

# SOLITARY CONFINEMENT, PUBLIC SAFETY, AND RECIDIVISM

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*As of 2005, about 80,000 prisoners were housed in solitary confinement in jails and in state and federal prisons in the United States. Prisoners in solitary confinement are generally housed in a cell for twenty-two to twenty-four hours a day with little human contact or interaction. The number of prisoners held in solitary confinement increased 40 percent between 1995 and 2000, in comparison to the growth in the total prison population of 28 percent. Concurrently, the duration of time that prisoners spend in solitary confinement also increased: nationally, most prisoners in solitary confinement spend more than five years there. The effects of solitary confinement on prisoners have been a source of growing concern, but the question of whether solitary confinement affects public safety and recidivism has received less attention. While lower courts have imposed constitutional limitations on the use of solitary confinement, in the modern era the Supreme Court has never held that the practice is unconstitutional. Therefore, this Note argues for policy reforms to counteract the harmful impact of solitary confinement on public safety and recidivism, informed by the constitutional standards for its use in prisons.*

## INTRODUCTION

As of 2005, about 80,000 prisoners were housed in solitary confinement in jails and in state and federal prisons in the United States.<sup>1</sup> In general, prisoners in solitary confinement are housed “removed from sustained contact” with other people.<sup>2</sup> While conditions in solitary confinement can vary, prisoners are generally housed in a cell for twenty-two to twenty-four hours a day “with little human contact or interaction”; prisoners do not eat with others or participate in group activities.<sup>3</sup> They have little or no natural light, reading material, television or radio access, property, or visitation

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1. Shane Bauer, *Solitary in Iran Nearly Broke Me. Then I Went Inside America's Prisons*, MOTHER JONES (Nov./Dec. 2012), <http://www.motherjones.com/politics/2012/10/solitary-confinement-shane-bauer>.

2. 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, 497 n.97 (1997) (quoting *Berch v. Stahl*, 373 F. Supp. 412, 420 (W.D.N.C. 1974)).

3. David Fathi, *The Dangerous Overuse of Solitary Confinement in the United States*, in PRISON LAW 2012, at 175, 178 (PLI Litig. & Practice, Course Handbook Ser. No. 234, 2012).

rights.<sup>4</sup> Sensory deprivation, where a prisoner's access to anything that stimulates the senses—for instance radio, television, and reading material—is restricted makes the isolation drastically more severe.<sup>5</sup>

There are different terms for solitary confinement, corresponding to the varying purposes for which it is used. Prisoners who are held in solitary confinement for their own protection are placed in “protective custody,” whereas prisoners who are held in solitary confinement for the purposes of punishment or control are held in “administrative” or “disciplinary segregation.”<sup>6</sup> Protective custody involves isolation for a prisoner's own protection and is used on both juvenile and adult prisoners. Often, jails place youth who are charged as adults in “protective custody” in order to separate them from adults “who can pose grave physical and emotional threats to youth.”<sup>7</sup> Juveniles are also sometimes held in disciplinary solitary confinement.<sup>8</sup> Traditional disciplinary segregation involves a brief removal from the population that is meant to punish a prisoner for a certain infraction.<sup>9</sup> Conversely, in administrative segregation, prisoners are placed in solitary confinement for nonpunitive safety or security reasons.<sup>10</sup>

The number of prisoners held in solitary confinement increased 40 percent between 1995 and 2000; in comparison, the total prison population grew by 28 percent over the same period.<sup>11</sup> Solitary confinement is now a “regular part of the rhythm of prison life.”<sup>12</sup>

In addition to being confined more frequently, the duration of time that prisoners spend in solitary confinement has also increased. One study of prisoners in New York reported an average

4. *Id.*

5. *See id.* at 179–80.

6. Margo Schlanger et al., *ABA Criminal Justice Standards on the Treatment of Prisoners*, 25 CRIM. JUST. 14, 23 (2010).

7. CAMPAIGN FOR YOUTH JUSTICE, JAILING JUVENILES: THE DANGERS OF INCARCERATING YOUTH IN ADULT JAILS IN AMERICA 14 (2007), available at [http://www.campaignforyouthjustice.org/documents/CFYJNR\\_JailingJuveniles.pdf](http://www.campaignforyouthjustice.org/documents/CFYJNR_JailingJuveniles.pdf).

8. *See generally* AM. CIVIL LIBERTIES UNION & HUMAN RIGHTS WATCH, GROWING UP LOCKED DOWN: YOUTH IN SOLITARY CONFINEMENT IN JAILS AND PRISONS ACROSS THE UNITED STATES 67 (2012), available at <http://www.hrw.org/reports/2012/10/10/growing-locked-down>.

9. Craig Haney, *Mental Health Issues in Long-Term Solitary and “Supermax” Confinement*, 49 CRIME & DELINQUENCY 124, 126 (2003).

10. Maureen L. O’Keefe, *Administrative Segregation from Within*, 88 PRISON J. 123, 123 (2008).

11. JOHN J. GIBBONS & NICHOLAS DE B. KATZENBACH, CONFRONTING CONFINEMENT: A REPORT OF THE COMMISSION ON SAFETY AND ABUSE IN AMERICA’S PRISONS 14–15 (2006), available at [http://www.vera.org/sites/default/files/resources/downloads/Confronting\\_Confinement.pdf](http://www.vera.org/sites/default/files/resources/downloads/Confronting_Confinement.pdf).

12. *Id.*

cumulative sentence in disciplinary solitary confinement of three years for its prisoners.<sup>13</sup> In the Pelican Bay Security Housing Unit in California, prisoners are held for an average of seven and a half years.<sup>14</sup> Of the 1,126 prisoners in solitary confinement at Pelican Bay, more than half have been there for at least five years.<sup>15</sup> Eighty-nine have been there for over twenty years and one has been in solitary confinement for forty-two years.<sup>16</sup>

Demonstrating the trend toward solitary confinement's increased role in the American penal system is the development of the "supermax" prison. Supermaxes are prisons in which all prisoners are held in extreme isolation in long-term solitary confinement, often because the prison system deems them to be gang members.<sup>17</sup> Prisoners in supermaxes are completely isolated from other prisoners and guards.<sup>18</sup> These prisons are designed to isolate prisoners from any human contact: cells are purposefully solid so prisoners cannot communicate through walls, and prison guards close the doors with remote controls so the confined prisoner does not come into contact with other prisoners.<sup>19</sup> In supermax prisons, prisoners can only exercise in "caged-in or cement-walled areas," often called "dog runs."<sup>20</sup> Prison officials recognize that these conditions are inhumane, but some attempt to justify such treatment as deserved. For instance, Don Poston, an administrator of the Estelle supermax prison in Texas, has stated that, "It's sad to say, but there are some people who deserve to be treated like animals."<sup>21</sup> Although lower courts have imposed constitutional limitations on the use of solitary confinement, the Supreme Court in the modern era has never held that solitary confinement is per se unconstitutional.

Solitary confinement's effects on prisoners have been a source of growing concern,<sup>22</sup> but the question of whether solitary confinement affects public safety and recidivism has received less attention.

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13. THE CORRECTIONAL ASSOCIATION, LOCKDOWN NEW YORK: DISCIPLINARY CONFINEMENT IN NEW YORK STATE PRISONS 21–22 (2003), available at [http://www.correctionalassociation.org/wp-content/uploads/2012/05/lockdown-new-york\\_report.pdf](http://www.correctionalassociation.org/wp-content/uploads/2012/05/lockdown-new-york_report.pdf).

14. Bauer, *supra* note 1.

15. *Id.*

16. *Id.*

17. Haney, *supra* note 9, at 126–27.

18. See Craig Haney, *A Culture of Harm: Taming the Dynamics of Cruelty in Supermax Prisons*, 35 CRIM. JUST. & BEHAV. 956, 968 (2008) (quoting Jones v. Berge, 164 F. Supp. 1096, 1098–99 (W.D. Wis. 2001)).

19. *Id.*

20. Haney, *supra* note 9, at 126.

21. Kevin Johnson, *Serving Superhard Time: New Prisons Isolate Worst Inmates*, USA TODAY, Aug. 4, 1997, at A1.

22. See, e.g., Bauer, *supra* note 1; Atul Gawande, *Hellhole: The United States Holds Tens of Thousands of Inmates in Long-Term Solitary Confinement. Is This Torture?*, NEW YORKER, Mar. 30,

This question is of growing importance because of the prevalence and severity of solitary confinement practices in prisons across the United States. Solitary confinement may cause prisoners to become more dangerous because of the mental health consequences, the lack of permitted activities, and the dehumanizing treatment by some prison guards.<sup>23</sup> While supporters of solitary confinement argue that it decreases recidivism by deterring prisoners from committing future crimes,<sup>24</sup> two studies—which matched prisoners held in solitary confinement with those held in the general population—found that solitary confinement increased recidivism.<sup>25</sup>

Because of the increasing prevalence and severity of solitary confinement and its potential effects on public safety and recidivism, reform is needed. This Note, therefore, proposes policy reforms that would limit time spent in solitary confinement and eliminate sensory deprivation in order to remedy solitary confinement's potential negative effects on public safety and recidivism, informed by the constitutional standards for its use in prisons. Part I provides a historical overview of solitary confinement, explains its current growth in the United States for adult and juvenile prisoners, and examines its impact on prisoners' mental health. Part II discusses the constitutional status of solitary confinement under the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment. Part III demonstrates that solitary confinement is not necessary in order to maintain safety within prisons. Part IV considers the tendency of solitary confinement to increase recidivism and discusses potential models for changing solitary confinement. Part V concludes by discussing a proposal for reform.

## I. THE GROWING USE OF SOLITARY CONFINEMENT

This Part traces the original justifications for and ultimate drawbacks of solitary confinement in the nineteenth century. It then

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2009. Solitary confinement has also received negative attention due to its financial costs. Building and operating supermax prisons can cost up to three times as much as normal prisons, because prisoners are kept in single cells, the technological costs are greater, and solitary confinement requires higher officer-to-prisoner ratios. Daniel P. Mears & William D. Bales, *Supermax Incarceration and Recidivism*, 47 *CRIMINOLOGY* 1131, 1135 (2009). In 2012, Illinois Governor Pat Quinn initiated the closure of the Tamms Supermax Facility due to its financial burden. Ed Yohnka, *Closing Tamms Supermax: A Chance to Reevaluate Solitary Confinement*, *ACLU BLOG OF RIGHTS* (June 21, 2012, 5:43 PM), <http://www.aclu.org/blog/prisoners-rights/closing-tamms-supermax-chance-reevaluate-solitary-confinement>.

23. See Hans Toch, *The Future of Supermax Confinement*, 81 *PRISON J.* 376, 378, 382 (2001).

24. Mears & Bales, *supra* note 22, at 1137.

25. See *id.* at 1149–51; David Lovell et al., *Recidivism of Supermax Prisoners in Washington State*, 53 *CRIME & DELINQUENCY* 634, 649–50 (2007).

discusses the reasons for solitary confinement's increasing use in American prisons, beginning in the 1980s. Finally, this Part outlines the significant problems that accompany the widespread use of solitary confinement for adults and juveniles.

### A. Solitary Confinement in the Nineteenth Century

In the late eighteenth century, American reformers advocated for solitary confinement because they hoped it would "give prisoners time to contemplate their sins . . . ." <sup>26</sup> Dominant theory believed that prisons could best rehabilitate prisoners "[b]y maximizing control" over them and isolating them from negative influences. <sup>27</sup> Advocates believed that solitary confinement would rehabilitate the prisoner through "reclamation" which would "effect 'a deeper change in the offender's psyche' than that produced by the rehabilitative aspects of mere hard labor." <sup>28</sup>

Despite this initial optimism, commentators, as well as the Supreme Court, soon realized the dangers of solitary confinement. In 1833, de Toqueville and Beaumont reported that solitary confinement "proved fatal for the majority of prisoners" at the Auburn prison in New York; solitary confinement "devour[ed] the victim incessantly and unmercifully; it does not reform, it kills." <sup>29</sup> In 1890, The Supreme Court addressed solitary confinement in *In re Medley*. <sup>30</sup> The Court in *Medley* found that sentencing a murder convict to solitary confinement prior to execution constituted an *ex post facto* punishment above the statutory regime in place at the time of the crime's commission. <sup>31</sup> In doing so, the Court recognized the severe consequences of solitary confinement, writing that the practice caused some prisoners to:

f[a]ll, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them,

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26. Keramet Ann Reiter, *The Most Restrictive Alternative: A Litigation History of Solitary Confinement in U.S. Prisons*, in 57 *STUDIES IN LAW, POLITICS, AND SOCIETY* 71, 72 (Austin Sarat ed., 2012).

27. See Haney & Lynch, *supra* note 2, at 482.

28. *Id.* at 481 n.15 (quoting Adam J. Hirsch, *From Pillory to Penitentiary: The Rise of Criminal Incarceration in Early Massachusetts*, 80 *MICH. L. REV.* 1179, 1209 (1982)).

29. Reiter, *supra* note 26, at 78 (quoting GUSTAVE AUGUSTE DE BEAUMONT & ALEXIS DE TOCQUEVILLE, *ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION TO FRANCE* 41 (S. Ill. Univ. Press 1979) (1833)).

30. 134 U.S. 160 (1890).

31. *Id.* at 167-71.

and others became violently insane, others, still, committed suicide, while others 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.<sup>32</sup>

After the Court's decision in *In re Medley*, solitary confinement lost public approval as a legitimate form of punishment and was only inflicted as a short-term punishment in response to misbehavior by prisoners.<sup>33</sup>

### B. The Modern Use of Solitary Confinement

Solitary confinement is part of a general trend toward punishment and the incapacitation of prisoners in the United States. A "rapid expansion" in the United States prison population began in the 1980s; this expansion resulted in "extreme overcrowding" and precipitated the reimplementing of solitary confinement to deal with resulting violence.<sup>34</sup> Prison officials did not fix the worsening prison conditions, which were a "source of behavioral problems."<sup>35</sup> Instead, correctional administrators implemented "aggressive policies" of solitary confinement in order to gain control over prisoners and as a "weapon in th[e] war against unwieldy numbers of unruly prisoners."<sup>36</sup> States began building technologically advanced supermax prisons in which all prisoners are held in long-term solitary confinement. California opened Pelican Bay, one of the first supermax prisons, in 1988.<sup>37</sup> By 1991, thirty-six states had built dedicated supermax prisons,<sup>38</sup> and in 2008 there were forty-four states with supermax housing.<sup>39</sup>

Unlike the nineteenth century, correctional administrators in modern prisons do not implement solitary confinement for rehabilitative purposes. The goals of modern solitary confinement are simply to incapacitate and assert control over prisoners: the warden and designers of the Tamms Supermax prison in Illinois, for instance, described Tamms as "society's latest, no-holds-barred effort

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32. *Id.* at 168.

33. *See* Reiter, *supra* note 26, at 80.

34. *See* Haney & Lynch, *supra* note 2, at 491–92.

35. *Id.* at 493.

36. *Id.* at 480.

37. Keramet A. Reiter, *Parole, Snitch, or Die: California's Supermax Prisons and Prisoners, 1997–2007*, 14 PUNISHMENT & SOC'Y 530, 531 (2012).

38. Haney & Lynch, *supra* note 2, at 480.

39. Mears & Bales, *supra* note 22, at 1132.

to ensure that certain predatory people are isolated from the rest of us, and from each other.”<sup>40</sup> This emphasis is consistent with the general evolution of the American prison’s mission: since the nineteenth century, the purpose of incarceration has transitioned from rehabilitation to “command and control.”<sup>41</sup>

The increased use of solitary confinement has been predicated on its supposed benefits to prisons, but there has been little discussion of the effects of solitary confinement on prisoners’ interactions with society after they have been released. Most prisoners—including prisoners in solitary confinement—will eventually be released from prison: indeed, overall more than 93 percent of prisoners will eventually rejoin society.<sup>42</sup>

Large numbers of prisoners are in fact released directly from solitary confinement into communities.<sup>43</sup> Prisoners may be released directly from solitary confinement if they are given “indeterminate terms” in solitary confinement when prison officials find the prisoner to be dangerous or a gang member.<sup>44</sup> Prisoners who are released from solitary confinement directly into communities often have difficulty adjusting to “natural light, the noise of traffic and conversation, and physical, human contact.”<sup>45</sup> Similarly, prisoners released from solitary confinement into the general prison population often experience “great difficulty controlling their tempers”

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40. Robert Sheppard et al., *Closed Maximum Security: The Illinois SuperMax*, 58 CORRECTIONS TODAY 84, 84 (1996).

41. PEW CENTER ON THE STATES, STATE OF RECIDIVISM: THE REVOLVING DOOR OF AMERICA’S PRISONS 27 (2006), available at [http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/sentencing\\_and\\_corrections/State\\_Recidivism\\_Revolving\\_Door\\_America\\_Prisons%20.pdf](http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/sentencing_and_corrections/State_Recidivism_Revolving_Door_America_Prisons%20.pdf).

In the mid-1970s, the United States formally abandoned its commitment to the rehabilitative ideals that had guided its prison policy for decades. Often at the insistence of the politicians who funded their prison systems, correctional administrators embraced a new philosophy built on the notion that incarceration was intended to inflict punishment and little else.

Haney, *supra* note 9, at 128.

42. Haney, *supra* note 18, at 979–80

43. Fathi, *supra* note 3, at 188. In California and Colorado, 40 percent of prisoners in solitary confinement are released directly into communities. *Id.* California releases an average of 909 prisoners each year directly from solitary confinement in the Security Housing Units at Pelican Bay and Corcoran prisons. Reiter, *supra* note 37, at 552–53. In 2005, Texas released 1,458 prisoners directly from solitary confinement. Laura Sullivan, *In US Prisons Thousands Spend Years in Isolation*, NPR (Nov. 13, 2006), <http://www.npr.org/templates/story/story.php?storyId=5582144>.

44. Haney, *supra* note 9, at 127. In order for gang members to be released from solitary confinement into the general prison population, they must renounce their gang membership and “debrief” or “snitch.” Reiter, *supra* note 37, at 536; see *Madrid v. Gomez*, 889 F. Supp. 1146, 1241 (N.D. Cal. 1995) (discussing the “debriefing” process in California prisons).

45. Reiter, *supra* note 37, at 553.

because of the “anger that has been mounting” during their time in solitary confinement.<sup>46</sup>

Because of these problems of transition, some prison experts have argued that prison officials should shift their focus from simple isolation in prison to preparing prisoners “to succeed at ‘going straight’ once they are released.”<sup>47</sup> Despite the broader focus on punishing prisoners, there have been some recent efforts to implement more rehabilitative prison policies.<sup>48</sup>

### C. Solitary Confinement of Juveniles

The juvenile justice system was created in the early nineteenth century when “[r]eformers realized that nobody’s interests were served by traumatizing children, sometimes irreparably,” in the adult criminal justice system.<sup>49</sup> However, juveniles who are charged as adults are incarcerated in adult jails and prisons in a majority of jurisdictions throughout the United States.<sup>50</sup> In those situations, the juveniles are generally held in protective custody in order to separate them from adults.<sup>51</sup> The conditions of protective custody mirror those of punitive and administrative solitary confinement: juveniles are locked down twenty-three to twenty-four hours a day in a small cell without natural light, “verbal contact” with other prisoners, or “meaningful contact with staff.”<sup>52</sup>

Solitary confinement is both unnecessary and harmful for youth. National correctional standards, juvenile justice experts, and social scientists agree that isolation in solitary confinement is an “ineffective therapeutic tool” that harms juveniles and is “normally unnecessary” in juvenile facilities.<sup>53</sup>

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46. Terry A. Kupers, *What to Do With the Survivors?*, 35 CRIM. JUST. & BEHAV. 1005, 1010 (2008).

47. *Id.* at 1014.

48. See Haney, *supra* note 18, at 979–80 (arguing that, despite the “culture of control” and the “penal harm movement” that has harmed both prisoners and correctional officers, there is a growing commitment to the goal of rehabilitation).

49. CAROLINE ISAACS & MATTHEW LOWEN, AM. FRIENDS SERV. COMM., BURIED ALIVE: SOLITARY CONFINEMENT IN ARIZONA’S PRISONS AND JAILS 43 (2007).

50. AM. CIVIL LIBERTIES UNION & HUMAN RIGHTS WATCH, *supra* note 8, at 2. Juveniles are charged as adults because of the “political stereotype” that teenagers who commit crimes “must be as sophisticated as an adult.” CAMPAIGN FOR YOUTH JUSTICE, *supra* note 7, at 14 (quoting Matt Olson, *Kids in the Hole*, 67 THE PROGRESSIVE 26, 27 (2003)). However, these children are “most often younger than their age emotionally.” Olson, *supra*.

51. CAMPAIGN FOR YOUTH JUSTICE, *supra* note 7, at 14.

52. *Id.*

53. ISAACS & LOWEN, *supra* note 49, at 43 (citing Kenneth Zimmerman et al., Letter to Valerie Egar, Deputy Attorney General of New Jersey (2005)).

Solitary confinement can make it impossible for juveniles to develop a healthy, functioning adult social identity because they are still in an “uncertain, unformed state of social identity.”<sup>54</sup> Authorities also report high rates of suicide for juveniles held in solitary confinement.<sup>55</sup> Between 1995 and 1999, 110 juvenile suicides occurred in juvenile correctional and detention facilities.<sup>56</sup> Half of the victims were on “room confinement status”<sup>57</sup> at the time of suicide, and 62 percent of the victims had a history of room confinement.<sup>58</sup> These rates may show that prisons do not adequately address the mental health effects of solitary confinement on juveniles. It is also possible that mentally ill juveniles are disproportionately placed in solitary confinement, that solitary confinement exacerbates or causes mental illness in juveniles, or that a combination of these factors contributes to the high suicide rates. Reform is necessary because of the widespread use of solitary confinement for juveniles and its detrimental effects on their mental health.

#### *D. The Effects of Solitary Confinement on Prisoners’ Mental Health*

##### 1. Lack of Adequate Mental Health Treatment

Prisoners housed in solitary confinement often do not receive adequate mental health treatment, which is troubling not least because a disproportionate number of prisoners with mental illness are housed in solitary confinement, and such confinement both exacerbates and causes mental illness.<sup>59</sup> A large number of mentally ill prisoners are placed in solitary confinement because—due to mental illness, brain damage, or other factors—such prisoners often have difficulty conforming to prison rules.<sup>60</sup> In a Washington State study, researchers found that mentally ill prisoners were more than four times more likely than other prisoners to have been held

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54. CAMPAIGN FOR YOUTH JUSTICE, *supra* note 7, at 14 (quoting Olson, *supra* note 50, at 27).

55. ISAACS & LOWEN, *supra* note 49, at 44.

56. *Id.* (citing LINDSAY M. HAYES, JUVENILE SUICIDE IN CONFINEMENT: A NATIONAL SURVEY 10 (Feb. 2004), available at <https://www.ncjrs.gov/pdffiles1/ojjdp/grants/206354.pdf>).

57. The study included solitary confinement, time-outs, and confinement in a quiet room during waking hours in its definition of “room confinement.” HAYES, *supra* note 56, at 28.

58. ISAACS & LOWEN, *supra* note 49, at 44 (citing HAYES, *supra* note 56, at 24).

59. Haney, *supra* note 9, at 132.

60. Lovell et al., *supra* note 25, at 634.

in solitary confinement.<sup>61</sup> The American Friends Service Committee (AFSC), in a separate study, found that 26 percent of prisoners held in Arizona's supermax prisons were mentally ill, compared to 16.8 percent of the state's general prison population.<sup>62</sup> AFSC explained that these findings reflect the "higher likelihood of prisoners with untreated mental illness receiving disciplinary write-ups for behaviors associated with their symptoms."<sup>63</sup>

Despite the large numbers of prisoners with mental illness held there, prisoners in solitary confinement receive psychiatric treatment very infrequently; depending on the prison, prisoners may only be evaluated every ninety days.<sup>64</sup> Those in solitary confinement who are mentally ill or who become mentally ill (and therefore need treatment the most) do not receive it. Their behaviors are viewed as disciplinary problems rather than as symptoms of mental illness. To the extent that prisoners do receive treatment, they are not evaluated confidentially or out of earshot of other prisoners and staff.<sup>65</sup>

## 2. Solitary Confinement Can Exacerbate and Cause Mental Illness in Prisoners

Solitary confinement can exacerbate mental illness for prisoners who are already mentally ill. In *Madrid v. Gomez*, the Northern District of California analogized that housing mentally ill prisoners in solitary confinement "is the mental equivalent of putting an asthmatic in a place with little air."<sup>66</sup> Indeed, some studies have shown that solitary confinement is countertherapeutic. Linda Finke, Ph.D, RN, in her study of isolation for adults and children in psychiatric hospitals, found that the use of seclusion or isolation "may cause additional trauma and harm."<sup>67</sup> Furthermore, the study found that "seclusion does not add to therapeutic goals and is in

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61. *Id.* at 642.

62. MATTHEW LOWEN & CAROLINE ISAACS, AM. FRIENDS SERV. COMM., LIFETIME LOCKDOWN: HOW ISOLATION CONDITIONS IMPACT PRISONER REENTRY 8 (2012).

63. *Id.*

64. Kupers, *supra* note 46, at 1010.

65. *Id.*

66. 889 F. Supp. 1146, 1265 (N.D. Cal. 1995). In *Madrid*, the court ordered that mentally ill prisoners be removed from solitary confinement in the Security Housing Unit because "a severe reduction in environmental stimulation and social interaction can have serious psychiatric consequences for some people." *Id.* at 1231-32.

67. See Linda M. Finke, *The Use of Seclusion Is Not Evidence-Based Practice*, 14 J. CHILD & ADOLESCENT PSYCHIATRIC NURSING 186, 189 (2001).

fact a method to control the environment instead of a therapeutic intervention.”<sup>68</sup>

Moreover, solitary confinement causes harmful psychological effects for prisoners who did not previously suffer from mental illness. Professor Craig Haney reviewed studies of solitary confinement and found that, in every published study of solitary confinement where participants were held in “nonvoluntary confinement” for more than ten days and were “unable to terminate their isolation at will,” the participants experienced negative psychological effects.<sup>69</sup> Although these psychological effects ranged in severity, participants suffered “clinically significant symptoms,” including “hypertension, uncontrollable anger, hallucinations, emotional breakdowns, chronic depression, and suicidal thoughts and behavior.”<sup>70</sup>

Haney identified five social pathologies that are caused by solitary confinement and that provide explanations for these psychological effects. First, the “unprecedented totality of control” in solitary confinement forces prisoners to become completely dependent on the prison for all aspects of their lives.<sup>71</sup> Many prisoners become unable to “initiate or to control their own behavior, or to organize their own lives.”<sup>72</sup> Second, prisoners may become unable to structure their lives around activity and purpose, because they no longer have any opportunities to do so.<sup>73</sup> These prisoners experience “[c]hronic apathy, lethargy, depression, and despair.”<sup>74</sup> Third, solitary confinement “undermin[es]” prisoners’ “sense of self” because they lose the opportunity to socially construct their identity through “regular, normal interpersonal contact,” thus “creat[ing] a feeling of unreality.”<sup>75</sup> Prisoners in solitary confinement risk “losing their grasp” on their own identity and connection to a “larger social world.”<sup>76</sup> Fourth, the total isolation of solitary confinement can lead some prisoners to become “disoriented and even frightened” by social contact and interaction.<sup>77</sup> Fifth, “the deprivations, restrictions,

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68. *See id.*

69. Haney, *supra* note 9, at 132; *see also* Kupers, *supra* note 46, at 1005–06 (“[I]t is very clear . . . that for just about all prisoners, being held in isolated confinement for longer than 3 months causes lasting emotional damage if not full-blown psychosis and functional disability.”).

70. Haney, *supra* note 9, at 132.

71. *Id.* at 138–39.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*; *see also* Haney & Lynch, *supra* note 2, at 503 (“[W]e look to others and in them see identity-forming reflections of ourselves.”).

77. Haney, *supra* note 9, at 140.

the totality of control, and the prolonged absence of any real opportunity for happiness or joy” result in “intolerable levels of frustration” in some prisoners, which can lead to anger and “uncontrollable and sudden outbursts of rage.”<sup>78</sup> Haney concluded that these adaptations are “dysfunctional and problematic.”<sup>79</sup>

Prisons have not adequately responded to the mental health deterioration of prisoners in solitary confinement. Solitary confinement causes mental illness and anger, which can result in a “vicious cycle—the prisoner becoming more angry and incapable of controlling his temper and the resulting disciplinary tickets leading to more time in the isolation setting that induces the angry behaviors.”<sup>80</sup> Prisoners in solitary confinement who exhibit signs of mental illness such as refusing an order, self-mutilation or cutting, or expressing anger at officers likewise receive disciplinary sanctions rather than treatment.<sup>81</sup> Even suicidal behavior is sometimes treated as a behavioral rather than psychological problem.<sup>82</sup> When prisoners in solitary confinement “become so acutely ill” that they are brought to a psychiatric hospital, the prisoners are returned to solitary confinement when they recover, causing a “revolving door phenomenon.”<sup>83</sup>

### 3. Solitary Confinement’s Impact on Prisoners’ Mental Health Affects Their Potential for Successful Reentry

Due to the psychological effects of solitary confinement, prisoners held in such conditions may be unable to “exercise increased self-control and self-initiative” if they are released into the general population of a prison or into communities.<sup>84</sup> Additionally, prisoners may not be able to recover after their release because these harmful adaptations may “become too ingrained to relinquish.”<sup>85</sup> The severe mental health deterioration and the lack of mental health treatment associated with solitary confinement suggest that

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78. *Id.*

79. *Id.* at 139.

80. Kupers, *supra* note 46, at 1012.

81. *Id.*

82. The American Friends Service Committee reported that “some correctional employees seek to punish the youth for their mental illness, viewing suicide threats as behavioral problems rather than as mental health crises requiring therapeutic intervention.” ISAACS & LOWEN, *supra* note 49, at 44.

83. GIBBONS & KATZENBACH, *supra* note 11, at 60.

84. Haney, *supra* note 9, at 140.

85. *Id.* at 141.

prisoners may suffer prolonged mental illness after they are released. In turn, these prisoners might pose an increased risk to public safety after their release. The “paranoia and social anxiety” that result from solitary confinement mean that prisoners may have more difficulty “getting their bearings during the first few months” after they are released from prison, when they are at the greatest risk of reoffending.<sup>86</sup>

## II. THE CONSTITUTIONAL STATUS OF SOLITARY CONFINEMENT

The Eighth and Fourteenth Amendments to the U.S. Constitution limit which types of prisoners can be placed in solitary confinement and the time they can be held there and require that prisoners receive sufficient due process before and during their confinement. The Fourteenth Amendment’s Due Process Clause requires that prison officials provide prisoners due process of law prior to placing them in significantly harsher conditions than confinement in the general prison population.<sup>87</sup> However, many limitations on prisoners’ privileges and rights are seen as a permissible aspect of the penal system and of a prisoner’s sentence and are therefore not subject to due process protections.<sup>88</sup> The Eighth Amendment prohibits cruel and unusual punishment.<sup>89</sup> Courts in some circumstances have found that the solitary confinement of severely mentally ill prisoners violates the Eighth Amendment<sup>90</sup>

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86. Lovell et al., *supra* note 25, at 635.

87. U.S. CONST. amend. XIV, § 1; *see* *Wilkinson v. Austin*, 545 U.S. 209, 223 (2005).

88. *See, e.g., Jones v. N.C. Prisoners’ Labor Union, Inc.*, 433 U.S. 119, 125 (1977) (“[L]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.”) (quoting *Price v. Johnston*, 334 U.S. 266, 285 (1948)).

89. U.S. CONST. amend. VIII.

90. Fathi, *supra* note 3, at 185 (citing *Ruiz v. Johnson*, 37 F. Supp. 2d 855, 915 (S.D. Tex. 1999), *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) (“Conditions in TDCJ-ID’s administrative segregation units clearly violate constitutional standards when imposed on the subgroup of the plaintiffs’ class made up of mentally-ill prisoners.”); *Coleman v. Wilson*, 912 F. Supp. 1282, 1300 & n.15, 1301 & n.16, 1320–21 (E.D. Cal. 1995) (holding that housing prisoners with serious mental disorders—defined as schizophrenia, bipolar disorders, and major depression or an inability to function in prison life without psychiatric intervention—in administrative segregation violated the Eighth Amendment); *Madrid v. Gomez*, 889 F. Supp. 1146, 1231–32, 1265–66 (N.D. Cal. 1995) (removing mentally ill prisoners from the Special Housing Unit because the court found that “a severe reduction in environmental stimulation and social interaction can have serious psychiatric consequences for some people”); *Casey v. Lewis*, 834 F. Supp. 1477, 1515–16, 1531–34, 1548–50 (D. Ariz. 1993) (holding that confinement of seriously mentally ill prisoners—including prisoners suffering from self-abusive behavior, psychosis, paranoid schizophrenia, and depression—in lockdown for more than three days instead of providing mental health treatment violated the Eighth Amendment); *Langley v. Coughlin*, 715 F. Supp.

and have affirmed time limits for the duration of solitary confinement.<sup>91</sup>

*A. Challenges to Solitary Confinement Under the Fourteenth Amendment's Due Process Clause*

The most successful challenges to solitary confinement have been brought under the Fourteenth Amendment's Due Process Clause, which dictates that the government cannot "physically punish an individual except in accordance with due process of law."<sup>92</sup> Because of the hardship inherently imposed by solitary confinement, the Due Process Clause limits its use by requiring that prisoners receive reviews prior to, and during, their placement in solitary confinement.

Therefore, in challenges under the Due Process Clause, prisoners claim that they did not receive sufficient process prior to their placement in solitary confinement.<sup>93</sup> Due process challenges do not address the underlying problems of solitary confinement because they generally demand only increased hearings and reviews.<sup>94</sup> However, these cases implicate the Eighth Amendment because, in order to find a due process violation, courts must find that solitary confinement imposes an "atypical and significant hardship"<sup>95</sup> on a prisoner in comparison to normal prison confinement.

Since the 1970s, circuit courts have found that placement in solitary confinement might "involve [such] grievous loss" that it requires due process.<sup>96</sup> In *Twomey*, the Seventh Circuit rejected the prisons' argument that the Due Process Clause does not require any procedural safeguards "for purely internal prison disciplinary matters"<sup>97</sup> and found that prisoners placed in solitary confinement for two to four months were entitled to procedural safeguards.<sup>98</sup> More recent circuit court cases have found solitary confinement of

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522, 540 (S.D.N.Y. 1988) (holding that evidence of prison officials' failure to screen out from solitary confinement "those individuals who, by virtue of their mental condition, are likely to be severely and adversely affected by placement there" states an Eighth Amendment claim); see also *Austin v. Wilkinson*, No. 4:01-CV-071, Doc. 134, at \*27 (N.D. Ohio Nov. 21, 2001) (order granting preliminary injunction prohibiting the placement of seriously mentally ill prisoners at the Ohio Supermax).

91. *Hutto v. Finney*, 437 U.S. 678, 684 (1978).

92. *Ingraham v. Wright*, 430 U.S. 651, 674 (1977).

93. See *Austin*, 545 U.S. at 223.

94. See *Id.*

95. *Sandin v. Conner*, 515 U.S. 472, 484 (1995).

96. *United States ex rel. Miller v. Twomey*, 479 F.2d 701, 717 (7th Cir. 1973)

97. *Id.* at 716.

98. *Id.* at 708, 718.

305 days or more to be an “atypical and significant hardship” that requires due process.<sup>99</sup>

The United States Supreme Court has only considered the constitutionality<sup>100</sup> of long-term solitary confinement once, in *Wilkinson v. Austin*.<sup>101</sup> In that case, the plaintiffs had been in extreme isolation in the Ohio State Penitentiary (OSP), a supermax facility. Prisoners were placed in OSP if they were convicted of certain offenses, such as organized crime, or if they engaged in certain misconduct while in prison.<sup>102</sup> The prisoners held in OSP lost parole eligibility, were held in indefinite solitary detention, and had almost no human contact.<sup>103</sup>

The Court in *Austin* explained that prohibiting “almost all human contact” created an “atypical and significant” hardship when compared to “any plausible baseline” within the Ohio prison system.<sup>104</sup> However, the Court held that, despite its infliction of hardship, solitary confinement in the case of the plaintiff prisoners did not violate their Fourteenth Amendment due process rights because the state “provide[d] multiple levels of review” prior to its imposition.<sup>105</sup>

### *B. The Eighth Amendment’s Prohibition on Cruel and Unusual Punishment*

Solitary confinement may also violate prisoners’ rights under the Eighth Amendment to the U.S. Constitution. In analyzing the Eighth Amendment’s prohibition on cruel and unusual punishment, the Supreme Court first considers “objective indicia that reflect the public attitude toward a given sanction.”<sup>106</sup> Although courts expect that prison conditions are “restrictive and even harsh”

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99. See, e.g., *Colon v. Howard*, 215 F.3d 227, 230–32 (2d Cir. 2000) (305 days in segregated housing unit); *Shoats v. Horn*, 213 F.3d 140, 143–44 (3d Cir. 2000) (eight years in segregation); *Williams v. Fountain*, 77 F.3d 372, 374 n.3 (11th Cir. 1996) (one year in solitary confinement); *Herron v. Schriro*, 11 F. App’x 659, 661–62 (8th Cir. 2001) (thirteen years in segregation).

100. The Supreme Court examined the constitutionality of long-term solitary confinement only under the Due Process Clause, and not under the Eighth Amendment. The prisoners’ Eighth Amendment claims had settled in the District Court. *Wilkinson v. Austin*, 545 U.S. 209, 218 (2005).

101. *Id.*

102. *Id.* at 216–17.

103. *Id.* at 214–15.

104. *Id.* at 223.

105. *Id.* at 227.

106. U.S. CONST. amend. VIII; *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (death penalty).

as “part of the penalty that criminal offenders pay for their offenses,” prison conditions may not “deprive inmates of the minimal civilized measures of life’s necessities.”<sup>107</sup> A successful Eighth Amendment claim must be based on specific actions that “produce[ ] the deprivation of a single, identifiable human need” rather than “amorphous . . . overall conditions.”<sup>108</sup> For example, under the Eighth Amendment, prison conditions must not deprive prisoners of specific needs such as food, warmth, and exercise.<sup>109</sup>

In addition to considering whether prisoners’ needs are being met, the Supreme Court also considers whether harsh prison conditions are necessary and serve a penological purpose.<sup>110</sup> The first prong of this analysis asks whether the prison regulation “bears a rational relationship to the legitimate governmental interest put forward to justify it.”<sup>111</sup> The second prong asks if the regulation “involve[s] the wanton and unnecessary infliction of pain” or is “grossly disproportionate to the severity of the crime warranting imprisonment.”<sup>112</sup> Even if a regulation meets the first prong, it violates the Eighth Amendment if it fails the second.

This standard, while objective, is not static; the Supreme Court recognizes that this Eighth Amendment standard changes as society progresses. These “evolving standards of decency . . . mark the progress of a maturing society.”<sup>113</sup> Furthermore, this objective component can be satisfied even if a prisoner has not yet been harmed: the Supreme Court has explained that prison officials cannot “ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year.”<sup>114</sup>

After a prisoner has demonstrated an objective violation of the Eighth Amendment, the prisoner must also show that, subjectively, prison officials were “deliberate[ly] indifferen[t] to a substantial risk of serious harm . . . .”<sup>115</sup> In the medical context, for example, it is not enough to establish that a prison official should have known

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107. *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981).

108. *Wilson v. Seiter*, 501 U.S. 294, 304–05 (1991).

109. *Id.* In *Madrid v. Gomez*, the court found that prisoners with a history of mental illness were deprived of the need for mental health when placed in solitary confinement because of the “severe psychological consequences” that would “most probably” result. 889 F. Supp. 1146, 1266 (N.D. Cal. 1995).

110. *Rhodes*, 452 U.S. at 347; *Sheley v. Dugger*, 833 F.2d 1420, 1428 (11th Cir. 1987).

111. Andrea Lyon & Mark D. Cunningham, “Reason Not the Need”: Does the Lack of Compelling State Interest in Maintaining a Separate Death Row Make It Unlawful?, 33 AM. J. L. 1, 12 (2005) (citing *Turner v. Safley*, 482 U.S. 89 (1987)).

112. *Rhodes*, 452 U.S. at 347.

113. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

114. *Helling v. McKinney*, 509 U.S. 25, 33 (1993).

115. *Farmer v. Brennan*, 511 U.S. 825, 828 (1994).

of a prisoner's serious medical need.<sup>116</sup> In order to establish a prison official's deliberate indifference, a prisoner-plaintiff must show evidence that the official was *actually* aware of a prisoner's serious need and chose to ignore it.<sup>117</sup> In addition to showing how a prisoner was harmed by prison conditions, a successful Eighth Amendment claim must also show culpability by prison officials.

### C. *The Eighth Amendment's Limitations on Solitary Confinement*

Although the Supreme Court acknowledged the harm of solitary confinement in *In re Medley*,<sup>118</sup> the Court has not found that long-term solitary confinement constitutes a per se violation of the Eighth Amendment.<sup>119</sup> Federal courts have held that solitary confinement cannot be used to punish prisoners for the crimes they committed prior to conviction<sup>120</sup> and that excessively long-term solitary confinement can violate the Eighth Amendment.<sup>121</sup> Decisions have also restricted the use of solitary confinement for mentally ill prisoners.<sup>122</sup> Despite these restrictions, courts have refused to find that solitary confinement is per se unconstitutional.

The Supreme Court first established that solitary confinement is a "form of punishment subject to scrutiny" under the Eighth

116. *Estelle v. Gamble*, 429 U.S. 97, 106 (1976).

117. *Farmer*, 511 U.S. at 839.

118. 134 U.S. 160, 168 (1890); *see also supra* Part I.A. (discussing the Court's early criticisms of solitary confinement).

119. Reiter, *supra* note 26, at 80; *see, e.g., McElvaine v. Brush*, 142 U.S. 155, 158–60 (1891) (holding that solitary confinement prior to execution did not violate the Eighth Amendment).

120. *United States v. Johnson*, 223 F.3d 665, 673 (7th Cir. 2000). In litigation following the Supreme Court decision in *Wilkinson v. Austin*, the district court found that the prisoners' due process rights were violated because they were being confined in the supermax based on their original offense and not based on their behavior while confined in the supermax. *Austin v. Wilkinson (Austin VII)*, No. 4:01-CV-71, 2007 WL 2840352, at \*7 (N.D. Ohio Sept. 27, 2007).

121. *See Hutto v. Finney*, 437 U.S. 678, 685 (1978) ("Confinement in a prison or in an isolation cell is a form of punishment subject to scrutiny under Eighth Amendment standards.")

122. *See, e.g., Madrid v. Gomez*, 889 F. Supp. 1146, 1265–66 (N.D. Cal. 1995) (removing mentally ill prisoners—such as prisoners with "borderline personality disorders, brain damage or mental retardation, impulse-ridden personalities, or a history of prior psychiatric problems or chronic depression"—from the Special Housing Unit because the court found that these prisoners were at a "particularly high risk for suffering very serious or severe injury to their mental health"); *Austin*, No. 4:01-CV-071, Doc. 134, at \*16–18, \*27 (N.D. Ohio Nov. 21, 2001) (order granting preliminary injunction prohibiting the placement of prisoners with serious mental illnesses—such as schizophrenia, chronic depression, antisocial personality disorder, and major depressive disorder—at the Ohio Supermax).

Amendment in *Hutto v. Finney*.<sup>123</sup> That opinion recognized that the Eighth Amendment “prohibits penalties that are grossly disproportionate to the offense,” as well as punishments that violate “today’s ‘broad and idealistic concepts of dignity, civilized standards, humanity, and decency.’”<sup>124</sup> The *Hutto* Court found that the constitutionality of solitary confinement depends on the length of the confinement and on its particular conditions.<sup>125</sup> The Court affirmed the District Court’s decision limiting the length of time that a prisoner could be held in solitary confinement to thirty days.<sup>126</sup> This precedent suggests that long-term solitary confinement may violate the Eighth Amendment.

Lower federal courts have further defined constitutional limits on solitary confinement. In *Davenport v. DeRobertis*, the Seventh Circuit recognized that isolating a prisoner from others for years or even months can cause substantial psychological damage and may violate the Eighth Amendment.<sup>127</sup> However, in that decision Judge Posner made clear that the prohibition on “‘cruel and unusual punishments’ is relative rather than absolute.”<sup>128</sup> Judge Posner analogized prison conditions to the poverty line in that, as society’s standards of living improve, “the standard of minimum decency of prison conditions, like the poverty line, rises too.”<sup>129</sup> Therefore, a court may find a correctional practice that had previously been upheld to be unconstitutional due to increased knowledge of its harmfulness or because society has developed less-harmful methods of addressing the problem.

Courts have also found that solitary confinement violates the Eighth Amendment for severely mentally ill prisoners. David Fathi, Director of the ACLU’s National Prison Project, found that every federal court that has considered claims by severely mentally ill<sup>130</sup>

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123. 437 U.S. 678, 685 (1978). Although the Supreme Court critiqued solitary confinement in *In re Medley*, the Supreme Court found that the conditions violated the prisoner’s *ex post facto* rights. 134 U.S. 160, 166 (1890). The prisoner did not raise Eighth Amendment claims in *In re Medley* because that case was a petition for habeas corpus.

124. *Hutto*, 437 U.S. at 685 (quoting *Estelle v. Gamble*, 429 U.S. 97, 102 (1976)).

125. *Id.* at 685–86 (internal citations omitted).

126. *Id.* at 684.

127. *Davenport v. DeRobertis*, 844 F.2d 1310, 1313 (7th Cir. 1988), *cert. denied*, 488 U.S. 908 (1988). In *Davenport*, Judge Posner affirmed the District Court’s order that the Eighth Amendment required prisoners segregated for ninety days or more to be allowed at least five hours of out-of-cell exercise per week. *Id.* at 1314–15. However, the court found that the Eighth Amendment did not require that prisoners be allowed three showers per week. *Id.* at 1316.

128. *Id.* at 1315.

129. *Id.*

130. According to Haney, the prisoners at the greatest risk of suffering permanent harm from solitary confinement are those who are “emotionally unstable, who suffer from clinical

prisoners held in solitary confinement has found this treatment unconstitutional.<sup>131</sup> For example, in *Jones 'El v. Berge*, the Western District of Wisconsin granted an injunction prohibiting the housing of mentally ill prisoners in the Boscobel supermax.<sup>132</sup> The court explained that the prison's faulty procedures for screening mentally ill prisoners "support a finding of deliberate indifference" in violation of the Eighth Amendment and the "serious risk of harm" the procedures posed to mentally ill prisoners was unconstitutional.<sup>133</sup> Similarly, in *Madrid v. Gomez*, the Northern District of California found that, if conditions of solitary confinement "inflict a serious mental illness, greatly exacerbate mental illness, or deprive inmates of their sanity," they thereby "depriv[e] inmates of a basic necessity of human existence."<sup>134</sup>

Despite these cases, courts have not found solitary confinement to be per se unconstitutional for prisoners who are not mentally ill. The district court in *Madrid*, for instance, did not find long-term solitary confinement unconstitutional for all prisoners because the "generalized 'psychological pain'—i.e. the loneliness, frustration, depression or extreme boredom"—that prisoners may experience in solitary confinement is not sufficiently cruel and unusual to be unconstitutional.<sup>135</sup>

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depression or other mood disorders, who are developmentally disabled, and those whose contact with reality is already tenuous." Haney, *supra* note 9, at 142.

131. Fathi, *supra* note 3, at 185 (citing Ruiz v. Johnson, 37 F. Supp. 2d 855, 915 (S.D. Tex. 1999), *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); Coleman v. Wilson, 912 F. Supp. 1282, 1320–21 (E.D. Cal. 1995); Madrid v. Gomez, 889 F. Supp. 1146, 1231–32, 1265–66 (N.D. Cal. 1995); Casey v. Lewis, 834 F. Supp. 1477, 1549–50 (D. Ariz. 1993); Langley v. Coughlin, 715 F. Supp. 522, 540 (S.D.N.Y. 1988); see also Austin v. Wilkinson, No. 4:01-CV-00071-JG, Doc. 134, at \*27 (N.D. Ohio Nov. 21, 2001) (order granting preliminary injunction prohibiting the placement of seriously mentally ill prisoners at the Ohio Supermax).

132. 164 F. Supp. 2d 1096, 1125 (W.D. Wis. 2001).

133. *Id.*

134. 889 F. Supp. at 1264.

135. *Id.* at 1263. One reason courts may consider that the risk of psychiatric harm to prisoners who are not mentally ill is insufficient to state an Eighth Amendment violation is section 1997e(e) of the Prison Litigation Reform Act. That section states that "[n]o Federal civil action may be brought by a prisoner . . . for mental or emotional injury suffered while in custody without a prior showing of physical injury." Jules Lobel, *Prolonged Solitary Confinement and the Constitution*, 11 U. PA. J. CONST. L. 115, 133 (2008) (quoting Prison Litigation Reform Act of 1995, Pub. L. No. 104-103, § 803(d), 110 Stat. 1321 (1996), codified as 42 U.S.C. § 1997e(e)). This provision reflects the view that "claims for mental and emotional injuries are seen as easily feigned or exaggerated." *Id.*

### III. THE IMPACT OF SOLITARY CONFINEMENT ON VIOLENCE IN PRISONS

Ironically, most prisoners housed in solitary confinement are not the “worst of the worst,” or the most dangerous or violent.<sup>136</sup> Indeed, many prisoners are housed in solitary confinement because they are mentally ill or are “nuisance prisoners” who break minor rules.<sup>137</sup> For example, 35 percent of prisoners in Arizona’s maximum-security units were convicted of nonviolent offenses.<sup>138</sup>

Even when prisoners are placed in solitary confinement based on their violent behavior, however, this behavior is not always clearly distinguishable from that of prisoners in the general population. In an empirical study of solitary confinement, Mears and Bales paired Florida prisoners held in solitary confinement with those in the general population based on “past offending record, current offense, and behavior while incarcerated.”<sup>139</sup> The matching process resulted in a “non-supermax group that did not differ statistically” in age, race, criminal history, and disciplinary record from the supermax group.<sup>140</sup> While Florida’s policy called for housing prisoners in solitary confinement when they had been convicted of “violent or serious crimes or . . . engaged in violent or disruptive behavior,”<sup>141</sup> Mears and Bales found that “more prisoners are eligible for supermax housing in Florida than end up in it,” because the number of prisoners in supermax housing does not fluctuate, “the criteria for supermax placement are largely open ended” and “cover a wide range of possible behaviors that could implicate large swaths of the inmate population,” and they were able to match the prisoners in supermax with prisoners in the general population.<sup>142</sup> Mears and Bales’s study suggests that behavior-based assignment to solitary confinement can be somewhat arbitrary, meaning that the most violent prisoners may not be the ones in solitary confinement.

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136. Fathi, *supra* note 3, at 185.

137. *Id.* at 186.

138. LOWEN & ISAACS *supra* note 62, at 14.

139. Mears & Bales, *supra* note 22, at 1144.

140. *Id.* at 1149.

141. *Id.* at 1143.

142. *Id.* at 1143–44. In Florida, prisoners are held in solitary confinement for:

committing murder and assault, instigating a riot or disorder, causing more than \$1,000 in property damage, escaping or attempting to escape, possessing weapons or drugs, and, more generally, exhibiting behaviors “that threaten the safety of others, threaten the security of the institution, or demonstrate an inability to live in the general population without abusing the rights and privileges of others.”

*Id.* at 1143 (internal citations omitted).

Solitary confinement has not come close to solving the very problem it was meant to reduce: prison violence.<sup>143</sup> For example, a 2012 study showed that the “rate of violent incidents” in California prisons is almost 20 percent higher than when the Pelican Bay supermax prison—California’s first supermax—opened in 1989.<sup>144</sup> Studies have shown that supermax prisons have little effect on prisoner-on-prisoner violence<sup>145</sup> and that there is only mixed support for the view that supermax prisons increase safety for prison guards.<sup>146</sup>

In fact, solitary confinement may even result in *increased* violence in prisons. The Vera Commission<sup>147</sup> explained that “[t]here is troubling evidence that the distress of living and working in this environment actually causes violence between staff and prisoners.”<sup>148</sup> In *Toussaint v. McCarthy*, the Northern District of California found that segregation, with its idleness and lack of programmed activity, “spawn[ed] tension and violence; [and] it increase[d] rather than decrease[d] antisocial tendencies among inmates” in California’s San Quentin and Folsom prisons.<sup>149</sup> Similarly, Don Cabana, the warden of Parchman Prison in Mississippi, explained: “we’re taking some bad folks, and we’re making them even worse. We’re making them meaner.”<sup>150</sup>

Long-term solitary confinement is unnecessary. In the past, institutions achieved control over prisoners through less-restrictive means. Recently, several states have successfully reduced the number of prisoners in solitary confinement without compromising security. “There is no evidence” that today’s violent prisoners “are

143. See Sheppard et al., *supra* note 40, at 84.

144. Bauer, *supra* note 1.

145. Chad S. Briggs et al., *The Effect of Supermaximum Security Prisons on Aggregate Levels of Institutional Violence*, 41 *CRIMINOLOGY* 1341, 1365–67 (2003) (finding that opening the Tamms Supermax prison in Illinois, the SMU I and II in Arizona, and the OPH in Minnesota did not decrease inmate-on-inmate violence in these states); see also Haney, *supra* note 18, at 980 (“Supermax has proliferated despite empirical evidence suggesting that its existence has done little or nothing to reduce systemwide prison disorder or disciplinary infractions . . . .”) (internal citations omitted).

146. Briggs et al., *supra* note 145, at 1365–67. Prisoner assaults on staff decreased in Illinois after the Tamms supermax was built. *Id.* However, staff injuries increased following the opening of the SMU II in Arizona. *Id.* Finally, opening the OPH in Minnesota and the SMU I in Arizona did not impact violence toward staff. *Id.*

147. The Vera Institute of Justice created the Commission on Safety and Abuse in America’s Prisons, chaired by the Honorable John J. Gibbons and former Attorney General Nicholas de B. Katzenbach, which issued recommendations on prison reform, including solitary confinement.

148. GIBBONS & KATZENBACH, *supra* note 11, at 14.

149. 597 F. Supp. 1388, 1403 (N.D. Cal. 1984), *aff’d*, 801 F.2d 1080 (9th Cir. 1986).

150. ISAACS & LOWEN, *supra* note 49, at 35.

any worse than those who had been adequately managed by less drastic measures in the past.”<sup>151</sup>

In fact, Colorado, Maine, and Mississippi have reduced the numbers of prisoners in solitary confinement without an increase in prison violence.<sup>152</sup> Mississippi State Penitentiary at Parchman, for example, experienced a 50 percent decrease in violence after it transferred 75 percent of its solitary confinement prisoners in the mid-2000s.<sup>153</sup> The State transferred most of these prisoners into the general prison population and transferred prisoners with serious mental illness to a psychiatric hospital or to a step-down mental health treatment program.<sup>154</sup> After these changes, there was a “marked decrease of violence” throughout Mississippi’s Department of Corrections and a “stunning decrease in the number of disciplinary infractions . . . given to prisoners suffering from serious mental illness.”<sup>155</sup>

One explanation for why nonviolent prisoners are held in solitary confinement is that states built supermax prisons because of a “desire to appear ‘tough on crime’” and then needed to find prisoners to house in them.<sup>156</sup> Despite its purpose—to make the state appear as if it is keeping its citizens safe—solitary confinement actually deals a blow to societal safety concerns.

#### IV. SOLITARY CONFINEMENT AND RECIDIVISM

Prisoner recidivism is a serious public safety concern: almost 700,000 prisoners are released from prison every year,<sup>157</sup> and approximately two-thirds of those released are rearrested within three

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151. Haney, *supra* note 9, at 129.

152. Bauer, *supra* note 1.

153. *Id.* (citing *Reassessing Solitary Confinement: The Human Rights, Fiscal, and Public Safety Consequences Before the Subcomm. On the Constitution, Civil Rights & Human Rights of the S. Judiciary Comm.*, 112th Cong. (2012) (statement of Christopher B. Epps, Comm’r of Corrections for the State of Mississippi), available at <http://www.motherjones.com/documents/452652-epps-testimony#document/p3/a76665>). Dr. James Austin, a classification expert, had concluded that almost 80 percent of the prisoners held in Unit 32 at Parchman should be transferred from solitary confinement in administrative segregation into the general prison population. Terry A. Kupers et al., *Beyond Supermax Administrative Segregation*, 36 CRIM. JUST. & BEHAV. 1037, 1040 (2009).

154. See Kupers, et al., *supra* note 153, at 1042–43 (discussing the process by which these prisoners were released from solitary confinement into the step-down mental health program and then into general population after three to six months).

155. Terry A. Kupers, *Treating Those Excluded from the SHU*, 12 CORRECTIONAL MENTAL HEALTH REP. 49, 50 (2010).

156. Fathi, *supra* note 3, at 185.

157. E. ANN CARSON & WILLIAM J. SABOL, U.S. BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2011 1 (2012). 688,384 state and federal prisoners were released in 2011. *Id.*

years.<sup>158</sup> While there are multiple theories for why solitary confinement would increase or decrease recidivism, there are few quantitative studies on solitary confinement and recidivism, in part because some states do not release data on recidivism rates of prisoners held in solitary confinement.<sup>159</sup> Based on factors discussed below, however, spending time in solitary confinement may actually increase an individual's risk of recidivism.

*A. Recidivism for General Population Prisoners  
and Access to Rehabilitation*

Education and work programming,<sup>160</sup> maintenance of family ties during incarceration,<sup>161</sup> and assistance transitioning into society post-release<sup>162</sup> are all factors known to decrease recidivism. Similarly, placement in community-based programs instead of detention decreases recidivism for juveniles.<sup>163</sup>

States that have reduced their recidivism rates have often done so by implementing programs that help prisoners transition from incarceration to release. For example, Michigan launched the Michigan Prisoner Reentry Initiative (MPRI) in 2003 and expanded the program statewide in 2008.<sup>164</sup> Under this program, prior to release, prisoners are transferred from prison to a reentry facility where a transition plan is created in order to “address[ ] employment, housing, transportation, mentoring, counseling, and any necessary treatment for mental illness or addictions.”<sup>165</sup> Parolees who participated in MPRI were reincarcerated at one-third the rate of similar offenders who did not participate in MPRI.<sup>166</sup> Similarly, Oregon dropped its recidivism rate by implementing “detailed transition planning” for prisoners in the six months prior to their

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158. PATRICK A. LANGAN & DAVID J. LEVIN, U.S. BUREAU OF JUSTICE STATISTICS, RECIDIVISM OF PRISONERS RELEASED IN 1994 I (2002), available at <http://bjs.gov/content/pub/pdf/rpr94.pdf>. Of almost 300,000 prisoners released in fifteen states in 1994, 67.5% were rearrested within three years. *Id.*

159. See, e.g., ISAACS & LOWEN, *supra* note 49, at 6 (“[N]one of the three [Arizona] institutions studied in this report could provide recidivism data for prisoners released from supermax units.”).

160. Gerald Gaes et al., *Adult Correctional Treatment*, 26 CRIME & JUST. 361, 402–03 (1999).

161. See Mears & Bales, *supra* note 22, at 1138.

162. PEW CENTER ON THE STATES, *supra* note 41, at 20–21.

163. ELIZABETH CALVIN, NATIONAL JUVENILE DEFENDER CENTER, LEGAL STRATEGIES TO REDUCE THE UNNECESSARY DETENTION OF CHILDREN 56–58 (2004), available at [http://www.njdc.info/pdf/detention\\_guide.pdf](http://www.njdc.info/pdf/detention_guide.pdf).

164. PEW CENTER ON THE STATES, *supra* note 41, at 21.

165. *Id.*

166. *Id.*

release.<sup>167</sup> Between 1999 and 2004, the recidivism rate dropped almost 32 percent. Oregon's recidivism rate—22.8 percent—was the lowest of the forty-one states that the Pew Center studied.<sup>168</sup>

In addition to transition planning, educational and vocational programs also reduce recidivism. Studies have shown that “adult academic and vocational correctional education programs lead to fewer disciplinary violations during incarceration, reductions in recidivism, increases in employment opportunities, and to increases in participation in education upon release.”<sup>169</sup> Additionally, family visitation decreases the risk that prisoners will reoffend.<sup>170</sup> In sum, minimizing restrictions during incarceration increases prisoners' chances at successful reentry.<sup>171</sup>

In contrast, prisoners in solitary confinement are disadvantaged because they have no access to the types of programming that have been shown to reduce recidivism. They have “little to no access” to work, substance abuse classes, vocational training, or education.<sup>172</sup> Solitary confinement prisoners in Arizona's Special Management Units, for example, can only view education or rehabilitative programming if they purchase a television, which many prisoners cannot afford to do.<sup>173</sup> They also have few opportunities “to learn how to manage interpersonal conflict or to develop reentry plans, which can be critical to successful transition back into society.”<sup>174</sup>

Similarly, juveniles reoffend less if they are placed in less restrictive environments. To start, young people placed in detention “feel stigmatized because they have been labeled delinquent,” arguably creating a self-fulfilling prophecy that they will continue to offend after release.<sup>175</sup> Juveniles who are placed in detention have higher rates of recidivism than juveniles who are not detained or who are placed in community-based programs.<sup>176</sup> Conversely, young people in San Francisco's Detention Diversion Advocacy Program—where youth currently or likely to be held in secure detention are released

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167. *Id.* at 20.

168. *Id.*

169. Gaes et al., *supra* note 160, at 402–03 (quoting J. Gerber & E.J. Fritsch, *The Effects of Academic and Vocational Program Participation on Inmate Misconduct and Reincarceration*, in SAM HOUSTON STATE UNIVERSITY, PRISON EDUCATION RESEARCH PROJECT: FINAL REPORT 11 (1994)).

170. Mears & Bales, *supra* note 22, at 1138.

171. See ISAACS & LOWEN, *supra* note 49, at 60.

172. *Id.* at 13; see also Haney, *supra* note 9, at 127 (“[Prisoners in solitary confinement are] denied access to vocational or educational training programs or other meaningful activities . . .”).

173. ISAACS & LOWEN, *supra* note 49, at 33.

174. Mears & Bales, *supra* note 22, at 1138 (citations omitted).

175. CALVIN, *supra* note 163, at 56.

176. *Id.* at 56–58 (discussing reforms in King County, Washington, New York City, San Francisco, and Cook County, Illinois).

to their homes and participate in community services with specific objectives overseen by case managers<sup>177</sup>—reoffend at half the rate of juveniles in detention or in the juvenile justice system.<sup>178</sup> Given that detention leads to recidivism for juveniles, solitary confinement of juveniles may increase recidivism to an even greater degree.

Research on recidivism for both juveniles and adults has shown that rehabilitative and transition programming, as well as less punitive and restrictive conditions, can help reduce recidivism. Solitary confinement is clearly incompatible with the factors shown above that reduce recidivism.

### *B. Explanations for Why Solitary Confinement May Affect Recidivism*

One explanation for why solitary confinement may increase recidivism is the “rage hypothesis,” which posits that prisoners become so angry and frustrated by their incarceration in solitary confinement that they gain an “active desire, or a heightened readiness, to exact revenge on society.”<sup>179</sup> Similarly, many prisoners believe that they were placed in solitary confinement unfairly and that they were treated in solitary confinement in an “extreme, unfair, and demeaning way.”<sup>180</sup> “This sense of mistreatment and procedural injustice” could result in higher rates of recidivism.<sup>181</sup>

Supporters of solitary confinement argue that it decreases recidivism by deterring prisoners from committing future crimes, particularly crimes where they would face another prison sentence in solitary confinement.<sup>182</sup> Proponents also argue that solitary confinement could help with rehabilitation because it “disrupt[s] exposure to negative peer influences”<sup>183</sup> in the general prison population and gives prisoners the “opportunity for reflection.”<sup>184</sup> However, solitary confinement may increase recidivism by weakening prisoners’ social bonds and causing prisoners to become

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177. RANDALL G. SHELDEN, U.S. DEPARTMENT OF JUSTICE OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, DETENTION DIVERSION ADVOCACY: AN EVALUATION 5 (1999), *available at* [http://www.cjcb.org/uploads/cjcb/documents/ojdp\\_ddap.pdf](http://www.cjcb.org/uploads/cjcb/documents/ojdp_ddap.pdf).

178. BARRY HOLMAN & JASON ZIEDENBERG, JUSTICE POLICY INSTITUTE, THE DANGERS OF DETENTION: THE IMPACT OF INCARCERATING YOUTH IN DETENTION AND OTHER SECURE FACILITIES 6 (2006), *available at* <http://www.justicepolicy.org/research/1978>.

179. Mears & Bales, *supra* note 22, at 1138.

180. *Id.*

181. *Id.*

182. *Id.* at 1137.

183. *Id.*

184. *Id.* at 1153.

enraged,<sup>185</sup> in addition to the negative effects of solitary confinement on mental health and the lack of rehabilitative programming described above.<sup>186</sup>

Critics of solitary confinement argue that being confined without human contact can “reduce social bonds to others and induce strain and possibly embitterment and rage. It also may undermine inmates’ beliefs in conventional moral codes and impede efforts to prepare inmates for reentry.”<sup>187</sup> Prisoners held in solitary confinement, particularly if they are released directly into communities, “might be too disoriented, jumpy, or hostile to cope with the challenges of society.”<sup>188</sup>

### C. Quantitative Studies of Solitary Confinement and Recidivism

The notion that solitary confinement increases recidivism is not merely theoretical. Two foundational studies that matched prisoners held in solitary confinement with prisoners held in the general population found that solitary confinement increased recidivism.<sup>189</sup>

Daniel Mears and William Bales studied prisoners who had been imprisoned for at least one year and who were released from Florida prisons between July 1996 and June 2001.<sup>190</sup> The authors compared recidivism rates by matching the 1,247 prisoners who were incarcerated in solitary confinement<sup>191</sup> with prisoners who had been in the general prison population based on “past offending record, current offense, and behavior while incarcerated.”<sup>192</sup> The

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185. See *supra* Part I.D.2.

186. See *supra* Parts I.D, I.B.

187. Mears & Bales, *supra* note 22, at 1153.

188. Lovell et al., *supra* note 25, at 639.

189. See Mears & Bales, *supra* note 22, at 1149–51; Lovell et al., *supra* note 25, at 649–50. A third study found that solitary confinement correlated with an increased rate of recidivism; however, this study did not pair the prisoners held in solitary confinement with prisoners held in the general population based on likelihood of recidivism. MAUREEN L. O’KEEFE, ANALYSIS OF COLORADO’S ADMINISTRATIVE SEGREGATION iii, 25 (2005), available at <http://cospl.coalition.org/fedora/repository/co:3048>. This study in Colorado of 3,003 prisoners held in solitary confinement between January 1995 and December 2003 found that the prisoners released directly from solitary confinement to the community had recidivism rates of 66 percent during the three years after release. *Id.* Prisoners who had been in solitary confinement but were housed in general population before release had recidivism rates of 60 percent, compared to general population recidivism rates of 50 percent. *Id.*

190. Mears & Bales, *supra* note 22, at 1141.

191. Mears and Bales defined these prisoners as prisoners who had been in solitary for at least ninety-one days. *Id.* at 1144.

192. *Id.* The study defined recidivism as a new felony conviction resulting in a sentence in a local jail, state prison, or community supervision during the thirty-six months after the prisoners were released. *Id.* at 1142.

study found that 24.2 percent of the prisoners held in solitary confinement were reconvicted of a violent crime compared to 20.5 percent of prisoners held in general population<sup>193</sup> and concluded that solitary confinement “is associated with an increased risk of violent recidivism.”<sup>194</sup>

Mears and Bales posited that defiance theory may explain this outcome because the increase in recidivism did not depend on how long or how recently the offender had been in solitary confinement.<sup>195</sup> According to defiance theory, placing prisoners in solitary confinement undermines their belief in the legitimacy of the prison system, because they feel mistreated and that their placement is unfair.<sup>196</sup> Mears and Bales noted that, although solitary confinement is “arguably the most severe sanction” in prisons, it does not in fact deter, and may instead increase, violent recidivism.<sup>197</sup> They inferred that solitary confinement “prevents inmates from sustaining or creating a social bond” and causes the “removal of positive stimuli, imposition of negative stimuli, and introduction of barriers to achieving goals”; its use therefore may increase violent offending.<sup>198</sup>

Similarly, a study from Washington State found that prisoners released directly from solitary confinement had a higher rate of recidivism than prisoners who had been released from the general population. Professor Lovell studied 7,248 men released from prison in Washington State and compared prisoners released from solitary confinement with those who were not held in solitary confinement.<sup>199</sup> The study examined new felonies committed within three years of release and found that prisoners who were held in solitary confinement up until the point they were released from prison had an increased rate of recidivism compared to those who were not.<sup>200</sup> These prisoners “committed new felonies sooner and at higher rates” than similar prisoners who had not been held in solitary confinement and prisoners who were not released directly

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193. *Id.* at 1150–51. However, the study found that the amount of time prisoners spent in solitary confinement and how recently the prisoners were held in solitary confinement did not impact recidivism. *Id.* at 1151–52.

194. *Id.* at 1151.

195. *Id.* at 1156.

196. *Id.*

197. *Id.* at 1154.

198. *Id.* at 1155.

199. Lovell et al., *supra* note 25, at 638, 649. Solitary confinement prisoners had been in solitary confinement within four years of their release and had spent either a minimum of twelve weeks in solitary confinement continuously or at least 40 percent of their sentence in solitary confinement. *Id.* at 638. Nonsolitary confinement prisoners had spent no more than thirty days in solitary confinement. *Id.*

200. *Id.* at 638, 649–50.

from solitary confinement.<sup>201</sup> Similarly to Mears and Bales,<sup>202</sup> Lovell paired the prisoners based on their criminal histories.<sup>203</sup> Therefore, the different rates of recidivism were caused by conditions in solitary confinement and not by characteristics of the prisoners.<sup>204</sup>

These studies demonstrate that solitary confinement does not help prisoners “develop[ ] effective, nonviolent strategies to achieve goals or to manage interpersonal conflicts.”<sup>205</sup> Rather, solitary confinement may cause prisoners to become more dangerous because of the mental health consequences, the lack of permitted activities, and the dehumanizing treatment by prison guards.<sup>206</sup> Solitary confinement may also increase *violent* recidivism, particularly for prisoners released directly from solitary confinement. Solitary confinement certainly does not decrease recidivism and may in fact increase the risk of reoffending. The harmful mental health effects of solitary confinement and its negative impact on perceived institutional legitimacy provide convincing explanations for these findings.

#### D. Models for Reform

States house prisoners in solitary confinement at different rates and for different reasons and amounts of time. States that have successfully reduced their use of solitary confinement serve as models for how states with large numbers of prisoners in solitary confinement can similarly reduce their reliance on the tactic. The percentage of prisoners in solitary confinement ranges by state from less than 1 percent to 12 percent.<sup>207</sup> California houses at least 11,730 prisoners in “some form of isolation,” and at least 3,808 California prisoners are in isolation for an indeterminate amount of time.<sup>208</sup> In Texas, 4,748 prisoners are held in indefinite solitary confinement because they have been validated as gang affiliates. Some of these prisoners have been held in solitary confinement for over twenty years.<sup>209</sup> In contrast, Minnesota holds prisoners in solitary confinement for an average of only twenty-nine days.<sup>210</sup>

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201. *Id.*

202. *See supra* notes 191–92 and accompanying text.

203. Lovell et al., *supra* note 25, at 642.

204. Mears & Bales, *supra* note 22, at 1144.

205. *Id.* at 1155.

206. *See* Toch, *supra* note 23, at 378, 382.

207. Mears & Bales, *supra* note 22, at 1140.

208. Bauer, *supra* note 1.

209. *Id.*

210. *Id.*

Furthermore, multiple states have removed prisoners with mental illness from solitary confinement following class action litigation and settlements.<sup>211</sup> As a result, some states have created intensive mental health treatment programs for these prisoners.<sup>212</sup> New York and Mississippi, for example, have created “step-down mental health units,” which are intensive treatment programs for those mentally ill prisoners who have been excluded from solitary confinement units.<sup>213</sup> These examples show that states can successfully limit the use of solitary confinement, particularly for juveniles and for the mentally ill.

Some prisons have had great success implementing more open and social programs for housing prisoners. At Minnesota’s Oak Park Heights maximum-security prison, prisoners have human contact, natural light and sensory stimulation, and they are allowed to exercise; few people are locked in their cells during the day.<sup>214</sup> James Bruton, a former warden of the prison, explained: “[H]alf of the people that you work with every day have killed somebody and 95 percent have hurt somebody, you better find a way every day for them to get up in the morning and look forward to something positive or you’ve got big trouble.”<sup>215</sup> This prison has succeeded in treating prisoners humanely while maintaining prison safety. As a result, there has not been a homicide in the prison in its twenty-three years of operation.<sup>216</sup>

Missouri has implemented a decentralized, small-group corrections system that focuses on rehabilitation for juveniles.<sup>217</sup> The model has resulted in low recidivism rates and has been “widely acclaimed as a common sense, research based approach” to juvenile justice.<sup>218</sup> Juveniles are placed in “homey, small-group setting[s] that incorporate[ ] constant therapy and positive peer pressure under the direct guidance of well-trained counselors.”<sup>219</sup> The Missouri Department of Youth seeks to provide the “least restrictive environment” to all youth and uses isolation only as “an absolute last resort.”<sup>220</sup> Out of a total of seven hundred beds, only seven are

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211. *Presley v. Epps*, 4:05-cv-148-JAD (N.D. Miss. 2005 & 2007); *Madrid v. Gomez*, 889 F. Supp. 1146 (N.D. Cal. 1995); *Jones ‘El v. Berge*, 164 F. Supp. 2d 1096 (W.D. Wis. 2001).

212. See Kupers, *supra* note 155, at 149–50; see, e.g., *Disability Advocates, Inc. v. N.Y. State Office of Mental Health*, 02 civ.4002-GEL (S.D.N.Y. 2006) (settlement).

213. Kupers, *supra* note 155, at 50.

214. GIBBONS & KATZENBACH, *supra* note 11, at 60.

215. *Id.* (internal quotation omitted).

216. *Id.* at 61.

217. ISAACS & LOWEN, *supra* note 49, at 49.

218. *Id.*

219. *Id.*

220. *Id.* at 49–50.

in isolation rooms; during the last ten years, some of the state's five regions have not used their isolation rooms at all, and none of the regions have used isolation more than five times.<sup>221</sup>

## V. REFORM

As shown above, some states have implemented reforms that have decreased the amount of time prisoners spend in solitary confinement, removed mentally ill prisoners from solitary confinement, and reformed juvenile detention. The reforms implemented in individual states provide a blueprint for reforms that can be implemented across the United States through a federal statute to decrease the number of prisoners placed in solitary confinement, reduce the amount of time prisoners spend in solitary confinement, and end the use of sensory deprivation. These reforms will greatly limit the number of prisoners subjected to solitary confinement and counteract its harmful effects, including mental health deterioration. Prisoners will have greater access to rehabilitative programming and will have less likelihood of recidivism upon reentry into communities.

### A. *The Feasibility of a Federal Statute*

Congress should pass a federal statute<sup>222</sup> incorporating the findings of this Note, informed by the Vera Commission's study<sup>223</sup> and ABA Standards,<sup>224</sup> as well as by practices in Mississippi, Minnesota, and Maine.<sup>225</sup> This reform should be enacted through legislation because it can result in the greatest number of specific changes to the way solitary confinement is currently used throughout the United States. The statute should use the Prison Rape Elimination Act (PREA) as a model for enforcement. PREA requires states to

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221. *Id.* at 50.

222. Alternatively, the Uniform Law Commission could draft a uniform statute. This alternative would have the disadvantage of allowing states not to adopt the law. However, the process by which the Uniform Law Commission would draft the model statute would bring favorable attention to this issue and might encourage adoption by states.

223. GIBBONS & KATZENBACH, *supra* note 11, at 52–61.

224. AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE: TREATMENT OF PRISONERS (2011).

225. *See* AM. CIVIL LIBERTIES UNION, CHANGE IS POSSIBLE: A CASE STUDY OF SOLITARY CONFINEMENT REFORM IN MAINE (2013).

conform with its guidelines for reducing rape or lose 5 percent of any Department of Justice grant funds that they receive.<sup>226</sup>

Prison litigation is difficult and, as a result, is an unlikely avenue for securing meaningful reform. While litigation contributed to closing the Tamms supermax and helped catalyze reforms in Mississippi, federal courts have generally deferred to prison officials' judgments about the use of solitary confinement, and the Prison Litigation Reform Act (PLRA) restricts the impact of judicial decisions on prison conditions more generally. The PLRA, enacted in 1996, limited the scope of consent decrees to "narrowly drawn" relief that "extend[ed] no further than necessary to correct the violation of the Federal right."<sup>227</sup> Under the PLRA, a prisoner must exhaust all administrative remedies prior to suing prison officials, and the prisoner cannot recover for mental or emotional harm unless the prisoner has also been physically harmed.<sup>228</sup>

Furthermore, the financial and public safety costs of solitary confinement provide strong policy grounds for a legislative remedy. A federal statute is politically feasible—in fact, the Senate held hearings on solitary confinement in June 2012.<sup>229</sup> Furthermore, the Federal Bureau of Prisons is currently reviewing its use of solitary confinement, indicating that there is a growing political interest in questioning the practice.<sup>230</sup> A federal statute can most effectively create positive changes for adults and juveniles in solitary confinement in jails and prisons throughout the United States.

### *B. Recommendations*

Reform efforts should reduce the duration of time a prisoner may be held in solitary confinement and limit the types of prisoners that can be placed in such conditions. Furthermore, solitary confinement should only be used to protect prisoners and not to punish prisoners for breaking rules. Even if prisoners need to be physically separated from others, sensory deprivation is always unnecessary. Also, prisoners may only need to be separated from specific people, rather than from the entire population. Indeed,

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226. See 42 U.S.C. § 15607(c) (2006).

227. 18 U.S.C. § 3626(a)(1)(A) (2006).

228. 42 U.S.C. § 1997e(e) (2006).

229. *Reassessing Solitary Confinement: The Human Rights, Fiscal, and Public Safety Consequences Before the Subcomm. on the Constitution, Civil Rights & Human Rights of the S. Judiciary Comm.*, 112th Cong. (2012).

230. Edith Honan, *U.S. Bureau of Prisons to Review Solitary Confinement*, REUTERS (Feb. 4, 2013), <http://www.reuters.com/article/2013/02/05/us-usa-prisons-solitary-idUSBRE91404L20130205>.

prisoners in protective custody often do not need to be housed in solitary confinement. Instead, these prisoners should be placed in housing at “safe distances” from specific prisoners or groups of prisoners.<sup>231</sup>

Prisoners should not be placed in long-term solitary confinement as punishment. The Vera Commission cites “maintaining safety” as the only permissible goal of solitary confinement.<sup>232</sup> A prisoner should not be put in disciplinary segregation if the violation did not pose a safety threat; instead, prisons can address those infractions by restricting certain privileges.<sup>233</sup> Kupers recommends that prisons should “emphasize rewards over punishments,” because the “punitive prison milieu” is “entirely counter-therapeutic.”<sup>234</sup> According to Kupers, the “long-term static conditions” of solitary confinement are ineffective at addressing violent behavior.<sup>235</sup> Instead, prisoners should be incentivized to reach “attainable goals” with increased freedom and privileges, because “[h]aving no way to attain more freedom . . . lead[s] to despair and desperate acts.”<sup>236</sup>

Even when prisoners must be physically separated from other prisoners in order to ensure prison safety, this separation does not require the “social and sensory isolation” that is far too common in solitary confinement.<sup>237</sup> Sensory deprivation is solely punitive; it does not have any health or safety justification.<sup>238</sup> Prisoners should be provided stimulation including books, television, radio, and communication and visits with family and friends.<sup>239</sup> The Vera Commission recommended that prisoners in solitary confinement be provided “opportunities to fully engage in treatment, work, study, and other productive activities, and to feel part of a community.”<sup>240</sup> These recommendations counteract the sensory deprivation that researchers such as Haney have found to be harmful.

231. GIBBONS & KATZENBACH, *supra* note 11, at 14.

232. *Id.* at 53.

233. *See id.*

234. Kupers, *supra* note 155, at 59 (“[P]risoners are serving their sentence in prison as their punishment. . . . They do not need to be further punished with inhumane conditions and brutal abuse. In the case of prisoners with serious mental illness . . . a relative emphasis on rewards over punishments is a prerequisite to therapeutic success.”).

235. *Id.*

236. *Id.* at 59–60.

237. Schlanger et al., *supra* note 6, at 24; *see also* Lobel, *supra* note 135, at 132 (“There is simply no strong security need for the total social isolation that exists at some supermax prisons.”).

238. Schlanger et al., *supra* note 6, at 24.

239. Lobel, *supra* note 135, at 132.

240. GIBBONS & KATZENBACH, *supra* note 11, at 53.

Solitary confinement should only be used as a last resort to prevent prisoners from acting violently.<sup>241</sup> In these situations, solitary confinement should be used for less than twenty-four hours and only in “extreme circumstances as a therapeutic intervention to stabilize someone who is completely out of control and to prevent harm to self or others.”<sup>242</sup> Additionally, trained mental health professionals should be involved throughout the process,<sup>243</sup> and prisoners should never be released directly from solitary confinement into communities. Instead, they should undergo a “transitional process” where the prisoners can “gradually increas[e]” their interactions with prisoners and guards in order to “become accustomed to living with others in a less controlled environment.”<sup>244</sup>

### *C. Provisions of a Federal Statute*

This Note proposes that the following text be included in a federal statute. The text aims to limit the use of solitary confinement to certain conditions.

- Solitary confinement is defined as housing a prisoner in a single cell for twenty-three hours per day, without the ability to eat, exercise, or otherwise interact with other prisoners.
- Solitary confinement may only be used in prisons under the following conditions:
  - Violent prisoners may be placed in solitary confinement for up to twenty-four hours under medical supervision as a therapeutic intervention.
  - Prisoners who have seriously injured other prisoners or prison guards may be placed in solitary confinement but must receive periodic reviews every thirty days, as well as weekly mental health assessments.
- Prisoners may not be housed in solitary confinement as a punishment for nonviolent infractions.
- Prisoners may not be housed in solitary confinement for protective custody.

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241. *See id.*

242. *Id.* at 58.

243. *Id.* at 59.

244. *Id.* at 57; AM. BAR ASS'N, *supra* note 224, at 43 (“[Prisoners] should be placed in a less restrictive setting for the final months of confinement.”).

- Prisoners in solitary confinement must receive access to mental health care, mental stimulation, rehabilitative programming, and family visitation and phone calls.<sup>245</sup>
- Prisoners who are mentally ill or under the age of eighteen may not be housed in solitary confinement.
- Prisoners must receive transition programming when they are released from solitary confinement into the general prison population and when they are released from prison.
- Prison staff must be trained to recognize symptoms of mental illness and to use alternative methods of addressing prisoner behavior other than solitary confinement.<sup>246</sup>

### CONCLUSION

Solitary confinement, like all prison policies, should be designed to maximize public safety and not solely to punish prisoners. Studies have shown that solitary confinement results in mental illness and appears to increase recidivism. Therefore, prisons need to drastically reduce their populations in solitary confinement and the amount of time they hold prisoners in solitary confinement. Indeed, the most oppressive feature of solitary confinement—sensory deprivation—is unnecessary. Prisoners can be physically separated from others in order to prevent violence without depriving them of all sensory stimulation. Studies of prisons that have used solitary confinement less frequently show that this action actually increased public safety.

The statutory reforms proposed in this Note will decrease the harmful effects that solitary confinement has on recidivism and public safety by greatly decreasing the number of prisoners housed in these conditions. Furthermore, the reforms will mitigate the harms such confinement causes to prisoners by providing those in solitary confinement with mental health treatment and sensory stimulation. Solitary confinement is inhumane and unnecessary, and for the common sense reason that doing so would increase public safety, Congress should pass legislation that limits the use of solitary confinement.

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245. See AM. BAR ASS'N, *supra* note 224, at 64–67.

246. See Haney, *supra* note 18, at 965. This training will incorporate the philosophy of the Oak Park Heights prison in Minnesota described above. See *supra* notes 214–16 and accompanying text.