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Buried Alive: The Need to Establish Clear Durational Standards for Solitary Confinement, 53 UIC J. Marshall L. Rev. 235 (2020)

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BURIED ALIVE: THE NEED TO ESTABLISH CLEAR DURATIONAL STANDARDS FOR SOLITARY CONFINEMENT

RUTH CHAN

Abstract

Hallucination, cognitive degeneration, paranoia, body mutilation, and suicide – these are just some of the many deleterious effects of solitary confinement. Despite decades of overwhelming research repeatedly proving that solitary confinement causes permanent brain damage, the judicial system has resisted taking a hard stance against the practice. Some individuals are kept in these small prison cells for days, while others are kept there for decades. The amount of time an individual can be kept in solitary confinement is almost limitless depending on the jurisdiction.

Following an introduction on the history of solitary confinement, its growth in the United States, and what research has shown us about its effects on humans, this Comment will compare how different federal circuits have ruled in regards to how long someone can be kept in solitary confinement for. Some circuits seem to give more discretion to the prisons in utilizing the practice, while others were more willing to create limits. This Comment will also discuss the different challenges associated with the common legal channels utilized in the fight against solitary confinement by briefly exploring the Eighth Amendment, Fourteenth Amendment, and Qualified Immunity. Finally, this Comment will propose several solutions. The best solution is to ban the practice. If we are going to continue it, then the Supreme Court needs to set clear boundaries as to how long someone can be kept in isolation, mandate a minimum of one hour recreation time absent a legitimate security reason, as well as ensure adequate mental health care to those in solitary confinement. More than just a legal right, these individuals rely on our system to fight for their sanity and most of all, to fight for their right to be human.

I. INTRODUCTION

"[A]bsolute solitude . . . is beyond the strength of man; it destroys the criminal. It does not reform, it kills."[1] Imagine living alone in a dark 7-foot by 14-foot windowless steel box for 23 hours a day with a bare light bulb as your only source of light.[2] The only

1. Gustave de Beaumont & Alexis de Tocqueville, *On the Penitentiary System in the United States and its Application in France (1833)*, HOUSE OF RUSSELL, www.houseofrussell.com/legalhistory/alh/docs/penitentiary.html (last visited Mar. 30, 2019).

2. *See* LEONARD ORLAND, PRISONS: HOUSES OF DARKNESS 72-78 (1975) (describing the conditions in solitary confinement); *see also* Wilkinson v. Austin, 545 U.S. 209, 214 (2005) (illustrating that "inmates must remain in their cells, which measure 7 by 14 feet, for 23 hours per day. A light remains on in the cell at all times, though it is sometimes dimmed . . .").

human contact you have is through a small hole where prison guards give you your food.[3] There are no visits, no conversations, no reading material, and in some cases, no outdoor exercise.[4] Imagine living in these conditions for months, years, and perhaps even indefinitely.[5] This is what one individual, Damon Thibodeaux, went through after 15 years of solitary confinement in a Louisiana correctional facility.[6] After his exoneration, Thibodeaux told senators, "Humans cannot survive without food and water . . . they can't survive without sleep. But they also can't survive without hope."[7] Hope felt so slim for Thibodeaux that he was "on the verge of committing suicide . . . and [was] allowing the state to carry out the sentence of death."[8] Solitary confinement destroys the human mind.[9] Thibodeaux is just one of the many inmates who experienced, and are still experiencing, the effects of solitary confinement.[10]

Another inmate, John Powers, amputated his testicle and scrotum and bit off two fingers while in solitary confinement at the federal ADX Florence supermax prison.[11] Humans fundamentally

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3. ORLAND, supra note 2.

4. *Id.*

5. Sarah Childress, *How Much Time U.S. Prisoners Spend in Solitary*, PBS (Apr. 22, 2014), www.pbs.org/wgbh/pages/frontline/criminal-justice/locked-up-in-america/how-much-time-u-s-prisoners-spend-in-solitary/ (noting that solitary confinement "typically start at 30 days but can last indefinitely" and providing examples of inmates who have served solitary time ranging from 15 to 42 years).

6. Carrie Johnson, *Solitary Confinement Costs $78K per Inmate and Should be Curbed, Critics Say*, NPR (Feb. 25, 2014), www.npr.org/sections/thetwo-way/2014/02/25/282672593/solitary-confinement-costs-78k-per-inmate-and-should-be-curbed-critics-say (discussing how the use of solitary confinement is both costly, counterproductive, and needs systemic reform).

7. *Id.* Thibodeaux also stated that "[y]ears on end in solitary, particularly in death row, will drain that hope from anyone. Because in solitary there's nothing to live for . . . after realizing what my existence would be like for years on end, until I was either executed or exonerated. . . ." *Id.*

8. *Id.*

9. Elizabeth Bennion, *Banning the Bing: Why Extreme Solitary Confinement is Cruel & Far Too Usual Punishment*, 90 IND. L.J. 741, 757-59 (2015) (discussing the many research findings consistently showing deleterious effects and documented changes in brain activity after solitary confinement).

10. Nicole Flatow, *Exonerated Inmate: No One, No Matter the Crime, Can Endure Solitary Confinement for Very Long*, THINK PROGRESS (Feb. 26, 2014), www.thinkprogress.org/exonerated-inmate-no-one-no-matter-the-crime-can-endure-solitary-confinement-for-very-long-26911dfe4685/ (Thibodeaux stated that he had sustained long-term effects from his time in solitary, including "difficulty engaging and speaking with people on some occasion.").

11. *See, e.g.* Emily Coffey, *Madness in the Hole: Solitary Confinement & Mental Health of Prison Inmates*, PUB. INTEREST L. RPTR. 17, 18 (2012), lawecommons.luc.edu/pilr/vol18/iss1/4 (illustrating how John Powers' time in solitary confinement "drove him insane").

need social interaction, environmental stimulation, and activity.[12] Our prison system originally incorporated rehabilitation as one of its goals for inmates.[13] Prisons were established so that inmates could serve their time for their wrongdoing, while also providing inmates the opportunity to rehabilitate themselves so that they can reintegrate into society as law-abiding citizens.[14] Prisoners were given opportunities to develop occupational skills and resolve psychological issues with the goal of reintegration into society in mind.[15] Since the mid-1970s, the prison system changed and adopted a "get tough on crime" approach with punishment, rather than rehabilitation and reintegration, as its main function.[16] This change has led to a drastic growth in the prison population with very little effect on crime rates.[17] Now, the United States has a higher rate of incarceration than any other developed country in the world.[18] Despite the growing research indicating the irreversible and deleterious effects of long-term solitary confinement, prisons have relied on this practice since the early 1970s and continue to do so increasingly.[19]

Many of these prisoners are not the "horrendous" criminals we like to imagine as "deserving" solitary confinement.[20] Rather, many are there for minor crimes or immigration charges.[21] Prisoners can be placed in solitary confinement for many reasons, including

12. Terry A. Kupers, *Isolated Confinement: Effective Method for Behavior Change or Punishment for Punishment's Sake?*, *in* THE ROUTLEDGE HANDBOOK FOR INT'L CRIME & JUST. STUD., 213, 215-16 (Bruce A. Arrigo & Heather Y. Bersot, eds., 2014).

13. Etienne Benson, *Rehabilitate or Punish?*, AM. PSYCHOL. ASS'N (July/Aug. 2003), www.apa.org/monitor/julaug03/rehab.

14. *Rehabilitative Effects of Imprisonment*, CRIME MUSEUM, www.crimemuseum.org/crime-library/famous-prisons-incarceration/rehabilitative-effects-of-imprisonment/ (last visited Mar. 29, 2019).

15. *Id.*

16. *Id.*

17. *Id.*

18. *See* Drew Kann, *5 Facts Behind America's High Incarceration Rate*, CNN (July 10, 2018), www.cnn.com/2018/06/28/us/mass-incarceration-five-key-facts/index.html (stating that the United States has a higher rate even compared to large countries such as India and China, as well as totalitarian countries such as Russia and the Philippines).

19. Monique Peterkin*, "I'm on Fire": A Call to Eradicate Excessive Solitary Confinement Sentences for Nonviolent Offenses*, 60 HOW. L.J. 817, 821 (2017).

20. *See* The Editors, *Solitary Confinement is Cruel and Ineffective*, SCI. AM. (Aug. 1, 2013), www.scientificamerican. com/article/solitary-confinement-cruel-ineffective-unusual/ (noting that many of these inmates are not the "worst of the worst" criminals and in actuality are placed in solitary for nonviolent offenses, non-criminal offenses, immigration charges, as well as being placed in solitary "for their own protection" for being homosexual, transgender, or raped by other inmates).

21. *Id.*

"punishment, for their own protection or as a preventive measure[.]"[22] Former President Barack Obama demanded that our country challenge and rethink solitary confinement practices, as well as address these issues head-on.[23] Despite the call for change and reform, both federal and state courts[24] have instead continued to give almost extreme deference to prison officials in determining that many of these solitary confinement conditions are constitutional.[25] This leaves thousands of prisoners stripped of any meaningful avenue to challenge the constitutionality of their solitary confinement.[26]

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22. Dan Nolan & Chris Amico, *Solitary by the Numbers*, FRONTLINE (Apr. 18, 2017), apps.frontline.org/solitary-by-the-numbers/.

23. *See* Barack Obama, *Why We Must Rethink Solitary Confinement*, WASH. POST (Jan. 25, 2016), www.washingtonpost.com/opinions/barack-obama-why-we-must-rethink-solitary-confinement/2016/01/25/29a361f2-c384-11e5-8965-0607e0e265ce_story.html?noredirect=on&utm_term=.cf0bbb203043 (recognizing that the psychological implications of solitary confinement were supported by many years of research and that the practice should be a measure of last resort, while adopting recommendations from The Justice Department to push for prison reform); *accord Report and Recommendations Concerning the Use of Restrictive Housing*, U.S. DEPT. OF JUST., www.justice.gov/archives/dag/report-and-recommendations-concerning-use-restrictive-housing (last updated Mar. 13, 2017) (stating guideline principles for prison reform, including: housing inmates in the least restrictive setting necessary, having a specific penological purpose when placing inmates in solitary, regularly evaluating existing restrictive housing policies, having a clear plan for returning inmates in less restrictive settings, and finding ways to increase the minimum amount of time inmates spend outside their cell).

24. Though this Comment will use examples found in the federal courts, the issue of solitary confinement affects both federal and state courts and prisons as a systemic issue. "Courts,"as used in this Comment, will refer to both federal and state courts generally.

25. Sandin v. Conner, 515 U.S. 472, 482 (1995) (stating that the Supreme Court has repeatedly expressed that "the federal courts ought to afford appropriate deference and flexibility to state officials" in maintaining prisons should they choose to keep an inmate in solitary); *see* Efrat Arbel, *Devalued Liberty and Undue Deference: The Tort of False Imprisonment and the Law of Solitary Confinement*, 84 SUP.CT.L.REV. 43, 46 (2018), ssrn.com /abstract=3190520 (noting that the courts "have shown significant deference" to a prison's discretionary authority despite overwhelming evidence that the authority was improperly exercised).

26. *See e.g.,* Arbel, *supra* note 25, at 54 (noting that the "internal complaints process is largely ineffective: even when prisoners report abuse, most complaints are dismissed as incredulous.") Challenges against solitary confinement using judicial system tools, such as *habeas corpus* applications, are also ineffective because the "remedy only provides release and does not compensate for harm." *Id.* Prisons often release prisoners in advance of filing a *habeas* application which "can render the matter moot." *Id.* The article also notes that the prison's ability to "'quickly shift the sands denies a prisoner the opportunity to seek accountability . . . [and] when cases do go forward, courts generally take a 'hands-off' approach for reviews of correctional decision-making and grant considerable deference to the discretionary authority of [the prison]." *Id.*

This Comment will explore the general issues with solitary confinement, while also arguing that time limits must be set by the Supreme Court. In doing so, Part II of this Comment will look at the history and trends of solitary confinement in the United States. It will also reveal years of scientific research establishing that solitary confinement causes irreversible psychological effects, even if the isolation is only for a short period of time. More importantly, Part II will address the unconstitutionality of solitary confinement due to the nature of the practice itself, and how our prison systems have no clear prescriptive durational boundaries to determine how long it can keep an inmate in solitary confinement for without violating that individual's constitutional rights. In Part III, this Comment will analyze how different federal circuit courts have ruled on the duration matter. Part III will also analyze how federal circuits have ruled regarding access to outdoor exercise and assess the lack of adequate mental health care for inmates. And finally, in Part IV, this Comment will address these issues with several proposals based on the many years of research conducted on solitary confinement. These include creating definite guidelines on the length of time an inmate can be put in solitary confinement, establishing a mandatory requirement for prisons to give inmates outdoor exercise absent a strong security rationale, and providing adequate mental health care to inmates.

It is time we address the issue recognized by the Supreme Court 40 years ago when it declared that the "length of [solitary] confinement cannot be ignored."[27] Let us not ignore it any further. As vehemently expressed by Charles Dickens while witnessing solitary confinement in the United States, "Nothing wholesome or good has ever had its growth in such unnatural solitude, even a dog . . . would . . . rust away beneath its influence."[28]

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27. *See* Hutto v. Finney, 437 U.S. 678, 686 (1978) (stating that the conditions of confinement were unconstitutional where an inmate was held in isolation in a small cell for long periods of time, sustained various medical diseases, received little food, and had a toilet that could only be flushed from the outside of the cell).

28. Michael Stern, *Like "Being Buried Alive": Charles Dickens on Solitary Confinement in America's Prisons*, AM. PROSPECT (Oct. 8, 2015), prospect.org/article/being-%E2%80%9Cburied-alive%E2%80%9D-charles-dickens-solitary-confinement-america%E2%80%99s-prisons. During his visits to the United States, Charles Dickens described the inmates in solitary confinement as "[men] buried alive . . . to be dug out in the slow rounds of years . . . and in the mean time dead to everything but torturing anxieties and horrible despair." *Id.* Charles Dickens wrote extensively about his strong views against solitary confinement and urged for the United States to abolish this practice. *Id.*

II. BACKGROUND

Understanding the issues behind solitary confinement requires understanding its history and how and why it grew with time. This section will first discuss the historical timeline of solitary confinement's growth in America, as well as briefly explore the international views on the practice. This section will then look at the recent statistics relating to solitary confinement to understand the severity of the issue through its numbers. Finally, this section will explore the history of experimentation and research behind solitary confinement to understand why many argue that this practice is a human rights violation.

A. The History of Solitary Confinement in America

Solitary confinement has a long history in the United States.[29] It became especially common with the rise of the modern penitentiary during the first half of the nineteenth century.[30] The first solitary confinement practice in the United States was founded in the Eastern State Penitentiary of Philadelphia.[31] It was created by Quakers who believed that prisoners who were isolated in their cells with the Bible would want to use that time to "repent, pray[,] and find introspection."[32] Contrary to the Quakers' hopes, the inmates actually became psychotic and resorted to suicide.[33] Due to these occurrences, the practice was subsequently abandoned for the next few decades.[34]

In the late 1800s, the United States Supreme Court addressed the issue of solitary confinement in *In re Medley*.[35] More notably, for the first time, the Court expressed open concern regarding the effects of solitary confinement on inmates.[36] Here, Medley was found guilty of homicide and was ordered to be placed in solitary

29. *See* Brooke S. Biggs, *Solitary Confinement: A Brief History*, MOTHER JONES (Mar. 3, 2009), www.motherjones.com/politics/2009/03/solitary-confinement-brief-natural-history/ (showing the change of solitary confinement during a two-hundred-year span in the United States).

30. Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 CRIME & JUST. 441, 441-42 (2006).

31. Peterkin, *supra* note 19, at 824.

32. *Id.*

33. *Id.*

34. *Id.*

35. *See* In re Medley, 134 U.S. 160, 171 (1890) (describing the solitary confinement conditions experienced by prisoners as "the most important and painful character, and is, therefore, forbidden by . . . the Constitution of the United States").

36. *Id.*

confinement until his date of execution.[37] The Court found that after a month of isolation, many prisoners kept in solitary confinement descended into a "semi-fatuous condition[,] . . . became violently insane[,] . . . committed suicide[,] . . . and did not recover sufficient mental activity to be of any subsequent service to the community."[38] The Court ultimately decided that the "solitary confinement to which the prisoner was subjected [to] . . . was an additional punishment of the most important and painful character, and is, therefore, forbidden by the provision of the Constitution of the United States."[39]

In 1934, the Federal Bureau of Prisons dismissed the Court's concerns and opened Alcatraz prison in San Francisco, which would come to house some of the country's worst criminals.[40] This federal prison was initially used in the late 1850s as a military prison before control of the facility was transferred to the Federal Bureau of Prisons.[41] Most inmates were kept in the general population.[42] Some inmates were housed in "The Hole," which was the prison's solitary-confinement hallway.[43] One room in this hallway, "The Oriental," confined inmates in a cell with no light except for a hole in the ground.[44] These inmates were kept naked and were provided food and water through a small hole in the door.[45] Other Alcatraz

37. *Id.* at 161-62.

38. *See generally* Laura Sullivan, *Timeline: Solitary Confinement in the U.S. Prisons*, NPR (July 26, 2006), www. npr.org/templates/story/story. php?storyId=5579901 (citing *In re Medley* and explaining the evolution of solitary confinement in the United States).

39. *In re Medley*, 134 U.S. at 171.

40. Peterkin, *supra* note 19, at 824 n.38 (discussing Alcatraz's history and how Alcatraz was originally used for the military but was released to the U.S. Department of Justice to house criminals that were too dangerous to be handled by other penitentiaries).

41. *Alcatraz*, FED. BUREAU OF PRISONS, www.bop.gov/about/history/alcatraz.jsp (last visited Apr. 4, 2019).

42. Sullivan, *supra* note 38 (discussing the conditions faced by those in the general population as compared to those kept in the "D block" and in "The Hole").

43. RICHARD DUNBAR, ALCARAZ 35 (1999) (describing how the conditions in the "D block" and in "The Hole" included having only a toilet, a sink, and a steel door, which was shut twenty-four hours a day, leaving the inmates in complete darkness). Dunbar also discussed the mental and emotional toll isolation had on the inmates with increasing time. *Id.*; *see also* STEPHANIE WATSON, ESCAPE FROM ALCATRAZ 22 (2012) (stating that the worst of the pitch-dark cells in the "D block" was "The Oriental," which had a hole in the floor as its bathroom).

44. WATSON, *supra* note 43.

45. *Id.*; *See, e.g.,* Jim Quillen, *My 19 Days in Solitary Confinement on Alcatraz*, THE TELEGRAPH (Jan. 6, 2015), www. telegraph.co.uk/men/thinking-man/11245414/My-19-days-in-solitary-confinement-on-Alcatraz. html (recalling that it was "very cold . . . because of the limited clothing you were allowed . . . [which] were inadequate to keep one warm, because the steel walls and floor of the cell retained the cold").

inmates had clothes, water, and food but were rarely released from their cells and had no contact with other inmates.[46] Alcatraz served as an "experiment" and model for future federal prisons, as extreme segregation at this level had not been tried before.[47]

The use of solitary confinement in prisons began to grow in the mid-1960s and would continue to do so for the next twenty years.[48] This growth was due in part to the state and federal penitentiaries' response to increased violence and disorder within their prisons.[49]

In 1983, the first supermax prison was founded in Marion, Illinois.[50] Modeled after the Alcatraz experiment, this prison was the first of its kind.[51] It was the first prison to adopt a 23-hour-a-day cell isolation rule with no communal yard time.[52] This prison, and others like it, were called "supermax facilities" because they were created to keep inmates in solitary confinement indefinitely.[53] The creation of the supermax was in response to two separate killings on the same day at the Marion penitentiary, and the general rise of prison violence for over a decade.[54] Supermax facilities built in the 1980s established a new norm for the prison system.[55]

In 1989, California built the Pelican Bay Prison, the first correctional facility to be completely used for housing individuals in solitary confinement.[56] The prison had no yard, cafeteria,

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46. Sullivan, *supra* note 38.

47. *U.S. Penitentiary Alcatraz*, NAT'L PARK SERV. (Feb. 27, 2015), www.nps.gov/alca/learn/historyculture/us-penitentiary-alcatraz. htm (discussing the history of Alcatraz and how Alcatraz was the national government's response to post-Prohibition and post-Depression America).

48. Alexander A. Reinert, *Solitary Troubles*, 93 NOTRE DAME L. REV. 927, 940 (2018).

49. *Id.*

50. Sullivan, *supra* note 38.

51. Stephen Richards, *USP Marion – The First Federal Supermax*, 88 PRISON J. 6, 8 (2008) (describing the birth of the supermax prison and how the conditions differed from all other federal penitentiaries at the time, such as the absence of any indoor or outdoor recreational activity and the lack of a "general population" since all prisoners were in solitary confinement).

52. Sullivan, *supra* note 38 (noting that solitary confinement in Marion, Illinois arose after two correctional officers were murdered in two separate incidents on the same day, causing the prison to be on "permanent lockdown"). This created the first prison in the country to adopt 23-hour-a-day cell isolation with no communal yard time. *Id.* Prisoners were no longer allowed to work, attend educational programs, or eat in a cafeteria. *Id.* Within a few years, several other states adopted permanent lockdown at existing facilities. *Id.*

53. Peterkin, *supra* note 19, at 825.

54. Smith, *supra* note 30, at 442. After the Marion incident, the prisoners were confined solitarily in lockdown, the lockdown was never lifted, and the use of solitary confinement became the ordinary solution for problematic prisoners. *Id.*

55. Peterkin, *supra* note 19, at 825.

56. Sullivan, *supra* note 38.

classrooms, or shops.[57] The inmates spent "[twenty-two-and-a-half] hours a day inside an [eight-by-ten-foot] cell. The other [one-and-a-half] hours were spent alone in a small concrete exercise pen."[58] Following the California Pelican Bay Prison, America saw a boom of supermax prisons in the 1990s.[59] This type of prison was built in over a dozen states, including Oregon, Mississippi, Indiana, Virginia, and Colorado.[60] Along with the growth of new supermax prisons, the United States saw an increase of longer duration and higher intensity solitary confinement practices throughout the country.[61]

The growth of solitary confinement practices was not met without concern.[62] The Supreme Court in *In re Medley* expressed doubt and concern over these practices in the early years of solitary confinement development.[63] In 1978, the Court in *Hutto v. Finney* also acknowledged the importance of considering the duration and conditions in determining the constitutionality of a sentence.[64] More recently, Justice Kennedy stated in a 2015 concurring opinion that "[y]ears on end of near-total isolation exact a terrible price."[65] Despite being a leader of mass incarceration and punitive isolation practices for decades, California also announced recent prison reforms in solitary confinement, including significantly reducing

57. *Id.*

58. *See* Peterkin, *supra* note 19, at 826 (stating that a federal judge found that there was no constitutional basis for shutting down the prison despite finding that the conditions were borderline humanly tolerable and allowed for the states to determine this for themselves). Pelican Bay Prison was also not originally intended to house prisoners in insolation for decades. *Id.*

59. Sullivan, *supra* note 38.

60. *Id.* (noting that Colorado's supermax facility was known as the "Alcatraz of the Rockies").

61. 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).

62. *See, e.g.,* Hudson v. McMillian, 503 U.S. 1, 16-17 (1992) (Blackmun, J., concurring) (stating that unnecessary pain can include physical and psychological pain). Blackmun stated that the Court's precedent did not support psychological pain as being cognizable for constitutional purposes, but nonetheless remarked that psychological pain can be more than *de minimis*, which is what the Court's precedent had said was not actionable under the Eighth Amendment. *Id.* He analogized the quantification of pain and suffering sustained from solitary confinement to that which we award for damages in the tort context. *Id.*

63. *In re Medley*, 134 U.S. at 171.

64. Daniel H. Goldman & Ryan Brimmer, *U.S. Supreme Court Cases,* SOLITARY WATCH, https://solitarywatch.org/resources/u-s-supreme-court-cases/ (last visited Apr. 24, 2020).

65. Davis v. Ayala, 135 S. Ct. 2187, 2210 (2015) (Kennedy, J., concurring) ("[C]ommon side effects of solitary confinement include anxiety, panic, withdrawal, hallucination, self-mutilation, and suicidal thoughts and behaviors.").

the numbers detained in solitary, limiting how the practice will be used in the future, and the maximum time a prisoner can be kept in solitary.[66] Former President Obama also demanded prison reform in solitary confinement practices and stated that solitary confinement "undercuts the second chance" engrained in our country of opportunity.[67] Moreover, the Association of State Correctional Administrators (ASCA) and the Arthur Liman Center for Public Interest Law at Yale Law School recently released an article stating that the "[t]wo areas of special concern are the impact of mental illness and the length of time individuals spend in restrictive housing."[68] However, despite recognizing how damaging isolation prison practices are, our courts have done little to regulate the boundaries of solitary confinement use.[69]

B. International Views Against Solitary Confinement

The international community has expressed negative opinions in response to the United States' expanding solitary confinement practices.[70] Based on what has been voiced thus far, it would seem the community believes that lengthy segregation sentences are

66. Reinert, *supra* note 48, at 940; *see* LISA GUENTHER, *in* HELL IS A VERY SMALL PLACE: VOICES FOR SOLITARY CONFINEMENT 212 (Casella, et al. eds., 2016) (describing solitary confinement practices in California and how California violated a Supreme Court order "to address its prison overcrowding crisis [but] produced conditions so intolerable that they violate the Eighth Amendment ban on cruel and unusual punishment"); *see also, e.g., Key Reforms to California's Use of Solitary Confinement*, PRISONERS WITH CHILD., www.prisonerswithchildren.org/wp-content/uploads/2015/09/PB-settlement-summary_short-version.pdf (last visited Mar. 30, 2019) (detailing some key reforms to California's solitary confinement practices, including not being able to impose indeterminate solitary sentences, having prisoners enter into a step-down program after serving their determinate sentence, capping the maximum time spent in solitary at 10 continuous years, and allowing prisoners to monitor compliance with the settlement agreement by meeting with California prison officials to "review the progress of the settlement, discuss programming and step-down program improvements, and monitor prison conditions").

67. Obama, *supra* note 23.

68. YLS Today, *ASCA and Liman Center Release Two New Reports on Solitary Confinement*, YALE L. SCH. (Oct. 10, 2018), www.law.yale.edu/yls-today/news/asca-and-liman-center-release-two-new-reports-solitary-confinement.

69. Reinert, *supra* note 48, at 941.

70. Juan E. Mendez, et al., *Seeing into Solitary: A Review of the Laws and Policies of Certain Nations Regarding Solitary Confinement of Detainees*, WEIL 15, 22 (Sept. 2016), www.weil.com/~/media/files/pdfs/2016/un_special_report_solitary_confinement.pdf (stating that many of the surveyed nations had statutory limits of approximately 30 days or less for solitary confinement as a disciplinary sanction and at least half of the jurisdictions reviewed showed improvement in amending or banning solitary practices).

inhumane and cruel.[71] For example, the Inter-American Court of Human Rights held that "prolonged isolation and coercive solitary confinement are . . . cruel and inhuman treatments, damaging to the person's psychic and moral integrity and the right to respect of the dignity inherent to the human person."[72] The European courts have also held that long term, indefinite solitary confinement constitutes degrading and inhumane treatment despite extraordinary circumstances, and despite an inmate having some access to the outside world.[73] In addition, the European Court of Human Rights stated that an inmate could not be held in isolation "indefinitely."[74]

In 2008, the United Nations characterized the "prolonged isolation of detainees" as something that can constitute "cruel, inhuman or degrading treatment or punishment and, in certain instances, may amount to torture."[75] In August 2011, the U.N. Special Rapporteur concluded that "any period of solitary confinement in excess of 15 days" is considered as "prolonged solitary confinement" because of the irreversible effects isolation can have on a person at that point.[76] The report also stated that "negative health effects occur [after] only a few days in solitary confinement, and the health risks rise with each additional day spent in such conditions."[77] The Special Rapporteur concluded that the "use of solitary confinement should be kept at a minimum, used in very exceptional cases, for as short a time as possible, and only as a last resort."[78] It also concluded that there should not be

71. Jules Lobel, *Cruel and Unusual Punishment: Litigating Under the Eighth Amend.: Prolonged Solitary Confinement and the Const.*, 11 U. PA. J. CONST. L. 115, 122 (2008).

72. Miguel Castro-Castro Prison v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 160, ¶ 323 (Nov. 25, 2006).

73. Lobel, *supra* note 71, at 125; *see* Ramirez Sanchez v. France, App. No. 59450/00, 45 Eur. H.R. Rep. 49, 128, 131 (2007), www.legal-tools.org/doc/84b1ed/pdf/ (stating that prisoners had two hours of outdoor exercise, family visits, one hour of indoor exercise, and recreational material).

74. Lobel, *supra* note 71, at 124.

75. Manfred Nowak (Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), P 77, U.N. Doc. A/63/175 (July 28, 200).

76. Juan E. Mendez, (Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), P 9, 22 U.N. Doc. A/66/268 (Aug. 5, 2011) (stating whether solitary confinement constitutes torture depends on the circumstances and listing several scenarios that would be especially problematic for international law); *accord* Smith, *supra* note 30, at 471 (indicating that studies on solitary confinement have shown that effects can start within hours or a few days).

77. Mendez, *supra* note 70, at 17.

78. *Id.* at 4 (stating also that there should be "established safeguards in place after obtaining the authorization of the competent authority subject to independent review.") Mendez implored for the prohibition of indefinite solitary confinement as a judicially imposed sentence or disciplinary measure and for

indefinite solitary sentences and that there should be determinate max time a prisoner can be kept in solitary before it is deemed "prolonged."[79]

The U.N.'s Committee Against Torture (CAT) also reviewed the United States' practice of solitary confinement.[80] CAT expressed concern over isolating prisoners for long periods of time and the effect such isolation has on their mental health.[81] CAT addressed its concerns by proposing that "the State party . . . review the regime imposed on detainees in 'supermax prisons,' in particular the practice of prolonged isolation."[82]

C. Solitary Confinement Statistics in the United States

The United States still sees an increasingly wide-spread use of solitary confinement practices across the country.[83] A reported twenty percent of federal and state prisoners, and eighteen percent of local jail detainees spent time in solitary confinement.[84] The Bureau of Justice Statistics stated that approximately 81,000 men and women were under solitary confinement between 2000 and 2005.[85] Today, that number has increased to between 80,000 and 100,000 men and women, not including individuals housed in juvenile facilities, immigrant detention centers, and jails.[86]

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there to be "a maximum term or days beyond which solitary confinement is considered prolonged. *Id.*; *see* Reinert, *supra* note 48, at 964 (noting that the Special Rapporteur also endorsed the Istanbul Statement on the Use and Effects of Solitary Confinement, where it concluded that solitary confinement "should only be used in very exceptional cases, for as short a time as possible and only as a last resort").

79. Mendez, *supra* note 70, at 16.

80. Reinert, *supra* note 48, at 965.

81. Lobel, *supra* note 71, at 122-23.

82. U.N. Comm. Against Torture, 36th Session, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Conclusions and Recommendations of the Committee Against Torture: United States of America, CAT/C/USA/CO/2, at P 9 (May 19, 2006), www.aclu.org/other/conclusions-and-recommendations-committee-against-torture.

83. Haney & Lynch, *supra* note 61, at 491.

84. Reinert, *supra* note 48, at 928-29.

85. Peterkin, *supra* note 19, at 827 (stating that the census figures do not account for inmates in juvenile facilities, immigrant detention centers, or local jails who are in solitary confinement).

86. Terrence McCoy, *When Solitary Confinement Becomes Cruel and Unusual Punishment*, PORTLAND PRESS HERALD (Jan. 30, 2016), www.pressherald.com/2016/01/30/when-solitary-confinement-becomes-cruel-and-unusual-punishment (discussing the challenges with prison reform, particularly for solitary confinement and noting how some facilities do not keep records or disclose how often they isolate inmates); *Solitary Confinement Facts*, AM. FRIENDS SERV. COMM., www.afsc.org/resource/solitary-confinement-facts (last visited Apr. 22, 2020).

These numbers also are partially due to present systemic prison issues.[87] The nation is currently seeing unprecedented rapid growth in the general prison population, resulting in extreme overcrowding and management control issues.[88] This growth has led prison officials to resort to segregating and isolating the inmates viewed as "troublesome."[89] This solution is especially used to remove and confine prison gangs or those suspected of being gang members.[90] In effect, these prison officials have "driven the renewed embrace of solitary confinement" because of their often first-resort solution in isolating prisoners.[91] Moreover, prison officials are given wide deference and are shielded heavily against litigation through legal tools such as the doctrine of qualified immunity.[92] This doctrine gives strong protection to governmental officials against liability when performing discretionary functions so long as their conduct does not violate a clearly established statutory or constitutional rights of which a reasonable person would have known.[93]

D. Experimental Findings of Solitary Confinement

Science and research have played an integral role in the legal discussion regarding the constitutionality and effects of solitary confinement.[94] Experiments performed on both animals and human subjects have shown a strong correlation between adverse psychological changes and increased time spent in isolation.[95] More importantly, these experimental results mimicked the findings observed from inmates who were surveyed and interviewed about their experiences while in solitary.[96] These studies provide a crucial insight into the toxic effects of this isolation practice and its

87. *See* Haney & Lynch, *supra* note 61, at 491 (discussing the rapid surge in the general prison population and its effect on the facilities).

88. *Id.*

89. *Id.*

90. *Id.* at 492.

91. Reinert, *supra* note 48, at 937.

92. *See, e.g.*, Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982) (stating how government officials are protected by qualified immunity from constitutional violation liability if pled as an affirmative defense unless the situation fell under certain limited circumstances).

93. *Id.* at 818.

94. Kirsten Weir, *Alone, in 'The Hole'*, AM. PSYCHOL. ASSOC. (May 2012), www.apa.org/monitor/2012/05/solitary (discussing the effects solitary confinement has on mental health and how scientific research has been used to better understand this issue).

95. *See* discussion *infra* Sections II.D.1-3 (discussing the experimental results supporting such correlation).

96. Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U.J.L. & POL'Y 325, 345 (2006), openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1362&context=law_journal_law_policy.

irreversible effect on brain functioning.[97]

1. Animal Experiments

In the 1950s, Dr. Harry Harlow, an American psychologist who dedicated his studies to understanding the effects of companionship, human needs, and social isolation,[98] stated that human social isolation is a problem of "vast importance" with deleterious effects.[99] He conducted a famous experiment using rhesus monkeys to understand these effects.[100] The monkeys were placed in a solitary chamber nicknamed "the pit of despair," as it was shaped like an inverted pyramid with slippery slides so that climbing out was impossible.[101] After a mere day or two, Dr. Harlow reported that the monkeys underwent significant changes. He stated that one could "presume at this point that [the monkeys] [found] their situation hopeless." Dr. Harlow found that monkeys kept in isolation engaged in irregular behavior such as "rocking in place for long periods" and "mutilating themselves."[102] The experiment also found that the longer the monkey stayed in isolation, the more severe the symptoms were – there was a direct correlation between time and the effects.[103] Monkeys who were isolated for twelve months "almost obliterated the animals socially . . .."[104] Dr. Harlow's study provided important initial insight into

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97. *Id.* at 347-48.

98. DEBORAH BLUM, LOVE AT GOON PARK: HARRY HARLOW AND THE SCIENCE OF AFFECTION (2002).; Kendra Cherry, *Biography of Psychologist Harry Harlow*, VERYWELLMIND, https://www.verywellmind.com/harry-harlow-biography-1905-1981-2795510 (updated Mar. 23, 2020).

99. Harry F. Harlow, et al., *Total Isolation in Monkeys*, DEPT. OF PSYCH. PRIMATE LAB. & REG'L PRIMATE RES. CTR. 90 (Apr. 28, 1965), www.ncbi.nlm.nih.gov/pmc/articles/PMC285801/pdf/pnas00159-0105.pdf (stating that human social isolation causes effects that are "deleterious to personal adjustment, normal heterosexual development, and control of aggressive and delinquent behaviors").

100. *See generally* Jason M. Breslow, *What Does Solitary Confinement Do to Your Mind?*, PBS (Apr. 22, 2014), www.pbs.org/wgbh/frontline/article/what-does-solitary-confinement-do-to-your-mind (discussing the psychological effects caused by solitary confinement, the experiments exploring these effects, and their findings).

101. *Id.*

102. *Id.* (The experiment found that the isolated monkeys ended up being "profoundly disturbed, given to staring blankly and rocking in place for long periods, circling their cages repetitively, and mutilating themselves").

103. *Id.* (stating that those that had been caged the longest were unable to readjust). Monkeys held for three months in isolation had debilitating effects that were reversible. *Id.* at 92. Isolation extending through the first six months "severely impair[ed] the potentiality for socialization." *Id.* at 93. The researchers stated that they initially thought that 12 months of isolation would produce no additional decrement, but they were proven false. *Id.* at 94.

104. Peterkin, *supra* note 19, at 829 (stating that twelve months of isolation

the psychological effects isolation can have on living beings.[105]

In another animal experiment, Dr. Michael J. Zigmond, Professor of Neurology at the University of Pittsburgh, stated that there were neurological differences observed in an experiment conducted in 2016 involving solitary confinement of laboratory mice.[106] In this research, some of the mice were placed in "shoebox housing," while other mice were placed in "enriched environments" that allowed interaction with other mice and had "freer range of movement and exercise equipment."[107] The study showed that the mice in shoebox housing had "a measurable difference consisting of simpler neurons, fewer connections between those neurons, and fewer synapses in the brain compared to [the] socialized mice" in the enriched environment.[108] Dr. Zigmond's experimental results further supported what was observed in Dr. Harlow's experiment and exposed a finding of deleterious neurological effects on living beings placed in isolation.[109]

2. Social Experiments on Humans

Social experiments were also performed to learn about the effects of solitary confinement observed in humans.[110] Though these experiments are rare nowadays, the experiments in the 1950s gave us a rare glimpse as to how solitary conditions actually affected human subjects.[111]

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almost obliterated the animals socially); *see also* Harlow, *supra* note 99, at 96 (stating that at 12 months, "the isolates were highly fearful and showed almost no positive social behavior and no aggression").

105. *Id.*; Harlow, *supra* note 99 and accompanying text; Breslow, *supra* note 100-104 and accompanying text.

106. Carol Schaeffer, "*Isolation Devastates the Brain": The Neuroscience of Solitary Confinement*, SOLITARY WATCH (May 11, 2016), solitarywatch.org/2016/05/11/isolation-devastates-the-brain-the-neuroscience-of-solitary-confinement/ (discussing the neurological effects of solitary confinement on the human brain).

107. *Id.* The housing was set up to emulate the solitary housing arrangements: some of the mice were put in stacks of small containers where "[t]hey may be able to sense each other's presence, but cannot see or interact in any way," while other mice were placed in a larger box which allowed mice to freely interact with one another, emulating the general prison population. *Id.*

108. *Id.* Dr. Zigmond obtained special permission in order to conduct the experiment because the animal care boards found "solitary housing [as] unacceptable under express circumstances." *Id.*

109. Schaeffer, *supra* notes 107-09 and accompanying text.

110. *See* sources cited *infra* notes 111-19 and accompanying text (discussing the different experiments that tested the effects of solitary confinement on humans).

111. Michael Mechanic, *What Extreme Isolation Does to Your Mind*, MOTHER JONES (Oct. 18, 2012), www.motherjones.com/politics/2012/10/donald-o-hebb-effects-extreme-isolation/ (explaining the different experiments performed in the 1950s investigating the effects of isolation on humans and noting how

In 1951, Dr. Donald Hebb, a Professor of Psychology at McGill University, conducted an experiment to study how sensory isolation affects human cognition.[112] His experiment applied extreme isolation for six weeks to paid male graduate school students to see what effects, if any, the isolation had on them.[113] What he found was that the majority of the subjects lasted no more than a few days in isolation, and none lasted more than a week.[114] Almost all of the subjects reported similar experiences of being "unable to think clearly about anything for any length of time" and experiencing hallucinations, childish emotional responses, extreme restlessness, and inability to perform grade-school tasks.[115] This experiment was crucial in showcasing the actual cognitive effects isolation has on humans, rather than just animals.[116]

More recently, in 2008, clinical psychologist Ian Robbins recreated Dr. Hebb's experiment by isolating six subjects for 48-hours in a sound-proofed room.[117] Similar to the symptoms experienced by the subjects in Dr. Hebb's experiment, the Robbin's subjects also experienced psychological symptoms including anxiety, extreme emotions, paranoia, and significant mental impairment.[118] This experiment further supported the idea that isolation does indeed affect humans and those effects were able to

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experiments like these are rare nowadays because of challenges in receiving approval from the institutional review boards).

112. *Id.*

113. *Id.* Hebb paid male graduate students $20 a day to stay in small chambers that were about a meter wide and a meter long. *Id.* The subjects were not completely deprived of human interaction as they were given food and escorted to the bathroom by humans. *Id.* The subjects all "wore goggles and earphones and [had] some sort of noise, just white noise, from a loudspeaker." *Id.* The subjects also wore gloves and cardboard tubes over their arms to limit their sense of touch, as well as a U-shaped pillow to cover their ears and block any outside noise. *Id.* The theory was to block continuous sensory input to the brain. *Id.*

114. *Id.*

115. *Id.* The cognitive tests showed that the subjects' mental faculties were temporarily impaired. *Id.* The subjects were seen "arguing that supernatural phenomena were real" despite not holding these beliefs when interviewed later. *Id.* The subjects also sustained both visual and oratory hallucinations – including seeing nothing but dogs, hearing a music box playing, hearing a full choir while seeing a sun rising over a church, etc. *Id.* One also felt like his arm was being hit by pellets fired "from a miniature rocket ship he saw . . .." *Id.*

116. *Id.*

117. Michael Bond, *How Extreme Isolation Warps the Mind*, BBC (May 13, 2014), www. bbc.com/future/story/20140514-how-extreme-isolation-warps-minds (discussing the effects of isolation on the human mind in general, not just in the prison setting, and how BBC conducted an experiment with Ian Robbins to recreate the Hebb experiment).

118. *Id.* The volunteers also suffered hallucination, including seeing a "heap of 5,000 empty oyster shells; a snake; zebras; tiny cars; the room taking off; mosquitos; fighter planes buzzing around." *Id.*

manifest within a short period of time.[119]

Dr. Hebb's and Dr. Robbins' experiments provide us with factual data as to the effects sensory deprivation and isolation have on humans.[120] This is important in allowing us to understand the experiences and eventual psychological changes of inmates placed in solitary confinement.

3. Observations of Inmates in Solitary Confinement

Studies have shown that solitary confinement can cause an individual to become a greater danger to themselves.[121] Inmates living in isolation self-mutilate at a higher rate than those living in the general prison population.[122] Suicide is another big concern for those in solitary confinement – one research study found that half of all suicides that took place in prisons between 1999 and 2004 were from those in solitary confinement.[123] A 2014 study showed that half of the inmates who engaged in acts of self-harm or potentially fatal self-harm, were inmates held in solitary confinement, though only seven percent of those subjects surveyed were in solitary.[124]

Stuart Grassian, a board-certified psychiatrist and faculty member of Harvard Medical School, interviewed hundreds of inmates who were placed in solitary confinement and found that a third of them were "actively psychotic and/or acutely suicidal."[125] He found that other symptoms manifesting from isolation included "psychiatric syndrome, characterized by hallucinations; panic attacks; overt paranoia; diminished impulse control; hypersensitivity to external stimuli; and difficulties with thinking, and concentration and memory."[126]

In addition, forensic psychiatrist Terry Kupers also interviewed thousands of supermax prisoners in the United States.[127] Dr. Kupers found that the conditions of supermax cells cause "great harm to individuals suffering from serious mental

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119. *Id.*

120. *See infra* Section II.D.2 (discussing the experiments conducted by the two doctors).

121. Breslow, *supra* note 100.

122 *Id.*

123. *Id.*

124. Fatos Kaba, et al., *Solitary Confinement and Risk of Self-Harm Among Jail Inmates*, AM. J. PUB. HEALTH (Mar. 2014), www.ncbi.nlm.nih.gov/pmc/articles/PMC3953781.

125. Kupers, *supra* note 12, at 213, 215-16.

126. Peterkin, *supra* note 19, at 831 (illustrating how inmates had crippling obsessions, including one inmate who stood in front of a toilet for hours because of his obsession with emptying out his bladder and wanting to feel like it was completely empty).

127. Bond, *supra* note 118.

illness [and] also cause great harm to those who are relatively stable from a psychiatric perspective."[128] His findings also concluded that prisoners who spent long periods of time in solitary confinement exhibited anxious, paranoid, and angry behavior and had difficulty with concentration, cognition, and memory.[129]

Moreover, based on his study on Pelican Bay Prison inmates, psychologist Craig Haney found that these effects follow the inmates after their release from solitary or prison – prisoners "lose the ability to initiate or to control their own behavior, or to organize their own lives."[130] Dr. Haney attributed these inabilities to the complete lack of control the inmates experienced while in solitary.[131] His research showed that prisoners often experienced "apathy, lethargy, depression, and despair . . . [and] [i]n extreme cases, prisoners may literally stop behaving."[132]

These studies provide important insight as to the psychological and physiological effects solitary imprisonment truly has on current inmates.[133] Moreover, these effects were consistently present in inmates throughout the different experiments.[134]

III. ANALYSIS

This section analyzes the various ways in which solitary confinement claims have been litigated and how the courts in different federal circuits have responded. This analysis begins by examining the two legal channels commonly used by inmates in lawsuits to challenge the issue of solitary confinement – the Eighth

128. Kupers, *supra* note 12, at 24-25.

129. *Id.* at 25. He observed that prisoners in solitary confinement "deteriorate and become more psychiatrically impaired and less capable of functioning back in the community." *Id.* The prison systems structured themselves in a way where "it is as if there is a wish to hide the damage wreaked by years of solitary confinement" by putting prisoners who have completed their prison terms in psychiatric hospitals or finding them guilty of a new, in-prison crime because of his actions while being locked up in isolation. *Id.*

130. Breslow, *supra* note 100 (discussing the possibility for inmates to adjust after being released).

131. *Id.* (stating that some inmates in solitary were found to "lose the ability to initiate behavior of any kind – to organize their own lives around activity and purpose").

132. *Id.* (stating that some inmates were unable to interact with people after they were given the opportunity to do so for the first time, that this was due to being isolated in their cell, and which such isolation resulted in social atrophy). "[T]he anxiety which surrounds social interaction can be extremely disabling and problematic for people who are released from solitary confinement, either released back into the larger prison community, or even more poignantly, released from solitary confinement into the larger society." *Id.*

133. *See* sources cited *supra* notes 122-134 and accompanying text (discussing the effects observed on inmates in solitary).

134. *Id.*

and Fourteenth Amendments. This analysis then examines the legal protection afforded to defendants via the qualified immunity doctrine. After laying the foundation upon which litigation is commonly based, this analysis will discuss the recent rulings of the different circuit courts in response to these claims. Furthermore, this analysis will briefly discuss the circuit split on the issue of whether a prison can deny inmates outdoor exercise without violating the Eighth Amendment, and the general inadequacies of mental health care for inmates in solitary confinement. Finally, this analysis will conclude by discussing how the lack of prison uniformity and insufficient mental health care, coupled together, result in prison conditions that violate the Eighth and Fourteenth Amendments.

A. Litigating Solitary Confinement

Solitary confinement issues most commonly arise out of Fourteenth Amendment and Eighth Amendment claims.[135] Bringing a claim under either Amendment poses its own individual challenges, as well as ruling differences among the circuit courts.[136] Moreover, these plaintiffs must anticipate and be able to argue against the defendant's qualified immunity protection to be successful in their claims.

1. Litigating Under the Fourteenth Amendment

The Fourteenth Amendment protects individuals from having their life, liberty, or property deprived without due process of law.[137] An inmate must challenge the conditions of his confinement to establish a due process violation by showing that the defendants deprived him of a constitutionally protected liberty interest.[138] A liberty interest is deprived if the defendants "impose atypical and

135. *See* discussion *infra* Section III.A (discussing the challenges behind litigating under the Eighth Amendment and Fourteenth Amendment); *see also* Karemet A. Reiter, *The Most Restrictive Alternative: A Litigation History of Solitary Confinement in U.S. Prisons, 1960-2006*, 57 STUDS. IN L., POLS., & SOC'Y (2012) 84-85, cloudfront.escholarship.org /dist/prd/content/qt3db064tt/qt3db064tt.pdf (discussing the history of litigation and how the expansion of habeas corpus rights, application of the Eighth Amendment to state prisoners, and authorization of suits against prison officials under the Civil Rights Act provided inmates with more tools to challenge the constitutionality of their solitary confinement sentences).

136. *Id.*

137. U.S. CONST. amend. XIV, § 1.

138. Steffey v. Orman, 461 F.3d 1218, 1221-22 (10th Cir. 2006) (holding that an inmate did not sustain an "atypical and significant hardship" where the prison restricted his right to receive money from another inmate's family member).

significant hardship on the inmate in relation to the ordinary incidents of prison life."[139]

What qualifies as an "atypical and significant hardship" has not been easy to define for prisoners wanting to litigate these matters. Indeed, the Supreme Court in *Wilkinson v. Austin* stated that a "baseline from which to measure what is atypical and significant" has not been identified for any prison system.[140] The Court also found it unnecessary to define what "atypical and significant hardship" entailed because the conditions sustained in that particular case passed constitutional muster "under any plausible baseline."[141] Since then, the Court has yet to clearly define the appropriate baseline but has instead directed that question for the lower courts to decide on their own.[142] This decision has caused the lower courts to use varying approaches to address the issue, without any clear baseline in sight.[143] Despite the divergent approaches, the circuits are all in agreement that no procedures are required before placing an individual in solitary confinement if for a "short" period of time.[144]

Procedural due process under the Fourteenth Amendment entitles inmates to know why they are placed in solitary confinement, as well as an opportunity to rebut and be heard as to why they should not be placed there.[145] Some prisons allow inmates to object before the final level of review as another layer of protection against a potential erroneous deprivation of rights.[146] Still, the Supreme Court has held that an inmate's solitary

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139. *Sandin*, 515 U.S. at 484.

140. *Wilkinson*, 545 U.S. at 223.

141. *Id.*

142. Reinert, *supra* note 48, at 941-42; *see e.g.,* Williams v. Sec'y Pa. Dep't of Corr., 848 F.3d 549, 559-60 (3d Cir. 2017) (applying *Sandin v. Conner* and *Wilkinson v. Austin* to guide the court as to what constitutes as an "atypical and significant" hardship).

143. Reinert, *supra* note 48, at 941-42 (contrasting the different approaches taken by the Second, Seventh, and Tenth Circuits in determining whether placement in segregation is atypical and significant); *see e.g.*, Grissom v. Roberts, 902 F.3d 1162, 1169-73 (10th Cir. 2018) (applying the DiMarco four-factor test for the inmate's Fourteenth Amendment claim).

144. Reinert, *supra* note 48, at 943 (stating that "short" can range from thirty to one hundred days or longer and noting that fifteen days constitutes as "cruel and inhuman treatment," prohibited by international law as suggested in the United Nations Special Rapporteur on Torture).

145. *Id.* at 943; *see also* Baldwin v. Hale, 68 U.S. 223 (1864) (declaring that "the central meaning of procedural due process has been clear: Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified."); *see also Wilkinson*, 545 U.S. at 226 (stating that "our procedural due process cases have been consistently . . . the most important procedural mechanisms for purposes of avoiding erroneous deprivations).

146. *Wilkinson*, 545 U.S. at 226.

confinement is constitutional despite finding that a liberty interest exists for a prisoner.[147]

Even in instances where solitary confinement conditions are considered "atypical and significant" by a court, minimal procedures actually apply.[148] Procedural due process is therefore unable to regulate and protect inmates against long term or permanent solitary confinements, the conditions experienced in solitary, or the decision-making factors to determine which inmates are placed in solitary.[149]

Individuals who choose to litigate their solitary confinement claims can do so under the Fourteenth Amendment.[150] However, they should be aware that there are challenges because of the Supreme Court's undefined baseline for measuring "atypical and significant hardship" and the varying opinions lower courts may have in defining that baseline for a particular case.[151]

2. Litigating Under the Eighth Amendment

The Supreme Court held that "confinement in . . . an isolation cell is a form of punishment subject to scrutiny under Eighth Amendment standards."[152] The Eighth Amendment prohibits the infliction of "cruel and unusual punishment."[153] It is not surprising that many constitutional claims regarding solitary confinement arise under the Eighth Amendment in light of the extreme nature of the practice.[154] It has been argued that solitary confinement is a

147. *Id.* at 224-30 (applying the *Mathews* test and concluding that the prison's interest in prison management and prison guard safety outweighed the process and the inmate's liberty interest); *see* Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (establishing a balancing test to determine whether a prison procedure is constitutional by assessing: (1) the private interest affected by the government action; (2) the risk of an erroneous deprivation of an interest because of the procedure used and the probable value of other or additional procedural safeguards if any; and (3) the state's interest); *accord* Perry v. Swanson, No. 16-2444, slip. op. at 10 (1st Cir. Aug. 29, 2018) (applying the *Mathews v. Eldridge* balancing test).

148. Reinert, *supra* note 48, at 943.

149. *Id.* at 944.

150. *See* discussion *supra* Section III.A.1 (discussing the requirements and challenges when litigating solitary confinement claims under the Fourteenth Amendment).

151. *Id.*

152. *Hutto*, 437 U.S. at 685; *accord* Robinson v. California, 370 U.S. 660, 667 (1962) (holding that the Eighth Amendment is applied against the states by way of incorporation because of the Due Process Clause of the Fourteenth Amendment).

153. U.S. CONST. amend. VIII.

154. *See* Weems v. United States, 217 U.S. 349 (1910) (striking down a sentence for violating the Eighth Amendment for the first time in the Supreme Court).

breed of "cruel and unusual punishment under the Eighth Amendment because (1) the conditions are typically horrid and (2) sentence lengths can be excessively and arbitrarily long."[155] In response, the courts have often focused on the physical conditions sustained by the inmates in the cell, rather than the psychological harm or the excessive use of solitary confinement in general when dealing with claims arising under the Eighth Amendment.[156]

To establish an Eighth Amendment claim, inmates must satisfy a two-pronged test established by the Supreme Court which is comprised of an objective and a subjective component.[157] The objective prong requires a claimant to show that the challenged condition deprived them of a "basic human need" or that the conditions were a "substantial risk of serious harm."[158] The subjective prong requires claimants to show that prison officials acted with "deliberate indifference" in subjecting the inmate to these conditions despite knowing the harm or risk of harm.[159] There are also additional considerations to this test — whether the punishment is proportional to the prison's interest, the length of the incarceration, and whether the punishment transgresses our "evolving standards of decency."[160]

The difficulty of litigating under the Eighth Amendment lies in the fact that courts need to balance the inmates' constitutional rights with the large deference the courts have historically provided to prison officials.[161] The tension between these two conflicting interests was illustrated in *Madrid v. Gomez*, where a Northern District of California court found that "[t]he Eighth Amendment simply does not guarantee that inmates will not suffer some psychological effects from incarceration or segregation" in addressing the first prong.[162] However, the court found the second

155. Peterkin, *supra* note 19, at 822.

156. *Id.*

157. Farmer v. Brennan, 511 U.S. 825, 834 (1994); Laura Rovner, *in* HELL IS A VERY SMALL PLACE: VOICES FOR SOLITARY CONFINEMENT 181 (Jean Casella, et al. eds., 2016).

158. Rovner, *supra* note 157.

159. *Id.*

160. Reinert, *supra* note 48, at 944-45.

161. *See* Mikel-Meredith Weidman, *The Culture of Judicial Deference and the Problem of Supermax Prisons*, 51 UCLA L. REV. 1505, 1523-24 (2004) (stating that supermax prisons are seen as the "prison of the future" and that the courts' solution to resolving constitutional issues regarding solitary confinement "provides a glimpse of the vulnerability of inmates' constitutional rights in the face of evolving prison practices").

162. Madrid v. Gomez*,* 889 F. Supp. 1146, 1264 (N.D. Cal. 1995) (stating also that a "severe reduction in environmental stimulation and social isolation can have serious psychiatric consequences for some people" and that it was clear the inmates in this case sustained psychiatric deterioration that "occurred in correlation with placement" in solitary confinement). The plaintiffs here were challenging the constitutionality of conditions they experienced while

prong was satisfied as the prison officials acted with indifference and "crossed the constitutional line" when they failed to provide inmates with adequate health care,[163] as well as "permitted and condoned" the use of excessive force.[164] However, the *Gomez* court, like other courts, also stated that it had a limited role in Eighth Amendment litigation and that courts should give discretion to state officials.[165] The rationale behind wide discretion is that policy choices regarding prison officials are not for judicial review and is instead an area for the legislative and executive branches of government to handle.[166] So long as the prison officials do not violate the Constitution, they are entitled to operate the prisons however they choose.[167]

3. Qualified Immunity Protection for Prison Officials

If the defendant, such as a prison official, raises a qualified immunity defense, the inmate bears the burden of showing that "the law was clearly established at the time of the alleged violation."[168] Qualified immunity is a powerful tool the law affords to prison officials against Eighth and Fourteenth Amendment claims.[169] Qualified immunity protects officials from civil liability so long as their actions do "not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[170] The immunity is triggered when a law is not "clearly

incarcerated at Pelican Bay State Prison. *Id.* at 1155.

163. Healthcare includes medical and mental healthcare.

164. *Id.* at 1279.

165. *Id.* (stating, "[f]ederal courts are not instruments for prison reform, and federal judges are not prison administrators. We must be careful not to stray into matters that our system of federalism reserves for the discretion of state officials.").

166. *Id.* at 1262 (stating that these policy decisions are not for "judicial review or concern unless the evidence demonstrates that conditions are so extreme as to violate basic concepts of humanity and deprive inmates of a minimal level of life's basic necessities").

167. *Id.*

168. *Cf.* Mitchell v. Miller, 790 F.3d 73, 77 (1st Cir. 2015) (applying the "clearly established" test to determine whether a police officer's actions violated the Fourth Amendment and holding that the plaintiff failed to demonstrate that it was clearly established that the officer's conduct was unconstitutionally unreasonable under the circumstances).

169. *See, e.g., Grissom*, 902 F.3d at 1174-75 (applying the qualified immunity doctrine to the inmate's Eighth and Fourteenth amendment claim and holding that the prison officials were entitled to qualified immunity because the inmate had failed to show any clearly established law that would entitle him to relief).

170. Mullenix v. Luna, 136 S. Ct. 305, 308 (2015) (citations omitted); *accord Williams*, 848 F.3d at 570 (stating that "a qualified immunity analysis looks through the rearview mirror, not the windshield" and that the inquiry should focus on the relevant law when the violation allegedly occurred).

established" at the time of the suit.[171]

Qualified immunity has been so powerful that a court may rule for the prison officials even in the face of precedent saying otherwise, and after acknowledging the existence of a protected liberty interest for the inmate.[172] This cushy layer of legal protection effectually allows prison officials to have wide deference to decide how to handle "a volatile environment."[173] However, to balance this wide deference and power, the courts have also required that adequate procedural protections be provided to the inmates.[174] Qualified immunity creates difficult hurdles for inmates challenging the constitutionality of their solitary confinement.[175] Inmates need to overcome the high standards required to raise Fourteenth and Eighth Amendment claims and the added layer of immunity that protects prison officials.[176]

B. Solitary Confinement Inconsistencies Among the Courts

Recent cases have shown that our prison systems have not wandered too far from when the Quakers first implemented isolation-imprisonment practices.[177] When combining the history of solitary confinement with the high standards of establishing a claim under the Eighth and Fourteenth Amendments, against the defensive shield of qualified immunity, the end result tends to show the courts siding with the prison officials over the inmates.[178] The

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171 *See* Lopera v. Town of Coventry, 640 F.3d 388, 396 (1st Cir. 2011) (stating that "a finding that a right was not clearly established at the time of the alleged violation is sufficient to warrant a finding of qualified immunity").

172. *See Williams*, 848 F.3d at 552-53 (applying qualified immunity doctrine in a case where death row inmate was housed in solitary confinement without meaningful review of continuing placement and holding that the prison officials had qualified immunity). The court held that the past precedent the plaintiff relied on was not sufficient to establish "clearly established law" because other district court decisions ruled otherwise. *Id.* at 570-71.

173. *Sandin*, 515 U.S. at 482 (holding that prison officials must be provided "appropriate deference and flexibility . . . [in managing] a volatile environment").

174. *See Wilkinson*, 545 U.S. at 223 (holding that inmates be provided proper procedural protections if they "impose[] atypical and significant hardship on [an] inmate in relation to the ordinary incidents of prison life") (citations omitted).

175. *See supra* notes 170-75 and accompanying text (discussing the deference courts tend to give prison officials).

176. Weidman, *supra* note 161, at 1520 (discussing The Prison Litigation Reform Act and how Congress joined the Supreme Court in limiting the courts' involvement with regulating prison regulation and entitling prison officials freedom to act in their deference without judicial oversight).

177. Peterkin, *supra* note 19, at 824.

178. *See, e.g., Grissom,* 902 F.3d at 1174 (holding in August of 2018 that the

Supreme Court has generally given legislatures wide latitudinal authority to decide what qualifies as a fair sentence for specific conduct.[179] The Court also left the question open for the lower courts to wrestle with on what an appropriate baseline of "atypical and significant" is.[180]

The Supreme Court's open-ended approach has left the lower courts trying to determine how long an inmate can constitutionally be placed in solitary confinement.[181] Some federal circuits have adopted a somewhat bright-line baseline while others have adopted more vague baselines that left procedural due process principles effectively inapplicable to solitary confinement regulation.[182] However, even in situations where an individual's time spent in solitary fell within the bounds of "atypical and significant," and therefore due process protections should be triggered, in reality very limited procedures actually apply.[183]

The better legal vehicle to raise claims would arguably be under the Eighth Amendment.[184] However, federal courts have not addressed definitively whether the Eighth Amendment protects against permanent or long-term placement of an inmate in solitary confinement without meaningful review of an inmate's

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prisoner did not overcome the defense of qualified immunity despite the inmate showing that "a growing number of courts have concluded [that] denying the basic human needs of social interaction and environmental stimulation can violate the Eighth Amendment, especially when the deprivation lasts for years"). Here, the court acknowledged those cases but held that those were four district court decisions that were not from the same circuit and thus the prisoner's argument was not "clearly established law." *Id.*; *see also e.g., Perry*, No. 16-2444, slip. op. at 12 (holding in August 2018 that the defendants were entitled to qualified immunity); *contra* Foster v. Runnels, 554 F.3d 807, 809-10 (9th Cir. 2009) (holding that an inmate's Eighth Amendment right against cruel and unusual punishment was violated when the prison official withheld nutritionally adequate meals on a regular basis and was deliberately indifferent to the obvious risk of harm).

179. Reinert, *supra* note 48, at 946-47.

180. *Id.* at 941.

181. *Id.* at 941-42.

182. *Id.* at 942-43; *Compare* Colon v. Howard, 215 F.3d 227, 230-33 (2d Cir. 2000) (holding that no liberty interests are at stake if the solitary confinement is 101 days or less, that liberty interests are at stake if duration is over 305 days, and that a claim would need evidence of psychological effects sustained to show a liberty interest violation if between 101 and 305 days), *with* Wagner v. Hanks, 128 F.3d 1173 (7th Cir. 1997) (analyzing how the prisoner could have transferred to another prison and that the conditions in this solitary confinement unit must be compared with the general population of this prison or those of the general population of any prison in the state).

183. Reinert, *supra* note 48, at 943-44 (noting that due process is very limited in its ability to regulate solitary confinement conditions and suggesting the Eighth Amendment as the better vehicle for protection).

184. *Id.*

placement.[185] Federal courts have often found solitary confinement to not be an Eighth Amendment violation despite years of empirical data and clinical research proving with clear data that solitary confinement causes extreme, irreversible psychological damage.[186] This focus on physical, rather than psychological, harm appears to be a trend among many courts.[187] Even so, some courts, particularly state courts,[188] have also held that an individual with a mental illness cannot be placed in long-term solitary confinement because doing so would inflict serious psychological pain on these individuals.[189]

While the courts slowly try to understand the constitutional issues with solitary confinement, meanwhile thousands of American inmates are losing their mental well-being with each passing day that they spend in isolation.[190] Thankfully, we have seen some movement and positive results, mainly on the state level, where a few prisons implemented reform.[191] Assaults against staff are at the lowest since 2006 after Colorado lowered the number of people held in solitary confinement.[192] New Mexico also has seen more prisoners engaging in rehabilitation programs after cutting the number of people in solitary confinement.[193] Moreover, assaults on staff have decreased after federal prisons lowered the use of solitary confinement by 25 percent since 2012.[194] As it stands now,

185. Lobel, *supra* note 71, at 117.

186. *Id.* at 119 (discussing how the federal courts recognize the psychological implications solitary confinement has on the inmates but still ruling no Eighth Amendment violation in most cases regardless).

187. *Id.* at 133-36 (providing examples where the federal courts seemed to place a higher value and emphasis on physical harm rather than psychological harm, such as the Prison Litigation Reform Act of 1995, which required the inmate to have sustained a physical injury before bringing a federal civil action for mental or emotional injury).

188. *The Dangerous Overuse of Solitary Confinement in the United States*, ACLU 12-13 (Aug. 2014), www.aclu.org /sites/default/files/assets/stop_solitary_briefing_paper_updated_august_2014.pdf. States like New York and Colorado passed laws prohibiting the placement of individuals with mental illness into solitary confinement. *Id.*

189. *Id.* at 120; *see also, e.g.,* Ruiz v. Johnson, 37 F. Supp. 2d 855, 915 (S.D. Tex. 1999) (stating that "the severe and psychologically harmful deprivations of its administrative segregation units are, by our evolving and maturing society's standards of humanity and decency, found to be cruel and unusual punishment [upon the mentally ill inmates]").

190. *See* William Blake, *in* HELL IS A VERY SMALL PLACE: VOICES FOR SOLITARY CONFINEMENT 25-33 (Casella, et al. eds., 2016) (describing his experience in solitary confinement as "a sentence worse than death" and how he would have "certainly" committed suicide had he known that he would spend 25 years in solitary confinement).

191. Obama, *supra* note 23.

192. *Id.*

193. *Id.*

194. *Id.*

the courts are still trying to determine how long someone can constitutionally be kept in solitary confinement. Because there is no clear baseline drawn, there is no *per se* circuit split among the federal circuit courts.[195] However, what we do see are some more lenient circuits requiring less time to trigger a constitutionally protected interest than other circuits.[196] Moreover, we see these circuits advising how we can change this systemic issue.[197]

C. Circuit Court Against Prolonged Solitary Confinement Sentences

Recent decisions in the Second, Fourth, Seventh, and Eleventh Circuits reflect a stronger concern than other circuits against unconstitutionally long solitary confinement sentences.[198]

1. Second Circuit

In a case where the inmate alleged that he spent more than two and a half years in continuous solitary confinement, the Second Circuit Court, in *Fludd v. Fischer,* held that this "unbroken stretch, substantially longer than 305 days, is sufficiently 'atypical and significant' to establish a liberty interest."[199] Similarly in another case, the court in *Colon v. Howard* held that the "duration of [solitary] confinement is a distinct factor bearing on atypicality and must be carefully considered . . ." and that "305 days . . . is a sufficient departure from the ordinary incidents of prison life to require procedural due process protections."[200] Moreover, though there is no clear way to measure the severity of hardship in solitary confinement, the Second Circuit stated that "305 days satisfies the standard[s]" of where the durational line should be drawn.[201]

2. Fourth Circuit

In a Fourth Circuit case where an inmate was held in solitary

195. *Id.*

196. *Id.*

197. *See* discussion *infra* Section III.C.2 (discussing how the Fourth Circuit provided recommendations on how to address this issue).

198. *See* discussion *infra* Sections III.C.1-4 (discussing the different holdings by various federal circuits less lenient towards prolonged durations in solitary confinement).

199. Fludd v. Fischer, 568 F. App'x 70, 73 (2d Cir. 2014).

200. Colon v. Howard, 215 F.3d 227, 231 (2d Cir. 2000) (stating that there are no "precise calipers to measure [the] severity of [solitary] hardship, but [the court here] believes that wherever the durational line is ultimately drawn, 305 days satisfies the standard").

201. *Id.*

confinement for twenty years without any disciplinary infractions during that period, the court in *Incumaa v. Stirling* rejected the district court's conclusion that the inmate had no liberty interest to support a due process claim to "avoid[] the onerous conditions of his confinement."[202] In other recent cases, despite some rulings in favor of the defendants, the Fourth Circuit discussed its desire to move away from indefinite-like sentences and suggested the Supreme Court to "prescribe more rigorous judicial review of state statutes and regulations governing prison confinement conditions."[203] In *Prieto v. Clarke*, the Fourth Circuit also stated that because the Supreme Court adopted an approach encouraging states to codify their own policies regarding prison treatment and inmate confinement, this led states "to codify procedures establishing very restrictive confinement conditions."[204]

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202. Incumaa v. Stirling, 791 F.3d 517, 531 (4th Cir. 2015) (holding that because the inmate was held in solitary for 20 years, he had a "significant private interest in leaving the restrictive conditions in the SMU and serving some part of his remaining life sentence outside of solitary confinement"). The court also discussed how "every aspect of [his] life [was] severely restricted and his body [was] subjected to extraordinary intrusion on a regular basis. *Id.* at 534. It stated that there must be some periodic review of the inmate's confinement in solitary and found that the inmate's "uncontested evidence" showed that the Department's confinement review was inadequate. *Id.* at 534-35. The court established the general prison population as the baseline to determine whether prison conditions constituted "atypical and significant hardship" in relation to the ordinary incidents of prison life. *Id.* at 529. However, it noted that the "baseline for atypicality" determination is made on a case by case basis. *Id.* at 527.

203. *See* Prieto v. Clarke, 780 F.3d 245, 254-55 (4th Cir. 2015) (holding that six years in solitary confinement is "undeniably severe" and "dehumanizing" and that the Supreme Court "could prescribe more rigorous judicial review of state statutes and regulations governing prison confinement conditions" but has refused to do so thus far); *see, e.g.,* Depaola v. Va. Dep't of Corr., 703 F. App'x 205 (4th Cir. 2017) (affirming the summary judgment against the inmate and adopting the reasoning presented by the district court's Opinion); *see also* DePaola v. Va. Dep't of Corr., No. 7:14CV00692, 2016 U.S. Dist. LEXIS 132980, at *28 (W.D. Va. Sep. 27, 2016) (stating that the prison's "step-down procedure," where inmates get to gradually be introduced into the general population through good behavior, "addresses and alleviates the isolating conditions and indefiniteness . . . as distinguishing factors of 'atypical and significant' hardships presented by a prison's long term segregation scheme"). This prison allowed for inmates to change their status from solitary to general population by participating in step-down procedures which provides "behavioral criteria for the inmate to qualify for incremental reductions of restrictions and increases in privileges." *Id.* The court also notes that the "team assessment approach" and "multi-level classification review procedures" are built into the Operating Procedures to protect inmates from guards who may willfully deny an inmate the ability to move through the step-down procedures away from segregation. *Id.* at 29.

204. *Prieto*, 780 F.3d at 255 (noting that if the Court holds onto this approach, due process claims, like Prieto's, will fail despite the court finding the conditions to be dehumanizing).

3. Seventh Circuit

In *Marion v. Colombia Corr. Inst.*, an inmate argued that his Eighth and Fourteenth Amendment rights were violated after he was placed in solitary confinement for over 200 days.[205] In this case, the Seventh Circuit stated that it previously held, in a number of cases, "that a liberty interest *may* arise if the length of segregated confinement is substantial and the record reveals that the conditions of confinement are unusually harsh."[206] The court held that Marion's 240-day confinement in solitary was "significantly longer than terms of segregation imposed in cases where [it] [had] affirmed dismissal without requiring a factual inquiry into the conditions of the confinement."[207]

4. Eleventh Circuit

Similar to the Second, Fourth, and Seventh Circuits, the Eleventh Circuit, in *Quintanilla v. Bryson*, held that it was unconstitutional for an inmate to spend two years in solitary confinement where there was a lack of meaningful periodic review and without explanation as to his continual placement.[208] Similarly, in *Magluta v. Samples*, the Eleventh Circuit held that over 500 days in solitary confinement, for the purpose of punishment and with minimal periodic reviews, was unconstitutional.[209] The court also held in *Williams v. Fountain* that one year of solitary confinement was sufficient to state a claim.[210]

205. Marion v. Columbia Corr. Inst., 559 F.3d 693, 696 (7th Cir. 2009).

206. *Id.* at 697-98; *see also, e.g.* Whitford v. Boglino, 63 F.3d 527, 533 (7th Cir. 1995) (holding that six months segregation is not "an extreme term" and would not trigger due process rights alone).

207. *Marion*, 559 F.3d 693 at 689-99 (explaining that despite the 240 days term, the court's analysis requires scrutiny of the actual conditions of segregation and that this approach is consistent with other sister circuits).

208. Quintanilla v. Bryson, 730 F. App'x 738, 744-45 (11th Cir. 2018).

209. Magluta v. Samples, 375 F.3d 1269, 1275 (11th Cir. 2004) (discussing how the district court failed to consider how the inmate was placed in solitary confinement shortly after filing a petition for a writ of habeas corpus and how he was placed in solitary again after a two month release in the general prison population despite there being no security threat). The Eleventh Circuit concluded that the defendants would not be entitled to qualified immunity due to the harsh conditions imposed by the officials on this particular inmate compared to the other pretrial detainees or convicted prisoners. *Id.* at 1277.

210. Williams v. Fountain, 77 F.3d 372, 374 (11th Cir. 1996).

D. Circuit Courts Finding Prolonged Solitary Confinement Constitutional

In contrast to the Second, Fourth, Seventh, and Eleventh Circuits, recent decisions in the First, Eighth, and Tenth Circuits found lengthy solitary confinement durations to be constitutional and qualified immunity protections applicable to the defendants.[211]

1. First Circuit

In a case where an inmate was held in solitary for 600 days, the First Circuit Court of Appeals held that the confinement was constitutional.[212] Though the inmate was informed of the administrative reviews regarding his solitary confinement placement, he "was not involved in the review process and there was no means of appealing the status review determinations."[213] Regardless, the court held that the defendants were entitled to qualified immunity because the prison officials did not know the precise requirements for placement review as the law was not clearly established at the time.[214]

2. Eighth Circuit

In *Ballinger v. Cedar Cty.*, the Eighth Circuit held that one year in solitary confinement did not constitute as an "atypical and significant hardship."[215] In so holding, the court reasoned that what the inmate experienced in solitary confinement was not materially different than other cases where the court denied finding a deprived liberty interest.[216] The court emphasized that it has "consistently

211. See discussion *infra* Sections III.D.1-3.

212. *Perry v. Swanson*, No. 16-2444, slip. op. at 10 (1st Cir. Aug. 29, 2018).

213. *Id.* at 4.

214. *Id.* at 12-13. The inmate argued that the law was clearly established after the Supreme Court ruled in *Wilkinson v. Austin* that the "'informal, adversary procedures' required where an inmate's interest in avoiding atypical and significant hardship was at stake had to include some sort of meaningful periodic review." *Id.* at 13. The First Circuit responded by holding that *Wilkinson* did not hold any standards for placement review and rather, the Supreme Court gave prison officials broad discretionary authorities to manage and maintain the prisons. *Id.*

215. Ballinger v. Cedar Cty., 810 F.3d 557, 562 (8th Cir. 2016).

216. *Id.* at 563; *see* Phillips v. Norris, 320 F.3d 844 (8th Cir. 2003) (holding that 37 days in isolation did not violate an inmate's Eighth Amendment or Fourteenth Amendment rights); *accord* Orr v. Larkins, 610 F.3d 1032, 1034 (8th Cir. 2010) (holding that demotion to segregation without cause is constitutional). The court denied the inmate's Eighth Amendment claim, which alleged that the prison officials worsened his mental illness. *Id.* The reasoning was two-fold: the inmate did not claim that the prison officials delayed or denied

held that a demotion to [administrative] segregation, even without cause, is not itself an atypical and significant hardship."[217]

3. Tenth Circuit

The Tenth Circuit recently ruled in favor of prison officials in two cases. In *Silverstein v. Fed. Bureau of Prisons*, the court held that 30 years in solitary confinement did not violate the Eighth Amendment since the inmate did not prove the conditions caused him psychological harm.[218] More recently, the Tenth Circuit held in *Grissom v. Roberts* that six years in solitary confinement did not violate the inmate's Eighth and Fourteenth Amendment rights in light of the qualified immunity protection applicable to the prison officials in this case.[219]

As demonstrated by the examples in this section, the different circuits seem split on how willing they are to push the durational boundaries.[220] The Second, Fourth, Seventh, and Eleventh Circuits seem to lean towards allowing shorter amounts of time spent in solitary confinement, while the First, Eighth, and Tenth Circuit

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him medical care, and he also received anti-depressants and anti-psychotic medication. *Id.*

217. *Ballinger*, 810 F.3d 557, at 562.

218. Silverstein v. Fed. Bureau of Prisons, 559 F. App'x. 739, 759 (10th Cir. 2014) (holding that it cannot focus on his thirty years of solitary confinement, alone, without considering the reasons for his confinement and the continuation of his solitary confinement). Silverstein claimed he developed anxiety disorder, depression, sleep depravity, memory loss, and cognitive impairment, due to social isolation and the lack of an environmental stimulation. *Id.* at 749. Silverstein had committed a range of prison misconduct such as threatening a staff member, making an escape by posing as a United States Marshal, possessing a weapon, and assaulting staff members. *Id.* at 759. Though Silverstein is no longer "as violent" as before, the court here held that his "institutionally conforming conduct occurred when he was not with other inmates" and that his low-risk rating was "based on his current housing were he ha[d] no access to weapons or potential victims." *Id.* at 760. The court also stated that length of time in confinement is only one consideration in determining whether an Eighth Amendment violation exists. *Id.* at 754. It ultimately held that it would defer to the prison officials' judgment in determining whether they think it is best to keep Silverstein isolated in the interest of security. *Id.* at 754-55. Moreover, the court stated that it could not, with certainty, conclude that the symptoms he experienced were due to his segregated confinement rather than due to "the mere fact of his length incarceration itself or some other factor, such as age." *Id.* at 758.

219. *Grissom*, 902 F.3d at 1166, 1175 (granting qualified immunity and holding that the prison officials were entitled to it because there was no clearly established law at the time to alert the officials that they were violating the prisoner's constitutional rights). Grissom was placed in segregation due to an "alleged involvement in narcotics trafficking at the prison" and later sustained three contraband violations. *Id.* at 1171-72.

220. *See* discussion *infra* Sections III.B., III.C (discussing the circuit split on the issue of long sentences in solitary confinement).

seem to allow shockingly long sentences.[221] Despite this split, one trend and issue common among them all is the absence of a firm duration upon which to measure by.[222]

E. Tenth Circuit's Split with Five Other Circuits on Right to Outdoor Activity

In 2018, two cases petitioned for a writ of certiorari regarding the issue of whether clearly established Eighth Amendment law permits prison officials to permanently deprive a prisoner in solitary confinement of outdoor exercise without a security rationale.[223] Though the Court denied certiorari in both cases, the circuit split regarding whether these inmates can be deprived of all outdoor activity still remains.[224]

Under the facts of both cases, the petitioners endured twenty-three years of solitary confinement at the Colorado State Penitentiary without access to outdoor recreational activity.[225] The Tenth Circuit held that prison officials were protected through qualified immunity since they did not know they were violating the Constitution, creating a split with five other circuits.[226] Other circuits held that a prison official may not even temporarily withhold outdoor exercise without a legitimate security reason.[227]

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221. *Id.*

222. *Id.*

223. Apodaca v. Raemisch, 864 F.3d 1071 (10th Cir. 2017), *cert. denied*, 139 S. Ct. 5; *see also* Lowe v. Raemisch, 864 F.3d 1205 (10th Cir. 2017), *cert. denied*, 139 S. Ct. 5 (2018).

224. *Id.*

225. Petition for Writ of Certiorari at 2, *Lowe v. Raemisch*, No. 17-1289 (Mar. 9, 2018), www.supremecourt.gov/opinions/18pdf/17-1284_8mjp.pdf; Petition for Writ of Certiorari at 2, *Apodaca v. Raemisch*, No. 17-1284 (Mar 9, 2018), www.supremecourt.gov/DocketPDF/17/17-1284/38308/20180309112929168_Apodaca%20Petition%20FINAL.pdf.

226. *Apodaca*, 864 F.3d at 1074, 1080 (holding that an 11-month deprivation of outdoor exercise did not amount to an Eighth Amendment violation and the defendants were entitled to qualified immunity as they did not knowingly violate the Constitution).

227. *See* Spain v. Procunier, 600 F.2d 189, 199 (9th Cir. 1979) (holding that "[s]everal factors combined to make outdoor exercise a necessity. [Solitary confinement] prisoners were in continuous segregation, spending virtually 24 hours every day in their cells with only meager out-of-cell movement and corridor exercise. Their contact with others is so minimal."); *accord* Hernandez v. Velazquez, 522 F.3d 556, 558-61 (5th Cir.2008) (per curium) (holding that the inmate's deprivation of outdoor exercise for thirteen months while in solitary confinement was proper for security reasons due to gang violence and his affiliation with a prison gang); *accord* Walker v. Minzes, 771 F.2d 920, 927-28 (6th Cir. 2016) (agreeing with the district court's ruling that withholding outdoor time for a year violated the Eighth Amendment and remanding for clarification on its orders regarding different minimum outdoor time depending on prisoner classification); *accord* Pearson v. Ramos, 237 F.3d 881, 885 (7th Cir.

The idea was that outdoor exercise is "extremely important to the psychological and physical wellbeing of the inmates."[228]

Responding to the Court's denial of certiorari, Justice Sotomayor wrote a statement expressing her deep concerns regarding solitary confinement.[229] She wrote that it is "clear . . . that . . . to deprive a prisoner of any outdoor exercise for an extended period of time in the absence of an especially strong basis for doing so is deeply troubling — and has been recognized as such for many years."[230]

As the Supreme Court denied hearing these cases, the issue is still left to be resolved.[231] Until the Court speaks on this issue, the circuits will likely remain split.[232]

F. Lack of Adequate Mental Health Care

Mental health care provided to inmates is often inadequate.[233] Mental health services for inmates in solitary confinement are limited to dispensing psychotropic medication, a health care clinician stopping at the cell front to ask how the inmate is doing, and occasional private sessions.[234] Inmates are typically not provided individual therapy, group therapy, recreational or life-skill-enhancing activities, and other forms of therapies due to insufficient resources and the nature of solitary confinement.[235] Additionally, prisons lack qualified medical staff and programs to support the number of prisoners that require mental health care.[236]

2001) (holding that denying the inmate one year of outdoor exercise was proper where there are security reasons in light of the inmate's history of attacking a prison guard); *accord* Bass v. Perin, 170 F.3d 1312, 1315-17 (11th Cir. 1999) (recognizing that there is "a significant difference between some time outside—even a minimal amount—and none at all" and holding that the Eighth Amendment was not violated in light of security purposes due to the inmates having murdered a prison guard and attempted to escape).

228. *Spain*, 600 F.2d at 199.

229. *See* Debra Cassens Weis, *Sotomayor Expresses 'Deeply Troubling Concern' About Solitary Confinement in Cert Denial*, ABA J. (Oct. 9, 2018), www.abajournal.com/news/article/sotomayor_deeply_troubling_solitary_confinement (noting that denying prisoners "even a moment in daylight for months or years" is a "deeply troubling concern").

230. *Id.*

231. *See* discussion *supra* III.E (discussing the circuit split on the issue of requiring outdoor activity for inmates in solitary confinement).

232. *Id.*

233. *See* discussion *infra* Section III.F (discussing the inadequacies of the mental health care provided to inmates in solitary).

234. Jeffrey L. Metzner & Jamie Fellner, *Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for Medical Ethics*, J. AM. ACAD. PSYCHIATRY L. 104, 105 (2010), jaapl.org/content/jaapl/38/1/104.full.pdf.

235. *Id.*

236. *Id.*

Indeed, 22 out of 44 surveyed state prisons reported that they did not have adequate mental health staff.[237]

Despite prisons offering some form of mental health care to inmates, care is sometimes provided by untrained non-medical staff.[238] In a 2016 Wisconsin study, 26 out of 65 respondents claimed that "they [had] medications or medical devices withheld or threatened to be withheld by security staff who distribute[d] prescriptions."[239] Former Wisconsin prison psychologist Bradley Boivin stated that solitary confinement "wasn't about correction at all . . . it was about perpetual punitive behavior."[240] He believed that the "drive-by" check-ins were insufficient to provide mental health care and that they "[did not] provide the opportunity for the clinician to address any psychological issues, any risk, in any meaningful way."[241] Dr. Boivin also stated that "medical delivery by non-health care staff is recognized on a national level as an unsafe practice."[242] Due to these and many additional reasons, Dr. Boivin resigned from his position as a prison psychologist because he could not contribute to this type of prison practice anymore.[243]

Conflicts relating to dual loyalty is another issue in prison mental healthcare.[244] Health professionals often find themselves trying to serve the interest of their patients, while also abiding by the rules of the correctional facility.[245] These prisons impart pressure on medical professionals to "incorporate security concerns into their clinical decision making[,] . . . [which] creates the potential for erosion of meaningful clinical care and turning a blind eye to neglect and abuse."[246]

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237. *Id.*

238. *See id*(discussing how untrained staff typically provide mental health care).

239. Alexandra Arriaga, *Wisconsin Inmates Report Despair, Little Counseling in Solitary Confinement That Can Stretch on for Years*, WIS. WATCH (Apr. 15, 2017), www.wisconsinwatch.org/2017/04/wisconsin-inmates-report-despair-little-counseling-in-solitary-confinement-that-can-stretch-on-for-years/ (providing accounts from inmates who alleged that prison officials withheld medication from them).

240. *Id.*

241. *Id.* Boivin stated that the brief encounters are "the only routine clinical contact inmates in solitary confinement receive" and that he received "pushback" from security when he tried to set up one-on-one sessions with the inmates. *Id.* He called the practice "inadequate" in that there is "no way to gather information about a person's mental health condition … in two or three minutes . . .." *Id.*

242. *Id.*

243. *Id.*

244. Jörg Pont, et al., *Prison Health Care Governance: Guaranteeing Clinical Independence*, AM. J. PUB. HEALTH (Apr. 2018), www.ncbi.nlm.nih.gov/pmc/articles/PMC5844391/.

245. *Id.*

246. Memorandum from the Conn. Advisory Comm. to the U.S. Comm'n on

Mental health services are still extremely inadequate despite some improvements and changes seen through the efforts of litigation.[247] However, this is also attributed to tight prison budgets and minimal public backing for investments in prisoner mental health treatments.[248] The health professionals struggle to provide adequate care due to the lack of resources, support, and large caseloads.[249]

The current mental health care provided in prisons is inadequate to address the high needs of those placed in solitary confinement.[250] Changes need to be made in order to combat the detrimental psychological effects that isolation has on these individuals.[251]

G. Consequences Resulting from the Lack of Clear, Prescriptive Durational Guidelines and Adequate Mental Health Care

The Supreme Court's decision in allowing the lower courts to determine where to draw the constitutional baseline for durations in solitary confinement has led the courts to arbitrarily decide that certain lengths of time are considered "unconstitutional," while that same length of time would be considered as "constitutional" in another court.[252] Providing such broad strokes of power to the lower courts threatens two very central aspects to an individual living in the United States: a prisoner's constitutional rights and his mind.[253]

The Supreme Court's decision to not prescribe durational

Civil Rights to U.S. Comm'n on Civil Rights (Dec. 20, 2017).

247. Metzner & Fellner, *supra* note 235.

248. *Id.*

249. *Id.*

250. *See* Terry Kupers, *in* HELL IS A VERY SMALL PLACE: VOICES FOR SOLITARY CONFINEMENT 169 (Casella, et al. eds., 2016) (stating that "a growing proportion of prisoners suffer[ing] from serious mental illness has not led to proportional enrichment of prisons' mental health treatment capacities").

251. *Id.* at 174 (asserting that rather than isolating problematic prisoners, a "richer collaboration between security and treatment staff is needed" to help develop a tailored plan in addressing the prisoner's problematic behavior).

252. *See* Williams v. Fountain, 77 F.3d 372, 374 (11th Cir. 1996) (holding one year in solitary confinement triggered a liberty interest); *but see* Smith v Mensinger, 293 F.3d 641, 654 (3d Cir. 2002) (holding that seven months in solitary confinement did not implicate a liberty interest); *but see also Silverstein*, 559 F. App'x 739, 759 (10th Cir. 2014) (holding that 30 years in solitary confinement was constitutional).

253. *See generally* Jodi Lessner, *A Cruel and Unusual Burden: The Case for the Unconstitutionality of Solitary Confinement*, COLUM. UNDERGRADUATE L. REV. (Nov. 19, 2017), blogs.cuit.columbia.edu/culr/2017/11/19/a-cruel-and-unusual-burden-the-case-for-the-unconstitutionality-of-solitary-confinement (discussing the harmful effects of solitary confinement and the absence of court rulings holding the practice to be unconstitutional).

standards for solitary confinement creates a fundamental issue under the Eighth Amendment for lower courts to deal with.[254] Allowing an open-ended, potentially decades-long, placement in segregation deprives inmates of basic human needs and subjects them to conditions that create a substantial risk of harm, satisfying the first prong to the Eighth Amendment test.[255] Research strongly proves that solitary placement has deleterious and potentially irreversible effects on the human mind.[256] It has also shown that the longer an individual remains in isolation, the more permanent the damage.[257] This research is also heavily corroborated by the many first-hand accounts from inmates who experienced solitary confinement.[258]

The second prong to the Eighth Amendment test is satisfied through the continued use of prolonged solitary confinement without much meaningful review (or repercussion for lack of meaningful review) and the insufficient mental health care provided to inmates despite robust findings of self-harm and other mental health issues.[259] This is a "deliberate indifference" to what science has already proven yet is continuously ignored by the correctional facilities.[260]

For these same reasons, solitary confinement practices without clear durational boundaries violate the Fourteenth Amendment by creating an "atypical and significant hardship" on inmates as the

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254. Reinert, *supra* note 48, at 941.

255. Metzner & Fellner, *supra* note 234, at 105 (stating that "[s]uicides occur disproportionately more often in segregation units than elsewhere in prison" and that "many [mentally ill prisoners] simply will not get better as long as they are isolated").

256. *Id.* at 104 ("Isolation can be psychologically harmful to any prisoner, with the nature and severity of the impact depending on the individual, the duration, and particular conditions . . . Psychological effects can include anxiety, depression, anger, cognitive disturbances, perceptual distortions, obsessive thoughts, paranoia, and psychosis.").

257. Breslow, *supra* note 100.

258. *See, e.g.* Coffey, *supra* note 11 (detailing the physical and psychological harm inflicted on John Jay Powers after being placed in solitary). Powers was serving a sentence for a bank robbery and had no mental illness prior to incarceration. *Id.* at 17-18. He was placed in solitary confinement for 60 months due to a prison infraction. *Id.* at 17. While in solitary confinement, Mr. Powers "amputated his testicle and scrotum, bit off two fingers, tattooed his entire body, and repeatedly attempted suicide. *Id.* at 18. Despite this behavior, a supermax psychologist determined that he did not have an active mental disorder and was not in need of treatment or an alternative custody arrangement." *Id.*

259 . *See* Kupers, *supra* note 250 (discussing how psychotropic medications are ineffective when the inmate is confined to a cell as the clinician has little chance to develop a therapeutic relationship and to teach the inmate about his mental condition and the need for medication).

260. *See* discussion, *supra* Section III.A.2 and sources cited (discussing the difficult of litigating under the Eighth Amendment and needing to show "deliberate indifference").

deleterious effects on the mind start the moment they are placed in isolation and increase in severity in correlation with time.[261] Indeed, "[n]early every scientific inquiry into the effects of solitary confinement over the past 50 years has concluded that subjecting an individual to more than 10 days of involuntary segregation results in distinct sets of emotional, cognitive, social, and physical pathologies."[262] The effects of an inmate being placed for years without any cut off point will undoubtedly exacerbate these health issues.[263]

Moreover, enforcing solitary confinement without adequate mental health care or required outdoor exercise further implicates the Eighth and Fourteenth Amendment in light of what we know about how solitary confinement affects the human mind.[264] If prisons are going to place inmates in solitary confinement for security purposes, then they must do so in a way that does not cause serious mental illness.[265] Taking proper steps to care for an inmate's mental health creates a higher likelihood of rehabilitating and reintegrating the prisoner back into the general prison population, which in turn decreases security risk and makes the prisons safer overall.[266]

Prison officials may argue that there are genuine reasons to place one in solitary.[267] The main arguments in support of solitary confinement include inmate and officer safety, punishment with the goal of changing behavior, and punishment for infractions.[268] Nonetheless, even if an individual is placed in solitary for legitimate reasons, there must be effective legal safeguards in place to protect inmates from systemic abuses and from wholly losing one's constitutional rights and mental well-being.[269] Otherwise, these

261. *See* Dana G. Smith, *Neuroscientists Make a Case Against Solitary Confinement*, Sci. Am. (Nov. 9, 2018), www.scientificamerican.com/article/neuroscientists-make-a-case-against-solitary-confinement/ (describing how "the brain is shaped by its environment" and stating that the conditions of solitary confinement is "bad for brain structure and function").

262. Kenneth L. Appelbaum, *American Psychiatry Should Join the Call to Abolish Solitary Confinement*, 43 J. AM. ACAD. PSYCHIATRY & L. 406, 410 (2015), jaapl.org/content/43/4/406 (quoting David H. Cloud, et al., *Public Health and Solitary Confinement in the United States*, 105(1) (AM. J. PUB. HEALTH 18, 21 (2015).

263. Grassian, *supra* note 96.

264 *See* discussion *supra* Sections II.D.1-3 (discussing the different studies performed to understand the effects of isolation).

265. *See* discussion *supra* Section II.D.3 (discussing effects observed on inmates in solitary).

266. Obama, *supra* note 23.

267. *Hernandez*, 522 F.3d at 558-61.

268. Appelbaum, *supra* note 262, at 407.

269. Eleanor Umphres, *Current Development 2016-2017: Solitary Confinement: An Unethical Denial of Meaningful Due Process*, 30 GEO. J. LEGAL

constitutional protections are rendered useless in effect.[270]

Prisons may also argue that an increase in medical care and administrative requirements could lead to incurring higher costs that the prisons cannot bear.[271] In reality, it costs more to keep prisoners in solitary than in general population prisons.[272] This is mainly due to increased staffing costs, as well as higher costs needed to construct supermax prisons than other types of facilities.[273] Moreover, costs alone cannot justify denying constitutional rights to individuals.[274] If prisons are going to use long-term isolation practices despite other rehabilitating and deterring prison practices available, then they must reform their practices so as to not deprive inmates of their foundational rights and mental well-being.[275]

The issue for inmates in solitary confinement is that there are no clear durational boundaries.[276] The federal circuit courts are split on how much discretion should be afforded to prison officials when determining the proper amount of time.[277] When we combine this durational ambiguity with no mandatory outdoor activity,[278] inadequate mental health care,[279] and challenges in litigating claims against these practices,[280] what we see as a result are prisoners sustaining increasingly detrimental and irreversible psychological and neurological effects without any true voice to fight against this.[281]

ETHICS 1057, 1083 (2017).

270. *Id.*

271. Metzner & Fellner, *supra* note 234.

272. Johnson, *supra* note 6 (noting that the cost of keeping an inmate in solitary is three times as much as putting someone in a regular prison unit).

273. Sal Rodriguez, *Fact Sheet: The Hight Cost of Solitary Confinement*, SOLITARY WATCH (2011), solitarywatch.org/wp-content/uploads/2011/06/fact-sheet-the-high-cost-of-solitary-confinement.pdf.

274. *See, e.g.,* Gideon v. Wainwright, 372 U.S. 335, 340 (1963) (holding that federal courts are required to provide counsel to individuals who cannot afford one).

275. Metzner & Fellner, *supra* note 234, at 107.

276. *See* discussion *supra* Section III.C., III.D (discussing the circuit split on duration).

277. *Id.*

278. *See* discussion *supra* Section III.E (discussing the circuit split on requiring outdoor activity).

279. *See* discussion *supra* Section III.F (discussing lack of adequate mental health care).

280. *See* discussion *supra* Section III.A (discussing litigating under the Eighth and Fourteenth Amendment).

281. *See* discussion *supra* Section III.D.2 (discussing the circuits lenient towards prolonged sentences in solitary confinement).

IV. PROPOSAL

Solitary confinement violates both the Eighth and Fourteenth Amendments' protections afforded to inmates.[282] Unfortunately, the Supreme Court has not abolished the practice of solitary confinement on these two bases. This Comment advocates that if correctional facilities are to continue solitary confinement practices, then they must do so in a way that does not violate the inmates' constitutional rights.

This Comment proposes that this issue can be resolved in three ways. The Supreme Court can: (1) establish a clear durational limit as to how long a person can be held in solitary confinement; (2) mandate prisons to provide a minimum of one-hour outdoor activity to inmates in solitary confinement absent legitimate security justifications, subject to meaningful periodic review; and (3) mandate prisons to provide adequate mental health care to individuals in solitary confinement. If our Court chooses to stay silent in this matter, then this Comment proposes that Congress create laws that will draw boundaries for these prisons.[283] These recommendations benefit correctional facilities by decreasing overall prison costs, considering the high costs of keeping an inmate in solitary confinement as compared to an inmate held in the general prison population.[284]

A. Establishing Durational Limits

No clear durational limits around solitary confinement have been set.[285] Instead, courts rule differently amongst themselves and even at times, ambiguously even within the circuit.[286] The Supreme Court has shirked from addressing this issue head-on.[287] The Court needs to establish these boundaries for the lower courts. In the past, the Supreme Court protected prison inmates' constitutional rights by creating institutional boundaries.[288] We saw this when the

282. *See* discussion *supra* Section III.G (discussing the consequences resulting from not having clear durational boundaries in line with the Constitution and lacking adequate mental health treatment to combat the psychological issues observed in inmates in solitary confinement).

283. This discussion is outside the scope of this Comment.

284. Johnson, *supra* note 6.

285. *See* discussion *supra* Sections III.B-C (discussing how the courts have disagreed on what the durational boundaries should be).

286. *Id.*

287. *See supra* note 166-68 and accompanying text (discussing how the courts avoided providing clear instructions and have instead given wide discretion for lower courts to decide for themselves).

288. *See infra* notes 289-91 (discussing instances where the Supreme Court created clear durational standards to prevent Constitutional violations).

Supreme Court ruled that 48 hours post-arrest is the maximum time limit before a person is entitled to have a Gerstein Hearing and that two weeks is the maximum time that an individual released from custody can be free from police interrogation before being approached again.[289] Indeed, in 2005, Justice O'Connor's dissent in *Roper v. Simmons* clearly acknowledged the need for clear boundaries when she stated, "[C]lear, predictable, and uniform constitutional standards are especially desirable" when it comes to the Eighth Amendment.[290]

The Court should similarly set clear boundaries for the lower federal courts and the states to follow. The liberty interests at stake here reflect the same concerns the Court previously had in those cases.[291] However, even greater risks are at stake here – the sanctity of the human mind and spirit. Social and scientific research has already heavily proven that solitary confinement causes irreversible, adverse neurological and mental effects which become more severe with time.[292] Courts have continued to acknowledge these effects.[293] For example, a 2019 concurring opinion from the

289. *See* County of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991) (holding that providing "judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of *Gerstein* . . . [and] will [allow such jurisdictions to] be immune from systemic challenges"). The Court notes that a probable cause determination does not "pass[] constitutional muster simply because it is provided within 48 hours." *Id.* A hearing may still violate *Gerstein* if the arrested individual can prove that probable cause determinations were unreasonably delayed. *Id.* More importantly, the Supreme Court noted that "[w]here an arrested individual does not receive a probable cause determination within 48 hours, the calculus changes." *Id.* at 57. The government bears the burden to show "bona fide emergency or other extraordinary circumstance[s]" resulting in the delay. *Id.;* Maryland v. Shatzer, 559 U.S. 98, 117 (2010) (holding that Shatzer's break in *Miranda* custody between the first and second attempts at interrogation lasted for more than two weeks, and therefore statements made thereafter were not subjected to mandate suppression). In its analysis, the Supreme Court looked at the timeline as to when the defendant made incriminating statements after a break in custody. *Id.* at 111. The Court determined that when a defendant "has been out of custody for two weeks before the contested interrogation, the court is spared the fact-intensive inquiry into whether he ever, anywhere, asserted his *Miranda* right to counsel." *Id.* at 111-12.

290. *Roper v. Simmons*, 543 U.S. 551, 594 (2005) (O'Connor, J., dissenting).

291. *See Riverside,* 500 U.S. at 58 (noting that "the police should make every attempt to minimize the time a presumptively innocent individual spends in jail . . . [by providing] a judicial determination upon completing the administrative steps incident to arrest . . .").

292. *See* discussion *supra* Sections II.D (showing the different experiments used to study the effects of isolation).

293. *See, e.g., Grissom*, 902 F.3d at 1176, 1179 (Lucero, J., concurring) (discussing solitary confinement's "significant toll on the human psyche," labelling its psychological effects as "devastating," and stating that "[g]iven the severe consequences of long-term placement in solitary confinement, such conditions must be treated as a last resort, used in only the most extreme of

Tenth Circuit recognized the effects of solitary confinement as "devastating" and stated that "social interaction, environmental stimulation, and activity are basic human needs . . . [and] [d]eprivation of these needs for an extended period causes severe and lasting consequences to mental and physical health."[294] The Supreme Court should, as it has done in the past, create bright-line durational boundaries for the states to follow to avoid any further deprivation of inmate rights.

This Comment proposes that the Court adopt a maximum time period of fourteen days for solitary confinement. Fourteen days will fall in line with the fifteen-day period in which irreversible effects take hold on a person's mind, as stated by the United Nations' 2011 Special Rapporteur Report.[295] It also creates a clear boundary for states to follow or to modify in accordance with their own state constitutions — they either set the boundary at fourteen days or provide more protection and require a shorter maximum time.[296] After the fourteen-day period, inmates must be released to the general prison population.

To ensure that prison officials do not attempt to release inmates only to immediately place them back into solitary confinement, there should also be a fourteen-day grace period in which an inmate may not be returned into solitary confinement absent exigent circumstances, such as true security reasons or immediate harm to self or others.[297] The prisoner must be afforded a hearing in which the confinement should be reviewed every three days within the fourteen-day period. This ensures that the prisoner will be provided adequate Fourteenth Amendment procedural protections.[298]

This Comment also advocates that correctional facilities should implement a program for individuals in solitary confinement that is actually aimed towards rehabilitation rather than

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cases. And even then, prison officials must meaningfully consider on a periodic basis whether solitary remains necessary . . .").

294. *Id.* at 1176.

295. Mendez, *supra* note 70, at 9.

296. *See* Paul Marcus, *State Constitutional Protection for Defendants in Criminal Prosecutions*, WM. & MARY L. SCH. SCHOLARSHIP REPOSITORY 151, 153 (1988), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1774763 (stating that the Supreme Court has repeatedly held that "a state is free *as a matter of its own law* to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards").

297. *Cf. Shatzer*, 559 U.S. at 117 (stating that a 14 day break from custody would prevent the police from releasing an interrogated suspect who invoked his *Miranda* right to counsel only to bring him back almost immediately for reinterrogation – an abuse of police power).

298. Reinert, *supra* note 48, at 943-44; *see supra* note 146-47 and accompanying text (discussing the necessity and importance of procedural due process protection).

punishment.[299] More than 30 states have developed "step-down" or "incentive" programs that gradually provide more prison "rights," such as access to television or a crossword puzzle, as the inmate progresses through the program from solitary to a lower-security status through good behavior.[300] Prisons that have already implemented these programs have experienced decreased rates of segregation and lower incidents, such as physical assault, rapes, and small-rule breakings.[301] These programs should be implemented in every correctional facility that practices solitary confinement, with the goal of assimilating the prisoner back into the general population. As previously stated, this would also help prisons to decrease costs.

B. Requiring Minimum One Hour Recreational Activity

This Comment proposes that the Supreme Court mandate access to outdoor activity for all individuals in solitary confinement. Five other federal circuits have previously held that prison officials cannot temporarily deny outdoor exercise from individuals in solitary confinement absent security justifications.[302] The Supreme Court should reject the Tenth Circuit holding allowing for full denial of outdoor exercise without any security justification.[303] In denying the grant of certiorari to two cases in 2018, the Court denied the nation another critical opportunity to address this serious issue.[304]

Providing outdoor exercise can help improve the negative psychological effects of solitary confinement.[305] Neuroscientist Huda Akil stated that being deprived of social interaction and sunlight can have an impact on the brain's hippocampus and cause depression and other medical conditions.[306] Harvard Health Publishing recently stated that "[r]esearch . . . has shown a strong

299. *See generally* Maurice Chammah, *How to Get Out of Solitary — One Step at a Time*, THE MARSHALL PROJECT (Jan. 7, 2016), www.themarshallproject.org/2016/01/07/how-to-get-out-of-solitary-one-step-at-a-time (providing examples of step programs designed to "motivate prisoners to demonstrate appropriate behavior").

300. *Id.*

301. *Id.*

302 *See* discussion *supra* Section III.E (showing that other than the Tenth Circuit, five other circuits have held that outdoor recreational activity should be required for inmates held in solitary).

303. *See supra* notes 218-19 and accompanying text (discussing the Tenth Circuit's ruling and the denial of certiorari by the Supreme Court).

304. *Id.*

305. *Spain*, 600 F.2d at 199.

306. Elizabeth Landau, *Solitary Confinement: 29 Years in a Box*, CNN (Jun. 9, 2015), www.cnn.com/2014/02/23/health/solitary-confinement-psychology/index.html?hpt=hp_c2.

connection between time spent in nature and reduced stress, anxiety, and depression."[307] In addition, requiring a security justification allows for correctional facilities to still have a right to withhold outdoor exercise in the face of a reasonable and important justification — officer security.[308] To prevent misuse of a security justification and to still afford protection to the inmate, this justification must be reviewed by upper-level prison management every week to determine whether the security threat is still present. It would also be best for management to work with the mental health team to determine the severity of this security threat as well.

The Supreme Court needs to reconsider the severity of these issues, understand how human lives are slowly deteriorating as these cases do not get their rightful day and ruling in court, and adopt the practices of the other five Circuits. Moreover, this Comment pleads for the Supreme Court to view this issue as their fellow bench member, Justice Sonia Sotomayor, sees it: that solitary confinement is an extremely troubling issue and that its implication "clutches a wide range of psychological scars."[309]

C. Providing Adequate Mental Health Care

Adequate mental health care should be mandated for every individual in solitary confinement, considering the severe effects the practice has on the human mind. The challenge is to clearly define what "adequate" entails. This Comment proposes that truly adequate mental health care should include available one-on-one private counseling sessions, available group counseling sessions, and providing proper training to staff.

The current "drive-by" mental health care provided to prison inmates in solitary confinement is grossly insufficient.[310] Such mental care would be ineffective for an ordinary individual, let alone an individual suffering from a mental health disease who is physically isolated for at least 23 hours a day. The quality of the therapist-prisoner interaction needs heavy improvement. Correctional facilities need to provide one-on-one time with a

307. *Sour Mood Getting You Down? Get Back to Nature*, HARV. HEALTH PUBL'G (July 2018), www.health.harvard.edu/mind-and-mood/sour-mood-getting-you-down-get-back-to-nature (noting that people under high levels of stress cause "malfunctions" in their brain that results in a "continuous loop of negative thoughts" and that individuals who had outdoor exercise "had lower activity in the . . . brain region that is active during rumination . . .").

308. *See supra* note 227 and accompanying text (discussing how officer security is still reasonable in denying an inmate recreational activity).

309. Weis, *supra* note 229.

310. *See* Arriaga, *supra* note 239 and accompanying text (quoting and discussing the short and inadequate attention inmates receive in their mental health care).

therapist, in a room, outside of the cell. Private sessions allow inmates a safe space to express themselves fully and allow therapists to truly get to know the person in order to understand how to tailor the mental health treatment for each individual inmate.[311]

Inmates in solitary confinement should also be provided with group counseling sessions. Even if the prison argues that the inmate is a security threat and he, therefore, cannot be around others, group counseling provides a second chance for an inmate to learn how to communicate and behave in a small group setting. Moreover, the sessions allow inmates to learn to work together to address issues such as drugs and other addictions.[312] Additionally, if an inmate feels uncomfortable sharing one-on-one with his counselor, he can have another option by sharing in a group with others who may feel the same way. These group sessions can teach the inmates to work with one another so as to better assimilate once released back into the general prison population.[313]

Finally, there needs to be better mental health training for prison staff. It is not uncommon that non-medical staff are the ones that interact with prisoners the most.[314] They are sometimes also used to dispense prisoners' medical drugs.[315] These individuals should undergo constant mandatory training to ensure their understanding of mental health care and what they can or cannot do in violation of a prisoner's constitutional rights. Training these individuals would allow courts to prevent hearing frivolous arguments and misusage of qualified immunity protections where prison officials claim they did not know the law or the constitutional bounds of their actions. Moreover, it prevents prison officials from haphazardly giving prisoners medicine or withholding medicine out of punishment. Similar mental health trainings have been implemented in police reform to "reduce stigma and better recognize the symptoms of a mental health crisis to support

311. *Psychotherapy Guide: Group Therapy vs. Individual Therapy*, AM. ADDICTION CTRS., americanaddictioncenters.org/therapy-treatment/group-individual (last updated June 13, 2019) (stating that individual therapy is advantageous because it "allows the therapist to be very thorough in understanding the specific problems of the client and in developing an individualized approach to helping the client" and that "[t]he level of analysis and treatment can be much more intense and comprehensive in individual therapy compared to group therapy").

312. Ctr. for Substance Abuse Treatment, *Substance Abuse Treatment: Group Therapy*, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN. 2 (2005), www.ncbi.nlm.nih.gov/books/NBK64223/.

313. *Id.* (stating that "groups benefitted the members emotionally due to supporting one another in shared experiences" and that group psychotherapy provided observable benefits to veterans following World War II).

314. Arriaga, *supra* note 239.

315. *Id.*

improved emergency response."[316] Prison staff should similarly receive training that will allow them to understand mental health and be adequately trained and equipped to handle individuals who suffer from mental health illnesses in prisons. Considering the high correlation between time spent in solitary confinement and the psychological effects manifested, adequate training is even more imperative to handle individuals placed in solitary.[317]

In light of the negative effects solitary confinement has on inmates, this Comment advocates that it is necessary for the United States Supreme Court to set clear durational guidelines as to how long a prisoner can be placed in solitary. In addition, if prisons are going to be allowed to continue this practice, then there should be required outdoor recreation time and adequate mental healthcare to protect inmates against these deleterious effects on their psychological, mental, and emotional well-being.

V. CONCLUSION

Each year, thousands of individuals are placed in solitary confinement. We as a nation have recognized the severe effects of solitary confinement for over a hundred years now.[318] Yet little has been done to address this constitutional issue. Because of the Supreme Court's refusal to establish mandates and boundaries for solitary confinement, each year we have thousands of individuals painfully wasting away in the confines of their dark, small cells. Their calls for help are left unheard. Many of these individuals are thrown in these conditions for crimes society may deem to be "less deserving" of harsh punishment yet they are nonetheless placed in

316. *Compare* Rahm Emmanuel, *Citywide Mental Health Steering Comm. Takes Steps on Police Reform, Mental Health Crisis Response*, CTY. OF CHI. (Jun. 25, 2018), www.cityofchicago.org/city/en/depts/cdph/provdrs/healthy_living/news/2018/june/citywide-mental-health-steering-committee-takes-steps-on-police-.html (emphasizing the City of Chicago's efforts to "improve crisis response through trauma-informed practices to better identify, serve and ultimately treat those individuals with mental health challenges during a crisis") *with Mental Health First Aid for Public Safety*, THE NAT'L COUNCIL FOR BEHAV. HEALTH (2018), www.thenationalcouncil.org/about/mental-health-first-aid/mental-health-first-aid-public-safety/ (establishing an 8-hour course to help officers better understand addictions, and providing effective response options to de-escalate incidents without compromising safety) "Approximately 80,000 public safety professionals have taken Mental Health First Aid for Public Safety to date." *Id.*

317. *See* discussion *supra* Sections II.D.1-3 (discussing the experimental findings from research of animals and humans held in isolation); *see also* Grassian, *supra* note 96, at 346 (stating that ". . . longer duration of the sensory deprivation experience ha[s] [] been associated with an increased risk of adverse psychiatric consequences").

318. *See In re Medley*, 134 U.S. 160 (recognizing the effects of solitary confinement in 1890).

isolation for long periods of time.[319]

The proposals set by this Comment understandably may financially burden the correctional facilities. However, the Supreme Court has held that financial strains alone cannot justify violating an individual's liberty.[320] It is costly for correctional facilities to utilize solitary confinement practices in a constitutional manner. However, these facilities choose to continue this practice. If they choose to do so, then they must bear the financial consequences to make this practice right. Justice Sotomayor recently, and accurately, portrayed solitary confinement as "perilously close to a penal tomb."[321] Her call for "[c]ourts and corrections officials . . . [to] remain alert to the clear constitutional problems raised by keeping prisoners" in isolation should give the Supreme Court the wakeup call it so desperately needs.[322]

319. The Editors, *supra* note 20.

320. *See Gideon*, 372 U.S. at 340 (holding that the courts cannot withhold the right to counsel if an individual does not have the financial means to hire an attorney).

321. Weis, *supra* note 229.

322. *Id.*