

FORGOTTEN IN SOLITARY: MENTALLY ILL INMATES IN SOLITARY CONFINEMENT AND HOW THE LAW CAN PROTECT THEM

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Every day, between 41,000 to 48,000 inmates, many of them seriously mentally ill (SMI) inmates, live in solitary confinement (solitary), which represents the most severe punishment that inmates can face aside from execution. With solitary, prison officials segregate inmates from the general prison population and deprive them of human contact and sensory stimulation for disciplinary or security reasons. Modern day research has confirmed its negative mental health impact, especially on SMI inmates, which can lead to suicide.

The Supreme Court's traditional prison conditions jurisprudence grounds itself in the Eighth Amendment's cruel and unusual punishments clause and the evolving standards of decency. It protects against the substantial risk of serious harm to which prison officials are deliberately indifferent. SMI inmates in solitary often advance two claims, that officials impose inhumane prison conditions and provide inadequate mental health care. Some cases, including a few class actions, have declared placing SMI inmates in solitary unconstitutional and denounced ineffective screening that led to placing SMI inmates in solitary. However, before overcoming their customary deference to prison officials, courts required egregious levels of harm.

The courts' proportionality review of sentences, also based on the Eighth Amendment and evolving standards of decency, offers an alternative doctrine that better equips courts to overcome their customary deference to prison officials. Courts have used proportionality review, for example, to ban the execution of the intellectually disabled and the doctrine can likewise lead to a broad ban on placing SMI inmates in solitary. Practically speaking, this entails considering the weight of current policy and the degree to which placing SMI inmates in solitary satisfies penological goals, to wit, retribution, incapacitation, deterrence, and rehabilitation. Also, professional organizations, international authorities, and Colorado, a good example of solitary reform, all support a broad ban on placing SMI inmates in solitary.

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98 *STANFORD JOURNAL OF CIVIL RIGHTS & CIVIL LIBERTIES* [19:97

I. BACKGROUND	99
A. Introduction	99
1. Solitary confinement: a contentious issue	99
2. Outline of article	100
3. Definition of solitary confinement.....	101
B. Research on solitary confinement's harm	103
1. Haney's Pelican Bay State Prison studies	103
2. The courts' recognition of research on the harms of solitary confinement	105
3. Population and prevalence of solitary confinement.....	106
II. PRISON CONDITIONS JURISPRUDENCE.....	111
A. Note on Due Process	111
B. Prison conditions jurisprudence canon	111
1. Historical foundations of a prison conditions claim	111
2. Prisoners' right to mental health care (<i>DeShaney, Estelle,</i> <i>and Bowring</i>)	113
3. Principles of a prison conditions claim (<i>Rhodes</i>)	114
4. Objective and subjective components of a prison conditions claim (<i>Wilson</i>).....	115
5. Risk of future harm (<i>Helling</i>) and deliberate indifference to a substantial risk of serious harm (<i>Farmer</i>)	116
C. Notable solitary confinement case law	117
1. Inhumane conditions and inadequate mental health care in solitary confinement (<i>Palakovic</i>).....	117
2. Class actions' ban on mentally ill inmates from solitary confinement (<i>Madrid, Ruiz, and Jones 'El</i>).....	120
3. Supreme Court developments pertaining to solitary confinement (<i>Hutto, Ayala, and Plata</i>)	127
III. EIGHTH AMENDMENT'S PROPORTIONALITY REVIEW AND BANNING THE SERIOUSLY MENTALLY ILL FROM SOLITARY CONFINEMENT .	129
A. Proportionality review	129
1. Historical foundations of proportionality review as applied to prison conditions.....	129
2. Evolving standards of decency: legislation and prison policy.	133
3. Parallels between the seriously mentally ill and the intellectually disabled and juveniles	137
4. Penological goals	140
a. Retribution.....	141
b. Incapacitation	142
c. Deterrence	143
d. Rehabilitation	145
5. Professional organizations and international consensus	146

August 2023]	<i>FORGOTTEN IN SOLITARY</i>	99
B. Successful solitary confinement reform (Colorado).....		150
C. Concluding remarks.....		152
APPENDIX.....		154
JURISDICTIONS WITH LEGISLATION THAT BANS PLACING SMI		
INMATES IN SOLITARY (5)		154
JURISDICTIONS WITH REGULATIONS OR POLICIES THAT BAN		
PLACING SMI INMATES IN SOLITARY (6)		154
JURISDICTIONS WITH LEGISLATION LIMITING SOLITARY FOR SMI		
INMATES TO LESS THAN FIFTEEN DAYS (1)		155
JURISDICTIONS WITH POLICIES LIMITING SOLITARY FOR SMI		
INMATES TO LESS THAN FIFTEEN DAYS OR THAT REPORT NO		
INMATES IN SOLITARY FOR FIFTEEN OR MORE DAYS (4)		155

I. BACKGROUND

A. Introduction

1. Solitary confinement: a contentious issue

Former Chicago inmate Anthony Gay spent over twenty years in solitary confinement (“solitary”), which led him to repeatedly mutilate himself,

cutting his forearm and neck, cutting his left inner thigh and . . . cutting his genitals [and] embedding foreign objects into the wounds Another manifestation of Gay’s mental illness was irrational “assaults” on prison staff, in which Gay would do things like throw his body fluids at prison guards. [In response, prison officials] extended his isolation and continued to deprive Gay of access to human contact, programming, mental health care, and activities for twenty years.¹

Now, out of prison he presses on to pass legislation, “The Anthony Gay Isolated Confinement Restriction Act,” which passed the Illinois General Assembly though it stalled in the Illinois Senate. The bill would limit solitary to 10 days over any 180-day period and would secure medical appointments, group therapy, educational programming, and exercise for solitary inmates.²

In contrast, New York City Mayor Eric Adams has promised to reinstate

1. Hannah May, *Buried Alive: Gay v. Baldwin and Unconstitutional Solitary Confinement for Prisoners with Mental Illness*, 52 LOY. UNIV. CHI. L. J. 1179, 1207 (2021) (citing Complaint at 2, *Gay v. Baldwin*, No. 19-cv-01133 (N.D. Ill. Oct. 28, 2018)).

2. *Illinois House Bill 3564*, LEGISCAN, <https://perma.cc/59YQ-P5W7> (H.B. 3564, 102nd Gen. Assemb., Reg. Sess. (Ill. 2021)).

solitary.³ As Mayor-elect he outlined his vision for solitary: “‘If you exhibit violent behavior on inmates or correction officers, you must be removed from general population until you get the rehabilitation assistance you need,’ Mr. Adams said, adding that the punishment would send a message to would-be assailants.”⁴ This came in response to the chaos and violence that has taken over Rikers Island, the city’s jail system.⁵

Although the issue of solitary is contentious, this Article shows that, at least in the case of seriously mentally ill inmates (“SMI inmates”), the courts must recognize that, based on the law, consigning them to solitary places them at too high a risk of severe harm.

2. Outline of article

In 2021, the U.S. had an estimated 41,000 to 48,000 inmates in solitary where they have little human contact and nothing to occupy themselves.⁶ This Article concerns itself with inmates subjected to solitary, specifically with SMI inmates, who suffer psychological harm in solitary, which combines limited access to mental health care with social isolation and lack of environmental stimulation.

In Part I, after defining solitary, the Article examines research that reveals the extent of the detrimental psychological and physiological impact, going as far as suicide, that solitary has on SMI inmates, as well as court cases that have recognized this research. It then considers the state of solitary confinement: who populates it and its prevalence.

Part II reviews traditional Eighth Amendment prison conditions jurisprudence, which inmates resort to in order to remedy their prison conditions. It then examines some notable lower federal court cases, which, based upon prison conditions jurisprudence, have ruled in favor of SMI inmates who sought redress for their placement in solitary, one on an individual’s behalf and three for SMI inmates as a class. The three class actions reached a rare outcome when they ruled that SMI inmates’ housing in solitary was unconstitutional. In doing so, they condemned the ineffective screening out of SMI inmates from solitary, the very screening needed to implement the bans. This case law incorporates a highly deferential standard in favor of prison officials before courts will intercede to remedy purported prison conditions violations.

Part III considers an alternative approach that would have the Supreme Court

3. Jan Ransom, *Jail Unions Gain a Powerful Supporter: The New Mayor*, N.Y. TIMES (Jan. 14, 2022), <https://perma.cc/28E4-3QJK>.

4. Nicholas Fandos & Jonah E. Bromwich, *In Naming New Jails Chief, Adams Vows to Revive Solitary Confinement*, N.Y. TIMES (Dec. 16, 2021), <https://perma.cc/K4AW-EKGS>.

5. *See id.* at 1-2.

6. *See* CORR. LEADERS ASS’N & ARTHUR LIMAN CENTER FOR PUB. INT. L. AT YALE L. SCH., TIME-IN-CELL: A 2021 SNAPSHOT OF RESTRICTIVE HOUSING 106 tbl.39 (2022) [hereinafter Liman Center].

extending its Eighth Amendment doctrine of proportionality review of sentences to ban placing SMI inmates in solitary absent exigent circumstances, such as SMI inmates' imminent threat of violence. According to the doctrine, evolving standards of society bar criminal sentences disproportionate to criminal offenses. By analogy, the doctrine would prohibit placing SMI inmates in solitary, which is a disproportionate punishment for them. After all, SMI inmates are at higher risk of deteriorating mental health in solitary even as they may be less culpable for the misconduct that resulted in their placement in solitary. The doctrine of proportionality review circumvents the courts' customary deference to prison officials' administration of prisons and leads to the Court establishing a clear standard that establishes a broad ban on placing SMI inmates in solitary.

3. Definition of solitary confinement

Solitary can refer to various types of confinement, and different departments of corrections refer to solitary by various terms, including disciplinary segregation, administrative segregation, protective segregation, secure housing unit, special housing unit, and the generic term restrictive housing. At its most basic, the Department of Justice defines solitary as prison cells to which prison officials remove inmates from the general prison population and place them in a locked cell, where they stay for twenty-two hours or more each day, by themselves or with one other person.⁷ Solitary serves four main purposes, all of which share the same restrictive conditions: (a) disciplinary solitary as punishment for infractions as mundane as swearing to serious violations, such as violent offenses for a determinate period (e.g., 14 days or 30);⁸ (b) holding inmates in administrative segregation pending an investigation into inmates' responsibilities for prison incidents;⁹ (c) long-term segregation for indeterminate terms, which can extend for years or even decades because prison officials deem certain inmates as threats to prison security or order, based on their serious or repeated misconduct or their status, such as gang affiliations;¹⁰ and (d) assignment to protective custody seg-

7. See U.S. DEP'T OF JUST., REPORT AND RECOMMENDATIONS CONCERNING THE USE OF RESTRICTIVE HOUSING: FINAL REPORT 3 (2016).

8. LÉON DIGARD, ET AL., RETHINKING RESTRICTIVE HOUSING: LESSONS FROM FIVE U.S. JAIL AND PRISON SYSTEMS 9 (2018); VT. DEP'T. OF CORR., 410.01, FACILITY RULES AND INMATE DISCIPLINE 13 (2012); TENN. DEP'T. OF CORR., 506.14, HOUSING ASSIGNMENTS 1 (2017).

9. See U.S. DEP'T OF JUST., *supra* note 7, at 4, 10.

10. See RYAN M. LABRECQUE, THE EFFECT OF SOLITARY CONFINEMENT ON INSTITUTIONAL MISCONDUCT: A LONGITUDINAL EVALUATION 22, 24 (2015) (Ph.D. dissertation, University of Cincinnati); Ryan M. Labrecque, *The Use of Administrative Segregation and Its Function in the Institutional Setting*, in RESTRICTIVE HOUSING IN THE U.S.: ISSUES, CHALLENGES, AND FUTURE DIRECTIONS 49, 52 (Loretta E. Lynch et al. eds., 2016); Keramet Reiter & Thomas Blairs, *Punishing Mental Illness: Trans-Institutionalization and Solitary Confinement in the United States*, in EXTREME PUNISHMENT: COMPARATIVE STUDIES IN DETENTION INCARCERATION AND SOLITARY CONFINEMENT 177, 187 (Keramet Reiter & Alexa

regation to protect inmates, sometimes at their request, such as transgender inmates and informants.¹¹ Inmates in solitary confinement are confined to “a cell no larger than a typical parking spot.”¹² In solitary, inmates face “severe isolation and control. Inmates remain confined within a cell for nearly the entire day (generally, twenty-two to twenty-three out of twenty-four hours a day) with minimal environmental stimulation . . . handcuffed and shackled at the waist and placed in leg irons when leaving the cell for any reason.”¹³ Inmates in solitary do not have the

opportunity to interact with [other inmates] and [are] without access to facility programs, such as education or work activities. Other deprivations can include restricted or prohibited visitation; limited, if any, natural sunlight; and the absence of diversions, such as radio, television, books, and magazines. Even the one hour spent out-of-cell generally consists of solitary exercise in a narrow cage that resembles a dog run.¹⁴

The limited access they have to “psychological or psychiatric treatment [is] frequently conducted through the cell door.”¹⁵ Although reduced environmental stimulation sometimes does contribute to inmates’ psychological deterioration, the critical harmful factor concerns their absence of meaningful social interaction.¹⁶ Supermaximum security units, also known as supermax units, refer to dedicated solitary units or entire prisons that impose the more severe solitary conditions on inmates for longer periods.¹⁷

Koenig eds., 2015); David C. Pyrooz, *Gang Affiliation and Restrictive Housing in U.S. Prisons*, in *RESTRICTIVE HOUSING IN THE U.S.: ISSUES, CHALLENGES, AND FUTURE DIRECTIONS* 117, 118 (Loretta E. Lynch et al. eds., 2016) (solitary imposed for gang affiliations); Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. REV. L. & SOC. CHANGE 477, 492 (1997).

11. *E.g.*, U.S. DEP’T OF JUST., *supra* note 7, at 23; MARC LEVIN, *REINING IN SOLITARY CONFINEMENT IN TEXAS: RECENT PROGRESS AND NEXT STEPS* 6-7 (2021).

12. *Davis v. Ayala*, 576 U.S. 257, 287 (2015) (Kennedy, J., concurring).

13. Laura Dellazizzo et al., *Is Mental Illness Associated With Placement Into Solitary Confinement in Correctional Settings? A Systematic Review and Meta-Analysis*, 29 INT’L J. OF MENTAL HEALTH NURSING 576, 577 (2020) (internal citations omitted).

14. Kenneth L. Appelbaum, *American Psychiatry Should Join the Call to Abolish Solitary Confinement*, 43 J. AM. ACAD. PSYCHIATRY L. 406, 407 (2015).

15. Dellazizzo et al., *supra* note 13, at 577 (citation omitted).

16. Jeffrey L. Metzner, *Class Action Litigation in Correctional Psychiatry*, 30 J. AM. ACAD. PSYCHIATRY L. 19, 25 (2002); *see also* Craig Haney, *The Social Psychology of Isolation: Why Solitary Confinement Is Psychologically Harmful*, 181 PRISON SERV. J. 12, 12 n.1 (2009).

17. *See* Craig Haney, *Mental Health Issues in Long-Term Solitary and “Supermax” Confinement*, 49 CRIME & DELINQ. 124, 125-26 (2003).

August 2023]

FORGOTTEN IN SOLITARY

103

B. Research on solitary confinement's harm

1. Haney's Pelican Bay State Prison studies

In a landmark study, Craig Haney explored the nature and extent of psychopathologies that solitary inmates experience.¹⁸ He sought to assess the prevalence of symptoms of psychological trauma and distress among inmates in Pelican Bay State Prison's solitary Security Housing Unit ("SHU"), a supermax prison. To do so he randomly selected 100 inmates from the SHU for interviews. In response to a first battery of questions regarding psychological distress generally, 70% of inmates answered that they were experiencing an "impending nervous breakdown."¹⁹ In response to a second battery of questions regarding symptoms of isolation, almost all solitary inmates (over 80%) reported certain perceptual, cognitive, and emotional difficulties, including "ruminations or intrusive thoughts, an oversensitivity to external stimuli, irrational anger and irritability, difficulties with attention and often with memory, and a tendency to socially withdraw."²⁰ Slightly fewer (over two-thirds) reported depressed or flat emotions. Over 40% revealed symptoms of extreme psychopathology, such as hallucinations and perceptual distortions, and over a quarter revealed suicidal thoughts.²¹

Solitary also directly affects inmates' ability to engage in and sustain social relationships. It produces a number of social pathologies in inmates as they try to adjust to and cope with their new and hostile solitary environment. Some of these have complicated, even paradoxical, origins. Without meaningful relationships, solitary inmates experience loneliness and associated social pain and as a response they may socially withdraw.²² Furthermore, without affiliation ("the opportunity to have meaningful contact with others") inmates cannot enjoy its potential for relief that can "help reduce anxiety in the face of uncertainty or fear-

18. Ruiz v. Johnson, 37 F. Supp. 2d 855, 908 (S.D. Tex. 1999), *rev'd sub nom.* Ruiz v. United States, 243 F.3d 941 (5th Cir. 2001) ("Craig Haney, Ph.D., J.D., is perhaps the nation's leading expert in the area of penal institution psychology.").

19. Haney, *supra* note 17, at 132-33.

20. *Id.* at 134.

21. *Id.* at 133-34; Ellie Brown, *A Systematic Review of the Effects of Prison Segregation*, 52 AGGRESSION AND VIOLENT BEHAV., Feb. 2020, at 12 (explaining that while research with prisoners imposes ethical limitations on research designs, which limits recourse to control groups, the study's systematic review "reveals . . . a level of consistency in existing research findings" that show "similar negative consequences" from solitary for inmates, notably, "hallucinations, hyper-responsivity to stimuli, perceptual distortions, anxiety and psychotic disturbances[,] suicide and self-harm").

22. Craig Haney, *Restricting the Use of Solitary Confinement*, 1 ANN. REV. CRIMINOL. 285, 296-98 (2018) [hereinafter Haney, *Restricting the Use*]; Craig Haney, *Solitary Confinement, Loneliness, and Psychological Harm*, in SOLITARY CONFINEMENT 129, 138-41 (Jules Lobel & Peter Scharff Smith eds., 2020); Haney, *supra* note 17, at 140.

arousing stimuli.”²³ However adaptive social withdrawal may be during long periods of solitary where inmates do not have social contact, inmates may actually lose the ability to affiliate with others, an essential capacity that they need to rely upon once they return to the general prison population and free society.²⁴ In pronounced cases, for example, upon release from prison, they may seclude themselves to their rooms or homes to the extent possible because in a restricted environment “they feel safe.”²⁵

Solitary can lead to other social pathologies. Solitary’s “totality of control” over inmates’ lives can cause both difficulties with impulse control and initiating purposeful activity, as well as apathy and depression, problems that can outlast their stay in solitary.²⁶ Also, without social interaction, which contributes to inmates’ perception of reality, some inmates may experience delusions or hallucinations that fill solitary’s stimulation void.²⁷ In addition, without social interaction, which contributes to defining a person’s identity, some solitary inmates may act out when given the opportunity in the pathological hope of eliciting a reaction, any reaction, that can reestablish their existence.²⁸

“For some prisoners, the negative effects [of solitary] can be permanent and life-threatening, including an increased likelihood of self-harm and suicide.”²⁹

23. Craig Haney, *The Science of Solitary: Expanding the Harmfulness Narrative*, 115 NW. U. L. REV. 211, 223 (2020).

24. Haney, *Restricting the Use*, *supra* note 22, at 297; see SHARON SHALEV, A SOURCEBOOK ON SOLITARY CONFINEMENT 19 (2008).

25. TERRY ALLEN KUPERS, SOLITARY: THE INSIDE STORY OF SUPERMAX ISOLATION AND HOW WE CAN ABOLISH IT 153 (2017).

26. Haney, *supra* note 17, at 138-39.

27. See SHALEV, *supra* note 24, at 13.

28. See Haney, *supra* note 17, at 139-40. This article combines Bennion’s point that solitary inmates have long-term trouble interacting with the world with Hafemeister and George’s focus on solitary provoking in them existential issues, issues that Bennion mentions in passing. Elizabeth Bennion, *Banning the Bing: Why Extreme Solitary Confinement Is Cruel and Far Too Usual Punishment*, 90 IND. L.J. 741, 758-59 (2015); Thomas L. Hafemeister & Jeff George, *The Ninth Circle of Hell: An Eighth Amendment Analysis of Imposing Prolonged Supermax Solitary Confinement on Inmates with a Mental Illness*, 90 DENV. U. L. REV. 1, 37 (2012).

29. Haney, *Restricting the Use*, *supra* note 22, at 290 (citing Fatos Kaba et al., *Solitary Confinement and Risk of Self-Harm Among Jail Inmates*, 104 AM. J. OF PUB. HEALTH 442, 445 (2014); see Lauren Brinkley-Rubinstein et al., *Association of Restrictive Housing During Incarceration with Mortality After Release*, 2 JAMA NETWORK OPEN, Oct. 2019, at 1, 8; Mimosa Luigi et al., *Shedding Light on “the Hole”: A Systematic Review and Meta-Analysis on Adverse Psychological Effects and Mortality Following Solitary Confinement in Correctional Settings*, 11 FRONTIERS IN PSYCHIATRY, Aug. 2020, at 6 (a systematic review and meta-analysis confirming a negative impact of solitary on inmates’ mental health, notably mood, psychotic experiences, hostility, and self-harm).

August 2023]

FORGOTTEN IN SOLITARY

105

2. The courts' recognition of research on the harms of solitary confinement

Various courts have recognized Haney's and others' research as credible when they report that solitary, depending on the severity of its restrictions, duration, and inmate characteristics, "poses a substantial risk of serious psychological and physical harm."³⁰ In particular, the Third and Fourth Circuits have highlighted Haney's 1997 and 2003 literature reviews.³¹ Courts from many other circuits along with Supreme Court Justices have underlined this consensus in the literature, whether it be in clinical, psychological, or medical literature.³² These courts have referred to the literature, which establishes solitary's potential for long-lasting mental harm, which can even lead to suicide.³³

One key variable that courts recognize in the research is how long is too long to keep an inmate in solitary before it exposes inmates to an unacceptable risk of harm. Courts note that research disagrees on this point. For instance, in the Supreme Court case *Wilkinson v. Austin*,³⁴ knowledgeable clinicians and academics in psychiatry and psychology averred in their amicus brief that after having spent sixty days in solitary inmates could not avoid mental harm.³⁵ In contrast,

30. *Porter v. Pa. Dep't of Corr.*, 974 F.3d 431, 441 (3rd Cir. 2020); *McClary v. Kelly*, 4 F. Supp. 2d 195, 206 (W.D.N.Y. 1998).

31. *Porter v. Clarke*, 923 F.3d 348, 356 (4th Cir. 2019) (quoting Haney, *supra* note 17, at 132); *Pa. Dep't of Corr.*, 974 F.3d at 442 (quoting *Williams v. Sec'y Pa. Dep't of Corr.*, 848 F.3d 549, 566 (3rd Cir. 2017) (quoting Haney & Lynch, *supra* note 10, at 491 n.74, 500-03, 521, 524, 530-31)).

32. *McClary*, 4 F. Supp. 2d at 208 (first quoting *Madrid v. Gomez*, 889 F. Supp. 1146, 1230 (N.D. Cal. 1995) ("[s]ocial science and clinical literature"); and then quoting *Davenport v. DeRobertis*, 844 F.2d 1310, 1316 (7th Cir. 1988) ("plenty of medical and psychological literature")); *Wilkerson v. Stalder*, 639 F. Supp. 2d 654, 683 (M.D. La. 2007) (quoting *Davenport*, 844 F.2d at 1316 (again referring to "plenty of medical and psychological literature")); *Grissom v. Roberts*, 902 F.3d 1162, 1176-77 (10th Cir. 2018) (Lucero, J., concurring) (first citing *Stuart Grassian, Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J.L. & POL'Y 325, 330-36 (2006)); then citing and quoting Haney, *supra* note 17, at 130-31, 140; and then citing Haney & Lynch, *supra* note 10, at 567-68 (referencing various scholars including Stuart Grassian and Craig Haney)); *DuPonte v. Wall*, 288 F. Supp. 3d 504, 513 (D.R.I. 2010) (quoting *Glossip v. Gross*, 135 S. Ct. 2726, 2765 (2015) (Breyer, J., dissenting) ("[I]t is well documented that . . . prolonged solitary confinement produces numerous deleterious harms.") (ellipsis in original)); *Davis v. Ayala*, 576 U.S. 257, 289 (2015) (Kennedy, J. concurring) ("[R]esearch still confirms what this Court suggested over a century ago: Years on end of near-total isolation exact a terrible price."); *Pa. Dep't of Corr.*, 974 F.3d at 442 ("[The Third Circuit has] repeatedly recognized the severe effects of prolonged solitary confinement, as have . . . sister circuits and Justices of the Supreme Court.").

33. *Grissom*, 902 F.3d at 1177 (Lucero, J., concurring) ("These harms . . . are persistent and may become permanent."); *Wallace v. Baldwin*, 895 F.3d 481, 484 (7th Cir. 2018) ("[T]he 'scientific consensus . . . that prisoners held in solitary confinement experience serious, often debilitating—even irreparable—mental and physical harms,' including an increased risk of suicide."); *Pa. Dep't of Corr.*, 974 F.3d at 442 ("Studies have documented high rates of suicide and self-mutilation.").

34. 545 U.S. 209 (2005).

35. Brief of Professors and Practitioners of Psychology and Psychiatry as Amici Curiae

Haney's 1997 and 2003 literature reviews, cited earlier in courts of appeals, establish a much shorter time period after which inmates in solitary will suffer mental harm: Inmates need only spend ten days in solitary before suffering a negative psychological impact.³⁶ At the extremes, inmates can suffer harm after very short periods while few inmates can escape its harms over prolonged periods.³⁷ Although research proposes various time periods after which inmates are liable to suffer mental harm, SMI inmates tend to deteriorate more rapidly and more dramatically than healthier inmates.³⁸

In addition, the Third Circuit pointed to Stuart Grassian, who had evaluated over two hundred solitary inmates, many of whom had no preexisting mental history, and yet experienced psychological trauma while in solitary: This suggested that solitary caused a deterioration in mental health.³⁹

In sum, courts across the U.S. have endorsed the research of leading experts in psychology and psychiatry who have established that solitary harms inmates' mental health, especially that of SMI inmates, even in short time periods. Yet, prison officials continue to confine a large number of SMI inmates in solitary as reviewed in the next section.

3. Population and prevalence of solitary confinement

As a result of its apparent harmful consequences, in the latter part of the

Supporting Respondents at 4, 22, *Wilkinson*, 545 U.S. 209 (No. 04-495) (Mar. 3, 2005) [hereinafter Brief of Professors] ("The overall consistency of these findings—the same or similar conclusions reached by different researchers examining different facilities, in different parts of the world, in different decades, using different research methods—is striking.").

36. Pa. Dep't of Corr., 974 F.3d at 442 (quoting *Williams*, 848 F.3d at 566 (quoting Haney & Lynch, *supra* note 10, at 531)); *Clarke*, 923 F.3d at 356 (quoting Haney, *supra* note 17, at 132); *J.H. v. Williamson County*, 951 F.3d 709, 719 (6th Cir. 2020) (quoting *Williams*, 848 F.3d at 566 (quoting Haney & Lynch, *supra* note 10, at 531)); see *Clarke*, 923 F.3d at 357 (quoting *Grissom*, 902 F.3d at 1176-77 (Lucero, J., concurring) ("[R]eviewing academic literature and determining that 'solitary confinement, even over relatively short periods, renders prisoners physically sick and mentally ill . . . These harms, which are persistent and may become permanent, become more severe the longer a person is exposed to solitary confinement.'" (ellipsis in original))).

37. See *McClary*, 4 F. Supp. 2d at 207 ("Some people can't handle it at all and a few days in [solitary], they don't do well."); see also *Wilkerson*, 639 F. Supp. 2d at 684 ("With each passing day its effects are exponentially increased, just as surely as a single drop of water repeated endlessly will eventually bore through the hardest of stones.").

38. *Peoples v. Annucci*, 180 F. Supp. 3d 294, 299 (S.D.N.Y. 2016) ("[N]umerous medical associations . . . oppos[e] the practice—especially with regard to mentally ill inmates, on whom the effects of solitary confinement are particularly pronounced."); see also *J.H.*, 951 F.3d at 719 (quoting *Palakovic v. Wetzel*, 854 F.3d 209, 225 (3d Cir. 2017) ("[R]ecognizing the 'growing consensus' of legal and scientific authorities, the Sixth Circuit held that mentally ill inmates are 'particularly vulnerable.'")).

39. See *Williams*, 848 F.3d at 567; see also *Grassian*, *supra* note 32, at 333 ("I have observed that, for many of the inmates so housed, incarceration in solitary caused either severe exacerbation or recurrence of preexisting illness, or the appearance of an acute mental illness in individuals who had previously been free of any such illness.").

nineteenth century, states across the U.S. abandoned the common use of prolonged solitary confinement.⁴⁰ However, the rate of incarceration “quintupled” during the last twenty-five years of the twentieth century, which coincided with an increase in the crime rate and a change in carceral priorities: Policies now embraced the penological goals of retribution, incapacitation, and deterrence, at the expense of rehabilitation, which fueled the adoption and spread of the “supermax, prolonged solitary confinement model.”⁴¹ Also, in the late 1960s and 1970s deinstitutionalization took place whereby the government closed many mental health hospitals (some of which had earned the infamous label of “snake pits” for exacerbating mental illness) in favor of community health centers.⁴² Unfortunately, the government did not appropriate the promised funds for the centers. This left many acutely mentally ill people stranded without care, a disproportionate number of whom ended up homeless or imprisoned.⁴³ “[T]he proportion of people in this country who are currently housed in either a mental hospital or a correctional facility is almost exactly the same as it was 50 years ago”⁴⁴ However, back then, mental hospitals had housed 75% of them. In contrast, today, correctional institutions house 95% of them, in large measure supplanting mental hospitals.⁴⁵

The catalyst for the building of supermax units across the U.S. occurred with an inmate riot in the U.S. Penitentiary at Marion, Illinois in 1983. When inmates killed two prison guards, prison officials imposed a lockdown, in which inmates were confined to their cells indefinitely. Other states’ departments of corrections followed suit, resorting more to solitary, and opening supermax units and prisons wholly dedicated to solitary confinement.⁴⁶ “Getting tough” on crime policies in tandem with an increased crime rate led to prison overcrowding and increased carceral violence.⁴⁷ In this context, solitary appeared as both a tool of justified retribution and to enforce order and security. The public embraced these punitive policies and prison management priorities.⁴⁸ Faith in solitary displaced faith in rehabilitation despite solitary’s cost. It bears noting that housing an inmate in solitary costs upwards of two times as much as housing them in the general prison population.⁴⁹

This Article uses the term inmate even though it focuses on prisoners in solitary, which means inmates whom the judicial system has convicted of a crime.

40. Hafemeister & George, *supra* note 28, at 11-12.

41. *Id.* at 13-14.

42. JAMES GILLIGAN & BANDY LEE, REPORT TO THE NEW YORK CITY BOARD OF CORRECTIONS 2 n.5 (2013).

43. *Id.*

44. *Id.* at 2.

45. *Id.* at 2-3.

46. Hafemeister & George, *supra* note 28, at 13-14.

47. LABRECQUE, *supra* note 10, at 2, 20-21; *see infra* Section III.A.4.

48. *See* LABRECQUE, *supra* note 10, at 20.

49. *Id.* at 64.

However, the Article generally refers to inmates because, in most respects, detainees, such as pretrial detainees who have not been convicted of a crime and immigration detainees who face civil proceedings, enjoy the same or more protections with respect to prison conditions and solitary likewise negatively impacts them.⁵⁰ The Correctional Leaders Association and the Liman Center's survey provides bedrock solitary confinement numbers for prisoners.⁵¹ For this purpose, it defined restrictive housing, what this Article calls more straightforwardly solitary, "as the practice of isolating an incarcerated person in a cell for an average of twenty-two hours or more per day, for fifteen or more consecutive days."⁵² The number of prisoners in solitary manifest an overall decline:

Declining Trend in Number and Percentage of Prisoners in Solitary⁵³

	2015	2017	2019	2021
Prisoners in Solitary	67,442	61,000	55,000-62,000	41,000-48,000
Prison Population	1.5 million	1.5 million	1.4 million	1.2 million
Percent in Solitary	4.5%	4.1%	3.9%-4.4%	3.4%-4.0%

Lengths of solitary stays vary enormously with 19.1% staying fifteen to twenty-nine days, 56.7% staying thirty to 365 days, while 24.2% stayed more than a year in solitary.⁵⁴ This Article does not focus on female prisoners and

50. *Hamm v. DeKalb County*, 774 F.2d 1567, 1574 (11th Cir. 1985) (holding that the Due Process Clause of the Fourteenth Amendment standard for medical care for pretrial inmates affords the same level of protection as the Eighth Amendment standard applied to convicted prisoners); *see also* *Boswell v. Sherburne County*, 849 F.2d 1117, 1121 (8th Cir. 1988) ("[I]t is an open question whether the fourteenth amendment provides pretrial detainees with a greater degree of protection against denial of medical care [than that afforded by the Eighth Amendment to convicted prisoners].") (footnote omitted); *see also* *Bell v. Wolfish*, 441 U.S. 520, 535-40 (1979) (holding that while pretrial detainees may not be subjected to punishment, restrictions and conditions of detention may be justified by the government's need for effective facility management and do not amount to punishment).

51. *See generally*, Liman Center, *supra* note 6.

52. *Id.* at 1.

53. *Id.* at 106 tbl.39, 60-61 (ranges reflect different assumptions extrapolating from the fewer jurisdictions that responded to the surveys). Also, the 2015 survey defined restrictive housing (i.e., solitary) as "isolating [a prisoner from the general population] in a cell for twenty-two hours or more per day and for fifteen or more continuous days." Liman Center, *supra* note 6, at x. Subsequent surveys "clarified the definition [as isolating prisoners] in a cell for an average of twenty-two hours or more per day for fifteen or more continuous days." *Id.* at x; CORR. LEADERS ASS'N & LIMAN CTR. PUB. INT. LAW AT YALE L. SCHOOL, TIME-IN-CELL 2019: A SNAPSHOT OF RESTRICTIVE HOUSING 1 (2020).

54. Liman Center, *supra* note 6, at 10 fig.3.

issues of race because of lack of data in this regard.⁵⁵ Also, the number of prisoners in solitary excludes other forms of detention like county and city run jails for inmates awaiting trial and misdemeanants, immigration detention centers, and juvenile facilities.⁵⁶ Moreover, solitary's reach extends much further than the numbers suggest because of the turnover in solitary. Accordingly, the number of prisoners placed in solitary over a given year is an estimated one in five of the total number of inmates.⁵⁷

The present Article focuses on serious mental illness as defined by departments of corrections, whose definitions vary but usually include current symptoms describing Diagnostic and Statistical Manual Axis I disorders, namely schizophrenia, bipolar, major depression, and schizoaffective disorders, and associated symptoms that cause significant functional impairment.⁵⁸

SMI inmates, in particular, find it difficult to adhere to rules in the stressful carceral environment.⁵⁹ Prison officials have wide discretion to mete out discipline as they see fit from warnings to lost privileges to solitary.⁶⁰ Having a mental illness makes it difficult for SMI inmates to obey prison rules and increases the likelihood that prison officials will send them to solitary.⁶¹ Also, all else being

55. That said, the Liman Center survey offers some pertinent data. Among responsive jurisdictions, only 0.8% of female prisoners were placed in solitary compared to 3.6% of male prisoners for these same jurisdictions. Liman Center, *supra* note 6, at viii. Black inmates accounted for a slightly larger percentage of the solitary population as compared to their prison population (37.7% versus 37.2%), as did Latinos (23.8% versus 22.6%). Liman Center, *supra* note 6, at ix. An explanation for these racial/ethnic disparities may lie in Blacks and Latinos falling into higher risk classifications (at risk of committing prison infractions) if they have more serious criminal histories or greater gang membership, which are often race/ethnic-based. Also, even if prison officials do not act based on explicit racial/ethnic bias, implicit bias may play a role when officials use their discretion to place inmates in solitary. KAYLA JAMES & ELENA VANKO, VERA INST. OF JUST., *THE IMPACTS OF SOLITARY CONFINEMENT* 7 (2021). In particular, Black women represent an alarming 30.1% of the female solitary population while constituting only 20.0% of the total female prison population. Liman Center, *supra* note 6, at ix.

56. Liman Center, *supra* note 6, at 4; see CHASE MONTAGNET ET AL., VERA INST. OF JUST., *MAPPING U.S. JAILS' USE OF RESTRICTIVE HOUSING: TRENDS, DISPARITIES, AND OTHER FORMS OF LOCKDOWN* 2-3, 9-10 (2021) (explaining that although prisons house more inmates than jails do, 1,435,500 prisoners versus 758,400 detainees, jails have a far higher turnover every year, 10.3 million detainees versus 576,956 prisoners. As a result, with 6% of the jail population in solitary for any duration, jails "potentially impact[] a far higher number of people [in solitary than do prisons], albeit often for shorter periods.").

57. ALLEN J. BECK, U.S. DEP'T OF JUST., *USE OF RESTRICTIVE HOUSING IN U.S. PRISONS AND JAILS* 1 (2015).

58. Liman Center, *supra* note 6, at app. D (Definitions of "Serious Mental Illness" by Jurisdiction); AM. BAR ASS'N DEATH PENALTY DUE PROCESS REV. PROJECT, *SEVERE MENTAL ILLNESS AND THE DEATH PENALTY* 1 (2016).

59. Jeffrey L. Metzner & Jamie Fellner, *Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for Medical Ethics*, 38 J. AM. ACAD. PSYCHIATRY L. 104, 105 (2010).

60. Kyleigh Clark, *The Effect of Mental Illness on Segregation Following Institutional Misconduct*, 45 CRIM. JUST. AND BEHAV. 1363, 1376-77 (2018).

61. Dellazizzo et al., *supra* note 13, at 579.

equal, even after adjusting for their higher misconduct record, mentally ill inmates are 1.36 times as likely to be consigned to solitary.⁶² Mentally ill inmates “may display unusual, frustrating or violent/problematic behaviour as part of their symptomatology, which is further considered as an endangerment to themselves, other inmates, [and] staff”⁶³ Because prison officials have prison security as their primary focus, they are liable to view mentally ill inmates’ problematic behavior as dangerous behavior warranting solitary.⁶⁴ Yet, SMI inmates do not represent the “worst of the worst” of offenders.⁶⁵ Instead, whether they merely exhibit “nuisance behavior” or violence, they require treatment rather than solitary, which risks exacerbating their mental illness and thus worsening their ability to control their problematic behavior.⁶⁶ Similarly, prisons often offer solitary inmates the possibility of graduating to progressively obtain more privileges through step-down or level programs as long as they show that they take responsibility for their misconduct and that they can conform their behavior to prison rules.⁶⁷

However, just as SMI inmates face inherent obstacles to adhering to myriad carceral rules when in the general prison population, they also languish in the bottom rungs of these step-down programs if they cannot overcome the challenges of the harsher solitary environment with its stricter rules and fewer privileges.⁶⁸ Consistent with these disparities, 29% of inmates experiencing serious psychological distress ended up spending time in solitary versus only 15% of those who reported no symptoms of mental health problems.⁶⁹ The disproportionate number of suicides in solitary further highlights solitary in tragic relief: According to one study, prison officials consigned 6-8% of inmates to solitary even as solitary amounted to 50% of prison suicides.⁷⁰

62. Clark, *supra* note 60, at 1376.

63. Dellazizzo et al., *supra* note 13, at 577.

64. *Id.*

65. Hafemeister & George, *supra* note 28, at 46 (discussing inmates in supermax confinement).

66. Appelbaum, *supra* note 14, at 408; Hafemeister & George, *supra* note 28, at 51.

67. Maurice Chammah, *How to Get Out of Solitary — One Step at a Time*, MARSHALL PROJECT (Jan. 7, 2016 7:15 AM), <https://perma.cc/LP2C-HSDP>.

68. Hafemeister & George, *supra* note 28, at 49; Jones ‘El v. Berge, 164 F. Supp. 2d 1096, 1117-18 (W.D. Wis. 2001); Terry A. Kupers, *Isolated Confinement: Effective Method for Behavior Change or Punishment for Punishment’s Sake?*, in THE ROUTLEDGE HANDBOOK OF INT’L CRIME AND JUST. STUD. 213, 218 (Bruce Arrigo & Heather Bersot eds., 2013) (“[I]f improved behavior on the part of the prisoners were the aim, it would be much more effective for staff to reward the prisoners’ positive behaviors at every turn than to mete increasingly petty or harsh punishments for every misstep on the prisoner’s part.”).

69. BECK, *supra* note 57, at 1, 7.

70. Terry A. Kupers, *What to Do with the Survivors? Coping with the Long-Term Effects of Isolated Confinement*, 35 CRIM. JUSTICE BEHAV. 1005, 1009 (2008); Fatos Kaba et al., *Solitary Confinement and Risk of Self-Harm Among Jail Inmates*, 104 AM. J. PUB. HEALTH 442, abstract (2014) (explaining that in New York from January 1, 2010 to January 31, 2013 “[a]lthough only 7.3% of [jail] admissions included any solitary confinement, 53.3% of acts

August 2023]

FORGOTTEN IN SOLITARY

111

II. PRISON CONDITIONS JURISPRUDENCE

A. Note on Due Process

The Due Process Clause of the Fourteenth Amendment offers very little to would-be plaintiff-inmates who would challenge their stay or conditions in solitary. Solitary precedent has made it very difficult for inmates to claim a liberty interest that warrants due process protection. For example, solitary for a term of thirty days is not sufficient.⁷¹ *Wilkinson v. Austin* created a liberty interest because the solitary in question combined typically harsh restrictive solitary conditions, though with especially severe limitations on human contact, with an indefinite solitary term reviewed annually, and, in addition it disqualified inmates from parole so long as they remained in solitary.⁷² Even should they have a liberty interest, Due Process only affords inmates protections such as a hearing where they receive notice of the factual basis against them and have an opportunity to be heard.⁷³ However, procedural due process does not cure the substance of solitary's harms because it does not establish limits on the length of solitary terms, ensure humane conditions, nor exclude vulnerable populations, for instance to bar SMI inmates from solitary.⁷⁴ As a result, inmates who challenge their solitary confinement based on Due Process engage in what likely amounts to a fruitless exercise. Instead, if they have the grounds for doing so, they should seek a remedy to solitary by having recourse to the Eighth Amendment.⁷⁵ This is the subject of the remainder of this article.

B. Prison conditions jurisprudence canon

1. Historical foundations of a prison conditions claim

Traditional prison conditions jurisprudence—where inmates seek a remedy to prison conditions imposed by prison officials—traces its historical foundations to Eighth Amendment case law reviewing prisoners' punishment as held in

of self-harm and 45.0% of acts of potentially fatal self-harm occurred within [solitary confinement]."); CAL CORR. HEALTH CARE SERVICES, REPORT OF SUICIDES IN THE CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION 31 (2020) ("During 2017 through 2019, suicides in segregated housing accounted for 41% . . . of the total suicides . . . [while o]n average, 3.6% of CDCR inmates were assigned to segregated housing during this time.").

71. *Wilkinson v. Austin*, 545 U.S. 209, 223-24 (2005) (quoting *Sandin v. Conner*, 518 U.S. 472, 484 (1995)) (*Sandin* did not consider solitary per se an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.").

72. *Wilkinson*, 545 U.S. at 223-24.

73. *Id.* at 225-26; *Hewitt v. Helms*, 459 U.S. 460, 476 (1983).

74. Alexander A. Reinert, *Solitary Troubles*, 93 NOTRE DAME L. REV. 927, 943-34 (2018).

75. *Cf. id.* at 944, 956 (explaining that though the Eighth Amendment ostensibly applies to rein in solitary, it has not lived up to its potential.).

their judicial sentences. The U.S. Constitution's Eighth Amendment's cruel and unusual punishments clause holds that "Excessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted*," which protects persons once they have been convicted of crimes.⁷⁶ Initially, its protections extended only to ban "punishments of torture . . . and all others in the same line of unnecessary cruelty."⁷⁷ In its macabre words, the Supreme Court barred the state from imposing "torture or a lingering death."⁷⁸ Nonetheless, every state could have legal recourse to capital punishment including public shooting and electrocution.⁷⁹ Indeed, at the time of the framing of the Constitution, the U.S. embraced the death penalty through its common law; and the Constitution acknowledged the death penalty in its Fifth and Fourteenth Amendments.⁸⁰

However, the Court views torture as a minimal baseline from which it can move beyond to prohibit other punishments consistent with contemporary public opinion on humane justice.⁸¹ As *Trop v. Dulles*,⁸² summed up, "[t]he Amendment must draw its meaning from evolving standards of decency that mark the progress of a maturing society" as distilled in the concept of the "dignity of man."⁸³ Basically, the dignity of man standard prohibits "excessive" penalties.⁸⁴ This means: "First, the punishment must not involve the unnecessary and wanton infliction of pain."⁸⁵ What's more, "[t]he punishment must not be grossly out of proportion to the severity of the crime."⁸⁶ And, *a fortiori*, "the sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering."⁸⁷

76. U.S. CONST. amend. VIII (emphasis added); *Bell v. Wolfish*, 441 U.S. 520, 579 (1979) (Stevens, J., dissenting).

77. *In re Kemmler*, 136 U.S. 436, 447 (1890).

78. *Id.*

79. *Jackson v. Bishop*, 404 F.2d 571, 577 (8th Cir. 1968).

80. *Gregg v. Georgia*, 428 U.S. 153, 176-77 (1976) (plurality opinion). The Fifth Amendment endorses capital punishment when it provides that:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . . nor be deprived of life, liberty, or property, without due process of law.

Id. at 177 (quoting U.S. CONST. amend. V). Likewise, the Fourteenth Amendment endorses capital punishment when it provides that: "[N]o State shall deprive any person of 'life, liberty, or property' without due process." *Id.* (quoting U.S. CONST. amend. XIV).

81. *Id.* at 171 (quoting *Weems v. United States*, 217 U.S. 349, 373 (1910)).

82. 356 U.S. 86 (1958) (plurality opinion).

83. 356 U.S. 86, 100-01 (plurality opinion).

84. *Gregg*, 428 U.S. at 173 (quoting *Trop*, 356 U.S. at 100 (plurality opinion)).

85. *Id.* at 173 (citing *Furman v. Georgia*, 408 U.S. 238, 392-93 (1972) (Burger, C.J., dissenting)).

86. *Id.* (first citing *Trop*, 356 U.S. at 100 (plurality opinion) (dictum); and then citing *Weems*, 217 U.S. at 367).

87. *Id.* at 183 (first citing *Wilkerson v. Utah*, 99 U.S. 130, 135-36 (1878); and then citing

2. Prisoners' right to mental health care (*DeShaney*, *Estelle*, and *Bowring*)

The Due Process Clause protects persons against states depriving them of “life, liberty, or property, without due process of law.”⁸⁸ The Constitution does not obligate the state to affirmatively provide them aid and other services, including medical services, to persons in need.⁸⁹ However, when the state places persons in its custody and thereby prevents them from caring for themselves “and at the same time fails to provide for [their] basic human needs—e.g., food, clothing, shelter, medical care, and reasonable safety” it violates the Eighth Amendment.⁹⁰ This principle runs throughout traditional prison conditions jurisprudence.

In the Supreme Court’s first case in its prison conditions jurisprudence, *Estelle v. Gamble*,⁹¹ the Court addressed how the Eighth Amendment—made applicable to the states through the Fourteenth Amendment—protected inmates from cruel and unusual punishment regarding prison conditions, in *Estelle*’s case, medical care.⁹² It reviewed the historical foundations of a prison conditions claim and considered the fact that “inmate[s] must rely on prison authorities to treat [their] medical needs.”⁹³ Therefore, the Court concluded that the “deliberate indifference to serious medical needs of prisoners” on the part of officials constituted an “unnecessary and wanton infliction of pain,” proscribed by the Eighth Amendment.⁹⁴ The pain need not rise to the level of torture because even “[i]n less serious cases, denial of medical care may result in pain and suffering which no one suggests would serve any penological purpose [and] is inconsistent with contemporary standards of decency.”⁹⁵ It added in a footnote that “punishments grossly disproportionate to the severity of the crime” violate the Eighth Amendment.⁹⁶

*Bowring v. Godwin*⁹⁷ established that prison officials have a duty to care for mental illness just as much as physical illness.⁹⁸ *Bowring* held that an inmate is

In re Kemmler, 136 U.S. 436, 447 (1890)).

88. U.S. CONST. amend. XIV.

89. *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 194-97 (1989) (first quoting *Harris v. McRae*, 448 U.S. 297, 317-318 (1980) (nothing that there is “no obligation to fund . . . medical services”); and then quoting *Youngberg v. Romeo*, 457 U.S. 307, 317 (1982) (“As a general matter, a State is under no constitutional duty to provide substantive services . . .”).

90. *Id.* at 200 (noting that, outside the prison context, for example in jails, such circumstances would violate substantive due process.).

91. 429 U.S. 97 (1976).

92. *Id.* at 101-02 (citing *Robinson v. California*, 370 U.S. 660 (1962)).

93. *Id.* at 103.

94. *Id.* at 104 (quoting *Gregg v. Georgia*, 428 U.S. 153, 182-183 (1976)).

95. *Id.* at 103.

96. *Id.* at n.7 (citing *Gregg*, 428 U.S. at 173).

97. 551 F.2d 44 (4th Cir. 1977).

98. *Id.* at 47.

entitled to psychological or psychiatric treatment if [ordinary care leads health staff to conclude]: (1) that the prisoner's symptoms evidence a serious disease or injury; (2) that such disease or injury is curable or may be substantially alleviated; and (3) that the potential for harm to the prisoner by reason of delay would be substantial.⁹⁹

From the very beginning, however, by requiring deliberate indifference in *Estelle*, the Supreme Court introduced a cautionary note to ensure that inmates' claims for inadequate medical care did not rise to the level of a constitutional violation simply because the claimant was a prisoner.¹⁰⁰ In the same vein, when *Bowring* recognized inmates' right to mental health treatment, it underscored that inmates only had a "limited right to treatment."¹⁰¹ Like medical care for physical ailments, mental health care "remains a question of sound professional judgment. The courts will not intervene upon allegations of mere negligence, mistake or difference of opinion."¹⁰²

3. Principles of a prison conditions claim (*Rhodes*)

Rhodes v. Chapman took the next step when it directly considered inmates' prison conditions, beyond medical and mental health care, as punishment subject to scrutiny under the Eighth Amendment.¹⁰³ The Court explicitly extended cruel and unusual punishments principles, though in this particular case it ruled that prison officials had not violated inmates' rights through overcrowding when it housed two inmates to a cell.¹⁰⁴ It reviewed the grounds presented in *Estelle* that could sustain a constitutional violation, specifically prison conditions involving "wanton and unnecessary infliction of pain [or if] grossly disproportionate to the severity of the crime warranting imprisonment."¹⁰⁵ It then added its own gloss when it defined as unconstitutional those prison conditions that result in a serious deprivation of inmates' "basic human needs" or "of the minimal civilized measure of life's necessities."¹⁰⁶ What exactly qualifies as a violative deprivation can

99. *Id.*

100. *Estelle*, 429 U.S. at 105-06.

101. *Bowring*, 551 F.2d at 48.

102. *Id.*

103. 452 U.S. 337 (1981).

104. *Id.* at 348.

105. *Id.* at 347 (citing *Estelle*, 429 U.S. at 103).

106. *Id.* at 347; see also *Madrid v. Gomez*, 889 F. Supp. 1146, 1263 (1995):

No prison, for example, can deprive inmates of a basic human need, even though the underlying conditions might otherwise arguably promote some penological objective. . . . Sedating all inmates with a powerful medication that leaves them in a continual stupor would arguably reduce security risks; however, such a condition of confinement would clearly fail constitutional muster. On the other hand, a condition

August 2023]

FORGOTTEN IN SOLITARY

115

expand with time as they accord with a “contemporary standard of decency.”¹⁰⁷

Before inmates can successfully request a court’s intervention to remedy unconstitutional prison conditions, they face a number of challenges. From the start, two general principles served to counsel courts against condemning mere unpleasant prison conditions. *Rhodes* underlined that the “Constitution does not mandate comfortable prisons.”¹⁰⁸ Penological goals, in particular retribution, may justify harsh disciplinary conditions.¹⁰⁹ In addition, “comity, judicial restraint, [and] recognition of expertise” counsels courts to defer to legislatures and prison officials as to what laws and policies should apply; and how prison officials should administer them.¹¹⁰ This grants them a presumption of legality so long as prison officials do not transgress constitutional minima, a high bar indeed.¹¹¹ After setting out the standards for a successful prison conditions claim, as well as the deference owed to prison officials, *Rhodes* closed its decision by affirming that legislatures and prison officials are equipped to decide “how best to achieve the goals of the penal function in the criminal justice system: to punish justly, to deter future crime, and to return imprisoned persons to society with an improved chance of being useful, law-abiding citizens.”¹¹²

4. Objective and subjective components of a prison conditions claim (*Wilson*)

Estelle had required that inmates prove deliberate indifference to serious medical needs to prevail in an inadequate medical care claim.¹¹³ *Rhodes*, though it mentioned deliberate indifference, did so in passing and did not consider it in reaching its holding.¹¹⁴ *Wilson v. Seiter*¹¹⁵ made explicit that inmates must satisfy the two components to prevail in a prison conditions claim: both “the objective component” that the deprivation was sufficiently serious, and the “subjective component,” that the prison officials acted with a “sufficiently culpable state of mind.”¹¹⁶ This culpable state of mind equated punishment for purposes of the

or other prison measure that has little or no penological value may offend constitutional values upon a lower showing of injury or harm.

107. *Rhodes*, 452 U.S. at 347.

108. *Id.* at 349.

109. *Id.* at 347 (“To the extent that [prison]conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society.”).

110. *Id.* at 362 (Brennan, J., concurring in the judgment).

111. *Id.*

112. *Id.* at 352. The overarching case in this regard, *Bell v. Wolfish*, recognizes this view that prison officials have the relevant expertise, and the legislative and executive branches the purview, of how to best meet penological goals. 441 U.S. 520, 547-48 (1979).

113. *Estelle v. Gamble*, 429 U.S. 97, 106 (1976).

114. *Rhodes*, 452 U.S. at 347; *Wilson v. Seiter*, 501 U.S. 294, 298 (1991).

115. 501 U.S. 294 (1991).

116. *Id.* at 298. *Wilson* also added that:

Some conditions of confinement may establish an Eighth Amendment violation “in

cruel and unusual punishments clause to prison officials' actions or prison conditions that they deliberately imposed or to which they were otherwise deliberately indifferent.¹¹⁷

5. Risk of future harm (*Helling*) and deliberate indifference to a substantial risk of serious harm (*Farmer*)

The Supreme Court subsequently addressed prison conditions claims in relation to a risk of future harm in *Helling v. Kinney*¹¹⁸ and *Farmer v. Brennan*.¹¹⁹ As to the objective component, *Helling* recognized the possibility of an "unreasonable risk of serious damage to [an inmate's] future health" caused by a cellmate's smoking.¹²⁰ However, the Supreme Court specified that the objective harm factor:

requires more than a scientific and statistical inquiry into the seriousness of the potential harm and the likelihood that such injury [will occur]. It also requires a court to assess whether society considers the risk that the prisoner complains of to be so grave that it violates contemporary standards of decency to expose anyone unwillingly to such a risk. In other words, the prisoner must show that the risk of which he complains is not one that today's society chooses to tolerate.¹²¹

For its part, *Farmer* clarified the meaning of the subjective component.

First, in terms of the objective component, "the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm."¹²²

Second, "[i]n prison conditions cases [a culpable] state of mind is one of 'deliberate indifference' to inmate health or safety."¹²³ Deliberate indifference represents a subjective standard and means to "'consciously disregard' a substantial risk of serious harm," the equivalent of "subjective recklessness as used

combination" when each would not do so alone, but only when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need[, for example, warmth when considering] low cell temperature at night combined with a failure to issue blankets.

Id. at 304 (emphasis in original). Yet, "[n]othing so amorphous as 'overall conditions'" can violate the constitution. *Id.* at 305.

117. *Id.* at 298-304; *id.* at 300 (quoting *Duckworth v. Franzen*, 780 F.2d 645, 652 (7th Cir. 1985) ("[I]f [a] guard accidentally stepped on [a] prisoner's toe and broke it, this would not be punishment.")).

118. 509 U.S. 25 (1993).

119. 511 U.S. 825 (1994).

120. *Helling*, 509 U.S. at 35.

121. *Id.* at 36 (emphasis omitted).

122. *Farmer*, 511 U.S. at 834.

123. *Id.* (quoting *Wilson*, 501 U.S. at 302-03).

August 2023]

FORGOTTEN IN SOLITARY

117

in the criminal law.”¹²⁴ Hence, a prison official must draw an inference from known facts that a substantial risk of serious harm exists.¹²⁵ Having drawn the inference, the official must then also fail to take reasonable steps to address the harm.¹²⁶ Although evidence of what is within a prison official’s knowledge may be hard to come by a “factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious.”¹²⁷

C. Notable solitary confinement case law

1. Inhumane conditions and inadequate mental health care in solitary confinement (*Palakovic*)

Inmates suffering mental harm in solitary often submit two claims, one for inhumane prison conditions regarding social isolation and reduced environmental stimulation, and one for inadequate mental health care. Both claims call for inmates’ transfer out of solitary. *Palakovic v. Wetzel*¹²⁸ is a case in point.¹²⁹ At the State Correctional Institution (“SCI”) in Cresson, Pennsylvania, prison officials repeatedly placed Brandon Palakovic in solitary whereupon he committed suicide and his parents, the Palakovics, sued prison officials and prison private mental health care providers.¹³⁰ While Brandon was incarcerated at SCI Cresson the Department of Justice was investigating the prison for abusive carceral conditions, especially of the mentally ill and their prolonged isolation.¹³¹ The Court of Appeals reversed the lower court when it ruled that the Palakovics had submitted a plausible claim for inhumane solitary prison conditions that violated the cruel and unusual punishments clause. It rested on the “growing consensus—with roots going back a century—that [solitary] conditions like those to which Brandon repeatedly was subjected can cause severe and traumatic psychological damage.”¹³² In fact, psychological damage risks becoming physical harm, specifically self-mutilation or suicide.¹³³ The particulars of Brandon’s case, with the Department of Justice’s investigation that had determined that the Pennsylvania

124. *Id.* at 839-40 (quoting MODEL PENAL CODE § 2.02(c) (1985)).

125. *Id.* at 837.

126. *Id.* at 847.

127. *Id.* at 842. This Article emphasizes more than some other authors the challenges that inmates face to prevail on a prison condition claim given courts’ deference to legislatures and prison officials regarding penological goals. *See generally* Hafemeister & George, *supra* note 28, at 18-24.

128. 854 F.3d 209 (3rd Cir. 2017).

129. *Id.* at 225-26 (discussing inhumane prison conditions); *id.* at 227-29 (discussing inadequate mental health care).

130. *Id.* at 217-18, 232.

131. *Id.* at 217.

132. *Id.* at 225-26 (citing *Williams v. Sec’y Pa. Dep’t of Corr.*, 848 F.3d 549, 566-68 (3d Cir. 2017)).

133. *Id.* at 226.

Department of Corrections “routinely subjected mentally ill prisoners (like Brandon) to unnecessarily harmful conditions of confinement,” and “the increasingly obvious reality that extended stays in solitary confinement can cause serious damage to mental health” led the court to find the Palakovics’ inhumane solitary conditions claim plausible.¹³⁴

In addition, the appellate court ruled that the Palakovics submitted a plausible claim for inadequate mental health care because “[t]o act with deliberate indifference to serious medical needs is to recklessly disregard a substantial risk of serious harm.”¹³⁵ The Palakovics alleged that prison officials knew Brandon had a serious mental health history that represented an urgent cause for concern. Specifically, Brandon had a prior history of suicide attempts and self-harm; prison officials had diagnosed him with serious mental disorders and had placed him on the prison’s mental health roster; had prescribed him antidepressants; and he had received mental health attention, albeit consisting of only a few psychology staff visits and routine and perfunctory cell-front visits. Cell-front visits were particularly inadequate because prison officials “expressly prohibited medical personnel from speaking with mentally ill prisoners in solitary confinement for more than 1–2 minutes at a time through solid steel [cell] doors.”¹³⁶

Understaffing, poor coordination and continuity of care, and discipline in lieu of treatment characterized SCI Cresson in general, but they especially marked Brandon’s experience with solitary.¹³⁷ Understaffing helps explain the “inadequate to non-existent mental health care,” which would include the lack of out-of-cell counselling, group therapy, and psychiatry.¹³⁸ “[C]ell-side” monitoring visits cannot replace out-of-cell thorough and confidential counseling out of earshot of custody staff and other inmates.¹³⁹ Further, when solitary denies inmates group programming, such as group therapy, education, and vocational training, they lose opportunities for therapy and social interaction.¹⁴⁰ Left to themselves inmates have no social outlet to keep the stress of solitary at bay.

Even when Brandon found that his cursory medication treatment was ineffective and he requested that a psychiatrist follow up with his care and review

134. *Id.*

135. *Id.* at 227 (quoting *Giles v. Kearney*, 571 F.3d 318, 330 (3d Cir. 2009)).

136. *Id.* at 228 (citation omitted).

137. Letter from Jocelyn Samuels, Acting Assistant Att’y Gen., and David J. Hickton, U.S. Att’y, U.S. Dep’t of Just. C.R. Div. to Hon. Tom Corbett, Governor of Pa. (Feb. 24, 2014) 14-15 (Department of Justice Findings Letter “re: Investigation of the Pennsylvania Department of Correction’s Use of Solitary Confinement on Prisoners with Serious Mental Illness and/or Intellectual Disabilities”).

138. See *Palakovic*, 854 F.3d at 216, 218, 228-29; Letter from U.S. Dep’t of Just. C.R. Div. to Governor Tom Corbett, *supra* note 137, at 16.

139. Letter from U.S. Dep’t of Just. C.R. Div. to Governor Tom Corbett, *supra* note 137, at 8 n.10.

140. *Id.* at 8 n.9.

his medication regimen, prison officials ignored his entreaties.¹⁴¹ Without anyone responding to his plight and his pleas, he ended up committing suicide.¹⁴² Brandon received some mental health care. However, some care may be considered constitutionally deficient care when there is deliberate indifference to serious needs, such as “less efficacious treatment” or results in “undue suffering.”¹⁴³

The decisive factor that made the Palakovics’ claim for inadequate mental health care plausible was that they alleged that prison officials placed Brandon, an inmate with a “fragile mental health condition and history of self-harm and suicide attempts” into the “inherent stress of solitary,” contravening their own policy that classified solitary as high risk for suicidal inmates.¹⁴⁴ In fact, effective mental health care begins in the general prison population to avoid prisoners from deteriorating and prison officials then responding by consigning them to solitary.¹⁴⁵ In essence, officials “substituted solitary confinement for treatment” for his mental disorders and suicidal behavior.¹⁴⁶ Where Brandon’s behavior called for care he received punishment. Yet, Brandon’s mental health history and continuity of care should have precluded his placement in solitary.¹⁴⁷ A critical factor that led to Brandon’s ultimate suicide lay in prison officials’ lack of systematic screening for inmates’ mental health needs that could have precluded his placement in solitary.¹⁴⁸

Palakovic illustrates how SMI plaintiff-inmates often can advance two cognizable claims to seek a remedy for their placement in solitary: one for inhumane prison conditions and one for inadequate mental health care.¹⁴⁹

141. *Id.* at 8, 14-15; *Palakovic*, 854 F.3d at 216.

142. *Palakovic*, 854 F.3d at 216, 228.

143. *Id.* at 228 (first quoting *West v. Keve*, 571 F.2d 158, 162 (3d Cir. 1978); and then quoting *Monmouth Cnty. Corr. Institutional Inmates*, 834 F.2d 326, 346 (3d Cir. 1987)).

144. *Id.* at 229 (citations omitted).

145. *Palakovic*, 854 F.3d at 216, 229; Letter from U.S. Dep’t of Just. C.R. Div. to Governor Tom Corbett, *supra* note 137, at 15.

146. *Palakovic*, 854 F.3d at 216, 229.

147. Letter from U.S. Dep’t of Just. C.R. Div. to Governor Tom Corbett, *supra* note 137, at 14-15.

148. *Palakovic*, 854 F.3d at 229.

149. Also, the court ruled that the Palakovics pled plausible vulnerability to suicide claims—whereby certain defendants allegedly knew (or should have known) of Brandon’s “particular vulnerability to suicide” and yet repeatedly placed him in solitary despite them knowing this would exacerbate his risk of suicide and mental harm. *Id.* at 230-31. As part of their vulnerability to suicide claims, the Palakovics included a claim that “supervisory defendants established a policy whereby mentally ill and suicidal prisoners like Brandon were repeatedly placed in solitary confinement rather than provided with adequate mental health treatment.” *Id.* at 233. This posed an “obvious” risk of suicide highlighted by prior incidents at the prison, and of particular concern given Brandon’s mental health history. *Id.* In addition, the plaintiffs submitted a failure to train claim in which they “(1) identif[ied] specific training not provided that could have reasonably been expected to prevent the suicide that occurred,” [training concerning SMI inmates and solitary’s impact] and (2) demonstrate[d] that the risk reduction [in suicides] associated with the proposed training [was] so great and so obvious” one could reasonably infer supervisors’ deliberate indifference towards inmates’ suicide risk. *Id.*

2. Class actions' ban on mentally ill inmates from solitary confinement
(*Madrid, Ruiz, and Jones 'El*)

A trifecta of three seminal decisions in class actions, *Madrid v. Gomez*,¹⁵⁰ *Ruiz v. Johnson*,¹⁵¹ and *Jones 'El v. Berge*,¹⁵² have applied solitary cruel and unusual punishments principles to condemn the solitary conditions for mentally ill inmates as unconstitutional because they faced there inhumane solitary conditions or inadequate mental health care. The decisions began by recognizing solitary's valid penological purposes, that is to say "to punish infractions and to control and perhaps protect inmates whose presence within the general prison population would create unmanageable risks."¹⁵³ In addition, they acknowledged that courts must initially defer to the legislative and executive branches' prerogatives in prison policy and administration.¹⁵⁴ Furthermore, some inmates will invariably experience discomfort and even "psychological pain" when in solitary "beyond that experienced by other general population inmates."¹⁵⁵ On this point, solitary inmates usually do not enjoy nor do they have the right to certain activities and programs, which can be seen as accompanying good behavior, but are dispensable, like "recreational, vocational or rehabilitative programs."¹⁵⁶ In surveying past jurisprudence, the courts acknowledged that previous "courts [had] often focused on the minimum needed to physically sustain life, such as shelter, food, and medical care."¹⁵⁷ Nonetheless, the class actions argued that society had moved beyond upholding only physical needs to embracing psychological ones as well and that courts had followed suit.¹⁵⁸ In sum, prison officials may not punish by imposing prison conditions that pose a substantial risk of serious harm to either physical or mental health.¹⁵⁹

(quoting *Colburn v. Upper Darby Township*, 946 F.2d 1017, 1030 (3d Cir. 1991)). "[S]upervisors were [plausibly] alleged to have provided essentially no training on suicide, mental health, or the impact of solitary confinement . . ." *Id.* at 234.

150. 889 F. Supp. 1146 (N.D. Cal. 1995) (denouncing prison conditions at California's Pelican Bay State Prison); see *supra* Section I.B.1. Haney's Pelican Bay State Prison Studies.

151. 37 F. Supp. 2d 855 (S.D. Tex. 1999), *rev'd sub nom.* *Ruiz v. United States*, 243 F.3d 941 (5th Cir. 2001) (denouncing prison conditions at Texas's department of corrections).

152. 164 F. Supp. 2d 1096 (W.D. Wis. 2001) (denouncing prison conditions at Wisconsin's Supermax Correctional Institution in Boscobel, Wisconsin).

153. *Madrid*, 889 F. Supp. at 1261 (quoting *Young v. Quinlan*, 960 F.2d 351, 364 (3rd Cir. 1992)); *Ruiz*, 37 F. Supp. 2d at 915 (quoting *Young*, 960 F.2d at 364).

154. *Madrid*, 889 F. Supp. at 1262.

155. *Id.* (quoting *Toussaint v. McCarthy*, 597 F. Supp. 1388, 1414 (N.D. Cal. 1984)).

156. *Id.*; cf. *Jones 'El v. Berge*, 164 F. Supp. 2d 1096, 1116-17 (explaining that the limited programming available for solitary SMI inmates can evidence overly harsh solitary conditions); *Ruiz*, 37 F. Supp. 2d at 911.

157. *Madrid*, 889 F. Supp. at 1260; *Ruiz*, 37 F. Supp. 2d at 914.

158. *Ruiz*, 37 F. Supp. 2d at 914 (describing "the maturation of our society's understanding of the very real psychological needs of human beings"); *Madrid*, 889 F. Supp. at 1260-61; *Jones 'El*, 164 F. Supp. 2d at 1117.

159. *Madrid*, 889 F. Supp. at 1259, 1264; *Jones 'El*, 164 F. Supp. 2d at 1117; *Ruiz*, 37 F. Supp. 2d at 887.

In *Madrid*, *Ruiz*, and *Jones 'El*, inmates submitted claims directed against, among other issues, inhumane solitary conditions and inadequate mental health care afforded to inmates in solitary. As observed in *Palakovic*, in solitary the two types of claims intersect.¹⁶⁰ First, solitary's inhumane conditions, specifically its social isolation and lack of environmental stimulation, can precipitate or aggravate inmates' mental health needs.¹⁶¹ Second, the limited mental health care services endemic in solitary (such as an overreliance on cursory medication and cell-front visits in lieu of proper psychiatry and out-of-cell therapy) usually falls short of addressing SMI inmates' mental illnesses and amounts to inadequate mental health care.¹⁶² Thus, both claims call for SMI inmates' immediate transfer out of solitary based on an effective screening of SMI inmates out from solitary.

First, *Madrid* emphasized the impact of inhumane solitary conditions on mental health and ruled that the "extreme social isolation and reduced environmental stimulation" of solitary "deprive[d] inmates of a minimal civilized level of one of life's necessities"¹⁶³ Inmates admitted that their conditions met their physical needs, but argued that solitary confinement nonetheless caused them mental harm sufficient to violate their constitutional rights.¹⁶⁴ *Ruiz* ruled that inmates were "deprived of even the most basic psychological needs," as they suffered an "almost total deprivation of human contact, mental stimulus, personal property and human dignity."¹⁶⁵ In combination, these systemic inhumane conditions caused cruel and unusual psychological harm.¹⁶⁶ *Jones'El's* inhumane solitary conditions recall those in *Madrid* and *Ruiz*, which amounted to constitutional violations.¹⁶⁷

Furthermore, the trifecta of cases recognized that prison officials must not impose punitive conditions that do not have a penological justification, for example: *Ruiz* and *Jones 'El* point out that starting inmates newly placed in solitary at the most restrictive levels within step-down programs serves no purpose and sets them up to fail because they must overcome the harshest prison conditions.¹⁶⁸

160. See *Palakovic v. Wetzel*, 854 F.3d 209, 216 (3d Cir. 2017) (noting that "solitary is characterized by extreme deprivations of social interaction and environmental stimulation, abusive staff, and inadequate to non-existent mental healthcare."); *Ruiz*, 37 F. Supp. 2d at 911-12; *Madrid*, 889 F. Supp. at 1267; *Jones 'El*, 164 F. Supp. 2d at 1116-17.

161. See *Ruiz*, 37 F. Supp. 2d at 908-11; *Madrid*, 889 F. Supp. at 1264-66; *Jones 'El*, 164 F. Supp. 2d at 1116-18.

162. See *Ruiz*, 37 F. Supp. 2d at 912-13; *Madrid*, 889 F. Supp. at 1218-23; Luigi et al., *supra* note 29, at 8. *Jones 'El* did not reach the question of inadequate mental health care because it found that plaintiff-inmates had demonstrated a "better than negligible chance of succeeding" in showing unconstitutional inhumane solitary conditions sufficient to obtain their requested preliminary injunction. *Jones 'El*, 164 F. Supp. 2d at 1117.

163. *Madrid*, 889 F. Supp. at 1261, 1266.

164. *Id.* at 1261.

165. *Ruiz*, 37 F. Supp. 2d at 913.

166. *Id.* at 914-15 (citing *Wilson v. Seiter*, 501 U.S. 294, 304 (1991)).

167. *Jones 'El*, 164 F. Supp. 2d at 1119-21.

168. *Ruiz*, 37 F. Supp. 2d at 911; *Jones 'El*, 164 F. Supp. 2d at 1099-1101.

Denying such things as soap, books, and calls to family members has a detrimental effect on inmates without promoting carceral goals.¹⁶⁹ Prison officials should instead begin by installing solitary inmates at less restrictive levels where they would enjoy more privileges that foster their well-being.¹⁷⁰ In theory, the system of graduated levels in solitary incentivizes inmates to better behave in order to graduate to levels with fewer restrictions and sometimes even to exit solitary. In reality, SMI inmates' illnesses may mean they face trouble complying with rules, especially under the duress of solitary.¹⁷¹ As a result, lack of penological purpose encompasses the essence of solitary because "[r]ather than being supplied the programming, human contact and psychiatric support that seriously mentally ill inmates need to prevent their illnesses from escalating . . . , [particularly] severe conditions serve no *legitimate* penological interest; they can only be considered punishment for punishment's sake."¹⁷²

Second, *Madrid* ruled that prison officials provided inadequate mental health care, marked by systemic deficiencies, which violated the constitution. Understaffing contributed to these deficiencies and led to "inadequate access to care."¹⁷³ Departments of corrections that rely on custody staff and qualified mental health professionals ("QMHPs"¹⁷⁴) with limited training to screen and monitor do so at their peril because they often cannot discern SMI inmates' range of symptomatic behaviors.¹⁷⁵ Such understaffing does not constitute an oversight. It reflects a "clearly conscious" decision on the part of the departments of corrections.¹⁷⁶ Without effective screening and monitoring, officials do not make the medically appropriate transfers of "acutely psychotic inmates" out of solitary to a less toxic environment, either to inpatient or intensive outpatient care in the general prison population.¹⁷⁷ In *Madrid*, prison officials "subjected [solitary inmates] to unnecessary and wanton infliction of pain . . . [stemming from their] anguish of descending into serious mental illness, the pain of physical abuse, or

169. *Ruiz*, 37 F. Supp. 2d at 911; *Jones 'El*, 164 F. Supp. 2d at 1116-17.

170. *See infra* Part III.B. Successful Solitary Confinement Reform (Colorado).

171. *See supra* notes 59-70 and accompanying text.

172. *Jones 'El*, 164 F. Supp. 2d at 1116-17 (emphasis added).

173. *Madrid*, 889 F. Supp. at 1218, 1259; *cf. Jones 'El*, 164 F. Supp. 2d at 1124.

174. *E.g.*, 103 MASS. CODE REGS. 430.05 (2019) (defining Qualified Mental Health Professionals as "Treatment providers who are psychiatrists, psychologists, psychiatric social workers, psychiatric nurses, and others who by virtue of their education, credentials and experience are permitted by law to evaluate and care for the mental health needs of patients.").

175. *See Madrid*, 889 F. Supp. at 1219; SASHA ABRAMSKY & JAMIE FELLNER, HUM. RTS. WATCH, *ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS* 76 (2003) (only seven states claimed to provide more than four hours of mental health training to prison employees).

176. *Madrid*, 889 F. Supp. at 1226; *see Metzner & Fellner, supra* note 59, at 105 (explaining that departments of corrections habitually underfund inmate mental health care, at least in part because of lack of public support).

177. *Madrid*, 889 F. Supp. at 1259. In dicta, the Supreme Court remarked that a "cost" defense due to fiscal constraints would not excuse deliberate indifference. *Wilson v. Seiter*, 501 U.S. 294, 301-02 (1991).

the torment of having serious medical needs that simply go unmet . . . ”¹⁷⁸

In contrast, while *Ruiz* found that prison officials did not afford inmates satisfactory mental health care, it concluded that the deficiencies only rose to the level of negligence and did not amount to a “systemic pattern” and hence did not violate the constitution.¹⁷⁹ In a class action, without a “pattern of negligent acts or serious systematic deficiencies” showing deliberate indifference, inmates cannot satisfy the culpable subjective state of mind prong of an inadequate health care claim.¹⁸⁰ The necessity of showing deliberate indifference represents a recurring obstacle to inadequate mental health care claims.¹⁸¹

Both *Madrid* and *Ruiz* questioned the efficacy of inmates’ initial screening before prison officials placed them in solitary.¹⁸² *Jones ‘El* went further and closely examined whether prison officials had a screening system to prevent SMI inmates from being consigned to solitary.¹⁸³ It turned out, the screening was “so vague in its criteria for weeding out seriously mentally ill inmates . . . that it amount[ed] to no [screening] at all.”¹⁸⁴ That prison officials placed SMI inmates in Supermax and that they continued to remain there showed just how deficient the mental health screening and monitoring were. Moreover, the very fact that officials had screening in place, which sometimes worked to keep SMI inmates out of solitary, actually revealed that they understood the risks the solitary conditions posed to SMI inmates.¹⁸⁵ Instead of keeping SMI inmates out of solitary, prison officials responded punitively to SMI inmates’ behavioral problems and proceeded to place them in solitary, even when their misconduct was symptomatic of their mental illnesses. Their placement in solitary gave rise to a vicious cycle whereby solitary aggravated SMI inmates’ illnesses, which worsened their behavioral problems, and then lengthened their solitary terms under more restrictive conditions.¹⁸⁶ After all, prisons established solitary for “disruptive and recalcitrant prisoners, but not mentally ill ones.”¹⁸⁷

Moreover, when evaluating SMI inmates’ mental health, officials sometimes

178. *Madrid*, 889 F. Supp. at 1280.

179. *Ruiz v. Johnson*, 37 F. Supp. 2d 855, 907 (S.D. Tex. 1999), *rev’d sub nom. Ruiz v. United States*, 243 F.3d 941 (5th Cir. 2001).

180. *Madrid*, 889 F. Supp. at 1256.

181. Jamie Fellner, *A Corrections Quandary: Mental Illness and Prison Rules*, 41 HARV. C.R.-C.L. L. REV. 391, 406 (2009).

182. *Ruiz*, 37 F. Supp. 2d at 913 (“[A] screening process is designed to ensure that a patient’s condition will not be worsened by placement in ad-seg . . . Several of plaintiffs’ experts, however, expressed doubts as to the success of that screening process.”).

183. *Jones ‘El v. Berge*, 164 F. Supp. 2d 1096, 1121-23 (W.D. Wis. 2001).

184. *Id.* at 1122.

185. *Id.* at 1121-23.

186. *Ruiz*, 37 F. Supp. 2d at 910 (citing Haney’s testimony on the “circular, self-fulfilling purpose of ad-seg [by which SMI inmates’ and even healthy inmates’] behavior becomes worse and they become less able to conform to prison rules”); *Jones ‘El*, 164 F. Supp. 2d at 1116-17; *Madrid v. Gomez*, 889 F. Supp. 1146, 1216 (N.D. Cal. 1995).

187. *Jones ‘El*, 164 F. Supp. 2d at 1118; *Ruiz*, 37 F. Supp. 2d at 913.

conclude that SMI inmates mangle their symptoms and hence fail to treat them.¹⁸⁸ One nuance concerns SMI inmates who mangle certain symptoms in order to gain medical attention for their very real mental illnesses.¹⁸⁹ Admittedly, exhibiting symptoms of mental illness can also win them favorable housing assignments, attract attention, or improve their legal situation.¹⁹⁰ In any case, prison officials may hesitate to recognize psychological distress lest they encourage the inmates' misconduct or that of other inmates generally. So officials presiding over disciplinary proceedings may not welcome QMHPs' input if it excuses inmates' misconduct as a product of their mental illnesses.¹⁹¹ Regardless, just because mental health staff participate in hearings does not mean that they will intervene sympathetically on behalf of inmates regarding the mitigating role that their mental illness may have played in their misconduct.¹⁹² Mental health staff may be insufficiently trained to "provide accurate diagnoses of inmates' conditions, or may not want to become involved in disagreements with custodial staff. In addition, some mental health staff 'burn out' over time and come to share custodial staff's suspicions of and hostility toward prisoners."¹⁹³ Without accurately identifying SMI inmates' mental health status prison officials cannot screen them from solitary so SMI inmates languish there, suffer, and likely deteriorate. For example, Ruiz's expert identified more than a dozen "floridly psychotic" inmates in solitary whom mental health staff were failing to treat.¹⁹⁴

The public is generally aware that solitary has the potential to inflict harm.¹⁹⁵ However, if prison officials are not aware "any amount of experience in [a solitary unit] would make it obvious."¹⁹⁶ At times, solitary conditions are so severe and the harm so grave that inmates satisfy the deliberate indifference prong by meeting the objective serious harm prong. For instance, in *Ruiz*, "inmates, obviously in need of medical help, are instead inappropriately managed merely as miscreants" by prison officials whom the court determined to be "well aware of both these conditions and these inmates' ensuing pain and suffering."¹⁹⁷ Yet, they

188. *Madrid*, 889 F. Supp. at 1225; *Ruiz*, 37 F. Supp. 2d at 903.

189. *Jones 'El*, 164 F. Supp. 2d at 1107.

190. ABRAMSKY & FELLNER, *supra* note 175, at 106.

191. Fellner, *supra* note 181, at 398-99.

192. *Id.* at 400 n.40 (citing ABRAMSKY & FELLNER, *supra* note 175, at 63-64).

193. *Id.*

194. *Ruiz v. Johnson*, 37 F. Supp. 2d 855, 912 (S.D. Tex. 1999), *rev'd sub nom.* *Ruiz v. United States*, 243 F.3d 941 (5th Cir. 2001) (internal quotation marks omitted) (citation omitted).

195. *Wilkerson v. Stalder*, 693 F. Supp. 2d 654, 680 (M.D. La. 2007) ("Any person in the United States who reads or watches television should be aware that [the conditions in solitary] are seriously detrimental to a human being's physical and mental health" so "[a] conclusion . . . that prolonged isolation from social and environmental stimulation increases the risk of development of mental illness does not strike this court as rocket science.") (ellipsis in original) (internal quotation marks omitted).

196. Andrew Leon Hanna, *Solitary Confinement as Per Se Unconstitutional*, 21 U. PA. J. CONST. L. ONLINE 1, 18 (2019).

197. *Ruiz*, 37 F. Supp. 2d at 913-14.

August 2023]

FORGOTTEN IN SOLITARY

125

failed to take any reasonable measures to address the inmates' needs, keeping them in solitary instead of, for example, transferring the neediest SMI inmates to inpatient or outpatient care.¹⁹⁸ Also, in *Jones 'El*, the court determined that the fact that prison officials had deficient screening and monitoring in place, provided evidence of their deliberate indifference: Officials were aware of a substantial risk of serious harm to SMI inmates' mental health because they implemented an inherently flawed process that only ostensibly prevented placing vulnerable SMI inmates in Supermax.¹⁹⁹

Even when prison officials purport to intervene on solitary SMI inmates' behalf by evaluating and treating them, this does not always mean that they take the salutary step of transferring inmates out of solitary. For instance, in *Jones 'El*, though staff often prescribed medication to SMI inmates in solitary, which helped to alleviate their symptoms, this did not resolve the precipitating cause of their deterioration, which is their placement in solitary's severe conditions.²⁰⁰ Even when inmates in need of intensive mental health care are identified as such and transferred out of solitary to intensive inpatient or outpatient care they are sometimes returned to solitary with or without their illnesses' remission: In solitary they once again decompensate or regress because solitary still precipitates their decline.²⁰¹

Overall, inmates prevailed in all three cases. The court in *Madrid* found that prison officials had exposed certain inmates to an impermissible substantial risk of serious mental harm by deliberate indifference regarding unnecessary and wanton infliction of pain caused by solitary's inhumane conditions, specifically social isolation and reduced stimulation, and inadequate mental health care.²⁰² In response, the court held the continued placement in solitary of mentally ill inmates and others at "unreasonably high risk of suffering serious mental illness," including those with a "history of prior psychiatric problems," as unconstitutional.²⁰³ The court in *Ruiz* found that conditions in solitary likewise exacerbated inmates' mental illnesses as they constituted "virtual incubators of psychosis."²⁰⁴ According to the court, "the pain and suffering caused by extreme levels of psychological deprivation are equally, if not more, cruel and unusual" than a "cat-o'-nine-tails lashing an inmate's back."²⁰⁵ As a result, it ruled that the present housing of mentally ill inmates in solitary had amounted to cruel and unusual punishment.²⁰⁶ In *Jones 'El*, the court granted inmates a preliminary injunction

198. *Id.* at 913; *Madrid v. Gomez*, 889 F. Supp. 1146, 1259 (N.D. Cal. 1995).

199. *Jones 'El v. Berge*, 164 F. Supp. 2d at 1121-23 (W.D. Wis. 2001).

200. *Id.* at 1118.

201. *Madrid*, 889 F. Supp. at 1220.

202. *Id.* at 1259-60, 1266-67.

203. *Id.* at 1267, 1265.

204. *Ruiz v. Johnson*, 37 F. Supp. 2d 855, 907 (S.D. Tex. 1999), *rev'd sub nom.* *Ruiz v. United States*, 243 F.3d 941 (5th Cir. 2001).

205. *Id.* at 914.

206. *Id.* at 915.

enjoining prison officials to identify and remove SMI inmates then in Supermax because exposing them to solitary meant exposing them to a “risk of irreparable emotional damage and, in some cases, a risk of death by suicide,” which ran contrary to the public interest.²⁰⁷ Parties subsequently settled to have prison officials stop housing SMI inmates in Supermax.²⁰⁸ The decisions of the three courts in the inmates’ favor rested on the fact that society would condemn placing the mentally ill in solitary given their disproportionate risk of serious harm. For those who more readily appreciate physical harm the court underlined that

placing [certain inmates, such as SMI inmates] in the SHU is the mental equivalent of putting an asthmatic in a place with little air to breathe. The risk is high enough, and the consequences serious enough . . . that the risk is plainly “unreasonable.” . . . It is surely not one “today’s society would choose to tolerate.”²⁰⁹

The fact that the solitary conditions appear to have little relation to penological goals only served to compound the matter.²¹⁰

These three cases explored how inhumane solitary conditions combined with limited access to mental health care can perniciously affect solitary SMI inmates. In practice, prison officials need effective screening and monitoring so that they can exclude SMI inmates from solitary. The *Ruiz* action spanned nearly three decades from its filing in 1972 to its seminal decision in 1999;²¹¹ the *Madrid* action took a little over four years from its filing in 1990 to its seminal decision in 1995;²¹² while *Jones ‘El* was a comparatively abbreviated action from its filing in 2000 till the court granted inmates’ request for a preliminary injunction in 2001 and the parties’ subsequent settlement in 2002.²¹³ These cases involved gross constitutional violations where SMI inmates endured grievous harm due to solitary’s inhumane conditions and inadequate mental health care. The violations

207. *Jones ‘El v. Berge*, 164 F. Supp. 2d 1096, 1125 (W.D. Wis. 2001).

208. *Id.* at 1125-26; Judgment in a Civ. Case, Exhibit A at ¶ 4.6, *Jones ‘El v. Berge*, 164 F. Supp. 2d 1096 (W.D. Wis. 2001) (No. 00-C-421-C).

209. *Madrid v. Gomez*, 889 F. Supp. 1146, 1265-66 (N.D. Cal. 1995) (alteration in original) (quoting *Helling v. McKinney*, 509 U.S. 25, 35, 36 (1993)).

210. *Madrid*, 889 F. Supp. at 1266; *Jones ‘El*, 164 F. Supp. 2d at 1124.

211. *Ruiz*, 37 F. Supp. 2d at 860. The case ended in 2002 when parties agreed to settle out of court with defendants agreeing that the National Institute of Corrections would audit and advise them as to prison conditions with the participation of plaintiffs and to the creation of an internal legal department, the Office of General Counsel, to monitor prison practice compliance with official prison policy. Donna Brorby & Meredith Roundtree, *Texas’ Historic Ruiz Lawsuit Settled*, PRISON LEGAL NEWS (Feb. 2003), <https://perma.cc/SXT3-S8KY>.

212. Order Terminating Force-Related Orders and Dismissing Case, at 1, *Madrid v. Cate*, No. C 90-3094 (N.D. Cal. 2011).

213. Complaint, at 1, *Jones ‘El v. Berge*, 164 F. Supp. 2d 1096 (W.D. Wis. 2001) (No. 00-421); Judgment in a Civil Case, Ex. A Settlement Agreement, at ¶ 4.6, *Jones ‘El v. Berge*, 164 F. Supp. 2d 1096 (W.D. Wis. 2001) (No. 00C-421-C); Memorandum, at 1-2, *Jones ‘El v. Berge*, 164 F. Supp. 2d (W.D. Wis. 2001) (No. 00-421).

August 2023]

FORGOTTEN IN SOLITARY

127

involved stood out as glaring enough that they overcame “the wide-ranging deference” courts owe to prison officials.²¹⁴ Yet inmates still faced years of drawn-out litigation. To avoid this protracted and vexing litigation, the Supreme Court needs to set a clear standard by declaring the placement of SMI inmates in solitary unconstitutional absent exigent circumstances.²¹⁵

3. Supreme Court developments pertaining to solitary confinement (*Hutto*, *Ayala*, and *Plata*)

The Supreme Court has yet to rule in a case where inmates directly claimed in their appeal that their solitary prison conditions violated the Eighth Amendment’s cruel and unusual punishments clause. However, it has made some notable pronouncements on the subject. In *Hutto v. Finney*,²¹⁶ it noted approvingly the lower court’s reiterating that isolation may be unconstitutional depending on its conditions and its duration.²¹⁷ In other words, depending on the severity of the conditions they “might be tolerable for a few days and intolerably cruel for weeks or months.”²¹⁸

More recently, justices have written concurrences and dissents to majority opinions in death penalty cases that focus on the legality or lack thereof of prolonged solitary. In a concurrence in *Davis v. Ayala*²¹⁹ upholding Ayala’s conviction and death sentence, Justice Kennedy nonetheless saw fit to denounce the woes of long-term solitary when he wrote how he imagined the sentencing judge forewarning the convict that “the penal system has a solitary confinement regime that will bring you to the edge of madness, perhaps to madness itself.”²²⁰ However, Justice Kennedy also acknowledged the tradeoff in using solitary:

Of course, prison officials must have discretion to decide that in some instances temporary, solitary confinement is a useful or necessary means to impose discipline and to protect prison employees and other inmates. But research still confirms what this Court suggested over a century ago: Years on end of near-total isolation exact a terrible price [noting that] common-side effects of solitary confinement include panic, withdrawal, hallucinations, self-mutilation, and suicidal thoughts and behaviors[. He added that i]n a case that presented the issue, the judiciary may be required, within its proper jurisdiction

214. *Madrid*, 889 F. Supp. at 1263.

215. See *infra* notes 268-70 and accompanying text.

216. 437 U.S. 678 (1978).

217. See *Hutto*, 437 U.S. at 685-86 (quoting *Finney v. Hutto*, 410 F. Supp. 251, 275 (E.D. Ark. 1976) (regarding overcrowded cells with unwholesome conditions, but the Court’s caution stands for solitary all the same)).

218. *Id.* at 687.

219. 576 U.S. 257, 288 (2015) (Kennedy, J., concurring).

220. *Id.* at 288.

and authority, to determine whether workable alternative systems for long-term confinement exist, and, if so, whether a correctional system should be required to adopt them.²²¹

Justice Kennedy seems to invite a case where the Supreme Court could consider the legality of long-term solitary. Unfortunately, Kennedy's retirement and the present make-up of the Court calls into question whether or not the Court remains as receptive to remedying long-term solitary.

In 2011, *Brown v. Plata*²²² upheld a lower court's decision to reduce the California's Department of Corrections and Rehabilitation's overcrowding by releasing inmates.²²³ In turn, the lower court had consolidated two class actions, one on behalf of inmates suffering deficient mental health care and the other deficient (physical) medical care. In 1995, the district court in *Coleman v. Wilson*²²⁴ found that the California prisons systematically delivered deficient mental health care, "due in large measure to the severe understaffing" in mental health staff.²²⁵ The Justices lamented that solitary SMI inmates sometimes had to wait "months in administrative segregation, where they endure harsh and isolated conditions and receive only limited mental health services."²²⁶ They denounced the fact that some inmates had committed suicide while waiting for treatment, contributing to the 72.1% of suicides that the court-appointed Special Master highlighted as preventable.²²⁷ *Brown* affirmed courts' dual obligations, that is to allow the state discretion to pursue penological goals that focus on the state's interest versus inmates' basic rights as conceptualized by contemporary society. In this way, "[c]ourts must be sensitive to the State's interest in punishment, deterrence, and rehabilitation, as well as the need for deference to experienced and expert prison administrators faced with the difficult and dangerous task of housing large numbers of convicted criminals."²²⁸ At the same time, a "prison that deprives prisoners of basic sustenance, including adequate medical care, is in-

221. *Id.* at 289-90 (citing Grassian, *supra* note 32). Although the Court did not declare solitary unconstitutional, over a century ago, *In re Medley* condemned the fact that a "considerable number of the prisoners fell, after even a short [solitary] confinement, into a semi-fatuous condition . . . and others became violently insane; others still, committed suicide." *Id.* at 287 (quoting *In re Medley*, 134 U.S. 160, 168 (alteration and ellipsis in original)).

222. 563 U.S. 493 (2011).

223. *Id.* at 501-02 (finding that at the time of the lower court's decision to enjoin California to reduce its prison population California's department of corrections had reached almost double its intended prison population capacity of 80,000, that is 156,000).

224. 912 F. Supp. 1282 (E.D. Cal. 1995).

225. *Brown*, 563 U.S. at 506 (quoting *Coleman*, 912 F. Supp. at 1315).

226. *Id.* at 504.

227. *Id.* at 504, 519.

228. *Id.* at 511 (citing *Bell v. Wolfish*, 441 U.S. 520, 547-48 (1979)).

August 2023]

FORGOTTEN IN SOLITARY

129

compatible with the concept of human dignity and has no place in civilized society.”²²⁹ Thus, courts have a responsibility and “must not shrink from their obligation to ‘enforce the constitutional rights of all persons,’ including prisoners.”²³⁰

III. EIGHTH AMENDMENT’S PROPORTIONALITY REVIEW AND BANNING THE SERIOUSLY MENTALLY ILL FROM SOLITARY CONFINEMENT

A. Proportionality review

1. Historical foundations of proportionality review as applied to prison conditions

Eighth Amendment proportionality review offers a second constitutional doctrine by which to prohibit placing SMI inmates in solitary, in addition to traditional prison conditions jurisprudence, which this Article reviewed in Part II.

As the [Supreme] Court explained in *Atkins*,²³¹ the Eighth Amendment guarantees individuals the right not to be subjected to excessive sanctions. The right flows from the basic

“‘precept of justice that punishment for crime should be graduated and proportioned to [the] offense.’ . . . [and] the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons. To implement the prohibition against ‘cruel and unusual punishments’ . . . the Court affirm[s] the necessity of referring to ‘the evolving standards of decency that mark the progress of a maturing society’ to determine which punishments are so disproportionate as to be cruel and unusual.”²³²

Rooted in these principles, the 2000s saw the culmination of Supreme Court decisions that prohibited as categorically disproportionate specific criminal sentences as applied to certain classes of offenders. Based on the Eighth Amendment’s evolving standards of decency, the Court categorically banned: the execution of the intellectually disabled in *Atkins* and juveniles in *Roper v. Simmons*,²³³ life without parole for juveniles convicted of nonhomicide crimes in *Graham v.*

229. *Id.*

230. *Id.* (quoting *Cruz v. Beto*, 405 U.S. 319, 321 (1972) (*per curiam*)).

231. *Atkins v. Virginia*, 536 U.S. 304 (2002).

232. *Roper v. Simmons*, 543 U.S. 551, 560-61 (2005) (citation omitted) (first quoting *Atkins*, 536 U.S. at 311 (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910)); and then quoting *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (plurality opinion); and then quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (quoting *Trop*, 356 U.S. at 101).

233. 543 U.S. 551 (2005).

Florida,²³⁴ and mandatory life without parole for juveniles convicted of murder in *Miller v. Alabama*.²³⁵ In these cases, inmates resorted to Eighth Amendment proportionality review to successfully challenge their sentences.

Their reasoning coheres with precedent in *Harmelin v. Michigan*,²³⁶ which affirmed that courts should not overturn sentences for terms of years, unless “grossly disproportionate” to the offenses.²³⁷ At the same time, *Harmelin* recognized that courts could differentiate according to an objective factor when sentences involved different types of punishment, such as between *cadena temporal*²³⁸ or the death penalty versus a term of years. They could overturn the former sentences, even while cautioning that courts would only rarely overturn sentences for terms of years as disproportionate.²³⁹ On this point, solitary is also a different punishment in kind from imprisonment in the general population.²⁴⁰ As this Article has made clear, solitary “mark[s] an important dichotomy for prisoners: the ‘distinction between imprisonment, which is tolerable, and isolation, which is not’”—this holds all the more true for SMI inmates who suffer the most debilitating of impacts in solitary.²⁴¹ Moreover, once courts distinguish solitary as *sui generis* it becomes a suspect punishment: “Fines, imprisonment and even execution may be imposed depending upon the enormity of the crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect.”²⁴²

By analogy to Eighth Amendment proportionality review of sentences, SMI inmates should have recourse to proportionality review to challenge their placement in solitary. Solitary, utilized properly, serves “both to punish infractions

234. 560 U.S. 48 (2010).

235. 567 U.S. 460 (2012).

236. 501 U.S. 957 (1991).

237. *Id.* at 997-1001, 1005 (Kennedy, J., concurring in part and concurring in the judgment). “Kennedy’s concurrence has been viewed by later courts as the controlling opinion and the last word on proportionality doctrine.” Eva S. Nilsen, *From Harmelin to Graham—Justice Kennedy Stakes Out a Path to Proportional Punishment*, 23 FEDERAL SENTENCING REPORTER 67, 68 (2010).

238. *Cadena temporal*:

based upon the Spanish Penal Code, called for incarceration at “hard and painful labor” with chains fastened to the wrists and ankles at all times. Several “accessor[ies]” were superadded, including permanent disqualification from holding any position of public trust, subjection to “[government] surveillance” for life, and “civil interdiction,” which consisted of deprivation of “the rights of parental authority, guardianship of person or property, participation in the family council [, etc.].”

Harmelin, 501 U.S. at 990 (alteration in original) (quoting *Weems v. United States*, 217 U.S. 349, 548 (1910)).

239. *Id.* at 1000-01.

240. See Reinert, *supra* note 74, at 959.

241. Brief of Professors, *supra* note 35, at 17 (quoting HANS TOCH, MEN IN CRISIS: HUMAN BREAKDOWNS IN PRISONS 54 (1975)); see *supra* Part I. Background.

242. *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion).

and to control and perhaps protect inmates whose presence within the general population would create unmanageable risks,”²⁴³ But *Rhodes* underscored that the Eighth Amendment entails that prison conditions must not “‘involve the unnecessary and wanton infliction of pain . . . ,’ [nor may they be] grossly disproportionate to the severity of the crime.”²⁴⁴ The language of proportionality undergirds both grounds.²⁴⁵ In particular, “[a]mong ‘unnecessary and wanton’ inflictions of pain are those that are ‘totally without penological justification.’”²⁴⁶ Without penological justification punishments degenerate into the “gratuitous infliction of suffering.”²⁴⁷

A case of note, *Jackson v. Bishop*,²⁴⁸ has its roots in the Eighth Amendment concept of the “dignity of man.”²⁴⁹ In 1968, after considering the constitutionality of whipping inmates with a strap, an Eighth Circuit decision, *Jackson*, declared corporal punishment unconstitutional, affirming that the Constitution prohibited “all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged.”²⁵⁰

Jackson considered the extent to which the punishment in question satisfied standard penological goals, which might have justified corporal punishment.²⁵¹ It adhered to the principle that without a penological justification, carceral punishments violate the Constitution. In reaching its decision the *Jackson* court conducted a succinct, yet encompassing, examination of corporal punishment’s impact on penological goals. The decision anticipates the proportionality review that the Supreme Court later utilized so fruitfully in the 2000s to categorically

243. *Madrid v. Gomez*, 889 F. Supp. 1149, 1261 (N.D. Cal. 1995) (quoting *Young v. Quinlan*, 960 F.2d 351, 364 (3rd Cir. 1992)); *Ruiz v. Johnson*, 37 F. Supp. 2d 855, 908, 915 (S.D. Tex. 1999), *rev’d sub nom.* *Ruiz v. United States*, 243 F.3d 941 (5th Cir. 2001) (quoting *Young v. Quinlan*, 960 F.2d 351, 364 (3rd Cir. 1992)).

244. *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981) (citations omitted) (first quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976); then citing *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion); and then citing *Weems*, 217 U.S. at 349).

245. *Cf.* *Milliken v. Sturdevant*, No. 18-CV-05326, 2020 U.S. Dist. LEXIS 86062, at *12 (N.D. Cal. May 15, 2020) (unpublished order granting in part and denying in part motion for summary judgment) (quoting *Allen v. Nelson*, 354 F. Supp. 505, 511 (N.D. Cal. 1973) (“[T]he language of the Eighth Amendment itself is expressed in words of proportionality.”)).

246. *Rhodes*, 452 U.S. at 346 (first citing *Gregg*, 428 U.S. at 183; and then quoting *Estelle v. Gamble*, 429 U.S. 97, 103 (1976)). Nor may conditions “deprive inmates of the minimal civilized measure of life’s necessities.” *Id.* at 347. These deprivations consider conditions in an absolute sense rather than in relation to penological goals (as unnecessary punishment) or specifically in relation to misconduct (as disproportionate punishment). *Id.*; *see supra* Part II.B. Prison Conditions Jurisprudence Canon.

247. *See Gregg*, 428 U.S. at 183.

248. 404 F.2d 571 (8th Cir. 1968).

249. *Jackson*, 404 F.2d at 579 (quoting *Trop v. Dulles*, 356 U.S. 86, 100 (1958)).

250. *Id.* at 577-78 (quoting *O’Neil v. Vermont*, 144 U.S. 323, 339-40, 364 (1892) (Field, J., dissenting)).

251. *See Bell v. Wolfish*, 441 U.S. 520, 538, 547 (1979); *Brown v. Plata*, 563 U.S. 493, 511 (2011).

ban specific criminal sentences as disproportionate for certain classes of offenders. Some of the factors also reflect solitary's harms underlined in research and case law as set out in Parts I and II. The *Jackson* court, in its opinion, noted that: (a) Public opinion condemned corporal punishment; (b) most states outlawed it; (c) according to experts it "frustrates correctional and rehabilitation goals;" (d) worse, it "creates other penological problems and makes adjustment to society more difficult;" (e) the fact that it generates animosity toward prison staff contributes to undermining penological goals; (g) imposing limits on its use while still allowing it lends itself to abuse; (h) "if whipping were to be authorised, how does one, or any court, ascertain the point which would distinguish the permissible from that which is cruel and unusual?"²⁵² Most importantly, the court was not "convinced . . . the State need[ed corporal punishment] for disciplinary purposes."²⁵³ In sum, penological goals could not justify the punishment.

Importantly, *Jackson* emphasized that there obtains no "meaningful distinction between punishment by way of sentence statutorily prescribed and punishment imposed for prison disciplinary purposes. It seems to [the court] that the Eighth Amendment's proscription [on disproportionate punishment and endorsement of human dignity] has application to both."²⁵⁴ In this way, *Jackson* legitimizes extending Eighth Amendment proportionality review, which courts customarily apply to determining the constitutionality of sentences, to review the constitutionality of solitary, an institutional carceral punishment.

With respect to administrative solitary, in contrast to disciplinary solitary, the question of proportionality remains, just not with respect to solitary as discipline befitting the gravity of an infraction.²⁵⁵ Therefore, retribution should play no role in justifying the imposition of administrative solitary. However, courts still conceive of administrative solitary as punishment for purposes of applying the protections of the Eighth Amendment's cruel and unusual punishments clause.²⁵⁶ This time the issue concerns whether or not prison officials more or less accurately determined inmates' security classifications and assigned solitary accordingly, or instead did so "arbitrarily [or] disproportionate to the reasons purportedly justifying such placement," that is for purposes of incapacitation or deterrence, to inoculate a real threat to prison order or security.²⁵⁷ For example,

252. *Jackson*, 404 F.3d at 579-80.

253. *Id.* at 580.

254. *Id.* at 579-81 ("[T]he applicable standards are flexible, that disproportion, both among punishments and between punishment and crime, is a factor to be considered and that broad and idealistic concepts of dignity, civilized standards, humanity, and decency are useful and usable.").

255. *Milliken v. Sturdevant*, No. 18-CV-05326, 2020 U.S. Dist. LEXIS 86062, at *13 (N.D. Cal. May 15, 2020) (quoting *Fitzgerald v. Procunier*, 393 F. Supp. 335, 342 (N.D. Cal. 1975)) ("[W]here no disciplinary infraction has been committed, there can be no relationship, disproportionate or otherwise, between the offense and the confinement.").

256. See *supra* Part II.B. Prison Conditions Jurisprudence Canon.

257. *Milliken*, 2020 U.S. Dist. LEXIS 86062, at *23 (quoting *Toussaint v. Rushen*, 553 F. Supp. 1365, 1382 (N.D. Cal. 1983), *aff'd in part sub nom.* *Toussaint v. Yockey*, 722

August 2023]

FORGOTTEN IN SOLITARY

133

did inmates' criminal and disciplinary histories provide "sufficient penological justification" for solitary.²⁵⁸ One sign that prison officials may have illegitimately placed inmates in solitary exists if other inmates have a similar record yet officials allow them to remain in the general population notwithstanding.²⁵⁹

Thus, whether evaluating disciplinary or administrative solitary the same question arises: Is there a "rational basis" between "means and end," that is a proportional relationship between disciplinary solitary and inmates' misconduct or between administrative solitary and inmates' potential for disruption or security threat if allowed in the general population?²⁶⁰

Thus, Eighth Amendment proportionality review in sentencing cases shares Eighth Amendment roots grounded in the dignity of man with traditional prison conditions jurisprudence.²⁶¹ Furthermore, *Jackson's* holding flowed from the dignity of man to ban a specific punishment administered in carceral institutions. The same principles underlying the dignity of man and proportionality review apply to examining a ban on placing SMI inmates in solitary. The remainder of this Article pursues this question.

2. Evolving standards of decency: legislation and prison policy

Under Eighth Amendment proportionality review, the Supreme Court has reviewed the constitutionality of imposing a specific sentence on a particular class of offenders as grounded in the "evolving standards of decency that mark the progress of a maturing society."²⁶² This investigation relies on "'objective indicia of society's standards, as expressed in legislative enactments and state practice,' [and whether they] show a 'national consensus' against a sentence for a particular class of offenders."²⁶³

The present Article asks if, by analogy, there exist evolving standards, as expressed in legislation and policy, against imposing specific prison conditions on a particular class of offenders: that is, against imposing solitary on SMI inmates. Some jurisdictions have variously banned placing in solitary especially vulnerable subpopulations, such as pregnant and postpartum women, juveniles, and SMI inmates.²⁶⁴ As reviewed subsequently in the Article, such protective

F.2d 1490 (9th Cir. 1984)).

258. See *Morris v. Travisono*, 549 F. Supp. 291, 295 (D.R.I. 1982).

259. *Id.*

260. *Allen v. Nelson*, 354 F. Supp. 505, 512 (N.D. Cal. 1973) (quoting *Landman v. Royster*, 333 F. Supp. 621, 645 (E.D. Va. 1972)).

261. See *supra* Part II.B.1. Historical Foundations of a Prison Conditions Claim.

262. *Atkins v. Virginia*, 536 U.S. 304, 311-12 (2002) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)).

263. *Miller v. Alabama*, 567 U.S. 420, 482 (2012) (quoting *Graham v. Florida*, 60 U.S. 48, 61 (2010)); see *Atkins*, 536 U.S. at 312 (emphasizing objective evidence, such as legislation).

264. See *Re: An Act Amending Title 61 (Prisons and Parole) of the Pennsylvania Consolidated Statutes, Providing for Solitary Confinement*, Senate Democratic Policy Committee

policies reflect a recognition that solitary represents a special cause for concern because SMI inmates face a heightened risk of exacerbating their mental illnesses if placed in solitary and their illnesses may have played a mitigating role in their prison misconduct.²⁶⁵

Applying proportionality review to examine the merits of banning placing SMI inmates in solitary has particular relevance because prison officials place them in solitary in disproportionately high numbers even while they are at acutely higher risk of decompensating in solitary than mentally healthy inmates.²⁶⁶ In addition, this discussion brings into sharper relief concerns that involve all inmates whose placement in solitary exposes them to the risk of developing or aggravating mental illnesses. Eleven out of fifty-two jurisdictions (fifty states, the District of Columbia, and the Federal Bureau of Prisons) ban placing SMI inmates in solitary.²⁶⁷ This accounting recognizes that any policy concerning solitary will by necessity grant prison officials the power to place inmates in solitary for a few days, given exigent security circumstances.²⁶⁸ Accordingly, this Article adopts a solitary policy that weighs the immediate risk of harm to inmates along with a prison's immediate security needs considering the extent to which solitary can address both interests.²⁶⁹ Along these lines, a few days in solitary may serve as a "time-out" . . . to defuse a tense situation [while longer,] substan-

of the Commonwealth of Pennsylvania, 20 (2021) (Liman Center Testimony on Pennsylvania Solitary Confinement Legislation revised Aug. 6, 2021), <https://perma.cc/WGH8-8JZZ>.

265. As a preliminary point, if states felt obliged to stop using solitary to punish people for crimes because of the "severity of the punishment, one could argue that prison officials are even less empowered to use solitary confinement as [disciplinary] punishment." Reinert, *supra* note 74, at 962. Nonetheless, "[d]espite the absence of explicit statutory authorization, state courts appear to assume that prison officials have the authority to impose solitary confinement as discipline" on the prison population generally. *Id.* at 960.

266. See *supra* Part I. Background; see also *supra* Part II.C. Notable Solitary Confinement Case Law.

267. See Appendix. Statutes, regulations, and policy directives were available online or obtained through contacting departments of corrections. While a few jurisdictions do not make their policies available and it is impossible to know for sure whether available policies accurately reflect actual practices, the available policies provide a picture of trends in solitary for evolving standards and practices regarding SMI inmates. Of the eleven jurisdictions, Massachusetts, Nebraska, New Jersey, New Mexico, and New York rely on legislation; California relies on a regulation; and Delaware, Indiana, Maine, Pennsylvania, and Wyoming rely on policies without legislation.

268. *E.g.*, N.M. STAT. ANN. § 33-16-4 (2021):

[A]n inmate with a serious mental disability . . . may be placed in restricted housing for longer than forty-eight consecutive hours only if: (a) other methods for ensuring the safety of the threatened person have been considered and determined insufficient, impracticable or inappropriate; (b) the inmate is placed in restricted housing for the shortest time period and under the least restrictive conditions practicable.

269. See *infra* Section III.A.4. Penological Goals.

August 2023]

FORGOTTEN IN SOLITARY

135

tial periods of isolation . . . are most problematic from a health standpoint” particularly for SMI inmates.²⁷⁰

The eleven-jurisdiction tally is comparable to the tally in *Graham*. That decision categorically prohibited sentencing juveniles to life without parole for nonhomicide crimes. *Graham* concluded that the prohibition represented a “national consensus” even though only eleven jurisdictions banned the sentencing practice.²⁷¹ *Graham* rested its decision on the fact that the actual practice in question was rare.²⁷² Here, while a ban on placing SMI inmates in solitary is not universal across jurisdictions nor is it categorical, since it allows placing SMI inmates in solitary in exigent circumstances, a consensus exists warning against placing SMI inmates in solitary; and the continued high prevalence and harmful impact of placing SMI inmates in solitary only serve to underscore the urgent need for a constitutional ban of the practice.²⁷³

Jurisdictions that do not ban placing SMI inmates in solitary do not deny that SMI inmates represent a vulnerable population at disproportionate risk if placed in solitary. For instance, five additional jurisdictions do not place either SMI inmates specifically or any inmates in solitary for terms of fifteen or more days.²⁷⁴ Also, through policy directives most jurisdictions make QMHPs responsible for determining when mentally ill inmates, especially SMI inmates, would be at unacceptable risk of harm if placed in solitary. In lieu of solitary, QMHPs sometimes recommend diverting SMI inmates to housing with more out-of-cell time or with a dedicated therapeutic component.²⁷⁵ Notwithstanding, prison officials often make the final housing assignment.²⁷⁶ Unfortunately, “it is impossible to know in advance which prisoners have the kinds of vulnerabilities that will result in psychological harm from segregation,” though the “risk of decompensation

270. LEVIN, *supra* note 11, at 4 (discussing time-outs lasting from 15 days in the U.S. to a few days in various countries internationally).

271. *Graham v. Florida*, 60 U.S. 48, 62 (2010).

272. *Id.* at 67.

273. Liman Center, *supra* note 6, at 51; *see supra* Part I. Background; *see also supra* Part II.C. Notable Solitary Confinement Case Law.

274. *See* Appendix (Colorado, Kansas, Montana, North Dakota, and Vermont).

275. *See e.g.*, R.I. POL’Y DIRECTIVE 12.27 DOC, Conditions of Confinement, 6-7, 9 (2018). These jurisdictions do not include the eleven jurisdictions that ban SMI inmates from solitary.

276. Prison officials may have ultimate discretion in making housing assignments for two reasons. The most common reason appears to prioritize security concerns over inmates’ health, as exemplified by higher ranked prison officials having the authority to override QMHPs’ determinations that placing SMI inmates in solitary is contraindicated. *E.g.*, N.C. POL’Y DIRECTIVE B.0200, Offender Disciplinary Procedures, 16-17 (2020). However, in some cases at least, final housing assignment authority lies with prison officials based on the principle that QMHPs should not implicate themselves in punishment or security decisions that would conflict with QMHPs’ responsibility to tend to inmates’ health in accordance with medical ethics. *See e.g.*, IDAHO POL’Y DIRECTIVE 319.02.01.001, Short Term Restrictive Housing, 6 (2018); *see infra* note 373 (establishing the responsibilities of prison health staff in solitary).

increases with the duration of the isolation and the severity of the prisoner's mental illness."²⁷⁷ SMI inmates' heightened and indeterminate vulnerabilities to solitary require their established ban from solitary rather than an unreliable ad hoc discretionary prohibition on their placement in solitary.

The trend in legislation and policies restricting the placement of SMI inmates in solitary coincides with an overall decline in the use of solitary mentioned earlier.²⁷⁸ The number of solitary inmates declined from a reported 67,442 in 2015 to an estimated 41,000 - 48,000 in 2021.²⁷⁹ These numbers correspond respectively to 4.5% of the total prison population in 2015 and to between 3.4% and 4.0% of the total prison population in 2021.²⁸⁰ "From 2015 to 2021, both the aggregate number and percentage of people [in responding] jurisdictions held in restrictive housing decreased"; and by extension so too did estimates for the prison system as a whole.²⁸¹ This decline in the solitary population signals a general shift away from solitary, as well as an embrace of alternatives for SMI inmates.²⁸² President Obama announced in 2016 that he stood for "keep[ing] Americans people safe" but noted that "some studies indicate that [solitary] can worsen existing mental illnesses and even trigger new ones."²⁸³ He voiced concern that "solitary confinement has the potential to lead to devastating, lasting psychological consequences . . . [including] depression, alienation, withdrawal, a reduced ability to interact with others and the potential for violent behavior."²⁸⁴ He challenged both the morality and pragmatism of solitary, asking, "How can we subject prisoners to unnecessary solitary confinement, knowing its effects, and then expect them to return to our communities as whole people? It doesn't make us safer. It's an affront to our common humanity."²⁸⁵ Also, then candidate for president Joe Biden promised to "end[] the practice of solitary confinement, with very limited exceptions such as protecting the life of an imprisoned person" because it is "inhumane."²⁸⁶

The above discussion focuses on the concern for the harm that SMI inmates

277. *Braggs v. Dunn*, 367 F. Supp.3d 1340, 1345 (M.D. Ala. 2019) (citation omitted).

278. *See supra* Section I.B.3. Population and Prevalence of Solitary Confinement.

279. Liman Center, *supra* note 6, at 106 tbl.39; *see supra* note 53 and accompanying text.

280. *See supra* note 53 (dividing the number of solitary inmates by the total prison population).

281. *Id.* at xi.

282. *See e.g.*, Rick Raemisch, *Colorado Ends Prolonged, Indeterminate Solitary Confinement*, in *SOLITARY CONFINEMENT* 311, 318 (Jules Lobel and Peter Scharff Smith eds., 2020) ("Any agency wishing to explore reforms in restrictive housing cannot be successful without addressing the mentally ill."); Part III.B. Successful Solitary Confinement Reform (Colorado).

283. Barack Obama, Opinion, *Barack Obama: Why We Must Rethink Solitary Confinement*, WASH. POST, Jan. 25, 2016, at A1.

284. *Id.*

285. *Id.*

286. *The Biden Plan for Strengthening America's Commitment to Justice*, BIDEN HARRIS, <https://perma.cc/H4LC-MRE8>.

August 2023]

FORGOTTEN IN SOLITARY

137

suffer in solitary. Another question asks whether, especially in the case of disciplinary solitary, SMI inmates' mental illnesses contribute to their misconduct, which makes them less culpable and therefore less deserving of, as well as less responsive to, severe sanctions, such as solitary. In fact, mainly through policy directives, upwards of 70% of jurisdictions (in addition to the eleven jurisdictions banning SMI inmates from solitary), expressly incorporate mental illness as a mitigating factor if QMHPs determine it contributed to inmates' misconduct. As a consequence, inmates can completely escape a finding of guilty or, alternatively, receive a less severe sanction (such as a temporary loss of television, commissary, or recreation privileges). QMHPs first have to advise that SMI inmates' mental disorders contributed to their misconduct. Then prison officials decide to what degree, if any, that lessens the inmates' punishments. Neither is a foregone conclusion.

Thus, on the one hand, today's evolving standards consist of moving away from solitary generally and of banning SMI inmates specifically from solitary. On the other hand, SMI inmates in solitary continue to represent a subpopulation in crisis because of their disproportionate numbers and the disproportionate harm that they endure. This ongoing impasse demands that the Supreme Court embrace a clear standard for banning the placement of SMI inmates in solitary and for that purpose requiring effective screening out of SMI inmates from solitary.

3. Parallels between the seriously mentally ill and the intellectually disabled and juveniles

The above survey of jurisdictions and practices does not conclude the discussion of Eighth Amendment proportionality review of solitary.

Community consensus, while "entitled to great weight," is not itself determinative of whether a punishment is cruel and unusual. In accordance with constitutional design, "the task of interpreting the Eighth Amendment remains [the court's] responsibility." The judicial exercise of independent judgment requires consideration of the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question. In this inquiry the Court also considers whether the challenged sentencing practice serves legitimate penological goals.²⁸⁷

By analogy, the reasoning applied in *Atkins*²⁸⁸ to prohibit executing the intellectually disabled and that applied in *Roper*²⁸⁹ to prohibit executing juveniles likewise applies to prohibit executing SMI inmates.²⁹⁰ By extension the same

287. *Graham v. Florida*, 560 U.S. 48, 67 (2010) (citations omitted).

288. *Atkins v. Virginia*, 536 U.S. 304 (2002).

289. *Roper v. Simmons*, 543 U.S. 551 (2005).

290. AM. BAR ASS'N, *supra* note 58, at 28 ("Much of the reasoning [prohibiting capital

argument leads to a ban on consigning SMI inmates to solitary as follows. The intellectually disabled combine deficits in intellectual functioning and in adaptive skills, which, though different in character from those experienced by SMI inmates, nevertheless affect areas in which SMI inmates also face difficulties. The intellectually disabled:

frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.²⁹¹

Even while knowing right from wrong, SMI inmates can also face challenges to their decision-making.²⁹² For example, SMI inmates with schizophrenia experience a number of symptoms that interfere with their judgment, such as hallucinations, and, more often, delusions and thought disorders.²⁹³ By definition, delusions consist of “fixed beliefs that are not amenable to change in light of conflicting evidence,” which interfere with rational decision-making.²⁹⁴ Furthermore, SMI inmates sometimes do not recognize, or cannot bring themselves to recognize, that they have an illness. This makes addressing their illnesses’ impairments and seeking treatment less likely.²⁹⁵ When manic, SMI inmates with bipolar I disorder can experience symptoms that affect their mood and judgment, such as pronounced elevated or irritable mood, highly inflated self-esteem or grandiosity, racing thoughts, and risky behavior, all of which prejudice sound reasoning and behavior; and they may also fall into depression.²⁹⁶ Major depression can disrupt cognition, instill hopelessness and at times cause irritability, and can lead to self-harm and suicide.²⁹⁷ Schizoaffective disorder combines the symptomology of schizophrenia and a mood disorder, notably bipolar I or major depression disorders.²⁹⁸

Like the *Atkins* case, *Roper* describes juveniles’ shortcomings in rational decision-making, which makes juveniles more prone to crime. They show a “lack of maturity and an underdeveloped sense of responsibility,” which translates in

punishment] in *Atkins* and *Roper* can be applied virtually word-for-word to defendants with severe mental illness.”).

291. *Atkins*, 536 U.S. at 318.

292. AM. BAR ASS’N, *supra* note 58, at 21, 29.

293. *See id.* at 10; DONALD W. BLACK & NANCY C. ANDREASEN, *INTRODUCTORY TEXTBOOK OF PSYCHIATRY* 127 (7th ed. 2021).

294. AM. BAR ASS’N, *supra* note 58, at 10.

295. *See id.* at 11.

296. *Id.* at 11-12.

297. *Id.* at 12-13.

298. *See id.* at 11.

them being “overrepresented statistically in virtually every category of reckless behavior.”²⁹⁹ In fact, youth is a risk factor for both misconduct and placement in solitary.³⁰⁰ Also, their character is still in flux.³⁰¹ While admittedly different experiences, by juxtaposing SMI inmates’ decision-making and their misconduct with those of the intellectually disabled and juveniles, such comparisons argue against sanctioning SMI inmates’ misconduct with solitary.

First, like the intellectually disabled and juveniles, SMI inmates’ impaired decision-making skills can contribute to their misconduct.³⁰² This leads to SMI inmates’ overrepresentation in solitary because they have difficulty adhering to prison rules and tend to commit more violations.³⁰³ Second, given that SMI inmates “do not choose to have a mental illness,”³⁰⁴ and to the extent that their illnesses precipitate impairments in decision-making, they bear less culpability for their misconduct. Third, even though schizophrenia and bipolar disorders are chronic diseases SMI inmates can often find effective treatment, usually a combination of medication and psychotherapy, that renders their symptoms manageable.³⁰⁵ Those with major depression can often completely remit with either psychotherapy or medication alone or in combination though some may need maintenance treatment if facing risk factors for relapse.³⁰⁶ If SMI inmates remit

299. *Roper v. Simmons*, 543 U.S. 551, 569 (2005).

300. Ryan M. Labrecque & Paula Smith, *Assessing the Impact of Time Spent in Restrictive Housing Confinement on Subsequent Measures of Institutional Adjustment Among Men in Prison*, 46 CRIM. JUST. AND BEHAVIOR 1445, 1451 (2019).

301. *See Roper*, 543 U.S. at 570.

302. ABRAMSKY & FELLNER, *supra* note 175, at 59 (quoting Letter from Keith R. Curry, Ph.D. to Donna Brorby, March 19, 2002):

Once incarcerated, inmates suffering from schizophrenia, schizoaffective disorder, bipolar disorder, and major depressive disorder display predictable deficits in behavioral and emotional control, maladaptive interpersonal styles, social skills deficits, and distorted perceptions of their environments. As a result, they are less able to conform their behavior to the rigid expectations of prison life and often fall into self-defeating patterns of irrational opposition to the demands placed upon them. Seriously mentally ill inmates are thus more prone to disciplinary infractions.

303. *See supra* notes 59-70 and accompanying text.

304. AM. BAR ASS’N, *supra* note 58, at 9.

305. Sarah D. Holder & Amelia Wayhs, *Schizophrenia*, 90 AM. FAMILY PHYSICIAN 775, 778-81 (2014); BLACK & ANDREASEN, *supra* note 293, at 134-37, 164-65 (noting that electroconvulsive therapy can be a treatment of choice when mania does not respond to medication); William V. Bobo, *The Diagnosis and Management of Bipolar I and II Disorders: Clinical Practice Update*, 92 MAYO CLINIC PROCEEDINGS 1532, 1532, 1546 (Oct. 2017); *see infra* note 306 (discussing treatments for depressive symptoms, which characterize bipolar disorder). If using antidepressants for bipolar patients one should add specific medications to avoid precipitating a manic episode. BLACK & ANDREASEN, *supra* note 293, at 165.

306. ALAN J. GELENBERG ET AL., PRACTICE GUIDELINE FOR THE TREATMENT OF PATIENTS WITH MAJOR DEPRESSIVE DISORDER 17-20 (Am. Psychiatric Ass’n, 3rd ed. 2010); BLACK & ANDREASEN, *supra* note 293, at 164-67. Electroconvulsive therapy can be a treatment of choice when severe depression does not respond to medication. BLACK & ANDREASEN, *supra* note

they will have transcended their erstwhile difficulties with thinking, unhealthy emotions, and problematic behavior.

Essentially, just as the intellectually disabled may profit from learned adaptive skills³⁰⁷ and youths usually mature into more responsible adults,³⁰⁸ SMI inmates may overcome their illnesses or at least abate their most disruptive symptoms. Consequently, prison officials should not consider SMI inmates' previous misconduct as "evidence of [an] irretrievably" dangerous mental illness.³⁰⁹ All three groups, the intellectually disabled, juveniles, and SMI inmates, have the potential to engage in healthier, more pro-social, and less criminally prone behavior in the future.

In its proportionality review, *Graham* stated that, while different, a death sentence and life without parole are unique in their severity and irrevocability.³¹⁰ For this reason, proportionality review demands "that only the most deserving of execution are put to death"³¹¹ or sentenced to life without parole.³¹² This also holds true for solitary. The Supreme Court recognized that the intellectually disabled and juveniles did not qualify as the most deserving of punishment because of their impaired decision-making. Similarly, SMI inmates' compromised decision-making may have precipitated their misconduct and consequent solitary. Yet, placing SMI inmates in solitary exposes them to a disproportionate risk of grievous suffering, pain, and permanent injury. Indeed, their term in solitary may forfeit their mental health and even their lives by suicide. Thus, the potentially severe harm of solitary as a penalty combined with SMI inmates' lesser culpability requires that the Supreme Court protect them with a broad ban on their placement in solitary.

4. Penological goals

In the same way that the Court applies proportionality review to determine to what degree specific sentences for certain class of offenders satisfy penological goals, likewise the Court should apply proportionality review to punishments

293, at 166.

307. BLACK & ANDREASEN, *supra* note 293, at 89-90.

308. *Roper v. Simmons*, 543 U.S. 551, 570 (2005) (quoting Laurence Steinberg & Elizabeth S. Scott, *Less Guilty Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty* 58 AM. PSYCHOLOGIST 1009, 1014 (2003) ("For most teens, [risky or antisocial] behaviors are fleeting; they cease with maturity as individual identity becomes settled. Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood.")).

309. *Roper*, 543 U.S. at 570.

310. *Graham v. Florida*, 560 U.S. 48, 69 (2010).

311. *Atkins v. Virginia*, 536 U.S. 304, 319 (2002).

312. *See Graham*, 560 U.S. at 69-72.

August 2023]

FORGOTTEN IN SOLITARY

141

meted out in carceral institutions, including to solitary's use for SMI inmates.³¹³ Solitary needs to meet this standard. At one extreme, "lacking in any legitimate penological justification [it] is by its nature, disproportionate to the offense," and violates the Eighth Amendment's cruel and unusual punishments clause.³¹⁴

a. Retribution

In terms of retribution, given their potential for compromised decision-making, SMI inmates may bear less culpability for infractions. Yet, just desserts is the central issue when deciding whether to place an inmate in disciplinary solitary.³¹⁵ However, given that their illnesses may mitigate their culpability, SMI inmates are liable not to have the mental wherewithal that would qualify them as the "most deserving" of solitary, the severest form of punishment in prison.³¹⁶ This applies all the more to SMI inmates because of their heightened risk of decompensation in solitary. Afterall, they did not choose their illnesses, and any calls for solitary should translate into placements in diversionary therapeutic treatment units rather than solitary.³¹⁷ In sum, the goal of retribution cannot justify imposing the severest punishment on SMI inmates because it would entail imposing a greater harm on the less culpable.³¹⁸ By allowing officials to place SMI inmates in solitary and to override considerations of solitary's deleterious impact on SMI inmates' health and rehabilitation, solitary "poses too great a risk of disproportionate punishment."³¹⁹

313. See Benjamin Steiner & Calli M. Cain, *The Relationship Between Inmate Misconduct, Institutional Violence, and Administrative Segregation: A Systematic Review of the Evidence*, in *RESTRICTIVE HOUSING IN THE U.S.: ISSUES, CHALLENGES, AND FUTURE DIRECTIONS* 165, 170-74 (Loretta E. Lynch et al., U.S. Dep't of Just. eds., 2016) (noting the similarities between criminal sentencing and institutional punishment and the corollary that sentencing's penological goals likewise apply to solitary).

314. *Graham*, 560 U.S. at 71.

315. See *Milliken v. Sturdevant*, No. 18-CV-05326-LHK, 2020 U.S. Dist. LEXIS 86062, at *40 (N.D. Cal. May 15, 2020) (quoting *Allen v. Nelson*, 354 F. Supp. 505, 511 (N.D. Cal. 1973)) (unpublished order granting in part and denying in part motion for summary judgment).

316. *Atkins*, 536 U.S. at 319; David H. Cloud et al., *Public Health and Solitary Confinement in the United States*, 105 AM. J. PUB. HEALTH 18, 24 (2015) ("[P]rolonged segregation as a form torture [is] the harshest form of punishment."); Steiner & Cain, *supra* note 313, at 173 ("[S]egregation is more severe than other sanctions."); GILLIGAN & LEE, *supra* note 42, at 6 (describing solitary as "one of the most severe forms of punishment that can be inflicted on human beings short of killing them").

317. E.g., ME. POL'Y DIRECTIVE 18.6.1, Intensive Mental Health Unit, 1-2 (2018) ("housing . . . for male prisoners with serious mental illnesses . . . which may include a prisoner . . . presenting a danger to himself or others"). The interdisciplinary Intensive Mental Health Unit Treatment Team provides psychiatric, individual and group therapeutic treatment, nursing care, daily living skills, and security. *Id.* at 2-3.

318. See *Graham*, 560 U.S. at 71-72.

319. *Miller v. Alabama*, 567 U.S. 460, 479 (2012) (striking down mandatory life sentences without parole for juveniles).

To make matters worse, SMI inmates' illnesses can interfere with their preparing and presenting their defense in their disciplinary proceedings. Because of its stigma, they may deny their illnesses, the essence of their mitigation defenses. Further, their cognitive impairments, such as forgetfulness and disorganized thoughts can impede the preparation and delivery of their defenses during disciplinary proceedings. Also, psychotic and mood disorders can flatten affect and diminish speech—side effects that antipsychotic and anti-depressant medications sometimes accentuate—hindering inmates' messages of their innocence and contrition.³²⁰ As for “inherent goodness,” even clinicians have difficulty ascertaining genuine contrition and the prognosis of treatment.³²¹

b. Incapacitation

In contrast to disciplinary solitary where prison officials consider retribution, prison officials imposing administrative solitary look “to incapacitate inmates and to deter them from future misconduct.”³²² Prison officials resort to solitary first and foremost to maintain order in prisons and to keep staff and inmates safe.³²³ So solitary units essentially serve as “prisons within prisons.”³²⁴ While prison officials place inmates who commit violations in disciplinary solitary for determinate terms, they consign inmates whom they believe pose longer term threats to prison order or security to administrative segregation for longer or indeterminate periods.³²⁵ The first challenge that SMI inmates face lies in prison officials' difficulties discerning SMI inmates' degree of dangerousness. Prison officials may instinctively, but erroneously construe SMI inmates' illnesses as making them “inherently dangerous” or the “worst of the worst” and deserving of retribution.³²⁶ That being said, proponents of solitary argue that the increased security in solitary, including the social isolation, limits inmates' opportunities for misconduct. Opponents counter that solitary merely transfers misconduct from the general prison population to solitary and creates “extreme reactions and acts of resistance [like f]looding[,] throwing . . . feces [and] self-mutilation.”³²⁷

320. AM. BAR ASS'N, *supra* note 58, at 23.

321. BLACK & ANDREASEN, *supra* note 293, at 128-30, 145-46, 154; *cf.* *Roper v. Simmons*, 543 U.S. 551, 573 (2005) (“It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.”).

322. Jody Sundt, *The Effect of Administrative Segregation on Prison Order and Organizational Culture*, in *RESTRICTIVE HOUSING IN THE U.S.: ISSUES, CHALLENGES, AND FUTURE DIRECTIONS* 297, 298 (Loretta E. Lynch et al., U.S. Dep't of Just. eds., 2016).

323. *Id.* at 297-98.

324. *Id.* at 298.

325. Labrecque, *supra* note 10, at 52.

326. Jules Lobel, *Prolonged Solitary Confinement and the Constitution*, 11 U. PA. J. CONST. L. 115, 132 (2008); Hafemeister & George, *supra* note 28, at 45; *see supra* notes 59-70 and accompanying text.

327. Sundt, *supra* note 322, at 301.

August 2023]

FORGOTTEN IN SOLITARY

143

Both sides find some support in research studies with “more quantitative reports” suggesting that solitary merely transfers violence and disorder to solitary.³²⁸

Regardless of the debate concerning solitary’s effectiveness as an incapacitation tool, solitary’s incapacitating role has its limits given that prisons eventually release 93% of its inmates back to society and that solitary does not affect inmates’ maximum sentence.³²⁹ In fact, if prison officials aim to incapacitate violent inmates, they can have recourse to an acute crisis intervention by placing SMI inmates in solitary to defuse violent incidents, for only a few hours to a few days, as exemplified by Norwegian, German, and Dutch practices.³³⁰ Even if prolonged solitary continued to effectively incapacitate inmates throughout their solitary term “[i]ncapacitation cannot override all other considerations, [including rehabilitation], lest the Eighth Amendment’s rule against disproportionate sentences be a nullity.”³³¹ The same holds true for solitary. Therefore, prison officials must refer to penological goals in addition to incapacitation to justify solitary.

c. Deterrence

In addition to incapacitation, prison officials justify solitary both because of its specific and its general deterrent effects.³³² Regarding specific deterrence, by targeting inmates who have repeatedly committed misconduct or a serious violation and placing them in solitary, prison officials aim to deter them from recommitting institutional infractions. On the one hand, advocates for solitary as an effective deterrent see it as an aversive experience that solitary inmates will seek to avoid once they have experienced it.³³³

On the other hand, opponents of solitary advance a number of explanations to help understand why solitary may undermine any deterrence potential it may have: (a) solitary inmates internalize the label of a bad miscreant when placed in

328. *Id.*

329. Kupers, *supra* note 70, at 1005. Notwithstanding, while solitary does not in itself extend the maximum sentence that inmates must serve those in solitary end up serving more time than they would otherwise because they may lose good time earned and the parole board disapproves of the misconduct that earned them their stint in solitary. Thus, SMI inmates are more likely to serve their maximum sentences. Fellner, *supra* note 181, at 401.

330. Cyrus Ahalt & Brie Williams, *Reforming Solitary-Confinement—Heeding a Presidential Call to Action*, 374 N. ENGL. J. MED. 1704, 1704-05 (2016); LEVIN, *supra* note 11, at 4-5 (the maximum duration in solitary amounts to 4 weeks in Germany and 2 weeks the Netherlands); see *Andersen v. County of Kern*, 45 F.3d 1310, 1315 (9th Cir. 1994) (explaining that “controlling violent or self-destructive inmates” requires their temporary placement in solitary safety cells “until the episode passes”).

331. *Graham v. Florida*, 560 U.S. 48, 73 (2010).

332. Specific deterrence in terms of solitary refers to whether the punished inmate avoids recommitting infractions for fear of renewed punishment. General deterrence regarding solitary refers to whether placing inmates in solitary deters other inmates from committing misconduct. Pyrooz, *supra* note 10, at 128.

333. Appelbaum, *supra* note 14, at 409-10.

solitary;³³⁴ (b) they react angrily to what they perceive as their unfair experience in solitary;³³⁵ (c) they cannot take advantage of rehabilitation programs (see next section); (d) they enter solitary with a set of criminogenic risk factors that are impervious to solitary;³³⁶ and (e) solitary negatively impacts inmates' mental health, especially that of SMI inmates. It stands to reason that solitary SMI inmates are even less likely than their healthier counterparts to incorporate solitary's aversive lessons because of their compromised decision-making and deteriorating mental illness.

Studies consistently suggest that solitary has either no effect or possibly a perverse effect on solitary inmates' subsequent misconduct.³³⁷ Further, these findings concern inmates in general, not SMI inmates in particular, so one should anticipate less deterrence of SMI inmates. By analogy with the intellectually disabled so too with SMI inmates:

[I]t is the same cognitive and behavioral impairments that make these defendants less morally culpable—for example, the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses—that also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information.³³⁸

Similarly, SMI inmates probably do not deliberate their misconduct based upon the possibility of having to face a solitary term. Furthermore, assuming—contrary to research evidence—that solitary did effectively deter mentally healthy inmates from committing misconduct, affording SMI inmates an exemption from solitary leaves this deterrence unaffected.³³⁹ With respect to general deterrence, only minimal research exists, and it resulted in mixed findings. The principal study cited considered inmate-on-inmate and inmate-on-staff assaults

334. Steiner & Cain, *supra* note 313, at 174.

335. Mimosa Luigi et al., *Solitary Confinement of Inmates Associated with Relapse into Any Recidivism Including Violent Crime: A Systematic Review and Meta-Analysis*, 20 TRAUMA, VIOLENCE, & ABUSE 444, 450 (2020); Daniel P. Mears & William D. Bales, *Super-max Incarceration and Recidivism*, 47 CRIMINOLOGY 1131, 1138 (2009).

336. See Labrecque & Smith, *supra* note 300, at 1447 (finding that solitary operates as a “deep freeze . . . of one’s previously held values and motivations”).

337. Robert G. Morris, *Exploring the Effect of Exposure to Short-Term Solitary Confinement Among Violent Prison Inmates*, 32 J. QUANTITATIVE CRIMINOLOGY 1, 17 (2016); LABRECQUE, *supra* note 10, at 104; Labrecque & Smith, *supra* note 300, at 1452; Youngki Woo et al., *Disciplinary Segregation’s Effects on Inmate Behavior Institutional and Community Outcomes*, 31 CRIM. JUST. POL’Y REV. 1036, 1050-51 (2020) (finding that while disciplinary solitary per se does not have an effect on misconduct, lack of visitation and rehabilitation programs, privileges usually in short supply in solitary, increases the likelihood of subsequent violent infractions).

338. *Atkins v. Virginia*, 536 U.S. 304, 320 (2002).

339. See *id.*

August 2023]

FORGOTTEN IN SOLITARY

145

after the opening of a supermax: It found that opening a supermax failed to reduce inmate-on-inmate assaults while its effect on inmate-on-staff assaults was inconsistent and depended on the prison.³⁴⁰ “In short, the findings, on the whole, are not consistent with either incapacitation or deterrence theory” and “the bulk of the evidence presented [in the study] suggests that supermax is not effective at reducing system-wide levels of prison violence.”³⁴¹

Thus, regarding deterrence, studies suggest that solitary has no effect on specific deterrence and no effect on general deterrence, though in the latter case too little research exists to draw a firm conclusion. Given that the research evidence points to solitary as having, at best, no effect on deterrence, coupled with the fact that it leads to serious harm to SMI inmates, prison officials cannot justify imposing solitary on SMI inmates.”³⁴² *Graham* concluded that “in light of juvenile nonhomicide offenders’ diminished moral responsibility, any limited deterrent effect provided by life without parole [was] not enough to justify the sentence.”³⁴³ The same applies to placing SMI inmates in Solitary.

d. Rehabilitation

Immediate goals of order and security constitute prison officials’ first order of concern, not rehabilitation.³⁴⁴ Accordingly, for the time an inmate spends in solitary—just like *Graham*’s juvenile sentenced to life without parole—prison officials provide solitary inmates with only limited access to out-of-cell therapy and deny them programming like educational and vocational services.³⁴⁵ In essence, the solitary “penalty forswears altogether the rehabilitative ideal.”³⁴⁶ Studies suggest that solitary has a deleterious impact on recidivism and that the longer the solitary term, the worse the fallout.³⁴⁷ Also, direct-release inmates, inmates

340. Chad S. Briggs et al., *The Effect of Supermaximum Security Prisons on Aggregate Levels of Institutional Violence*, 41 CRIMINOLOGY 1341, 1365 (2003).

341. *Id.* at 1367-68. However, a critical caveat regards whether the introduction of the supermax (a longer term and more severe form of solitary) and its lackluster effect simply meant that preceding solitary practices had already reached a point beyond which increased control and isolation of inmates failed to reduce their misconduct. *Id.* at 1367.

342. See Leena Kurki & Norval Morris, *The Purposes, Practices, and Problems of Supermax Problems*, 28 CRIME AND JUST. 385, 419-20 (2001) (“[W]here prison regimes are so depriving as those offered in most supermax facilities the onus is upon those imposing the regimes to demonstrate this is justified . . . beyond simply asserting that the recipients are . . . the ‘worst of the worst.’” (citation omitted)).

343. *Graham v. Florida*, 560 U.S. 48, 72 (2010).

344. David Lovell et al., *Recidivism of Supermax Prisoners in Washington State*, 53 CRIME AND DELINQ. 633, 651 (2007) (“It is important also to bear in mind that custody-level decisions have historically been made with a view only to consequences within prison walls.”).

345. *Graham*, 560 U.S. at 74-75; Luigi et al., *supra* note 29, at 8.

346. *Graham*, 560 U.S. at 74; Luigi et al., *supra* note 335, at 450 (explaining how the absence of programming in solitary negatively impacts inmates and increases recidivism).

347. DANIEL P. MEARS ET AL., THE IMPACTS OF RESTRICTIVE HOUSING ON INMATE BEHAVIOR MENTAL HEALTH, AND RECIDIVISM, AND PRISON SYSTEMS AND PERSONNEL 17

whom prison officials directly release to free society without a transition period to the general prison population have particularly high rates of recidivism. They likely do not have the benefit of acclimatizing themselves to social contact in the general prison population and cannot take advantage of rehabilitation programs not offered in solitary.³⁴⁸

In sum, solitary fails to satisfy any of the four penological goals—retribution, incapacitation, deterrence, and rehabilitation—even as SMI inmates bear lesser culpability and face higher health risks in solitary. As such, solitary is a punishment meted out to SMI inmates disproportionate to the offense and thus violates the Constitution.³⁴⁹ In this way, SMI inmates’ limited culpability and solitary’s harmful impact on SMI inmates argue conclusively for a ban on placing them in solitary. Proportionality review, by focusing on objective factors like legislation and policy and penological goals, has the advantage that it does not require plaintiff-inmates to establish case specific deliberate indifference on the part of prison officials, which is sometimes difficult to prove.³⁵⁰ Instead, it condemns solitary as applied to SMI inmates in the abstract as a class, that is, leaving aside exigent circumstances, the state may not impose solitary on SMI inmates.

5. Professional organizations and international consensus

Prohibiting the mentally ill from being placed in solitary is consistent with the views held by both “respected professional organizations [and by the international community, including] other nations that share our Anglo-American heritage, and by the leading members of the Western European community.”³⁵¹ Correctional and medical organizations endorse prohibitions of different degrees on solitary as it relates to SMI inmates. The stricter organizations advocate against imposing solitary of any duration on SMI inmates. These organizations

(2021) (findings suggest that long-term and repeated solitary consignments have an adverse impact on recidivism); Kristen M. Zgoba et al., *Assessing the Impact of Restrictive Housing on Inmate Post-Release Criminal Behavior*, 45 AM. J. OF CRIM. JUST. 102, 118 (2020); Brown, *supra* note 21, at 12 (a systematic review of the literature indicating that solitary has either a negative or negligible impact on recidivism); Luigi et al., *supra* note 335, at 448-49; see GRANT DUWE & VALERIE CLARK, *THE REHABILITATIVE IDEAL VERSUS THE CRIMINOGENIC REALITY: THE CONSEQUENCES OF WAREHOUSING PRISONERS* 24-25 (2016) (certain rehabilitation programming can significantly reduce recidivism among inmates in general).

348. Luigi, et al., *supra* note 335, at 448-49 (a systematic review and meta-analysis that confirms solitary’s detrimental impact; that the longer the solitary the higher the risk of recidivism and that direct-releases have a higher recidivism risk); Lovell, et al., *supra* note 344, at 653 (“[D]irect-release supermax inmates are twice as likely as other supermax inmates to reoffend during the 1st months after release . . .”); Mears & Bales, *supra* note 335, at 1139.

349. See *Graham*, 360 U.S. at 71.

350. Alexander A. Reinert, *Eighth Amendment Gaps: Can Conditions of Confinement Litigation Benefit from Proportionality Theory*, 36 FORDHAM URB. L.J. 53, 69-70 (2009).

351. *Roper v. Simmons*, 543 U.S. 551, 561 (citing *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988) (plurality opinion) (internal quotations omitted)).

August 2023]

FORGOTTEN IN SOLITARY

147

include the National Commission on Correctional Health Care,³⁵² the American Public Health Association,³⁵³ and the American Bar Association.³⁵⁴ Another group prohibits placing SMI inmates in prolonged solitary defined variously, which members includes the American Correctional Association,³⁵⁵ the American College of Correctional Physicians,³⁵⁶ and the American Psychiatric Association.³⁵⁷ The Court has ultimate responsibility to interpret the Eighth Amendment, “[y]et at least from the time of the Court’s decision in *Trop*, the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment’s prohibition of ‘cruel and unusual punishments.’”³⁵⁸ The World Medical Association (“WMA”) combines both the authority of a respected international and a respected professional association that condemns the abuse of solitary outside of exceptional cases as a last resort and for the shortest amount of time, while prohibiting its use for prisoners with mental illness.³⁵⁹ As such, it adheres to the Nelson Mandela Rules and explicitly

352. While “[p]rolonged (greater than 15 consecutive days) solitary confinement is cruel, inhumane, and degrading treatment and harmful to an individual’s health[:] mentally ill individuals . . . should be excluded from solitary confinement of any duration.” National Commission on Correctional Health Care Board of Directors, *Position Statement: Solitary Confinement (Isolation)*, 22 J. CORR. HEALTH CARE 257, 260 (2016).

353. It calls to “[e]xclude from solitary confinement prisoners with serious mental illnesses” and to “[e]liminate solitary confinement as a means of managing security threats except in the most extreme cases when no less restrictive option is available to mitigate a serious, current, and ongoing threat to safety.” Am. Pub. Health Ass’n, SOLITARY CONFINEMENT AS A PUBLIC HEALTH ISSUE (2013).

354. The American Bar Association resolves that solitary “is prohibited for individuals with Intellectual Disability or serious mental illness . . . and [in general] should be used only in exceptional cases as a measure of last resort . . . typically not to exceed 15 consecutive days.” A.B.A. RESOLUTION 108A (Fed. 5, 2018).

355. ACA Standards state that “the agency will not place a person with serious mental illness in Extended Restrictive Housing,” defined as “housing that separates the offender from contact with the general population while restricting an offender/inmate to his/her cell for at least 22 hours per day and for more than 30 days.” Liman Center, *supra* note 6, at 51, 22 (footnotes omitted).

356. “[P]rolonged segregation[, that is beyond 4 weeks,] of inmates with serious mental illness, with rare exceptions, violates basic tenets of mental health treatment.” Society of Correctional Physicians [now the American College of Correctional Physicians], RESTRICTED HOUSING OF MENTALLY ILL INMATES (July 9, 2013). “Two principal factors contraindicate the placement of mentally ill inmates in restricted housing, the adverse effects and the injustice of disciplinary placement without consideration of the mental illness.” *Id.* Alternatively, prison officials can provide SMI inmates with increased out-of-cell therapeutic activities and exercise. *Id.*

357. “Prolonged segregation of adult inmates with serious mental inmates, with rare exceptions, should be avoided.” American Psychiatric Association, POSITION STATEMENT ON SEGREGATION OF PRISONERS WITH MENTAL ILLNESS, APA OFFICIAL ACTIONS (Nov. 2012).

358. *Roper v. Simmons*, 543 U.S. 551, 575 (2005) (citing *Trop v. Dulles*, 356 U.S. 86, 102-03 (1958) (plurality opinion)).

359. WORLD MEDICAL ASSOCIATION, WMA STATEMENT ON SOLITARY CONFINEMENT (Oct. 2014, rev. Oct. 2019), at 4-5.

endorses them (see below).³⁶⁰ The WMA does specifically allow its brief use to separate inmates from the general prison population through placement in a “non-solitary confinement environment” “as an immediate response to violent or disruptive behaviour or where a person must be isolated to protect themselves or others.”³⁶¹

As regards international legal instruments, the United Nations General Assembly, including the U.S., voted overwhelmingly in favor of the Universal Declaration of Human Rights, which provides in Article 5: “No one shall be subjected to torture or to *cruel, inhuman or degrading treatment or punishment*” (“CIDT”).³⁶² “All major human rights treaties . . . prohibit both torture and CIDT.”³⁶³ For example both the International Covenant on Civil and Political Rights (“ICCPR”), Article 7 and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”), Article 16(1) contain CIDT language and the U.S. has ratified both of them.³⁶⁴ *Jus cogens* consists of

[c]ustomary international law [that] arises from the general and consistent practice of States, when the practice is followed from a sense of

360. See *infra* notes 374-77 and accompanying text.

361. WORLD MEDICAL ASSOCIATION, *supra* note 359, at 1-2.

362. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) (emphasis added) (48 state votes in favor, 8 abstentions, 2 non-voting, out of 58 total voting membership).

363. Caitlin Hunter, *Aldana v. Del Monte Fresh Produce: Cruel, Inhuman, and Degrading Treatment after Sosa v. Alvarez-Machain*, 44 U.C. DAVIS L. REV. 1347, 1356 (2011).

364. G.A. Res. 2200A (XXI), art. 7 (Dec. 16, 1966); G.A. Res. 39/46, art. 16, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Dec. 10, 1984); *U.S. Reservations, Declarations, and Understandings, International Covenant on Civil and Political Rights*, 138 Cong. Rec. S4781-01 (daily ed., Apr. 2, 1992); 173 countries are state parties to the ICCPR, which indicates a global consensus; and 173 countries are state parties to the CAT, which indicates a global consensus. The U.S. has ratified both the ICCPR and the CAT, but it attached the same reservation to both treaties.

U.S. reservation on the ICCPR:

That the United States considers itself bound by article 7 to the extent that ‘cruel, inhuman or degrading treatment or punishment’ means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.

U.S. reservation on the CAT:

“That the United States considers itself bound by the obligation under article 16 to prevent ‘cruel, inhuman or degrading treatment or punishment’, only insofar as the term ‘cruel, inhuman or degrading treatment or punishment’ means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.”

legal obligation[,] so universal and . . . derived from values so fundamental to the international community that they are considered binding on all nations, irrespective of a State's consent.³⁶⁵

The prohibition on CIDT has acquired *jus cogens* status, also called a peremptory norm of international law, from which no derogation is possible, which illustrates the strong consensus against CIDT.³⁶⁶

The issue is not whether CIDT prohibits the use of solitary for SMI inmates and then that CIDT, as *jus cogens*, binds the U.S. based on international law.³⁶⁷ Rather, the question is, does CIDT prohibit the use of solitary for SMI inmates?³⁶⁸ Then seeing as CIDT enjoys the strong consensus of *jus cogens*, it would provide the Court with a “respected and significant confirmation for [its] own conclusions.”³⁶⁹ On this point, the U.N. Special Rapporteur of the Human Right Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E. Méndez issued a report that stated that “[g]iven their diminished mental capacity and that solitary confinement often results in severe exacerbation of a previously existing mental condition, the Special Rapporteur believes that its imposition, of any duration, on persons with mental disabilities is cruel, inhuman or degrading treatment and violates article 7 of the Covenant and article 16 of the Convention.”³⁷⁰ Moreover, the monitoring treaty bodies for both the ICCPR and the CAT have unequivocally called on countries to abolish placing SMI inmates in solitary because they conclude that the practice contravenes ICCPR Articles 7 and 10(1) (the latter article protects a person's humanity and human dignity) and CAT Article 16(1), as well as the Nelson Mandela Rules (see below).³⁷¹ Likewise, the non-binding Inter-American Commission on Human

365. David Weissbrodt & Cheryl Heilman, *Defining Torture and Cruel, Inhuman, and Degrading Treatment*, 29 L. AND INEQUALITY 343, 361-62 (2011) (citations omitted).

366. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 cmt. n (AM. L. INST. 1987).

367. *Graham v. Florida*, 560 U.S. 48, 81 (2010).

368. *See generally* Reinert, *supra* note 74, at 963-69 (conducting a survey focusing on to what degree international law condemns solitary for the prison population overall rather than SMI inmates specifically).

369. *Graham*, 560 U.S. at 81.

370. Juan E. Méndez (Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment), *Interim Rep. on Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*, ¶ 78, U.N. Doc. A/66/268, (Aug. 5, 2011); G.A. Res. 48/96, Standard Rule on the Equalization of Opportunities for Persons with Disabilities, ¶ 17 (Mar. 4, 1994) (emphasis added):

The term ‘disability’ summarizes a great number of different functional limitations occurring in any population in any country of the world. People may be disabled by physical, intellectual or sensory impairment, medical conditions or *mental illness*. Such impairments, conditions or illnesses may be permanent or transitory in nature.

371. HUMAN RIGHTS COMM., CONCLUDING OBSERVATIONS ON THE FOURTH PERIODIC REP. OF THE U.S. OF AMERICA, ¶ 20, U.N. Doc. CCPR/C/USA/CO/4 (Apr. 23, 2014); U.N.

Rights—the monitoring and non-binding adjudicatory treaty body for the Organization of American States, of which the U.S. is a party—warned that “the practice of solitary confinement must never be applied to juveniles or to persons with mental disabilities.”³⁷²

In addition, the U.N. General Assembly unanimously approved the 2015 United Nations Standard Minimum Rules for the Treatment of Prisoners (commonly referred to as the “Nelson Mandela Rules”), which declared that the “imposition of solitary confinement should be prohibited in the case of prisoners with mental or physical disabilities when their conditions would be exacerbated by such measures”;³⁷³ “used only in exceptional cases as a last resort, for as short a time as possible”;³⁷⁴ and bans solitary of anyone for more than 15 days.³⁷⁵ While non-binding, the Nelson Mandela Rules “have been the universally acknowledged minimum standards . . . a guide, in the development of correctional laws, policies and practices.”³⁷⁶ Thus, the Court should take into consideration the strong international norm against CIDT that condemns the use of solitary for SMI inmates.

B. Successful solitary confinement reform (Colorado)

As Justice Kennedy remarked in *Ayala*, in the future the Court may consider the availability of effective alternatives to solitary to meet the penological goals of ensuring safety and discipline when considering solitary’s constitutionality.³⁷⁷ In this regard, a number of departments of corrections demonstrate the benefits that accrue when they prioritize reducing solitary through an emphasis on inmates’ well-being. For example, in 2011 the Colorado Department of Corrections (“CDOC”) developed a step-down program for inmates to obtain release

COMM. AGAINST TORTURE, CONCLUDING OBSERVATIONS ON THE THIRD TO FIFTH PERIODIC REPS. OF THE U.S. OF AMERICA ¶ 20(b), U.N. Doc. CAT/C/USA/CO/3-5 (Dec. 19, 2014).

372. INTER-AM. COMM’N. ON H.R., ANNEX PRESS RELEASE ISSUED AT THE CLOSE OF THE 147TH SESSION, (Apr. 5, 2013).

373. G.A. Res. 70/175, United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) (Jan. 8, 2016), at 17 [hereinafter Nelson Mandela Rules]. The Nelson Mandela Rules make clear that QMHPs’ responsibilities concern inmates’ health rather than enabling solitary practices: “Health-care personnel shall not have any role in the imposition of disciplinary sanctions or other restrictive measures. [Rather, h]ealth-care personnel shall report . . . any adverse effect of disciplinary sanctions or other restrictive measures.” *Id.* at 17; G.A. Res. 37/194, Principles of Medical Ethics (Dec. 18, 1982) (prohibiting health personnel from participating in torture and other cruel, inhuman or degrading treatment or punishment).

374. Nelson Mandela Rules, *supra* note 373, at 16-17.

375. *Id.* at 17.

376. *Id.* at 1.

377. See *supra* note 221 and accompanying text; Jules Lobel, *Mass Solitary and Mass Incarceration: Explaining the Dramatic Rise in Prolonged Solitary in America’s Prisons*, 115 NW. U. L. REV. 159, 168 (2020) (citing *Davis v. Ayala*, 135 S.C. 2187, 2210 (2015) (Kennedy, J., concurring)).

August 2023]

FORGOTTEN IN SOLITARY

151

from administrative segregation (defined by CDOC as more than thirty days in solitary).³⁷⁸ In 2013, CDOC still had 700 inmates in administrative segregation and released 49% of them directly into society.³⁷⁹ In July 2013, an ex-convict, directly released from administrative segregation, murdered CDOC's Executive Director, Tom Clements. Rather than reverting to past harsh solitary practices, his successor, Rick Raemisch, saw the murder as signaling a need for further reform.³⁸⁰

Raemisch decried the tragic paradox that solitary does a disservice to inmates; and that society ultimately pays a price: "[W]hy are we sending people back to society worse than when they came in? Ninety-five percent of those incarcerated in Colorado will return to their community."³⁸¹ He denounced how solitary can become a living Hell for the mentally ill because they are liable to decompensate in its isolation.³⁸² So he created management control units, which consisted of new step-down programs to transition inmates from solitary to the general prison population. They incorporated a multidisciplinary team of security, nurse, behavioral health, and case manager staff and provided more out-of-cell time with cognitive behavioral and group programming, which started from a minimum of four hours of out-of-cell time per day to socialize in small groups.³⁸³ Furthermore, Raemisch pointed out that reforming solitary requires meeting the therapeutic needs of the mentally ill rather than simply aggravating their illness and associated misconduct by punishing them with solitary.³⁸⁴ In this vein, depending on whether SMI inmates are unstable or not and whether their illnesses contributed to their infraction, prison officials may place them in management control units, residential treatment programs (see below), or otherwise have them avoid disciplinary solitary.³⁸⁵ CDOC also instituted a maximum of fifteen days in disciplinary solitary for all inmates, and the maximum of any kind of solitary.³⁸⁶

Instead of administrative segregation, prison officials either released its SMI

378. Inmates in administrative segregation had to graduate through a level system by following the rules. Raemisch, *supra* note 282, at 312 ("Unfortunately, if you had a bad day in level three you had to start over in level one. This is how one week turned in to one month, to one year, to five years, to over a decade."); *id.* at 315 n.7.

379. *Id.* at 314-15.

380. *Id.* at 314.

381. *Id.* at 311.

382. *Id.* ("[In solitary] someone who is mentally ill in a cell the size of a parking space, twenty-three hours per day for years, [experiences] demons chas[ing] him or her around in the cell").

383. *Id.* at 316.

384. *Id.* at 318-19.

385. Raemisch, *supra* note 282, at 318; COLO. POL'Y DIRECTIVE 150-01, Code of Penal Discipline, 17 (2019).

386. Raemisch, *supra* note 282, at 320; Liman Center, *supra* note 6, at 5, 8 tbl.1 (reporting no prisoners in solitary for fifteen or more days).

inmates to the general prison population or transferred them to a residential treatment program in which inmates enjoy a minimum of ten hours of structured therapeutic programming and ten hours of non-structured recreational time per week.³⁸⁷ Inasmuch as CDOC recognized that there are “offenders who are stabilizing and still quite dangerous” it designed “restraint tables” to safely “facilitate group and pro-social interactions.”³⁸⁸ This reflected CDOC’s ethos that restraining in the interest of safety does not have to entail inmates’ social isolation.³⁸⁹ The reforms succeeded on both the level of institutional security and inmates’ well-being. CDOC has three prisons that incorporate residential treatment programs, which have shown positive results for its acutely and chronically mentally ill inmates: inmate-on-staff assaults decreased by 46% and 50% at its two male residential treatment program facilities, and special controls—like involuntary restraints as in the case of suicidal inmates—fell 93% and 85% over one year.³⁹⁰

C. Concluding remarks

Prison officials continue to disproportionately place SMI inmates in solitary even as SMI inmates confront an unacceptable risk of psychological pain and suffering, decompensation, self-harm, and suicide while in solitary. Traditional Eighth Amendment prison conditions jurisprudence focuses on the harm inflicted on SMI inmates in solitary linked to inhumane conditions, related in particular to social isolation and reduced environmental stimulation, and the inadequate mental health care endemic in solitary. A number of lower federal courts have granted a remedy to SMI inmates on these grounds, notably by ruling their placement in solitary unconstitutional and by denouncing their ineffective screening and monitoring, which prevented prison officials from identifying SMI inmates to keep them out of solitary.

However, the high number of SMI inmates in solitary continues. The Supreme Court must intercede to provide a bright line rule that establishes a broad ban on placing SMI inmates in solitary absent exigent circumstances and mandates effective screening. After all, prison officials often “accept the minimum standards for prison conditions and the treatment of prisoners set by [constitutional] Supreme Court [precedent] as both a ceiling and a floor, which makes the Court’s voice all the more urgent.”³⁹¹ A national rule originating in Supreme Court precedent would add some level of assurance of relief from solitary to SMI inmates. In this way, SMI inmates will more likely avoid uncertain and drawn-out litigation, which they have had to face until now when seeking redress from

387. Raemisch, *supra* note 282, at 318.

388. *Id.* at 319.

389. *Id.* at 321.

390. *Id.* at 320.

391. Fellner, *supra* note 181, at 410.

August 2023]

FORGOTTEN IN SOLITARY

153

solitary and it would encourage prison officials to reevaluate placing SMI inmates in solitary in the first place.

Furthermore, courts presently afford prison officials inordinate deference in how they administer prison conditions and carceral punishments and only consider granting inmates relief from solitary when they suffer egregious injury. SMI inmates confront an ongoing crisis in solitary despite the fact that both research and case law underscore the harms they face in solitary and that practice's consequent unlawfulness. To break this impasse, Eighth Amendment proportionality review offers an alternative doctrinal solution to prison conditions jurisprudence. Evolving standards of decency as embodied in recent policy are progressing towards a ban on placing SMI inmates in solitary. Consistent with the prohibition on executing the intellectually disabled and juveniles, the practice's lack of penological justification conclusively argues for a ban. Further, professional organizations and international legal instruments provide strong support for a ban. Lastly, in answer to Justice Kennedy's interest in alternatives, Colorado provides an example of solitary reform that functions in practice to both secure order and safety, and SMI inmates' well-being. Therefore, the Supreme Court must establish a clear standard that establishes a broad ban on placing SMI inmates in solitary.

APPENDIX

JURISDICTIONS WITH LEGISLATION THAT BANS PLACING SMI INMATES IN SOLITARY (5)

Massachusetts: MASS. GEN. LAWS ANN. ch. 127, § 39A(a) (West 2022).
 Nebraska: NEB. REV. STAT. ANN. § 83-173.03(3), (4) (West 2022).
 New Jersey: N.J. STAT. ANN. § 30:4-82.7; § 30:4-82.8(b) (West 2021).
 New Mexico: N.M. STAT. ANN. § 33-16-4(A) (West 2021).
 New York: N.Y. CORRECT. LAW § 137(d) (McKinney 2022).

JURISDICTIONS WITH REGULATIONS OR POLICIES THAT BAN PLACING SMI INMATES IN SOLITARY (6)

California: CAL. CODE REGS. tit. 15 § 3341.2 (2021); DEPARTMENT OF CORRECTIONS & REHABILITATION, MENTAL HEALTH SERVICES DELIVERY SYSTEMS PROGRAM GUIDE (2021), 12-9-1, 12-9-3, 12-9-7, 12-9-12 (on file with author) (Psychiatric Services Unit “offer[s] at least ten hours per week of scheduled structured therapeutic activities” and “a minimum of ten hours of out-of-cell exercise each week.”).

Delaware: *DOC Eliminates Restrictive Housing in Delaware Prisons*, WBOC (Sept. 21, 2020), <https://perma.cc/WU4L-9EVW> (“Many inmates in maximum security and disciplinary detention have mental illness. . . [but s]eriously mentally ill inmates are housed in Residential Treatment Units where they receive at least 10 hours per week each of recreation and mental health programming.”).

Indiana: Stipulation to Enter into Private Settlement Agreement Following Notice to the Class and Fairness Hearing at ¶ 29, *Ind. Protection and Advocacy Services Comm’n v. Comm’r Ind. Dep’t of Corr.*, No. 08-01317 (S.D. Ind. Jan. 27, 2016); Corrected Acknowledgement of Extension of Private Settlement Agreement, *Ind. Protection and Advocacy Services Comm’n*, No. 08-01317 (S.D. Ind. Feb. 23, 2022) (extending the Private Settlement Agreement until April 2023).³⁹²

392. A comment on the Liman Center survey. It presents a table entitled “People with Serious Mental Illness (SMI) in Total Custodial and Restrictive Housing Populations,” which is on point. However, it has a number of incongruities that caution relying on the table to draw conclusions. Liman Center, *supra* note 6, at 51-52, 53-54 tbl.22. These incongruities include: (1) Indiana that claims it has forty-five SMI inmates for its entire prison population of 23,783 prisoners (Restrictive Housing Population divided by Percentage in Restrictive Housing). Liman Center, *supra* note 6, at 8 tbl.1. A higher count of SMI inmates would commensurately reduce its high percentage number of SMI inmates in solitary. This would result in a percentage more consistent with its ban on placing SMI inmates in solitary; (2) Kansas’s relevant policy directive, which appears to be its first to limit SMI inmates to the less than fifteen days of short-term restrictive housing only became effective in October of 2021, which is after the Liman Center conducted its July 2021 survey. One would expect its

August 2023]

FORGOTTEN IN SOLITARY

155

Maine ME. POL'Y DIRECTIVE 15.1, Administrative Status § Procedure C ¶ 12 (2020); ME POL'Y DIRECTIVE 15.2 Disciplinary Segregation Status § Procedure C ¶ 10 (2020); ME. POL'Y DIRECTIVE 18.6.1, Intensive Mental Health Unit (2018).

Pennsylvania: PA. POL'Y DIRECTIVE DC-ADM 801, Inmate Discipline Procedures Manual, 4-3, 6-2, glossary of terms (2016); PA. POL'Y DIRECTIVE 13.8.1, Access to Mental Health Care Procedures Manual (2017).

Wyoming: WYO. POL'Y DIRECTIVE 3.302, Restrictive Housing, 7F (2018).

JURISDICTIONS WITH LEGISLATION LIMITING SOLITARY FOR SMI INMATES TO LESS THAN FIFTEEN DAYS (1)

Montana: MONT. CODE ANN. § 53-30-708(6) (West 2021).

JURISDICTIONS WITH POLICIES LIMITING SOLITARY FOR SMI INMATES TO LESS THAN FIFTEEN DAYS OR THAT REPORT NO INMATES IN SOLITARY FOR FIFTEEN OR MORE DAYS (4)

COLO. POL'Y DIRECTIVE 150-01, Code of Penal Discipline, 17 (2019) (limit of fifteen days or less for SMI inmates among others); Colorado reported no prisoners in solitary for fifteen or more days.³⁹³

Kansas: KAN. POL'Y DIRECTIVE 20-104A, Segregation/Restrictive Housing: Purpose of Administrative Restrictive Housing and Appropriate Placements, 2 (2021); KAN. POL'Y DIRECTIVE 20-110J, Restrictive Housing: Treatment Units for Behavioral Health Offenders (2016).³⁹⁴

North Dakota: North Dakota reported no prisoners in solitary for fifteen or more days.³⁹⁵

Vermont: VT. STAT. ANN. tit. 28, § 701a (2021); VT. STAT. ANN. tit. 28, § 906 (2021); CODE OF VT. RULES 13-130-024, The Use of Administrative and Disciplinary Segregation for Inmates with Serious Mental Illness (2021); VT. POL'Y DIRECTIVE 410.01, Facility Rules and Inmate Discipline, 13 (2012); Vermont reported no prisoners in solitary for fifteen or more days.³⁹⁶

percentage of SMI inmates in solitary for fifteen days or more to have fallen once Kansas instituted this limiting policy; and

(3) Texas claims that it does not place any SMI inmates in solitary. However, as recently as 2018 a report revealed the state often simply failed to conduct mental health assessments of its solitary inmates. As a result, it could perversely claim that it had no SMI inmates in solitary. MEGAN HARDING, TEXAS CIVIL RIGHTS PROJECT, TORTURE BY ANOTHER NAME: SOLITARY CONFINEMENT IN TEXAS 7 (2019).

393. Liman Center, *supra* note 6, at 5, 8 tbl.1.

394. *See supra* note 392.

395. Liman Center, *supra* note 6, at 5, 8 tbl.1.

396. *Id.*

156 *STANFORD JOURNAL OF CIVIL RIGHTS & CIVIL LIBERTIES* [19:97