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Cruel and Unusual: The Eighth Amendment and the Overuse of Solitary Confinement in American Corrections

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Cruel and Unusual: The Eighth Amendment and the Overuse of Solitary Confinement in
American Corrections

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Requirements for Departmental Honors in Criminal Justice

Bridgewater State University

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Chapter I: Introduction

At 17 years old, Bronx resident Kalief Browder was sent to New York's Riker's Island jail complex on a robbery charge, where he ended up residing, without a conviction, for about three years. For most of his incarceration, he was held in solitary confinement—inside a 7' by 12' cell for 23 hours a day, the longest duration being 300 days straight (Martin, 2017). It was during this time that Browder displayed marked psychological deterioration, attempting suicide on four different occasions. In the documentary film about his ordeal, *Time: The Kalief Broder Story*, he comments on his mental state a year after finally being released in 2013: "You know, I smile, and I joke a lot. But, you know, deep down, I'm a mess because, like, I'm 21, and on the inside, I feel like I'm 40" (Martin, 2017). On June 6th, 2015, Browder hanged himself in his bedroom, just two weeks after his 22nd birthday.

According to the U.S. Department of Justice, solitary confinement is defined as housing an inmate (or, rarely, multiple inmates) in a locked cell, fully separated from the general population, with the inability to leave the confines of the cell for most of the day—typically, at least 22 hours (U.S. Department of Justice, 2016). Even at a purely semantic level, the concept of solitary confinement has problems. This is because different correctional jurisdictions—whether they be local, state, or federal—have differing terminology and definitions to refer to the concept of segregating certain prisoners from the general population. Examples of terms used in varying capacities during various eras are: "solitary confinement", "isolation", "segregated housing", "special housing", "lockdown", and "security housing", among countless others. Regardless of its name, we know that, today, the practice of solitary confinement is reality for many individuals under the jurisdiction of American corrections, like Kalief Browder was; exactly how many individuals, though, is harder to determine. Getting an accurate, all-encompassing set of statistics

on solitary confinement rates in the United States has been notably difficult to accomplish, primarily due to the aforementioned differences in terminology, and variation of data-gathering practices. As a result, many studies on the subject use data that are over a decade old.

However, some recent reports are promising. In a report on 34 prison jurisdictions—that, together, account for 73 percent of the 1.5 million incarcerated in prisons in the United States—66,000 incarcerated individuals were found to be currently residing in solitary confinement of some kind. If that number is indicative of all 52 prison jurisdictions in the U.S., it is estimated that 80,000 to 100,000 incarcerated individuals nationwide currently reside in solitary confinement—not to mention the prisoners in local jails, juvenile facilities, and military or immigration detention centers, which these statistics do not take into account (The Liman Program, Yale Law School, & Association of State Correctional Administrators, 2015). This is the closest in a decade that criminal justice researchers have come to a complete set of statistics on solitary confinement rates throughout the various correctional jurisdictions of the U.S. Another recent report—this one by the Department of Justice’s Bureau of Justice Statistics—details that, on any given day, 4.4 percent of the federal and state prison population and 2.7 percent of those in local jails are residing in solitary confinement (2015).

The origins of the practice lie in the origins of the modern prison, in the early-nineteenth century. The Pennsylvania prison system, which debuted with the completion of Eastern State Penitentiary in 1829, was entirely designed around solitary confinement use; complete, 24-hour isolation between inmates was intended to encourage reflection and induce religious penance (Pennsylvania system, 2008). Soon, countless visitors from European and South American countries would come to the United States to examine American prisons; Western corrections administrators favored the Pennsylvania system during their observations, and, as a result,

hundreds of prisons in Europe and South America were remodeled or newly built in accordance with this system of imprisonment (Smith, 2006).

Even in these early days, however, people in both the U.S. and Europe noticed a great number of physical, mental, and emotional issues that solitary confinement seemed to produce and/or exacerbate in inmates—symptoms that are still currently observed and researched throughout the social sciences. Consequently, in the late-nineteenth century and into the twentieth, there was a gradual decline in the use of solitary confinement on a large scale. In 1890, the U.S. Supreme Court issued an opinion on an 1889 Colorado statute that mandated solitary confinement for murderers on death row. In it, Justice Samuel Freeman Miller spoke about how, even in the case of relatively short confinements, many prisoners fell into a “semi-fatuous condition, from which it was next to impossible to arouse them”; others isolated longer became “insane and violent” or suicidal, and even those who made it through their time in solitary were “not generally reformed, and in most cases, did not recover sufficient mental activity to be of any subsequent service to the community” (*In re Medley*, 1890). Though this was by no means a definitive opinion on the overall use of solitary confinement, it highlighted the growing sentiment that solitary—particularly in cases of long-term isolation—does more harm than any punitive good. By the beginning of the twentieth century, prisons were no longer entirely composed of solitary confinement cells, though disciplinary and protective isolation would continue. This would be the status quo until the late-1980s, with the rise of the supermax prison, which would bring with it a new era of widespread solitary confinement.

Since this resurgence of solitary confinement, negative effects similar to those observed by the Supreme Court in 1890 have been observed and studied by contemporary social science researchers. For example, according to psychologist Craig Haney of UC Santa Cruz, numerous

studies varying in duration, intensity, and location have consistently found that individuals in extended stays in solitary often present with significant psychological and physiological issues, including: depression, high blood pressure, insomnia, uncontrollable anger, hallucinations, anxiety, feelings of emotional near-breakdown, hopelessness, paranoia, obsessive-compulsions, self-mutilation, and even suicidal ideation and behaviors (2003). With effects like these being well-documented over the past several decades, a widely-held sentiment is that the use of solitary confinement constitutes what it means to be a cruel and unusual punishment—and, as such, would be an unconstitutional practice under the Eighth Amendment.

In recent decades, many have sought a solution through civil rights litigation, but have come up empty-handed like many from centuries before. From 1866 to date, there have been 35 Eighth Amendment violation petitions that received rulings from the U.S. Supreme Court, of which a number specifically named solitary confinement overuse in prisons as an example of a cruel and unusual punishment; however, *none* of the cases resulted in the Supreme Court *directly* addressing the constitutionality of solitary in its ruling (Solitary Watch, 2010). Aside from a handful of recent concurring and dissenting opinions—*Davis v. Ayala*, 2015 and *Ruiz v. Texas*, 2017, respectively—the Court has essentially skirted around the issue every time.

The purpose of this thesis is to examine how and why the Supreme Court has not held long-term solitary confinement unconstitutional under the Eighth Amendment's prohibition on cruel and unusual punishment. I seek to analyze key cases in which the Court fails to consider the constitutionality of the issue, and outline the social and legal rationales that informed those cases; I also detail why the Court, in general, is either unable or unwilling to rule on it. Another purpose of the thesis is to explain why the Court *should* address the issue of constitutionality and

deem it not so; I will consider contemporary evidence from psychology and other social science fields to evaluate how the Supreme Court should treat this issue.

Methodologies

This thesis relies primarily on interpretive legal analysis, meaning that I have chosen significant cases related to the Eighth Amendment, prison conditions, and solitary confinement itself from the nineteenth century to the present, and seek to analyze the Supreme Court's legal logic in each. This requires paying careful attention to what precedent the justices cite, how they frame the legal issue, and how they logically justify their constitutional avoidance of solitary confinement. For example, I am tracking the justifications that the justices most frequently use in their solitary confinement cases, which range from narrow interpretations of the Eighth Amendment, to deferential approaches, to state control over prison systems. The logic the Court uses may illuminate the motivations and concerns of the justices as they continue to grapple with this controversial, complex issue.

I also take into consideration the social context of these cases—legal scholars often note that the social institutions surrounding the Supreme Court have unique effects on the Court's decisions (Clayton & Gillman, 1999). For example, the prevailing notion in the early-nineteenth century that solitary confinement would encourage religious reflection and remorse in prison inmates may explain the Court's decisions in cases of that time involving the issue. As is common in contemporary legal scholarship, I am analyzing these cases with attention to multiple explanatory factors, including judicial ideology (Segal and Spaeth 2002) and historical context (Gillman 1999).

This thesis also relies on a review of social science research. I am conducting a literature review of numerous empirical studies pertinent to the issue at hand, and organizing their findings

according to common themes that present themselves throughout. Additionally, the thesis depends on a historical analysis of solitary confinement. I examine the origins of the practice in the nineteenth century, how its purpose and prevalence changed over time, and how its use in the past informs its status in American corrections in the present.

Overview of Thesis Chapters

The purpose of this project is to highlight the problematic nature of long-term solitary confinement by detailing its well-established negative effects and, ultimately, assert why overuse of the practice could constitute a cruel and unusual punishment under the Eighth Amendment. This thesis will begin with a historical overview of solitary confinement (Chapter II). This chapter will chronicle the origins of solitary confinement in the two competing American prison systems of the early-nineteenth century, the extent to which its use expanded and evolved until a decline at the turn of the twentieth century, and its large-scale return with the rise of the supermax prison in the 1980s. The goal of this chapter is to demonstrate how ingrained solitary confinement is in American corrections.

Next, Chapter III will identify key studies from social scientific literature, and review their findings. Most literature on solitary confinement and mental health effects takes the form of qualitative, interview- or questionnaire-based studies of small prisoner samples. That being said, many studies on the topic have found associations between prolonged isolation and negative psychological effects, certain criminal behaviors, and certain demographic groups. While the majority of research discussed will be empirical studies that affirm these associations, there will also be mention of some studies with negative or inconclusive results, and of existing literature reviews on the subject.

Chapter IV will discuss key United States Supreme Court cases concerning claims of Eighth Amendment violation, those related to prison conditions, and those concerning the issue of solitary confinement specifically. Additionally, it will identify specific legal tests and requirements for the applicability of the Eighth Amendment's Cruel and Unusual Punishments Clause, analyze the Supreme Court's apprehension to confronting the solitary confinement issue, and highlight recent judicial opinions that seem to indicate an impending application of those legal tests to a solitary confinement case. Finally, Chapter V will summarize and conclude the thesis, and present thoughts going forward.

Chapter II: A Brief History of Solitary Confinement and the Surrounding Controversy

1. Introduction

The confinement of prisoners in near-total isolation has been practiced since the advent of the modern prison itself. This chapter will first provide a brief history of solitary confinement, and detail its origins in the first American prisons of the early-nineteenth century—built through both the Pennsylvania and Auburn (New York) prison systems—while also touching upon the social theory of Michel Foucault and his idea of a punishment shift, where the locus of punishment moved from the bodies of the condemned to the souls. Next, the evolution of solitary confinement will be traced, from this initial implementation in the early-nineteenth century, through its gradual decline in the mid- and late-nineteenth century, finally to its resurgence in the 1980s and 1990s with the rise of supermax prison facilities.

2. A Brief History of Solitary Confinement

A. Foucault and Public Punishments in History

In his seminal work *Discipline and Punish*, French social theorist Michel Foucault opens by recounting the case of Robert-François Damiens. In March of 1757, Damiens was tried for the attempted regicide of King Louis XV of France; he was convicted shortly after, and sentenced to be executed by drawing and quartering. However, the execution would merely be the final act in a prolonged, public display of torture at the hands of the state.

As Foucault writes, first, Damiens was to have the skin of his chest, arms, thighs, and calves torn-away with red-hot pliers specially designed for the occasion; when the executioner attempted this, the skin did not give way easily, and he was twisting and pulling for an inordinate amount of time while Damiens screamed in pain (1977). Next, with an iron ladle, the executioner poured a boiling concoction of lead, resin, wax, sulfur, and oil into each of the coin-sized

wounds he managed to make with the pliers. Then, each of Damiens' four limbs were tied tightly and affixed to horses in preparation for drawing, but after a fifteen-minute ordeal that resulted in excruciating pain and dislocated joints for the convict, two more horses were affixed. However, Damiens' limbs remained attached; it would take two executioners with long knives hacking at his joints for the limbs to tear-away with the horses' efforts (Foucault, 1975/1977). Finally, the convict was dead.

At the end of the eighteenth century, public torture and executions like this were commonplace in Europe and the newly established United States; as Foucault writes, these practices were administered by the state to illicit confessions of guilt, create the illusion of investigative transparency,¹ and produce spectacles that were both entertaining to everyday citizens and deterring to any would-be offenders (1977). Strangling, flogging, hanging, burning, drawing-and-quartering, branding, and time in the pillory were, at times, frequently used criminal punishments². By today's standards, such acts would be deemed medieval, barbaric, or inhumane, and would certainly constitute cruel and unusual punishments if administered by the criminal justice system.

B. "Docile Bodies" and the Punishment Shift

However, at the turn of the nineteenth century, the dominant punitive logic in Western legal spheres began to shift. Foucault argues that, during Western history, punishment's locus shifted from the body of the condemned to the soul—from public, brutal penalties like the aforementioned to more hidden, psychological ones (1977). Upon entering the Industrial Age,

¹ In most European countries, knowledge concerning a criminal investigation was exclusively the privilege of the prosecution; both the public and the accused themselves were not privy to evidence or even the charges during the investigation process.

² It should be noted, however, that violent or capital punishments did not make-up the majority of criminal penalties. Fines were most common throughout Western nations; banishments were particularly popular in France.

society became restructured around discipline; “disciplinary institutions,” as Foucault deems them, like factories, schools, and armies required malleable individuals who could be easily molded into productive, disciplined members of society—individuals who possessed “docile bodies” (1977). It became evident to legal actors of the time that public displays of the state’s power through excessive force would not effectively produce this desired discipline. As a result, the locus of punishment was gradually moved from the public sphere to more private spaces. This logical shift would facilitate the rise of the modern prison in the early-nineteenth century, which would become the primary center for more criminal punishment. In the United States, two major prison systems developed: Pennsylvania, and Auburn. Both utilized the isolation of prisoners, albeit in differing capacities, while emphasizing religious rehabilitation.

C. Early Prisons and Solitary Confinement

i. The Pennsylvania System Under the Pennsylvania or separate system of incarceration, prisoners were kept in perpetual solitary confinement. Opened in 1829 as the flagship of this system, Eastern State Penitentiary in Philadelphia (formerly called Cherry Hill Prison) was designed and constructed specifically to achieve this goal. Each cell housed one prisoner, and was built with its own exercise yard attached, with thick, high walls—along with staggered exercise times—to prevent communication between prisoners (Pennsylvania system, 2008). Inmates performed work duties, but they were of a sedentary nature, and completed within their cells; in the event that prisoners did leave their cells, they were escorted by guards and made to wear full hoods at all times, in order to keep-up the sense of isolation (Pennsylvania system, 2008). Proponents of the Pennsylvania system explained that this seclusion was intended to induce reflection and true penitence in its inmates—to lead them to turn thoughts inward,

encounter God, repent for crimes committed, and, eventually, return to society as productive, moral citizens (Smith, 2006).

From the 1830s to the 1850s, countless visitors from European and South American nations came to the United States to observe American correctional systems. European corrections administrators favored the Pennsylvania system during their observations, and, consequently, several hundred prisons in Europe were restructured or newly built in accordance with this model of incarceration (Smith, 2006). In the United States, however, the Auburn or congregate system would prove to be more widely used.

ii. New York State's Auburn System Under the Auburn or congregate system, named for Auburn Prison in Upstate New York, prisoners resided in isolated cells only during the nighttime hours. When they were not sleeping, they performed work duties, ate their meals, and attended mandatory prayer services with the rest of the prison population; inmates were only allowed to speak to guards with permission, and in low voices (Foucault, 1975/1977). This system was built upon the idea that criminal behavior was perpetuated through exposure to other criminals; as such, absolute silence was always enforced between inmates (Auburn system, 2008). Unlike in the Pennsylvania system, prisons utilizing the Auburn system implemented both manual labor and crafting for their inmates, who moved to different tasks throughout prison areas in lockstep, and wore the well-known striped jumpsuit. Prisoners of the Auburn system were expected to find God—and therefore penitence and rehabilitation—not through silent reflection in their cells, but rather through silent, efficient group work, perhaps reminiscent of Protestant work ethic ideals. Proponents argued that the system was a perfect version of society itself; with prisoners silently living, working, and praying together within a strict hierarchy, being observed by those higher

up, an Auburnian prison served as a paradigm for the newly established, industrial society (Foucault, 1975/1977, p. 238).

By the middle of the nineteenth century, the majority of prisons in the United States were built in accordance with the Auburn system. In Massachusetts, for example, Charlestown State Prison—just north of Boston—was an Auburnian institution (Smith, 2006). It is perhaps not a surprise that the newly industrialized American society would prefer a system of incarceration that, at least in theory, engaged prisoners in disciplined work that would ultimately lead to productive behavior upon release back into society. While the Pennsylvania system was still used across the states throughout the early-nineteenth century, it was not long before controversy arose surrounding the conditions of its solitary confinement.

D. Controversy and Gradual Decline

As soon as the late-1830s, reports on Pennsylvania system prisons appeared in newspapers across the country, detailing claims of hallucinations, dementia, and “monomania” among their inmates as a result of solitary confinement (Smith, 2006). Proponents of the Pennsylvania system denied the idea that isolation was harmful, citing other factors as the cause of mental disorder. In 1846, a physician at Eastern State Penitentiary argued that the prisoners who suffered from mental disorder were members of the “mulatto race” who were addicted to “sexual excesses,” and simply could not cope with solitary confinement as well as prisoners with “pure Anglo-Saxon blood”³ (Prison Discipline Society of Boston, 1855, p. 78). This belief became a common explanation for mental health issues in prison, and reflects both the era’s views on sexuality, and ideas of scientific racism.

³ A prevailing theory of sexuality and mental illness at the time was that masturbation led to insanity.

While the Pennsylvania system and solitary confinement still possessed a large body of supporters throughout the 1840s and 1850s, many physicians in the medical community did not simply explain away prisoner mental health issues with racist logic, and found numerous problems with the system's use of isolation. In an 1841 report, the resident physician of a Pennsylvania system penitentiary in New Jersey commented that "the more rigidly the plan [for solitary confinement] is carried out, the more the spirit of the law is observed, the more its effects are visible upon the health of the convicts. A little more intercourse with each other, and a little more air in the yard, have the effects upon mind and body, that warmth has upon the thermometer, almost every degree of indulgence showing a corresponding rise in health of the individual" (Prison Discipline Society of Boston, 1855, p. 60). According to his observations, though mental disorder can easily spring from solitary confinement, a remedy for it may be drawn just as readily, by way of increased social interaction between prisoners.

In a subsequent report, the same physician elaborates on this concept, stating that, in "many cases of insanity" at his New Jersey penitentiary, if a prisoner's mind "begins to fail, and he shows symptoms of derangement, [then] another convict is put with him in his cell. This invariably restores the patient" (Prison Discipline Society of Boston, 1855, p. 82). Similarly, in Rhode Island, "symptoms of insanity" at a state prison utilizing Pennsylvania-style solitary confinement simply dissipated when inmates were given a partner to complete work tasks with (Prison Discipline Society of Boston, 1855, p. 63). In these and a growing number of other prisons, when prisoner mental health issues arose, solitary confinement was simply done-away with.

By the 1860s, a general consensus in the United States was immense skepticism toward the idea of "rehabilitation through isolation," and, consequently, the nation that had birthed

large-scale solitary confinement became one of the first to abandon it (Smith, 2006). Throughout the 1870s and into the 1880s, as Smith continues, prisons across the nation gradually abandoned both the Pennsylvania and Auburn systems of incarceration in favor of newer ones; for example, the so-called “progressive system” was adopted in many states, which entailed initial short terms of solitary confinement, followed by a multi-stage increase in both social interaction with other inmates, and various prison privileges (2006). The outright condemnation of large-scale, long-term solitary confinement was a belief held by even members of the Supreme Court at the turn of the twentieth century. In an opinion on a case that involved the solitary confinement of death row inmates in Colorado, Supreme Court Justice Samuel Freeman Miller remarked that that solitary confinement was “an additional punishment of the most important and painful character,” and describes how, in many prisons, inmates were found to be in “semi-fatuous condition, from which it was next to impossible to arouse them”; others became “insane and violent” or suicidal, and even those who made it through their time in isolation were “not generally reformed, and in most cases, did not recover sufficient mental activity to be of any subsequent service to the community” (*In re Medley*, 1890). This legal decision acknowledged the severity of mental health effects that plagued a number of prisoners housed in long-term solitary confinement.

By the 1930s, solitary confinement had all-but vanished in most American prisons. When it *was* present, it was used only for the so-called “worst-of-the-worst”. Notable was the infamous “D Block” at Alcatraz Federal Penitentiary in San Francisco, where (beginning in 1934) dozens of the nation’s worst criminals were kept in solitary confinement. One D Block cell in particular, simply deemed “The Hole,” was a completely bare and dark concrete room where inmates guilty of disciplinary infractions were stripped naked, and fed bread and water through a hole in the door (Sullivan, 2006). Alcatraz would continue to house federal prisoners—both in D Block, and

in normal housing wings—until its closure in 1963. Not long after the era of Alcatraz came to an end, the federal prison system experienced a sharp increase in violent incidents between 1970 and 1980; as a result, in 1979, Marion Federal Penitentiary in Illinois was modified with new level 6 safeguards—becoming the first “super-maximum security” facility in the nation (Frost & Monteiro, 2016). For four years, Marion stood on its own as a new kind of correctional institution; then, the deaths of two prison guards in 1983 would change everything.

E. Resurgence and Rise of the Supermax

On an October day in 1983, two prison guards at Marion Federal Penitentiary were killed in two different altercations with inmates. As a result, a high-security lockdown was initiated—one that would never be lifted. Inmates no longer had access to communal spaces and interactions, personal belongings were removed from cells, and time out-of-cell was extremely restricted, with handcuffs required at all times when it *did* occur (Smith, 2006). While shocking to prison rights advocates, Marion’s new lockdown status quo would inspire a host of other state and federal prisons, known from then on referred to as “supermaxes”. In 1989, California’s notorious supermax prison Pelican Bay was completed, where prisoners in its Security Housing Unit experience very little freedom. Construction of more supermax facilities became widespread throughout the 1990s; by 1997, there were 55 supermax facilities in 34 states, with 20,000 individuals incarcerated in them by the following year (Frost & Monteiro, 2016; Smith, 2006). While whole supermax prisons garnered much of the focus of corrections administrators seeking to modernize in accordance with the latest trend, supermax-style housing units added to lower-security prisons were also implemented on a wide scale.

In these new supermax facilities, prisoners being isolated in their cells for 23 hours of the day was the standard, and continues to be in today’s institutions. Inmates are often allowed a

minimal number of personal belongings, if any, and cells have minimal furniture, and often receive no sunlight; room temperature and lighting are entirely at the discretion of prison staff; the mere one hour a day spent out-of-cell is often devoted to bathing and exercise; there are no communal spaces or programs, and therefore zero interaction between prisoners; phone calls and visits with those on the outside are extremely restricted, if allowed at all (Smith, 2006). For years, and sometimes decades, the only “social interaction” supermax prisoners receive is with prison staff—as if the cold, commanding demeanor of a corrections officer applying restraints, or the rushed delivery of food through a slot in the cell door constitutes true social contact.

3. Conclusion

Solitary confinement has been extant since the birth of the modern prison itself. What began as, essentially, an experiment in corrections soon became the normal in the nineteenth century United States. Within a decade of its wide-scale implementation, however, problems concerning the effects it had on the health of prisoners arose, leading to ever-going controversy and debate throughout legal circles. By the last half of the nineteenth century, the large-scale use of solitary confinement, along with the Pennsylvania and Auburn systems as a whole, would gradually disappear. Despite usage in the 1930s to 1960s in federal prisons like Alcatraz for the “worst-of-the-worst,” solitary confinement would not be seen en masse again until the late-1980s. With the rise of the supermax prison, the United States witnessed a resurgence of large-scale, long-term solitary confinement. While centuries have passed since the first solitary confinement experiments, the Pennsylvania and Auburn systems, time has not led to much change. The same controversy over prisoners’ health in isolation that faced corrections officials in the nineteenth century is ever-present here in the twenty-first. As a result, contemporary scholars in the clinical and social sciences—psychology in particular—have turned their focus

toward empirically studying the effects that solitary confinement, for hundreds of years, has been reported to have on the incarcerated, isolated mind. This will be the focus of Chapter III.

Chapter III: Perspectives from Contemporary Social Science Research

1. Introduction

Prompted by the rise of supermax prisons, the social sciences—psychology in particular—have become increasingly interested in how prison conditions and type of confinement can affect the mental health of those incarcerated. However, despite the topic’s increasing significance in the past few decades, the corresponding body of published empirical studies is not yet as large and varied as it should be. Most literature on solitary confinement and mental health effects takes the form of qualitative, interview-based studies of prisoner samples. That being said, much of the literature on the topic has found associations between prolonged isolation and negative psychological effects, detrimental behaviors, and certain demographic groups. This chapter will identify key studies from social scientific literature and review their findings. While the majority of research discussed will be empirical studies that indicate solitary confinement’s association with various psychological effects and psychiatric symptomology, there will also be mention of some studies with negative or inconclusive results, and existing literature reviews on the subject.

2. Studies That Suggest Solitary Confinement is Associated with Certain Psychological Effects, Behaviors, and Demographics

A. Negative Psychological Effects as Outcomes of Solitary Confinement

In a 1983 study at the maximum-security prison in Walpole, MA, psychiatrist Stuart Grassian interviewed fourteen male solitary confinement inmates about their experiences in isolation. The inmates were between 22 and 38 years old, and were isolated within a range of eleven days to ten months. Through the interviews, Grassian found that several psychopathological symptoms, including hypersensitivity to stimuli, gaps in concentration and memory, hallucinations, marked anxiety, intense paranoia, and violent ideation and behaviors, were present in a large portion of the prisoners. It should be noted that, while exaggeration of symptoms was expected, the exact

opposite occurred; in general, the prisoners were initially apprehensive to share their experiences, often out of fear of reprisal from prison staff, but were later willing to.

Clinical psychologist Richard Korn (1988a) interviewed five “high-risk” women connected to violent political groups incarcerated in the Federal Correction Institution’s High-Security Unit (HSU) in Lexington, KY; nearly all of the women reported various symptoms after several months of confinement in nearly-bare cells that included claustrophobia, depression, visual and auditory hallucinations, dizziness, loss of appetite, sleep disturbances, heart palpitations, violent outbursts, and worsening of preexisting medical issues. Some of the women also reported suffering sexual mistreatment and humiliation at the hands of male prison guards, denial of adequate feminine hygiene products, and prevention of access to commissary funds.

Social psychologist Craig Haney, studying inmates housed in Pelican Bay Prison’s notorious Security Housing Unit (SHU), found through interviews that many exhibited problematic behaviors such as loss of impulse control, degradation of communication skills, violent outbursts, self-mutilation, and suicidal actions (1993). In a subsequent study, a questionnaire concerning twelve indices of psychological trauma and thirteen psychopathological symptoms related to isolation was administered to 100 inmates; Haney found that eleven of the trauma indices and eleven of the psychopathological symptoms were suffered by over half of the prisoners (2003).

In 2000, another team of Danish researchers (Andersen, Sestoft, Lillebaek, Gabrielsen, & Hemmingsen) used a battery of cognitive tests and clinical assessment tools—including interviews, questionnaires, and physiological assessments—to examine 228 prisoners on remand, 133 of whom were held in solitary confinement, and 95 of whom were not. In their longitudinal study, the researchers evaluated each prisoner at multiple intervals, until their remand was over:

within two days, at three weeks, at two months, and monthly thereafter (the longest remand being four months). They found that 28% of the solitary confinement inmates developed diagnosed adjustment or depressive disorders while incarcerated, while only 15% of the non-solitary confinement prisoners did so, with the difference primarily explained by form of incarceration.

In a collaborative study, American and Italian researchers (Roma, Pompili, Lester, Girardi, & Ferracuti, 2013) examined incidence of suicides in Italian jails and prisons from 2004 through 2008. The Italian Ministry of Justice organizes inmate suicide records by three types of confinement: general population, short-term isolation, and maximum-security isolation. The researchers found that the rate of suicide was 2.39 times higher in short-term isolation prisoners, and 4.39 times higher in maximum-security isolation prisoners than in general population prisoners. While the data were limited in detail—Italy's Ministry of Justice does not keep demographic information on these suicides—the study demonstrates how incremental conditions of solitary confinement can predict rates of suicide.

In 2014, researchers in Queens, NY (Kaba, et al.) set out to better-understand prisoner self-harm in New York City correctional facilities. They examined 244,699 medical records from the Bureau of Correctional Health Services, dated from January 2010 through January 2013; out of these incarcerations, there were 2182 acts of self-harm committed, both fatal and non-fatal. The researchers found that, while only 7.3% of the medical records involved a stay in solitary confinement, 53.3% of all acts of self-harm were within this group. Even after controlling for age, gender, serious mental illness, length of jail stay, and race/ethnicity, it was found that jail inmates placed in solitary confinement were about 6.9 times more likely to engage in an act of self-harm than those placed in normal celling.

B. Certain Behaviors and Demographics Are Predictors of Solitary Confinement Placement

In 1994, researchers (Fong & Vogel) conducted an exploratory study on distinct prisoner groups in the Texas Department of Corrections. Differences between three groups—general population prisoners, security threat groups (e.g. the KKK, Aryan Nation), and prison gangs (e.g. MS-13)—were studied, with the variables being race, education, IQ, placement in solitary confinement, custody level, offense category, number of offenses, maximum prison term, and flat time served. The researchers found that, in terms of solitary confinement placement, the mean number of times that general population prisoners were placed in solitary confinement (1.06) was significantly less than the mean number of times that both security threat groups (3.87) and prison gangs (4.53) were. The security threat group and prison gang means were not statistically significantly different, so members of those two groups are similarly at-risk for being placed in solitary, much higher than those in the general population. While Fong and Vogel’s study found that these prisoner classification groups were more likely to be placed in solitary confinement, it is evident that other factors may also predict likelihood of placement. Two studies by a team of researchers in England and Wales, Coid et al., complicate the picture by finding that inmates with pre-existing psychiatric disorders are more likely to be placed in solitary confinement. This raises the question of the practice being used as a sort of shortcut for dealing with prisoners’ mental illness, instead of providing adequate mental health treatment.⁴

In 2003, Coid, et al. conducted a pair of studies on prisoners and psychiatric morbidity. In the first study, researchers examined disciplinary segregation units in order to identify common psychological characteristics of those placed there. 3141 English and Welsh prisoners were

⁴ In *T.R. v. South Carolina Department of Corrections*, a case from the South Carolina Fifth Circuit Court of Common Pleas, the state judiciary ruled that the SCDC’s use of solitary confinement on inmates with serious mental illness is unconstitutional.

interviewed by research assistants and clinically assessed by psychiatrists. 24% admitted to being placed in disciplinary segregation either during their current imprisonment or during a prior one; the number of placements ranged from once to 25 times. The researchers found that prisoners placed in disciplinary segregation were more likely to be younger, have personality disorders, be career criminals, have early-life environmental disadvantages, have higher scores of psychopathy have a history of drug abuse (crack cocaine in particular), and have a history of offenses such as robbery, burglary, murder/manslaughter, kidnapping, and possession of illegal firearms. The results did not indicate, however, that prisoners with severe mental illness were overrepresented in disciplinary segregation units.

In their second study, Coid et al. (2003) examined prisoners placed in special cells, often called “strip cells,” which are designated for temporary isolation of inmates with no access to personal belongings or privileges. U.K. penal law mandates that these cells are not to be used for discipline, but rather for temporary situations where a prisoner may pose a threat to his-/herself, other prisoners, prison staff, or prison property. Using the same sample as their previous study, the researchers subsequently asked the inmates if they had ever been placed in isolation with “stripped” conditions, and if it was or was in a prison hospital wing or elsewhere in the facility. 11% of the prisoners interviewed and clinically assessed admitted to being placed in special “strip” cells either during their current imprisonment or during a prior one; 47% of these were in a medical care area of prison, 53% in other areas. The researchers found that inmates placed in special “strip” cells were more likely to have a history of diagnosed depressive or psychotic disorders, self-harm and suicide attempts, and prior psychiatric treatment. Additionally, they were more likely to have been diagnosed with cluster A and C personality disorders (paranoid, schizoid, and schizotypal; avoidant, dependent, and obsessive-compulsive, respectively), and to

have a history of offenses such as arson, sex crimes, and abduction. Finally, and perhaps most notably, those placed in special “strip” cells were found to be victimized in daily prison life much more often than those placed in disciplinary segregation, suggesting that they may be seen by other inmates as “lower” on a prison hierarchy. These results indicate that preexisting serious mental illness, a higher risk of self-harm, and a higher risk of being victimized while incarcerated are significantly associated with placement into special “strip” cells. This has significant implications for mental healthcare in prisons; a massive point of contention in the conversation surrounding solitary confinement is its increasing use to house the mentally ill who are incarcerated—to simply isolate them instead of providing proper treatment.

2. Studies That Do Not Suggest Solitary Confinement is Associated with Certain Psychological Effects, Behaviors, or Demographics

In 1982, Suedfeld, Ramirez, Deaton, & Baker-Brown interviewed and clinically tested inmates from five prisons in the United States and Canada, as part one of a two-part study. In the first study, twelve prisoners were interviewed about their reactions to solitary confinement, their coping mechanisms, and their experiences while isolated. The researchers found that the most common grievances from this first group in solitary confinement were complaints about everyday problems of prison life, such as interference with normal diet, humiliation and mistreatment by guards, and other physical and social problems, as opposed to any significant negative effects on mental health.

In the second study in 1984, Suedfeld examined inmates in three different correctional facilities. He compared fifteen male subjects who had been placed in solitary confinement to five non-solitary confinement subjects, and eleven female solitary confinement subjects to twelve non-solitary subjects. Unlike the first study, the author used a variety of standardized clinical assessment measures, including depression and anxiety inventories, aggression questionnaires,

and psychotic symptom screenings. He found that there were no significant overall differences between solitary confinement and non-solitary confinement on any of the measures; Suedfeld concluded that there was minimal evidence to support the idea that solitary confinement is psychologically damaging to those incarcerated. Additionally, it was concluded that the main complaints in both portions of the study—the lower quality of food, and missing out on recreational activities—were not specifically a part of being in solitary confinement.

Canadian researchers Zinger and Wichmann (1999) conducted a longitudinal study on inmates in two Canadian prisons, comparing those housed in solitary confinement with those not housed in solitary confinement. They expected that 60 days of solitary confinement would negatively impact the mental health and behavior of those inmates, and that those who were put into solitary confinement involuntarily would be more significantly affected than those who willingly wished to be placed in isolation. They administered to the participating prisoners a variety of clinical assessment measures (including an aggression questionnaire, psychotic symptomology questionnaire, depression inventory, and anxiety inventory) on the first day in isolation, after 30 days, and after 60 days. Prisoners were selected to be as similar as possible in terms of criminal and education histories. The researchers found that, overall, prisoners placed in solitary confinement had worse mental health and psychological functioning. Still, they found no significant differences between the voluntary and involuntary solitary confinement groups, and no evidence of major mental health decline over the duration of confinement in isolation. In fact, the opposite was found; prisoners improved over the course of solitary confinement—the authors state that this was most likely the result of repeated testing, however.

O'Keefe et al. conducted a longitudinal study of administrative segregation in order to determine what psychological effects solitary confinement can have on its inmates compared to

non-solitary confinement prisoners. There were 270 male participants, some with mental illness and some without, spread among three types of confinement: general population, administrative segregation, and special-needs celling. The researchers administered the Brief Symptom Inventory to each participant at approximately three-month intervals, until a total of six testing-sessions was reached. At the conclusion of testing, they found that, while there were initial differences between the three groups in the beginning of testing, all groups improved slightly over time; additionally, unlike what was hypothesized, there was not a significant difference between the groups over time—i.e., those in solitary confinement did not decline in performance over time as was expected. This recent study advanced the literature, but should be replicated in the future in order to better understand the initial differences on symptom inventories between solitary confinement and non-solitary confinement prisoners.

3. Previous Literature Reviews on Solitary Confinement

Some scholars have previously written literature reviews on the topic of solitary confinement and related issues. In a 1986 article, psychiatric researchers Grassian and Friedman reviewed contemporary literature on sensory deprivation, social isolation, and solitary confinement. The authors asserted that most studies on solitary confinement have yielded results that share common elements; for example, that many studies indicate a consistent group of psychopathological symptoms in their results, such as anxiety, depression, memory and sleep disturbances, hallucinations, paranoia, and aggression. However, they also explain that, according to some studies, the development of these and other symptoms may depend on both pre-existing personality traits, and on perceptions of one's solitary confinement as punishment versus some form of therapeutic condition.

Haney and Lynch (1997) reviewed contrasting contemporary literature on the issue, but used Haney's 1993 study to suggest that a cluster of psychopathological symptoms exists in a

variety of solitary confinement cases, including problems like anxiety, panic attacks, fits of rage, sleep disturbances, and perception of loss of control. Additionally, the authors refute the argument that those who end up in solitary confinement are only people with preexisting serious mental illness that cannot handle life in the general population, or that only inmates with mental illness have problems in solitary confinement. Finally, they argued that there is no empirical evidence of benefits to solitary confinement, only evidence of ambiguity and detrimental effects.

4. Shortcomings of the Literature

While there are clearly several empirical studies on the practice that have conclusive results, the fact of the matter is that solitary confinement, simply put, is a very understudied topic. For one, any research with prisoners as participants is inherently more difficult to conduct. All institutional review boards consider prisoners to be a vulnerable population that require special consideration. As such, researchers need to be pay particularly close attention to how they construct their studies, and treat their interactions with this population. Still, even in the event that a study *is* approved, prison administration is the next hurdle to jump through; a prison warden may not approve the study to be conducted at his or her facility, for a variety of reasons. It is very likely that prisons with questionable conditions will deny a research request—perhaps a significant factor for the dearth of literature.

An additional evident trend in the literature is low sample size. Again, with approval for prison research being so variable, it is likely unsurprising that when many studies *do* get conducted, they are only allowed access to a handful of participants. While a small sample size suits studies involving qualitative interviews and questionnaires, the generalizability of these findings to other prisons is not very high. A further issue is that a number of studies in the literature do not indicate any form of causation; more longitudinal studies are needed before concluding on directionality. Still, some studies—Zinger & Wichmann (1999), Andersen et al.

(2000), Kaba et al. (2014)—have methodological strengths incorporated within them, and may serve as models for future scholarship.

5. Conclusion

The effects of solitary confinement on mental health is certainly a subject for debate among social scientific scholars, as there are significant studies that bring doubt to the assertion that it is always negatively impactful. However, the majority of the literature acknowledges that solitary confinement is, at the least, ineffective, with a large part providing evidence that it is indeed harmful to the mental health of prisoners. An issue of note, though, is that there is simply not enough current research on the topic; more studies should be conducted, of varying methodological approaches, in order to present more compelling evidence of the psychological harm that long-term solitary confinement can have. Future studies should be quasi-experimental in nature, and control for a variety of variables. Social scientific scholarship, and the objective evidence it produces, may be the key to persuading actors in the legal system to push for reform of solitary confinement practices—a concept that will be touched-upon in the next chapter.

Chapter IV: Prison Litigation, the Eighth Amendment, and Addressing the Constitutionality of Solitary Confinement

1. Introduction

Solitary confinement has a centuries-long history, with its origins in the birth of American corrections, and has garnered controversy equally as lengthy. Contemporary research in the social sciences has confirmed observations of its negative effects made time-and-time-again since the nineteenth century. As a result, the issue of solitary confinement and its overuse has been raised repeatedly in litigation—particularly, litigation concerning constitutionality. This chapter will identify and analyze key United States Supreme Court cases concerning claims of Eighth Amendment violation, those related to prison conditions, and those concerning the issue of solitary confinement itself. Additionally, it will detail specific legal tests and requirements for the applicability of the Cruel and Unusual Punishments Clause, analyze the Supreme Court’s apprehension to confronting the solitary confinement issue, and highlight recent judicial opinions that seem to indicate an impending application of those legal tests to a solitary confinement case.

2. Interpreting the Eighth Amendment

A. Early Application

Like other constitutional amendments, the Eighth Amendment in its first 100 years of existence was seen only as applicable to the federal government, and the Cruel and Unusual Punishments Clause was seen to only protect against outright torturous punishments (Smith, 2004). This interpretation is perhaps not surprising; as discussed in Chapter II, at the time of the Framers, the general trend for criminal punishments transitioned from harsh penalties made into public spectacles (e.g. beheadings, hangings, burnings) designed to intimidate and deter the masses to more private, hidden-away punishments (e.g. incarceration) influenced by Enlightenment ideas of rational self-reflection, and behavioral change (Foucault, 1975/1977). In 1866, the Supreme Court made it clear that the Eighth Amendment would not apply to

Massachusetts state-level legislation concerning illegal alcohol sales (*Pervear v. The Commonwealth*). Similarly, in *O’Neil v. Vermont* (1892), a case alleging an Excessive Fines Clause violation, the Supreme Court stated that “as a federal question, it has always been ruled that the Eighth Amendment to the Constitution of the United States does not belong to the States,” specifically citing their 1866 *Pervear v. The Commonwealth* decision.

With federally-administered punishments, those of a more brutal nature still did not always fall under the purview of the Cruel and Unusual Punishments Clause, as we see in *Wilkerson v. Utah* (1878), where the Supreme Court ruled that a convicted Utah Territory murderer’s impending execution by firing squad was not unconstitutional. Many states, though, had their own constitutional provisions that prohibited cruel and unusual punishments—however they respectively defined them—during this period before the Eighth Amendment’s incorporation to the states; the effectiveness of these prohibitions depended on state judicial interpretation (Smith, 2004). Incorporation to the states would not occur until several decades into the twentieth century, which will be discussed later in this chapter.

B. Proportionality and Other Tests

In 1910, the Supreme Court heard the case of a Philippine government official who was federally convicted of embezzlement and falsifying administrative records.⁵ Per the Penal Code of the Philippines, he was sentenced to a fifteen-year prison sentence that not only came with the physical toll of hard, “painful labor” in metal shackles, but also the societal tolls of loss of parental and marital authority, loss of personal or property guardianship, loss of voting rights, and state surveillance from that day forward (*Weems v. United States*, 1910; Mulligan, 1979). However, the majority of the Supreme Court agreed in their ruling that this punishment was

⁵ Following the Spanish-American War, the Philippine Islands became a territory of the United States; it would not gain its independence until 1946.

“cruel in its excess of imprisonment and that which accompanies and follows imprisonment. It is unusual in its character. Its punishments come under the condemnation of the bill of rights, both on account of their degree and kind” (*Weems v. United States*, 1910). For the first time, the Court found a punishment to be cruel and unusual due to its disproportionality, by utilizing the two major parts of a proportionality test: comparing the punishment of the defendant to those imposed in the same jurisdiction for crimes considered more serious than the one the defendant had been convicted of, and comparing the punishment under attack with those imposed in other jurisdictions for the same crime (Mulligan, 1979). The concept of a proportionality test for the Eighth Amendment persisted throughout the decades, with it ultimately being refined and denoted as a three-pronged test in *Solem v. Helm* (1983; which will be discussed later in this chapter).

Like *Weems v. United States* (1910) before it, *Trop v. Dulles* (1958) also involved loss of citizenship as a criminal punishment, but this time as punishment for military desertion during the Second World War. In 1944, an American soldier in Morocco was caught deserting after a disciplinary incident, for which he received a forfeiture of pay, dishonorable discharge, and a three-year prison sentence with hard labor; in 1952, he applied for a passport but was denied, with the federal government citing the 1940 Nationality Act, under which he apparently had lost his citizenship due to his conviction and dishonorable discharge (*Trop v. Dulles*, 1958). The case ended up in front of the Supreme Court, who ruled that denationalization—loss of citizenship—is indeed a cruel and unusual punishment under the Eighth Amendment. As Chief Justice Earl Warren wrote in the majority opinion, while denationalization involves no physical harm or anything along the lines of torture, it is “total destruction of the individual’s status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual

the political existence that was centuries in the development. The punishment strips the citizen of his status in the national and international political community” (*Trop v. Dulles*, 1958).

Additionally, *Trop v. Dulles* had the consequence of establishing a test for application of the Cruel and Unusual Punishments Clause—Chief Justice Warren explained that “the words of the Amendment are not precise, and...their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society” (1958). In other words, society’s standards for cruel and unusual punishments change, as society overall progresses and matures (Smith, 2004). As tests go, this one is inherently very vague—judicial perceptions of society’s “evolving standards of decency” and other values become the crux of evaluating a case.

C. Later Developments

i. Robinson v. California (1962) The 1962 Supreme Court case *Robinson v. California* marked the first time that the Cruel and Unusual Punishments Clause of the Eighth Amendment was successfully applied to the states, officially becoming incorporated. In this case, a California man who police observed having syringe marks on his arms was arrested under a state law making it a misdemeanor to “be addicted to the use of narcotics;” he was sentenced to a 90-day incarceration, which he appealed on the grounds that he was being punished for a medical condition (*Robinson v. California*, 1962). Justice Potter Stewart wrote the majority opinion, stating that “imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the ‘crime’ of having a common cold” (*Robinson v. California*, 1962). This ruling from the Supreme Court effectively established two new concepts: the first, more general one was that the Eighth Amendment, in relation punishments (but not bails or fines), could now be applied to the states. As for the second, the ruling also established

that punishing someone for a medical condition renders that punishment cruel and unusual, and a violation of the Eighth Amendment.

ii. Solem v. Helm (1983) In 1983, the Supreme Court considered the case of a South Dakota man who, after being convicted of his seventh non-violent felony conviction since 1964, was sentenced—per a South Dakota mandatory minimum sentence law—to life in prison without the possibility of parole (*Solem v. Helm*). In its 5-to-4 ruling, the Court overturned Helm’s sentence on the grounds that it was a cruel and unusual punishment disproportionate to the crime. Writing for the five-member majority, Justice Lewis Powell expressed his sentiments that Helm was given “the penultimate sentence for relatively minor criminal conduct;” he had “been treated more harshly than other criminals in the State who have committed more serious crimes,” and he had “been treated more harshly than he would have been in any other jurisdiction, with the possible exception of a single State” (*Solem v. Helm*, 1983). Justice Powell and the majority’s logic for their decision was in accordance with a three-pronged proportionality test used in prior cases (e.g. *Enmund v. Florida*, 1982), mentioned previously in this chapter. In *Solem v. Helm* (1983), however, the Court clarified their test, and detailed their “objective criteria” used to determine if a punishment is proportionate or disproportionate, and therefore unconstitutional under the Eighth Amendment.

The first criterion, Justice Powell wrote, that the Court must consider is the nature and gravity of the offense, and the harshness of the penalty; in Helm’s case, his seventh nonviolent felony charge was for writing a \$100 “no account” check, and his previous six offenses, although technically felonies, were considered “all relatively minor,” yet he was facing a life-without-parole prison sentence (*Solem v. Helm*, 1983). The second criterion that the Court must consider involves sentences imposed on other criminals in the same jurisdiction, i.e. to determine if more

serious crimes are subject to the same penalty or to less serious penalties; in South Dakota, Helm's sentence of life imprisonment was the same sentence mandated for murder on the first offense, and treason, first-degree manslaughter, first degree-arson, and kidnapping on the second or third offense (*Solem v. Helm*, 1983). The final criterion that the Court must consider concerns sentences imposed for commission of the same crime in other jurisdictions; Nevada was the only state where Helm's offense could (it is not mandated, however) receive the same sentence of life imprisonment without parole (*Solem v. Helm*, 1983). These three factors being evident influenced the majority's opinion on *Solem v. Helm*, demonstrating that an analytic framework for determining proportionality could successfully apply the Cruel and Unusual Punishments Clause to long-term prison sentences—and, by extension, could potentially apply it to future cases involving solitary confinement as well.

3. Conditions of Confinement

While not all relating to the Eighth Amendment per se, various Supreme Court cases establish precedent for dealing with issues of prison conditions. Soon after *Robinson v. California* incorporated the Cruel and Unusual Punishments Clause to the states in 1962, the Supreme Court ruled on *Jones v. Cunningham*. In this case, with a majority opinion written by Justice Hugo Black, the Court determined that a prisoner incarcerated in a state correctional facility has the right to file a writ of habeas corpus to challenge both the conditions and overall legality of their incarceration (1963). In other words, from this ruling forward, a prisoner could challenge the legality or conditions of his/her *state* imprisonment through the U.S. Constitution, something not seen prior; this vastly expanded the opportunity for appealing on the grounds of constitutional violation.

A. Deliberate Indifference

The case *Estelle v. Gamble* (1976) established the criterion that subsequent prisoners' rights appeals would be subject to: the presence of "deliberate indifference," which could be proven as either "deliberate ignorance," or "intentional denial". This concept was applied in the 1994 Supreme Court case *Farmer v. Brennan*. After a trans woman was placed in the male population of an Indiana prison, beaten and raped repeatedly by fellow inmates, and gained HIV as a result, she felt that the prison administration should have taken more efforts to protect her knowing that she was more vulnerable to violence than the average prisoner. The majority of the Court agreed, holding that prison officials can indeed be held in violation of the Cruel and Unusual Punishments Clause if they are aware that "inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it"—acting with a deliberate indifference to an inmate's needs for health or safety (*Farmer v. Brennan*, 1994). This case contributed to "deliberate indifference" becoming the standard for evaluating the conduct of prison officials with regard to conditions inside a prison.

B. Subjective Components

Farmer v. Brennan contained an additional component: deliberate indifference requires proof that a prison official is *subjectively* aware of risks—deemed "subjective recklessness" (1994). This, of course, is inherently more difficult to prove than *objective* awareness. Similarly, in *Whitley v. Albers* (1986), where an Oregon prisoner claimed that being shot in the process of officers attempting to end a hostage situation constituted a violation of his Eighth and Fourteenth Amendment rights, the Court denied this, stating that a "culpable state of mind" on the part of prison staff is required to prove deliberately indifferent behavior. The majority wrote that it is "obduracy and wantonness, not inadvertence or error in good faith" produce behaviors that qualify as Eighth Amendment violations (*Whitley v. Albers*, 1986).

C. Prisoner Lawsuits

The ability itself for prisoners to pursue constitutional violations in federal courts has also been subject to the Supreme Court. According to federal law, the Prison Litigation Reform Act of 1995, state and federal prisoners must exhaust every available administrative-level solutions before pursuing claims about prison conditions in federal court (*Woodford v. Ngo*, 2006). When a California prisoner filed a state-level grievance about his confinement conditions, it was rejected as untimely under state law; upon appeal, the corresponding Federal District Court denied the grievance as well, saying he didn't exhaust all administrative options, but further pursuit resulted in the Ninth Circuit Court reversing, as the judiciary felt he *had* exhausted all of them (*Woodford v. Ngo*, 2006). As a result, the Supreme Court granted certiorari, and the majority—headed by Justice Samuel Alito—held that untimely grievances or appeals constitute not properly exhausting administrative options. In a dissenting opinion, Justice John Stevens stated that, with the Prison Litigation Reform Act simply reading as “exhaustion” of administrative methods not “*proper* exhaustion” related to a timeframe, the majority placed its own semantic interpretation into the law for its ruling (*Woodford v. Ngo*, 2006).

4. Precedence on Solitary Confinement

The first case involving solitary confinement to reach the U.S. Supreme Court was *In re Medley* in 1890 (mentioned in Chapter II). In Colorado, an 1889 statute mandated solitary confinement for convicted murders incarcerated on death row; the petitioner committed his crime before the statute was enacted, so this was seen as adding an additional punishment for the same crime—creating an *ex post facto* problem. Ultimately, while this case did not directly involve the Eighth Amendment (*ex post facto* laws fall under Article 1, Section 10), it did bring solitary confinement into the light. In the ruling's majority opinion, Justice Samuel Freeman Miller spoke about how, even in the case of relatively short confinements, many prisoners fell into a “semi-fatuous condition, from which it was next to impossible to arouse them”; others isolated

longer became “insane and violent” or suicidal, and even those who made it through their time in solitary were “not generally reformed, and in most cases, did not recover sufficient mental activity to be of any subsequent service to the community” (*In re Medley*, 1890). The majority’s ruling that the statute indeed constituted an *ex post facto* violation illustrates that solitary confinement was indeed seen as a harsher, sometimes even separate punishment (“of the most important and painful character”) when compared to ordinary incarceration (*In re Medley*, 1890). Though this was by no means a definitive opinion on the overall use of solitary confinement, it highlighted the growing sentiment that solitary—particularly in cases of long-term isolation—has more risks than any kind of punitive benefits. However, as we see over the centuries, the practice only grew in frequency of use.

One year later, with *McElvaine v. Brush*, the Supreme Court saw a similar case, again involving a state statute (this time, in New York) mandating solitary confinement—in addition to electrocution—for capital offenders on death row. However, unlike in *In re Medley* (1890), the statute was enacted by legislature *before* the crime was committed, so the Court upheld the lower court’s judgment, saying that the statute’s addition of punishment requirements for murderers did not amount to an *ex post facto* violation; additionally, they reemphasized the prevailing legal logic of the time, that the Eighth Amendment would not apply to a state prison sentence in any case. (*McElvaine v. Brush*, 1891). Again, this was still not an overall ruling on solitary confinement’s constitutionality, but certainly an instance of solitary becoming better-known as a punishment in its own right.

Decades later, *Brooks v. Florida* (1967) would warrant a rare 9-to-0 *per curiam* opinion from the Supreme Court. In this case, the petitioner, Bennie Brooks, was a Florida prisoner convicted of taking part in a riot on May 27th, 1965, and sentenced to nine years and eight

months consecutive to his prior prison sentence; in the hours following the quelling of the disturbance, prison administration had ordered Brooks and two other prisoners accused of rioting as well to be confined together for 35 days in a disciplinary cell (*Brooks v. Florida*, 1967). This cell was, at most, thirteen feet long (although Brooks stated it was only seven), and six-and-a-half feet wide; there were no windows, no beds, and no toilet—just a hole in the floor; the three men were fed only a “restricted diet” of thin broth with peas and carrots (*Brooks v. Florida*, 1967). After 14 days, Brooks was brought out of the cell to speak with one of the prison’s investigative officers, to whom he immediately confessed his statement concerning his involvement with the riot, which was recorded—this confession was used to convict him and add the additional prison sentence.

A week before Christmas, the Court reversed the lower court’s decision, issuing a unanimous opinion on the case: “...we cannot accept his statement as the voluntary expression of an uncoerced will. For two weeks, this man's home was a barren cage fitted only with a hole in one corner into which he and his cell mates could defecate. For two weeks, he subsisted on a daily fare of 12 ounces of thin soup and eight ounces of water...[and] was completely under the control and domination of his jailers;” the justices saw no way that Brook’s confession “was not tainted by the 14 days he spent in such an oppressive hole” (*Brooks v. Florida*, 1967). This case demonstrated to the Supreme Court just how horrific the conditions in solitary confinement units have the capacity to become.

Similarly inhumane conditions were present in the 1978 Supreme Court case *Hutto v. Finney*, which followed a series of Eastern Arkansas District Court cases, part of the Eighth Federal Circuit: *Holt v. Sarver I* and *Holt v. Sarver II* (1969 and 1970, respectively). The Arkansas Department of Corrections frequently placed prisoners in “punitive isolation” for a

variety of reasons, often for an indeterminate amount of time. This isolation involved, on average, four (but as many as eleven) inmates locked in an eight-foot by ten-foot windowless room, with a toilet that only flushed from outside the cell, and no beds; mattresses were brought in at varying times of evening, and the inmates were fed less than 1,000 calories a day in the form of a potato, meat, egg, vegetable, and syrup paste that was seasoned and baked (*Hutto v. Finney*, 1978).

These isolation conditions, in addition to the long-standing “trustee system” that utilized favored prisoners to supervise and discipline other prisoners, were found by the District Court to violate both the Eighth and Fourteenth Amendments. Consequently, the judiciary imposed new reform requirements on the Arkansas Department of Corrections, which included a 30-day limit on prisoner terms in punitive isolation, and abolition of the trustee system (*Holt v. Sarver II*, E.D. Ark. 1970). The Department of Corrections opposed the limit on isolation, and appealed to Eighth Circuit Court of Appeals, who affirmed the District Court’s orders; the Department then petitioned for writ of certiorari, which the Supreme Court granted (*Hutto v. Finney*, 1978). The Court upheld the lower courts’ decision to mandate reform for Arkansas Department of Correction’s punitive isolation. The justices of the majority opinion acknowledged that the 30-day limit was very appropriate given the circumstances, explaining that “taken as a whole, conditions in the isolation cells continued to violate the prohibition against cruel and unusual punishment” (*Hutto v. Finney*, 1978). This outcome shows that the Supreme Court not only acknowledges solitary confinement overall as a distinct form of punishment, but additionally its components of (1) conditions and (2) duration, which they will take into account in order to make decisions on the issue.

5. Prospects for Reform

Some Supreme Court jurisprudence from the past few years may prove promising for proponents of solitary confinement reform. In a concurring opinion from *Davis v. Ayala* (2015), a Supreme Court case in which Hector Ayala's counsel was excluded from meetings to discuss potential racial prejudice of peremptory challenges in jury selection, Justice Anthony Kennedy put forth an extensive commentary on the respondent Ayala's living conditions while incarcerated. Ayala had been held in administrative segregation for most of his more-than 25-year stay San Quentin State Prison; Justice Kennedy, referring to statistics, examples in literature (Dickens' *A Tale of Two Cities*), empirical observations, past Supreme Court jurisprudence (*In Re Medley*, 1890), and the case of Kalief Browder, asserted that we as a society have observed the negative effects of long-term solitary confinement for centuries, with it evident that "years on end of near-total isolation exact a terrible price," though it is currently not an issue at the forefront of public concern (*Davis v. Ayala*, 2015). Additionally, Justice Kennedy stated that "in a case that present[s] the issue, the judiciary may be required, within its proper jurisdiction and authority, to determine whether workable alternative systems for long-term confinement exist" (*Davis v. Ayala*, 2015).

Interestingly, this concurring opinion is not the only instance in which Justice Kennedy spoke-out against our corrections system's overuse of solitary confinement. Speaking March 23rd, 2015 to the House Appropriations Subcommittee on Financial Services and General Government concerning the Supreme Court's 2016 budget request, Kennedy was asked by Arkansas Congressman Steve Womack about his thoughts on the nation's straining correctional budget. In response, he commented that "the corrections system is one of the most overlooked, misunderstood institutions we have in our entire government...this idea of total incarceration justice isn't working, and it's not humane" (C-Span, 2015). In specific reference to solitary

confinement and supermax prisons with isolation units in his home state of California, Justice Kennedy remarked, “solitary confinement literally drives men mad...and we simply have to look at this system that we have...we haven’t given nearly enough study, nearly enough thought, nearly enough investigative resources to looking at our corrections system. In many respects, I think it’s broken” (C-Span, 2015). Justice Kennedy’s comments both on and off the bench prove to be surprising but promising for proponents of solitary confinement reform. His very deliberate comments during the House Subcommittee hearing, and passionate, five-page concurring opinion during *Davis v. Ayala* (2015) that culminated in, practically, an invitation for the Court to evaluate long-term solitary confinement’s constitutionality demonstrate that America’s pendulum of punitive thought may be swinging in the direction of correctional reform, especially for individuals with the legal power to make change occur.

Anthony Kennedy is not the only Justice to have recently voiced opinions on solitary confinement, however. In *Ruiz v. Texas* (2017), the Court ruled on the case of Rolando Ruiz, a convicted murderer who had spent over 20 years of his death row incarceration in solitary confinement. Ruiz claimed that his subjection to solitary while already on death row constituted “traumatic” conditions and a cruel and unusual punishment, as he showed evidence of anxiety, depression, suicidal ideation, hallucinations, disorientation, memory problems, and sleep dysfunction, symptoms long-established as hallmarks of extended stays in solitary confinement; he sought a stay of execution from the Court, in order to commute his sentence to life imprisonment. Unfortunately for Ruiz, the Court’s discussion of his case was delayed by several hours, and he was executed on the evening of March 7th, 2017—regardless, however, his petition for a stay of execution was denied. In a dissenting opinion on this ruling, Justice Stephen Breyer expressed his sentiments that perhaps it is time for the Court to definitively rule on the

constitutionality of solitary confinement. Like Justice Kennedy two years prior, Justice Breyer referred heavily to the *In Re Medley* ruling of 1890, citing Justice Samuel Freeman Miller's detailing of solitary confinement cutbacks in the mid-nineteenth century because of numerous negative effects being observed. Justice Breyer quoted Justice Kennedy's *Davis v. Ayala* commentary as well, asserting, in response to his colleague's mention of Eighth Amendment scrutiny, that *Ruiz v. Texas* "is an appropriate case to conduct that constitutional scrutiny" (2017). Having a second justice on the Court who voices sentiments in favor of confronting the solitary confinement issue is an exceedingly fortunate situation for those who seek the long-term use of the practice to be deemed unconstitutional.

6. Conclusion: Why a Definitive Ruling is Imperative

For incarcerated individuals, there are no doubt experiences that are cruel, and experiences that are unusual. The entire incarceration experience, regardless of conditions, is a punishment after all, and at some point, an inmate will have to confront circumstances or individuals that harm their health and security. The Constitution of the United States is certainly not some sort of protective barrier that will prevent all amounts of harm to those incarcerated; it is clear that was never an intended purpose, and proponents of solitary confinement do not claim it is. That being said, litigation on behalf of prisoners—like the cases discussed previously—shows us that there *are* times when the type, duration, or conditions of an individual's confinement result in an inappropriate level of harm. When produced by deliberate indifference resulting from the subjective recklessness of prison officials, this harm amounts to an Eighth Amendment violation—a formally cruel and unusual punishment.

The substantial and still-growing body of social scientific literature (also discussed previously) indicates that, when used in the long-term—more than fourteen days at a time—

solitary confinement can produce wide-ranging cognitive, behavioral, and physiological effects. Not only has the practice been found to exacerbate mental health issues in prisoners with prior mood or psychotic disorders, but further research has indicated that long-term residents in isolation often develop a variety of mood and psychotic disorder symptomologies themselves. Additionally, solitary confinement has repeatedly been shown to be ineffective at reducing disruptive and violent behaviors—sometimes, even worsening them—behaviors that often are corrections officials’ rationale for placing prisoners into isolation in the first place.

We have known for decades that the Supreme Court acknowledges mental health as a distinct facet of an individual’s health; why should lack of treatment be seen as the only significant mental health problem present in prison? Is throwing a prisoner into a concrete and steel cell the size of a parking spot with no windows, no clock, minimal bedding, lights perpetually on, limited bathing opportunity, limited (if any) exercise time, and a windowless steel door with only a slot for food not impactful on mental health? Does locking a prisoner in conditions like these—which are seen in state and federal institutions all across the nation, despite having been empirically proven to harm the mental health of both the previously mentally ill and the undiagnosed—for weeks or months at a time, which remains unknown to the prisoner themselves, not constitute *at least* deliberate indifference and subjective recklessness on the part of corrections officers and administration, if not an outright malicious state of mind?

It is time for the Supreme Court to act. Two of its currently presiding justices, Anthony Kennedy and Stephen Breyer, have expressed sentiments that solitary confinement needs to be addressed, with Justice Kennedy outright inviting the Court to take a long-term solitary confinement case. As far back as 1890 with *In re Medley*, the Court has, in some capacity (however small) acknowledged that solitary confinement can have significantly harmful

psychological and social consequences on those isolated. The next time that a case concerning long-term solitary confinement reaches them, it is imperative that the Supreme Court rules against the practice. If the justices can acknowledge (a) that the trend of long-term solitary confinement constitutes deliberate indifference to the mental health risks of prisoners; (b) that the potential harm discovered through recent empirical studies is disproportionate to the lesser crimes that many prisoners thrown in isolation often are convicted of; (c) that, with awareness of and advocacy for mental health in criminal justice at an all-time high, the continued overuse of the practice does not reach meet our evolved standards of decency; and (d) that some lower courts and legislatures throughout the nation have already made efforts and succeeded in curbing the durations and mandating improved conditions of isolation, then they can safely and certainly rule long-term solitary confinement as a violation of the Cruel and Unusual Punishments Clause of the Eighth Amendment.

Chapter V: Conclusion

Solitary confinement is one of the most overlooked and understudied, yet most controversial and divisive practices in all of American corrections. As discussed in Chapter II, the idea of isolating prison inmates for most—if not all—hours of the day has been ingrained in our state and federal prison systems since the opening of Eastern State Penitentiary in 1829. What started as a grand experiment—no doubt influenced by the desire to create “docile bodies” for the newly industrialized American society, as Foucault would argue—quickly became the standard for criminal punishment by the 1830s and 1840s. The newly established penitentiaries of that era utilized perpetual solitary confinement (known as the Pennsylvania system) in the hopes that criminals held there would reflect on their behavior, speak to God, repent, and return to society as moral, industrious citizens (Smith, 2006). This system grew to massive popularity in both the U.S. and Europe.

Around the same time, the Auburn prison system (originating in Upstate New York) also debuted. Unlike the Pennsylvania system, the Auburn system only mandated solitary confinement during nighttime hours, encouraging reflection and repentance not through time in-cell, but rather through manual labor with other prisoners (Foucault, 1975/1977). Still, a strict code of silence was enforced, and prayer was a part of daily incarcerated life (Auburn system, 2008). Soon, the Auburn system’s popularity would outweigh the Pennsylvania system’s, coinciding with a growing disdain towards perpetual isolation.

By the 1860s, a general consensus in the United States was immense skepticism toward “rehabilitation through isolation” (Smith, 2006). Throughout the 1870s and 1880s, as Smith continues, prisons across the nation gradually abandoned both the Pennsylvania and Auburn systems of incarceration in favor of more “progressive” models (2006). The outright

condemnation of large-scale solitary confinement was a belief held by even members of the Supreme Court at the turn of the twentieth century. In an opinion on a case that involved the solitary confinement of death row inmates in Colorado, Supreme Court Justice Samuel Freeman Miller remarked that that solitary confinement was “an additional punishment of the most important and painful character,” and describes how, in many prisons, inmates were found to be in “semi-fatuous condition, from which it was next to impossible to arouse them”; others became “insane and violent” or suicidal, and even those who made it through their time in isolation were “not generally reformed, and in most cases, did not recover sufficient mental activity to be of any subsequent service to the community” (*In re Medley*, 1890). This legal decision acknowledged the severity of mental health effects that a number of prisoners housed in solitary confinement had experienced. By the beginning of the twentieth century, prisons were no longer entirely enforced solitary confinement; this would be the standard until the late-1980s, with the rise of the supermax prison, which would bring with it a new era of widespread solitary confinement.

As discussed in Chapter III, since the resurgence of large-scale solitary confinement, negative effects have been observed and studied by contemporary social science researchers. For example, according to psychologist Craig Haney of UC Santa Cruz, numerous studies varying in duration, intensity, and location have consistently found that individuals in extended stays in solitary often present with significant psychological and physiological issues, including: depression, high blood pressure, insomnia, uncontrollable anger, hallucinations, anxiety, feelings of emotional near-breakdown, hopelessness, paranoia, obsessive-compulsions, self-mutilation, and even suicidal ideation and behaviors (2003). With effects like these being well-documented in recent decades, a growing sentiment is that the overuse of solitary confinement (particularly in

the long-term) constitutes what it means to be a cruel and unusual punishment and, as such, would be unconstitutional under the Eighth Amendment.

As discussed in Chapter IV, in recent decades, many have sought a solution through civil rights litigation, but have, like their predecessors in the centuries before, come up empty-handed. From 1866 to date, there have been 35 Eighth Amendment violation petitions that received rulings from the U.S. Supreme Court, many of which specifically named the overuse of solitary confinement in prisons as an example of a cruel and unusual punishment—*McElvaine v. Brush* (1891), *Brooks v. Florida* (1967), and *Hutto v. Finney* (1978) among them. However, *none* of these cases resulted in the Supreme Court *directly* addressing the constitutionality of solitary in its ruling (Solitary Watch, 2010). Aside from a handful of recent concurring and dissenting opinions—*Davis v. Ayala*, 2015 and *Ruiz v. Texas*, 2017, respectively—the Court has essentially avoided the issue.

Still, more than ever before, now is the time for the Supreme Court to act. Two of its current justices, Anthony Kennedy and Stephen Breyer, have expressed sentiments that solitary confinement needs to be addressed, with Justice Kennedy outright inviting the Court to tackle a long-term solitary confinement case, the next time one presents itself to them. When this does occur, it is *imperative* that the Supreme Court rules against the practice. If the Court can acknowledge (a) that the trend of long-term solitary confinement constitutes deliberate indifference to the mental health risks of prisoners; (b) that the potential harm discovered through recent empirical studies is disproportionate to the lesser crimes that many prisoners thrown in isolation often are convicted of; (c) that, with awareness of and advocacy for mental health in criminal justice at an all-time high, the continued overuse of the practice does not reach meet our evolved standards of decency; and (d) that some lower courts and legislatures

throughout the nation have already made efforts and succeeded in curbing the durations and mandating improved conditions of isolation, then they will be able rule long-term solitary confinement as a violation of the Eighth Amendment, without any doubt. No prisoner—no person—should be thrown into a cell the size of a parking space for a prolonged span of time, one that is unknown to them. No one should spend months, weeks, or years in such an environment that conducive to mental trauma. There should not be another story like that of Kalief Browder.

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