POLICY ESSAY

TOWARD A MORE CONSTITUTIONAL APPROACH TO SOLITARY CONFINEMENT: THE CASE FOR REFORM

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The past forty years have brought significant growth in the use of segregation in penal settings. Prison officials maintain that segregation is an effective tool to manage dangerous or vulnerable prisoners, but research has demonstrated that it is being utilized more and more as a commonplace disciplinary tool, deployed and withdrawn at the discretion of prison and jail management. Researchers have demonstrated that there are very real human and fiscal costs related to the segregation of prisoners in isolated settings. The Supreme Court has yet to conclude that the use of solitary confinement for prolonged periods is unconstitutional, but evidence suggests that under certain conditions prisoners may experience such extreme anguish and injury so as to pose a serious inquiry as to whether cruel and unusual punishment has taken place. Policymakers need to act to promote more uniform standards for solitary confinement that more closely comply with the U.S. Constitution. Congress will have a role in promoting reforms to the use of segregation practices in the federal prison system, administered by the Department of Justice's Bureau of Prisons. A comprehensive, top down approach is likely unworkable due to federalism implications, but the federal government is uniquely positioned to work with stakeholders in the states to reform practices in local prison systems.

I. INTRODUCTION

There is no question that inmates must pay their debts to society, but justice demands that we extract these payments only within the limits of our Constitution and accepted standards of human decency. The rising prevalence of solitary confinement as an administrative tool for public and private penitentiaries has also led to a rise in harrowing stories by inmates subjected to a psychological, emotional, and oftentimes physical hell. Most disturbingly, many of these prisoners are placed in solitary confinement for a prolonged or indefinite period of time. This prevalence requires us to reevaluate whether this practice remains respectful of our laws and values.

This article will address whether the practice of prolonged or indefinite solitary confinement by prisons should be considered cruel and unusual punishment under the Eighth Amendment, and whether it violates the due process rights of prisoners under the Fourteenth Amendment. It then explores policy rationales and ideas for addressing this issue.

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I have introduced first of its kind legislation on this topic which would provide incentives for local stakeholders to act and would create a commission to work with these stakeholders to perform and publish a comprehensive and inclusive study to inform possible future policy decisions by the Executive Branch, Congress, and by local elected and corrections personnel. I believe we need to start a national conversation about the use of solitary confinement to explore how we can improve our criminal justice system so that it remains safe, efficient, and humane for inmates and administrators. For this reason I have sponsored the Solitary Confinement Study and Reform Act of 2014.[2] If enacted, this legislation will establish the National Solitary Confinement Study and Reform Commission to help policymakers develop and implement national standards for the use of solitary confinement in our nation's prisons, jails, and juvenile detention facilities.

II. Background

Solitary confinement is the practice of isolating a person in a cell for twenty-two to twenty-four hours per day with little to no human contact or interaction. Typically, these cells are small and receive limited natural sunlight (or sometimes no natural sunlight). Prisoners have severe constraints on visitation privileges, and access to books, television and other property is restricted or denied.[3] Although there are many different forms of solitary confinement, this practice is generally used as an administrative tool by federal and state penitentiaries to ensure the safety of inmates and prison staff and maintain control of the prison population. Prisoners in solitary confinement are "segregated" within various minimum-, medium-, and maximum-security facilities in a "special housing unit" ("SHU") for disciplinary and other reasons.[4]

The United States first introduced the practice of solitary confinement in the early nineteenth century.[5] Known as the "Philadelphia System," this mode of incarceration relied almost exclusively on solitary confinement both

[2] Solitary Confinement Study and Reform Act of 2014, H.R. 4618, 113th Cong. (2014).

[3] *See* American Civil Liberties Union National Prison Project, ACLU Briefing Paper: The Dangerous Overuse of Solitary Confinement in the United States 2 (2013), *available at* https://www.aclu.org/files/assets/stop_solitary_briefing_paper.pdf, *archived at* http://perma.cc/YHN4-83EW.

[4] *See* Angela Browne, Alissa Cambier & Suzanne Agha, *Prisons Within Prisons: The Use of Segregation in the United States*, 24 Fed. Sent'g Rep. 46, 47 (2011). Aside from disciplinary segregation, solitary confinement is used for "administrative segregation," "protective custody" and "temporary confinement." *Id.* Administrative segregation is used to remove prisoners from the general prison population for the safety of other prisoners or for investigative purposes, but is not a punitive measure. Prisoners are kept in segregation for an indefinite period of time. Protective custody is segregation for the safety of prisoners who are living within the general prison population. Temporary confinement is the use of segregation for a short period of time for the purposes of investigating misconduct. *Id.*

[5] Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 Wash. U. J.L. & Pol'y 325, 328 (2006).

for pretrial and post-conviction detainees.[6] It infamously failed at rehabilitating prisoners and was ultimately abandoned.[7] As Alexis de Tocqueville observed while studying the U.S. penitentiary system, "[t]he solitary cell of the criminal is for some days full of terrible phantoms. Agitated and tormented by a thousand fears, he accuses society of injustice and cruelty, and in such a disposition of mind, it sometimes will happen that he disregards the orders, and repels the consolations offered to him."[8] Almost 200 years later, the national Commission on Safety and Abuse in America's Prisons similarly found that the U.S. criminal justice system "cannot promote safety or rehabilitation if we confine prisoners in high-security 'segregation' units where they have no opportunity to interact with others or to take responsibility for their lives."[9]

Nonetheless, the use of solitary confinement in federal, state and local prisons has greatly increased over the past few decades. One prominent prison reform think tank studied recent data from the Bureau of Justice Statistics and concluded that the number of inmates in restricted housing units increased from 57,591 in 1995 to 81,622 in 2005.[10] In the federal Bureau of Prison ("BOP") system, the total inmate population in SHUs increased approximately seventeen percent from 2008 to 2013, up from 10,659 to 12,460.[11] Furthermore, at least 25,000 inmates are held in the most secure and restrictive "supermax" prisons that are used almost exclusively for segregation.[12]

The psychological, emotional and physical consequences for prisoners subjected to these conditions are well documented, especially in instances where they have been confined for extended periods of time. Many first-

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[6] *Id*.

[7] Jules Lobel, *Prolonged Solitary Confinement and the Constitution*, 11 U. PA. J. CONST. L. 115, 118 (2008).

[8] GUSTAV DE BEAUMONT & ALEXIS DE TOCQUEVILLE, ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION IN FRANCE 39–40 (Francis Lieber trans., Carey, Lea & Blanchard 1833).

[9] John J. Gibbons & Nicholas De B. Katzenbach, *Confronting Confinement: A Report of The Commission on Safety and Abuse in America's Prisons*, 22 WASH. U. J.L. & POL'Y 385, 414 (2006).

[10] *Reassessing Solitary Confinement: The Human Rights, Fiscal and Public Safety Consequences: Hearing Before the Subcomm. on the Constitution, Civil Rights and Human Rights of the S. Comm. on the Judiciary*, 112th Cong. (2012) [hereinafter *Hearing*] (statement of Michael A. Jacobson, Director, Vera Institute of Justice), *available at* http://www.vera.org/files/michael-jacobson-testimony-on-solitary-confinement-2012.pdf, *archived at* http://perma.cc/Y9G3-39P7 .

[11] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-429, BUREAU OF PRISONS: IMPROVEMENTS NEEDED IN BUREAU OF PRISONS' MONITORING AND EVALUATION OF IMPACT OF SEGREGATED HOUSING 14 (2013), *available at* http://www.bjs.gov/content/pub/pdf/csfcf05.pdf, *archived at* http://perma.cc/Q9L9-E73B.

[12] Atul Gawande, *Hellhole*, THE NEW YORKER (March 30, 2009), *available at* http://www.newyorker.com/magazine/2009/03/30/hellhole, *archived at* http://perma.cc/DXS2-9UWD; *see also* Laura Sullivan, *At Pelican Bay Prison, a Life in Solitary*, NATIONAL PUBLIC RADIO (July 26, 2006), *available at* http://www.npr.org/templates/story/story.php?storyId=5584254, *archived at* http://perma.cc/YPP4-UCGL (profiling Pelican Bay State Prison in northern California, one of the oldest and largest isolation units in the country).

hand accounts by prisoners of war, hostages, and inmates tell of the agony of their solitary confinement. Senator John McCain, a prisoner of war in Vietnam for five and a half years, famously wrote about his experience, "[i]t's an awful thing, solitary, it crushes your spirit and weakens your resistance more effectively than any other form of mistreatment."[13]

Studies have detailed the significant toll that solitary confinement can have on inmates who are mentally infirm or prone to mental illness. These studies have often explored how the tendency to incarcerate instead of treat the mentally ill eventually leads to a bias of placing the mentally infirm in solitary confinement.

> This growth in the number of inmates with a mental disorder, combined with the recent rise of prolonged supermax solitary confinement and the increasingly punitive nature of the American penological system, has resulted in a disproportionately large number of inmates with a mental disorder being housed in supermax confinement.[14]

A 2012 study concluded that the aforementioned link between mental illness, incarceration, and solitary confinement contribute to a strong presumption that the prolonged confinement of the mentally ill is contrary to the Eighth Amendment of the Constitution.[15] The fact that certain inmates are already in a sensitive state before being confined exacerbates their condition and could contribute to further degradation of their mental condition. Other studies have further explored this theme.

Professor Craig Haney has studied the psychological effects of solitary confinement for over thirty years and was a chief researcher for the well-known "Stanford Prison Experiment."[16] He is a well-known authority in this area of research and is frequently cited by other experts on this topic. He testified before Congress in 2012 about the powerful psychological effects solitary confinement can have on inmates.[17] "The level of suffering and despair in many of these units is palpable and profound . . . . Serious forms of mental illness can result from these experiences. Moreover, many prisoners become so desperate and despondent that they engage in self-mutilation and . . . a disturbingly high number resort to suicide."[18] In a systematic study that

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[13] Gawande, *supra* note 12. **R**

[14] 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).

[15] *Id.* at 54.

[16] The Stanford Prison Experiment was a psychological research experiment conducted in the summer of 1971. Paid participants were put in replicated prison conditions and subjected to various stress scenarios commonly associated with the prison experience. *See* Philip G. Zimbardo, *Stanford Prison Experiment*, http://www.prisonexp.org/faq.htm (last visited Nov. 10, 2014), *archived at* http://perma.cc/L3MM-7QKH.

[17] *Hearing*, *supra* note 10 (written statement of Craig Haney, Professor of Psychology, University of California, Santa Cruz). **R**

[18] *Id.* at 9.

he conducted, three-quarters of inmates interviewed experienced many of the following symptoms: irritability and rage, chronic insomnia, panic attacks, severe discomfort around other people, social withdrawal, extreme paranoia, hypersensitivity, different types of cognitive dysfunction, depression, and various symptoms of psychosis such as visual and auditory hallucinations.[19]

The lack of any normal interpersonal contact results in the destruction of a prisoner's socially constructed identity.[20] This research contributes to a conclusion that prisoners begin to lose the ability to control their own behavior, sometimes to the point that they are unable to effectively reenter society. This psychological impact can be observed beyond prison walls in certain custodial settings, a phenomenon illustrated by Terry Anderson.

The story of Terry Anderson is a compelling account of the psychological and emotional effects of solitary confinement.[21] According to reporting about his ordeal, Anderson, a journalist, was kidnapped by Hezbollah in Lebanon in 1985, and despite the fact that he was not tortured or starved, he was kept largely in isolation for seven years.[22] About a year and a half after being captured, he was moved to a six-by-six-foot cell with no windows and little light. "One day, three years into his ordeal, he snapped. He walked over to a wall and began beating his forehead against it, dozens of times. His head was smashed and bleeding before the guards were able to stop him."[23] Luckily, Terry Anderson survived this incident and four more years of confinement before finally being released.

Inmates that are subject to prolonged isolation tend to engage in extreme and sometimes dangerous behavior due to the psychological impact of the isolation.[24] A prominent scholar on the psychological effects of imprisonment noted that "punitive isolation" and "social depravation" lead to uniquely detrimental impacts on the incarcerated.[25] He noted that inmates were prone to engage in confused, angry, aggressive, violent, suicidal and otherwise troubling behavior.[26]

The effects of isolation on prisoners do not end after they are released. This is because the consequences are not only psychological and emotional, but also physical. Evidence suggests that even a few days of solitary will "shift the electroencephalogram ("EEG") pattern toward an abnormal pattern characteristic of stupor and delirium."[27] Over time, an individual be-

[19] *Id*. at 10–11 (citing Craig Haney, *Mental Health Issues in Long-Term Solitary and "Supermax" Confinement*, 49 CRIME & DELINQ. 124–56 (2003)).

[20] *Id*. at 12.

[21] *See* Gawande, *supra* note 12. R

[22] *Id.*

[23] *Id*.

[24] Craig Haney, *The Psychological Impact of Incarceration*, *in* PRISONERS ONCE REMOVED 53, (Jeremy Travis & Michelle Waul eds., 2003).

[25] *Id.*

[26] *Id.*

[27] Grassian, *supra* note 5, at 331. R

comes increasingly incapable of processing external stimuli, making them "hyper responsive" or overly sensitive to such stimuli.[28] There are many potential behavioral consequences of this shift, including withdrawal, agitation, paranoia, and even obsession with the offending stimuli, but most behaviors are defined by two characteristics: the inability to focus and the inability to shift attention.[29]

Although the specific effects of solitary vary from person to person, it is unsurprising that some evidence suggests that the neurological effects of solitary confinement can also lead to elevated rates of recidivism.[30]

III. Cruel and Unusual Punishment

The practice of solitary confinement deserves intense study in part because it raises significant Eighth Amendment concerns. The rights of prisoners could be violated depending on the circumstances of their isolation, including the period of time for which they are isolated. Policymakers must study this issue because the growth of this practice has been significant. Tens of thousands of inmates in America are at risk of mental and physical danger due to the conditions of their isolation.[31] As previously noted, the effects of prolonged isolation can be severe. Policymakers should ask questions about the moral and legal propriety of long-term solitary confinement and should consider immediate reforms.

The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[32] At its core, the Amendment prohibits penalties that are grossly disproportionate to the offense.[33] But the standard for what types of punishment are "excessive" is not static.[34] The Supreme Court has determined that the standard for cruel or unusual punishment is an evolving one that adheres to contemporary notions of human dignity.[35]

There are multiple grounds on which solitary confinement could be found to be a violation of the Eighth Amendment. One theory looks at the conduct of a prison official in placing a prisoner in solitary confinement.[36] Both the initial sentencing and the treatment of prisoners in the course of serving a prison sentence are subject to scrutiny under the Eighth Amend-

[28] *Id.*
[29] *Id.* at 331–32.
[30] *Hearing*, *supra* note 10 (written statement of Prof. Craig Haney at 15). R
[31] *Hearing*, *supra* note 10 (statement of Michael A. Jacobson at 1). R
[32] U.S. Const. amend. VIII.
[33] *See* Hutto v. Finney, 437 U.S. 678, 687 (1978).
[34] *See* Rhodes v. Chapman, 452 U.S. 337, 346 (1981).
[35] *Id.*; *see also* Roper v. Simmons, 543 U.S. 551, 569–71 (2005) (holding that the death penalty for individuals under the age of eighteen violates the Eighth and Fourteenth amendments); Atkins v. Virginia, 536 U.S. 304, 311 (2002) (holding that execution of a mentally retarded offender is an excessive punishment).
[36] Farmer v. Brennan, 511 U.S. 825, 834 (1994).

ment.[37] As stated in *Farmer v. Brennan*, in the case of solitary confinement, there are two requirements that a prisoner must show a prison official did not meet in order to find a violation.[38] First, an inmate must prove that "he is incarcerated under conditions posing a substantial risk of serious harm" and second, that in putting the prisoner in solitary confinement, the prison official showed "deliberate indifference" to a substantial risk of serious harm to prisoners.[39]

This standard has evolved through caselaw. In *Estelle v. Gamble*, the Court first acknowledged that the Amendment was applicable to some deprivations that were not specifically part of the prison sentence if there was an "unnecessary and wanton infliction of pain" by prison officials.[40] At issue in that case was whether inadequate prison medical care constituted this type of deprivation. In order to find that the punishment was indeed "wanton," it has to be established that the officials had a culpable state of mind.[41] In this case, the Court found that the negligent medical treatment of a prisoner did not rise to the level of a constitutional violation.[42] "Medical malpractice does not become a constitutional violation merely because the victim is a prisoner."[43] The Court determined that prison officials were liable for Eighth Amendment violations only if they showed "deliberate indifference" towards "serious" medical needs of inmates.[44] This standard was later extended to apply to general conditions of confinement in *Wilson v. Seiter*, with an exception for instances where an official is responding to an emergency situation.[45]

It was not until 1994 that the Court clarified exactly what constituted "deliberate indifference" in *Farmer v. Brennan*.[46] Circuit courts had previously interpreted it to be a recklessness standard.[47] The Court agreed that recklessness captures the essence of "deliberate indifference," but stated that the concept was not self-defining.[48] It held that officials must both be

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[37] *Hutto*, 437 U.S. at 687.

[38] *Farmer,* 511 U.S. at 834.

[39] *See id.* (finding that prison officials may be held liable under the Eighth Amendment for denying humane conditions if they know that inmates face substantial risk of serious harm and disregard that risk by failing to take reasonable measures to abate it).

[40] Estelle v. Gamble, 429 U.S. 97, 104 (1976) (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976) (holding that failure of prison officials to sufficiently treat a prisoner's medical condition is not a constitutional violation unless there is a deliberate indifference to serious medical needs)).

[41] *See* Wilson v. Seiter, 501 U.S. 294, 302–04 (1991) (holding that a mental standard of deliberate indifference is appropriate to establish a constitutional violation whether for conditions of confinement, failure to attend medical needs, or a combination of both).

[42] *Estelle*, 429 U.S. at 108.

[43] *Id.* at 106.

[44] *Id.* at 109.

[45] 501 U.S. at 303; *cf.* Whitley v. Albers, 475 U.S. 312, 320–21 (1986) (finding that, in the event an official is responding to an emergency situation such as a prison riot, wantonness consists of acting maliciously for the purpose of causing harm).

[46] Farmer v. Brennan, 511 U.S. 825, 835–40 (1994).

[47] *See, e.g.*, LaMarca v. Turner, 995 F.2d 1526, 1535 (11th Cir. 1993).

[48] *Farmer*, 511 U.S. at 837.

aware of facts that pose an excessive risk to the health or safety of inmates and actually draw the inference that there is a substantial risk of serious harm.[49] By requiring that prison officials are factually aware of the dangers being created, the Court was able to comply with the Eighth Amendment's prohibition against cruel and unusual *punishments* and not hold prison officials liable merely for *conditions*.[50]

The court has clarified its thinking on what constitutes "wanton" punishment. In *Rhodes v. Chapman*, the Court considered an Eighth Amendment claim brought by inmates at the Southern Ohio Correctional Facility where the inmates alleged that lodging two inmates in a single cell constituted cruel and unusual punishment.[51] In rejecting their claim, the Court noted that the Constitution "does not mandate comfortable prisons."[52] Rather, a claim must demonstrate that an act or omission of a prison official resulted in the denial of "the minimal civilized measure of life's necessities."[53] The Court later clarified that for a claim based on a failure to prevent harm (such as for solitary), an inmate must show that he is incarcerated under conditions that pose a substantial risk of serious harm.[54]

Using these two standards, federal courts have largely held that solitary confinement does not raise *per se* constitutional concerns.[55] But the severity and length of some solitary confinement sentences have led some scholars and judges to question whether the practice should amount to "cruel and unusual punishment" under the Eighth Amendment.[56] Over 120 years ago, in a case dealing with the *ex-post facto* application of a Colorado criminal law, the Supreme Court acknowledged the potentially serious objections to solitary confinement:

> 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.[57]

Federal courts have not yet specifically found that prolonged or indefinite solitary confinement constitutes cruel and unusual punishment. In *Ma-*

[49] *Id.*
[50] *Id.*
[51] Rhodes v. Chapman, 452 U.S. 337 (1981).
[52] *Id.* at 349.
[53] *Id.* at 347.
[54] *Farmer*, 511 U.S. at 834.
[55] *See, e.g.*, Hutto v. Finney, 437 U.S. 678, 686 (1978) ("It is perfectly obvious that every decision to remove a particular inmate from the general prison population for an indeterminate period could not be characterized as cruel and unusual.").
[56] *See, e.g.*, Lobel, *supra* note 7. R
[57] In re Medley, 134 U.S. 160, 168 (1890).

drid v. Gomez, a 1995 district court case from northern California, the court reviewed conditions of confinement at Pelican Bay Security Housing Unit in California, including instances of prolonged confinement.[58] It held that prisoners with mental health conditions were particularly vulnerable to the effects of prolonged isolation and, therefore, subjecting them to such treatment "can not be squared with evolving standards of humanity or decency."[59]

The court did not, however, find that prolonged isolation for non-vulnerable inmates constituted cruel and unusual punishment.[60] It noted that "social science and clinical literature have consistently reported that when human beings are subjected to social isolation and reduced environmental stimulation, they may deteriorate mentally and in some cases develop psychiatric disturbances."[61] It also concluded that "it is beyond dispute that mental health is a need as essential to a meaningful human existence as other basic physical demands our bodies make."[62] But the court was unable to find, absent a particular vulnerability in a class of inmates, that the conditions of the prison posed a threat to life necessities of the inmates such as "adequate food, clothing, shelter, medical care and personal safety."[63] It had no choice but to hold as a matter of law that operations at Pelican Bay did not violate Eighth Amendment standards "vis-à-vis all inmates."[64]

A Texas district court did find constitutional violations in Texas's segregation units for both inmates with and without serious mental health conditions in 1999.[65] It considered that, based on the evolving standards of decency recognized by the Supreme Court, avoidance of psychological pain should be included in the calculus of life necessities.[66] While the court did not condemn the practice outright, its observations about the behavior of inmates in administrative segregation led it to find that psychological deprivation can constitute cruel and unusual punishment.[67]

When assessing contemporary notions of human dignity, the Court has looked to many different sources. In *Roper v. Simmons*, Justice Kennedy's

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[58] Madrid v. Gomez, 889 F. Supp. 1146 (N.D. Cal. 1995).

[59] *Id*. at 1266; *see also* Letter from Thomas E. Perez, Assistant Att'y Gen., U.S. Dep't of Justice, to Tom Corbett, Governor of Pa. 7 (May 31, 2013), *available at* http://www.justice.gov/crt/about/spl/documents/cresson_findings_5-31-13.pdf, *archived at* http://perma.cc/7BRL-G84F.

[60] *Madrid*, 889 F. Supp. at 1280.

[61] *Id.*

[62] *Id*. at 1261.

[63] *Id*. at 1260.

[64] *Id*. at 1261.

[65] Ruiz v. Johnson, 37 F. Supp. 2d 855, 915 (S.D. Tex. 1999) (finding that extreme levels of psychological deprivation "[were] the cause of cruel and unusual pain and suffering by inmates in administrative segregation"), *rev'd on other grounds*, 243 F.3d 941 (5th Cir. 2001), *adhered to on remand*, 154 F. Supp. 2d 975 (S.D. Tex. 2001).

[66] *Ruiz*, 37 F. Supp. at 914.

[67] *Id*. at 914–15 ("Before the court are levels of psychological deprivation that violate the United States Constitution's prohibition against cruel and unusual punishment. It has been shown that defendants are deliberately indifferent to a systemic pattern of extreme social isolation and reduced environmental stimulation.").

opinion appealed to international authorities to bolster the Court's view that permitting the execution of juveniles constitutes cruel and unusual punishment:

> Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty. This reality does not become controlling, for the task of interpreting the Eighth Amendment remains our responsibility. Yet . . . the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of 'cruel and unusual punishments.'[68]

Courts have not yet concluded that prolonged isolation per se amounts to cruel and unusual punishment based on their interpretations of the Constitution, current law and legal precedents.[69]

Recently, it has been argued that the practice of solitary confinement may violate the Eighth Amendment as a general prison policy in certain cases if a prisoner is held there indefinitely.[70] In a 2012 case brought in the Southern District of New York, a convicted prisoner who had been held in solitary confinement for over fifteen months raised a successful Eighth Amendment claim.[71] In reaching its decision, the court applied a four-factor test described in the Supreme Court case *Turner v. Safely* that is used to evaluate constitutional challenges to prison regulations and determine whether the regulation is "reasonably related to a valid correctional objective."[72] The court came to the conclusion that under the test, the prisoner's placement in solitary confinement violated the Eighth Amendment, with Judge Scheindlin noting that she could not "shirk [her] duty under the Constitution and *Turner* to ensure that Bout's confinement is not arbitrarily and

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[68] Roper v. Simmons, 543 U.S. 551, 575 (2005).

[69] Some courts have found that prolonged instances of isolation are not violations of the Eighth Amendment because the prisons must balance the individual prisoner's situation with concerns about the safety of other inmates. *See e.g.*, Griffin v. Gomez, 741 F.3d 10, 21–22 (9th Cir. 2014).

[70] *See* U.S. v. Bout, 860 F. Supp. 2d. 303 (S.D.N.Y. 2012).

[71] *Id.* at 305–306, 311.

[72] *Id.* at 307; *see also* Turner v. Safely, 482 U.S. 78 (1987). The four-factor *Turner* test as applied in *Bout* is as follows:

> The court must consider first whether there is a valid, rational connection between the regulation and the legitimate governmental interest used to justify it; second, whether there are alternative means for the prisoner to exercise the right at issue; third, the impact that the desired accommodation will have on guards, other inmates, and prison resources; and fourth, the absence of ready alternatives. *Bout*, 860 F. Supp. at 304.

The court explained that though "some of the *Turner* factors are geared toward the validity of generally applicable prison regulations, rather than the specific conditions of confinement, the test is essentially whether there is a rational basis for the BOP's [Board of Prison's] decision to continue to hold Bout in the SHU." *Id.* at 308.

excessively harsh."[73] This case further emphasizes how the Eighth Amendment rights of prisoners may be violated by prison policies of solitary confinement, and why the legislation I have proposed is necessary in order to better understand this issue.

I think that Congress must act to address solitary confinement in statute by affirmatively making clear that certain aspects of the practice are troubling. It is my belief that Congress must act to promote solitary confinement reforms because it appears that prolonged solitary confinement tends to pose serious and unacceptable risks to inmates' physical and mental well-being. As I will discuss, I have proposed legislation entitled the Solitary Confinement Study and Reform Act of 2014 to begin to address these issues.

IV. Due Process

Solitary confinement also raises due process concerns. The Fourteenth Amendment provides that states shall not "deprive any person of life, liberty, or property, without due process of law."[74] Due process rights for incarcerated prisoners differ markedly, however, from that of ordinary citizens. By necessity inmates are deprived of their "life, liberty and property" in the course of serving their prison sentences. They have already had an opportunity to be heard by a court, and were sentenced in proportion to their crime. Nonetheless, "a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime."[75]

In *Sandin v. Conner*, the Supreme Court held that a constitutional "liberty interest" exists for the purposes of avoiding disciplinary segregation when the confinement amounts to an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life."[76] The Court did not lay out a clear test for determining when such a hardship exists, but engaged in a factual inquiry to determine that thirty days of disciplinary segregation in conditions that were similar to other inmates in administrative segregation, protective custody or the general population did not constitute a hardship giving rise to a liberty interest.[77] The Court also noted that the segregation did not affect the duration of the inmate's sentence or his opportunity for parole.[78]

In fact, the Court found it unnecessary to draw an "appropriate baseline" ten years later in *Wilkinson v. Austin*, where the conditions of the Ohio State Penitentiary ("OSP") under consideration in that case imposed "an atypical and significant hardship *under any plausible baseline*."[79] OSP is a

[73] *Id.* at 311.
[74] U.S. Const. amend. XIV, § 1.
[75] Wolff v. McDonnell, 418 U.S. 539, 555 (1974).
[76] Sandin v. Conner, 515 U.S. 472, 484 (1995).
[77] *Id.* at 486.
[78] *Id.* at 487.
[79] Wilkinson v. Austin, 545 U.S. 209, 223 (2005) (emphasis added).

supermax prison where inmates are almost completely isolated from all human contact, live in a small, illuminated cell for twenty-three hours a day, and are only given one hour per day to exercise in a small room.[80] The Court noted that these characteristics by themselves would not be enough to trigger due process concerns because they are typical of most solitary conditions.[81] However, the Court highlighted two additional features that tipped the scales in favor of creating a liberty interest.[82] First, after an initial 30-day review, placement at OSP is indefinite and only reviewed annually.[83] Second, placement disqualifies an otherwise eligible inmate for parole.[84] When taken together, these circumstances "impose an atypical and significant hardship within the correctional context."[85]

In declining to draw a bright-line rule, the Court also noted that Courts of Appeals had not reached consistent conclusions when identifying a baseline since *Sandin*.[86] The Seventh Circuit, for example, determines whether disciplinary segregation amounts to a constitutional violation by looking at both the duration of the confinement and the conditions of the confinement.[87] Alternatively, the Tenth Circuit applies four factors when analyzing whether an atypical and significant hardship exists: considering whether (1) there is a penological interest in the segregation; (2) the conditions are extreme; (3) the placement increases the duration of confinement; and (4) the placement is indeterminate.[88]

The duration of confinement, however, seems to play a critical role in determining if a "liberty interest" is at stake. Although the length of isolation should not be considered in a vacuum, "[it] is equally plain . . . that the length of confinement cannot be ignored in deciding whether the confinement meets constitutional standards."[89] A level of transparency and accountability is needed for the process of assigning someone to solitary confinement conditions and for keeping them there for more than just a short period of time. A reformed process could afford prison officials the opportunity to justify their administrative decisions and the prisoner the opportunity to object to the decision and have the objections be seriously considered and analyzed for propriety in context. These are not reforms that can take place overnight. True and lasting reforms in this area will only result from inclu-

[80] *Id.* at 209, 211, 214.
[81] *Id.* at 223–24.
[82] *Id.* at 228.
[83] *Id.* at 217.
[84] *Id.* at 221.
[85] *Id.* at 224.
[86] *Id.* at 223.
[87] Marion v. Columbia Corr. Inst., 559 F.3d 693, 697 (7th Cir. 2009) (finding that six months of segregation by itself does not implicate due process rights); *cf.* Hardaway v. Meyerhoff, 734 F.3d 740, 744–45 (7th Cir. 2013) (noting that the jurisprudence of the Seventh Circuit for specific lengths of duration and conditions of confinement that constitute an atypical and significant hardship is lacking).
[88] Matthews v. Wiley, 744 F. Supp. 2d 1159, 1171 (10th Cir. 2010).
[89] Hutto v. Finney, 437 U.S. 678, 686 (1978).

sive conversations with prisoners, prison and jail officials, legislators, public safety experts and other important stakeholders. I have introduced legislation to spur this kind of necessary and vital conversation.

V. Proposed Legislation

Rationale

In May 2014, I introduced the Solitary Confinement Study and Reform Act of 2014.[90] The bill aims to study and promote reforms to how solitary confinement is done in America and to bring the practice more in line with the U.S. Constitution.

This area is ripe for congressional attention due to the growth in the use of solitary confinement in recent decades and the implications of this growth for rehabilitative and other outcomes. There are moral and fiscal reasons to act in this area, but it is critical that policymakers reform the use of solitary confinement so that it reflects the proper aims of criminal justice policy. I would argue that our current approach to solitary confinement does not promote the interests of corrections policy and public safety.

Tens of thousands of inmates are subject to solitary confinement conditions on any given day in America.[91] These tens of thousands of human beings may have erred in judgment over the course of their lives, or they may have done nothing more than be a member of a population that has been proven to be vulnerable once incarcerated. Either way, optimal criminal justice policy should dictate that our corrective measures, as applied to inmates in our prison system, should serve to rehabilitate the inmate, not make his or her situation direr. I have introduced legislation on this issue because I believe that we should be more concerned about rehabilitation than about punishments that could exacerbate criminality and public safety.

Inmates subject to indefinite long-term solitary confinement are at higher risk for suicide and self-mutilation, and often descend into madness.[92] The conditions, which are often present in long-term solitary confinement situations, could destabilize the broader prison community once a previously impacted and segregated inmate is returned to the general population because of these mental and physical implications for that inmate. The difficulty of inmates' experiences in solitary confinement could also be directly linked to increased risk to the public upon the release of a prisoner from solitary conditions directly into the community. One study concluded that the risk of recidivism is higher for a previously segregated inmate if he or she is returned directly to the broader community with no buffer time in the

[90] Solitary Confinement Study and Reform Act of 2014, H.R. 4618, 113th Cong. (2014).

[91] *Hearing*, *supra* note 10 (statement of Michael A. Jacobson at 1). R

[92] Craig Haney, *Mental Health Issues in Long Term Solitary and "Supermax" Confinement,* 49 Crime & Delinq. 131, 134–56 (Jan. 2003).

prison's general population.[93] It stands to reason that solitary confinement jeopardizes the long-term rehabilitative goals that we set when we incarcerate people as a punishment for their transgressions against society.

The current practice raises Eighth Amendment (cruel and unusual punishment) and Fifth and Fourteenth Amendment (procedural due process) concerns because often prisoners are subject to indefinite or effectively permanent solitary confinement without meaningful periodic review of the assignment to solitary. The psychological and physiological impact of this detention could easily amount to cruel and unusual punishment, though the Supreme Court has stopped short of saying this is the case. Some lower Article III courts have said that long-term solitary confinement is unconstitutional as applied to inmates with "serious mental illness" before they were subject to solitary.[94] Some state legislatures have also acted on the issue, as applied to the mentally ill segment of the prison population.[95] But there is not a uniform approach to this issue across all jails and prisons.

Also, current practices raise due process concerns. The Supreme Court has noted in *Hewitt v. Helms* that prisoners in long-term solitary must be afforded "periodic review" of their status.[96] Justice Stevens' dissent in *Hewitt* cuts to the heart of the matter: "[t]herefore, due process demands periodic reviews that have genuine substance—not mere paper-shuffling."[97] Though *Hewitt* was overruled by the *Sandin* decision, the "periodic review" analysis is still being utilized in some lower courts, and I believe it still remains an important and relevant public policy consideration.[98] In my personal discussions with prisoners and prison reform advocates I have learned that some prison authorities may be engaging in "sham" reviews in which the outcome is predetermined so as to simply keep prisoners in long term solitary confinement on a semi-permanent basis.[99] My bill would have a national commission study these important constitutional issues to promote reform that makes the practice not cruel and unusual and a practice that affords inmates an opportunity to make their case for not being kept in solitary.

Some Americans may contend that inmates are criminals, undeserving of a concrete set of rights. I forcefully disagree. Inmates must absolutely pay their debts to society. That being said, we must reform how we approach

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[93] Lovell, et al., *Recidivism of Supermax Prisoners in Washington State*, 53 CRIME & DELINQ. 633, 633–56 (Oct. 2007).

[94] *See, e.g.*, Indiana Prot. & Advocacy Servs. Comm'n v. Comm'r, Indiana Dep't of Corr., No. 1:08-cv-01317-TWP-MJD, 2012 WL 6738517 (S.D. Ind. Dec. 31, 2012).

[95] Michael Muskal, *Colorado bans solitary confinement for seriously mentally ill,* L.A. TIMES (Jun. 6, 2014) *available at* http://touch.latimes.com/#section/-1/article/p2p-80432666/, *archived at* http://perma.cc/V23E-83Z6.

[96] Hewitt v. Helms, 459 U.S. 460, 490 n.19 (1983).

[97] *Id.* at 493 (Stevens, J., dissenting).

[98] Alston v. Cahill, No. 3:07–CV–473, 2012 WL 3288923 (D. Conn. Aug. 10, 2012); Blount v. Folino, No. 10-697, 2011 WL 2489894 (W.D. Pa. June 21, 2011).

[99] I have met with numerous stakeholders in private meetings as a Member of the House Judiciary Committee in the U.S. House of Representatives, as well as in meetings when I was Chairman of the Louisiana House of Representatives prior to my arrival in the U.S. House.

solitary confinement, because its current administration is likely unconstitutional. Prisoners are still human beings, yet if we treat them as less than human beings, what kind of country are we? We are putting juveniles and mentally ill inmates in solitary confinement, because it is convenient for prison officials. We have to respect the challenges of housing the nation's offenders, but we must make sure that the systems prison officials have in place are humane. Putting people in a box for years—sometimes decades—with limited oversight and human interaction is fundamentally wrong.

In addition to affecting the lives of those placed in solitary confinement, this bill helps the average American by saving taxpayer money, promoting public safety and making our prison system more humane. This is a public safety issue. If a prisoner is in solitary for years on end, there can be lasting psychological and physical damage. We have seen some inmates released from solitary directly back into their communities and this can increase the chances for problems for that released inmate in his community and increase the chances of recidivism. Second, there is certainly a moral issue. The psychological damage done to an average prisoner when confined in solitary conditions is bad enough but often those put into solitary are already mentally ill, and the practice only serves to exacerbate their condition. Solitary inmates often commit suicide, mutilate their own bodies or simply descend into madness. This is wrong. Lastly, solitary confinement is expensive. Some studies have shown that solitary confinement dwarves the cost of maximum security or general population inmate housing. Building solitary confinement units can cost two to three times more than conventional prison facilities. States that have changed their systems have saved millions and if the Federal government incentivizes nationwide changes the taxpayer could save more than a billion dollars.

Substantive Bill Specifics

The Solitary Confinement Study and Reform Act of 2014 has several provisions that will address the policy concerns identified above. The Act will establish a commission named the National Solitary Confinement Study and Reform Commission. It will implement a comprehensive legal and factual study of the numerous impacts, including mental, physical, and economic, of solitary confinement in the United States. The study shall include a review of existing Federal, State, and local government policies and practices with respects to the extent and duration of the use of solitary confinement. Also, characteristics of inmates most likely to be referred to solitary confinement and the effectiveness of various types of treatment or programs to reduce such likelihood will be assessed.

No later than three years after the date of the initial Commission meeting, the Commission shall submit a report on the study to the President, Congress, Attorney General of the United States, Secretary of Health and

Human Services, Director of the Federal Bureau of Prisons, governors of every state, and the head of the department of corrections of every state.

The Commission shall hold public hearings and may hold such hearings, take such testimony, and receive such evidence as it considers advisable to carry out its duties. After the Commission has acted, the Department of Justice ("DOJ") has the opportunity to act. No later than two years after receiving the report shall the Attorney General publish a final rule adopting national standards for the reduction of solitary confinement in America's prisons.

The Attorney General shall not validate a national standard that would impose significant additional costs compared to the costs presently expended by Federal, State, and local prison authorities. Within ninety days of publishing the final rule, DOJ shall convey the national standards adopted under the final rule to the governors of each state, the heads of the departments of corrections of each state, and to the appropriate authorities of local government who oversee operations of prisons.

The bill builds in a compliance mechanism to ensure that states act to pursue these important reforms. For each fiscal year, any money that a state would otherwise receive for prison purposes for that fiscal year under a grant program shall be reduced by fifteen percent for non-compliance. This reduction may be neutralized if the governor of the state submits to the Attorney General a certification that the state has adopted and is in full compliance with the national standards or is on the way to being fully compliant.

I am hopeful that my colleagues will join me in considering and debating this bill. I want to engage in an exchange of ideas that brings many perspectives to the table to address this complex issue. The job of a legislator is to consider the current state of the law and decide whether it is sufficient to solve a problem that impacts society. I think our approach to solitary confinement deserves scrutiny and I think now is the time to have this conversation.

The bill starts a national conversation about solitary confinement by bringing all relevant stakeholders to the table to explore options on how to improve the system. It establishes a national commission that will study the issue with significant stakeholder input and publish a study on the topic as well as a set of best practices that DOJ will consider in issuing a separate and independent set of rules for federal prisons to follow. The legislation creates strong financial incentives for non-federal prison and jail facilities to comply with whatever DOJ will come up with or begin a process that puts them on a road to compliance. I drafted the bill to ultimately provoke thoughts about how we can balance the need to afford prison officials sufficient flexibility while concurrently complying with the Constitution.