

A Longitudinal Study of Administrative Segregation

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The use of administrative segregation for inmates with and without mental illness has generated considerable criticism. Segregated inmates are locked in single cells for 23 hours per day, are subjected to rigorous security procedures, and have restricted access to programs. In this study, we examined whether inmates in segregation would show greater deterioration over time on psychological symptoms than would comparison offenders. The subjects were male inmates, with and without mental illness, in administrative segregation, general population, or special-needs prison. Subjects completed the Brief Symptom Inventory at regular intervals for one year. Results showed differentiation between groups at the outset and statistically significant but small positive change over time across all groups. All groups showed the same change pattern such that there was not the hypothesized differential change of inmates within administrative segregation. This study advances the empirical research, but replication research is needed to make a better determination of whether and under what conditions harm may or may not occur to inmates in solitary confinement.

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Placement of offenders in long-term administrative segregation (AS; also called Ad Seg), particularly those with serious mental illness, has been subject to considerable criticism. AS generally involves locking an inmate in a cell for 23 hours per day, with out-of-cell time occurring with significant security restrictions (e.g., hands and ankles cuffed) and escort by two correctional officers. Critics have argued that the conditions of AS confinement exacerbate symptoms of mental illness and create mental illness in those who previously had no such disorders.^{1,2} The use of AS across the country has persisted as a corrections management tool despite litigation, although in some states its use in inmates with mental illness is no

longer permitted. Prior research has shed light on the problem, but because of methodological limitations, the core questions remain unresolved.³ Researchers have been unable to settle the question of whether the high rates of mental illness found in AS are caused by this harsh environment or whether there is a selection bias such that offenders with mental illness, unable to adapt to general prison settings, are placed in AS at higher rates.

In 1983, Grassian⁴ described psychopathological features associated with rigidly imposed solitary confinement that he believed formed a clinical syndrome. He interviewed 14 plaintiffs in a conditions-of-confinement case and described clinical observations resulting from those interviews. He noted perceptual changes, affective disturbances, cognitive difficulties, disturbed thought content, and impulse-control problems that subsided after release from such confinement. In more recent research, Haney⁵ found elevated symptoms of psychological trauma (e.g., anxiety, headaches, and impending nervous breakdown) and psychopathological features (e.g., ruminations, social withdrawal, and irrational anger) among 100 security housing unit (SHU) prisoners, compared with such symptoms in national adult population samples. This constellation of symptoms composes the primary features of what has

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been coined the SHU syndrome in the wake of *Madrid v. Gomez*,⁶ a class-action suit that successfully challenged conditions of confinement in a California supermax prison.

Research on the effects of AS has been criticized for being deficient in quality designs that allow one to rule out plausible alternative explanations.⁷⁻¹⁰ Because of the lack of a comparison group, some frequently cited studies are demonstrations of the potential impacts of AS.^{4,11,12} Other researchers have used a variety of comparison groups including non-inmate populations and norms, inmate volunteers, general population prisoners, and inmates in different security levels.^{5,13,14} Most, although not all, of these studies found that inmates in AS demonstrate higher levels of psychological distress. These cross-sectional studies lack the ability to attribute differences to the conditions of confinement because of the potential for pre-existing differences, including psychological impairments that may have existed before entry into AS.

There have been few longitudinal studies about the effects of segregation. In early studies, Gendreau and colleagues¹⁵⁻¹⁹ used repeated-measures experimental designs over periods of up to 10 days. Few negative impacts of segregation were found over these brief periods. Although the use of a repeated-measures experimental paradigm improves over cross-sectional studies that may have selection bias, the short confinement periods are unrealistic for providing information on the effects of segregation as currently used in U.S. prisons.

In two studies, inmates were followed for longer periods after placement in segregation.^{10,20} Andersen *et al.*²⁰ studied participants over a 4-month period, but most of the participants had data for less than a month. Zinger *et al.*¹⁰ observed inmates over a 60-day period. Each study demonstrated that segregated populations had more psychological disorders at the start than did the comparison subjects, but had conflicting evidence on whether conditions worsened over time. Because these studies had high refusal and attrition rates, the conclusions must be interpreted cautiously. Further longitudinal studies are needed to sort out these discrepancies and understand the long-term impacts of segregation.

We hypothesized that inmates in segregation would develop psychological symptoms consistent with the SHU syndrome and that they would deteriorate over time relative to comparison offenders. In

addition, we hypothesized that segregated offenders, with or without mental illness, would deteriorate over time, but the rate at which it occurred would be more rapid and more extreme in the mentally ill.

Method

Setting

The Colorado Department of Corrections managed 19,279 inmates in 25 state and 7 private prisons at the start of data collection. Colorado State Penitentiary (CSP) was one of four state prisons designed to hold AS-classified offenders. As a 756-bed male facility, CSP was the largest and only dedicated AS facility in the state. Therefore, any study participants who were classified as AS were waitlisted and placed in CSP.

AS is the most secure and restrictive of five security classification levels in Colorado. Placement is determined through an administrative action (during a hearing) that is separate and distinct from both the usual classification system and the disciplinary system. Classification to the other four levels is determined through a scored instrument, and the disciplinary process is a punitive response to a finding of guilt for an institutional rule violation that may result in punitive segregation for up to 60 days. AS is of longer duration and is used for management purposes; Colorado did not place protective-custody inmates or new prison inmates into AS at the time of the study. In addition, prehearing segregation may occur immediately after a serious incident, for safety and security reasons. Thus, in the time leading up to and during their AS hearing, inmates have typically been in segregation. All segregation cells in Colorado are single occupancy, and inmates may only leave their cells with a two-person escort while in full restraints.

Offenders reclassified to AS remain in a punitive segregation bed until an AS bed becomes available. Once transferred to CSP, inmates have increased access to services compared with punitive segregation, such as library, education courses, and treatment programs. Most services are provided cellside, including meals, medications, library, and even programs. Each cell is equipped with an intercom system for on-demand communication between the inmate and the unit's control center. Officers also make rounds every 30 minutes to perform a visual check. Inmates are permitted to leave their cells for at least

one hour of recreation five times per week and to shower for 15 minutes three times per week. CSP provides incentive-based behavior modification and cognitive programs. The incentive-based programming consists of three quality-of-life levels, bringing more privileges with each level earned. Once inmates progress from level one (usually after the first seven days), they are permitted televisions in their cells. To progress from CSP, every offender must successfully complete three televised cognitive classes, each lasting three months. A variety of mental health services are available within the facility, including monthly cell-front rounds, individual counseling sessions, psychiatry, and crisis management.

Colorado has a dedicated 255-bed special needs (SN) prison for inmates with acute psychiatric symptoms who cannot be managed in the general prison population. When inmates are admitted to the SN prison, they are held at a highly restricted level while undergoing intake and assessment, and they quickly progress to less restrictive environments unless their behavior prohibits progression. When CSP and the SN prison were excluded because of their unique missions, 26 male general population (GP) prisons remained. GP inmates have access to significant out-of-cell time (e.g., >10 hours/day), jobs, and programming in contrast to AS inmates.

Subjects

Subjects included male inmates placed in AS and comparison inmates drawn from 10 GP facilities housing higher security inmates. Placement into AS or GP conditions occurred as a function of routine prison operations in the context of an inmate's being charged with a prison rule infraction. Following an AS hearing, inmates were waitlisted for CSP if prison officials determined that AS placement was warranted or were returned to GP if not reclassified to AS. GP comparison subjects also included disruptive inmates at high risk of AS placement who were transferred to a diversionary program; the program discontinued shortly after the study commenced, so only 17 percent of GP subjects were identified this way.

Inmates in both study conditions (AS, GP) were classified into two groups, those with mental illness (MI) and those with no mental illness (NMI), giving four study groups. These groups were based on the prison system's existing mental health classification

system, which takes into account clinical diagnosis, acuity of symptoms, and consumption of resources. The primary diagnoses that met criteria for elevated mental health ratings are bipolar mood disorders, major depressive disorder, depressive disorder not otherwise specified, dysthymia, schizophrenia and other psychotic disorders, and posttraumatic stress disorder. Inmates with serious mental illnesses placed in the SN prison comprised a fifth study group (labeled SN MI). SN MI inmates were included only if they had institutional histories of disciplinary violations. The AS NMI group's primary comparison group was the GP NMI group, whereas the AS MI group was compared with both the GP MI and the SN MI groups.

Figure 1 illustrates the eligibility and selection of inmates for participation in the five study groups. Because the focus was long-term segregation, 226 inmates were excluded for having less than 15 months remaining on their sentences. Eighteen were excluded because of illiteracy or language barriers. Before contact by the researcher, inmates with mental illness were reviewed by clinicians, and two SN MI inmates were determined to be unable to comprehend the consent form. Subjects were selected from the remaining inmates by using nonprobability sampling according to inmates' proximity by timing or location to others who could be included in the study.

A total of 302 male inmates were approached to participate in the study. After complete description of the study to the subjects, written informed consent was obtained from 270 inmates. Thirty refused to participate, two were removed for inappropriate behavior toward the researcher, and 23 later withdrew their consent (data provided up to withdrawal were included). The participation of subjects within each group at each testing interval is shown in Figure 2.

Subjects' ages ranged from 17 to 59 (mean (M) = 31.8; standard deviation (SD) = 9.1). The racial/ethnic breakdown was 40 percent white, 36 percent Hispanic, 18 percent African American, 4 percent Native American, and 1 percent Asian. There were few or no significant group differences in the following contrasts: AS subjects versus eligible pool, those who refused versus those who participated, and subjects who completed every testing session versus those who did not (analyses can be found in the report for the funding agency²¹).

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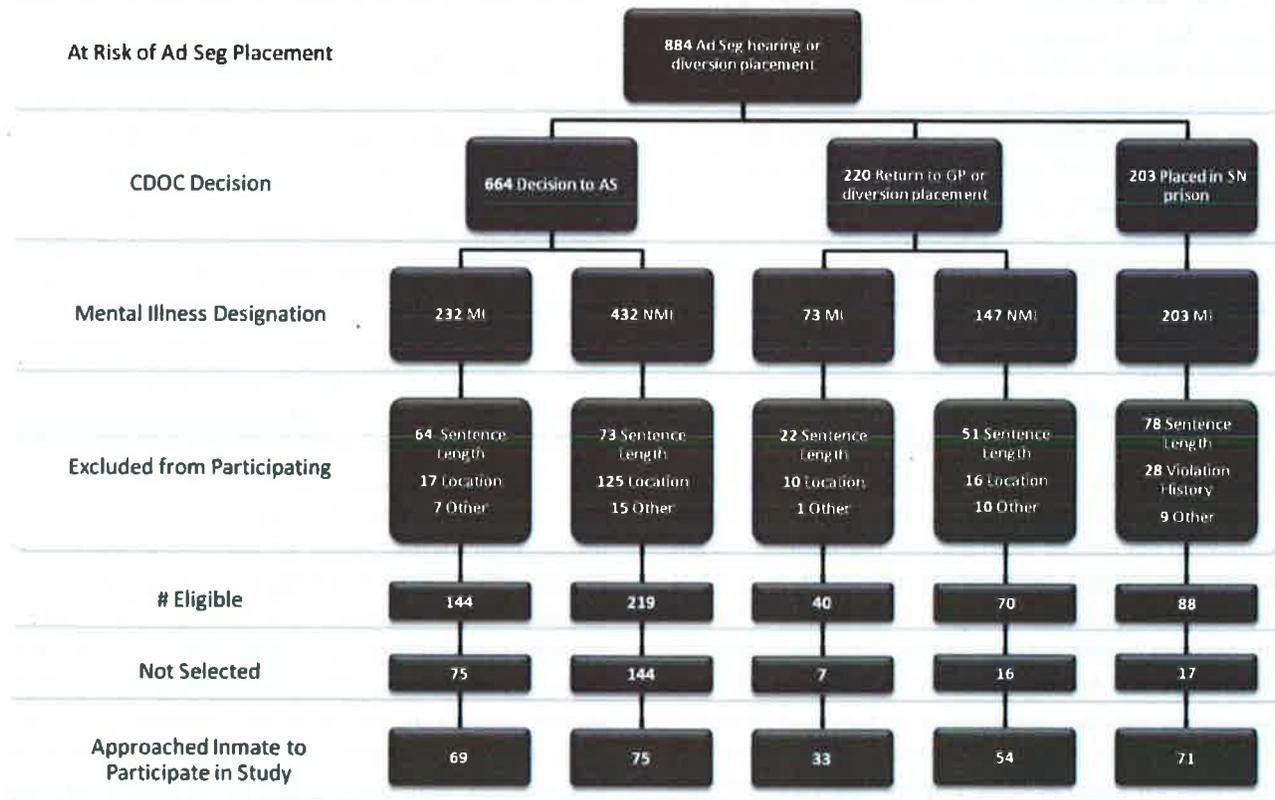


Figure 1. Eligibility and selection of subjects.

Measures

The Brief Symptom Inventory²² (BSI) was selected to measure the variety of psychiatric constructs hypothesized to be affected by AS, with specific reference to the SHU syndrome. Subjects were administered a battery of 12 psychological and cognitive tests as part of a larger study; however, the BSI is reported here because it covers a broad range of psychological symptoms (measuring constructs that overlapped with the other instruments) and yielded the same results as the other tests.²¹ As a standardized paper-and-pencil test, the BSI provides objective self-report data. The measure was also selected for its demonstrated reliability and validity, testing length, and ease of administration within the prison setting (e.g., no specialized equipment, no contact, reading level).

The BSI is a 53-item self-report measure that is widely employed to assess a broad range of psychological symptoms. It measures clinical symptoms across nine subscales (i.e., somatization, obsessive-

compulsive, interpersonal sensitivity, depression, anxiety, hostility, phobic anxiety, paranoid ideation, and psychoticism) and three global scales (i.e., general severity index (GSI); positive symptom total; and positive symptom distress index²³). Respondents are asked to rate the degree of distress experienced over the past week, using a five-point rating scale (0, not at all, to 4, extremely). Higher scores on the BSI indicate a greater degree of psychopathology. Despite having different subscales, the BSI seems to be better at providing information on the general degree of psychopathology than on the nature of it.²³ A minimum sixth-grade reading ability is needed to complete this measure, and it generally takes 10 minutes to complete.

The BSI demonstrated adequate reliability across forensic populations with internal consistency reliabilities of 0.52 to 0.86^{10,24} and item-total correlations of 0.73 to 0.91²³; two-week test-retest reliability was 0.90 for the GSI.²² Convergent validity estimates of the BSI ranged from 0.30 to 0.72 compared with clusters on the MMPI^{23,25} and from 0.49

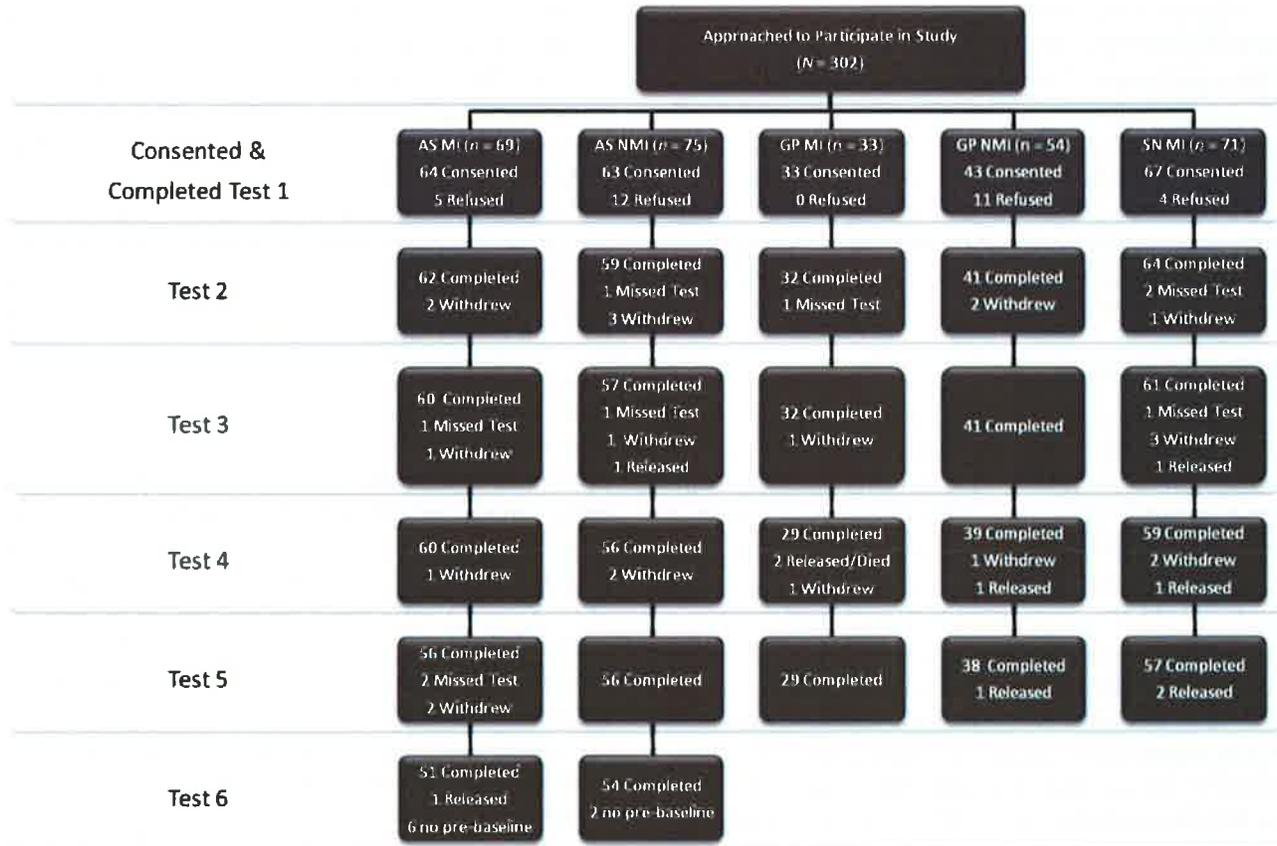


Figure 2. Flow of subjects through study.

to 0.69 in comparison to scales on the Brief Psychiatric Rating Scale.²⁶ In the present study, internal consistency estimates for scores on the BSI subscales ranged between 0.71 and 0.91 ($M = 0.85$), and test-retest reliability estimates ranged between 0.53 and 0.79 ($M = 0.72$). When the data from the complete study were included, scores on the BSI subscales showed reasonable convergent validity, as correlations with other self-report measures of the same constructs ranged between 0.15 and 0.89 ($M = 0.56$), but there were lower validity estimates with staff reports with correlations ranging between -0.01 and 0.43 ($M = 0.23$).

Procedures

The project operated under the approval of the institutional review board at the University of Colorado at Colorado Springs. The research team was notified of pending AS hearings by prison staff when the offender received notice and of SN prison placements before transfers. Research staff screened elec-

tronic inmate files for eligibility, including mental health status, time remaining on sentence, and literacy.

The BSI was administered by a female field researcher. In advance of each visit, the researcher contacted prison security to arrange visits with specific inmates. All inmates were escorted by security staff to the visiting room, which entailed a noncontact booth for inmates in segregation. The researcher met individually with each inmate to review the consent form, which included the general purpose of the study, voluntary nature of participation, risks and benefits, and remuneration. Inmates were compensated \$10 per testing session (subject to a \$3 fee for restitution payment plus a \$5 fee if an inmate had a negative bank balance) for a maximum of \$60 for those who completed six sessions. They were advised that the purpose was to learn about prison adjustment and that inmates across the state were participating in the study. At the time of consent, the initial test battery was administered.

Subjects were added to the study at the time of their AS hearings, usually while in segregation, or SN prison placement (baseline assessment). The GP and SN groups were tested at approximately three-month intervals for five testing sessions. Because of the long waitlist for the AS facility, AS subjects had their second test after placement and approximately every three months thereafter, for a total of six testing sessions. The median between first and second testing intervals was 89 days (range, 41–190).

Statistical Analyses

Multilevel modeling for repeated-measures data was used to determine the underlying function of change and to determine whether groups changed in different ways over time. The linear mixed model command in SPSS 20 was used for all analyses. BSI scores were positively skewed with a significant number of outliers so that scores were transformed by using a square root transformation. This transformation reduced the number of outliers in the data and each distribution was less skewed. Because time between assessments varied for participants, time was coded as the number of months from baseline, with the baseline coded as time 0. BSI scores were centered at the mean of the baseline period using all participants. These two parameterizations allowed the intercept to be interpreted as an estimate of the score at the initial assessment interval. We followed the basic procedure and steps for testing multilevel models suggested by West²⁷ and Heck *et al.*²⁸ Multiple models were fit to the data to determine if a linear, quadratic, cubic, or logarithmic function best explained the underlying change over time. This method gave 12 models to fit. To determine the best fitting model, we used Akaike's Information Criterion (AIC) and assessed nested models with the chi-square test for differences between log-likelihood ratio values (-2 restricted log-likelihood), with maximum-likelihood estimation. Additional parameter estimates were examined with the Wald z test to determine statistical significance. Each model parameter was also assessed to determine if it should be treated as a random or fixed effect by examining whether the variance and covariance elements were significantly different from zero, as well as by comparing model fit when the elements were treated as random versus fixed. The repeated-measures error covariance matrix was fit by using an autoregressive structure, following comparison of other possible structures, and the random

coefficients covariance matrix was estimated by using an unstructured form.

Once the best fitting change function was determined, multiple models were estimated to test the hypotheses that the AS groups changed in different ways than the comparison groups did. Thus, we have two levels, with the first level estimating the intraindividual change over time and the second level estimating interindividual differences in function parameters. Three different sets of models were assessed to test the hypotheses. For the first two sets, all study groups were used, and the first five time periods were used. One model was coded so that the AS MI parameter estimates could be compared with the other groups' estimates, and the other model was coded so that comparisons of the AS NMI parameter estimates could be made with the other groups' estimates. These two models are equivalent except for the tests of each group with the other groups. A third set of models used only the AS groups and all six time assessments to compare the change over time for the AS groups using all data (the three other groups were not assessed at Time 6). All consenting participants were used regardless of the number of assessments that were completed ($n = 270$).

Results

Table 1 provides the descriptive statistics for the original BSI subscale scores and the centered square-root-transformed scores, along with normative means. The original scores are provided so that comparisons could be made with normative BSI data, and the transformed centered data are used for the mixed-level analysis. Initially, all BSI subscales were used; however, the results were the same for all subscales; that is, the conclusions about change and group differences at initial value and change over time were the same. Thus, for ease of interpretation and understanding, only the BSI global score index (GSI) is reported (full results are available from the authors). Figure 3 provides a graphic representation of the best fitting function for each BSI subscale and GSI score.

Table 2 provides the fit statistics for the 12 estimated models used to estimate the best fitting function for transformed GSI scores (the Level 1 models) for all groups, when using the first five assessments. Models differed in the underlying mathematical function (e.g. linear, quadratic) and whether parameters were treated as fixed or random. Random coef-

Table 1 Summary Statistics for BSI Subscales for Raw Scores and Transformed Centered Scores

BSI Scale	Assessment												Nonpatient Norms M (SD)	Outpatient Norms M (SD)
	0		1		2		3		4		5			
	M	SD	M	SD	M	SD	M	SD	M	SD	M	SD		
Original Scale														
Anxiety	1.05	0.99	0.86	0.96	0.87	0.98	0.82	0.94	0.75	0.89	0.62	0.82	0.26 (0.31)	1.51 (0.95)
Depression	1.34	1.07	1.12	1.06	1.12	1.10	1.06	1.05	1.02	1.05	0.84	0.91	0.21 (0.33)	1.65 (1.11)
Hostility	1.03	0.99	0.84	0.89	0.91	0.95	0.94	1.06	0.88	0.94	0.78	0.94	0.34 (0.40)	1.07 (0.90)
Interpersonal sensitivity	1.20	1.05	1.00	0.96	0.99	1.05	0.95	1.02	0.95	1.01	0.78	0.94	0.24 (0.38)	1.48 (1.06)
Obsessive-compulsive	1.34	1.01	1.19	1.03	1.18	1.07	1.15	1.05	1.07	0.99	0.92	0.92	0.37 (0.41)	1.53 (0.98)
Paranoid ideation	1.52	1.01	1.28	0.98	1.29	1.02	1.26	1.02	1.21	1.02	1.17	0.99	0.33 (0.41)	1.06 (0.93)
Phobic anxiety	0.77	0.95	0.62	0.88	0.66	0.92	0.59	0.89	0.56	0.79	0.42	0.80	0.11 (0.25)	0.79 (0.84)
Psychoticism	1.28	1.02	1.07	0.95	1.04	0.99	0.97	0.93	0.96	0.93	0.83	0.86	0.15 (0.27)	1.12 (0.84)
Somatization	0.82	0.87	0.65	0.75	0.69	0.82	0.62	0.80	0.61	0.79	0.45	0.67	0.23 (0.32)	0.67 (0.71)
GSI global score	1.15	0.82	0.96	0.80	0.97	0.86	0.92	0.83	0.88	0.79	0.75	0.72	0.25 (0.24)	1.20 (0.70)
Transformed														
Anxiety	0.00	0.55	-0.15	0.58	-0.13	0.58	-0.16	0.57	-0.21	0.56	-0.29	0.54		
Depression	0.00	0.55	-0.14	0.59	-0.16	0.62	-0.18	0.60	-0.21	0.60	-0.31	0.58		
Hostility	0.00	0.54	-0.11	0.53	-0.08	0.55	-0.09	0.59	-0.10	0.55	-0.17	0.56		
Interpersonal sensitivity	0.00	0.58	-0.11	0.57	-0.16	0.62	-0.16	0.61	-0.17	0.61	-0.27	0.59		
Obsessive-compulsive	0.00	0.54	-0.10	0.58	-0.11	0.59	-0.12	0.59	-0.16	0.57	-0.24	0.55		
Paranoid ideation	0.00	0.48	-0.13	0.52	-0.13	0.54	-0.15	0.54	-0.19	0.57	-0.21	0.56		
Phobic anxiety	0.00	0.59	-0.10	0.57	-0.10	0.60	-0.14	0.58	-0.14	0.55	-0.27	0.53		
Psychoticism	0.00	0.53	-0.13	0.56	-0.16	0.57	-0.18	0.56	-0.20	0.57	-0.27	0.54		
Somatization	0.00	0.52	-0.13	0.52	-0.10	0.53	-0.16	0.53	-0.17	0.53	-0.26	0.47		
GSI global score	0.00	0.41	-0.11	0.44	-0.12	0.46	-0.14	0.45	-0.16	0.46	-0.24	0.44		
Time (mo)	0	NA	3.1	.95	6.0	.92	9.1	.92	12.1	.97	15.4	1.37		

BSI subscale norms were taken from the BSI manual using male nonpatients and psychiatric outpatients (Ref. 22, p 35). Transformed data were centered at first assessment for entire sample with a square-root transformation to normalize the positively skewed distributions. Time is the mean number of months (with standard deviation) taken from the baseline assessment.

ficients imply that individuals differ on specific values for parameters and allow for intraindividual change. Fixed coefficients provide information about the mean function that fits the data. Comparisons between nested models demonstrated that a nonlinear function was most appropriate for the change over time and that coefficients should be random. Based on the AIC statistics, the logarithmic function was selected as the change model that best fit the data. A logarithmic model implies initial fast change

with change slowing over time. The intercept estimate was -0.01 ($SE = .02$; $p = .74$), which was not statistically significant (i.e., not different from zero), as expected, because the data were centered for initial scores for the entire sample. The change parameter was statistically significant ($b = -0.06$; $SE = 0.01$, $p < .001$) and negative, indicating that the scores decreased significantly (i.e., showing improvement on BSI scores) over time (as can be seen in Fig. 3). There was statistically significant variability in the intercept ($\sigma = 0.13$; $SE = 0.01$; $Wald z = 9.29$; $p < .001$) and in the change parameter ($\sigma = 0.01$; $SE = 0.002$; $Wald z = 4.98$; $p < .001$), but there was not a statistically significant relationship between intercept and change parameters ($\sigma = -0.001$; $SE = 0.004$; $Wald z = -0.34$; $p = .74$). Because there was significant variability in the random coefficients, the second-level models were estimated to determine whether this variability could be explained by group membership.

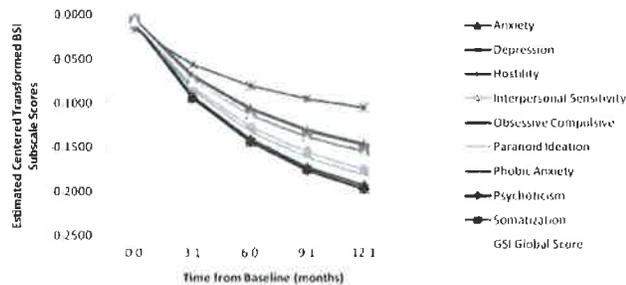


Figure 3. Logarithmic change functions for BSI subscales. Time is the average number of months between assessments.

Table 3 provides the results for the second-level models with logarithmic change for GSI global

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Table 2 Level 1 Model Statistics for BSI GSI Global Scores to Determine Best Fitting Change Function

Model Estimated	-2LLR	AIC
Cubic polynomial: Int, T1, T2, T3 random*	387.87	417.87
Cubic polynomial: Int, T1, T2 random	387.70	411.70
Cubic polynomial: Int, T1 random	407.92	425.92
Cubic polynomial: Int random	442.20	456.20
Quadratic polynomial: Int, T1, T2 random	391.71	413.71
Quadratic polynomial: Int, T1 random	411.52	427.52
Quadratic polynomial: Int random	445.38	457.38
Logarithmic Model: Int, TLN random	387.68	401.68
Logarithmic Model: Int random	488.72	498.72
Linear: Int, T1 random	425.94	439.94
Linear: Int random	458.39	468.39
Intercept-only model (no change)	521.46	529.46

-2LLR, log likelihood ratio statistic; AIC, Akaike's information criterion: smaller values are better. Int, Intercept coded so it is an estimate of BSI GSI at first assessment period. T1, Time coded for linear function. T2, Time squared coded for quadratic function. T3, Time cubed coded for cubic function. TLN, Time coded for logarithmic function. Time is number of months since initial assessment.

* Hessian matrix was positive definite although all convergence criteria were met.

scores with random intercept and change parameters as well as the statistics to compare parameter estimates of each AS group with each other group. Statistically significant differences in intercepts indicate that the two groups are not the same at the initial assessment. A significant difference between the change parameters indicates that the two groups changed in different ways. The change was tested with two sets of parameters based on AS group so that each AS group could be compared with each of the other groups. The overall fit and variance estimates were the same for either coding; only the parameter estimates changed with the different codes. The intercept and change parameters continued to demonstrate statistically significant variability, indicating that group membership did not account for all the intraindividual variability. Group membership accounted for approximately 30 percent of the variability in intercept scores, as demonstrated by a reduction in the intercept variance estimate (0.09 vs. 0.13); however, group membership did not account for any of the variance in the change parameter. There is not a statistically significant relationship between the intercept and change parameters, indicating that the subjects' initial scores were not related to how they changed over time. The change parameter is statistically significant, indicating that there was significant change over time, with scores declining (i.e., showing improvement on BSI scores). Neither AS group showed any statistically significant differ-

ences in change parameters in comparison with the other groups, demonstrating a lack of support for the hypothesis of differential change over time. Figure 4 demonstrates the underlying function of change over time for each group.

Each AS group had a statistically significant intercept, indicating that the initial group mean was different from the total sample mean and demonstrated differences from individual comparison groups. The AS MI group demonstrated significantly higher scores (i.e., more psychological distress) than did the total sample and scored significantly higher than the two non-mentally ill groups but were not different from the two other mentally ill comparison groups at the initial assessment. In contrast, the AS NMI group had significantly lower scores than did the total sample, scoring significantly lower than the three mentally ill groups and significantly higher than the GP NMI group.

Because the AS groups had six assessment periods, a second set of analyses was completed to make a direct comparison of change over time for the two AS groups. All models given in Table 2 were assessed, but the logarithmic model with random coefficients showed the best fit. The estimates for that model are provided in Table 4. Results are similar to the above results with the AS NMI group demonstrating lower overall initial values than the entire sample and statistically significant improvements over time. The AS MI group had significantly higher initial scores than the AS NMI group. There was not differential change over time, as indicated by the nonsignificant difference in the change parameters. Figure 5 provides a graph of each group's estimated change functions over time.

Discussion

The results of this study were inconsistent with the hypothesis that inmates, with or without mental illness, experience significant psychological decline in AS. Intercept comparisons showed that baseline differences were largely related to mental health status. Segregated inmates with mental illness displayed more symptoms than did inmates without mental illness. Mentally ill inmates in segregation were fairly similar to their comparison groups, but, from the beginning of the study, non-mentally ill segregated inmates had more symptoms than their GP comparison group had. It should be noted, however, that all offenders, regardless of their mental health status,

Table 3 Logarithmic Level 1 Models Testing Group and Group by Time Interactions for All Groups Using 5 Time Periods

Model Statistic	Estimates
Overall model fit	
Fit statistic (-2RLL)	290.92
AIC statistic	320.92
Repeated measures error structure	
Autoregressive variance estimate	0.04 (SE = 0.002, $p < .001$)
Autoregressive covariance estimate	0.64 (SE = 0.24, $p = .007$)
Random coefficients variance matrix	
Intercept random variance	0.09 (SE = 0.01, $p < .001$)
Intercept-change random covariance	-0.002 (SE = 0.003, $p = .51$)
Change parameter random variance	0.01 (SE = 0.002, $p < .001$)
Random Coefficients (Level 1 Parameters) With AS MI Coding	
AS MI intercept estimate	0.12 (SE = 0.04, $p = .007$)
AS MI change parameter estimate	-0.07 (SE = 0.02, $p < .001$)
Comparison of each group from AS MI Intercept	
AS NMI	-0.29 (SE = .08, $p < .001$)
SN MI	0.10 (SE = .06, $p = .09$)
GP NMI	-0.48 (SE = .07, $p < .001$)
GP MI	-0.08 (SE = .08, $p = .26$)
Comparisons of AS MI with each group on difference in change parameter	
AS NMI	0.01 (SE = 0.02, $p = .60$)
SN MI	0.02 (SE = 0.02, $p = .34$)
GP NMI	0.002 (SE = 0.03, $p = .94$)
GP MI	0.02 (SE = 0.03, $p = .45$)
Random Coefficients (Level 1 Parameters) With AS NMI Coding	
AS NMI intercept estimate	-0.16 (SE = 0.04, $p < .001$)
AS NMI change parameter estimate	-0.06 (SE = 0.02, $p = .001$)
Comparison of each group from AS NMI intercept	
AS MI	0.29 (SE = 0.06, $p < .001$)
SN MI	0.39 (SE = 0.06, $p < .001$)
GP NMI	-0.20 (SE = 0.07, $p = .005$)
GP MI	0.20 (SE = 0.08, $p = .008$)
Comparisons of AS NMI with each group on difference in change parameter	
AS NMI	-0.01 (SE = 0.02, $p = .60$)
SN MI	0.01 (SE = 0.02, $p = .68$)
GP NMI	-0.01 (SE = 0.03, $p = .69$)
GP MI	0.01 (SE = 0.03, $p = .75$)

Estimating logarithmic model with five time points using all groups. Models are coded in two ways so that each AS group is compared with all other groups on intercept and change parameters. Model fit statistics and covariance structures are the same for each model. Only the random and fixed parameter estimates change for the two models.

reported symptoms that were significantly elevated over normative community samples. Although the initial values showed group differences, the change function indicated significant change in psychological symptoms over time with early fast improvements slowing to stability. In contrast to the hypotheses, this pattern of change was similar in all five study groups.

The longitudinal design allowed assessment of whether change was occurring and in which direction. The presence of comparison groups avoids an attribution error; because findings were typically similar for people in segregation and in the general population, the findings cannot be attributed to segregation. These conclusions replicate those drawn by

Zinger and colleagues,¹⁰ although that study was criticized for high refusal rates, high attrition rates, small sample sizes, and short durations. Furthermore, the use of a reliable and valid standardized measure in the present study enabled objective assessment of psychological functioning.

A review of the findings warrants a discussion of plausible alternative explanations for inmates' responses to the questionnaire that might account for the results. Improvements may be due to reactivity; participants knew they were in a study and responded in a particular way. Perhaps they had a need to respond in a way that put them in the most favorable light (e.g., the ability to handle demands of confinement); however, comparisons to normative data

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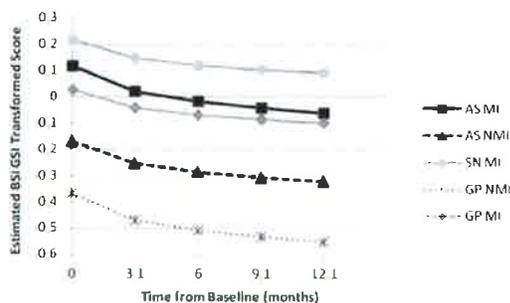


Figure 4. Logarithmic change functions for BSI GSI scores for each study group for five assessment periods. Although these lines are not statistically parallel, the interaction term was not statistically significant, indicating that the groups changed at the same basic rate over time. GP, general prison; AS, administrative segregation; MI, mental illness needs; NMI, no identified mental illness needs; SN, special needs prison. Time is the average number of months between assessments.

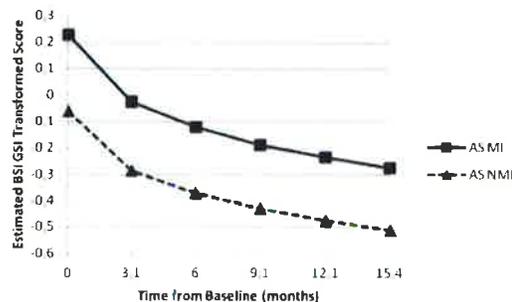


Figure 5. Logarithmic change functions for BSI GSI scores for AS groups for six assessment periods. Although these lines are not statistically parallel, the interaction term was not statistically significant, indicating that the groups changed at the same basic rate over time. AS, administrative segregation; MI, mental illness needs; NMI, no identified mental illness needs. Time is the average number of months between assessments.

indicate that the participants on average did not have good psychological functioning. Sometimes improvement in performance due to being observed is called the Hawthorne effect; however, this effect seems to be misunderstood, and it was not merely the fact of being studied that led to those original findings of improvement.²⁹ It is also possible that there are demand characteristics introduced by the field researcher that cues participants on how to respond; that seems unlikely as participants would be expected to respond in the hypothesized direction. Although a

testing or practice effect might explain improvements on cognitive measures, we were unable to find evidence that psychological measures should be influenced by testing effects. Study demands may lead to positive ratings, but it seems unlikely that response biases would overshadow the negative impacts of AS if they existed. However, there is not enough information in the data collected to account for the positive change. The most likely explanation is that all subjects were included in the study when in the midst of a crisis and, with time, the crisis dissipated and they adapted to their environment, a finding that is consistent with the research of Zamble and Porporino^{30,31} on adaptation to prison and that is delineated by the logarithmic change function.

Table 4 Logarithmic Level 1 Model Testing Group and Group by Time Interactions for AS Groups Using Only Six Time Periods

Model Statistic	Estimate
Fit statistic (-2RLL)	221.21
AIC statistic	239.21
Repeated-measures error structure	
Autoregressive variance estimate	0.04 (SE = .003, $p < .001$)
Autoregressive covariance estimate	0.77 (SE = .27, $p = .004$)
Random coefficients variance matrix	
Intercept random variance	0.11 (SE = .02, $p < .001$)
Intercept-change random covariance	-0.009 (SE = .006, $p = .12$)
Change parameter random variance	0.01 (SE = .003, $p < .001$)
Random coefficients (Level 1 parameters)	
AS NMI intercept estimate	-0.16 (SE = .05, $p = .001$)
AS NMI change parameter estimate	-0.06 (SE = .02, $p = .001$)
Group intercepts effect (overall)	
AS MI difference from AS NMI intercept	0.29 (SE = .07, $p < .001$)
Group by time interaction	
AS MI difference from AS NMI change	-0.02 (SE = .02, $p = .40$)

All models (as in Table 2) were re-estimated for the AS groups with six time periods; the logarithmic model was still the best fitting model.

Although this study incorporated several design features that improved on the capacity of previous research to draw conclusions about the effects of AS, there are several limitations that affect its generalizability to other settings. First, it included literate adult male offenders and should therefore not be generalized to female offenders, illiterate offenders, or juveniles. Second, because we studied behaviorally disruptive inmates, they may have experienced punitive or administrative segregation previously, and thus we are not assessing persons with no prior experience in isolation conditions. Third, segregation conditions vary from state to state on a host of variables, including average duration of AS, double-bunking, televisions, exercise, selection criteria for AS, and quality and quantity of mental health and medical services. Thus, the results of the study can be generalized only to other prison systems to the extent

that their conditions of AS confinement are similar to Colorado's.

The duration of the study was limited to one year because it was postulated in earlier research that the effects of segregation would be quickly evident.^{5,32-34} Kupers stated "that for just about all prisoners, being held in isolated confinement for longer than 3 months causes lasting emotional damage if not full-blown psychosis and functional disability" (Ref. 2, p 1006). Therefore, we expected that deleterious effects would become evident within a year, but it is possible that they do not appear until after longer periods of segregation.

This study was not designed to address the question of whether segregation is an appropriate confinement option for offenders, including those with serious and persistent mental illness. We are unaware of any treatment guideline that suggests that long-term confinement in an AS environment would be clinically helpful. We examined both intraindividual differences in change and intergroup differences. Although the data suggest that there is variability in change over time, it is not the study conditions that explain these differences. We used smooth mathematical functions to study change over time; it is possible that a person in segregation could have had one or more brief episodes, possibly even severe episodes, of psychopathology that were not reflected in the data because testing occurred at three-month intervals.

Replication is needed in other prisons to determine whether these findings hold true when conditions of confinement vary. Further research is needed to understand how increased services, privileges, staff, and out-of-cell time may ameliorate the unintended consequences of AS, and research should inform prison officials about the standards and practices necessary to protect inmates in segregation from potentially harmful psychological effects. It is also important to note that there may be other negative consequences of AS that we did not study, and research has yet to demonstrate the efficacy of AS in improving inmate behavior and conditions for the rest of the system. Thus, we make no empirical or value judgments about whether and to what degree the use of AS balances the purported benefits (e.g., a safer prison system) with costs (e.g., significant reductions in freedom).

We do not claim, nor believe, that these data definitively answer the question of whether long-term

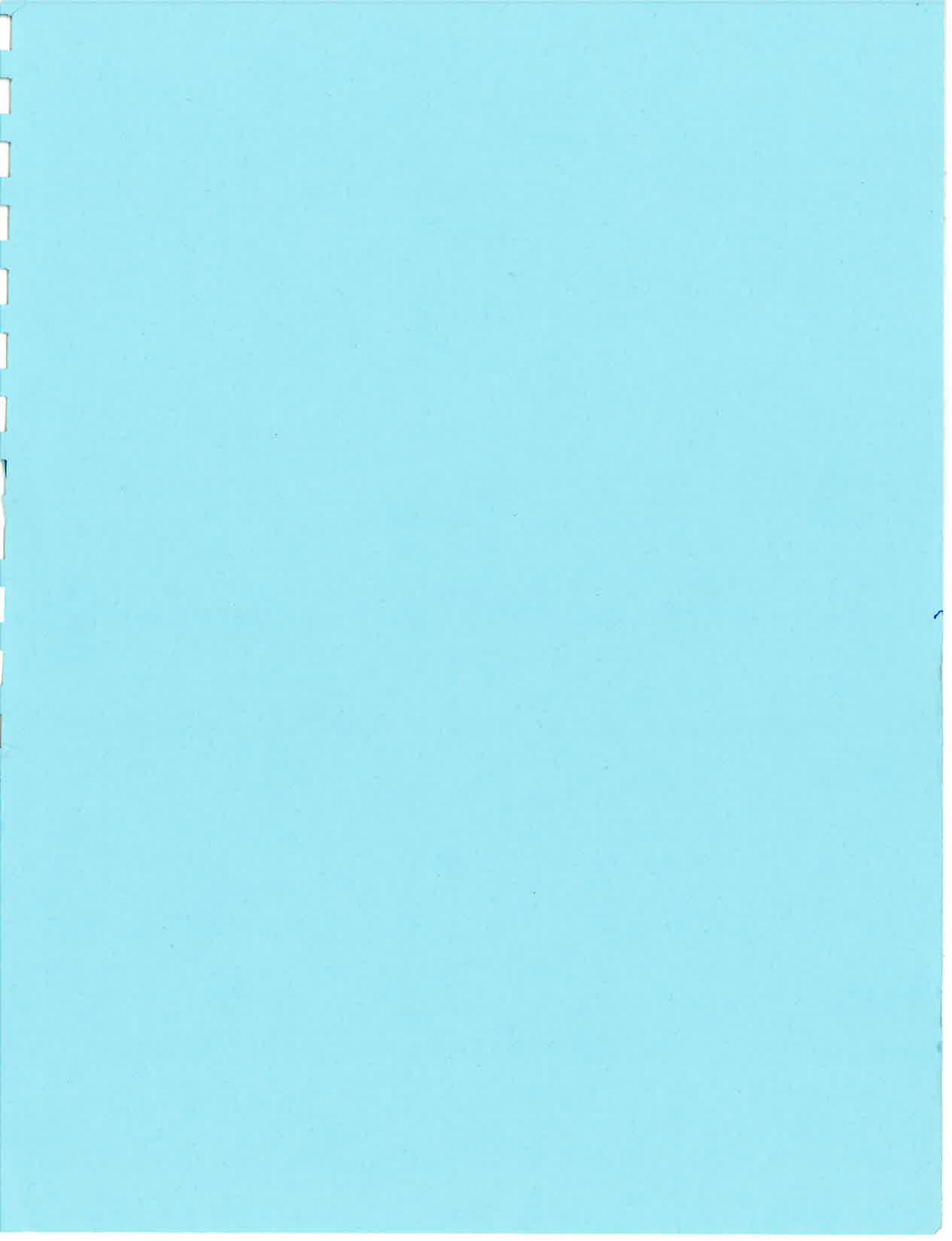
segregation causes psychological harm. We used one rigorous methodology to study, for one year, inmates in one state prison system that may or may not be similar to other prisons. Frankly, having seen individuals in psychological crisis in segregation, we were surprised that such effects did not appear in these data. We believe that this study moves us forward, but that future research will shed additional light on this crucial question.

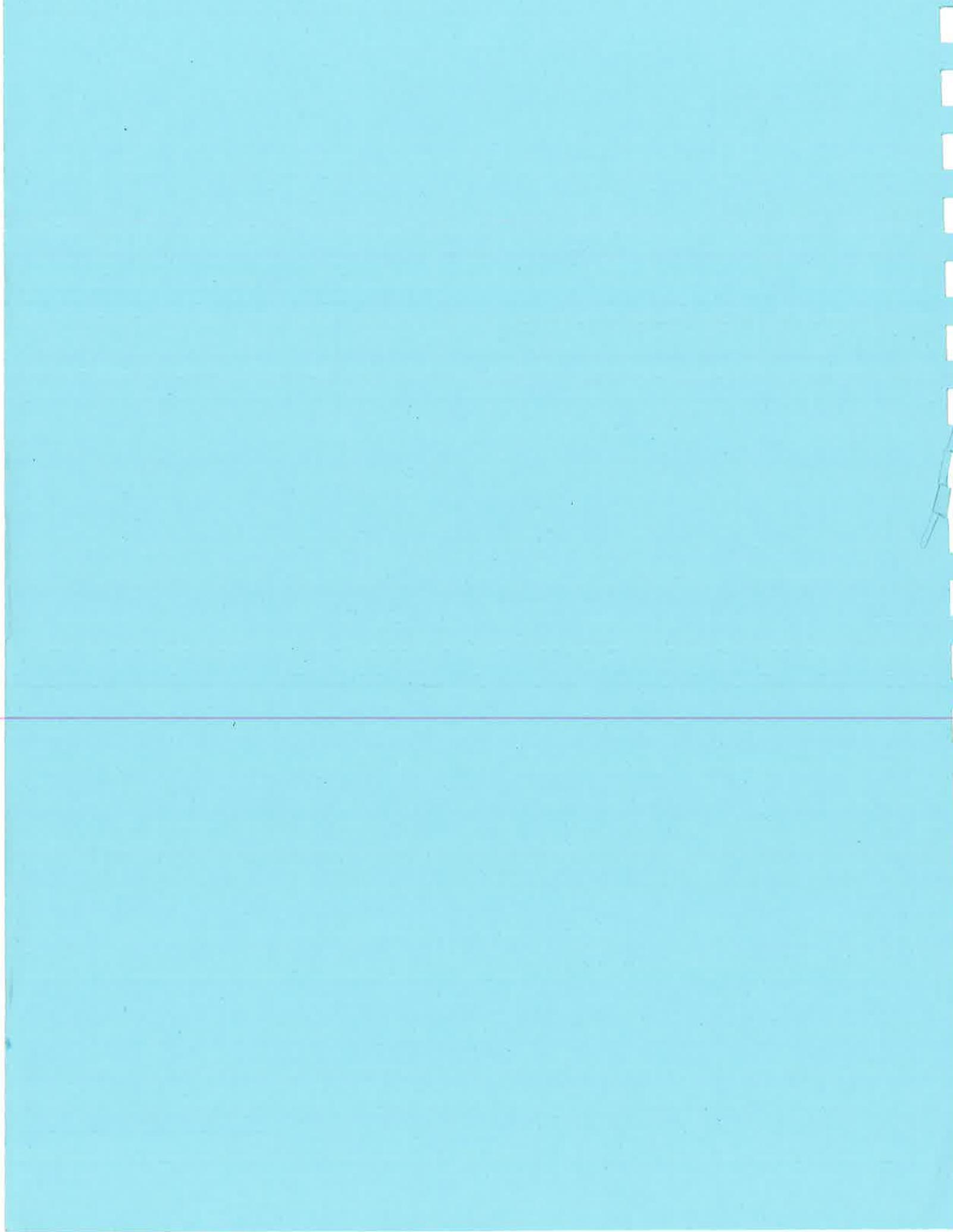
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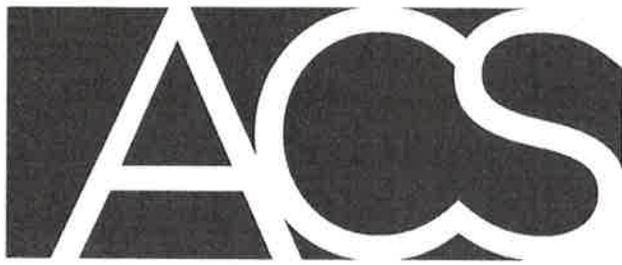
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AMERICAN
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Issue Brief

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

By Laura Rovner

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

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

Thus it was more than a century ago, as Justice Kennedy recently reminded us,³ that the Supreme Court first recognized the harm solitary confinement causes and nearly declared it unconstitutional. Yet, despite this unequivocal condemnation of solitary confinement by the nation’s highest court, over the course of the century that followed—and especially the last three decades—most states and the federal government have significantly increased their use of penal isolation. Today, conservative estimates place the number of people in solitary confinement at over 100,000.⁴ And they are there largely with the blessing of the federal courts.

¹ Jack Henry Abbott, *In the Belly of the Beast* 44-45 (1981).

² *In re Medley*, 134 U.S. 160, 168 (1890) (finding unconstitutional on *ex post facto* grounds a statute that required death-sentenced prisoners to be held in solitary confinement prior to their executions).

³ *Davis v. Ayala*, 135 S.Ct. 2187, 2209 (June 18, 2015) (Kennedy, J., concurring).

⁴ Sarah Baumgartel et al., *Time-In-Cell: The ASCA-Liman 2014 National Survey of Administrative Segregation in Prison*, Yale Law School 1, 3 (2015), http://www.law.yale.edu/documents/pdf/Liman/ASCA-Liman_Administrative_Segregation_Report_Sep_2_2015.pdf (approximating that “between 80,000 and 100,000 people were in isolation in prisons as of the fall of 2014”).

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

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

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

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

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

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

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

The U.S. has experimented with solitary confinement for nearly two centuries. Eastern State Penitentiary, built in Philadelphia by the Quakers in 1829, was the nation's first supermax prison.⁸ The men who served their sentences there spent years in isolation, on the theory that solitary

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

confinement would not only punish them, it would also rehabilitate them by providing an opportunity to seek forgiveness from God. The belief was that isolation would bring penitence; thus the prison gave rise to the term “penitentiary.” But, according to Charles Dickens, who visited there in 1842, instead of becoming penitent and rehabilitated, the men housed at Eastern State were, “dead to everything but torturing anxieties and despair.”⁹ He further observed, “[t]he system here, is rigid, strict and hopeless solitary confinement. I believe it . . . to be cruel and wrong . . . I hold this slow and

daily tampering with the mysteries of the brain to be immeasurably worse than any torture of the body.”¹⁰

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

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

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

⁹ Keramet Ann Reiter, *The Most Restrictive Alternative: A Litigation History of Solitary Confinement, in U.S. Prisons, in Studies in Law, Politics, and Society* 71, 72 (Austin Sarat ed., 2012).

¹⁰ *Id.*

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

¹² See Robert Martinson, *What Works? Questions and Answers About Prison Reform*, 35 *The Public Interest* 22 (1974).

this period caused incarceration rates across the country to rise dramatically.¹³ Finally, the deinstitutionalization movement and closure of many state mental health facilities resulted in the influx of thousands of people with mental illness into communities that lacked the necessary services and supports, ultimately leading to many mentally ill individuals being incarcerated in jails and prisons.¹⁴

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

During this period, the federal courts also were undergoing a shift in philosophy. While, in the late 1960s courts began to abandon the longstanding "hands off" doctrine¹⁸ that had effectively precluded judicial review of virtually all prison conditions, this shift was short-lived. In the ensuing decades, the Supreme Court—particularly during the Rehnquist era—while not returning entirely to the hands off doctrine, has significantly scaled back judicial scrutiny of prison conditions by developing standards of deference to constrain the lower courts.¹⁹ As a result, federal courts often give correctional officials considerable (sometimes complete) deference "defining the legitimate goals of a corrections system and for determining the most appropriate means to accomplish them."²⁰

¹³ See, e.g., Sharon Shalev, *Supermax: controlling risk through solitary confinement* 28-29 (2009).

¹⁴ *Id.*

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

¹⁶ See generally Roy D. King, *The Rise and Rise of Supermax: An American Solution in Search of a Problem*, 1 *Punishment & Soc'y* 163 (1999).

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

¹⁸ Prior to the prison reform movement that began in the 1960s, the predominant view of the federal courts was that prisoners had no legal right to humane conditions of confinement that could be judicially enforced. Consequently, they maintained a "hands-off" approach to prison cases, often citing concerns about separation of powers, federalism, and lack of judicial expertise in prison management. See Malcolm Feeley & Edward Rubin, *Judicial Policy Making and the Modern State: How Courts Reformed America's Prisons* 30-31 (1998); Lynn S. Branham, *The Law of Sentencing, Corrections, and Prisoners' Rights* 335-36 (6th ed. 2002).

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

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

II. Eighth Amendment Challenges to Solitary Confinement

Generally, constitutional challenges to solitary confinement have been grounded in the Eighth Amendment's prohibition against cruel and unusual punishment.²¹ The Eighth Amendment prohibits the infliction of "cruel and unusual punishments."²² In determining whether a particular form of punishment is cruel and unusual, the Supreme Court interprets the Amendment "in a flexible and dynamic manner."²³ This means that "[n]o static 'test' can exist by which courts determine whether conditions of confinement are cruel and unusual, for the Eighth Amendment 'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.'"²⁴

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

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

Most federal courts to consider whether the use of long-term solitary confinement violates the Eighth Amendment have held that it does not, except in situations where the person is a juvenile or has a pre-existing mental illness. Those exceptions are grounded in the idea that youth and mental

²¹ The use of long-term solitary confinement also implicates the due process clauses of the Fifth and Fourteenth Amendments, which prohibit the government from depriving a person of life, liberty, or property without due process of law. Unlike the Eighth Amendment, which is the primary focus of this Issue Brief, rather than prohibiting harsh or atypical prison conditions, due process safeguards are intended to ensure that people are not caused to suffer deprivations in error or without reason.

²² U.S. Const. amend. VIII.

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

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

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

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

²⁷ *Farmer*, 511 U.S. at 836-38.

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

²⁹ *Helling*, 509 U.S. at 33.

illness make people more vulnerable to the harmful effects of isolation. For example, in the leading case, *Madrid v. Gomez*, a federal district court likened the placement of persons with mental illness in solitary confinement to "putting an asthmatic in a place with little air to breathe."³⁰ For that reason, the court held that confining people with mental illness in supermax conditions could not "be squared with evolving standards of humanity or decency" because the risk of exacerbating their mental illness was so grave—"so shocking and indecent—[that it] simply has no place in civilized society."³¹

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

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

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

³⁰ *Madrid*, 889 F.Supp. at 1265.

³¹ *Id.* at 1266.

³² *Id.* at 1267.

³³ *See, e.g.*, *Jones-El v. Berge*, 164 F. Supp. 2d 1096 (W.D. Wis. 2001) (placing seriously mentally ill prisoners in Wisconsin supermax violates the Eighth Amendment); *Austin v. Wilkinson*, No. 4:01-CV-071, Doc. 134 at *27 (N.D. Ohio Nov. 21, 2001) (order granting preliminary injunction) (noting that the defendants offered little opposition to a preliminary injunction prohibiting the placement of seriously mentally ill prisoners at the Ohio supermax); *Ruiz*, 37 F. Supp. 2d at 915 (finding that prison conditions can pose too great a threat to the psychological health of mentally ill inmates, violating the Eighth Amendment).

³⁴ *Silverstein*, 559 Fed. App'x. at 739. I teach in the Civil Rights Clinic at the University of Denver College of Law, which was counsel to Silverstein in this case.

the prison official’s asserted penological interests can be summed up by its statement that “the opinion of a prison administrator on how to maintain internal security carries great weight and the courts should not substitute their judgment for that of officials.”³⁵

For those who take seriously the idea that the Eighth Amendment imposes moral limits on what the state may do to people as punishment,³⁶ the Tenth Circuit’s approach to analyzing security issues is troubling for two reasons. First, the Eighth Amendment’s two-pronged test does not expressly contemplate the role of the prison’s penological interest.³⁷ While the prison’s reason for putting someone in solitary is obviously relevant to the question of whether doing so is cruel and unusual,

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

the lack of a coherent doctrinal structure has resulted in courts varying considerably in their analysis of whether, how, and how much they consider an asserted penological interest in determining whether the Eighth Amendment has been violated.

Second, there is a separate issue about how much deference courts should give to that asserted interest. While the Supreme Court has held that other constitutional rights are less strong in prison

because they must give way to legitimate penological interests,³⁸ the Court has affirmed that those limits do not apply to claims of cruel and unusual punishment because “[t]he whole point of the amendment is to protect persons convicted of crimes.”³⁹ Accordingly, the Court has held that affording “deference to the findings of state prison officials in the context of the [E]ighth [A]mendment would reduce that provision to a nullity in precisely the context where it is most necessary.”⁴⁰

Despite this, the *Silverstein* court—and other courts that have considered the constitutionality of solitary confinement under the Eighth Amendment—have heavily weighted prison administrators’ asserted penological interest and have given enormous deference to the judgments of prison staff, going so far as to profoundly minimize or ignore evidence that conflicts with those judgments. The

³⁵ *Id.* at 754 (quoting *Whitley v. Albers*, 475 U.S. 312, 321–22 (1986)).

³⁶ See *Furman v. Georgia*, 408 U.S. 238, 382 (1972) (Burger, C.J., dissenting) (“The standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment.”).

³⁷ For a more in-depth discussion of this issue, see Brittany Glidden, *Necessary Suffering?: Weighing Government and Prisoner Interests in Determining What is Cruel and Unusual*, 50 Am. Crim. L. Rev. 1815 (Fall 2012).

³⁸ Other constitutional rights—for example, First Amendment rights to free expression, association, and exercise of religion; due process; equal protection, etc.—are limited by the very deferential, rational basis test established by the Supreme Court in *Turner v. Safley*, 482 U.S. 78, 89–92 (1987).

³⁹ *Johnson v. California*, 543 U.S. 499, 511 (2005) (“[T]he integrity of the criminal justice system depends on full compliance with the Eighth Amendment”) (quoting *Spain v. Proconier*, 600 F.2d 189, 193–94 (9th Cir. 1979)).

⁴⁰ *Id.*

result has not only produced judicial decisions sanctioning the use of prolonged or indefinite solitary confinement, it has also perverted Eighth Amendment jurisprudence more broadly.⁴¹

In addition to the deference the *Silverstein* court gave to the prison's asserted penological interest, the court also relied on the fact that Silverstein had not been diagnosed with a serious mental illness prior to his thirty years in isolation. Further, the court found that the mental health issues he developed during his time in solitary—including an anxiety disorder, cognitive impairment, hopelessness, inability to concentrate, memory loss, and depression—were “minor mental health symptoms” and therefore his thirty years of isolation was not “sufficiently serious so as to ‘deprive him of the minimal civilized measure of life’s necessities.’”⁴²

Not only did the Tenth Circuit disregard the harm Silverstein had already suffered, it also disregarded the risk of harm that indefinite solitary confinement posed to Silverstein in the future. In *Helling v. McKinney*, the Supreme Court expressly recognized the “risk of harm” formulation of the objective prong, holding that “[t]he Amendment . . . requires that inmates be furnished with the basic human needs, one of which is ‘reasonable safety.’ . . . [A] remedy for unsafe conditions need not await a tragic event.”⁴³ In *Helling*, the plaintiff asserted that his exposure to tobacco smoke from other prisoners subjected him to cruel and unusual punishment. In rejecting the state’s argument that the Eighth Amendment is not violated absent a showing of current harm, the Court emphasized that prison authorities may not “ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year.”⁴⁴ The Court went on to explain:

[T]he Eighth Amendment requires more than a scientific and statistical inquiry into the seriousness of the potential harm and the likelihood that such injury to health will actually be caused. . . . It also requires a court to assess whether society considers the risk that the prisoner complains of to be so grave that it violates contemporary standards of decency to expose anyone unwillingly to such a risk. In other words, the prisoner must show that the risk of which he complains is not one that today’s society chooses to tolerate.⁴⁵

One of the reasons the Tenth Circuit held that indefinite solitary confinement did not pose a constitutionally significant risk of harm to Silverstein in the future was its determination that in conditions of confinement cases where a plaintiff asserts a future risk of mental harm, “[t]he *actual extent* of any . . . psychological injury is pertinent in proving a substantial risk of serious harm.”⁴⁶

⁴¹ An especially troubling basis for this deference is sometimes found in courts’ invocation of separation of powers principles. In such cases, courts contend that prison administration is uniquely the province of the executive branch and that separation-of-powers concerns counsel judicial restraint. While this argument is not without merit, taken too far it represents abdication of the judicial role. *See, e.g., Plata*, 131 S.Ct. at 1228-29 (“courts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration”).

⁴² *Silverstein*, 559 Fed. App’x. at 758.

⁴³ *Helling*, 509 U.S. at 33-34.

⁴⁴ *Id.*

⁴⁵ *Id.* at 36.

⁴⁶ *Silverstein*, 559 Fed. App’x. at 754 (quoting *Benefield v. McDowall*, 241 F.3d 1267, 1272 (10th Cir. 2001)).

Aside from the fact that a requirement of current harm as a precondition for asserting a risk of future harm appears nowhere in *Helling* or its progeny, the Tenth Circuit's formulation of the "risk of harm" element situates the determination of whether a condition is "sufficiently serious" in the character of the prisoner-plaintiff rather than the nature of the conditions themselves.

Framing the inquiry in this way also allowed the *Silverstein* court to disregard substantial evidence of the negative psychological effects of isolated prison confinement.⁴⁷ That evidence includes studies documenting a recurring cluster of harms suffered by people in long-term isolation, including "ruminations or intrusive thoughts, an oversensitivity to external stimuli, irrational anger and irritability, difficulties with attention and often with memory" as well as "a constellation of symptoms indicative of mood or emotional disorders . . . emotional flatness or losing the ability to feel, swings in emotional responding, and feelings of depression or sadness that did not go away."⁴⁸ Finally, "sizable minorities . . . report symptoms that are typically only associated with more extreme forms of psychopathology—hallucinations, perceptual distortions, and thoughts of suicide."⁴⁹ Over and over again, there are reports of people who have spent long periods in solitary suffering the same symptoms of harm—so much so that researchers refer to this cluster as "SHU syndrome."⁵⁰ Harvard psychiatrist Dr. Stuart Grassian published research in 1983 (the year *Silverstein* was put in solitary) documenting brain function abnormalities of people held in isolation.⁵¹ Studies from all over the world detail the "psychologically precarious state of persons confined under penal isolation, [including] the pain and suffering that isolated prisoners endure."⁵² Further, "[t]he data that establish these harmful effects have been collected in studies conducted over a period of several decades, by researchers from several different continents who had diverse academic backgrounds and a wide range of professional expertise."⁵³

Despite this overwhelming body of evidence, the Tenth Circuit found that there was no triable issue of fact as to whether *Silverstein* faced a substantial risk of future harm as he entered his fourth decade of indefinite and extreme isolation— isolation that continues to this day. Moreover, the court's approach to its analysis shifted the inquiry away from the core constitutional question of whether such confinement is inconsistent with the "evolving standards of decency that mark the progress of a maturing society."⁵⁴ As *Silverstein*'s extreme case demonstrates, the Tenth Circuit's

⁴⁷ Haney Aff., Attach. 2 at 7, *Silverstein v. Fed. Bureau of Prisons*, 2011 WL 4552540 (D. Colo. 2011) *aff'd*, 559 Fed. App'x. 739 (10th Cir. 2014), available at <http://solitarywatch.com/wp-content/uploads/2011/05/declaration-of-dr-craig-haney-in-silverstein-case.pdf>.

⁴⁸ *Id.* at 12; see also Craig Haney, *Mental Health Issues in Long-Term Solitary and 'Supermax' Confinement*, 49 *Crime & Delinq.* 124, 134-41 (2003), available at <http://www.supermaxcd.com/NewSupermaxMaterials/Haney-MentalHealthIssues.pdf> (detailing the findings of Dr. Haney's study of California's Pelican Bay supermax prison, including the prevalence of psychopathological symptoms of isolation).

⁴⁹ Haney Aff., Attach. 2, *supra* note 47 at 7; see also Haney, *supra* note 48, at 134-41.

⁵⁰ See e.g., Stuart Grassian, *The SHU Syndrome: Psychopathological Effects of Solitary Confinement*, *American Journal of Psychiatry* 1450-54 (1983).

⁵¹ *Id.*

⁵² Haney Aff., Attach. 2, *supra* note 47, at 3.

⁵³ *Id.* at 7.

⁵⁴ *Trop*, 356 U.S. at 100-01.

approach would make it difficult for any prisoner-plaintiff to prevail in an Eighth Amendment challenge to his solitary confinement.

III. A Way Forward

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

First, we appear to be approaching a societal consensus that solitary confinement causes people harm and pain. The overwhelming and ever-growing body of psychological and medical evidence documents what we know intuitively—that human beings need social interaction and meaningful activity, and they suffer without it.⁵⁵ Indeed, this borders on common sense; it is why solitary confinement is a regular feature of torture regimes. Additionally, neuroscience research has increasingly demonstrated that the harmful effects of solitary confinement appear not only in the reports of those who are forced to endure it, but also in brain imagery and testing, which reveal that changes can occur in the brain after even (comparatively) brief periods of solitary confinement.⁵⁶ In short, “we now know that prolonged social deprivation has the capacity to literally change who we are, physically as well as mentally.”⁵⁷

In light of this, a broad array of medical and mental health organizations, human rights groups, religious entities, and even correctional administrators have denounced the use of long-term isolation and called for its elimination or reduction.⁵⁸ And those who have the most expertise about the harm of long-term isolation—the people who are confined there—have raised public

⁵⁵ It is therefore unsurprising that there are increased rates of suicide and self-harm among prisoners held in prolonged isolation. In one study of California’s prison system, researchers found that 2% of the prison population is housed in isolation, but accounted for 42% of all prison suicides from 2006 to 2010. *Striking Against Solitude*, Wash. Post, Aug. 4, 2013 at A18. This finding was replicated in a study published in the *American Journal of Public Health* in 2012, in which the correctional psychiatrist Fatos Kaba and colleagues analyzed about 244,699 jail admissions New York City between 2010 and 2013, and found that although 7.3% of prisoners admitted during this period were consigned to solitary, accounting for 53.3% of acts of self-harm and 45% of potentially fatal acts of self-harm. Similarly, a 1995 study of federal prisoners found that 63% of suicides occurred among people in solitary. The Department Of Justice, *Prison Suicide: An Overview and Guide to Prevention* 55 (1995), available at <https://s3.amazonaws.com/static.nicic.gov/Library/012475.pdf>.

⁵⁶ See e.g., Stephanie Pappas, *Mystery of How Social Isolation Messes with Brain Solved*, Live Science (Sept. 13, 2012, 2:10 PM), available at <http://www.livescience.com/23169-social-isolation-changes-brain.html>; Rita Hari & Milamaaria V. Kujala, *Brain Basis of Human Social Interaction: From Concepts to Brain Imaging*, 89 *Physiological Rev.* 453, 454 (2009); Roy F. Baumeister & Mark R. Leary, *The Need to Belong: Desire for Interpersonal Attachment as a Fundamental Human Motivation*, 117 *Psychol. Bull.* 497, 497 (1995); Nadia Ramlagan, *Solitary Confinement Fundamentally Alters the Brain, Scientists Say*, *Advancing Science, Serving Society* (Feb. 15, 2014), <http://www.aaas.org/news/solitary-confinement-fundamentally-alters-brain-scientists-say>.

⁵⁷ Dr. Craig Haney, Testimony before the California Senate and Assembly Committee on Public Safety, Hearing on CDCR’s New Policies on Inmate Segregation: The Promise and Imperative of Real Reform (Feb. 11, 2014) at 6 [hereinafter CDCR Testimony].

⁵⁸ For example, the American Psychiatric Association, Physicians for Human Rights, the National Alliance for the Mentally Ill, the National Religious Campaign Against Torture, and Pope Francis have all condemned the use of solitary confinement.

consciousness through writing, art, and most recently, massive hunger strikes by California prisoners held for decades in solitary confinement.⁵⁹ Public awareness about the harm of solitary confinement is growing, and public opinion is changing as a result.

Second, the international community has almost universally condemned the use of long-term isolation. In 2011, the U.N. Special Rapporteur on Torture concluded that prolonged solitary confinement is prohibited by the International Covenant on Civil and Political Rights (“ICCPR”) and the Convention Against Torture, and declared that the use of solitary confinement for more than fifteen days constitutes torture.⁶⁰ Amnesty International, Human Rights Watch, and the World Health Organization are just a few of the many international human rights organizations that have condemned the use of penal isolation in the U.S. Earlier this year, the High Court of Ireland refused to extradite a man wanted by the U.S. on terrorism-related charges because it found that if convicted, he was at risk of being held in isolation indefinitely at the federal supermax prison in Florence, Colorado, in conditions that violate the Irish Constitution.⁶¹ In short, the U.S. is an outlier in the degree to which it uses long-term isolation, rendering it dramatically out of sync with international human rights standards.

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

⁵⁹ See, e.g., Benjamin Wallace-Wells, *The Plot from Solitary*, N.Y. Magazine, Feb. 26, 2014, available at <http://nymag.com/news/features/solitary-secure-housing-units-2014-2/#>.

⁶⁰ Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Special Rapporteur on Torture Tells Third Committee Use of Prolonged Solitary Confinement on Rise, Calls for Global Ban on Practice*, U.N. Doc. GA/SHC/2014 (Oct. 18, 2011), available at

<http://www.un.org/press/en/2011/gashc4014.doc.htm>. The Special Rapporteur’s view comports with standards laid out by the Istanbul Statement on the Use and Effects of Solitary Confinement, the ICCPR Human Rights Committee, and the United Nations Office of the High Commissioner for Human Rights.

⁶¹ *Attorney General v. Ali Charaf Damache*, [2015] IEHC 339, (Ir.), available at <http://www.bailii.org/ie/cases/IEHC/2015/H339.html>.

⁶² Solitary Watch, Fact Sheet: The High Cost of Solitary Confinement, <http://solitarywatch.com/wp-content/uploads/2011/06/fact-sheet-the-high-cost-of-solitary-confinement.pdf> (last visited Sept. 8, 2015).

⁶³ See Alison Shames et al., *Solitary Confinement: Common Misconceptions and Emerging Safe Alternatives*, Vera Inst. of Justice (2015), http://www.vera.org/sites/default/files/resources/downloads/solitary-confinement-misconceptions-safe-alternatives-report_1.pdf (discussing alternatives used by several states, including Maine, Colorado, and Washington).

Attorney General Loretta Lynch to “start a review of the overuse of solitary confinement across American prisons.”⁶⁴

These converging forces have set in motion state legislation, correctional agency initiatives, and executive actions, which, individually and in combination, have begun to reduce the number of people in long-term isolation in state and federal prisons—especially children and those with mental illness.⁶⁵ State legislatures are increasingly prohibiting the use of solitary confinement for people with mental disabilities⁶⁶ and juveniles,⁶⁷ an interesting parallel with the evolution of death penalty legislation and jurisprudence.

But we know that children and people with mental illness are not the only ones harmed by prolonged isolation. While these two groups are especially vulnerable to grave harm, “all individuals will still experience a degree of stupor, difficulties with thinking and concentration, obsessional thinking, agitation, irritability, and difficulty tolerating external stimuli (especially noxious stimuli).”⁶⁸ Although acute symptoms may subside, many prisoners will likely suffer permanent harm because of such confinement.⁶⁹ Disturbingly, this harm also may include “lasting personality changes—especially a continuing pattern of intolerance of social interaction, leaving the individual socially impoverished and withdrawn, subtly angry and fearful when forced into social interaction.”⁷⁰ It is these long-term effects that likely led to the recent, tragic suicide of Kalief Browder, who, as a juvenile, spent three years at Rikers Island—nearly two of those years in solitary confinement—based on charges that prosecutors ultimately dropped.⁷¹

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

⁶⁴ President Barack Obama, Address at the NAACP Conference (July 14, 2015), available at <https://www.whitehouse.gov/the-press-office/2015/07/14/remarks-president-naacp-conference>; see also Peter Baker & Erica Good, *Critics of Solitary Confinement are Buoyed as Obama Embraces their Cause*, N.Y. TIMES (July 21, 2015), http://www.nytimes.com/2015/07/22/us/politics/critics-of-solitary-confinement-buoyed-as-obama-embraces-cause.html?mc=edit_tnt_20150721&nid=63690974&ctntemail0=y.

⁶⁵ See Shames et al., *supra* note 63; see also *Solitary Confinement: Resource Materials*, ACLU 14, <https://www.aclu.org/files/assets/Solitary%20Confinement%20Resource%20Materials%202012%2017%2013.pdf#page=14> (last visited Aug. 26, 2015) (listing legislation by state).

⁶⁶ S. 64, 69th Leg. (Colo. 2014), available at [http://www.leg.state.co.us/clics/clics2014a/csl.nsf/fsbillcont2/CC49C5479FE8AD7487257C3000062140/\\$FILE/064_enr.pdf](http://www.leg.state.co.us/clics/clics2014a/csl.nsf/fsbillcont2/CC49C5479FE8AD7487257C3000062140/$FILE/064_enr.pdf) (enacted); L.B. 548, 104th Leg. (Neb. 2015), available at <http://nebraskalegislature.gov/FloorDocs/104/PDF/Slip/LB598.pdf> (enacted); H.R. 26, 148th Leg. (Del. 2015), available at <http://legis.delaware.gov/LIS/LIS148.NSF/93487d394bc01014882569a4007a4cb7/77c64b1cb4da4b385257dce0073e45b?OpenDocument> (as introduced on Jan. 29, 2015).

⁶⁷ See, e.g., Michael Winerip and Michael Schwartz, *Rikers to Ban Isolation for Inmates 21 and Younger*, N.Y. TIMES Jan. 13, 2015, available at http://www.nytimes.com/2015/01/14/nyregion/new-york-city-to-end-solitary-confinement-for-inmates-21-and-under-at-rikers.html?_r=0.

⁶⁸ Stuart Grassain, *Psychiatric Effects of Solitary Confinement*, 22 Wash. U J.L. & Pol’y 325, 332 (2009).

⁶⁹ *Id.* at 332-33.

⁷⁰ *Id.* at 353.

⁷¹ Jennifer Gonnerman, *Kalief Browder, 1993–2015*, New Yorker, June 7, 2015, available at <http://www.newyorker.com/news/news-desk/kalief-browder-1993-2015>.

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

Although “dignity” appears nowhere in the text of the Constitution, “it is routinely invoked to make extremely foundational points, [including] that dignity is the motivating force behind the whole Constitution itself: ‘the essential dignity and worth of every human being [is] a concept at the root of any decent system of ordered liberty.’”⁷² Beginning in the 1940s, the concept of dignity began gaining traction in the Supreme Court’s constitutional jurisprudence.⁷³ Many scholars attribute the increase in its use to Justice William Brennan, who “emphasized that the fundamental value at the crux of American law is ‘the constitutional ideal of human dignity,’ believ[ing] that the Constitution, and particularly the Bill of Rights, ‘expressed a bold commitment by a people to the ideal of libertarian dignity protected through law.’”⁷⁴ Although there is disagreement about whether the Court has explicitly *recognized* human dignity as a constitutional value, there is considerable evidence that—especially in recent years—the Court has *treated* it as such.

The Supreme Court’s recent decision in *Obergefell v. Hodges*⁷⁵ arguably represents its most significant reliance on a dignity interest in recent years, but it is far from novel. In the last 220 years, the Justices have invoked the term in more than 900 opinions, with an uptick in its use by the Roberts Court following a brief period of non-use during the Burger and Rehnquist eras.⁷⁶ The Court has invoked dignity in conjunction with the First, Fourth, Fifth, Sixth, Eighth, Ninth, Eleventh, Fourteenth, and Fifteenth Amendments,⁷⁷ and “the Court’s repeated appeals to dignity, particularly in majority opinions, appear to parallel its greater willingness to proffer dignity as a substantive value animating our constitutional rights.”⁷⁸

Of course, this begs the question of exactly what the Court means when it invokes dignity within the ambit of legal rights. The Court recognizes that “[d]ignity is ‘admittedly an ethereal concept’ which ‘can mean many things’ and therefore suffers from an inherent vagueness at its core.”⁷⁹ However, particularly in the Eighth Amendment context, the Court has appeared to embrace the notion of “inherent dignity” described by Alan Gewirth as “a kind of intrinsic worth that belongs equally to all human beings as such, constituted by certain intrinsically valuable aspects of being human.”⁸⁰ It is a

⁷² Rex D. Glensy, *The Right to Dignity*, 70 Colum. Hum Rts. L. Rev. 93 (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring)).

⁷³ See, e.g., *In re Yamashita*, 327 U.S. 1, 29 (1946) (Murphy, J., dissenting) (“If we are ever to develop an orderly international community based upon a recognition of human dignity it is of the utmost importance that the necessary punishment of those guilty of atrocities be as free as possible from the ugly stigma of revenge and vindictiveness”).

⁷⁴ Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. Pa. L. Rev. 169, 171 (2011).

⁷⁵ *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015).

⁷⁶ Henry, *supra* note 74, at 171.

⁷⁷ See *id.* at 173 nn.18-26 (collecting cases).

⁷⁸ *Id.* at 181.

⁷⁹ Hugo Adam Bedau, *The Eighth Amendment, Human Dignity, and the Death Penalty*, in *The Constitution of Rights: Human Dignity and American Values*, 145, 145 (Michael Meyer & William Parent eds., 1992).

⁸⁰ Alan Gewirth, *Human Dignity As the Basis of Rights*, in *The Constitution of Rights: Human Dignity and American Values*, 10, 12 (Michael Meyer & William Parent eds.) (1992). See also Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 Eur. J. Int’l L. 655, 679 (2008).

“necessary, not a contingent, feature of all humans; is permanent and unchanging, not transitory or changeable; and . . . it sets certain limits to how humans may justifiably be treated.”⁸¹

B. Dignity and the Eighth Amendment

I say the Supreme Court embraced dignity “particularly in the Eighth Amendment context” because it is there that the Court has arguably expressed one of its clearest commitments to the notion of dignity as animating a constitutional right. In *Trop v. Dulles*, the Court announced the modern Eighth Amendment standard, which mandates that a given punishment must conform to “the evolving standards of decency that mark the progress of a maturing society.”⁸² In articulating this standard, the Court declared that “the basic concept underlying the Eighth Amendment is nothing less than the dignity of man.”⁸³

A review of the Court’s Eighth Amendment jurisprudence in the wake of *Trop* reveals that when the Court has held a challenged punishment to be unconstitutional, it has—explicitly or implicitly—examined the relationship between the Eighth Amendment and human dignity and been unable to “square the accused state practice with the individual’s dignitary interest.”⁸⁴

In the death penalty context, for example, the Court drew on dignity and evolving standards of decency in prohibiting the execution of juveniles,⁸⁵ as well as people with intellectual disabilities⁸⁶ or mental illness so severe that they have been declared insane.⁸⁷ In *Ford v. Wainwright*, the Court considered whether inflicting the death penalty on a person who had been found insane violated the Eighth Amendment. Observing the “natural abhorrence civilized societies feel” at executing people who are insane, as well as the national “intuition that such an execution simply offends humanity,” the Court held the practice unconstitutional. Significantly, the Court considered not only the dignity interests of the condemned prisoner, but it also sought “to protect the dignity of society itself from the barbarity of exacting mindless vengeance.”⁸⁸

Similarly, in *Atkins v. Virginia*, the Court invoked dignity and decency in holding that the execution of people with intellectual disabilities is unconstitutional. Emphasizing that the Eighth Amendment draws on “the evolving standards of decency that mark the progress of a maturing society,” the Court explained that whether the execution of a person with an intellectual disability violates the Eighth Amendment “is judged not by the standards that prevailed in 1685 when Lord Jeffry’s presided

⁸¹ See Gewirth, *supra* note 80, at 12.

⁸² *Trop*, 356 U.S. at 100-01. Justice Warren, writing for the majority, adopted this approach from *Weems v. United States*, 217 U.S. 349 (1910), in which the Court held unconstitutional the punishment of twelve years of hard labor in iron chains for falsifying public records. In *Weems*, the Court repeatedly referenced the Eighth Amendment requirement that punishment must be humane according to existing standards of decency, explaining that the Eighth Amendment is “progressive, and is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by humane justice.” *Id.* at 378.

⁸³ *Id.* at 99.

⁸⁴ Glensy, *supra* note 72, at 123-24.

⁸⁵ See *Roper v. Simmons*, 543 U.S. 551 (2005).

⁸⁶ See *Atkins v. Virginia*, 536 U.S. 304 (2002).

⁸⁷ See *Ford v. Wainwright*, 477 U.S. 399 (1986).

⁸⁸ *Id.* at 409.

over the ‘Bloody Assizes’ or when the Bill of Rights was adopted, but rather by those that currently prevail.”⁸⁹ As a measure of those standards, the Court cited state legislatures’ widespread and growing condemnation of the execution of people with intellectual disabilities, and ultimately held that the practice violates the “dignity of man” underlying the Eighth Amendment.

In *Roper v. Simmons*, the Court examined the constitutionality of executing juveniles and looked not only to national opinion, but also examined whether the practice faced international condemnation.⁹⁰ Noting that the U.S. was the only country that permitted the death penalty for juveniles, the Court observed that the laws of other nations confirmed the Court’s view that certain punishments must be prohibited “to secure individual freedom and preserve human dignity.”⁹¹ The Court relied on those values, which it deemed “central to the American experience” and “essential to our present-day self-definition and national identity,” in holding that the execution of juveniles violates the Eighth Amendment.⁹²

In those cases where the Court has held that a prison condition violates the Eighth Amendment, it has similarly invoked dignity as a rationale. In *Hope v. Pelzer*, for example, the Court grounded its decision in the language of human dignity and decency, holding that an Alabama prison’s use of a hitching post as punishment for a prisoner’s disruptive conduct during a work detail violated the Eighth Amendment.⁹³ The majority opinion examined societal standards to assess whether use of the hitching post violated contemporary standards of decency, and ultimately determined that “the obvious cruelty inherent in this practice” is impermissible “under precepts of civilization which we profess to possess.”⁹⁴

More recently, the Court again drew on dignity and decency in its 2011 decision in *Brown v. Plata*, in which a class of California prisoners asserted Eighth Amendment claims for harms caused by severe and pervasive overcrowding in the state’s prisons.⁹⁵ The majority characterized California’s prison conditions as “grossly inadequate.”⁹⁶ In describing the constitutional violations suffered by prisoners needing mental health treatment, the Court noted that overcrowding caused California prisoners to have a suicide rate eighty percent higher than the national prison population.⁹⁷ Due to bed shortages, at least one suicidal prisoner was “held in a cage for nearly 24 hours, standing in a pool of his own urine, unresponsive and nearly catatonic.”⁹⁸

⁸⁹ *Atkins*, 536 U.S. at 311.

⁹⁰ *Roper*, 543 U.S. at 575-78.

⁹¹ *Id.* at 578.

⁹² *Id.*

⁹³ *Hope v. Pelzer*, 536 U.S. 730, 745 (2002). The Court characterized Hope’s experience on the hitching post as “antithetical to human dignity—he was hitched to the post for an extended period of time in a position that was painful, and under circumstances that were both degrading and dangerous.” *Id.*

⁹⁴ *Id.* at 742.

⁹⁵ *Plata*, 131 S.Ct. at 1910.

⁹⁶ *Id.* at 1923.

⁹⁷ *Id.* at 1924.

⁹⁸ *Id.*

In analyzing the plaintiffs' claims, the Court explained that although "prisoners may be deprived of rights that are fundamental to liberty," they still "retain the essence of human dignity inherent in all persons . . . that animates the Eighth Amendment prohibition against cruel and unusual punishment."⁹⁹ The Court expressly characterized the deprivation of a basic life necessity—here medical and mental health care—as conduct that is "incompatible with the concept of human dignity and has no place in civilized society."¹⁰⁰ This holding reaffirmed the principle that certain prison conditions violate the Eighth Amendment because they are inconsistent with how a decent society treats even those it despises the most.

C. A Dignity-Based Approach to Solitary Confinement Challenges

Although conditions of confinement cases are notoriously difficult for prisoners to win, the various political, social, scientific, economic, and legal trends that are converging suggest that we may be approaching a moment in history when the Supreme Court could be receptive to a constitutional challenge to long-term isolation. Indeed, Justice Kennedy all but invited such a challenge in his recent concurrence in *Davis v. Ayala*.¹⁰¹ Clearly troubled by the fact that the petitioner had been held in solitary confinement during the twenty-five years since he was sentenced to death, Justice Kennedy highlighted some of the harms associated with long-term isolation, as well as a "new and growing awareness in the broader public of the subject of corrections and of solitary confinement in particular."¹⁰² While recognizing the need to defer to the discretion of prison officials that "temporary" solitary confinement may be useful or necessary in "some instances," he observed that "research still confirms what this Court suggested over a century ago: Years on end of near total-isolation exact a terrible price."¹⁰³ He then concluded: "In a case that presented the issue, the judiciary may be required, within its proper jurisdiction and authority, to determine whether workable alternative systems for long-term confinement exist, and, if so, whether a correctional system should be required to adopt them."¹⁰⁴

As discussed earlier, to prevail in such a case, the plaintiffs would need to demonstrate either that their conditions in solitary confinement are sufficiently serious so as to deprive them of a basic human need or put them at substantial risk of serious harm; they also must show that prison officials knew of the harm (or risk of harm) and recklessly disregarded it. Given the overwhelming body of research and evidence documenting the harms solitary causes, if the Court were to find the objective prong satisfied, proving the subjective prong would presumably be considerably less onerous.¹⁰⁵ For that reason, the analysis below focuses primarily on the objective prong.

⁹⁹ *Id.* at 1928.

¹⁰⁰ *Id.*

¹⁰¹ *Davis v. Ayala*, 135 S.Ct. 2187, 2208 (2015) (Kennedy, J. concurring). Justice Kennedy acknowledged that the issue of solitary confinement had "no direct bearing on the precise legal questions presented by this case." *Id.*

¹⁰² *Id.* at 2210.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ While the subjective prong requires actual awareness on the part of prison officials, that awareness may be inferred where the risk to the prisoner is obvious (*Farmer v. Brennan*, 599 U.S. 825, 842 (1994)) or from the litigation itself.

In evaluating the objective prong, lower courts, guided by evolving standards of decency, are showing increased receptivity to the idea that the consequences of long-term solitary confinement present a substantial risk of serious harm. For example, in *Ashker v. Brown*, a class action brought on behalf of men confined in California’s notorious Pelican Bay prison, the district court recently held that the plaintiffs’ claim that their ten to twenty-eight year periods of solitary confinement had deprived them of the basic human needs of “normal human contact, environmental and sensory stimulation, mental and physical health, physical exercise, sleep, nutrition, and meaningful activity” established a serious risk of harm that satisfied the objective prong of Eighth Amendment analysis.¹⁰⁶ Similarly, the court in *U.S. v. Corozzo* refused to apply a state statute that would cut off a defendant’s visits from his family on the grounds that “human beings require the company of other humans to stay healthy.”¹⁰⁷ In so holding, the court noted that “[s]ubstantial research demonstrates the psychological harms of solitary confinement and segregation.”¹⁰⁸

Given that the Eighth Amendment’s objective prong inquiry is situated in the “evolving standards of decency” framework, in evaluating a claim of cruel and unusual punishment, a reviewing court is

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

required to consider the current state of society’s knowledge about the harms of solitary confinement. In the “Angola 3” litigation, which involved three prisoners who had been in solitary confinement in the Louisiana State Penitentiary for more than thirty years, the district court held that “social interaction and environmental stimulation are basic human needs.”¹⁰⁹ To reach this conclusion, the court rejected the defendants’ argument that the list of basic human needs the Supreme Court had recognized to date was exhaustive and that the

prison had therefore not deprived plaintiffs of a basic human need. Instead, the court relied on the notion that the Eighth Amendment is grounded in evolving standards of decency to find that, in light of judicial recognition that the Eighth Amendment protects mental as well as physical health, social interaction and environmental stimulation are basic human needs. The court asserted that in our modern social and legal landscape, “recognizing social interaction and environmental stimulation as basic human needs is hardly going out on a radical limb.”¹¹⁰

As the Seventh Circuit has explained, “[t]he conditions in which prisoners are housed, like the poverty line, is a function of a society’s standard of living. As that standard rises, the standard of

¹⁰⁶ Doc. 191 at 8, *Ashker*, 2014 U.S. Dist. LEXIS 75347 (N.D. Cal. June 2, 2014). On September 1, 2015, the parties agreed to a landmark settlement in the case that will effectively end indeterminate, long-term solitary confinement in all California state prisons. See Ian Lovett, *California Agrees to Overhaul Use of Solitary Confinement*, N.Y. Times, Sept. 1, 2015.

¹⁰⁷ *U.S. v. Corozzo*, 256 F.R.D. 398, 401 (E.D.N.Y. 2009).

¹⁰⁸ *Id.*

¹⁰⁹ *Wilkerson v. Stadler*, 639 F.Supp.2d 654, 679 (M.D. La. 2007).

¹¹⁰ *Id.* at 678.

minimum decency of prison conditions, like the poverty line, rises too.”¹¹¹ And there is ample evidence that with respect to human contact, social interaction, and environmental stimulation, the “standard of living” is indeed rising.

It is this last piece that may be the tipping point if the Supreme Court were to hold that long-term solitary confinement is unconstitutional. The Court has said that while “prisoners may be deprived of rights that are fundamental to liberty,” they nevertheless “retain the essence of human dignity inherent in all persons . . . [that] animates the Eighth Amendment prohibition against cruel and unusual punishment.”¹¹² The overwhelming body of medical and mental health research demonstrates that social interaction and environmental stimulation are basic human needs. The deprivation of them has been described by Professor Craig Haney as a “painfully long form of social death,” observing that “[t]hese are people consigned to living in suspended animation, not really part of this world, not really removed from it, and not really part of any other world that is tangibly and fully human.”¹¹³ In that sense, solitary confinement deprives a person “of what we ordinarily think of as a life; of the structure of a life; of a social life; of meaningful activities and commitments; in short, of the most elemental form of human dignity.”¹¹⁴

What is additionally important for Eighth Amendment purposes is that the eviscerating effect of solitary confinement is not only an affront to the dignity of the people held in isolation, it also diminishes our collective dignity and humanity. This notion of “collective virtue as dignity” is “rooted in communitarianism” and “addresses how members of civilized societies ought to behave and ought to be treated in order to respect the collective dignity of humanity.”¹¹⁵ Often proffered as a moral justification against the use of torture (especially in the wholly fictitious but emotionally compelling ‘ticking time bomb’ scenario¹¹⁶), the Supreme Court has invoked the construct of collective virtue as dignity in the Fourth Amendment and due process contexts.¹¹⁷ It is especially relevant in the Eighth Amendment context because “the content of human dignity is a corollary of . . . cultural, political, constitutional, and other conditions, which can evolve and change in the course of history.”¹¹⁸

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

¹¹¹ *Davenport v. DeRobertis*, 844 F.2d 1310, 1315 (7th Cir. 1988).

¹¹² Henry, *supra* note 74, at 225.

¹¹³ CDCR Testimony, *supra* note 57, at 8.

¹¹⁴ R. George Wright, *What (Precisely) Is Wrong with Prolonged Solitary Confinement?*, 64 *Syracuse L. Rev.* 297, 310-11 (2014).

¹¹⁵ Henry, *supra* note 74, at 220-21.

¹¹⁶ See David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 *Va. L. Rev.* 1425 (2005).

¹¹⁷ Henry, *supra* note 74, at 226-28 (discussing *Rochin v. California*, 342 U.S. 165 (1952) (Fourth Amendment) and *Gonzales v. Carhart*, 550 U.S. 124, 132 (2007) (due process)).

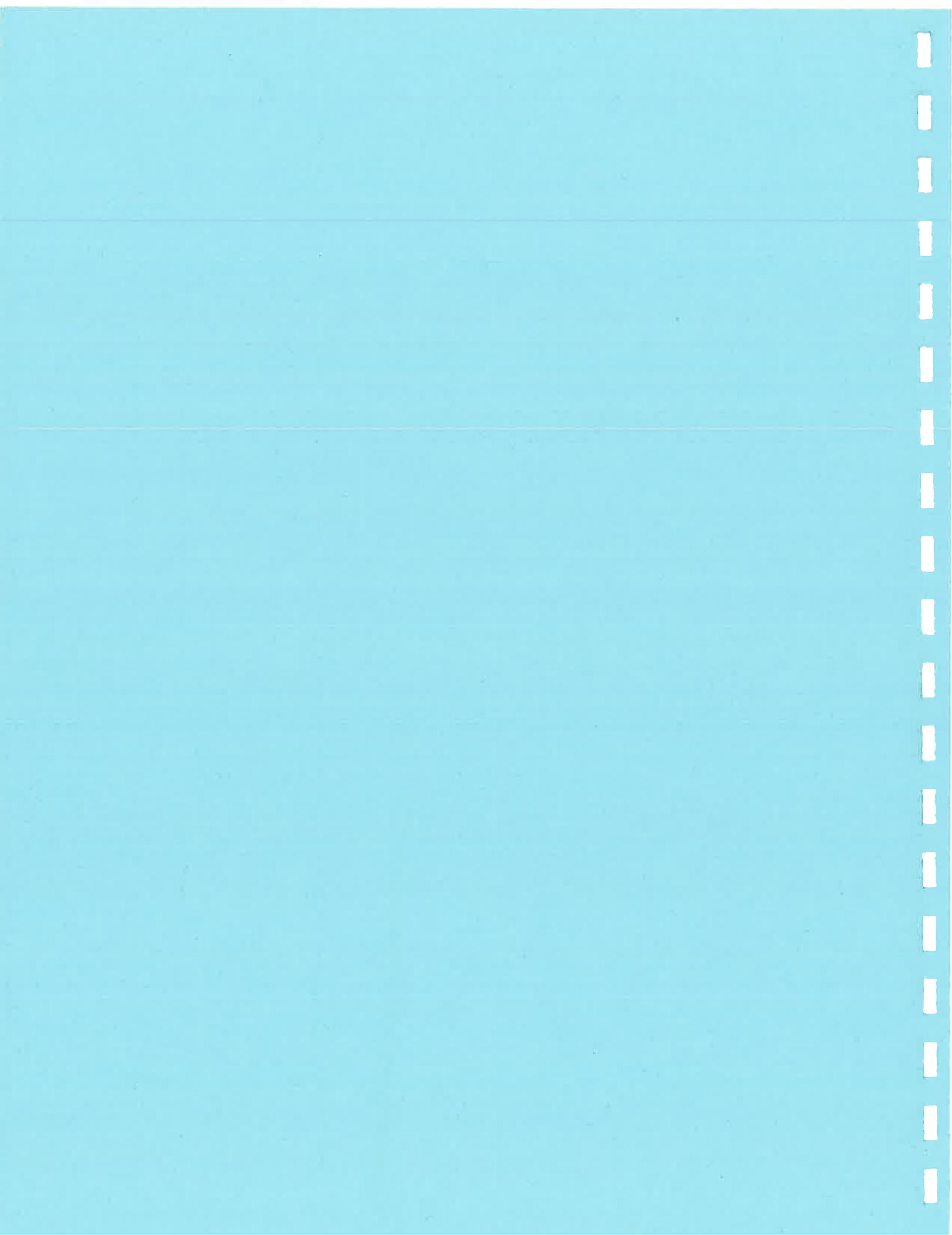
¹¹⁸ Doron Shultziner, *Human Dignity – Functions and Meanings*, 3 *Global Jurist Topics* 1, 5 (2003).

About the Author

Laura Rovner is the Ronald V. Yegge Clinical Director and Associate Professor of Law at the University of Denver College of Law, where she also created and teaches in the Civil Rights Clinic. Through the clinic, she supervises law students representing clients in cases involving prisoners' rights and other civil rights matters. Professor Rovner and her students represent a number of prisoners, many of whom are incarcerated in federal and state supermax prisons, in lawsuits asserting constitutional challenges to their conditions of confinement including prolonged isolation, denial of outdoor exercise, and lack of adequate medical and mental health care. Prior to joining the faculty at University of Denver, she was a clinical teaching fellow in the Institute for Public Representation at Georgetown University Law Center, and has also taught in civil rights clinics at Syracuse University College of Law and the University of North Dakota School of Law and was a staff attorney/Equal Justice Works Fellow at the National Association of the Deaf.

About the American Constitution Society for Law and Policy

The American Constitution Society (ACS) believes that law should be a force to improve the lives of all people. ACS works for positive change by shaping debate on vitally important legal and constitutional issues through development and promotion of high-impact ideas to opinion leaders and the media; by building networks of lawyers, law students, judges and policymakers dedicated to those ideas; and by countering the activist conservative legal movement that has sought to erode our enduring constitutional values. By bringing together powerful, relevant ideas and passionate, talented people, ACS makes a difference in the constitutional, legal and public policy debates that shape our democracy.



TOWN HALL MEETING

Today's Answers to Tomorrow's Challenges

RESTRICTIVE HOUSING: Principles of Prevention That Promote Effective Programming, and Inmate and Staff Safety

Date: Monday, August 18, 2014

Time: 2:00 p.m. - 4:00 p.m.

Location: Room 254 ABC, Level 2,
Salt Palace Convention Center.



DISCUSSION:

- 1) **Keeping inmates out of restrictive housing.**
 - Learn how to keep inmates, including those with mental illness, from falling through the cracks into restrictive housing. We will discuss processes we should use to identify exclusionary criteria for placement into restrictive housing.
- 2) **Who should NOT be in restrictive housing?**
 - Learn how to identify critical characteristics indicating that an inmate is unable to adequately function in restrictive housing.
- 3) **Programs and treatment services are needed in diversion housing and in alternative housing.**
 - Learn how to implement programming and treatment planning that promotes successful institutional adjustment, while ensuring staff and inmate safety.

Moderator: Chris Epps, President of ACA, Commissioner, Mississippi, Department of Corrections.

Presenters:

Prisons: Bernie Warner, Secretary, Washington State, Department of Corrections

Jails: Joseph Ponte, Commissioner, New York City, Department of Corrections

Juveniles: Mary Livers, Deputy Secretary, Louisiana Department of Juvenile Justice

Treatment: Dr. Dean Aufderheide, Director of Mental Health, Florida, Department of Corrections

Restrictive Housing Round Table: A Candid Conversation

We invite professionals to attend and actively participate.

Brief Overview: The American Correctional Association, the world leader in correctional standards, is addressing the use of restrictive housing in corrections. The profession is affected by changes in standards and ACA is having an open and honest dialogue on the future direction of restrictive housing. We want a conversation that is candid on this vital subject. Having experts from our profession and a correctional expert from the National Prison Project, American Civil Liberties Union at the table will promote an engaging and in-depth conversation. The ACA's Ad Hoc Standards Committee on Restrictive Housing is working on proposed revisions and additions to our national standards, use of terminology and training on restrictive housing.

Introduction: Elizabeth Gondles, Ph.D. American Correctional Association, Alexandria, Virginia

Moderator: Mary Livers, Ph.D., Deputy Secretary, Office of Juvenile Justice, Baton Rouge, Louisiana and 104th President of the American Correctional Association

Participates: Gary C. Mohr, Director, Ohio Department of Rehabilitation and Correction, Columbus, Ohio; Rick Raemisch, Executive Director, Colorado Department of Corrections, Colorado Springs, Colorado; Janet Conover, Warden, Kentucky Correctional Institution for Women, Louisville, Kentucky; Tony Wilkes, Chief of Corrections, Davidson County Sheriff's Office, Nashville, Tennessee; Dean Aufderheide, Ph.D., Director of Mental Health Services, Florida Department of Corrections, Tallahassee, Florida; David Fathi, Director, National Prison Project, American Civil Liberties Union, Washington, DC

Date: Monday, August 17, 2015

Time: 2:00 p.m. - 4:00 p.m.

Location: Sagamore Ballroom Sections 1-2, Indiana Convention Center

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