appropriate: but it may be more akin to the *Rhodes* issue of double-celling (which was a legislative solution), than a problem requiring a constitutional remedy—at least on an as-applied level.

Third, regardless of whether the Court defined the practice as unconstitutional for the severely mentally ill at either the sentencing or disciplinary levels, there

would be a challenge in defining “severe mental illness.” To be sure, there are obvious cases of psychosis or schizophrenia. But what about a case like severe depression that could cause the prisoner to attempt suicide? Or, if that was an obvious case, would mild depression be included because it could be worsened by solitary confinement, and become severe depression? What about the potential for depression to someone who does not even have such a condition? While the standard may not immediately stretch so far, the Court would certainly have to evaluate such concerns before declaring solitary confinement unconstitutional for the mentally ill at a facial level.

However, supposing that the Court could find a way to circumvent these concerns, this may be the most constitutional approach. It would be far better for states to eliminate this practice, however it could be appropriate for the Court to intervene if the opportunity presents itself. There is little doubt that solitary confinement may at times be necessary—even the liberal United Nations has not called for its total abolition (though it supports such efforts where they exist). But the effects of long-term confinement, particularly for those who suffer a severe mental illness, are not negligible concerns, and may warrant judicial intervention.

Conclusion

Solitary confinement began as an attempt to reform prisoners through penitence. It continued as a means of retaining prisoners sentenced to execution, until their execution date. In recent years, it has been used as a form of safety for the general prison population and sometimes society at large. States have restricted its use for juveniles and in some cases for the mentally ill yet the last count showed that 80,000 prisoners were still being housed in some form of restricted housing with little connection to the outside world. These prisoners may attempt suicide. They may write in their own blood. They may enter a state of total psychosis. And this is certainly a state so harmful as to warrant constitutional intervention, at least if the prison is culpable for exacerbating a severe mental health condition. Long-term confinement, especially for those who do have a severe mental illness, is virtually synonymous with psychological torture. It is a deprivation just as starvation is a deprivation. Yet in this case, it is not food of which the prisoner is deprived. It is the lost connection with humanity, the stripping of a link to sanity. It is, in short, a starvation of the spirit and on those grounds it merits constitutional review.

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