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Solitary Troubles

Alexander A. Reinert
Benjamin N. Cardozo School of Law, areinert@yu.edu

ARTICLES

SOLITARY TROUBLES

*Alexander A. Reinert**

Solitary confinement is one of the most severe forms of punishment that can be inflicted on human beings. In recent years, the use of extreme isolation in our prisons and jails has been questioned by correctional officials, medical experts, and reform advocates alike. Yet for nearly the entirety of American history, judicial regulation of the practice has been extremely limited. This Article explains why judges hesitate to question the use of solitary confinement, while also providing a path forward for greater scrutiny of the practice.

* Professor of Law, Benjamin N. Cardozo School of Law. I am grateful to Rick Bierschbach, Maggie Lemos, Jules Lobel, Max Minzner, Kevin Stack, and the participants in the Drexel University Thomas R. Kline School of Law and St. John's University School of Law faculty workshops for helpful comments on earlier drafts of this Article. I also wish to acknowledge Alison Gross for her excellent research in support of this Article.

INTRODUCTION

The use of solitary confinement, or extreme isolation,[1] is routine in the United States. Although precise figures are unavailable, best estimates suggest that about twenty percent of people in federal and state prisons and jails will experience some form of extreme isolation at some point during their

1 For the purposes of this Article, I will use the generally accepted definition of "solitary confinement"—segregation in any cell, alone or with other people, for periods of twenty-two or more hours per day. *See* Wilkinson v. Austin, 545 U.S. 209, 214 (2005) (defining solitary confinement as limiting human contact for twenty-three hours per day); Letter from Thomas E. Perez, Assistant Attorney Gen., and David J. Hickton, United States Attorney, Western District of Pennsylvania, to Tom Corbett, Governor of Pennsylvania 5 (May 31, 2013) (defining solitary confinement as "confine[ment] to one's cell for approximately 22 hours per day or more"). In many systems, prisoners are essentially confined to a cell for all twenty-four hours in a day, because access to "recreation" is obtained by walking from one's cell to an adjoining cell for a period of one or two hours per day. *Wilkinson*, 545 U.S. at 214. In addition, the term "solitary confinement" refers to cells that hold one or two people. Indeed, being housed in a cell for twenty-two out of twenty-four hours per day can be even more debilitating when such a small living space is shared with one other person. *See* Christie Thompson & Joe Shapiro, *The Deadly Consequences of Solitary with a Cellmate*, MARSHALL PROJECT (Mar. 24, 2016), https://www.themarshallproject.org/2016/03/24/the-deadly-consequences-of-solitary-with-a-cellmate#.1mCzv3WTc. As one of the leading experts on the harms of solitary confinement has testified:

> [I]n some ways, prisoners who are double-celled in an isolation unit have the worst of both worlds: they are "crowded" in and confined with another person inside a small cell but—and this is the crux of their "isolation"—simultaneously isolated from the rest of the mainstream prisoner population, deprived of even minimal freedom of movement, prohibited from access to meaningful prison programs, and denied opportunities for any semblance of "normal" social interaction.

Redacted Expert Report of Craig Haney, Ph.D., J.D., Ashker v. Brown, No. 4:09 CV 05796, at 13 (N.D. Cal. Mar. 12, 2015) (redacted copy on file with author) [hereinafter Haney Expert Report].

confinement, with many of them held for more than thirty days.[2] On an average day, as many as five percent of people in federal and state prisons are held in extreme isolation.[3]

At the same time, extreme isolation has a significant deleterious impact on those who experience it. Mental health professionals who have studied its effects extensively have concluded that it is dehumanizing, striking at the core of a person's identity, and results in "deep emotional disturbances" and an increase in self-harming behavior.[4] It can lead to "social death," leaving persons subjected to the practice not only emotionally scarred and harmed, but also unable to function effectively in social contexts moving forward.[5] It is thus a special kind of punishment—"one of the most severe forms of punishment that can be inflicted on human beings short of killing them."[6]

Despite its ubiquity and impact, however, the doctrinal and theoretical framework for regulating its use is impoverished, leaving correctional administrators, for the most part, free to dispense extreme isolation as punishment whenever they see fit. The unfortunate result has been a trend over recent decades towards greater use of solitary, for longer periods of time, for less and less serious misconduct.[7]

This Article seeks to explain why punishment theory and doctrine—as elaborated by courts—have had little to say about the use of extreme isolation, and then to fill that gap by providing a new framework for understanding how the Constitution in particular could and should regulate solitary's use. There are good reasons to believe that a new way of thinking about solitary is necessary and will be welcomed by judges, lawyers, and academics.

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2 *See* ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT NCJ 249209, USE OF RESTRICTIVE HOUSING IN U.S. PRISONS AND JAILS, 2011–12, at 1 (2015).

3 *See id.* A joint report issued in 2015 by Yale Law School's Liman Program and the Association of State Correctional Administrators estimated that in 2014, between five to six percent of the 1.5 million people held in state prisons were held in administrative segregation. *See* LIMAN PROGRAM ET AL., TIME-IN-CELL: THE ASCA-LIMAN 2014 NATIONAL SURVEY OF ADMINISTRATIVE SEGREGATION IN PRISON, at ii (2015). This figure did not include people held in punitive segregation or local jails. *See id.*

4 Haney Expert Report, *supra* note 1, at 15–19, 25–27 (summarizing research); Bruno M. Cormier & Paul J. Williams, *La Privation Excessive de la Liberté*, 11 CAN. PSYCHIATRIC ASS'N J. 470, 484 (1966).

5 United States v. D.W., 198 F. Supp. 3d 18, 94 (E.D.N.Y. 2016) (quoting Samarth Gupta, *From Solitary to Society*, HARV. POL. REV. (Feb. 7, 2016), http://harvardpolitics.com/united-states/solitary-society); *see also* LISA GUENTHER, SOLITARY CONFINEMENT: SOCIAL DEATH AND ITS AFTERLIVES (2013). Recent theory and research now indicate that "touch is a primary platform for the development of secure attachments and cooperative relationships," is "intimately involved in patterns of caregiving," is "a powerful means by which individuals reduce the suffering of others," and also "promotes cooperation and reciprocal altruism." Jennifer L. Goetz et al., *Compassion: An Evolutionary Analysis and Empirical Review*, 136 PSYCHOL. BULL. 351, 360 (2010).

6 James Gilligan, M.D. & Bandy Lee, M.D., M.Div., Report to the New York City Board of Correction, at 6 (Sept. 2013) (on file with author).

7 *See* Atul Gawande, *Hellhole*, NEW YORKER, Mar. 30, 2009, at 36, 42 https://www.newyorker.com/magazine/2009/03/30/hellhole.

As just one example, Justice Kennedy surprised many criminal justice advocates with an unexpected concurring opinion in *Davis v. Ayala*.[8] In that opinion, Justice Kennedy railed against the vices of solitary confinement, reminding readers that in 1890, the Supreme Court itself observed that the practice was extremely harmful to prisoners and had been abandoned by the end of the nineteenth century.[9] Justice Kennedy made similar remarks, though less detailed, when he and Justice Breyer appeared before the House Committee on Appropriations in March 2015.[10] Justice Kennedy's concurrence was all the more remarkable because, as he acknowledged, the issue had "no direct bearing on the precise legal questions presented by this case."[11]

Justice Kennedy is not alone in paying greater attention to solitary confinement. The Federal "Administrative Maximum" ("ADX") unit in Florence, Colorado, has been the subject of lengthy news coverage, and in 2016, the Bureau of Prisons (BOP) agreed to make changes in response to a class action lawsuit.[12] Arizona, California, Colorado, Mississippi, New York State, and New York City (with a jail population larger than the prison systems of many states), among other jurisdictions, have all announced or been compelled to pursue reform of the use of solitary confinement.[13] International

8 135 S. Ct. 2187 (2015).

9 *Id.* at 2209 (Kennedy, J., concurring).

10 The Justices' appearance in its entirety can be found online. *See Financial Services and General Government Appropriations for 2016: Hearing Before the Subcomm. on Fin. Servs. & Gen. Gov't of the H. Comm. on Appropriations*, 114 Cong. 111 (2015) (statement of Anthony Kennedy, Associate Justice, Supreme Court of the United States). During the hearing, Justice Kennedy said that "[s]olitary confinement literally drives men mad" and noted that other countries do a much better job providing human contact in correctional settings. *Id.* at 122; Jess Bravin, *Two Supreme Court Justices Say Criminal-Justice System Isn't Working*, WALL ST. J. (Mar. 24, 2015), http://www.wsj.com/articles/two-supreme-court-justices-say-criminal-justice-system-isnt-working-1427197613.

11 *Davis*, 135 S. Ct. at 2208 (Kennedy, J., concurring).

12 *See* Cunningham v. Fed. Bureau of Prisons, No. 12-cv-01570, 2016 WL 8786871 (D. Colo. Dec. 29, 2016) (approving settlement agreement); Mark Binelli, *Inside America's Toughest Federal Prison*, N.Y. TIMES MAG. (Mar. 26, 2015), https://www.nytimes.com/2015/03/29/magazine/inside-americas-toughest-federal-prison.html; Andrew Cohen, *Death, Yes, but Torture at Supermax?*, ATLANTIC (June 4, 2012), https://www.theatlantic.com/national/archive/2012/06/death-yes-but-torture-at-supermax/258002/.

13 *See* Tim Hull, *Arizona Agrees to Fix Prison Health System*, COURTHOUSE NEWS SERV. (Oct. 14, 2014), https://www.courthousenews.com/arizona-agrees-tofix-prison-health-system/ (reporting settlement in Arizona); Randall Pinkston & Phil Hirschkorn, *Mississippi Rethinks Solitary Confinement*, CBS NEWS (May 18, 2013), https://www.cbsnews.com/news/mississippi-rethinks-solitary-confinement/ (reporting settlement in Mississippi); Rick Raemisch, Opinion, *Why We Ended Long-Term Solitary Confinement in Colorado*, N.Y. TIMES (Oct. 12, 2017), https://www.nytimes.com/2017/10/12/opinion/solitary-confinement-colorado-prison.html (editorial by executive director of Colorado Department of Corrections announcing end to long-term solitary confinement in Colorado state prisons); Michael Schwirtz & Michael Winerip, *New York State Agrees to Overhaul Solitary Confinement in Prisons*, N.Y. TIMES (Dec. 16, 2015), https://www.nytimes.com/2015/12/17/nyregion/new-york-state-agrees-to-overhaul-solitary-confinement-in-prisons.html (reporting New York

human rights instruments have been interpreted to condemn periods of extreme isolation longer than fifteen days.[14] And in President Barack Obama's final year in office, the federal government announced revisions to the use of solitary confinement in federal prisons after a Department of Justice review of the practice.[15]

Despite the increased awareness of the harms caused by solitary confinement, the practice presents something of a conundrum within the law. As opposed to criminal sentences or conditions of confinement, which have been subjected to increasing legislative and judicial oversight,[16] the use of

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State settlement); Paige St. John, *California Agrees to Move Thousands of Inmates Out of Solitary Confinement*, L.A. TIMES (Sept. 1, 2015), http://www.latimes.com/local/lanow/la-me-ln-california-will-move-thousands-of-inmates-out-of-solitary-20150901-story.html (reporting settlement in California); Michael Winerip & Michael Schwirtz, *Rikers to Ban Isolation for Inmates 21 and Younger*, N.Y. TIMES (Jan. 13, 2015), https://www.nytimes.com/2015/01/14/nyregion/new-york-city-to-end-solitary-confinement-for-inmates-21-and-under-at-rikers.html (reporting on changes to use of isolation for juveniles); *see also* Reuven Blau & Stephen Rex Brown, *Number of Rikers Island Inmates Placed in Solitary Confinement Shrinks to Just 1.7% of City Jail Population*, N.Y. DAILY NEWS (Apr. 21, 2016), http://www.nydailynews.com/new-york/rikers-island-solitary-population-drops-167-inmates-article-1.2609868 (reporting on changes to rules in Rikers Island to reduce use of solitary). In the interest of full disclosure, I am one of the attorneys representing the class of all New York State prisoners in litigation challenging New York State's use of solitary confinement.

14 *See* U.N. Secretary-General, *Interim Report of the Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶¶ 70, 76, U.N. Doc. A/66/268 (Aug. 5, 2011).

15 *See* U.S. DEP'T OF JUSTICE, REPORT AND RECOMMENDATIONS CONCERNING THE USE OF RESTRICTIVE HOUSING 104–11 (2016) (making recommendations to reduce use of solitary confinement in federal facilities); Barack Obama, Opinion, *Why We Must Rethink Solitary Confinement*, WASH. POST (Jan. 25, 2016), https://www.washingtonpost.com/opinions/barack-obama-why-we-must-rethink-solitary-confinement/2016/01/25/29a361f2-c384-11e5-8965-0607e0e265ce_story.html (announcing reforms to the use of solitary confinement in federal prison).

16 Legislatures, for example, set the lengths of sentences, subject to judicial oversight for rough proportionality. *See generally* Alexander A. Reinert, *Release as Remedy for Excessive Punishment*, 53 WM. & MARY L. REV. 1575, 1584–92 (2012) (summarizing proportionality challenges to sentences). The judiciary has taken a greater role in cases involving capital punishment, while striving to be respectful of legislative judgments about the appropriateness of its use. *See, e.g.*, Kennedy v. Louisiana, 554 U.S. 407, 420 (2008) (expressing concern that imposition of the death penalty may "descen[d] into brutality, transgressing the constitutional commitment to decency and restraint"); Roper v. Simmons, 543 U.S. 551, 560–64, 574–75 (2005) (finding that the execution of defendants who committed a capital crime while younger than eighteen years old was prohibited by the Eighth Amendment). Courts have also been conscious of the role that juries should play in finding facts that ultimately impact criminal sentences. *See, e.g.*, Apprendi v. New Jersey, 530 U.S. 466 (2000) (holding that any fact that increases penalty for crime beyond prescribed statutory maximum must be submitted to jury and proved beyond reasonable doubt); Richard A. Bierschbach & Stephanos Bibas, *Constitutionally Tailoring Punishment*, 112 MICH. L. REV. 397, 413–16 (2013) (discussing *Apprendi* and its progeny as giving juries an institutional role in determining appropriate punishment). And since at least 1976, courts have looked to Eighth Amendment principles to regulate all manners of conditions of confinement,

solitary confinement has been left in the hands of line officers and their supervisors. Formal constitutional law has had little to say about the use of extreme isolation in our prisons and jails. A judge who reviews a complaint alleging that a person in prison was denied access to drinkable water for thirty days would have no difficulty concluding that it stated a constitutional claim, but that is not the case where the complaint alleges deprivation of human contact for thirty days.[17] The Eighth Amendment, which prohibits "cruel and unusual punishments,"[18] has never imposed muscular limitations on the conditions or duration of solitary confinement, except for litigation involving particular populations, such as the mentally ill or juveniles.[19] Indeed, in the past two centuries the Supreme Court has only once addressed solitary confinement's relationship to the Eighth Amendment, and even then it spoke obscurely.[20] Instead, the Court has left a gap in any substantive limitation of how, why, and for how long extreme isolation can be used. The only constitutional regulation of solitary confinement is procedural in nature—the Court has insisted that when isolation reaches a sufficient duration and severity, some minimal procedures must be provided before prison officials place a person in extreme isolation.[21] If there are any true substantive limitations on the conditions presented by solitary or the length of time that a person may be placed in extreme isolation, they have not come from constitutional law.

Nor has statutory law provided any real governance. Most states abolished the use of solitary confinement as a form of criminal punishment long ago.[22] As Justice Kennedy noted in *Davis*, by 1890, the Supreme Court remarked that states abandoned their experimentation with solitary confinement because the results were uniformly terrible—prisoners suffered serious mental harm, driven to insanity and suicide, and those who survived the

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from access to medical care to overcrowding. *See, e.g.*, Brown v. Plata, 563 U.S. 493 (2011) (approving prisoner release order to remedy harms from overcrowding); Farmer v. Brennan, 511 U.S. 825 (1994) (holding that prison officials have a constitutional obligation to protect prisoners from assault by other prisoners); Estelle v. Gamble, 429 U.S. 97 (1976) (holding that the Eighth Amendment guarantees a minimum standard of medical care).

17 This is not to say that deprivation of water imposes the same harms as social isolation. As discussed *infra* notes 151–63, however, courts tend to have greater difficulty conceptualizing the human need for social contact as even amenable to constitutional regulation.

18 U.S. CONST. amend. VIII.

19 *See, e.g.*, Madrid v. Gomez, 889 F. Supp. 1146, 1262 (N.D. Cal. 1995). *Madrid*, however, rejected claims that solitary confinement raised constitutional difficulties for people who were not vulnerable because of their mental illness. *Id.* at 1261–62.

20 Hutto v. Finney, 437 U.S. 678 (1978). In *Hutto*, which I discuss in detail *infra*, the Supreme Court affirmed a district court's entry of an injunction with regard to conditions of confinement in Arkansas prisons, including conditions in "the hole," as it was called there. The Court did not address the Eighth Amendment implications of the confinement so much as the district court's power to enter the remedial order.

21 *See* Wilkinson v. Austin, 545 U.S. 209 (2005); Sandin v. Conner, 515 U.S. 472 (1995).

22 *See infra* Section III.A.

ordeal were not prepared to return to life on the street.[23] But although legislatures rejected the use of solitary confinement as a penal practice, prison administrators increasingly began using extreme isolation in the mid-1960s as they addressed a new scale of prison violence and overcrowding.[24] With the construction of modern facilities tailor-made for extreme isolation, an unheard of level of solitary confinement developed in this country, such that the Supreme Court in 2005 (in a unanimous opinion authored by Justice Kennedy) clinically (and without finding fault) described a facility in Ohio as depriving people in prison of "almost any environmental or sensory stimuli and of almost all human contact."[25] In the opaque world of prison discipline, no positive law regulates the use of solitary confinement. As prison administrators have moved from using solitary in a limited fashion—imposing fifteen to thirty days in isolation for only the most violent instances of misconduct in prison—to placing people in extreme isolation for years at a time for nonviolent infractions, the only limitation is the conscience of midlevel executive officials administering the discipline. It is thus news when a member of the "Angola Three" is released after serving forty-five years in prison, almost all while in solitary confinement,[26] but no one looks askance at the constitutional regime that tolerated such a long period of confinement in extreme isolation.

This Article attempts to explain why the Constitution has failed to govern the use of solitary confinement in prisons and jails, and offers a way forward that might fill in the arguments for Justice Kennedy's intuition that the hands-off approach has held sway for too long. In so doing, I offer a critique of some of the larger failings of punishment jurisprudence, building on my own work and the work of others.[27] I also integrate recent punishment juris-

23 *See* Davis v. Ayala, 135 S. Ct. 2187, 2209 (2015) (Kennedy, J., concurring) (citing *In re* Medley, 134 U.S. 160, 170 (1890)).

24 *See infra* notes 57–60.

25 *Wilkinson*, 545 U.S. at 214.

26 Campbell Robertson, *For 45 Years in Prison, Louisiana Man Kept Calm and Held Fast to Hope*, N.Y. TIMES (Feb. 20, 2016), https://www.nytimes.com/2016/02/21/us/for-45-years-in-prison-louisiana-man-kept-calm-and-held-fast-to-hope.html?mtrref=www.google.com&gwh=70E60D0D21A485ACA7799F1E67F4ECFD&gwt=PAy.

27 For example, I have argued that disparate strands of substantive Eighth Amendment jurisprudence can be better integrated, that Eighth Amendment law is rooted in regressive relationships of subordination, and that broader remedies should be available under the Eighth Amendment. *See* Alexander A. Reinert, *Eighth Amendment Gaps: Can Conditions of Confinement Litigation Benefit from Proportionality Theory?*, 36 FORDHAM URB. L.J. 53 (2009) [hereinafter Reinert, *Eighth Amendment Gaps*]; Alexander A. Reinert, *Reconceptualizing the Eighth Amendment: Slaves, Prisoners, and "Cruel and Unusual" Punishment*, 94 N.C. L. REV. 817 (2016) [hereinafter Reinert, *Reconceptualizing the Eighth Amendment*]; Reinert, *supra* note 16. Other scholars have argued for closer regulation of extreme isolation based on evidence of its harms and the trends in international human rights norms. *See* Thomas L. Hafemeister & Jeff George, *The Ninth Circle of Hell: An Eighth Amendment Analysis of Imposing Prolonged Supermax Solitary Confinement on Inmates with a Mental Illness*, 90 DENV. U. L. REV. 1 (2012); Jules Lobel, *Prolonged Solitary Confinement and the Constitution*, 11 U. PA. J. CONST. L. 115 (2008) [hereinafter Lobel, *Prolonged Solitary*]; Jules Lobel, *The Liman Report and Alterna-*

prudence with new research to show how current Eighth Amendment principles speak to the use of extreme isolation. In so doing, I provide a novel framework for understanding the judicial role in regulation of the use of solitary confinement.

This Article breaks new scholarly ground, both doctrinally and theoretically. For although many scholars have written about solitary confinement doctrine,[28] none has combined a comprehensive jurisprudential and theoretical account for why judicial regulation of solitary confinement has been lacking with a well-developed analytical frame for altering past practice. Many scholars have limited their arguments to the use of solitary confinement for vulnerable populations, such as juveniles and inmates suffering from mental illness.[29] Others have focused more narrowly on international law[30] or evi-

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tives to Prolonged Solitary Confinement, 125 YALE L.J. FORUM 238 (2016) [hereinafter Lobel, *The Liman Report*].

28 *See* Elizabeth Alexander, "*This Experiment, So Fatal*": *Some Initial Thoughts on Strategic Choices in the Campaign Against Solitary Confinement*, 5 U.C. IRVINE L. REV. 1 (2015); Elizabeth Bennion, *Banning the Bing: Why Extreme Solitary Confinement Is Cruel and Far Too Usual Punishment*, 90 IND. L.J. 741 (2015); Fred Cohen, *Isolation in Penal Settings: The Isolation-Restraint Paradigm*, 22 WASH. U. J.L. & POL'Y 295 (2006); Brittany Glidden, *Necessary Suffering?: Weighing Government and Prison Interests in Determining What Is Cruel and Unusual*, 49 AM. CRIM. L. REV. 1815 (2012); Hafemeister & George, *supra* note 27; Lobel, *Prolonged Solitary*, *supra* note 27; Holly Boyer, Comment, *Home Sweet Hell: An Analysis of the Eighth Amendment's 'Cruel and Unusual Punishment' Clause as Applied to Supermax Prisons*, 32 SW. U. L. REV. 317 (2003); Shannon H. Church, Note, *The Depth of Endurance: A Critical Look at Prolonged Solitary Confinement in Light of the Constitution and a Call to Reform*, 103 KY. L.J. 639 (2014–2015); Mariam Hinds & John Butler, Note, *Solitary Confinement: Can the Courts Get Inmates out of the Hole?*, 11 STAN. J. C.R. & C.L. 331 (2015); Laura Matter, Note, *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 (2010); Charles A. Pettigrew, Comment, *Technology and the Eighth Amendment: The Problem of Supermax Prisons*, 4 N.C. J.L. & TECH. 191 (2002); Alexa T. Steinbuch, Note, *The Movement Away from Solitary Confinement in the United States*, 40 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 499 (2014); Gertrude Strassburger, Comment, *Judicial Inaction and Cruel and Unusual Punishment: Are Super-Maximum Walls Too High for the Eighth Amendment?*, 11 TEMP. POL. & CIV. RTS. L. REV. 199 (2001); Mikel-Meredith Weidman, Comment, *The Culture of Judicial Deference and the Problem of Supermax Prisons*, 51 UCLA L. REV. 1505 (2004).

29 *See* Alexander, *supra* note 28, at 12–18; Tamar R. Birckhead, *Children in Isolation: The Solitary Confinement of Youth*, 50 WAKE FOREST L. REV. 1 (2015); Hafemeister & George, *supra* note 27, at 34–44; Joseph B. Allen, Note, *Extending Hope into "The Hole": Applying* Graham v. Florida *to Supermax Prisons*, 20 WM. & MARY BILL RTS. J. 217 (2011); John F. Cockrell, Note, *Solitary Confinement: The Law Today and the Way Forward*, 37 LAW & PSYCHOL. REV. 211 (2013); Anthony Giannetti, Note, *The Solitary Confinement of Juveniles in Adult Jails and Prisons: A Cruel and Unusual Punishment?*, 30 BUFF. PUB. INT. L.J. 31 (2011–2012); Jessica Knowles, Comment, *"The Shameful Wall of Exclusion": How Solitary Confinement for Inmates with Mental Illness Violates the Americans with Disabilities Act*, 90 WASH. L. REV. 893 (2015); Jacob Zoghlin, Student Article, *Punishment in Penal Institutions: (Dis)-Proportionality in Isolation*, 21 HUM. RTS. BRIEF 24 (2014).

30 *See* Birckhead, *supra* note 29, at 61–65; Lobel, *Prolonged Solitary*, *supra* note 27, at 116; Giannetti, *supra* note 29, at 52–56; Zoghlin, *supra* note 29, at 27.

dence of the harms of solitary.[31] A few, like this Article, have linked critiques of solitary to Eighth Amendment proportionality jurisprudence,[32] but none has grounded that critique in the history recounted here.

This Article also provides a new theoretical framework to complement its doctrinal insights. What commentators have overlooked is that the Eighth Amendment has proved a poor fit for regulating the use of solitary confinement because there are disparate strands of Eighth Amendment jurisprudence that trigger doctrines of deference that might be inappropriate in the context in which solitary confinement is used. Courts are loath to interfere with legislative decisions about appropriate criminal sentences because of institutional legitimacy concerns—legislatures speak for the people and their judgment about what punishment is appropriate for certain crimes is one that is owed due deference. Similarly, courts hesitate to second-guess the response of a prison official to a moment of crisis, say, a disruptive prisoner, because of institutional competence concerns—prison administrators are experts in their field and should be given ample leeway to make split-second decisions.

Decisions about the use of solitary confinement appeal to courts' deferential frame in both ways. Solitary confinement in many ways looks like a criminal sentence—an official is deciding how long someone should experience certain conditions of confinement as a consequence for misbehavior. Similarly, the decision to use solitary confinement can be seen as a response to an immediate threat to order—a person with expertise in prison administration is deciding the extent of extreme isolation that will ensure safety and security within a particular facility. The combination of themes of institutional competence and institutional legitimacy builds deference onto deference, making courts hesitate to enter the fray, let alone to lay down guidelines.

As I will argue, however, neither mode of deference may be appropriate in the context of solitary. Prison administrators are not publicly accountable in the way that legislators are, and it is difficult to argue that their use of solitary confinement is the product of majoritarian decisionmaking. Courts should therefore not be as concerned about institutional legitimacy when reviewing the constitutionality of particular sentences to solitary confinement. Moreover, there are reasons to question whether the use of solitary

31 *See* Alexander, *supra* note 28, at 39–48; Bennion, *supra* note]28, at 775–77 (looking to evidence of psychological harm to show deliberate indifference more generally); Cohen, *supra* note 28, at 304–06; Hafemeister & George, *supra* note 27, at 34–40; Maximilienne Bishop, Note, *Supermax Prisons: Increasing Security or Permitting Persecution?*, 47 ARIZ. L. REV. 461, 468–69 (2005); Shira E. Gordon, Note, *Solitary Confinement, Public Safety, and Recidivism*, 47 U. MICH. J.L. REFORM 495, 503–07 (2014); Hinds & Butler, *supra* note 28, at 343–49; Zoghlin, *supra* note 29, at 26.

32 *See* Glidden, *supra* note 28, at 1837–47; Reinert, *Eighth Amendment Gaps*, *supra* note 27, at 68–76; Allen, *supra* note 29, at 240–46; Giannetti, *supra* note 29, at 49–52; Julia L. Torti, Note, *Accounting for Punishment in Proportionality Review*, 88 N.Y.U. L. REV. 1908, 1922–30 (2013); Zoghlin, *supra* note 29, at 28–29.

confinement is a product of the professional judgment that characterizes other penological decisions to which courts often defer.

I develop these theoretical and doctrinal arguments over four Parts. In Part I, I briefly review the history of the use of solitary confinement, showing that in the nineteenth century it was rejected by legislatures as too harsh for use as a criminal sanction, only to be embraced anew as a device for prison discipline in the mid-twentieth century. Key to this account is that correctional officers and administrators, not democratically accountable legislators, drove the renewed embrace of solitary confinement. In Part II, I provide an overview of the procedural and substantive principles that have imposed almost no constraints on the use of extreme isolation.

In Part III, I develop the argument for how a challenge to solitary confinement could fit within recent developments in Eighth Amendment doctrine. The new approach I outline does not require a categorical condemnation of extreme isolation, notwithstanding powerful arguments in favor of such a prohibition. Rather, resting on a more populist strand of Eighth Amendment jurisprudence—evolving standards of decency as reflected by punishment trends in state and federal systems—I argue that there is space in existing Eighth Amendment doctrine for judges to engage in greater scrutiny of solitary confinement practices. The result would not be a bar to the use of solitary, but greater regulation of how, why, and for how long solitary is used. The path forward is not well-traveled, but is marked nonetheless. The best example of this new approach comes from cases challenging the use of the death penalty and life without parole ("LWOP") for specific groups of offenders such as juveniles or people with intellectual disabilities. The lesson from those cases, all announced after 2000 and often by narrow majorities led by Justice Kennedy, is that specific punishment practices may be unconstitutional when a confluence of factors is present. These cases are not sufficient on their own—making use of them also requires closely scrutinizing the regulatory apparatus that currently governs the use of solitary in most prisons. Therefore, in Part III, I also show that the landscape of solitary confinement has changed to make judicial regulation of extreme isolation more palatable.

Although a judicial revision of solitary confinement can be supported by developing Eighth Amendment jurisprudence, in Part IV I discuss some of the theoretical insights that will complement this approach. Practically, solitary confinement's use has grown over time in many jurisdictions, with little oversight by any judicial system. This is largely a function of the administrative deference that pervades Eighth Amendment jurisprudence and the pressures of statutes such as the Prison Litigation Reform Act (PLRA)—most judges do not think they are competent to question correctional judgments about the need for measures such as solitary confinement, and even if they did, the PLRA makes doing so extremely difficult.[33] Overcoming these barri-

33 For example, one portion of the PLRA imposes barriers to any judicial relief sought by people held in prison, *see* 42 U.S.C. § 1997e (2012), while another specifically limits the ability of courts to impose the kinds of injunctive relief that might be necessary to regulate

ers requires recognition that Eighth Amendment doctrine is truly chimerical—it imposes different limitations in different contexts, and solitary confinement spans different models of regulation. Extreme isolation is not a formal punishment imposed by legislatures, judges, and jury; nor is it a split-second response to a crisis that correctional staff are best equipped to address. As such, it can be challenging to fit revision of solitary confinement into any one model of Eighth Amendment regulation. But one must start by recognizing that Eighth Amendment deference is premised upon decision-making models that are quite different from the context in which solitary confinement is used.

I. A Brief History of the Practice of Solitary Confinement

The use of solitary confinement has been debated since at least the eighteenth century.[34] In this Part, I provide a necessarily abbreviated history of the practice. In vogue as a statutorily enacted mode of punishment in the eighteenth and early nineteenth centuries, it soon passed into disfavor because of the harm it caused and the lack of any observable benefits.[35] By the end of the nineteenth century, state legislatures had concluded that it was not an appropriate punishment for violations of criminal law.[36] Yet it reemerged in force in the 1960s and 1970s as a disciplinary response to disorder within prison, and by the 1990s many states constructed facilities dedicated solely to solitary confinement.[37] Extreme isolation is now common in every correctional system—it is estimated that nearly 20% of federal and state prisoners and 18% of local jail detainees have spent some time in extreme isolation, and on an average day about 4.4% of people in prison are held in some form of restrictive housing.[38] For reasons that will become clear in Parts II and III of this Article, what is key to this account is that line officers and their supervisors, not democratically accountable legislators, have driven the renewed embrace of solitary confinement.

The use of solitary confinement dates back at least three centuries. Early penologists in both Europe and the United States were attracted to the order it provided to the developing penitentiary system, even as they were conscious of its debilitating effects.[39] English and Dutch observers noted the

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the use of solitary, *see* 18 U.S.C. § 3626(a). Even without the PLRA, judicial attitudes are surely swayed by a perception of the dangers faced by prison officials and the need for flexibility in responding to misbehavior. *See, e.g.*, Wilkinson v. Austin, 545 U.S. 209, 224 (2005) (stating that harsh conditions in solitary may be necessary "in light of the danger that high-risk inmates pose both to prison officials and to other prisoners")

34 For a thorough history of the subject, see Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. Rev. L. & Soc. Change 477, 481–96 (1997).

35 *Id.* at 482.

36 *See id.* at 486–87.

37 *Id.* at 480.

38 *See* Beck, *supra* note 2, at 1.

39 Haney & Lynch, *supra* note 34, at 482.

increase in mental illness, insanity, and suicide among those confined to solitary confinement,[40] but as Craig Haney and Mona Lynch note, solitary confinement was appealing despite these harms because the operative theory of criminality emphasized the need to control the minds of prisoners so as to compel internal change.[41] The Dutch model was particularly informative, because houses of correction (precursors to penitentiaries) originated in the Dutch Republic and the criminological model that governed there held sway in both the rest of Europe and abroad.[42] And for the Dutch, "[m]ind control became a major objective, and solitary confinement fit into this model."[43]

This philosophy was influential in the late eighteenth and early nineteenth century United States. According to Louis Masur, "By the 1770s and 1780s, nearly everyone was abuzz with the possibility of solitary confinement."[44] The Walnut Street Jail began in the 1790s by confining a small number of offenders to continuous solitary confinement.[45] But by 1800, Walnut Street was overcrowded and in a state of disrepair; the true Pennsylvania model—with continuous silence and solitary cells—emerged in the 1830s with the construction of the Cherry Hill and Pittsburgh penitentiaries.[46] This contrasted with the Auburn and Sing Sing prisons in New York State, which isolated prisoners at night and insisted on continual silence, but which also enforced congregate labor during the day.[47] Although these systems were different, the impact of solitary confinement was noted to be the same throughout; even with the interval of congregate labor offered during the day in New York, Beaumont and Tocqueville observed on their visit to the United States: "This experiment, of which such favourable results had been anticipated, proved fatal for the majority of the prisoners. It devours the victim incessantly and unmercifully; it does not reform, it kills. The unfortunate creatures submitted to this experiment wasted away . . . ."[48]

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40 *Id.* at 482–83.

41 *Id.* at 481–82.

42 Pieter Spierenburg, *From Amsterdam to Auburn an Explanation for the Rise of the Prison in Seventeenth-Century Holland and Nineteenth-Century America*, 20 J. SOC. HIST. 439, 441–42 (1987).

43 *Id.* at 455.

44 LOUIS P. MASUR, RITES OF EXECUTION: CAPITAL PUNISHMENT AND THE TRANSFORMATION OF AMERICAN CULTURE, 1776–1865, at 81 (1989).

45 Spierenburg, *supra* note 42, at 452. According to Spierenburg, four out of 117 prisoners in 1795 and seven out of 159 in 1796 were held in solitary confinement. *Id.*

46 *Id.*; *see also* Haney & Lynch, *supra* note 34, at 483–84.

47 Haney & Lynch, *supra* note 34, at 483–84; Spierenburg, *supra* note 42, at 452.

48 *See* TORSTEN ERIKSSON, THE REFORMERS: AN HISTORICAL SURVEY OF PIONEER EXPERIMENTS IN THE TREATMENT OF CRIMINALS 49 (1976) (quoting Gustave de Beaumont & Alexis de Tocqueville); *see also* Harry Elmer Barnes, *The Historical Origin of the Prison System in America*, 12 J. AM. INST. CRIM. L. & CRIMINOLOGY 35, 53 (1921) (describing Auburn experiment as a "hopeless failure [that] led to a marked prevalence of sickness and insanity on the part of the convicts in solitary confinement").

Despite the fact that the conditions imposed in the Auburn system were more extreme in many ways,[49] the Pennsylvania system fared no better in the opinion of contemporaneous observers.[50] Thus, by the turn of the nineteenth century, the experiment with widespread use of solitary appeared to be over. States continued to use it in a limited fashion—prisoners condemned to death might spend substantial time in solitary prior to execution and in some states a prisoner might spend a brief time in solitary on the anniversary of the crime of conviction.[51] To the extent it was used in these ways, however, courts and legislatures were extremely cautious about the duration to which prisoners were exposed—Minnesota, for example, authorized officials to place people convicted of first-degree murder in solitary confinement up to twelve days a year, "to be apportioned in periods of not exceeding three days' duration each, with an interval of not less than fourteen days intervening each two successive periods."[52] At the same time, although solitary confinement was becoming less prevalent as formal punishment, it was contemplated as a means of discipline for misconduct within prison.[53]

As Haney and Lynch document, at the beginning of the twentieth century, the impact of solitary confinement was recognized in cases addressing the voluntariness of confessions and the defense of insanity.[54] By this time, long-term solitary confinement was unusual in the United States, either explicitly abolished by statute or, even if permissible, having fallen into disre-

49 Barnes, *supra* note 48, at 53. Barnes also distinguished the Pennsylvania and Auburn systems in terms of the specific conditions of confinement that each imposed. Unlike the Pennsylvania model in which prisoners were placed in two large, roomy cells with provisions for labor and an individual outside yard, Auburn's solitary confinement cells more closely resembled those used in modern-day prisons—"a single small inside cell without any labor or other adequate provisions for physical exercise." *Id.*

50 The Supreme Court would ultimately describe it as a failed experiment because of its impact on the mental health of people held in continuous solitary confinement. *In re* Medley, 134 U.S. 160, 168 (1890); Haney & Lynch, *supra* note 34, at 484–85.

51 Haney & Lynch, *supra* note 34, at 487. The practice of placing people in solitary on the anniversary of the crime persisted in some states into the mid to late twentieth century. *See, e.g.*, People v. Thompson, 44 N.E.2d 876 (Ill. 1942) (upholding sentence in which defendant was ordered to be placed in solitary confinement on each anniversary of the crime); State v. Stratton, 374 N.W.2d 31, 33–34 (Neb. 1985) (approving sentence which included placing prisoner in solitary confinement on his birthday and the anniversary of the crime of conviction); State v. Bennett, 508 N.W.2d 294, 298 (Neb. Ct. App. 1993) (holding that court did not abuse its discretion by requiring that defendant be kept in solitary confinement for twelve days on the anniversary of the offense, but finding that statute repealing authority of court to order solitary confinement would be applied retroactively).

52 Holden v. Minnesota, 137 U.S. 483, 488 (1890) (citing MINN. STAT. § 3 (1868)). Along similar lines, in Massachusetts a prisoner could be placed in solitary confinement for up to twenty days as part of a sentence to a penitentiary. Murphy v. Massachusetts, 177 U.S. 155, 162 (1900) (citing MASS. GEN. LAWS ch. 504 (1895)).

53 MINN. STAT. § 79.1 (1876) (abolishing solitary confinement as punishment but permitting its use for discipline).

54 Haney & Lynch, *supra* note 34, at 486–87.

pute and disfavor by prison administrators.[55] And terms of confinement in solitary were measured in days and weeks, not months or years.[56]

The expanded use of solitary confinement began in the mid-1960s and expanded in the next twenty years as a response to increased violence and disorder in federal and state prisons.[57] What is significant about this expansion is that it was driven by corrections officials, not legislators. State legislatures had turned their backs on extreme isolation as a punishment for crime, but corrections officials embraced it as a sanction for misbehavior in prison. Over time, solitary confinement sentences stretched longer and solitary confinement units became more mechanized and devoid of human contact. Today, for instance, prisoners may spend years in solitary conditions in facilities built specifically for that purpose with almost no human contact over the course of the confinement.[58]

Indeed, when California announced recent reforms to solitary confinement in *Ashker v. Brown*, it was viewed as progress even though sentences to solitary, even for nonviolent offenses, can now stretch to a year and beyond.[59] And even in states that have limited disciplinary sentences to maximums of thirty days or fewer, about ten percent of people are transferred at the end of their disciplinary confinement to indefinite administrative segregation, under which people experience conditions similar to punitive segregation.[60]

The history of the use of solitary confinement, then, is something of a puzzle. As the penitentiary system developed in the United States, solitary confinement was part and parcel of some systems of criminal punishment, but was quickly discarded as the public and their representatives appreciated the human cost.[61] After solitary confinement reemerged as a dominant disciplinary practice in the mid to late twentieth century, it soon became more extreme in both duration and intensity than the nineteenth-century practice.[62] In the next Part of this Article, I explore what, if any, limits have been imposed by positive law on the practice of extreme isolation over all of this time.

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55 *Id.* at 487.

56 Leach v. Whitbeck, 115 N.W. 253, 253–54 (Mich. 1908) (citing MICH. COMP. LAWS §§ 2674, 2675 (1897)) (expressing shock at person having been held in solitary for three months and citing to statute limiting such punishment to ten days).

57 Haney & Lynch, *supra* note 34, at 487.

58 *See* Weidman, *supra* note 28, at 1525–27.

59 *See* Settlement Agreement at Attachment B, Ashker v. Brown, No. C 09-05796 (N.D. Cal. Sept. 1, 2015) (providing that both battery without serious injury and "harassment" could receive a "low" sentence of six months, an "expected" sentence of one year, and a "high" sentence of eighteen months).

60 *See* Reply Expert Declaration of James Austin in Support of Plaintiffs' Motion Regarding Mentally Ill Prisoners in Segregation at 8, Coleman v. Brown, No. Civ. S 90-0520 (E.D. Cal. Aug. 23, 2013).

61 *See* Haney & Lynch, *supra* note 34, at 486–87.

62 *See id.* at 491–94.

II. Legal Constraints on the Use of Solitary Confinement

For most of the history described above, judges have been observers on the sidelines, taking little role in regulating the use of solitary confinement, except where specific statutory provisions were at issue. To understand why this is, it is necessary to consider the two sources of constitutional law that bear on issues relating to a prison administrator's use of solitary confinement: the Fourteenth Amendment's Due Process Clause and the Eighth Amendment's prohibition against "cruel and unusual punishments." This Part begins with the Fourteenth Amendment, because it can be quickly summarized, before turning to the more complex and applicable Eighth Amendment doctrine.

A. Solitary Confinement and Procedural Due Process

The Fourteenth Amendment requires that "due process of law" be provided before the government deprives a person of life, liberty, or property.[63] "Due process" has come to have both a procedural and a substantive meaning. I will focus on the procedural component of the Due Process Clause as it relates to the use of solitary confinement because for my purposes the substantive component of "due process" overlaps with the boundaries of the Eighth Amendment.[64]

To trigger the procedural protections of the Due Process Clause, state action must implicate some interest protected as liberty, life, or property.[65] Under controlling caselaw, placement in solitary confinement implicates a liberty interest when it imposes conditions that are "atypical and significant. . . in relation to the ordinary incidents of prison life."[66] What this means varies from court to court, in part because whether something is "atypical and significant" depends in large part on the baseline, the "ordinary incidents of prison life." The Supreme Court has acknowledged this "appropriate baseline" question but has not decided it,[67] leaving lower courts to their own devices.

Courts have taken divergent approaches to this problem, as illustrated by the law in three different circuits. The Second Circuit, after a series of cases emphasizing the need for careful fact finding concerning the conditions of

63 U.S. Const. amend. XIV, § 1.

64 *See* County of Sacramento v. Lewis, 523 U.S. 833, 843 (1998) ("[I]f a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process." (quoting United States v. Lanier, 520 U.S. 259, 272 n.7 (1997)) (internal quotation marks omitted)).

65 *See, e.g.*, Town of Castle Rock v. Gonzales, 545 U.S. 748, 756 (2005) ("The procedural component of the Due Process Clause does not protect everything that might be described as a 'benefit.'").

66 Wilkinson v. Austin, 545 U.S. 209, 223 (2005) (quoting Sandin v. Conner, 515 U.S. 472, 483–84 (1995)) (internal quotation marks omitted).

67 *Id.* (stating that the supermax conditions before it were "atypical and significant . . . under any plausible baseline").

confinement,[68] adopted a set of presumptions for determining whether placement in segregation is atypical and significant. If the confinement is 101 days or less under "the normal conditions of [solitary] confinement,"[69] no liberty interest is at stake unless aggravating factors of some sort are shown.[70] If the confinement is 305 days or more under "normal" conditions, the plaintiff has been deprived of liberty.[71] For periods between 101 and 305 days, the court prescribed "development of a detailed record," which might include "evidence of the psychological effects of prolonged confinement in isolation."[72] In the Tenth Circuit, by contrast, courts use the following factors to help establish a baseline for whether confinement conditions created a protected liberty interest: (1) whether the segregation "furthers a legitimate penological interest, such as safety," (2) whether the conditions in the placement are extreme, (3) whether the punishment impacts the inmate's duration of incarceration, and (4) whether the placement was indeterminate.[73] The Seventh Circuit has suggested at times that the proper baseline is the most severe conditions that exist in any prison system in the United States, rendering procedural due process principles basically inapplicable to the regulation of solitary confinement.[74]

The bottom line is that any assessment of a due process complaint is often extremely fact intensive. For instance, in *Allah v. Bartkowski*, the Third Circuit first considered the length and conditions of restrictive confinement (as compared to other prisoners in segregation).[75] The court found that the prisoner experienced "atypical and significant" conditions because he was held for six years and, unlike other prisoners in administrative segregation, had no access to the commissary, "window visits," or recreation in an area that is not caged.[76] And the prisoner alleged that the process by which he was placed in segregated confinement was characterized by a "litany of defects," including that the individuals tasked with reviewing whether to

68 *See, e.g.*, Wright v. Coughlin, 132 F.3d 133 (2d Cir. 1998); Giakoumelos v. Coughlin, 88 F.3d 56, 62 (2d Cir. 1996); Frazier v. Coughlin, 81 F.3d 313, 317–18 (2d Cir. 1996) (per curiam) (holding that twelve days in prehearing confinement is not atypical and significant based on the district court's "extensive fact-finding").

69 Colon v. Howard, 215 F.3d 227, 230 (2d Cir. 2000).

70 *Id.* at 232 n.5.

71 *Id.* The court said that "the duration of SHU confinement is a distinct factor bearing on atypicality and must be carefully considered." *Id.* at 231. The relevant time period is the time actually served in cases where the prisoner does not serve the entire sentence. *Id.* at 231 n.4; *accord* Hanrahan v. Doling, 331 F.3d 93, 97 (2d Cir. 2003) (per curiam). But the court has recently held that for purposes of analyzing the qualified immunity of the hearing officer, the focus should be on the sentence imposed by the hearing officer, regardless of whether it was later modified. *Id.* at 98.

72 *Colon*, 215 F.3d at 232.

73 Estate of DiMarco v. Wyo. Dep't of Corr., 473 F.3d 1334, 1342 (10th Cir. 2007).

74 *See* Wagner v. Hanks, 128 F.3d 1173 (7th Cir. 1997). The Seventh Circuit's logic is that any prisoner could theoretically be transferred to any prison in the United States because of the Interstate Compact for Adult Offender Supervision. *Id.* at 1176.

75 Allah v. Bartkowski, 574 F. App'x 135, 138–40 (3d Cir. 2014) (per curiam).

76 *Id.* at 139.

release prisoners from the conditions were unfamiliar with governing regulations and convened hearings that were "perfunctory and without substance."[77]

No matter which circuit one is in, however, for "short" periods of confinement in solitary (generally anywhere from thirty to one hundred days, but sometimes longer), no procedures at all are required before a person is placed there. By contrast, the United Nations Special Rapporteur on Torture has suggested that periods of extreme isolation longer than fifteen days can constitute "cruel and inhuman treatment" prohibited by international law.[78] But our domestic law contemplates that individuals can be held for periods exceeding that by multiples of five or six, without providing even minimal procedural protections.

Even when the length of time in solitary exceeds that which is considered "atypical and significant," and therefore is sufficient to trigger due process protections, very limited procedures apply. Procedural due process provides an opportunity to know why one is being placed in solitary, an opportunity to be heard as to why one should not be placed in solitary, which includes a hearing before an impartial decisionmaker (but potentially an employee of the prison), and a limited opportunity to examine witnesses and offer evidence (but no right to be represented).[79] Even accepting that there is a substantive dimension to procedural justice,[80] the minimal process provided is unlikely to offer much in the way of real constraints. For even when

77 *Id.* at 139–40 (noting also that one of the members of the review committee "never engaged in factfinding or weighing of the evidence").

78 U.N. Secretary-General, *supra* note 14, at ?? 74, 76. I discuss the application of international human rights instruments in further detail later in the Article. *See infra* Part III.

79 Wilkinson v. Austin, 545 U.S. 209, 216 (2005); *see also id.* at 226–30 (discussing procedures necessary before placement of person in Ohio's most isolating maximum security unit); Wolff v. McDonnell, 418 U.S. 539 (1974) (discussing procedural requirements before good-time credit can be taken away).

80 PAUL D. CARRINGTON ET AL., JUSTICE ON APPEAL 8–9 (1976) (noting the importance of ritual and "process imperatives"); ROBERT M. COVER & OWEN M. FISS, THE STRUCTURE OF PROCEDURE (1979) (describing procedure as a social, cultural institution); DUE PROCESS: NOMOS XVIII (J. Roland Pennock & John W. Chapman eds., 1977) (collection of essays explaining nature and rationale of procedural fairness); Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 2 (1979) ("Adjudication is the social process by which judges give meaning to our public values."); E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System*, 24 LAW & SOC'Y REV. 953 (1990) (presenting evidence that participants in legal system evaluated procedural justice and outcomes based on perceptions of procedural fairness); Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge*: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 49–52 (1976) (observing importance of dignitary concerns); Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part I*, 1973 DUKE L.J. 1153, 1172–77 (defining dignity, participation, deterrence, and effectuation as litigation values); Judith Resnik, *Precluding Appeals*, 70 CORNELL L. REV. 603, 619 (1985) ("[A]lthough procedure exists to provide outcomes, procedure also serves nonoutcome related functions—to instruct about and to act out the political system, to legitimate decisions of the state, to dignify the participants, and to make meaningful the interaction between individuals and the state."); Judith Resnik, *Tiers*, 57 S.

they are in play, procedural due process principles cannot limit the length of solitary, the conditions under which prisoners experience solitary, or the categories of prisoners who are exposed to solitary.

B. Solitary Confinement and the Eighth Amendment

Unlike procedural due process, the Eighth Amendment on its face might seem like a better candidate to limit whether one can use solitary confinement at all, for it is substantive, prohibiting the use of "cruel and unusual" punishment.[81] But as I will discuss below, the Eighth Amendment has done little to no work in the area of solitary confinement. To understand why, however, it is necessary to first understand the basic parameters of Eighth Amendment regulation.

1. Eighth Amendment Fundamentals

Perhaps more than any other single provision of the Bill of Rights, the Eighth Amendment has come to occupy multiple roles in regulating criminal justice (a breadth of coverage that has garnered criticism in many corners).[82] It regulates both the formal sentences that may be imposed for particular offenses, as well as the conditions under which prisoners must serve those sentences.[83] When a criminal defendant receives a sentence upon conviction, the Eighth Amendment imposes two related constraints: (1) a proportionality standard that very loosely applies to the punishment, including the

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CAL. L. REV. 837, 840 (1984) ("Procedure is a mechanism for expressing political and social relationships and is a device for producing outcomes.").

81 U.S. CONST. amend. VIII.

82 Indeed, some scholars have criticized Eighth Amendment jurisprudence for being so capacious. *See, e.g.*, John D. Castiglione, *Qualitative and Quantitative Proportionality: A Specific Critique of Retributivism*, 71 OHIO ST. L.J. 71, 78–79 (2010) (arguing that proportionality jurisprudence should not permit challenges to length of sentence); Laurence Claus, *Methodology, Proportionality, Equality: Which Moral Question Does the Eighth Amendment Pose?*, 31 HARV. J.L. & PUB. POL'Y 35, 45 (2008); Steven Grossman, *Proportionality in Non-Capital Sentencing: The Supreme Court's Tortured Approach to Cruel and Unusual Punishment*, 84 KY. L.J. 107, 107 (1995) (describing the Court's proportionality jurisprudence as "confused"); Donna H. Lee, *Resuscitating Proportionality in Noncapital Criminal Sentencing*, 40 ARIZ. ST. L.J. 527, 528 (2008) (criticizing the Court for failing to "provide practical guidance or a coherent theoretical framework for analyzing proportionality challenges"); Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 684 (2005) [hereinafter Lee, *The Constitutional Right Against Excessive Punishment*] (describing Eighth Amendment jurisprudence as "ineffectual and incoherent"); Tom Stacy, *Cleaning up the Eighth Amendment Mess*, 14 WM. & MARY BILL RTS. J. 475 (2005).

83 The Supreme Court first struck down a sentence for violating the Eighth Amendment in 1910. *See* Weems v. United States, 217 U.S. 349 (1910). In 1962, the Court found that the Eighth Amendment was incorporated against the States via the Fourteenth Amendment. *See* Robinson v. California, 370 U.S. 660, 667 (1962). And in 1976, the Court ushered in modern prison conditions jurisprudence by holding that the Eighth Amendment protected prisoners from harm caused by the "deliberate indifference" of prison officials. *See* Estelle v. Gamble, 429 U.S. 97, 104 (1976).

length of any incarceration;[84] and (2) an "evolving standards of decency" test that the punishment must not transgress.[85] And after the sentence is handed down, the same "evolving standards of decency" principle regulates prison conditions, including the provision of medical and mental health care, the use of force by officers to impose order, the level of supervision required to ensure safety within prisons, and the material conditions that form the daily lived experience of people in prisons such as living space, food, and sanitation.[86] Thus, whether a prisoner is challenging the length of a particular sentence,[87] the appropriateness of execution for particular crimes or categories of offenders,[88] an officer's use of force,[89] a prison's failure to provide

84 *See, e.g.*, Harmelin v. Michigan, 501 U.S. 957, 997 (1991) (Kennedy, J., concurring in part and concurring in the judgment) (articulating "narrow proportionality principle").

85 The "evolving standards of decency" standard was introduced in *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion). Since the beginning of the twentieth century, the Supreme Court has found sentences to be unconstitutional—under either proportionality or "evolving standards" analysis—in only a handful of noncapital cases involving adults. *See* Solem v. Helm, 463 U.S. 277 (1983); *Trop*, 356 U.S. at 101 (plurality opinion). The Court generally has held that sentences of terms of years will almost never be found to be unconstitutional. *See* Lockyer v. Andrade, 538 U.S. 63 (2003); Ewing v. California, 538 U.S. 11 (2003) (plurality opinion); *Harmelin*, 501 U.S. 957; Hutto v. Davis, 454 U.S. 370 (1982) (per curiam). To the extent that the Court has been at all receptive to arguments regarding the constitutionality of both capital and noncapital sentences, the defendant has had specific characteristics that rendered a particular punishment inappropriate. *See* Miller v. Alabama, 567 U.S. 460, 479 (2012) (holding that the Eighth Amendment prohibits imposition of mandatory LWOP sentence on juveniles who commit capital crimes); Graham v. Florida, 560 U.S. 48, 75–76 (2010) (ruling that Eighth Amendment prohibits imposition of LWOP sentence on juveniles who do not commit capital crimes); Roper v. Simmons, 543 U.S. 551, 571–73 (2005) (ruling that death penalty for juveniles violates Eighth Amendment); Atkins v. Virginia, 536 U.S. 304 (2002) (deeming it unconstitutional to execute defendant who is mentally handicapped); *cf.* Kennedy v. Louisiana, 554 U.S. 407 (2008) (holding death penalty disproportionate for conviction of a crime that did not involve death).

86 *See* Hope v. Pelzer, 536 U.S. 730, 738 (2002) (handcuffing prisoner to hitching post without water or bathroom for seven hours well after its necessity for maintaining order had dissipated violated Eighth Amendment); Farmer v. Brennan, 511 U.S. 825 (1994) (failure to protect from other prisoners); Helling v. McKinney, 509 U.S. 25, 33 (1993) (deliberate indifference to secondhand tobacco smoke); Hudson v. McMillian, 503 U.S. 1, 7 (1992) (ruling that use of force that is "malicious[ ] and sadistic[ ]" violates Eighth Amendment); Wilson v. Seiter, 501 U.S. 294, 304–05 (1991) (requiring access to minimum standards of warmth and exercise); Rhodes v. Chapman, 452 U.S. 337 (1981) (requiring conditions of confinement that meet minimum standards); *Estelle*, 429 U.S. 97 (medical care); *see also* Snider v. Dylag, 188 F.3d 51, 55 (2d Cir. 1999) (holding that assault invited by staff member's statements to other inmates is actionable); LaBounty v. Coughlin, 137 F.3d 68 (2d Cir. 1998) (deliberate indifference to asbestos exposure); Fischl v. Armitage, 128 F.3d 50 (2d Cir. 1997) (assault made possible by officer's opening of cell).

87 *See, e.g.*, *Solem*, 463 U.S. 277.

88 *See, e.g.*, *Kennedy*, 554 U.S. 407 (finding capital punishment unconstitutional where defendant was convicted of a crime that did not involve death); *Roper*, 543 U.S. 551 (holding that it was unconstitutional to execute a defendant who committed crime as a juve-

medical care,[90] a failure to protect from assault,[91] or harmful conditions of confinement in general,[92] the Eighth Amendment will guide resolution of the controversy. It is fair to say that the Eighth Amendment imposes constraints on state action, albeit with ample leeway, from the day a criminal sentence is imposed until the day a person is released from custody.

The breadth of Eighth Amendment doctrine is also a weakness: the structure of any Eighth Amendment claim depends on the context of the particular challenge. An Eighth Amendment challenge to a sentence of confinement for a term of years must meet an extremely difficult gross proportionality standard that almost always results in the sentence being upheld, whereas challenges to uniquely harsh sentences such as death or life imprisonment without the possibility of parole have been subjected to a different proportionality standard that provides more avenues for relief.[93] Even for cases involving conditions of confinement, the Eighth Amendment is chimerical—when a prisoner alleges that corrections officers have used excessive force, she must show that the force was used with the intent to cause harm; when a prisoner alleges that corrections officials failed to provide adequate medical care or failed to protect the prisoner from harm inflicted by others, she must show that the official behaved recklessly with respect to the risk that the prisoner would suffer harm.[94]

2. Judicial Deference Across Eighth Amendment Doctrine

The reasons for these differing standards can be found, broadly, in themes of institutional legitimacy and institutional competence. In general, the Supreme Court has recognized that democratically accountable legislatures should be given almost unquestioned authority to decide whether a

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nile); *Atkins*, 536 U.S. 304 (holding that Eighth Amendment prohibited execution of mentally handicapped prisoner).

89 *See, e.g.*, *Hudson*, 503 U.S. 1.

90 *See, e.g.*, *Estelle*, 429 U.S. at 104.

91 *See, e.g.*, *Farmer*, 511 U.S. 825 (failure to protect from other prisoners).

92 *See, e.g.*, Rhodes v. Chapman, 452 U.S. 337 (1981) (conditions of confinement); *see also* Helling v. McKinney, 509 U.S. 25 (1993) (permitting lawsuit based on exposure to secondhand tobacco smoke); LaBounty v. Coughlin, 137 F.3d 68 (2d Cir. 1998) (finding that claim could be made for exposure to asbestos).

93 *Compare, e.g.*, Hutto v. Davis, 454 U.S. 370, 375 (1982) (per curiam) (rejecting Eighth Amendment challenge to a prison term of forty years and fine of $20,000 for "possession and distribution of approximately nine ounces of marihuana"), *with* Solem v. Helm, 463 U.S. 277 296–300 (1983) (setting aside a LWOP sentence imposed under a South Dakota recidivist statute).

94 Some conditions cases use a "deliberate indifference" standard, which is akin to recklessness. *See Farmer*, 511 U.S. 825 (failure to protect from other prisoners); *Helling*, 509 U.S. 25 (deliberate indifference to secondhand tobacco smoke); Wilson v. Seiter, 501 U.S. 294, 304–05 (1991) (requiring access to minimum standards of warmth and exercise); *Rhodes*, 452 U.S. 337 (requiring conditions of confinement that meet minimum standards); *Estelle*, 429 U.S. 97 (medical care). Cases involving use of force, by contrast, use a "malicious[ ] and sadistic[ ]" standard. *Hudson*, 503 U.S. 1.

particular person "deserves" a particular prison term for engaging in particular conduct.[95] This is because courts are not legitimate sites for making the important decision about how much certain conduct should be punished, involving as it does difficult moral, empirical, and fiscal issues which are better resolved by democratically accountable actors.[96] The death penalty is treated differently because it is an "absolute renunciation of all that is embodied in our concept of humanity."[97]

95 One illustration is the Court's fractured decision in *Harmelin v. Michigan*, 501 U.S. 957 (1991). Justice Scalia, announcing the judgment of the Court, wrote solely for himself and Chief Justice Rehnquist to argue that the proportionality principle applied only to death penalty cases, not term-of-years sentences, because legislatures are best situated to determine appropriate sentence lengths. *Id.* at 988 (opinion of Scalia, J.). Justice Kennedy, writing for himself and Justices O'Connor and Souter, argued in favor of a proportionality limitation on sentences to terms of years, but acknowledged that "prison terms for specific crimes involves a substantive penological judgment that, as a general matter, is 'properly within the province of legislatures, not courts.'" *Id.* at 998 (Kennedy, J., concurring in part and concurring in the judgment) (quoting Rummel v. Estelle, 445 U.S. 263, 275–76 (1980)). And the dissenters, Justices White, Blackmun, and Stevens, similarly recognized that legislatures were to be given profound deference in setting appropriate punishments. *Id.* at 1016 (White, J., dissenting); *see also* Ewing v. California, 538 U.S. 11, 31–32 (2003) (Scalia, J., concurring in the judgment) (objecting that proportionality principle is fundamentally a policy, not legal, judgment); *Rummel*, 445 U.S. at 274 ("[O]ne could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence actually imposed is purely a matter of legislative prerogative.").

96 *See, e.g.*, *Harmelin*, 501 U.S. at 990 (opinion of Scalia, J.) ("Diversity not only in policy, but in the means of implementing policy, is the very *raison d'être* of our federal system. Though the different needs and concerns of other States may induce them to treat simple possession of 672 grams of cocaine as a relatively minor offense, nothing in the Constitution requires Michigan to follow suit." (citations omitted)).

97 Furman v. Georgia, 408 U.S. 238, 306 (Stewart, J., concurring); *see also* Kennedy v. Louisiana, 554 U.S. 407, 420 (2008) (expressing concern that imposition of death penalty may "descen[d] into brutality, transgressing the constitutional commitment to decency and restraint"). For instance, sentencing regimes that mandate the death penalty upon conviction, without qualification, have been declared unconstitutional. *See* Roberts v. Louisiana, 428 U.S. 325 (1976) (plurality opinion); Woodson v. North Carolina, 428 U.S. 280 (1976) (plurality opinion); *cf.* Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion) (mitigating factors may be given individualized consideration prior to imposition of death penalty). Similarly, the Court has declared unconstitutional the imposition of the death penalty for crimes that do not involve the death of another. *Kennedy*, 554 U.S. 407 (child rape); Coker v. Georgia, 433 U.S. 584 (1977) (plurality opinion) (rape of an adult woman). And the Court has declared that the states may be prohibited from executing particular categories of defendants. Roper v. Simmons, 543 U.S. 551 (2005) (prohibiting death sentence for those who commit crime while under the age of eighteen); Atkins v. Virginia, 536 U.S. 304 (2002) (ruling death sentences for the mentally handicapped unconstitutional); Thompson v. Oklahoma, 487 U.S. 815 (1988) (plurality opinion) (prohibiting death sentence for those who commit crime while under the age of sixteen). The Court has also reviewed challenges to execution carried out by particular means. Baze v. Rees, 553 U.S. 35 (2008) (plurality opinion) (ruling death sentence carried out pursuant to three-drug lethal injection not per se unconstitutional); Louisiana *ex rel.* Francis v.

Along with themes of institutional legitimacy, Eighth Amendment jurisprudence is also informed by concerns about institutional competence. The standard for establishing excessive use of force, for instance, is set intentionally high because courts recognize that the decision to use force is made in split-second increments, based on variables that are difficult for courts to assess.[98] By contrast, there is a less stringent standard for demonstrating the unconstitutionality of particular conditions of confinement, or particular deprivations of medical care.[99] This is because the decision whether, say, to provide medical care is often made after deliberation under less stressful conditions than the decision whether to use force, giving courts more leeway to inquire into the grounds for denying or delaying care.[100]

3. Deference in Action

One can see these themes in operation when one looks in more granular detail at how different Eighth Amendment challenges are resolved. To succeed on a proportionality challenge to a sentence of a term of years, for example, a challenger must show that the severity of a sentence is "grossly" disproportionate to the seriousness of the offender's crime.[101] If a court finds that this extremely high standard is met, then it will go on to consider whether other states punish the same crime as severely, as well as whether more serious crimes are punished more severely.[102] The Supreme Court has not found that a sentence to a term of years is disproportionate since 1983, illustrating how difficult this standard is to meet.[103]

For challenges to sentences other than a term of years, such as a death sentence or life without the possibility of parole, many factors contribute to

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Resweber, 329 U.S. 459, 463–64 (1947) (plurality opinion) (rejecting claim that it violated the Eighth Amendment to attempt to execute someone by electrocution after a first attempt failed).

98 For use of force cases, a plaintiff must show that an official acted "maliciously and sadistically for the very purpose of causing harm." Whitley v. Albers, 475 U.S. 312, 320–21 (1986) (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973)) (describing standard for use of force during prison riot); *see also Hudson*, 503 U.S. at 5–6 (extending *Whitley* standard to all allegations of excessive force).

99 *See, e.g., Farmer*, 511 U.S. at 837 (describing "deliberate indifference" standard as akin to recklessness).

100 *See, e.g., Whitley*, 475 U.S. at 320–22.

101 *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring in part and concurring in the judgment); Solem v. Helm, 463 U.S. 277, 290–91 (1983).

102 *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring in part and concurring in the judgment).

103 *See* Ewing v. California, 538 U.S. 11 (2003) (plurality opinion) (upholding California's "three strikes" law); *Harmelin*, 501 U.S. 957 (upholding sentence of LWOP for first-time offender who was found guilty of possession of 650 grams of cocaine); *Solem*, 463 U.S. 277 (ruling that Eighth Amendment prohibited imposition of LWOP for nonviolent recidivist whose crimes were minor); Hutto v. Davis, 454 U.S. 370 (1982) (per curiam) (upholding sentence of forty years for possession with intent to distribute nine ounces of marijuana); Rummel v. Estelle, 445 U.S. 263 (1980) (upholding sentence of mandatory life imprisonment under Texas recidivist statute).

the proportionality analysis, including how the punishment fits with different penological theories, the types of punishment meted out by sovereign states and even internationally, and the court's own subjective evaluation of proportionality.[104] Applying this standard over the past fifteen years, the Supreme Court has on numerous occasions found that the Eighth Amendment prohibited the imposition of a death sentence or life imprisonment without the possibility of parole.[105]

When the Eighth Amendment is litigated in the context of conditions of confinement, the questions are different, reflecting the different institutional role of the courts. The focus is not on the kinds of comparisons at issue in proportionality jurisprudence—how harsh is this sentence compared to the culpability of the offender? Or what is the general consensus of relevant jurisdictions in assessing the permissibility of this sentence for this kind of offense? Instead, the questions center on the subjective state of mind of the prison official imposing the conditions and the objective harm being created by those conditions.[106]

This is not to say that there is no link between proportionality jurisprudence and conditions of confinement challenges.[107] In *Trop v. Dulles*,[108] the Supreme Court struck down a punishment as "cruel and unusual," without a controlling opinion or agreement as to how best to operationalize the Eighth Amendment in challenges to particular sentences.[109] The statute invalidated in *Trop* authorized federal courts to impose denationalization as a punishment for military desertion, a penalty that the Court found to be repugnant to Eighth Amendment principles and international law.[110] The plurality in *Trop* based its decision on the consistency of denationalization with basic norms of decency and not on a particular conception of a just punishment.[111] Instead of reviewing the sentence for disproportionality, the *Trop* plurality asked whether the penalty was prohibited by the Eighth Amend-

104 For a good example of how these factors are applied, see Roper v. Simmons, 543 U.S. 551 (2005), which held that the death penalty was disproportionate punishment for those who committed a death-eligible crime while under the age of eighteen.

105 *See* Miller v. Alabama, 567 U.S. 460 (2012) (holding that mandatory LWOP for those under the age of eighteen at the time of their crimes violates the Eighth Amendment); Graham v. Florida, 560 U.S. 48, 81–82 (2010) (finding LWOP unconstitutional for juveniles convicted of nonhomicide offenses); Kennedy v. Louisiana, 554 U.S. 407, 446 (2008) (finding death penalty to be disproportionate punishment for child rape); *Roper*, 543 U.S. at 560–64 (finding execution of defendants who committed capital crime while younger than eighteen to be prohibited by the Eighth Amendment); Atkins v. Virginia, 536 U.S. 304, 311–13 (2002) (holding that death penalty for the mentally handicapped is "excessive" because it is inconsistent with evolving standards of decency).

106 *See* Reinert, *Eighth Amendment Gaps*, *supra* note 27, at 69.

107 *See* Reinert, *supra* note 16, at 1584.

108 356 U.S. 86 (1958) (plurality opinion).

109 *Id.* at 104.

110 *Id.* at 98–99.

111 The four-Justice plurality in *Trop* viewed disproportionality as an invalid basis for finding denationalization unconstitutional for the crime of desertion during war because death was a constitutional punishment for the same crime. *Id.* It may also have been

ment's guarantee of "civilized treatment."[112] In so doing, the Justices made clear that "evolving standards of decency" were independent restrictions on the government's power to punish.[113] The plurality identified within the Eighth Amendment a basic concept of protecting dignity[114] and reasoned that traditional methods of punishment—fines, incarceration, and execution—were constitutionally permissible. Punishment that fell outside these borders, however, would be reviewed with suspicion.[115]

4. The Failure to Regulate Solitary Confinement Through the Eighth Amendment

As the above discussion illustrates, Eighth Amendment doctrine is operative in at least three distinct contexts that could bear on solitary confinement. It prohibits sentences that are grossly disproportionate, as measured by evolving standards of decency.[116] It rejects conditions of confinement that deprive people of life's basic necessities.[117] And it condemns administrative responses to misbehavior that impose unnecessary pain for no legitimate penological purpose.[118]

Despite this broad coverage, the Eighth Amendment has not historically been applied by courts to regulate much of the use of extreme isolation. In only one case has the Supreme Court addressed the question close to

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difficult for the plurality to embrace a principle of proportionality when the sentence was not subject to degrees, such as a term of years.

112 *Id.*

113 *See id.* at 99–101.

114 *See id.* at 100.

115 *Id.* ("[A]ny technique outside the bounds of these traditional penalties is constitutionally suspect."). On the plurality's reasoning, denationalization was incompatible with basic standards of dignity because it deprives the individual of the "right to have rights." *Id.* at 101–02.

116 *See, e.g.*, Kennedy v. Louisiana, 554 U.S. 407, 413 (2008) (holding that death penalty may not be imposed on defendant convicted of rape of a child under the age of twelve); Harmelin v. Michigan, 501 U.S. 957, 997 (1991) (Kennedy, J., concurring in part and concurring in the judgment) (noting that Eighth Amendment's proportionality principle applies to both capital and noncapital sentences). In recent years, most proportionality litigation has focused on the permissibility of the death penalty for certain types of crimes or certain categories of defendants. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 574 (2005) (holding that death penalty may not be imposed on a defendant who committed a capital crime when under the age of eighteen). Challenges to the death penalty may also be brought based on the arbitrariness of a capital punishment regime, Gregg v. Georgia, 428 U.S. 153, 189 (1976) (plurality opinion), or because the goals of capital punishment are inconsistent with executing offenders who share particular characteristics, such as the mentally handicapped. Atkins v. Virginia, 536 U.S. 304, 321 (2002). These kinds of challenges rely in many ways on the factors that inform proportionality analysis, but they are not conceived of as challenges to the excessiveness of a particular sentence.

117 Rhodes v. Chapman, 452 U.S. 337, 347 (1981) (finding that conditions are unconstitutional if they "deprive inmates of the minimal civilized measure of life's necessities").

118 *See id.* at 345–46; *see also* Estelle v. Gamble, 429 U.S. 97, 103–04 (1976).

squarely—*Hutto v. Finney*,[119] a 1978 case in which the Court simply affirmed the district court's entry of an injunction with regard to conditions of confinement in Arkansas prisons, including conditions in "the hole."[120] The Court did not address the Eighth Amendment implications of the confinement, because the argument centered on the district court's power to enter the remedial order—there was offhand language in Justice Stevens's opinion clarifying that the length of time in solitary could play some role in assessing the constitutionality of the treatment ("A filthy, overcrowded cell and a diet of 'grue' might be tolerable for a few days and intolerably cruel for weeks or months.")[121]—but nothing more specific.

In every other case, however, we can only read the tea leaves. There is a late nineteenth century case, *In re Medley*,[122] which was not about the Eighth Amendment at all, but in which the Court offered a scathing critique of the "experiment" with solitary confinement described in Part I of this Article. In that 1890 case, the Court considered an ex post facto challenge to an 1889 Colorado statute that required that death-sentenced prisoners be kept in solitary confinement until the time of execution.[123] The 1883 version of the statute made no reference to solitary confinement.[124] The defendant had committed his crime in 1889, prior to the effective date of the challenged statute.[125] In determining that the statute violated the Ex Post Facto Clause, the Court made several notable observations.

First, the Court reviewed the history of the use of solitary confinement, rejecting the argument that it was "a mere unimportant regulation as to the safe-keeping of the prisoner" and confirming that it was a form of punishment.[126] Second, experience with "complete isolation" in American prisoners had taught that

> [a] considerable number of the prisoners 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.[127]

Third, by the mid-1800s, according to the Court the "main feature of solitary confinement was found [by prison experts] to be too severe."[128] The Court remarked on the fact that under English law solitary confinement had initially been applied to those convicted of murder as a "further terror and

119 437 U.S. 678 (1978).
120 *Id.* at 681.
121 *Id.* at 686–87.
122 134 U.S. 160 (1890).
123 *Id.* at 161–62.
124 *Id.* at 167.
125 *Id.* at 162.
126 *Id.* at 167.
127 *Id.* at 168.
128 *Id.*

peculiar mark of infamy" in addition to the punishment of death.[129] It was ultimately repealed because "public sentiment revolted against this severity."[130] With this understanding of solitary confinement, the Court's Ex Post Facto Clause holding was straightforward: because solitary confinement constituted "an additional punishment of the most important and painful character," it could not be imposed retroactively on the defendant.[131]

In re Medley is indicative of the early twentieth century attitude toward the use of solitary confinement as a punishment for crime. In 1916, the Arkansas Supreme Court held that a punishment of "solitary confinement" imposed for contempt was unconstitutional because it was "unusual" under the Arkansas Constitution: "there is no such punishment known to our law as 'solitary confinement.'"[132] And the first case in which the Supreme Court actually found that the Eighth Amendment imposed a substantive limitation on the power to punish—*Weems v. United States*,[133] a 1910 case—involved a punishment that included solitary confinement.[134] In *Weems*, the Court (for the first time) struck down as excessive a sentence imposed by a court in the Philippines for falsifying a public and official document.[135] The trial court had sentenced the defendant to fifteen years' imprisonment, as well as to an additional punishment known as *cadena temporal*.[136] Individuals sentenced to *cadena temporal* were required by statute to be housed in solitary confinement, among other harsh conditions.[137] Because the Court viewed the sentence as excessive, especially compared to sentences for more serious crimes, it found that the statute fixing the sentence reflected "more than different exercises of legislative judgment" and instead imposed cruel and unusual punishment

129 *Id.* at 170 (citing The Murder Act 1751, 25 Geo. 2. c. 37 (Eng.) (entitled 'An Act For Better Preventing the Horrid Crime of Murder')).

130 *Id.*

131 *Id.* at 171. And perhaps most notably, the Court ordered the defendant be released from custody as a result of its holding—the action was in the nature of habeas corpus, and the statute that provided the punishment of solitary confinement had repealed the prior statute providing for punishment of murder, leaving the state with no valid power to punish the defendant. *Id.* at 173–74.

132 Williams v. State, 188 S.W. 826, 827 (Ark. 1916) ("Misdemeanors are punishable in this state by fine or imprisonment, or both, and any other character of punishment must necessarily be regarded as unusual within the prohibition of the Constitution.").

133 217 U.S. 349 (1910).

134 *Id.* at 366.

135 *Id.* at 363, 382. The Philippines constitution contained a cruel and unusual punishment clause identical to the Eighth Amendment, so the issue of incorporation of the Eighth Amendment against the states did not arise.

136 *Id.* at 362–64. The phrase betrays the punishment's Spanish origins, and literally translated means "temporary chain." *See id.* at 363.

137 *See id.* at 364–66. The additional punishment associated with *cadena temporal* included "hard labor," ankle and wrist restraints, deprivation of parental rights and the right to dispose of property through a will, the obligation to give authorities notice of any change in domicile, and disqualification to hold public office or vote. *Id.* at 364–65. As the Supreme Court observed, the only punishments more severe than *cadena temporal* were death or *cadena perpetua*. *Id.* at 363–64.

under the meaning of the Eighth Amendment.[138] The Court notably declined to consider the fixed imprisonment term of the sentence separately from the conditions of confinement imposed by the *cadena temporal* sentence because they had been imposed pursuant to statute and therefore had to be considered jointly as punishment.[139] For both *Weems* and *In re Medley*, then, the use of solitary confinement was a powerful punishment, one not to be taken lightly.

If we fast-forward to a more recent Supreme Court case—the Court's decision in *Wilkinson v. Austin*[140]—the Court's narrative about solitary confinement has changed. This was another case in which the Eighth Amendment was not directly at issue (all Eighth Amendment claims had been resolved in the lower court)—only procedural due process protections were in play.[141] But it is the Court's description in that case of the lived experience of people confined in Ohio's Supermax that is notable:

> In OSP [the Ohio State Penitentiary] almost every aspect of an inmate's life is controlled and monitored. Inmates must remain in their cells, which measure 7 by 14 feet, for 23 hours per day. A light remains on in the cell at all times, though it is sometimes dimmed, and an inmate who attempts to shield the light to sleep is subject to further discipline. During the one hour per day that an inmate may leave his cell, access is limited to one of two indoor recreation cells.
>
> Incarceration at OSP is synonymous with extreme isolation. In contrast to any other Ohio prison, including any segregation unit, OSP cells have solid metal doors with metal strips along their sides and bottoms which prevent conversation or communication with other inmates. All meals are taken alone in the inmate's cell instead of in a common eating area. Opportunities for visitation are rare and in all events are conducted through glass walls. It is fair to say OSP inmates are deprived of almost any environmental or sensory stimuli and of almost all human contact.[142]

The distance from the Court's discussion of solitary in *Medley* to *Wilkinson* is hard to grapple with. All the more so because when one looks at the doctrine on its face and as summarized above, the Eighth Amendment appears to be a good candidate for limiting extreme isolation's use. As noted above, the Eighth Amendment prohibits punishments that are either disproportionate or contrary to evolving standards of decency. While proportionality doctrine is a weak constraint on the state's exercise of its power to punish, some courts have acknowledged that SHU sentences must not be "grossly disproportionate," must have some penological justification, and must not

138 *Id.* at 380–81 (comparing punishment to punishment for crimes such as homicide, conspiracy, and forgery).

139 *See id.* at 381.

140 545 U.S. 209 (2005).

141 *Id.* at 229 (noting that any possible Eighth Amendment claims were not before the Court).

142 *Id.* at 214.

"involve the unnecessary and wanton infliction of pain."[143] To the extent this doctrine has been of use, however, it has not been for wholesale challenges to the use of solitary, but instead to challenges to the reasons solitary is used, or to the categories of people for whom it is used.[144]

The Eighth Amendment also prohibits the use of punishments that are inconsistent with "the evolving standards of decency that mark the progress of a maturing society."[145] If one were to ask what "evolving standards of decency" taught us more than 100 years ago, it is questionable whether any use of solitary for any prisoner would be considered to be consistent with the Eighth Amendment. For although the use of solitary confinement is currently widespread throughout the United States and in many ways taken for granted by state and federal corrections officials and prisoner advocates alike, as *Medley* and the discussion in Part I suggest, it was not always this way.[146] Several states through the nineteenth century briefly flirted with the use of extreme isolation only to abandon it after it proved too harmful to prisoners, generating the *Medley* Court's language about the failure of the experiment with extreme isolation.[147]

Over time, a consensus emerged that the harms of extreme isolation far outweighed any potential benefits of the practice. For much of the twentieth century, this was reflected in prison practices, but in the mid-twentieth century, the experimentation began anew, supported by rhetoric about the need to control the "worst of the worst" prisoners.[148] Use of solitary escalated in the 1980s and 1990s with the construction of freestanding supermax facilities and other units designed with isolation in mind.[149] In many of the new units, the extent of dehumanization is comparable (or worse) than nineteenth century practices, as the Court's description of the OSP conditions confirms.

The limitations of the use of the Constitution to challenge either the imposition of solitary confinement (from a due process perspective) or the conditions of solitary (from an Eighth Amendment perspective) are evident in recent caselaw. In the Fourth Circuit, for example, the court recently rejected a due process challenge by a prisoner on Virginia's death row, who

143 Smith v. Coughlin, 748 F.2d 783, 787 (2d Cir. 1984) (quoting Rhodes v. Chapman, 452 U.S. 337, 346 (1980)) (internal quotation marks omitted); Dixon v. Goord, 224 F. Supp. 2d 739, 748 (S.D.N.Y. 2002) (quoting *Smith*, 748 F.2d at 787) (internal quotation marks omitted); *see also* Wright v. McMann, 460 F.2d 126, 133 (2d Cir. 1972).

144 The *Wilkinson* Court had no reason to decide issues of proportionality of punishment because the plaintiffs' Eighth Amendment claims had been settled. 545 U.S. at 229. Nonetheless, the Court at least acknowledged the theoretical possibility that individual claims of "excessive punishment" could be viable for people held in the supermax. *Id.*

145 Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion).

146 *See In re* Medley, 134 U.S. 160, 172 (1890).

147 *See id.* at 168 ("[S]ome thirty or forty years ago the whole subject [of solitary confinement] attracted the general public attention, and . . . solitary confinement was found to be too severe.").

148 Weidman, *supra* note 28, at 1506.

149 *See Wilkinson*, 545 U.S. at 213–14.

argued that he was placed in indefinite solitary confinement without any process whatsoever (Virginia has a formal written policy that requires all death row prisoners to be held in their cells twenty-three hours a day, with no group programming or religious services—the equivalent of solitary confinement).[150] In *Prieto v. Clarke*, the majority held that to even implicate the Due Process Clause, it was not enough that the conditions of confinement be "atypical and significant," but also that there be a state law or policy that provides a liberty interest.[151] Thus, given that Virginia has a written policy requiring that death row prisoners be confined in isolation, the plaintiff could not prevail under a due process theory.[152] In the alternative, the court held that the plaintiff could not show atypicality and significance because the baseline was the "conditions dictated by a prisoner's conviction and sentence"; here, those conditions were isolation.[153] The dissent argued that the majority had misconstrued *Sandin* and *Wilkinson* and that all that was required to establish a liberty interest was to show that the imposed conditions were atypical and significant.[154] Otherwise, the dissent argued, "prisoners have no interest in avoiding even extreme hardships so long as a state simply removes all delineating prison regulations or expressly disclaims any liberty expectation."[155] There was no discussion of Eighth Amendment limitations.

When prisoners have challenged the conditions of solitary confinement *simpliciter* as violating the Eighth Amendment's requirement that prisoners have access to life's basic necessities, they have generally been unsuccessful. Mostly this is because courts conceptualize life's basic necessities in stark material terms—i.e., food, shelter, and minimum access to hygiene.[156] A court considering a complaint alleging that a prison had denied access to water for thirty days, for example, would have no difficulty concluding that an Eighth Amendment claim was alleged; not so for a court considering a complaint alleging that a prison had denied access to human contact for thirty days. But if the plaintiff alleges facts beyond the basic conditions of solitary confinement, a court might find enough to state an Eighth Amendment claim.

A recent example is a case from the Third Circuit, *Allah v. Bartkowski*.[157] In *Allah*, the district court had dismissed the prisoner's Eighth Amendment claim, which contained allegations that "he was allowed a 10-minute shower every day and a 90-minute yard period every second or third day," but the

150 Prieto v. Clarke, 780 F.3d 245, 247 (4th Cir. 2015).

151 *Id.* at 250–51.

152 *See id.* at 252 ("That is, a court cannot conclude that death row inmates have a state-created interest in consideration for non-solitary confinement when the State's established written policy expressly precludes such consideration.").

153 *Id.* at 252–53.

154 *Id.* at 255 (Wynn, J., dissenting).

155 *Id.* at 257 (Wynn, J., dissenting).

156 *See* Reinert, *supra* note 16, at 1598.

157 574 F. App'x 135 (3d Cir. 2014) (per curiam).

remaining time "was confined to a small cell in a cell block that held mentally ill inmates who banged and kicked on the cell doors throughout the day," causing headaches and sleep deprivation.[158] Additionally, the plaintiff alleged that the other prisoners did not clean themselves, creating unsanitary conditions in which the cell block "smelled of urine and excrement, and was infested with pests."[159] The court of appeals found that the unsanitary conditions served "no 'legitimate penological objectiv[e]'" and that the allegations of sleep deprivation were sufficient to state an Eighth Amendment claim.[160] In the Tenth Circuit, by contrast, the court of appeals recently rejected a challenge brought by a prisoner who had served thirty years in solitary confinement in federal custody.[161] The court held that the plaintiff had not established any serious deprivation by virtue of being confined to solitary for such a long period of time, noting that even if a lack of social contact could give rise to an Eighth Amendment violation, the plaintiff had not shown a sufficiently serious deprivation of human contact.[162]

To be clear, the consequences of being denied access to water for thirty days are more serious than being denied access to human contact. The point is not that they are the same, but that, although both involve deprivations of a basic human need, courts have usually found it difficult to conceptualize them both as such. There are recent cases that suggest that this conceptual resistance is breaking down. But those examples are confined to extreme cases involving decades of solitary confinement.[163]

In sum, although the Eighth Amendment appears capacious enough to regulate the use of extreme isolation in our prisons and jails, it has not played such a role to date, except in a few cases in which prisoners have experienced decades of isolation. In the next Part, I explore different avenues that might change this trajectory.

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158 *Id.* at 138–39.

159 *Id.* at 138.

160 *Id.* at 139 (quoting Farmer v. Brennan, 511 U.S. 825, 833 (1994)); *see also* Parsons v. Ryan, No. CV-12-00601, 2014 WL 3887867, at *6 (D. Ariz. Aug. 7, 2014) (denying summary judgment regarding conditions of confinement in isolation units).

161 *See* Silverstein v. Fed. Bureau of Prisons, 559 F. App'x 739, 755–56 (10th Cir. 2014).

162 *Id.* at 755–56.

163 *See, e.g.*, Fussell v. Vannoy, 584 F. App'x 270, 271 (5th Cir. 2014) (per curiam) (holding that decades in lockdown could constitute deprivation of serious human need); Johnson v. Wetzel, 209 F. Supp. 3d 766, 777 (M.D. Pa. 2016) (discussing cases and finding that plaintiff was likely to succeed in claim that thirty-six years in solitary confinement resulted in deprivation of basic human needs); Shoatz v. Wetzel, No. 2:13-cv-0657, 2016 WL 595337, at *8 (W.D. Pa. Feb. 12, 2016) (denying summary judgment because a reasonable fact finder could find that the "cumulative effect" of more than twenty years in consecutive solitary confinement obviously results in serious deprivation of sleep, exercise, social contact, or environmental stimulation); Ashker v. Brown, No. C 09-5796, 2013 WL 1435148, at *5 (N.D. Cal. Apr. 9, 2013) (finding Eighth Amendment allegations sufficient where plaintiffs alleged harms caused by at least eleven years of "prolonged social isolation and lack of environmental stimuli").

III. A Way Forward for Judicial Regulation of Solitary Confinement

As the discussion to this point has established, solitary confinement is ubiquitous as a mode of prison discipline in the United States. Moreover, the Constitution has played almost no role in substantively limiting its use. Yet there is an increasing chorus of voices calling for greater regulation, both within and without the judiciary. In this Part, I seek to show how an argument could be structured, without substantial extension of Eighth Amendment doctrine, to invigorate judicial regulation of solitary confinement.

A. The Relevance of Sentencing Jurisprudence to Solitary Confinement Challenges

As described above, challenges to sentences that involve terms of years face steep hurdles. But courts have been more open to some challenges to sentences that involve particular modes of punishment. In cases involving capital sentences or life without parole, for example, the Court has more recently applied an "evolving standards of decency" standard to questions of proportionality of punishment.[164] This often requires the court to determine whether there is a "consensus" among States regarding the permissibility of certain punishment.[165] The Supreme Court's post-2000 Eighth Amendment cases are particularly instructive, because the Court's definition of "consensus" is quite flexible. For instance, in *Atkins v. Virginia*, the Court found that a consensus against executing the mentally handicapped had evolved between 1989, when two states specifically prohibited such executions, and 2002, when eighteen states had enacted similar prohibitions.[166] In *Roper v. Simmons*, the Court found a consensus against execution of juveniles had been established between 1989, when twenty-five states permitted the execution of juveniles, and 2005, when twenty states did.[167] As the Court recognized in *Roper*, the pace of change with respect to juveniles was less dramatic than that in *Atkins* but still "significant."[168]

In *Kennedy v. Louisiana*, the Court found evidence of a consensus against executions for child rape even though the momentum of change was swinging in the opposite direction: six states had introduced the death penalty as a punishment for child rape since 1995.[169] And perhaps most importantly, in *Graham v. Florida* the Court found evidence of a consensus against LWOP for juveniles convicted of nonhomicide crimes despite the fact that six jurisdictions did not allow LWOP for any juvenile offender, seven permitted it only for homicides, and thirty-seven states permitted it for some nonhomicide offenses.[170] In large part, the Court rested its conclusion in *Graham* on the relative infrequency of LWOP sentences for juveniles even in those states that

164 *See, e.g.*, Reinert, *Reconceptualizing the Eighth Amendment*, *supra* note 27, at 827.
165 *See* Lee, *The Constitutional Right Against Excessive Punishment*, *supra* note 82, at 689.
166 Atkins v. Virginia, 536 U.S. 304, 314–15 (2002).
167 Roper v. Simmons, 543 U.S. 551, 564–65 (2005).
168 *Id.* at 565.
169 Kennedy v. Louisiana, 554 U.S. 407, 423 (2008).
170 Graham v. Florida, 560 U.S. 48, 62 (2010).

formally permitted such a sentence.[171] Finally, in *Miller v. Alabama*, the Court found mandatory LWOP for juveniles unconstitutional on procedural grounds, despite the absence of a consensus against the punishment.[172] Table 1 summarizes these recent Supreme Court decisions in which an Eighth Amendment challenge was brought to a particular mode of punishment (rather than to a sentence of a term of years) according to evidence of "consensus" found by the Court.

TABLE 1. SUPREME COURT'S RECENT EIGHTH AMENDMENT PROPORTIONALITY DECISIONS

Case (Year)	**Punishment Subject to Challenge**	**Practice in States Indicating Consensus**	**Other Indicia of Consensus**
Atkins (2002)[173]	• Death penalty for mentally handicapped individuals	• Prohibited in 18 states (plus 12 states in which there is no DP) • Permitted in 20 States	• Lack of connection to deterrence and retribution • Pace of change in rate of rejection
Roper (2005)[174]	• Death penalty for people who commit crime when younger than 18	• Prohibited in 18 states (plus 12 states in which there is no DP) • Permitted in 20 States	• Lack of connection to deterrence and retribution • International opinion
Kennedy (2008)[175]	• Death penalty for people who commit child rape	• Prohibited in 44 states (plus federal) • Permitted in 6 states	• No consistent direction of change • Rarity of sentence for the offense • Court's own moral judgment
Graham (2010)[176]	• LWOP for juveniles convicted of nonhomicide crimes	• Prohibited in 13 jurisdictions (6 which did not allow LWOP for any juvenile offender, 7 which permitted it only for homicides) • Permitted for some nonhomicide offenses in 37 jurisdictions	• Rarity of sentence • Inadequacy of penological theory to justify sentence for juveniles • International practice and opinion
Miller (2012)[177]	• LWOP for juveniles convicted of homicide crimes	• Permitted in 29 jurisdictions • Prohibited in 22 jurisdictions	• Rarity of penalty • Inadequacy of penological theory to justify sentence for juveniles

171 *Id.* at 63–67.
172 Miller v. Alabama, 567 U.S. 460, 482, 489 (2012).
173 Atkins v. Virginia, 536 U.S. 304, 306, 314–15, 319 (2002).
174 Roper v. Simmons, 543 U.S. 551, 555–56, 564, 572, 575 (2005).
175 Kennedy v. Louisiana, 554 U.S. 407, 412, 423, 426, 431, 433, 435 (2008).
176 *Graham*, 560 U.S. at 52–53, 62, 71, 80.
177 *Miller*, 567 U.S. at 465, 472, 482.

Solitary confinement can properly be considered a "mode" of punishment distinct from sentences to a term of years in prison. And if one applied the Supreme Court's approach to "consensus" in the context of the use of solitary confinement, an argument emerges that there is clearly a consensus against the use of solitary confinement as punishment *for crimes.* Currently, only four states specifically authorize solitary confinement as a mode of punishment for violations of the criminal law.[178] Delaware permits a court to specify that a sentence include solitary confinement, but not for a period of time exceeding three months.[179] Washington permits a sentencing court to impose up to twenty days of solitary confinement as part of a criminal sentence.[180] South Carolina generally permits courts to impose a punishment of solitary confinement for felonies in limited circumstances.[181] Pennsylvania is unusual in including solitary confinement as a potential punishment for specific offenses without apparent limitation on time frame.[182] In addition to these states, Idaho, Pennsylvania, and Wyoming call for the use of solitary confinement for death row prisoners who are under death warrant, where execution has not been stayed.[183] Otherwise, however, solitary confinement is not available as a means of punishment for violations of criminal law in the vast majority of states;[184] as a consequence of the failed experiment with solitary confinement in the 1800s, states nearly unanimously

178 *See, e.g.*, State v. McHenry, 525 N.W.2d 620, 627 (Neb. 1995) (holding that sentence of four days per year in solitary confinement was unauthorized by law); State v. Snitzky, Nos. 74706, 74811, 1998 WL 827611, at *2 (Ohio Ct. App. Nov. 25, 1998) ("The punishment allowed by law in the case of a conviction for murder does not provide for any period of solitary confinement, therefore, the solitary confinement sentence was contrary to law.").

179 DEL. CODE ANN. tit. 11, § 3902 (2017).

180 WASH. REV. CODE ANN. § 10.64.060 (West 2017).

181 *See* S.C. CODE ANN. § 17-25-20 (2017).

182 18 PA. STAT. AND CONS. STAT. ANN. § 4904 (West 2017) (possession of burglary tools punishable by up to three years imprisonment or "separate or solitary confinement"); 25 PA. STAT. AND CONS. STAT. ANN. § 2096 (West 2017) (same for neglect of duty in care of ballot boxes); Commonwealth *ex rel.* Scasserra v. Keenan, 106 A.2d 842, 843 (Pa. Super. Ct. 1954) (conspiracy to cheat and defraud).

183 IDAHO CODE ANN. § 19-2705(3) (West 2017); 61 PA. STAT. AND CONS. STAT. ANN. § 4303 (West 2017); WYO. STAT. ANN. § 7-13-907 (2017) (solitary confinement for death-sentenced prisoners). In Idaho, where the prisoner's death warrant has been stayed, the warden is not required to impose solitary confinement, but may "house such person under conditions more restrictive [than maximum security confinement] if necessary to ensure public safety or the safe, secure and orderly operation of the facility." IDAHO CODE ANN. § 19-2705(11). South Dakota has amended its death penalty procedure to do away with the imposition of solitary confinement prior to execution. S.D. CODIFIED LAWS § 23A-27A-16 (2017).

184 *See, e.g.*, Fludd v. Goldberg, 854 N.Y.S.2d 362, 367 (App. Div. 2008) (holding that sentencing judge lacked authority to specify that sentence be served in solitary confinement). Indeed, as recently as 2015, Michigan repealed a provision of its penal code that permitted a sentencing court to specify that a prisoner be kept in solitary confinement. *See* 2015 Mich. Pub. Acts 25, No. 216 § 1(a) (repealing MICH. COMP. LAWS ANN. § 769.2 (West 2015)) (effective Mar. 14, 2016).

moved away from permitting that criminal sentences be executed through the use of solitary confinement. Thus, were one asking the question from the Eighth Amendment perspective of "evolving standards of decency," it is fair to say that there is a long-established consensus among the states that solitary confinement is inappropriate as a means of criminal punishment.

The question this raises is what a consensus against solitary confinement as punishment for violations of the criminal law means when solitary confinement is used as prison discipline. As compared with penal statutes, there is far greater variation in legislation related to the use of solitary confinement as a means of prison discipline. The vast majority of states make no specific reference to solitary confinement as a mode of discipline for convicted prisoners. Arkansas is one example, providing general authority to prison officials to "prescribe, with the approval of the Board of Corrections, rules and regulations for the maintenance of good order and discipline in the facilities and institutions of the Department of Correction or the Department of Community Correction, respectively, including proceedings for dealing with violations."[185] The Arkansas Board of Corrections, however, has authorized the use of punitive segregation as a disciplinary measure, but has not appeared to limit its use in any significant respect.[186] It is difficult to determine with certainty how many other states have authorized the use of solitary confinement via a similar administrative procedure. Delaware, for instance, makes no statutory reference to the use of solitary confinement.[187]

Despite the absence of explicit statutory authorization, state courts appear to assume that prison officials have the authority to impose solitary confinement as discipline. For instance, as early as 1923, Iowa courts recognized the power of a warden to enforce discipline by imposing solitary confinement, despite the absence of specific language authorizing such punishment.[188] Even now, no statutory reference to solitary confinement is made in Iowa law with respect to prison discipline.[189] Similarly, Illinois currently does not appear to place any statutory limit on the power of corrections officials to impose solitary confinement as a disciplinary measure.[190]

185 ARK. CODE ANN. § 12-29-103(a) (2017).

186 004-00-2 ARK. CODE R. § 839 (Lexis 2017).

187 DEL. CODE ANN. tit. 11, § 6535 (2017) (giving Department power to "promulgate rules and regulations for the maintenance of good order and discipline in the facilities and institutions of the Department, including procedures for dealing with violations").

188 State v. Cahill, 194 N.W. 191, 194 (Iowa 1923).

189 *See* IOWA CODE ANN. § 904.505 (West 2017).

190 *See* 730 ILL. COMP. STAT. ANN. 5/3-8-7 (West 2017). Prior versions of this statute provided:

> No person in the Adult Division may be placed in solitary confinement for disciplinary reasons for more than 15 consecutive days or more than 30 days out of any 45 day period except in cases of violence or attempted violence committed against another person or property when an additional period of isolation for disciplinary reasons is approved by the chief administrative officer.

1996 Ill. Legis. Serv. 89-688 (West) (amending Section 3-8-7(b)(3)). Currently the only limitation prohibits the use of corporal punishment or "disciplinary restrictions on diet,

A minority of states explicitly address solitary confinement by statute. Two states—Louisiana and Wisconsin—explicitly permit the use of solitary confinement as prison discipline, without limiting the length of confinement.[191] Three states—Massachusetts, South Dakota, and Tennessee—permit the use of solitary but impose time limits ranging up to thirty days per offense.[192] Maine recently radically revised its solitary confinement policy. Maine now requires that all sentences of segregation be approved by the chief administrative officers of the prison and that medical staff shall visit every twenty-four hours any prisoner sentenced to more than a day in segregation.[193] Any sentence exceeding five days will result in the commissioner of corrections receiving notice and the reasons for the confinement.[194] Even more restrictive than Maine, Nebraska specifically provides that "[n]o person shall be placed in solitary confinement."[195] Similarly, in 2014 South Dakota repealed its law that had permitted, to a limited degree, the use of solitary confinement as discipline in prisons.[196] And in Colorado, the executive director of the state's prison system has announced an end to solitary confinement that extends beyond fifteen consecutive days.[197]

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medical or sanitary facilities, [and] mail or access to legal materials." 730 ILL. COMP. STAT. ANN. 5/3-8-7(b)(1).

191 Louisiana, for instance, has abolished the use of solitary confinement as criminal punishment but explicitly authorizes it for "enforcing obedience to the police regulations of the penitentiary." LA. STAT. ANN. § 15:865 (2017). Wisconsin also permits the use of solitary confinement for violation of prison rules, but specifies that the prisoner be "under the care and advice of [a] physician." WIS. STAT. ANN. § 302.10 (West 2017).

192 In Massachusetts, solitary may be imposed for no more than fifteen days per offense. MASS. GEN. LAWS ANN. ch. 127, § 40 (West 2017). Moreover, the fifteen-day limit is assumed to apply to multiple violations arising out of a single course of conduct. Buchanan v. Superintendent of Mass. Corr. Inst., 402 N.E.2d 1082, 1083 (Mass. App. Ct. 1980) ("Were the correction institutions of the Commonwealth to tack the redundant charges of conduct which disrupts or interferes with the institution and violation of the rules of the institution to any of a variety of infractions of the Code of Offenses . . . the policy of sparing use of isolation enunciated in § 40 would be much eroded. Such a practice would have a fault analogous to the imposition of cumulative sentences for conviction of multiple offenses where the lesser offense arises out of facts identical with those which supported conviction of the greater offense." (footnote omitted)). South Dakota once limited the use of solitary confinement as discipline, prohibiting prisons from imposing solitary confinement for refusal to labor to no more than ten days for any one offense, and no more than ninety days in all. S.D. CODIFIED LAWS § 24-11-34 (2014). It is not clear that there is any limitation on its use for other disciplinary reasons. Tennessee permits its county "workhouses" and municipal correctional institutions to use solitary confinement as discipline without any specific limitation. TENN. CODE ANN. § 41-2-120(a) (2017); *id.* § 41-3-102(a). By contrast, prisoners may be punished by solitary confinement for no more than thirty days per offense. *Id.* § 41-21-402(a).

193 *See* ME. REV. STAT. ANN. tit. 34-A, § 3032(3) (2017).

194 *See id.* § 3032(3)(E).

195 NEB. REV. STAT. ANN. § 83-4,114(3) (West 2017).

196 2014 S.D. Sess. Laws ch. 118 (repealing S.D. Codified Laws § 24-11-34).

197 *See* Raemisch, *supra* note 13.

Relatedly, some states have explicitly limited the use of solitary confinement as discipline for prisoners and other detainees held in county jails. Currently, Iowa, Michigan, Minnesota, and Wisconsin limit the use of solitary confinement in jails to ten days for any one offense.[198] By contrast, New Jersey authorizes county jails to impose solitary confinement as discipline, without any explicit limitation on duration.[199]

One can imagine multiple ways in which the general practice in the states could be of relevance to Eighth Amendment arguments to regulate the use of extreme isolation. At its most extreme, one could argue that solitary confinement is simply inconsistent with evolving standards of decency. After all, if legislatures have abandoned use of solitary confinement as punishment for criminal violations because of the severity of the punishment, one could argue that prison officials are even less empowered to use solitary confinement as punishment. This argument can only go so far, however, given that the use of solitary has been implicitly if not explicitly tolerated as a necessary ingredient to prison discipline.[200]

One could still argue in favor of a proportionality principle, based on the practice in the states, without going so far as to advocate for the abolition of solitary confinement. As detailed above, to the extent that states have explicitly addressed solitary confinement as a disciplinary measure in prisons and jails, most states have imposed time limits that are in the nature of days and weeks rather than months and years. Five states limit the use of solitary confinement as discipline in prisons to sentences ranging from five days to thirty days, with an additional four states limiting the use of solitary confinement in jails to no more than ten days. By contrast, two states appear to permit prisoners to be sentenced to solitary for any length of time whatsoever. The direction of change, as in *Atkins* and *Roper*,[201] is towards greater limits on the use of solitary for discipline. One could argue that this reflects a trend toward a bounded proportionality principle that limits the use of solitary confinement to sentences that last no more than thirty days. The end point would be a limitation on the use of solitary confinement for more than a certain period of time, rather than an absolute ban on the imposition of extreme isolation. Such an approach is buttressed when one looks to international human rights norms, as the Court has in other sentencing contexts.

198 IOWA CODE ANN. § 356.14 (West 2017); MICH. COMP. LAWS ANN. § 801.25 (West 2017); MINN. STAT. ANN. § 641.09 (West 2017) (no more than ninety days total); WIS. STAT. ANN. § 302.40 (West 2017).

199 *See* N.J. STAT. ANN. § 30:8-23 (West 2017).

200 *See, e.g.*, Wilkinson v. Austin, 545 U.S. 209, 229 (2005) ("Prolonged confinement in Supermax may be the State's only option for the control of some inmates . . . .").

201 Roper v. Simmons, 543 U.S. 551, 564–65 (2005); Atkins v. Virginia, 536 U.S. 304, 314–15 (2002).

B. The Role of International Law in Eighth Amendment Regulation of Solitary Confinement

As the Supreme Court's cases on sentencing proportionality illustrate, international opinion also plays a role in the evaluation of particular modes of punishment.[202] Indeed, international and foreign law has always been relevant in Eighth Amendment jurisprudence, dating back to the nineteenth century.[203] A consideration of both foreign law and international norms in the context of solitary confinement suggests that the use of extreme isolation for more than fifteen continuous days is inconsistent with domestic law in other countries and numerous human rights instruments.

The use of solitary confinement as part of a prison sentence had largely been abandoned worldwide by the turn of the twentieth century, principally because of observations regarding the psychological effects of solitary confinement.[204] There were exceptions, including among countries that are associated with progressive prison policies. Sweden, Belgium, Holland, Denmark, and Norway used solitary confinement for sentenced prisoners until the mid-twentieth century.[205] In the United Kingdom, the use of solitary confinement as part of a prisoners' sentence gradually declined from eighteen months in 1842 to nine months in 1921; by 1939 "this use of isolation was entirely abandoned in England."[206] In the 1960s, Great Britain reintroduced solitary confinement, but reforms have dramatically reduced its use.[207]

Solitary confinement has not abated entirely and its use as a disciplinary measure has yet to be abolished in any country. Over time, international and regional bodies charged with enforcing multinational human rights norms have developed standards for reviewing the use of solitary confinement as criminal punishment and as prison discipline. For the most part, the cases have emerged from complaints by prisoners and detainees that isolation constitutes cruel, inhuman, or degrading treatment, a prohibition common to multinational human rights agreements.[208] Courts and other enforcement

202 *See, e.g.*, Graham v. Florida, 560 U.S. 48, 80 (2010); *Roper*, 543 U.S. at 575–78.

203 *See* Trop v. Dulles, 356 U.S. 86, 102 (1958) (plurality opinion). *See generally* Gordon A. Christenson, *Using Human Rights Law to Inform Due Process and Equal Protection Analyses*, 52 U. CIN. L. REV. 3 (1983); Youngjae Lee, *International Consensus as Persuasive Authority in the Eighth Amendment*, 156 U. PA. L. REV. 63 (2007).

204 *See* Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 CRIME & JUST. 441, 465–69 (2006) (describing experience in the United States, France, and Germany and concluding that, with the exception of Holland, Belgium, Sweden, Norway, and Denmark "[f]rom the 1860s onward, the use of solitary confinement declined gradually in the Western world").

205 *See id.* at 467–68.

206 *Id.* at 468–69.

207 *See* Knowles, *supra* note 29, at 895–96 & n.17 (reporting that approximately 500 people are confined in isolation for periods of time that usually do not exceed twenty-one days)

208 *See* G.A. Res. 217 (III) A, Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), at art. 5 (Dec. 10, 1948); Inter-American Convention to Prevent and Punish Torture art. 7, Dec. 9, 1985, O.A.S.T.S. No. 67; Convention Against

bodies vary in their interpretations of the prohibition on cruel, inhuman, and degrading treatment, but as a general matter most international and regional bodies have evaluated both the psychological and physical effects of a particular treatment to determine whether it is prohibited.[209]

When hearing challenges or complaints based on the use of solitary confinement, courts and other enforcement bodies have focused on the duration of the confinement, particulars such as lighting, cell size, and opportunity for recreation, and the procedural protections afforded to prisoners or detainees. None of the international bodies that have reviewed complaints about solitary have adopted bright line rules, but as explored in greater detail below, many have stated a goal of abolishing solitary and ensuring that its use will be limited and proportional while at the same time affirming its use in some specific circumstances even for prolonged periods of time.

1. Review of Solitary Confinement in the United Nations

The United Nations' Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has stated that "prolonged isolation of detainees may amount to cruel, inhuman or degrading treatment or punishment and, in certain instances, may amount to torture."[210] In August 2011, the U.N. Special Rapporteur defined prolonged solitary con-

Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 16, Dec. 10, 1984, 1465 U.N.T.S. 85; African Charter on Human and Peoples' Rights art. 5, June 27, 1981, 1520 U.N.T.S. 217; American Convention on Human Rights art. 5, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123; International Covenant on Civil and Political Rights art. 7, Dec. 19, 1966, 999 U.N.T.S. 171; Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Nov. 4, 1950, 213 U.N.T.S. 221; *see also* American Declaration of the Rights and Duties of Man arts. XXV, XXVI, Apr. 30, 1948, O.A.S. Res. XXX (requiring "humane treatment" of prisoners and prohibiting "cruel, infamous or unusual punishment"). It is worth noting that the United States has routinely attached a reservation upon ratification of these agreements stating that "cruel, inhuman or degrading" treatment is no broader than that treatment proscribed by the Fifth, Eighth, and Fourteenth Amendments. *See* Nan D. Miller, Comment, *International Protection of the Rights of Prisoners: Is Solitary Confinement in the United States a Violation of International Standards?*, 26 CAL. W. INT'L. L.J. 139, 143–47 (1995) (describing reservations made by United States when it ratified the ICCPR and CAT). Note, however, that the United States' reservations cannot defeat the object and purpose of the treaties that the United States has ratified. *See* Vienna Convention on the Law of Treaties art. 19, May 23, 1969, 1155 U.N.T.S. 331. The United States has not ratified the American Convention on Human Rights or the Inter-American Convention to Prevent and Punish Torture.

209 For a discussion of the development of the "totality of the circumstances" test in the European Court of Human Rights, see Renee E. Boxman, Comment, *The Road to* Soering *and Beyond: Will the United States Recognize the "Death Row Phenomenon?"*, 14 HOUS. J. INT'L L. 151, 153–64 (1991). The United Nations' Human Rights Committee, charged with evaluating complaints brought under the ICCPR, has adopted a similar approach. *See* Miller, *supra* note 208, at 152–54.

210 Manfred Nowak (Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), ¶ 77, U.N. Doc. A/63/175 (July 28, 2008).

finement as "any period of solitary confinement in excess of 15 days," because "according to the literature surveyed, some of the harmful psychological effects of isolation can become irreversible" at that point.[211] The Special Rapporteur concluded that the use of solitary confinement constitutes torture and other cruel, inhuman, or degrading treatment, depending on the circumstances. He drew attention to several situations that are especially problematic as a matter of international law: (1) punitive solitary confinement, whether as criminal punishment or for breaches of prison rules;[212] (2) pretrial solitary confinement as an intentional technique to aid interrogation or confessions;[213] and (3) indefinite solitary confinement.[214] The Special Rapporteur also concluded that the use of solitary confinement for juveniles and persons with mental disabilities, for any duration, is cruel, inhuman, or degrading treatment.[215] He further explained that one of the principles that must guide a prison regime is that period of confinement "must be proportional to the severity of the criminal or disciplinary infraction for which solitary confinement is imposed."[216]

In addition, the Special Rapporteur has concluded that "the use of solitary confinement should be kept to a minimum, used in very exceptional cases, for as short a time as possible, and only as a last resort."[217] The Special Rapporteur also has endorsed the conclusions of the Istanbul Statement on the Use and Effects of Solitary Confinement.[218] The Istanbul Statement, adopted in 2007, concluded that "[a]s a general principle solitary confinement should only be used in very exceptional cases, for as short a time as possible and only as a last resort."[219]

Bodies of the United Nations have also reviewed specific allegations of cruel and inhuman treatment related to solitary confinement. In 1997, for instance, the U.N.'s Human Rights Committee reviewed a complaint that raised issues related to the limits of solitary confinement.[220] The prisoner, the leader of the "Revolutionary Movement Tupac Amaru," was held for nine

211 Juan E. Méndez, (Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), ¶¶ 26, 79, U.N. Doc. A/66/268 (Aug. 5, 2011).

212 *Id.* ¶ 72.

213 *Id.* ¶ 73.

214 *Id.* ¶ 75.

215 *See id.* ¶¶ 77–78.

216 *Id.* ¶ 90.

217 Nowak, *supra* note 210, ¶ 83; *see also* Méndez, *supra* note 211, ¶ 89 ("[S]olitary confinement should be used only in very exceptional circumstances, as a last resort, for as short a time as possible. He emphasizes that when solitary confinement is used in exceptional circumstances, minimum procedural safeguards must be followed.").

218 Nowak, *supra* note 210, ¶ 85 ("The Special Rapporteur draws the attention of the General Assembly to the Istanbul Statement . . . and strongly encourages States to reflect upon the Statement as a useful tool in efforts to promote the respect and protection of the rights of detainees." (citation omitted)).

219 *See id.*, Annex, The Istanbul Statement on the Use and Effects of Solitary Confinement, at 25.

220 *See* Human Rights Committee, Polay Campos v. Peru, Commc'n No. 577/1994, ¶ 2.1, U.N. Doc. CCPR/C/61/D/577/1994 (Jan. 9, 1998), https://web.archive.org/web/

months in isolation for twenty-three and a half hours a day, in a cell measuring six by six feet, without electricity or water and in subfreezing temperatures (conditions that generally are more extreme than those found in the United States).[221] The Committee determined that "these conditions amounted to a violation of article 10, paragraph 1, of the [ICCPR]."[222] The Human Rights Committee also found a similar violation for detention under "inhuman prison conditions," which included the arbitrary use of solitary confinement for up to thirty days.[223]

The United Nations Committee Against Torture (CAT) has also expressed concern regarding long-term solitary confinement.[224] In 1997, the CAT recommended that solitary confinement be abolished "other than in exceptional cases."[225] The CAT has worked closely with numerous countries to create less objectionable systems of solitary confinement. By 2000, it noted that Denmark had proposed rules limiting the use of solitary confinement that were stricter than the Committee's own proposals.[226] In the same year, the CAT noted that Luxembourg committed to taking action "to ensure that the period of solitary confinement for disciplinary reasons does not exceed one month."[227] Reviewing the use of solitary confinement in Norway,

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20110408121932/http://www.humanrights.is/the-human-rights-project/humanrightscases andmaterials/cases/internationalcases/humanrightscommittee/nr/328.

221 *Id.*

222 *Id.* ¶ 8.4.

223 Human Rights Committee, Estrella v. Uruguay, Commc'n No. 74/1980, U.N. GAOR, 18th Sess., ¶¶ 8.5, 10, U.N. Doc. Supp. No. (Mar. 29, 1983), http://www1.umn.edu/humanrts/undocs/session38/74-1980.htm.

224 U.N. Comm. Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Switzerland, ¶ 133, U.N. Doc. CAT/A/49/44 (Apr. 20, 1994), http://www1.umn.edu/humanrts/cat/catSwitzerland94.htm.

225 U.N. Comm. Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Sweden, ¶ 225, U.N. Doc. CAT/A/52/44 (Sept. 10, 1997), http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N97/235/57/IMG/N9723557.pdf?OpenElement.

226 U.N. Comm. Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Denmark, ¶ 119, U.N. Doc. CAT/C/55/Add.2 (Aug. 4, 2000), http://www1.umn.edu/humanrts/cat/denmark2000.html. Denmark imposed the following time limits on the use of solitary confinement: where offenses entail imprisonment for less than four years, no more than four weeks of solitary may be imposed; for offenses that involve imprisonment between four and six years, no more than eight weeks of solitary may be imposed; for a sentence of six years or more, up to three months' solitary confinement may be imposed. *Id.* ¶ 120 ("This limit may only be exceeded in rare, exceptional cases if the court finds that essential considerations of clearing-up of the case render continued solitary confinement necessary despite the time in which the detainee has been held in solitary confinement until then."). Moreover, Denmark provided compensation for pretrial detainees held in solitary: for every three days of solitary, a detainee will have his sentence reduced by one day. *Id.* ¶ 122.

227 U.N. Comm. Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Luxembourg, ¶ 96, U.N. Doc. CAT/C/34/Add.14 (Oct. 30, 2000), http://www1.umn.edu/humanrts/cat/luxembourg2001.html. In 2002, the CAT still expressed concern about the use of solitary confinement in Luxembourg,

the CAT emphasized that "solitary confinement and other restrictive measures may only be used when they are not considered to be disproportionate."[228] The CAT has even taken a position on the use of isolation in "supermaximum" prisons in the United States, finding that the "extremely harsh regime" could "constitute cruel, inhuman or degrading treatment or punishment."[229]

2. Solitary Confinement in the European Court of Human Rights

The European Court of Human Rights (ECHR), charged with passing judgment regarding alleged violations of the European Convention on Human Rights, has acknowledged that "complete sensory isolation, coupled with total social isolation can destroy the personality and constitutes a form of inhuman treatment which cannot be justified by the requirements of security or any other reason."[230] The ECHR's application of this standard would appear, however, to contemplate extensive use of solitary confinement so long as it did not amount to total social isolation.[231] In one complaint brought against France, for example, the prisoner had been held in isolation for just over eight years.[232] He was permitted to leave his cell for two hours each day to walk "in a triangular area that was 15 [meters] long and 7.5 [meters] wide at the base, receding to 1 [meter] at the vertex."[233] The court did not find a violation of Article 3 of the European Convention on Human Rights, noting that Mr. Ramirez Sanchez had not been held in "complete sensory isolation or total social isolation."[234]

The Court contrasted the conditions faced by Mr. Ramirez Sanchez with other conditions in which a violation of Article 3 had been found. In *Messina*

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most notably that the punishment "is applied only in severe circumstances, with a view to its abolition, particularly during pre-trial detention." U.N. Comm. Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Luxembourg, ¶ 6(b), U.N. Doc. CAT/C/CR/28/2 (June 12, 2002).

228 U.N. Comm. Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Norway, ¶ 81, U.N. Doc. CAT/C/55/Add.4 (Sept. 15, 2000), http://www1.umn.edu/humanrts/cat/norway2000.html. The CAT expressed this concern even though more than half of prisoners were subjected to these restrictions for fewer than fifteen days and ninety-seven percent were subject to the restrictions for fewer than ninety days. *Id.* ¶ 91.

229 U.N. Comm. Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: United States of America, ¶ 36, U.N. Doc. CAT/C/USA/CO/2, (May 18, 2006), https://www.state.gov/documents/organization/133838.pdf.

230 Ramirez Sanchez v. France, 2006-IX Eur. Ct. H.R. 171, 218.

231 Öcalan v. Turkey, 2005-IV Eur. Ct. H.R. 191 ("[T]he prohibition of contact with other prisoners for security, disciplinary or protective reasons does not in itself amount to inhuman treatment or punishment."). It should be noted that conditions in the United States do not usually amount to total social isolation—those held in solitary will usually be able to receive visitors, even if they are prohibited from having contact with them.

232 *Ramirez Sanchez*, 2006-IX Eur. Ct. H.R. at 179.

233 *Id.*

234 *Id.* at 221.

v. Italy (No. 2)[235] and *Argenti v. Italy*,[236] the applicants had been in solitary confinement for four and a half years and twelve years respectively, could not communicate with third parties, received visits behind a glass screen (with a maximum of a single one-hour visit a month), and could not spend more than two hours outdoors. And in *Mathew v. The Netherlands*,[237] the applicant "had been detained in conditions similar to solitary confinement for more than two years in a cell on the last (second) floor of the prison," where a hole in the ceiling permitted rain to enter and where the applicant was "frequently prevented from going to the exercise yard or even outside."[238] The court found Ramirez Sanchez's conditions "closer to those it examined" in connection with the application in *Rohde v. Denmark*,[239] in which there was no violation of Article 3 where the prisoner was held in solitary confinement for almost a year, with access to television and newspapers, language lessons, and weekly visits from attorneys and members of his family.[240] The court ultimately concluded that there was no violation of Article 3, "having regard to the physical conditions of the applicant's detention, the fact that his isolation is 'relative,' the authorities' willingness to hold him under the ordinary regime, his character and the danger he poses."[241]

Nonetheless, the court emphasized that "to avoid any risk of arbitrariness, substantive reasons must be given when a protracted period of solitary confinement is extended."[242] Moreover, Mr. Ramirez Sanchez was entitled to "have an independent judicial authority review the merits of and reasons for a prolonged measure of solitary confinement."[243] These procedures were necessary to determine whether the solitary confinement was justified, proportionate, and accompanied by measures to safeguard the physical and mental health of the detainee.[244]

3. Solitary Confinement as Adjudicated by Other Regional Bodies

The Council of Europe's European Committee for the Prevention of Torture (CPT) has stated that "[s]olitary confinement can, in certain circumstances, amount to inhuman and degrading treatment; in any event, all forms

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235 2000-X Eur. Ct. H.R. 57.

236 HUDOC ¶ 18 (Nov. 10, 2005), https://hudoc.echr.coe.int/eng#{"itemid":["001-70979"]}.

237 *Ramirez Sanchez*, 2006-IX Eur. Ct. H.R. at 219 (discussing the prisoner's circumstances in *Mathew v. The Netherlands*, 2005-IX Eur. Ct. H.R. 57, 65).

238 *Id.*

239 Rohde v. Denmark, HUDOC (July 21, 2005), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-69794.

240 *Ramirez Sanchez*, 2006-IX Eur. Ct. H.R. at 220–21 (citing *Rohde*, HUDOC ¶ 97).

241 *Id.* at 223–24.

242 *Id.* at 221–22 ("The statement of reasons will need to be increasingly detailed and compelling the more time goes by.").

243 *Id.* at 222.

244 *Id.* at 222–23.

of solitary confinement should be as short as possible."[245] In a report on a 2007 visit to Spain, the CPT observed that sentencing prisoners to isolation for up to twelve days or more for "insulting" officers appeared "disproportionate."[246] Upon a visit to Turkey, the CPT observed that isolation for several months in dark cells with no natural light and no access to out-of-cell activity "could. . . be considered" inhuman and degrading.[247]

Outside of Europe, the problem of solitary confinement has received somewhat less attention from regional bodies. According to the Inter-American Court of Human Rights, "prolonged isolation and coercive solitary confinement are, in themselves, cruel and inhuman treatments, damaging to the person's psychic and moral integrity and the right to respect of the dignity inherent to the human person."[248] And the African Commission on Human and Peoples' Rights found that solitary confinement for ten months in a six-square-meter cell with continuous light and intermittent access to bathroom facilities constitutes inhuman and degrading treatment but not torture.[249] These conditions are admittedly more extreme than most people experience in the United States.

* * *

As the discussion above illustrates, the extent to which solitary confinement has been found to constitute cruel, inhuman, or degrading treatment depends in large part on the duration, intensity, and harm imposed by isola-

245 Council of Eur., European Comm. for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *2nd General Report on the CPT's Activities Covering the Period 1 January to 31 December 1991*, ¶ 56 (Apr. 13, 1992). In its 1996 assessment of Spanish prisons, the CPT found that "a regime of isolation . . . with little or nothing by way of activity . . . constitutes inhuman treatment." Council of Eur., European Comm. for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *Report to the Spanish Government on the Visit to Spain*, ¶ 113 (Mar. 5, 1996).

246 Council of Eur., European Comm. for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *Report to the Spanish Government on the Visit to Spain*, ¶ 110 (Mar. 25, 2011).

247 Council of Eur., European Comm. for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *Report to the Turkish Government on the Visit to Turkey*, ¶ 135 (Mar. 31, 2011).

248 Miguel Castro-Castro Prison v. Peru, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 160, ¶ 323 (Nov. 25, 2006); *see also* Castillo Petruzzi v. Peru, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 52, ¶ 198 (May 30, 1999); Loayza Tamayo v. Peru, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 33, ¶¶ 29, 57–58 (Sept. 17, 1997) (finding that prisoner who was subjected to solitary confinement with only half an hour of recreation per day experienced cruel and inhuman treatment in violation of Article 5 of the American Convention); Velasquez-Rodriguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 156 (July 29, 1988) (finding that "prolonged isolation and deprivation of communication are in themselves cruel and inhuman treatment").

249 Ouko v. Kenya, Communication 232/99, African Comm'n on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶¶ 23, 26 (Nov. 6, 2000), http://www.achpr.org/files/sessions/28th/comunications/232.99/achpr28_232_99_eng.pdf.

tion. To the extent that international standards should inform Eighth Amendment jurisprudence (as they have since the 1800s), one could advance several arguments that relate to the use of solitary confinement. First, there is uniform agreement that solitary confinement should be both proportional and as short as possible. Second, where long-term isolation has been permitted, it has been in situations where procedural safeguards are in place, medical and mental health care is provided, and where sensory stimulation is limited but not eliminated. Finally, there is also a general consensus that to the extent possible, solitary confinement should be abolished as a punishment.

C. Solitary Confinement as a Dignitary Assault

The case for regulation of the use of solitary becomes stronger when one considers the central role that dignity has played in Eighth Amendment jurisprudence, from *Weems* until now. Dignitary concerns inform the law on sentencing jurisprudence as well as the law on conditions of confinement.[250] Focusing on solitary's impact on human dignity, therefore, also could offer additional reasons to question the judicial reluctance to regulate the use of extreme isolation.

Anecdotally, people in prison and others have recounted the extent to which extreme isolation can be dehumanizing. As one person wrote after experiencing extreme isolation in the custody of the Federal BOP:

> It seems endless. Each morning I look at the same gray door and hear the same rumbles followed by long silences. It is endless. . . .
>
> I see forced feedings, cell extractions . . . . Airborne bags of shit and gobs of spit become the response of the caged.
>
> The minds of some prisoners are collapsing in on them. . . . One prisoner subjected to four-point restraints (chains, actually) as shock therapy had been chewing on his own flesh. . . .

250 *See* Roper v. Simmons, 543 U.S. 551, 578 (2005); Hope v. Pelzer, 536 U.S. 730, 738 (2002) (finding that handcuffing a prisoner to a hitching post in the sun for seven hours violated the Eighth Amendment's fundamental principles, which require respecting "nothing less than the dignity of man" (quoting Trop v. Dulles, 356 U.S. 86, 100 (1958) (plurality opinion)) (internal quotation marks omitted)); Ford v. Wainwright, 477 U.S. 399, 409–10 (1986) (plurality opinion) (prohibiting the execution of mentally ill persons and explaining that the Eighth Amendment "protect[s] the dignity of society itself from the barbarity of exacting mindless vengeance"); Gregg v. Georgia, 428 U.S. 153, 158, 173, 207 (1976) (plurality opinion) (upholding the death penalty of an individual convicted of murder but noting that the Eighth Amendment requires penalties to "accord with 'the dignity of man'" (quoting *Trop*, 356 U.S. at 100)); *see also* Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 222–27 (2011) (summarizing role of dignity in Eighth Amendment cases); Susan Raeker-Jordan, *Kennedy,* Kennedy, *and the Eighth Amendment: "Still in Search of a Unifying Principle"?*, 73 U. PITT. L. REV. 107, 149–59 (2011) (discussing role of dignity in Justice Kennedy's Eighth Amendment jurisprudence).

> Every seam and crack is sealed so that not a solitary weed will penetrate this desolation. . . . When they're done with us, we become someone else's problem.[251]

And after the executive director of Colorado's Department of Corrections voluntarily spent only twenty hours in solitary confinement to learn more about how prisoners experienced those conditions, he wrote:

> First thing you notice is that it's anything but quiet. You're immersed in a drone of garbled noise—other inmates' blaring TVs, distant conversations, shouted arguments. I couldn't make sense of any of it, and was left feeling twitchy and paranoid. I kept waiting for the lights to turn off, to signal the end of the day. But the lights did not shut off. I began to count the small holes carved in the walls. Tiny grooves made by inmates who'd chipped away at the cell as the cell chipped away at them. . . .
>
> I felt as if I'd been there for days. I sat with my mind. How long would it take before Ad Seg chipped that away? I don't know, but I'm confident that it would be a battle I would lose.[252]

The evidence is not only found in anecdotes, however. Mental health professionals who have studied the impact of solitary for decades have concluded that the "long-term absence of meaningful human contact and social interaction, the enforced idleness and inactivity, and the oppressive security and surveillance procedures, and the accompanying hardware and other paraphernalia that are brought or built into these units combine to create harsh, dehumanizing, and deprived conditions of confinement."[253] An early study of the impact of solitary confinement noted that it resulted in "deep emotional disturbances,"[254] and many studies have documented an increase in self-mutilation and self-harm among people held in solitary.[255]

Most critically, social interaction is central to maintain a sense of self. Solitary confinement is destabilizing, striking at the core of a person's identity. As experts in the area have concluded, the outcome of long-term isolation can result in "social death," leaving persons subjected to the practice not only emotionally scarred and harmed, but also unable to function effectively in social contexts moving forward.[256]

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251 Raymond Luc Levasseur, *Trouble Coming Every Day: ADX—The First Year 1996*, *in* THE NEW ABOLITIONISTS: (NEO)SLAVE NARRATIVES AND CONTEMPORARY PRISON WRITINGS 45, 47–48 (Joy James ed., 2005).

252 Rick Raemisch, Opinion, *My Night in Solitary*, N.Y. TIMES (Feb. 20, 2014), https://www.nytimes.com/2014/02/21/opinion/my-night-in-solitary.html. For more firsthand narratives of the impact of solitary confinement, see N.Y. CIVIL LIBERTIES UNION, BOXED IN: THE TRUE COST OF EXTREME ISOLATION IN NEW YORK'S PRISONS 27–43 (2012), https://www.nyclu.org/sites/default/files/publications/nyclu_boxedin_FINAL.pdf.

253 Haney Expert Report, *supra* note 1, at 14.

254 *See* Cormier & Williams, *supra* note 4, at 484.

255 *See* Haney Expert Report, *supra* note 1, at 15–20 (summarizing research).

256 *See* United States v. D.W., 198 F. Supp. 3d 18, 94 (E.D.N.Y. 2016) (quoting Gupta, *supra* note 5); GUENTHER, *supra* note 5, at xx–xxiv. Recent theory and research now indicate that "touch is a primary platform for the development of secure attachments and

This anecdotal and empirical data suggest that solitary confinement is a special kind of punishment—it is "one of the most severe forms of punishment that can be inflicted on human beings short of killing them."[257] Though not as extreme as a punishment of death, it is nonetheless "different"—in some people its use will be permanently disabling.[258] As one expert concluded, "There is not a single study of solitary confinement wherein nonvoluntary confinement that lasted for longer than 10 days failed to result in negative psychological effects."[259] Health effects can occur after only a few days of solitary confinement and they increase for each additional day in solitary.[260]

At the same time, there is no evidence that use of solitary confinement achieves traditional utilitarian goals of punishment such as deterrence or rehabilitation.[261] Although one might assume extreme isolation has an impact through incapacitating the most violent people in prisons and jails, the evidence is scant: levels of violence are not correlated with the frequency of use of solitary confinement.[262]

Solitary confinement is a practice, therefore, that uniquely harms people in prisons and jails while producing little if any correlative benefit. It thus fits squarely into other punishment practices condemned by the Eighth Amendment because it causes unnecessary pain for no legitimate penological purpose.[263] This evidence, combined with the history of its disuse as a mode of criminal punishment and its conflict with international human rights norms, provides ample ground upon which to conclude that the Eighth Amendment is a fertile source to regulate the use of extreme isolation.

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cooperative relationships," is "intimately involved in patterns of caregiving," is a "powerful means by which individuals reduce the suffering of others," and also "promotes cooperation and reciprocal altruism." Goetz et al., *supra* note 5, at 360.

257 Gilligan & Lee, *supra* note 6.

258 *See* Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J.L. & POL'Y 325, 336 (2006) (noting loss of impulse control and self-harm); Craig Haney, *Mental Health Issues in Long-Term Solitary and "Supermax" Confinement*, 49 CRIME & DELINQ. 124, 130–31 (2003) (noting the association of suicide and self-mutilation with isolated housing); Scharff Smith, *supra* note 204, at 492 (noting problems with impulse control, violent reactions, self-mutilation, and suicide associated with prolonged isolated confinement).

259 Haney & Lynch, *supra* note 34, at 531.

260 Scharff Smith, *supra* note 204, at 471, 487, 494–95, 503–04.

261 *See* Wilkinson v. Austin, 545 U.S. 209, 227 (2005); Ryan M. Labrecque, The Effect of Solitary Confinement on Institutional Misconduct: A Longitudinal Evaluation 117–18 (Aug. 2015) (dissertation) (on file with author) (reporting results of longitudinal study of solitary confinement in Ohio).

262 *See, e.g.*, ALISON SHAMES ET AL., SOLITARY CONFINEMENT: COMMON MISCONCEPTIONS AND EMERGING SAFE ALTERNATIVES 17–18 (2015) (collecting data).

263 Rhodes v. Chapman, 452 U.S. 337, 345–46 (1981); *see also* Estelle v. Gamble, 429 U.S. 97, 103 (1976).

IV. Overcoming Judicial Reluctance to Regulate Extreme Isolation

Although, as the prior Part establishes, a judicial revision of solitary confinement can be supported by established Eighth Amendment jurisprudence, it nonetheless is necessary to grapple with what theoretical models stand behind the doctrine as well. Many jurisdictions have increasingly relied upon solitary confinement as a means of controlling people in prisons and jails, with little oversight by any judicial system. If one could summarize the reason that judges have hesitated to use available tools to regulate the use of extreme isolation, it would reduce to one word: deference. The purpose of this Part is to interrogate the modes of deference that operate when courts are confronted with challenges to solitary confinement.

Political and social attitudes of deference are grounded in a dichotomy in decisionmaking, in which nonelites voluntarily accept leadership by an elite subset.[264] Judicial deference in the area of punishment regulation has a similar effect but is grounded in two different forms that relate to the particular context in which courts operate. The first is rooted in conceptions of institutional democratic design: the courtroom, controlled by unelected judges, is not a proper site for resolving conflicts over the proper amount of punishment. Instead, legislatures, with their majoritarian accountability and inclusive process, are the institutions vested with authority over decisions about what kind of punishment is appropriate. The second form of deference is grounded in judgments about competence: generalist judges are not competent to question correctional judgments about the need for measures such as solitary confinement. The executive branch, tasked with carrying out the set of punishments approved by legislatures, is the proper decision-making body for deciding when measures such as extreme isolation are necessary for prison administration.[265] Of course, when federal judges are reviewing the experience of punishment in state-run facilities, there is a federalism overlay that can complicate deference in many directions, but this is true whether the federal court is considering the workings of a state prison or any other state entity, and as such I will leave it to the side here.

Regulating solitary confinement poses difficulties because on its face it might trigger both kinds of deference. Solitary confinement is essentially used as a punishment for wrongdoing within prison. But it is also an imposition of harsh conditions of confinement. It could be analogized to challenges to criminal sentences or it could be analogized to cases involving discrete conditions of confinement, such as the challenge to the provision of living space in *Rhodes v. Chapman*.[266] If it is seen as analogous to criminal sentencing, then it might call to mind the deference rooted in concerns

264 John G.A. Pocock, *The Classical Theory of Deference*, 81 Am. Hist. Rev. 516, 517 (1976).

265 Eric Berger has described sources of deference in different terms as based in "political authority and epistemic authority." Eric Berger, *In Search of a Theory of Deference: The Eighth Amendment, Democratic Pedigree, and Constitutional Decision Making*, 88 Wash. U. L. Rev. 1, 6 (2010).

266 452 U.S. 337.

about institutional legitimacy.[267] After all, the Constitution does not require adherence to one theory of punishment[268]—so if a court lacks authority to determine what theory of punishment a sentence must vindicate, it is at its lowest ebb when it reviews criminal sentences for proportionality. If it is seen as analogous to an administrative response to disorder, then it might trigger the deference rooted in institutional competence.[269] What basis does a court have for questioning the judgment of correctional experts as to what kind of force was necessary to quell a disturbance? In an era of fiscal want, how can a court order a prison system to provide specific material conditions of confinement, such as a specified amount of living space or access to natural light?

Thus, in challenges to the use of solitary confinement, courts may have a tendency to build one model of deference on the other, making any challenge to the conditions or amount of extreme isolation doomed to fail. The solution is to see that the reasons for deference that are central to the two different models of Eighth Amendment regulation do not necessarily translate to the use of solitary confinement. Unlike the criminal sentences that are adjudicated under the Eighth Amendment's proportionality principle, sentences of solitary confinement are imposed by midlevel executive officials for transgression of prison rules, not by publicly accountable legislators for transgression of criminal law. Prison administrators are not publicly accountable in the way that legislators are, and it is difficult to argue that their use of solitary confinement is the product of majoritarian decisionmaking. Admittedly, some public officials have made "tough on crime" proposals central to successful campaigns, but even if one were to read those examples as indicative of majoritarian sentiment, one cannot conclude that they indicate public approval of current practices regarding the use of extreme isolation.[270]

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267 *See supra* subsection II.B.2.

268 *See* Kennedy v. Louisiana, 554 U.S. 407, 437 (2008) (observing that Eighth Amendment doctrine is "still in search of a unifying principle"); Ewing v. California, 538 U.S. 11, 25 (2003) (plurality opinion) (observing that the Constitution "does not mandate adoption of any one penological theory" (quoting Harmelin v. Michigan, 501 U.S. 957, 999 (1991) (Kennedy, J., concurring in part and concurring in the judgment))).

269 *See supra* subsection II.B.2.

270 For example, many governors have run on the promise to build more and harsher prisons, without making reference to the use of extreme isolation in those facilities. *See* Donald P. Baker, *Wilder Defiant in Final Budget: Spending Plan at Odds with Some of Next Va. Governor's Priorities*, WASH. POST, Dec. 21, 1993, at A1 (noting Virginia Governor-elect George F. Allen's promise to build more prisons); Linda Kleindienst, *Martinez Promises More Prison Beds*, SUN SENTINEL (Sept. 14, 1990), http://articles.sun-sentinel.com/1990-09-14/news/9002140143_1_prison-beds-new-prison-new-inmates (reporting that Florida Governor Bob Martinez promised to build more prison beds if reelected); Richard Perez-Pena, *Governor's Inmate Estimates Were Too High, Memo Says*, N.Y. TIMES (Jan. 28, 1998), http://www.nytimes.com/1998/01/28/nyregion/governor-s-inmate-estimates-were-too-high-memo-says.html (reporting Governor George Pataki's reelection proposal to build new maximum-security prison); Frank Reeves, *Ridge Facing Trying Times; Inaugural Euphoria Bound to Give Way to Governing Reality*, PITT. POST-GAZETTE (Jan. 15, 1995) (recounting promise of Pennsylvania Governor-elect Tom Ridge to build more maximum security prisons for

Unlike the imposition of particular conditions of confinement, the purpose of prison discipline sounds in the traditional justifications of criminal law—retribution, deterrence, and rehabilitation.[271] By contrast, most conditions claims either involve conditions caused by lack of resources or neglect, or are instantaneous responses to a perceived threat.[272] The choice to place someone in solitary confinement is an affirmative step taken by corrections officials for the purposes of vindicating penological goals. Given the lack of evidence that extreme isolation accomplishes these goals,[273] courts may be better situated to abandon a posture of deference that is more appropriate when decisions involve areas within the ken of corrections officials. Indeed, the Association of State Correctional Administrators, representing leaders of each state corrections agency as well as heads of jails in large cities, recently issued a statement calling for substantial reform of the use of extreme isolation in prisons and jails.[274]

Thus, neither mode of deference may be suited for the use of solitary confinement. Overcoming reflexive deference requires recognition that Eighth Amendment doctrine is truly chimerical—it imposes different limitations in different contexts, and solitary confinement spans different models of regulation. Extreme isolation is not a formal punishment imposed by legislatures, judges, and jury; nor is it a split-second response to a crisis that correctional staff are best equipped to address. This is not to say that courts should show no deference to the decision to confine someone in extreme isolation, but to argue that there is space for judges to question how, why, and for how long it is used.

CONCLUSION

Creating space for the Eighth Amendment to regulate the use of solitary confinement will not eliminate its overuse. Like any mode of punishment, regulation can never exist exclusively on the constitutional plane. But until

juveniles); George Skelton, *News Analysis: A Split Decision on Deukmejian's Legacy*, L.A. TIMES (Dec. 30, 1990), http://articles.latimes.com/1990-12-30/news/mn-10337_1_george-deukmejian (recounting California Governor Deukmejian's promise to build more prisons); Larry Williams, *Pitching Promises in Bid for Governor; Little Emphasis on Practicality*, HARTFORD COURANT, May 21, 1994, at A1 (recouting Connecticuit Governor John Rowland's promise to build new prisons, "spartan ones, not country clubs"); *Full Text of Owen's* [sic] *2003 State of State Speech*, DENV. CHANNEL (Jan. 16, 2003), http://www.thedenverchannel.com/news/full-text-of-owen-s-2003-state-of-state-spee-1?page=2 (Colorado Governor Bill Owens promising to build new prisons in Colorado).

271 *See, e.g.*, N.Y. COMP. CODES R. & REGS. tit. 7, § 250.2 (1979) (expressing deterrent and rehabilitative goals of inmate discipline).

272 *See, e.g.*, Whitley v. Albers, 475 U.S. 312, 320–21 (1986); Estelle v. Gamble, 429 U.S. 97, 103–04 (1976).

273 *See* Keramet Reiter, *Supermax Administration and the Eighth Amendment: Deference, Discretion, and Double Bunking, 1986–2010*, 5 U.C. IRVINE L. REV. 89, 124–27 (2015).

274 *See* Timothy Williams, *Prison Officials Join Movement to Curb Solitary Confinement*, N.Y. TIMES (Sept. 2, 2015), https://www.nytimes.com/2015/09/03/us/prison-directors-group-calls-for-limiting-solitary-confinement.html.

now there has been almost no constitutional regulation of the practice of extreme isolation. As I have shown here, the Eighth Amendment is broad enough and sensitive enough to entertain new challenges to the use of solitary confinement. Doing so requires recognizing that solitary confinement does not easily square with the models of decisionmaking upon which Eighth Amendment deference is premised. I have tried to provide a way forward in this Article—but it is only the beginning of the process.