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Dignity and the Eighth Amendment: A New Approach to Challenging Solitary Confinement

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By Laura Rovner

Solitary confinement irreparably harms people. For those who have endured long-term isolation, it is not an overstatement to describe it as a living death: "Time descends in your cell like the lid of a coffin in which you lie and watch it as it slowly closes over you. When you neither move nor think in your cell, you are awash in pure nothingness. . . . Solitary confinement in prison can alter the ontological makeup of a stone."[1] U.S. Supreme Court Justice Samuel Miller, who was a physician as well as a lawyer, recognized the harms of solitary confinement as far back as 1890, observing that:

> A considerable number of the prisoners [subjected to solitary confinement] fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others, still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community.[2]

Thus it was more than a century ago, as Justice Kennedy recently reminded us,[3] that the Supreme Court first recognized the harm solitary confinement causes and nearly declared it unconstitutional. Yet, despite this unequivocal condemnation of solitary confinement by the nation's highest court, over the course of the century that followed—and especially the last three decades—most states and the federal government have significantly increased their use of penal isolation. Today, conservative estimates place the number of people in solitary confinement at over 100,000.[4] And they are there largely with the blessing of the federal courts.

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[1] JACK HENRY ABBOTT, IN THE BELLY OF THE BEAST 44-45 (1981).
[2] In re Medley, 134 U.S. 160, 168 (1890) (finding unconstitutional on *ex post facto* grounds a statute that required death-sentenced prisoners to be held in solitary confinement prior to their executions).
[3] Davis v. Ayala, 135 S.Ct. 2187, 2209 (June 18, 2015) (Kennedy, J., concurring).
[4] Sarah Baumgartel et al., *Time-In-Cell: The ASCA-Liman 2014 National Survey of Administrative Segregation in Prison*, YALE LAW SCHOOL 1, 3 (2015), http://www.law.yale.edu/documents/pdf/Liman/ASCA-Liman_Administrative_Segregation_Report_Sep__2_2015.pdf (approximating that "between 80,000 and 100,000 people were in isolation in prisons as of the fall of 2014").

While the Eighth Amendment's prohibition against cruel and unusual punishment appears to provide mechanisms to challenge the use of long-term solitary confinement, the way the federal courts have interpreted the amendment in the past two decades has rendered judicial review virtually meaningless, resulting in an unprecedented number of people being held in conditions of extreme solitary confinement. Part I of this Issue Brief examines the nature of solitary confinement and how it developed in the U.S. Part II discusses (in broad outlines) the current jurisprudence of Eighth Amendment solitary confinement litigation. Finally, Part III offers some reasons for optimism going forward and one promising path to achieving meaningful reforms through constitutional challenges to the practice.

I. Solitary Confinement: What It Is and How We Got Here

While there is some variation among prisons, the conditions in solitary confinement (also referred to as administrative segregation, special housing units (SHUs), disciplinary segregation, control units, penal isolation, and restrictive housing) typically share a common set of features.[5] Prisoners spend twenty-two to twenty-four hours each day alone in their cells, which are about the size of a Chevy Suburban. They sleep on concrete slabs with a thin piece of foam on top. The cell has a concrete or metal shelf that can be used as a desk, and another piece of concrete in front of it that functions as a stool. Cell doors are typically solid metal with metal strips along the bottom that help prevent communication with prisoners in other cells. Some cells have a small narrow window; others do not have access to any natural light.

For whatever period of time a prisoner is held in solitary confinement, virtually every aspect of his life occurs in his eighty square foot cell. A prisoner in segregation eats all of his meals there, within arm's reach of his toilet. He is usually denied many services and programs provided to non-segregated prisoners, such as educational classes, job training, drug treatment, work, or other kinds of rehabilitative or religious programming. To the extent that a person in solitary receives any programming, it is typically provided in-cell through written materials or via a television screen, though some people in solitary are prohibited from having televisions, radios, art supplies, and even reading materials. For the one hour per day (on average) that prisoners in solitary are permitted to leave their cells, they are taken to a small, kennel-like cage to exercise, and even the time there is spent alone.[6] Access to family visits and phone calls is limited; any visits that do occur take place through thick glass and over phones. And prisoners in solitary confinement typically are not permitted any human touch, except when the correctional officers shackle them to escort them from location to location.

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

[6] Sometimes these exercise periods are not even outside. *See e.g.,* Anderson v. Colo. Dept. of Corrections, 887 F. Supp. 2d 1133, 1137-38 (D. Colo. 2012).

The U.N. Special Rapporteur on Torture has deemed these conditions torture, if a person is forced to endure them for more than fifteen days.[7] Yet, many prisoners in the U.S. are held in segregation for years or even decades.

The U.S. has experimented with solitary confinement for nearly two centuries. Eastern State Penitentiary, built in Philadelphia by the Quakers in 1829, was the nation's first supermax prison.[8] The men who served their sentences there spent years in isolation, on the theory that solitary confinement would not only punish them, it would also rehabilitate them by providing an opportunity to seek forgiveness from God. The belief was that isolation would bring penitence; thus the prison gave rise to the term "penitentiary." But, according to Charles Dickens, who visited there in 1842, instead of becoming penitent and rehabilitated, the men housed at Eastern State were, "dead to everything but torturing anxieties and despair."[9] He further observed, "[t]he system here, is rigid, strict and hopeless solitary confinement. I believe it . . . to be cruel and wrong . . . I hold this slow and daily tampering with the mysteries of the brain to be immeasurably worse than any torture of the body."[10]

"the only option in the minds of many correctional administrators was to isolate prisoners from one another—as completely as possible for as long as possible."

From a rehabilitation perspective, the Eastern State experiment with solitary confinement was a failure, and "the Pennsylvania System" (as it became known) was abandoned by 1913. While this could—and should—have led to solitary confinement's demise, a trifecta of events instead helped produce a resurgence in its use. First, the 1980s witnessed a shift in correctional philosophy away from rehabilitation and toward a theory of "incapacitate and punish."[11] Driven by a belief that "nothing works" to rehabilitate people in prison,[12] correctional systems dramatically reduced or eliminated treatment programs. Second, changes in sentencing, probation, and parole policy during this period caused incarceration rates across the country to rise dramatically.[13] Finally, the

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[7] Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *The Istanbul Statement on the Use and Effects of Solitary Confinement*, U.N. DOC. A/63/175, annex (Dec. 9, 2007); *see also* Statement of Juan Mendez, U.N. Special Rapporteur on Torture to the General Assembly's Third Committee, *In Third Committee, Special Rapporteur on Torture Calls on States to Seriously Reconsider Whether Death Penalty Amounts to Cruel, Inhuman Treatment,* GAOR (Oct. 18, 2011), http://www.un.org/press/en/2012/gashc4046.doc.htm.

[8] Technological advances allow current supermax conditions to achieve an unprecedented level of isolation. When surveillance and, in some places, visits and therapy occur remotely via video screen, prisoners may literally not see another person for days on end. Some commentators liken this level of confinement to Michel Foucault's conception of total control over others because it so thoroughly separates prisoners from the outside world and so severely constrains them. *See generally*, Laura Matter, *Hey, I Think We're Unconstitutionally Alone Now: The Eighth Amendment Protects Social Interaction As A Basic Human Need*, 14 J. GENDER RACE & JUST. 265, 284-85 (2010).

[9] Keramet Ann Reiter, *The Most Restrictive Alternative: A Litigation History of Solitary Confinement, in U.S. Prisons*, *in* STUDIES IN LAW, POLITICS, AND SOCIETY 71, 72 (Austin Sarat ed., 2012).

[10] *Id.*

[11] Dr. Craig Haney, The Hardening of Prison Conditions, Lecture at the Thirteenth Annual Liman Colloquium, Yale Law School (Mar. 4, 2010), *available at* http://ylsqtss.law.yale.edu:8080/qtmedia/events10/LimanPanel1_030410_s.mov.

[12] *See* Robert Martinson, *What Works? Questions and Answers About Prison Reform,* 35 THE PUBLIC INTEREST 22 (1974).

[13] *See, e.g.,* SHARON SHALEV, SUPERMAX: CONTROLLING RISK THROUGH SOLITARY CONFINEMENT 28-29 (2009).

deinstitutionalization movement and closure of many state mental health facilities resulted in the influx of thousands of people with mental illness into communities that lacked the necessary services and supports, ultimately leading to many mentally ill individuals being incarcerated in jails and prisons.[14]

These events, in the aggregate, produced extraordinary overcrowding in the nation's prisons,[15] and with it, unsurprisingly, an increase in prison violence. Efforts to curb this violence coupled with the shift in correctional philosophy away from rehabilitation and toward incapacitation led to unprecedented growth in the number of supermax cells in the late 1980s and early 1990s. Believing that "criminals were harder"[16] and could not be rehabilitated, the only option in the minds of many correctional administrators was to isolate prisoners from one another—as completely as possible for as long as possible.[17]

During this period, the federal courts also were undergoing a shift in philosophy. While, in the late 1960s courts began to abandon the longstanding "hands off" doctrine[18] that had effectively precluded judicial review of virtually all prison conditions, this shift was short-lived. In the ensuing decades, the Supreme Court—particularly during the Rehnquist era—while not returning entirely to the hands off doctrine, has significantly scaled back judicial scrutiny of prison conditions by developing standards of deference to constrain the lower courts.[19] As a result, federal courts often give correctional officials considerable (sometimes complete) deference "defining the legitimate goals of a corrections system and for determining the most appropriate means to accomplish them."[20]

II. Eighth Amendment Challenges to Solitary Confinement

Generally, constitutional challenges to solitary confinement have been grounded in the Eighth Amendment's prohibition against cruel and unusual punishment.[21] The Eighth Amendment

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[14] *Id.*

[15] *See* Brown v. Plata, 131 S.Ct. 1910 (2011).

[16] *See generally* Roy D. King, *The Rise and Rise of Supermax: An American Solution in Search of a Problem,* 1 PUNISHMENT & SOC'Y 163 (1999).

[17] One commentator describes this evolution of the proliferation of supermax confinement incisively: "Seemingly powerless to combat the rampant violence and pervasive idleness that often accompanies incarceration, the warehouse prison-type operates without the pretense that it does anything other than store and recycle offenders." James E. Robertson, *The Rehnquist Court and the "Turnerization" of Prisoners' Rights*, 10 N.Y. CITY L. REV. 97, 125 (2006).

[18] Prior to the prison reform movement that began in the 1960s, the predominant view of the federal courts was that prisoners had no legal right to humane conditions of confinement that could be judicially enforced. Consequently, they maintained a "hands-off" approach to prison cases, often citing concerns about separation of powers, federalism, and lack of judicial expertise in prison management. *See* MALCOLM FEELEY & EDWARD RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW COURTS REFORMED AMERICA'S PRISONS 30-31 (1998); LYNN S. BRANHAM, THE LAW OF SENTENCING, CORRECTIONS, AND PRISONERS' RIGHTS 335-36 (6th ed. 2002).

[19] In *Bell v. Wolfish,* which is widely regarded as the first clear signal of the end of the reform movement, Justice Rehnquist observed that although the Court had acknowledged in prior cases that prisoners have rights, "our cases have also insisted on a second proposition: simply because prison inmates retain certain constitutional rights does not mean that these rights are not subject to restrictions and limitations." 441 U.S. 520, 545 (1979).

[20] Overton v. Bazzetta, 539 U.S. 126, 132 (2003).

[21] The use of long-term solitary confinement also implicates the due process clauses of the Fifth and Fourteenth Amendments, which prohibit the government from depriving a person of life, liberty, or property without due process

prohibits the infliction of "cruel and unusual punishments."[22] In determining whether a particular form of punishment is cruel and unusual, the Supreme Court interprets the Amendment "in a flexible and dynamic manner."[23] This means that "[n]o static 'test' can exist by which courts determine whether conditions of confinement are cruel and unusual, for the Eighth Amendment 'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.'"[24]

To prevail on an Eighth Amendment conditions-of-confinement claim, a prisoner must satisfy a two-prong test with objective and subjective components.[25] The objective prong requires the prisoner to demonstrate that the challenged condition is sufficiently serious to merit review, either because it deprives him of a "basic human need" or because the condition presents a "substantial risk of serious harm."[26] The subjective prong requires a showing that prison officials acted with "deliberate indifference" in imposing or maintaining the condition despite knowing about the harm or risk of harm.[27]

With respect to the objective prong, people who have brought Eighth Amendment challenges to long-term isolation have asserted that solitary confinement deprives them of several basic human needs, including normal human contact and social interaction, environmental and sensory stimulation, mental and physical health, exercise, sleep, nutrition, meaningful activity, and safety.[28] They also assert that these deprivations cause them serious physical and psychological harm and that they are at substantial risk of future harm if the isolation continues.[29]

Most federal courts to consider whether the use of long-term solitary confinement violates the Eighth Amendment have held that it does not, except in situations where the person is a juvenile or has a pre-existing mental illness. Those exceptions are grounded in the idea that youth and mental illness make people more vulnerable to the harmful effects of isolation. For example, in the leading case, *Madrid v. Gomez*, a federal district court likened the placement of persons with mental illness in solitary confinement to "putting an asthmatic in a place with little air to breathe."[30] For that reason, the court held that confining people with mental illness in supermax conditions could not "be

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of law. Unlike the Eighth Amendment, which is the primary focus of this Issue Brief, rather than prohibiting harsh or atypical prison conditions, due process safeguards are intended to ensure that people are not caused to suffer deprivations in error or without reason.

[22] U.S. CONST. amend. VIII.

[23] Gregg v. Georgia, 428 U.S. 153, 171 (1976).

[24] Rhodes v. Chapman, 452 U.S. 337, 346 (1981) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).

[25] Wilson v. Seiter, 501 U.S. 294, 299-304 (1991).

[26] Farmer v. Brennan, 511 U.S. 825 (1994); Helling v. McKinney, 509 U.S. 25 (1993).

[27] *Farmer*, 511 U.S. at 836-38.

[28] Ashker v. Brown, 2014 U.S. Dist. LEXIS 75347 (N.D. Cal. June 2, 2014); *see also* Silverstein v. Fed. Bureau of Prisons, 559 Fed. App'x 739 (10th Cir. 2014), Madrid v. Gomez, 889 F.Supp. 1146 (N.D. Cal. 1995), rev'd and remanded, 150 F.3d 1010 (9th Cir. 1998); Ruiz v. Johnson, 37 F.Supp. 2d 855 (S.D. Tex. 1999). Arguably, all of these human needs could be viewed as elements or subcategories of the basic human need for safety. Importantly, the Supreme Court has held that to prove the objective prong of an Eighth Amendment violation, a prisoner must demonstrate the "deprivation of a single, identifiable human need." "[O]verall conditions," the Court held, are too "amorphous" to constitute an Eighth Amendment violation. Wilson v. Seiter, 501 U.S. 294, 304-05 (1991).

[29] *Helling*, 509 U.S. at 33.

[30] *Madrid*, 889 F.Supp. at 1265.

squared with evolving standards of humanity or decency" because the risk of exacerbating their mental illness was so grave—"so shocking and indecent—[that it] simply has no place in civilized society."[31]

Yet, the court also held that confining people who were *not* mentally ill in identical conditions was *not* a violation of the Eighth Amendment. The court explained that "while the conditions in the SHU may press the outer bounds of what most humans can psychologically tolerate, the record does not satisfactorily demonstrate that there is a sufficiently high risk to all inmates of incurring a serious mental illness from exposure to conditions in the SHU to find that the conditions constitute a *per se* deprivation of a basic necessity of life."[32]

The *Madrid* case was decided in 1995, but other courts have largely adopted its distinction between prisoners with mental illnesses and those without when considering Eighth Amendment claims about solitary confinement.[33] One of the most striking examples of this is *Silverstein v. Federal Bureau of Prisons*, in which the U.S. Court of Appeals for the Tenth Circuit held that Thomas Silverstein's *thirty-year* confinement in extreme isolation did not constitute cruel and unusual punishment.[34] This case brings into sharp focus the way Eighth Amendment conditions-of-confinement jurisprudence has evolved, particularly with respect to solitary confinement.

Despite recognizing that the conditions in which prison officials confined Silverstein were the most isolating in the entire federal prison system and that his three decades of solitary confinement was unprecedented, the Tenth Circuit nevertheless held that his conditions did not violate the Eighth Amendment. The court based most of the rationale for its holding on security concerns—Silverstein was convicted of three murders while in custody, including the murder of a correctional officer in 1983. Although thirty-one years had passed since the murders, and Silverstein had maintained a violence-free record ever since (and was in his sixties), the court nevertheless deferred completely to prison officials, who claimed that no lessening of Silverstein's isolation was possible without threatening institutional safety. Indeed, the court's deference to prison officials was so absolute that it denied Silverstein a trial in which the court could have considered evidence that there were ways to ease his isolation without jeopardizing security. The beginning and end of the court's inquiry into the prison official's asserted penological interests can be summed up by its statement that "the opinion of a prison administrator on how to maintain internal security carries great weight and the courts should not substitute their judgment for that of officials."[35]

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[31] *Id.* at 1266.
[32] *Id.* at 1267.
[33] *See, e.g.,* Jones-El v. Berge, 164 F. Supp. 2d 1096 (W.D. Wis. 2001) (placing seriously mentally ill prisoners in Wisconsin supermax violates the Eighth Amendment); Austin v. Wilkinson, No. 4:01-CV-071, Doc. 134 at *27 (N.D. Ohio Nov. 21, 2001) (order granting preliminary injunction) (noting that the defendants offered little opposition to a preliminary injunction prohibiting the placement of seriously mentally ill prisoners at the Ohio supermax); *Ruiz*, 37 F. Supp. 2d at 915 (finding that prison conditions can pose too great a threat to the psychological health of mentally ill inmates, violating the Eighth Amendment).
[34] *Silverstein*, 559 Fed. App'x. at 739. I teach in the Civil Rights Clinic at the University of Denver College of Law, which was counsel to Silverstein in this case.
[35] *Id.* at 754 (quoting Whitley v. Albers, 475 U.S. 312, 321–22 (1986)).

For those who value the Eighth Amendment, the Tenth Circuit's approach to analyzing security issues is troubling for two reasons. First, the Eighth Amendment's two-pronged test does not expressly contemplate the role of the prison's penological interest.[36] While the prison's reason for putting someone in solitary is obviously relevant to the question of whether doing so is cruel and unusual, the lack of a coherent doctrinal structure has resulted in courts varying considerably in their analysis of whether, how, and how much they consider an asserted penological interest in determining whether the Eighth Amendment has been violated.

Second, there is a separate issue about how much deference courts should give to that asserted interest. While the Supreme Court has held that other constitutional rights are less strong in prison because they must give way to legitimate penological interests,[37] the Court has affirmed that those limits do not apply to claims of cruel and unusual punishment because "[t]he whole point of the amendment is to protect persons convicted of crimes."[38] Accordingly, the Court has held that affording "deference to the findings of state prison officials in the context of the [E]ighth [A]mendment would reduce that provision to a nullity in precisely the context where it is most necessary."[39]

"prison authorities may not 'ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year.'"

Despite this, the *Silverstein* court—and other courts that have considered the constitutionality of solitary confinement under the Eighth Amendment—have heavily weighted prison administrators' asserted penological interest and have given enormous deference to the judgments of prison staff, going so far as to profoundly minimize or ignore evidence that conflicts with those judgments. The result has not only produced judicial decisions sanctioning the use of prolonged or indefinite solitary confinement, it has also perverted Eighth Amendment jurisprudence more broadly.[40]

In addition to the deference the *Silverstein* court gave to the prison's asserted penological interest, the court also relied on the fact that Silverstein had not been diagnosed with a serious mental illness prior to his thirty years in isolation. Further, the court found that the mental health issues he

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[36] For a more in-depth discussion of this issue, *see* Brittany Glidden, *Necessary Suffering?: Weighing Government and Prisoner Interests in Determining What is Cruel and Unusual*, 50 AM. CRIM. L. REV. 1815 (Fall 2012).

[37] Other constitutional rights—for example, First Amendment rights to free expression, association, and exercise of religion; due process; equal protection, etc.—are limited by the very deferential, rational basis test established by the Supreme Court in *Turner v. Safley*, 482 U.S. 78, 89-92 (1987).

[38] Johnson v. California, 543 U.S. 499, 511 (2005) ("[T]he integrity of the criminal justice system depends on full compliance with the Eighth Amendment") (quoting Spain v. Procunier, 600 F.2d 189, 193-94 (9th Cir. 1979)).

[39] *Id.*

[40] An especially troubling basis for this deference is sometimes found in courts' invocation of separation of powers principles. In such cases, courts contend that prison administration is uniquely the province of the executive branch and that separation-of-powers concerns counsel judicial restraint. While this argument is not without merit, taken too far it represents abdication of the judicial role. *See, e.g., Plata*, 131 S.Ct. at 1928-29 ("courts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration").

developed during his time in solitary—including an anxiety disorder, cognitive impairment, hopelessness, inability to concentrate, memory loss, and depression—were "minor mental health symptoms" and therefore his thirty years of isolation was not "sufficiently serious so as to 'deprive him of the minimal civilized measure of life's necessities.'"[41]

Not only did the Tenth Circuit disregard the harm Silverstein had already suffered, it also disregarded the risk of harm that indefinite solitary confinement posed to Silverstein in the future. In *Helling v. McKinney*, the Supreme Court expressly recognized the "risk of harm" formulation of the objective prong, holding that "[t]he Amendment . . . requires that inmates be furnished with the basic human needs, one of which is 'reasonable safety.' . . . [A] remedy for unsafe conditions need not await a tragic event."[42] In *Helling*, the plaintiff asserted that his exposure to tobacco smoke from other prisoners subjected him to cruel and unusual punishment. In rejecting the state's argument that the Eighth Amendment is not violated absent a showing of current harm, the Court emphasized that prison authorities may not "ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year."[43] The Court went on to explain:

> [T]he Eighth Amendment requires more than a scientific and statistical inquiry into the seriousness of the potential harm and the likelihood that such injury to health will actually be caused. . . . 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.[44]

One of the reasons the Tenth Circuit held that indefinite solitary confinement did not pose a constitutionally significant risk of harm to Silverstein in the future was its determination that in conditions of confinement cases where a plaintiff asserts a future risk of mental harm, "[t]he *actual extent* of any . . . psychological injury is pertinent in proving a substantial risk of serious harm."[45] Aside from the fact that a requirement of current harm as a precondition for asserting a risk of future harm appears nowhere in *Helling* or its progeny, the Tenth Circuit's formulation of the "risk of harm" element situates the determination of whether a condition is "sufficiently serious" in the character of the prisoner-plaintiff rather than the nature of the conditions themselves.

Framing the inquiry in this way also allowed the *Silverstein* court to disregard substantial evidence of the negative psychological effects of isolated prison confinement.[46] That evidence includes studies

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[41] *Silverstein*, 559 Fed. App'x. at 758.
[42] *Helling*, 509 U.S. at 33-34.
[43] *Id.*
[44] *Id.* at 36.
[45] *Silverstein*, 559 Fed. App'x. at 754 (quoting Benefield v. McDowall, 241 F.3d 1267, 1272 (10th Cir. 2001).
[46] Haney Aff., Attach. 2 at 7, Silverstein v. Fed. Bureau of Prisons, 2011 WL 4552540 (D. Colo. 2011) *aff'd*, 559 Fed. App'x. 739 (10th Cir. 2014), *available at* http://solitarywatch.com/wp-content/uploads/2011/05/declaration-of-dr-craig-haney-in-silverstein-case.pdf.

documenting a recurring cluster of harms suffered by people in long-term isolation, including "ruminations or intrusive thoughts, an oversensitivity to external stimuli, irrational anger and irritability, difficulties with attention and often with memory" as well as "a constellation of symptoms indicative of mood or emotional disorders . . . emotional flatness or losing the ability to feel, swings in emotional responding, and feelings of depression or sadness that did not go away."[47] Finally, "sizable minorities . . . report symptoms that are typically only associated with more extreme forms of psychopathology—hallucinations, perceptual distortions, and thoughts of suicide."[48] Over and over again, there are reports of people who have spent long periods in solitary suffering the same symptoms of harm—so much so that researchers refer to this cluster as "SHU syndrome."[49] Harvard psychiatrist Dr. Stuart Grassian published research in 1983 (the year Silverstein was put in solitary) documenting brain function abnormalities of people held in isolation.[50] Studies from all over the world detail the "psychologically precarious state of persons confined under penal isolation, [including] the pain and suffering that isolated prisoners endure."[51] Further, "[t]he data that establish these harmful effects have been collected in studies conducted over a period of several decades, by researchers from several different continents who had diverse academic backgrounds and a wide range of professional expertise."[52]

Despite this overwhelming body of evidence, the Tenth Circuit found that there was no triable issue of fact as to whether Silverstein faced a substantial risk of future harm as he entered his fourth decade of indefinite and extreme isolation—isolation that continues to this day. Moreover, the court's approach to its analysis shifted the inquiry away from the core constitutional question of whether such confinement is inconsistent with the "evolving standards of decency that mark the progress of a maturing society."[53] As Silverstein's extreme case demonstrates, the Tenth Circuit's approach would make it difficult for any prisoner-plaintiff to prevail in an Eighth Amendment challenge to their solitary confinement.

III. A Way Forward

To date, the Constitution—as interpreted by the federal courts—has not functioned as a robust check on the use of solitary confinement, but there may be reason for cautious optimism. As with the confluence of events that produced a massive expansion in the use of supermax confinement starting in the early 1980s, the U.S. is now on the cusp of another convergence of factors that may swing the pendulum in the opposite direction.

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[47] *Id.* at 12; *see also* Craig Haney, *Mental Health Issues in Long-Term Solitary and 'Supermax' Confinement*, 49 CRIME & DELINQ. 124, 134-41 (2003), *available at* http://www.supermaxed.com/NewSupermaxMaterials/Haney-MentalHealthIssues.pdf (detailing the findings of Dr. Haney's study of California's Pelican Bay supermax prison, including the prevalence of psychopathological symptoms of isolation).

[48] Haney Aff., Attach. 2, *supra* note 46 at 7; *see also* Haney, *supra* note 47, at 134-41.

[49] *See e.g.,* Stuart Grassian, *The SHU Syndrome: Psychopathological Effects of Solitary Confinement*, AMERICAN JOURNAL OF PSYCHIATRY 1450-54 (1983).

[50] *Id.*

[51] Haney Aff., Attach. 2*, supra* note 46*,* at 3.

[52] *Id.* at 7.

[53] *Trop*, 356 U.S. at 100-01.

First, we appear to be approaching a societal consensus that solitary confinement causes people harm and pain. The overwhelming and ever-growing body of psychological and medical evidence documents what we know intuitively—that human beings need social interaction and meaningful activity, and they suffer without it.[54] Indeed, this borders on common sense; it is why solitary confinement is a regular feature of torture regimes. Additionally, neuroscience research has increasingly demonstrated that the harmful effects of solitary confinement appear not only in the reports of those who are forced to endure it, but also in brain imagery and testing, which reveal that changes can occur in the brain after even (comparatively) brief periods of solitary confinement.[55] In short, "we now know that prolonged social deprivation has the capacity to literally change who we are, physically as well as mentally."[56]

In light of this, a broad array of medical and mental health organizations, human rights groups, religious entities, and even correctional administrators have denounced the use of long-term isolation and called for its elimination or reduction.[57] And those who have the most expertise about the harm of long-term isolation—the people who are confined there—have raised public consciousness through writing, art, and most recently, massive hunger strikes by California prisoners held for decades in solitary confinement.[58] Public awareness about the harm of solitary confinement is growing, and public opinion is changing as a result.

Second, the international community has almost universally condemned the use of long-term isolation. In 2011, the U.N. Special Rapporteur on Torture concluded that prolonged solitary confinement is prohibited by the International Covenant on Civil and Political Rights ("ICCPR") and the Convention Against Torture, and declared that the use of solitary confinement for more

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[54] It is therefore unsurprising that there are increased rates of suicide and self-harm among prisoners held in prolonged isolation. In one study of California's prison system, researchers found that 2% of the prison population is housed in isolation, but accounted for 42% of all prison suicides from 2006 to 2010. *Striking Against Solitude*, WASH. POST, AUG. 4, 2013 at A18. This finding was replicated in a study published in the *American Journal of Public Health* in 2012, in which the correctional psychiatrist Fatos Kaba and colleagues analyzed about 244,699 jail admissions New York City between 2010 and 2013, and found that although 7.3% of prisoners admitted during this period were consigned to solitary, accounting for 53.3% of acts of self-harm and 45% of potentially fatal acts of self-harm. Similarly, a 1995 study of federal prisoners found that 63% of suicides occurred among people in solitary. THE DEPARTMENT OF JUSTICE, PRISON SUICIDE: AN OVERVIEW AND GUIDE TO PREVENTION 55 (1995), *available at* https://s3.amazonaws.com/static.nicic.gov/Library/012475.pdf.

[55] *See e.g.,* Stephanie Pappas, *Mystery of How Social Isolation Messes with Brain Solved*, LIVE SCIENCE (Sept. 13, 2012, 2:10 PM), *available at* http://www.livescience.com/23169-social-isolation-changes-brain.html; Rita Hari & Milamaaria V. Kujala, *Brain Basis of Human Social Interaction: From Concepts to Brain Imaging*, 89 PHYSIOLOGICAL REV. 453, 454 (2009); Roy F. Baumeister & Mark R. Leary, *The Need to Belong: Desire for Interpersonal Attachment as a Fundamental Human Motivation*, 117 PSYCHOL. BULL. 497, 497 (1995); Nadia Ramlagan, *Solitary Confinement Fundamentally Alters the Brain, Scientists Say*, ADVANCING SCIENCE, SERVING SOCIETY (Feb. 15, 2014), http://www.aaas.org/news/solitary-confinement-fundamentally-alters-brain-scientists-say.

[56] Dr. Craig Haney, Testimony before the California Senate and Assembly Committee on Public Safety, Hearing on CDCR's New Policies on Inmate Segregation: The Promise and Imperative of Real Reform (Feb. 11, 2014) at 6 [hereinafter CDCR Testimony].

[57] For example, the American Psychiatric Association, Physicians for Human Rights, the National Alliance for the Mentally Ill, the National Religious Campaign Against Torture, and Pope Francis have all condemned the use of solitary confinement.

[58] *See, e.g.*, Benjamin Wallace-Wells, *The Plot from Solitary*, N.Y. MAGAZINE, Feb. 26, 2014, *available at* http://nymag.com/news/features/solitary-secure-housing-units-2014-2/#.

than fifteen days constitutes torture.[59] Amnesty International, Human Rights Watch, and the World Health Organization are just a few of the many international human rights organizations that have condemned the use of penal isolation in the U.S. Earlier this year, the High Court of Ireland refused to extradite a man wanted by the U.S. on terrorism-related charges because it found that if convicted, he was at risk of being held in isolation indefinitely at the federal supermax prison in Florence, Colorado, in conditions that violate the Irish Constitution.[60] In short, the U.S. is an outlier in the degree to which it uses long-term isolation, rendering it dramatically out of sync with international human rights standards.

Third, recent bipartisan calls for criminal justice reform are gaining traction, including reforms to address mass incarceration in general and solitary confinement in particular. The motivation behind those calls varies (politics do make strange bedfellows). Traditional critics of solitary confinement are largely motivated by concerns about the humane treatment of people in prison. Those concerned with law and order cite research demonstrating the higher recidivism rates of people released straight from solitary to the street as a reason to reexamine the practice. For some, the interests are purely economic: prison is expensive, and solitary confinement is considerably more so.[61] The alignment of these interests has prompted some states to experiment with ways to reduce their use of solitary confinement, many of which have produced positive results.[62] At the federal level, the Senate has held two hearings about the use of solitary confinement, and in his recent speech on criminal justice delivered at the annual convention of the NAACP, President Obama reported that he has asked Attorney General Loretta Lynch to "start a review of the overuse of solitary confinement across American prisons."[63]

These converging forces have set in motion state legislation, correctional agency initiatives, and executive actions, which, individually and in combination, have begun to reduce the number of people in long-term isolation in state and federal prisons—especially children and those with mental

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[59] Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Special Rapporteur on Torture Tells Third Committee Use of Prolonged Solitary Confinement on Rise, Calls for Global Ban on Practice*, U.N. DOC. GA/SHC/2014 (OCT. 18, 2011), *available at* http://www.un.org/press/en/2011/gashc4014.doc.htm. The Special Rapporteur's view comports with standards laid out by the Istanbul Statement on the Use and Effects of Solitary Confinement, the ICCPR Human Rights Committee, and the United Nations Office of the High Commissioner for Human Rights.

[60] *Attorney General v. Ali Charaf Damache*, [2015] IEHC 339, (Ir.), *available at* http://www.bailii.org/ie/cases/IEHC/2015/H339.html.

[61] SOLITARY WATCH, FACT SHEET: THE HIGH COST OF SOLITARY CONFINEMENT, http://solitarywatch.com/wp-content/uploads/2011/06/fact-sheet-the-high-cost-of-solitary-confinement.pdf (last visited Sept. 8, 2015).

[62] *See* Alison Shames et al., *Solitary Confinement: Common Misconceptions and Emerging Safe Alternatives,* VERA INST. OF JUSTICE (2015), http://www.vera.org/sites/default/files/resources/downloads/solitary-confinement-misconceptions-safe-alternatives-report_1.pdf (discussing alternatives used by several states, including Maine, Colorado, and Washington).

[63] President Barack Obama, Address at the NAACP Conference (July 14, 2015), *available at* https://www.whitehouse.gov/the-press-office/2015/07/14/remarks-president-naacp-conference; *see also* Peter Baker & Erica Good, *Critics of Solitary Confinement are Buoyed as Obama Embraces their Cause*, N.Y. TIMES (July 21, 2015), http://www.nytimes.com/2015/07/22/us/politics/critics-of-solitary-confinement-buoyed-as-obama-embraces-cause.html?emc=edit_tnt_20150721&nlid=63690974&tntemail0=y.

illness.[64] State legislatures are increasingly prohibiting the use of solitary confinement for people with mental disabilities[65] and juveniles,[66] an interesting parallel with the evolution of death penalty legislation and jurisprudence.

But we know that children and people with mental illness are not the only ones harmed by prolonged isolation. While these two groups are especially vulnerable to grave harm, "all individuals will still experience a degree of stupor, difficulties with thinking and concentration, obsessional thinking, agitation, irritability, and difficulty tolerating external stimuli (especially noxious stimuli)."[67] Although acute symptoms may subside, many prisoners will likely suffer permanent harm because of such confinement.[68] Disturbingly, this harm also may include "lasting personality changes—especially a continuing pattern of intolerance of social interaction, leaving the individual socially impoverished and withdrawn, subtly angry and fearful when forced into social interaction."[69] It is these long-term effects that likely led to the recent, tragic suicide of Kalief Browder, who, as a juvenile, spent three years at Rikers Island—nearly two of those years in solitary confinement—based on charges that prosecutors ultimately dropped.[70]

In addition to this trio of factors, there is a fourth trend emerging that is relevant to future constitutional challenges to solitary confinement: the Supreme Court's increasing reliance on human dignity as a substantive value underlying and animating constitutional rights.

A. The Supreme Court's Increased Use of Dignity in Constitutional Decision-Making

Although "dignity" appears nowhere in the text of the Constitution, "it is routinely invoked to make extremely foundational points, [including] that dignity is the motivating force behind the whole Constitution itself: 'the essential dignity and worth of every human being [is] a concept at the root of any decent system of ordered liberty.'"[71] Beginning in the 1940s, the concept of dignity began

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[64] *See* Shames et al., *supra* note 62; *see also Solitary Confinement: Resource Materials*, ACLU 14, https://www.aclu.org/files/assets/Solitary%20Confinement%20Resource%20Materials%2012%2017%2013.pdf#page=14 (last visited Aug. 26, 2015) (listing legislation by state).

[65] S. 64, 69th Leg. (Colo. 2014), *available at* http://www.leg.state.co.us/clics/clics2014a/csl.nsf/fsbillcont2/CC49C5479FE8AD7487257C3000062140/$FILE/064_enr.pdf (enacted); L.B. 548, 104th Leg. (Neb. 2015), *available at* http://nebraskalegislature.gov/FloorDocs/104/PDF/Slip/LB598.pdf (enacted); H.R. 26, 148th Leg. (Del. 2015), *available at* http://legis.delaware.gov/LIS/LIS148.NSF/93487d394bc01014882569a4007a4cb7/77c64b1cb4da4bf385257dce0073e45b?OpenDocument (as introduced on Jan. 29, 2015).

[66] *See, e.g.,* Michael Winerip and Michael Schwirtz, *Rikers to Ban Isolation for Inmates 21 and Younger*, N.Y. TIMES Jan. 13, 2015, *available at* http://www.nytimes.com/2015/01/14/nyregion/new-york-city-to-end-solitary-confinement-for-inmates-21-and-under-at-rikers.html?_r=0.

[67] Stuart Grassain, *Psychiatric Effects of Solitary Confinement,* 22 WASH. U J.L. & POL'Y 325, 332 (2009).

[68] *Id.* at 332-33.

[69] *Id.* at 353.

[70] Jennifer Gonnerman, *Kalief Browder, 1993–2015*, NEW YORKER, June 7, 2015, *available at* http://www.newyorker.com/news/news-desk/kalief-browder-1993-2015.

[71] Rex D. Glensy, *The Right to Dignity*, 70 COLUM. HUM RTS. L. REV. 93 (quoting Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring)).

gaining traction in the Supreme Court's constitutional jurisprudence.[72] Many scholars attribute the increase in its use to Justice William Brennan, who "emphasized that the fundamental value at the crux of American law is 'the constitutional ideal of human dignity,' believ[ing] that the Constitution, and particularly the Bill of Rights, 'expressed a bold commitment by a people to the ideal of libertarian dignity protected through law.'"[73] Although there is disagreement about whether the Court has explicitly *recognized* human dignity as a constitutional value, there is considerable evidence that—especially in recent years—the Court has *treated* it as such.

The Supreme Court's recent decision in *Obergefell v. Hodges*[74] arguably represents its most significant reliance on a dignity interest in recent years, but it is far from novel. In the last 220 years, the Justices have invoked the term in more than 900 opinions, with an uptick in its use by the Roberts Court following a brief period of non-use during the Burger and Rehnquist eras.[75] The Court has invoked dignity in conjunction with the First, Fourth, Fifth, Sixth, Eighth, Ninth, Eleventh, Fourteenth, and Fifteenth Amendments,[76] and "the Court's repeated appeals to dignity, particularly in majority opinions, appear to parallel its greater willingness to proffer dignity as a substantive value animating our constitutional rights."[77]

Of course, this begs the question of exactly what the Court means when it invokes dignity within the ambit of legal rights. The Court recognizes that "[d]ignity is 'admittedly an ethereal concept' which 'can mean many things' and therefore suffers from an inherent vagueness at its core."[78] However, particularly in the Eighth Amendment context, the Court has appeared to embrace the notion of "inherent dignity" described by Alan Gewirth as "a kind of intrinsic worth that belongs equally to all human beings as such, constituted by certain intrinsically valuable aspects of being human."[79] It is a "necessary, not a contingent, feature of all humans; is permanent and unchanging, not transitory or changeable; and . . . it sets certain limits to how humans may justifiably be treated."[80]

B. Dignity and the Eighth Amendment

I say the Supreme Court embraced dignity "particularly in the Eighth Amendment context" because it is there that the Court has arguably expressed one of its clearest commitments to the notion of dignity as animating a constitutional right. In *Trop v. Dulles*, the Court announced the modern Eighth Amendment standard, which mandates that a given punishment must conform to "the evolving

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[72] *See, e.g., In re Yamashita*, 327 U.S. 1, 29 (1946) (Murphy, J., dissenting) ("If we are ever to develop an orderly international community based upon a recognition of human dignity it is of the utmost importance that the necessary punishment of those guilty of atrocities be as free as possible from the ugly stigma of revenge and vindictiveness").
[73] Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 171 (2011).
[74] Obergefell v. Hodges, 135 S.Ct. 2584 (2015).
[75] Henry, *supra* note 73, at 171.
[76] *See id.* at 173 nn.18-26 (collecting cases).
[77] *Id.* at 181.
[78] Hugo Adam Bedau, *The Eighth Amendment, Human Dignity, and the Death Penalty*, *in* THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES, 145, 145 (Michael Meyer & William Parent eds., 1992).
[79] Alan Gewirth, *Human Dignity As the Basis of Rights*, in THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES, 10, 12 (Michael Meyer & William Parent eds.) (1992). *See also* Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT'L L. 655, 679 (2008).
[80] *See* Gewirth, *supra* note 79, at 12.

standards of decency that mark the progress of a maturing society."[81] In articulating this standard, the Court declared that "the basic concept underlying the Eighth Amendment is nothing less than the dignity of man."[82]

A review of the Court's Eighth Amendment jurisprudence in the wake of *Trop* reveals that when the Court has held a challenged punishment to be unconstitutional, it has—explicitly or implicitly—examined the relationship between the Eighth Amendment and human dignity and been unable to "square the accused state practice with the individual's dignitary interest."[83]

In the death penalty context, for example, the Court drew on dignity and evolving standards of decency in prohibiting the execution of juveniles,[84] as well as people with intellectual disabilities[85] or mental illness so severe that they have been declared insane.[86] In *Ford v. Wainwright*, the Court considered whether inflicting the death penalty on a person who had been found insane violated the Eighth Amendment. Observing the "natural abhorrence civilized societies feel" at executing people who are insane, as well as the national "intuition that such an execution simply offends humanity," the Court held the practice unconstitutional. Significantly, the Court considered not only the dignity interests of the condemned prisoner, but it also sought "to protect the dignity of society itself from the barbarity of exacting mindless vengeance."[87]

Similarly, in *Atkins v. Virginia*, the Court invoked dignity and decency in holding that the execution of people with intellectual disabilities is unconstitutional. Emphasizing that the Eighth Amendment draws on "the evolving standards of decency that mark the progress of a maturing society," the Court explained that whether the execution of a person with an intellectual disability violates the Eight Amendment "is judged not by the standards that prevailed in 1685 when Lord Jeffrys presided over the 'Bloody Assizes' or when the Bill of Rights was adopted, but rather by those that currently prevail."[88] As a measure of those standards, the Court cited state legislatures' widespread and growing condemnation of the execution of people with intellectual disabilities, and ultimately held that the practice violates the "dignity of man" underlying the Eighth Amendment.

In *Roper v. Simmons*, the Court examined the constitutionality of executing juveniles and looked not only to national opinion, but also examined whether the practice faced international condemnation.[89] Noting that the U.S. was the only country that permitted the death penalty for juveniles, the Court

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[81] *Trop*, 356 U.S. at 100-01. Justice Warren, writing for the majority, adopted this approach from *Weems v. United States*, 217 U.S. 349 (1910), in which the Court held unconstitutional the punishment of twelve years of hard labor in iron chains for falsifying public records. In *Weems*, the Court repeatedly referenced the Eighth Amendment requirement that punishment must be humane according to existing standards of decency, explaining that the Eighth Amendment is "progressive, and is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by humane justice." *Id.* at 378.
[82] *Id.* at 99.
[83] Glensy, *supra* note 71, at 123-24.
[84] *See* Roper v. Simmons, 543 U.S. 551 (2005).
[85] *See* Atkins v. Virginia, 536 U.S. 304 (2002).
[86] *See* Ford v. Wainwright, 477 U.S. 399 (1986).
[87] *Id.* at 409.
[88] *Atkins*, 536 U.S. at 311.
[89] *Roper*, 543 U.S. at 575-78.

observed that the laws of other nations confirmed the Court's view that certain punishments must be prohibited "to secure individual freedom and preserve human dignity."[90] The Court relied on those values, which it deemed "central to the American experience" and "essential to our present-day self-definition and national identity," in holding that the execution of juveniles violates the Eighth Amendment.[91]

In those cases where the Court has held that a prison condition violates the Eighth Amendment, it has similarly invoked dignity as a rationale. In *Hope v. Pelzer*, for example, the Court grounded its decision in the language of human dignity and decency, holding that an Alabama prison's use of a hitching post as punishment for a prisoner's disruptive conduct during a work detail violated the Eighth Amendment.[92] The majority opinion examined societal standards to assess whether use of the hitching post violated contemporary standards of decency, and ultimately determined that "the obvious cruelty inherent in this practice" is impermissible "under precepts of civilization which we profess to possess."[93]

More recently, the Court again drew on dignity and decency in its 2011 decision in *Brown v. Plata*, in which a class of California prisoners asserted Eighth Amendment claims for harms caused by severe and pervasive overcrowding in the state's prisons.[94] The majority characterized California's prison conditions as "grossly inadequate."[95] In describing the constitutional violations suffered by prisoners needing mental health treatment, the Court noted that overcrowding caused California prisoners to have a suicide rate eighty percent higher than the national prison population.[96] Due to bed shortages, at least one suicidal prisoner was "held in a cage for nearly 24 hours, standing in a pool of his own urine, unresponsive and nearly catatonic."[97]

In analyzing the plaintiffs' claims, the Court explained that although "prisoners may be deprived of rights that are fundamental to liberty," they still "retain the essence of human dignity inherent in all persons . . . that animates the Eighth Amendment prohibition against cruel and unusual punishment."[98] The Court expressly characterized the deprivation of a basic life necessity—here medical and mental health care—as conduct that is "incompatible with the concept of human dignity and has no place in civilized society."[99] This holding reaffirmed the principle that certain prison conditions violate the Eighth Amendment because they are inconsistent with how a decent society treats even those it despises the most.

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[90] *Id.* at 578.
[91] *Id.*
[92] Hope v. Pelzer, 536 U.S. 730, 745 (2002). The Court characterized Hope's experience on the hitching post as "antithetical to human dignity—he was hitched to the post for an extended period of time in a position that was painful, and under circumstances that were both degrading and dangerous." *Id.*
[93] *Id.* at 742.
[94] *Plata*, 131 S.Ct. at 1910.
[95] *Id.* at 1923.
[96] Id. at 1924.
[97] *Id.*
[98] *Id.* at 1928.
[99] *Id.*

C. A Dignity-Based Approach to Solitary Confinement Challenges

Although conditions of confinement cases are notoriously difficult for prisoners to win, the various political, social, scientific, economic, and legal trends that are converging suggest that we may be approaching a moment in history when the Supreme Court could be receptive to a constitutional challenge to long-term isolation. Indeed, Justice Kennedy all but invited such a challenge in his recent concurrence in *Davis v. Ayala*.[100] Clearly troubled by the fact that the petitioner had been held in solitary confinement during the twenty-five years since he was sentenced to death, Justice Kennedy highlighted some of the harms associated with long-term isolation, as well as a "new and growing awareness in the broader public of the subject of corrections and of solitary confinement in particular."[101] While recognizing the need to defer to the discretion of prison officials that "temporary" solitary confinement may be useful or necessary in "some instances," he observed that "research still confirms what this Court suggested over a century ago: Years on end of near total-isolation exact a terrible price."[102] He then concluded: "In a case that presented the issue, the judiciary may be required, within its proper jurisdiction 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."[103]

As discussed earlier, to prevail in such a case, the plaintiffs would need to demonstrate either that their conditions in solitary confinement are sufficiently serious so as to deprive them of a basic human need or put them at substantial risk of serious harm; they also must show that prison officials knew of the harm (or risk of harm) and recklessly disregarded it. Given the overwhelming body of research and evidence documenting the harms solitary causes, if the Court were to find the objective prong satisfied, proving the subjective prong would presumably be considerably less onerous.[104] For that reason, the analysis below focuses primarily on the objective prong.

In evaluating the objective prong, lower courts, guided by evolving standards of decency, are showing increased receptivity to the idea that the consequences of long-term solitary confinement present a substantial risk of serious harm. For example, in *Ashker v. Brown*, a class action brought on behalf of men confined in California's notorious Pelican Bay prison, the district court recently held that the plaintiffs' claim that their ten to twenty-eight year periods of solitary confinement had deprived them of the basic human needs of "normal human contact, environmental and sensory stimulation, mental and physical health, physical exercise, sleep, nutrition, and meaningful activity" established a serious risk of harm that satisfied the objective prong of Eighth Amendment analysis.[105] Similarly, the court in *U.S. v. Corozzo* refused to apply a state statute that would cut off a

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[100] *Davis v. Ayala*, 135 S.Ct. 2187, 2208 (2015) (Kennedy, J. concurring). Justice Kennedy acknowledged that the issue of solitary confinement had "no direct bearing on the precise legal questions presented by this case." *Id.*
[101] *Id.* at 2210.
[102] *Id.*
[103] *Id.*
[104] While the subjective prong requires actual awareness on the part of prison officials, that awareness may be inferred where the risk to the prisoner is obvious (Farmer v. Brennan, 599 U.S. 825, 842 (1994)) or from the litigation itself.
[105] Doc. 191 at 8, *Ashker*, 2014 U.S. Dist. LEXIS 75347 (N.D. Cal. June 2, 2014). On September 1, 2015, the parties agreed to a landmark settlement in the case that will effectively end indeterminate, long-term solitary confinement in all California state prisons. *See* Ian Lovett, *California Agrees to Overhaul Use of Solitary Confinement*, N.Y. TIMES, Sept. 1, 2015.

defendant's visits from his family on the grounds that "human beings require the company of other humans to stay healthy."[106] In so holding, the court noted that "[s]ubstantial research demonstrates the psychological harms of solitary confinement and segregation."[107]

Given that the Eighth Amendment's objective prong inquiry is situated in the "evolving standards of decency" framework, in evaluating a claim of cruel and unusual punishment, a reviewing court is required to consider the current state of society's knowledge about the harms of solitary confinement. In the "Angola 3" litigation, which involved three prisoners who had been in solitary confinement in the Louisiana State Penitentiary for more than thirty years, the district court held that "social interaction and environmental stimulation are basic human needs."[108] To reach this conclusion, the court rejected the defendants' argument that the list of basic human needs the Supreme Court had recognized to date was exhaustive and that the prison had therefore not deprived plaintiffs of a basic human need. Instead, the court relied on the notion that the Eighth Amendment is grounded in evolving standards of decency to find that, in light of judicial recognition that the Eighth Amendment protects mental as well as physical health, social interaction and environmental stimulation are basic human needs. The court asserted that in our modern social and legal landscape, "recognizing social interaction and environmental stimulation as basic human needs is hardly going out on a radical limb."[109]

> "solitary confinement deprives a person 'of what we ordinarily think of as a life; of the structure of a life; of a social life; of meaningful activities and commitments; in short, of the most elemental form of human dignity.'"

As the Seventh Circuit has explained, "[t]he conditions in which prisoners are housed, like the poverty line, is a function of a society's standard of living. As that standard rises, the standard of minimum decency of prison conditions, like the poverty line, rises too."[110] And there is ample evidence that with respect to human contact, social interaction, and environmental stimulation, the "standard of living" is indeed rising.

It is this last piece that may be the tipping point if the Supreme Court were to hold that long-term solitary confinement is unconstitutional. The Court has said that while "prisoners may be deprived of rights that are fundamental to liberty," they nevertheless "retain the essence of human dignity inherent in all persons . . . [that] animates the Eighth Amendment prohibition against cruel and unusual punishment."[111] The overwhelming body of medical and mental health research demonstrates that social interaction and environmental stimulation are basic human needs. The

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[106] U.S. v. Corozzo, 256 F.R.D. 398, 401 (E.D.N.Y. 2009).
[107] *Id.*
[108] Wilkerson v. Stadler, 639 F.Supp.2d 654, 679 (M.D. La. 2007).
[109] *Id.* at 678.
[110] Davenport v. DeRobertis, 844 F.2d 1310, 1315 (7th Cir. 1988).
[111] Henry, *supra* note 73, at 225.

deprivation of them has been described by Professor Craig Haney as a "painfully long form of social death," observing that "[t]hese are people consigned to living in suspended animation, not really part of this world, not really removed from it, and not really part of any other world that is tangibly and fully human."[112] In that sense, solitary confinement deprives a person "of what we ordinarily think of as a life; of the structure of a life; of a social life; of meaningful activities and commitments; in short, of the most elemental form of human dignity."[113]

What is additionally important for Eighth Amendment purposes is that the eviscerating effect of solitary confinement is not only an affront to the dignity of the people held in isolation, it also diminishes our collective dignity and humanity. This notion of "collective virtue as dignity" is "rooted in communitarianism" and "addresses how members of civilized societies ought to behave and ought to be treated in order to respect the collective dignity of humanity."[114] Often proffered as a moral justification against the use of torture (especially in the wholly fictitious but emotionally compelling 'ticking time bomb' scenario[115]), the Supreme Court has invoked the construct of collective virtue as dignity in the Fourth Amendment and due process contexts.[116] It is especially relevant in the Eighth Amendment context because "the content of human dignity is a corollary of . . . cultural, political, constitutional, and other conditions, which can evolve and change in the course of history."[117]

We are in the midst of such an evolution with respect to the use of solitary confinement. But we can no longer solely depend on hunger strikes and the pain (and sometimes lives) of the people who are locked away to ensure that our justice system comports with the values of a maturing society. It is time for the federal courts, consistent with evolving standards of decency, to change the course of history.

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[112] CDCR Testimony, *supra* note 56, at 8.
[113] R. George Wright, *What (Precisely) Is Wrong with Prolonged Solitary Confinement?*, 64 SYRACUSE L. REV. 297, 310-11 (2014).
[114] Henry, *supra* note 73, at 220-21.
[115] *See* David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425 (2005).
[116] Henry, *supra* note 73, at 226-28 (discussing *Rochin v. Califo*rnia, 342 U.S. 165 (1952) (Fourth Amendment) and *Gonzales v. Carhart,* 550 U.S. 124, 132 (2007) (due process)).
[117] Doron Shultziner, *Human Dignity – Functions and Meanings*, 3 GLOBAL JURIST TOPICS 1, 5 (2003).

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