NOTES

SOLITARY CONFINEMENT AS ILLEGITIMATELY PROSCRIBED AND DISPROPORTIONAL PUNISHMENT: ANOTHER ANGLE FROM WHICH TO ATTACK THE INHUMANE PRACTICE

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INTRODUCTION

> *Reflexively locking people up in cages and subjecting them to degradation and humiliation—inflicting violence and suffering upon people in order to teach them that violence is wrong—is a doomed strategy, especially considering that most people who commit violent crime are victims as well . . . . [W]e need to hold people accountable in ways that aim to repair and prevent harm rather than simply inflicting more harm and trauma and calling it justice.*[1]

Current solitary confinement practices go against traditional notions of punishment, legality, and separation of powers. Use of the practice has persisted, and even grown, over time despite widespread criticism and characterization as a discredited penal technology.[2] It is a "perennial practice of last resort for those seeking control within prison walls," surviving sweeping changes in penal technologies and in justifications of punishment.[3] Criminal sentencing in general is an area that has a particularly glaring gap between empirical and academic expertise and practice.[4] Prison policies have all but remained unchanged or worsened in the last century despite a growing consensus that practices such as isolation techniques fail to meet punitive

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1. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS xxix (10th ed. 2020).

2. Ashley T. Rubin & Keramet Reiter, *Continuity in the Face of Penal Innovation: Revisiting the History of American Solitary Confinement*, 43 LAW & SOC. INQUIRY 1604 (2018).

3. *Id.* at 1604.

4. *See generally* Mirko Bagaric, Nick Fischer & Gabrielle Wolf, *Bringing Sentencing into the 21st Century: Closing the Gap between Practice and Knowledge by Introducing Expertise into Sentencing Law*, 45 HOFSTRA L. REV. 785 (2017).

objectives. Over the past several decades, the use of solitary confinement has dramatically increased, including the rise of super-maximum security ("supermax") prisons designed to house entire inmate populations in extreme isolation.[5] This is due, in large part, to the continual re-branding of solitary confinement by prison administrators as a means to combat prison violence, as well as the staggeringly large number of people held in United States' prisons in the current era of mass incarceration that is unmatched by any other country.[6]

Efforts to curb the practice have generally focused on limiting who can be subjected to solitary (such as excluding pregnant, juvenile, or mentally-ill prisoners), decreasing the duration of confinement, and mitigating the severity of conditions.[7] Constitutional challenges have mostly centered around the Eighth Amendment's prohibition of cruel and unusual punishment. There have been successful challenges to the practice based on Eighth Amendment concerns, but these cases have been confined to specific conditions in specific prisons, with courts refusing to apply *per se* unconstitutionality to solitary confinement practices in general.[8] The Supreme Court has yet to place sweeping restrictions on solitary as a penal practice, rather focusing on individual instances of excessive force, failure to protect inmates, and medical indifference.[9] While the detriments of solitary confinement have been known since its beginning, judicial intervention did not significantly occur until legal

5. ACLU, *Prisoners' Rights: Solitary Confinement*, https://www.aclu.org/issues/prisoners-rights#current (last visited Mar. 19, 2020). *See also* Alison Shames, Jessa Wilcox & Ram Subramanian, *Solitary Confinement: Common Misperceptions and Emerging Safe Alternatives*, VERA INST. OF JUST. (May 2015), https://www.gao.gov/assets/660/654349.pdf (noting increases in the use of solitary confinement by an estimated 42% between 1995 and 2005); U.S. GOV'T ACCOUNTABILITY OFF., GAO-13-429, *Improvements Needed in Bureau of Prisons' Monitoring and Evaluation of Impact of Segregated Housing* (May 1, 2013), http://www.gao.gov/assets/660/654349.pdf.

6. *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (10th ed. 2020); Roy Walmsley, *World Prison Population List*, INST. FOR CRIM. POL'Y RSCH. (12th ed. 2018), https://www.prisonstudies.org/sites/default/files/resources/downloads/wppl_12.pdf.

7. Bernice B. Donald & Marcus Gadson, *Rethinking Solitary Confinement*, 31 CRIM. JUST. 1 (2016) (Discussing President Obama's adoption of the Justice Department's recommendations for reforming the practice in federal prisons, including prohibiting solitary for juveniles, low-level prison infractions, and increasing the availability of treatment for mentally-ill offenders.). *See also* Leena Kurki & Norval Morris, *The Purposes, Practices, and Problems of Supermax Prisons*, 28 CRIME & JUST. 385 (2001); Martha L. Henderson Hurley, *Supermax prison*, ENCYC. BRITANNICA (Mar. 7, 2018), https://www.britannica.com/topic/supermax-prison (supermax prisons boomed in popularity from only one in the United States in 1984 to supermax prisons in over forty-four states by 2006).

8. Hutto v. Finney, 437 U.S. 678, 686 (1978). *See also* Madrid v. Gomez, 889 F. Supp. 1146, 1264 (N.D. Cal. 1995).

9. *See, e.g.*, Jones 'El v. Berge, 164 F. Supp. 2d 1096 (W.D. Wis. 2001); Ruiz v. Johnson, 37 F. Supp. 2d 855 (S.D. Texas 1999), *rev'd on other grounds*, 243 F.3d 941 (5th Cir. 2001), *adhered to on remand*, 154 F. Supp. 2d 975 (S.D. Texas 2001); Madrid v. Gomez, 889 F. Supp. 1146 (N.D. Cal. 1995).

changes augmenting the rights of individual inmates to sue state officials took place in the 1960s and 1970s.[10] This is largely because the Supreme Court had not formally applied the Eighth Amendment to the states, where most punishment occurs, until its 1962 ruling in *Robinson v. California*.[11] Not until then did courts really begin to recognize and impose constitutionally required limits on punishment.[12] At the same time, however, prison populations began to soar. Soon judges were unwilling to check certain forms of destructive punishment with administrators struggling to control the masses.[13] Recent trends towards limiting or abolishing solitary confinement altogether have come up on both the state and federal levels, and there have been significant legislative successes,[14] but these efforts have not fundamentally evaluated the use of solitary confinement as its own form of punishment, separate from regular imprisonment.

This Note will address the use of solitary confinement as a form of punishment and analyze the legality of the practice within the context of punishment theory. Building off of Professor Marah Stith McCleod's argument that death row is a form of added punishment that should have to be specifically proscribed,[15] this Note seeks to expand Professor McCleod's framework to apply to solitary confinement and supermax prisons in general. I will argue that solitary confinement is an altogether separate and additional form of punishment that should require the same legislative sanction and procedural due process as regular imprisonment sentencing. This Note is by no means a comprehensive analysis of the legality of solitary confinement, for which there are numerous other works, but instead aims to offer another angle from which to illustrate the irrationality and unfairness of solitary confinement through the lens of punishment theory.

10. *See* HEATHER ANN THOMPSON, BLOOD IN THE WATER: THE ATTICA PRISON UPRISING OF 1971 AND ITS LEGACY (Pantheon Books 2016). *See also* Alice Ristroph, *State Intentions and the Law of Punishment*, 98 J. CRIM. L. & CRIMINOLOGY 1353, 1369 n.66 (2008).

11. Robinson v. California, 370 U.S. 660 (1962).

12. Judith Resnik, *(Un)Constitutional Punishments: Eighth Amendment Silos, Penological Purposes, and People's "Ruin,"* 129 YALE L.J. F. 365, 368–372 (2020) (explaining a characterization proffered in most states prior to 1962 that incarcerated individuals did not deserve certain protections because they had civilly died and their rights had vanished).

13. *Id.* at 369.

14. *See* Shames et al., *supra* note 5, at 8; Valerie Kiebala & Sal Rodriguez, *FAQ: Solitary Confinement in the United States*, SOLITARY WATCH (2018), https://solitarywatch.org/wp-content/uploads/2019/05/Solitary-Confinement-FAQ-2018-final.pdf; CTR. ON SENT'G & CORR., *FAQ: Safe Alternatives to Segregation*, VERA INST. OF JUST., n.16–19, https://www.safealternativestosegregation.org/faq/ (last visited Mar. 23, 2020).

15. Marah Stith McLeod, *Does the Death Penalty Require Death Row? The Harm of Legislative Silence*, 77 OHIO ST. L.J. 525 (2016).

I. SOLITARY CONFINEMENT IN AMERICA

A. Defining Solitary Confinement

One difficulty in the study of solitary confinement is in defining it. Solitary confinement goes by many different names including disciplinary segregation, administrative isolation, punitive segregation, security housing units (SHU), the "hole," special management units (SMU), and segregated housing.[16] General definitions range from the more simple characterization laid out by the United Nations, defining solitary confinement as "confinement of prisoners for 22 hours or more a day without meaningful human contact[,]"[17] to the broad and all-encompassing term "restrictive housing" applied to any prison practice involving "limited interaction with other inmates, limited programming opportunities, and reduced privileges."[18] This definitional debate has been used historically as a legitimizing technique by prison administrators. When one kind of solitary confinement is condemned, prison administrators or other government actors resisting reform repeatedly replace it with a seemingly "new" and re-branded practice that often comes with the same issues that plagued the discredited version.[19] For example, Virginia, a state with some of the most severe solitary confinement practices, responded to backlash regarding their use of prolonged punitive isolation by declaring an end to solitary confinement, replaced by almost the exact same practice labelled instead as "segregation."[20]

For purposes of this Note, I adopt Rubin and Reiter's all-encompassing definition: "[T]he intersection of two of the most restrictive conditions of incarceration—reducing prisoners' freedom of movement by maximizing 'time in cell' and constraining human contact (both physical and social) so severely as not to be 'meaningful.'"[21] This includes all three types of solitary confinement used in regular prisons (punitive, administrative, and protective), as well as supermax prisons practicing both single and double-cell solitary.

16. ACLU, *Briefing Paper: The Dangerous Overuse of Solitary Confinement in the United States*, 3 (Aug. 2014) [hereinafter *ACLU Briefing Paper*], https://www.aclu.org/sites/default/files/assets/stop_solitary_briefing_paper_updated_august_2014.pdf.

17. UN ECON. AND SOC. COUNCIL, COMM'N ON CRIME PREVENTION AND CRIM. JUST., *UN Standard Minimum Rules on the Treatment of Prisons ('Nelson Mandela Rules')*, 24th Sess., E/CN.15/2015/L.6/Rev.1. (May 21, 2015), http://solitaryconfinement.org/mandela-rules.

18. Allen J.Beck, Bureau of Justice Statistics, U.S. Dep't of Just., No. NCJ249209, *Special Report: Use of Restrictive Housing in U.S. Prisons and Jails, 2011–12* (2015), https://www.bjs.gov/content/pub/pdf/urhuspj1112.pdf.

19. Rubin & Reiter, *supra* note 2, at 1608.

20. Anita Kumar, *Virginia Plans Changes in Prisoner Isolation Process*, WASH. POST (Mar. 30, 2012), https://www.washingtonpost.com/local/dc-politics/virginia-plans-changes-in-prisoner-isolation-process/2012/03/30/gIQAMzpFmS_story.html.

21. Rubin & Reiter, *supra* note 2, at 1608.

B. Historical Background

Solitary confinement has been in practice in the United States since the birth of prisons in the 1790s. It was a creation of the Pennsylvania System, where inmates were confined to small 12 by 7.5 foot cells with an attached square of space for physical activity, closed off from contact with other prisoners.[22] Early uses of segregation were administrative as opposed to penal, but separating prisoners increased as prisons grew more sophisticated over time.[23] Solitary confinement was initially used to keep more serious offenders from influencing less experienced offenders, with some prisons going so far as to require that solitary inmates wear hoods to cover their faces when being transported outside their cells.[24] Apart from its simple use as a separating tool, punitive solitary as a consequence for violating prison rules was originally only used as a last resort. However, with growing concern over the effectiveness of prisons as a deterrent to crime, reformers pushed for increasing solitary confinement practices to accomplish deterrence and reformation goals.[25] The Quakers particularly viewed solitary confinement as allowing time for reformation and reflection.[26]

These early experiments of solitary confinement in east coast prisons revealed its devastating physical and psychological effects from the start and became the basis for the first arguments against the practice. For example, an experiment of exclusive isolation in Auburn State Prison in 1821 was a complete failure: the isolation cells were so small that inmates' restrictive spaces caused muscle atrophy, and the psychological effects were alarming.[27]

> A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others, still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community.[28]

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22. *Pennsylvania System*, ENCYC. BRITANNICA (July 20, 1998), https://www.britannica.com/topic/Pennsylvania-system.

23. *See generally* Ashley Rubin, *The Prehistory of Innovation: A Longer View of Penal Change*, 20 PUNISHMENT & SOC'Y 192 (2018).

24. Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J.L. & POL'Y 325, 340 (2006).

25. *See* MICHAEL MERANZE, LABORATORIES OF VIRTUE: PUNISHMENT, REVOLUTION, AND AUTHORITY IN PHILADELPHIA, 1760–1835 (University of North Carolina Press 1996).

26. *See* CALEB LOWNES, AN ACCOUNT OF THE ALTERATION AND PRESENT STATE OF THE PENAL LAWS OF PENNSYLVANIA, CONTAINING, ALSO, AN ACCOUNT OF THE GAOL AND PENITENTIARY HOUSE OF PHILADELPHIA—AND THE INTERIOR MANAGEMENT THEREOF (Young & Minns. 1799).

27. G. POWERS, A BRIEF ACCOUNT OF THE CONSTRUCTION, MANAGEMENT, & DISCIPLINE &C. &C. OF THE NEW-YORK STATE PRISON AT AUBURN (U. F. Doubleday 1826).

28. In re Medley, 134 U.S. 160, 168 (1890).

By the early nineteenth century, there was consensus among both reformers and prison administrators that total solitary confinement was cruel and dangerous to prisoners' physical and mental health.[29] One study of various prison isolation policies around this time revealed that "the system of constant separation [solitary confinement according to the Pennsylvania model] as established here, even when administered with the utmost humanity, produces so many cases of insanity and of death as to indicate most clearly, that its general tendency is to enfeeble the body and the mind."[30]

C. Current Use

Solitary confinement's persistence despite its early failures and known harms is mainly attributed to prison administrators' rationale of maintaining prison safety. In *Hutto v. Finney* (1978), prison administrators rejected the idea that solitary confinement required a reformative or rehabilitative purpose, illustrating the shift away from justifying solitary confinement in terms of traditional punishment goals towards its purported necessity as a means of prison control and security.[31] Ashley T. Rubin and Keramet Reiter recently studied the history of solitary confinement, tracing its survival through the many obstacles of changes in penal technologies, the public's accepted punishment rationales, and widespread critiques of the practice as both illegal and immoral. They found that the persuasive strength in focusing on the internal administration goal of control and security, and the preference of solitary confinement as the means to do so, means it is "likely to persist as long as prison administrators remain committed to the practice as an ultimate tool of punitive control."[32] In other words, without legal prohibition of the practice in general, solitary confinement will likely continue as long as prison administrators wish to use it.

Despite its long history of criticism, solitary confinement has continued and grown in the past several decades as a supposed means to combat widely overcrowded prison populations and a lack of resources for implementing alternative procedures in the era of the mass incarceration machine.[33] On a given day, the United States confines an estimated 80,000 people in isolation.[34] Over 80% of federal prisons, and eighteen states, practice "double-cell solitary" in order to combat overcrowding, where two inmates are restricted to one

29. BOSTON PRISON DISCIPLINE SOCIETY, FIRST ANNUAL REPORT OF THE BOARD OF MANAGERS OF THE PRISON DISCIPLINE SOCIETY (T. R. Marvin 1826).

30. Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 CRIME & JUST. 441, 461 (2006).

31. Hutto v. Finney, 437 U.S. 678, 678 (1978).

32. Rubin & Reiter, *supra* note 2, at 1606.

33. 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, 480 (1997).

34. Dan Nolan & Chris Amico, *Solitary by the Numbers*, FRONTLINE (Apr. 18, 2017), http://apps.frontline.org/solitary-by-the-numbers/.

solitary cell for twenty-three hours per day.[35] The rise of and trend towards supermax prisons, also known as "prisons within prisons," has compounded the issue.[36] The invention of high-tech supermax prisons has offset a trend of facilities specifically designed for long-term segregation not only in state prisons, but in federal prisons as well. Forty-four states and the federal government have supermax facilities housing more than 25,000 inmates across the nation.[37] While this previously discussed history showed the continuous re-branding of solitary confinement over time, never has there been such a huge population of prisoners experiencing deliberate isolation for such long durations.[38]

Solitary confinement is generally used for three purposes: (1) administrative segregation for separating prisoners who allegedly pose a threat to others, (2) disciplinary or punitive segregation for violation of prison rules, and (3) protective custody for allegedly vulnerable inmates.[39] Space in supermax facilities is used for all three types of segregation, although most commonly for punitive or administrative confinement.

The most common use of solitary confinement is administrative segregation justified as a measure to promote safety in the midst of overcrowding, most prominently in separating alleged "known" gang members as "the rise in the power of prison gangs has made supermax facilities increasingly popular."[40] The treatment of inmates alleged to have gang affiliations is an apt illustration of the unchecked power of prison administrators. In his Comment, Scott Tachiki explores this issue through the lens of California's Pelican Bay State Penitentiary, arguing that segregation or administrative transfer to supermax prisons based on alleged gang affiliation as opposed to an actual infraction of prison rules violates constitutional due process. Pelican Bay's prison within the prison is known as the Security Housing Unit ("SHU"), where inmates are placed for differing lengths of time not based on the severity of their original crime, but for disciplinary violations or to separate those who prison administrators deem a threat to the safety of

35. Blair Hickman & Christie Thompson, *The Best Reporting on Solitary Confinement*, MARSHALL PROJECT (Mar. 24, 2016), https://www.themarshallproject.org/2016/03/24/the-best-reporting-on-solitary-confinement.

36. Scott N. Tachiki, *Indeterminate Sentences in Supermax Prisons Based Upon Alleged Gang Affiliations: A Reexamination of Procedural Protection and a Proposal for Greater Procedural Requirements*, 83 CALIF. L. REV. 1115, 1118 (1995).

37. Daniel P. Mears, *Evaluating the Effectiveness of Supermax Prisons*, URBAN INSTITUTE, JUST. POL'Y CTR. ii (Mar. 2006), https://www.urban.org/sites/default/files/publication/50846/411326-Evaluating-the-Effectiveness-of-Supermax-Prisons.PDF.

38. Haney & Lynch, *supra* note 34, at 480.

39. ACLU & HUMAN RIGHTS WATCH, GROWING UP LOCKED DOWN: YOUTH IN SOLITARY CONFINEMENT IN JAILS AND PRISONS ACROSS THE UNITED STATES 20 (2012), https://www.aclu.org/files/assets/us1012webwcover.pdf [hereinafter GROWING UP LOCKED DOWN].

40. Tachiki, *supra* note 36, at 1131.

themselves or other inmates.[41] At Pelican Bay, an inmate suspected of gang affiliation is brought before the Institutional Gang Investigator, who then recommends whether they should go before the Unit Classification Committee ("UCC"), which sentences the inmate to an indeterminate length of time in the SHU. One inmate testified that the only way an alleged prison gang member can get out of the SHU "is to debrief, parole, or just die of old age."[42] Debriefing requires an inmate to reveal their gang history and the names of all other gang members in the prison. Due to this policy, inmates wrongly accused of gang affiliation who therefore cannot debrief are left with the Department of Corrections' appeal process, often made up of the same people who accused and tried the inmate previously. Only after exhausting administrative appeals within the prison system can prisoners try their luck in federal court.[43] This process can take years, all of which are spent in solitary confinement while awaiting relief.

For punitive solitary, the lack of oversight and evidence required has led to a system of essentially full administrative control and alarming overuse. One would think that the use of solitary confinement is reserved for serious violations of prison rules given its known detrimental physical and psychological consequences;[44] however, that is not the case. Violations as minimal as being in someone else's cell, not making your bed, littering, talking back, or wasting food can lead to solitary sentences as long as twenty-five days.[45] The same inequity occurs in transfers of inmates to supermax prisons. Given the high expense of supermax facilities, reports show that states that overestimated the need for supermax space often fill cells with relatively low-risk inmates or those who pose an administrative nuisance, contradicting the purported idea that these maximum-security prisons are only for detaining the so-called "worst-of-the-worst."[46]

41. CAL. CODE REGS. tit. XV, 3341.5(c) (1994).

42. Plaintiffs' Proposed Findings of Fact and Conclusions of Law Re: Segregation of Alleged Gang Affiliates at 23, Madrid v. Gomez, 889 F. Supp. 1146, 1241 (N.D. Cal. 1995).

43. *See, e.g.*, Toussaint v. McCarthy, 926 F.2d 800 (9th Cir. 1990), *cert. denied*, 502 U.S. 874 (1991) (establishing minimal due process requirements for transfers to administrative segregation based on alleged gang affiliation).

44. *ACLU Briefing Paper*, *supra* note 16, at 4, 15 n.21–40. Potential psychological and physical reactions include anxiety, nervousness, severe and chronic depression, hallucinations, suicidal thoughts, muscle atrophy, dizziness, hypersensitivity to stimuli, self-mutilation, headaches, heart palpitations, and lowering brain function. *Id.* One of the most common consequences is the dramatic suicide rate in solitary units. A 2004 study of California prisons revealed that 73% of suicides occurred in isolation, although housing only 10% of the prison population. Similarly, in New York prisons detainees in isolation were seven times more likely to hurt themselves, and in Indiana prisons three times more likely to attempt suicide. *Id.* at 5. In a related study about the timing between incidents of self-harm showed that inmates in solitary confinement harm themselves an average of seventeen months earlier than inmates in the general population. *Id.* at 16 n.42.

45. GROWING UP LOCKED DOWN, *supra* note 39, at 52.

46. Kurki & Morris, *supra* note 7, at 391–93. *See also* HUMAN RIGHTS WATCH, RED ONION STATE PRISON: SUPER-MAXIMUM SECURITY CONFINEMENT IN VIRGINIA (1999), https://www.hrw.org/report/1999/05/01/red-onion-state-prison/super-maximum-security-confinement-virginia;

Lastly, protective solitary confinement, although touted as an administrative remedy to keep vulnerable inmates safe, subjects inmates to the same harsh conditions as those isolated for punitive reasons. Segregation has become a default management tool for the supposed protection of actual or perceived LGBTQ prisoners, mentally-ill or developmentally disabled inmates, former law enforcement, or inmates serving time for particular offenses that put them at risk of harm from the general population. Transgender women are especially targeted for protective segregation and often spend their entire sentences in solitary confinement.[47]

Lack of oversight in the administration of solitary confinement is not only prevalent in decisions regarding which inmates are isolated and for how long, but also in the treatment of detainees. Due to the lack of visibility, it is much more difficult to detect abuse and excessive force by correctional officers.[48] One example is the use of excessive force during cell extractions. Minor non-violent disobedience such as failure to return a food tray can be met with an extreme response of tasers, mace, gas guns, or metal batons to restrain the inmate, and physical blows so forceful as to render some detainees unconscious.[49] In a class action brought by inmates at Pelican Bay, the court found that violent cell extractions were implemented "not as tools to be used sparingly in response to threats to prison security, but as opportunities to punish, and inflict pain upon, the inmate population for what were often minor rules violations."[50]

Another shocking example of such abuse can be seen in gladiator fights, where correctional officers in Corcoran State Prison in the late 1980s–90s allegedly staged fights between rival gang members housed in the SHU for sport. When a clear winner did not emerge soon enough, officers would open fire on the inmates, informally labelling the SHU yard where the fights took place as the "shooting gallery."[51] From 1989 through 1994, Corcoran had more shootings and deaths than any other prison in the United States: seven prisoners shot to death and forty-three wounded by officers using assault weapons to

Roy D. King & Kathleen McDermott, '*My Geranium Is Subversive': Some Notes on the Management of Trouble in Prisons*, 41 BRIT. J. SOC. 445–47 (1990); David Lovell, Kristin Cloyes, David Allen & Lorna Rhodes, *Who Lives in Super-Maximum Custody? A Washington State Study*, 64 FED. PROB. J. 33 (2000).

47. *ACLU Briefing Paper*, *supra* note 16, at 8. *See also* Sylvia Rivera Law Project, "*It's War in Here": A Report on the Treatment of Transgender and Intersex People in New York State Men's Prisons*, 17–19 (2007), http://srlp.org/files/warinhere.pdf.

48. *See* Thomas v. Bryant, 614 F.3d 1288 (11th Cir. 2010); Caroline Isaacs & Matthew Lowen, *Buried Alive: Solitary Confinement in Arizona's Prisons and Jails*, AM. FRIENDS SERV. COMMITTEE 14–17 (May 2007), https://www.afsc.org/sites/default/files/documents/Buried%20Alive.pdf.

49. Madrid v. Gomez, 889 F. Supp. 1146, 1172–78 (N.D. Cal. 1995).

50. *Id.* at 1178.

51. Tim Cornwell, *Staged Fights, Betting Guards, Gunfire, and Death for the Gladiators*, INDEPENDENT (Aug. 22, 1996), https://www.independent.co.uk/news/world/staged-fights-betting-guards-gunfire-and-death-for-the-gladiators-1310849.html.

break up fights they allegedly staged.[52] While abuse by correctional officers occurs in prisons at every security level, the secluded nature of solitary units and the idea that they house the worst-of-the-worst leads public officials to turn a blind eye and justify abuse as an unavoidable consequence of maintaining safety and control.

Another facet of the administration of solitary confinement that invites criticism is procedures for releasing long-term segregated inmates back into the general prison population.[53] While having these sorts of transition programs in place is a step in the right direction, they continue to foster the same issues of lack of oversight and misplaced decisional power that plagues the administration of isolation techniques in general. Procedures for removing an inmate from isolation back to general population are often unclear, unfollowed, or unattainable. In a report by the California State Legislature, prison administration procedures for releasing inmates from solitary confinement were described as "arbitrary, subjective, and not based on any set of criteria."[54] In a series of cases regarding conditions in Arkansas prisons so abhorrent as to be deemed cruel and unusual punishment against the Eighth Amendment, inmates in extended punitive solitary had their release solely dependent upon "their attitudes as appraised by prison personnel."[55] Former corrections consultant James Austin criticized the ambiguous and subjective nature of step-down programs, comparing the process to a college saying that after four years of study and meeting every known requirement, "[y]ou *may* graduate based on how we feel about you."[56]

52. Mark Arax, *8 Prison Guards Are Acquitted in Corcoran Battles*, L.A. TIMES (June 10, 2000), https://www.latimes.com/archives/la-xpm-2000-jun-10-mn-39555-story.html. Despite testimony by numerous inmates and staff, patterns of incidents occurring only during certain guards' shifts, and video evidence of the brawls showing officers crowded into the control unit as spectators, a jury acquitted all eight officers accused of federal civil rights abuses. *Id.*

53. Maurice Chammah, *How to Get Out of Solitary — One Step at a Time*, MARSHALL PROJECT (Jan. 7, 2016), https://www.themarshallproject.org/2016/01/07/how-to-get-out-of-solitary-one-step-at-a-time. *See also* THE LIMAN PROGRAM, YALE LAW SCH. & ASS'N OF STATE CORR. ADM'RS, TIME-IN-CELL: THE ASCA-LIMAN 2014 NATIONAL SURVEY OF ADMINISTRATIVE SEGREGATION IN PRISON 51 (Aug. 2015), https://www.law.yale.edu/system/files/documents/pdf/asca-liman_administrative_segregation_report_sep_2_2015.pdf [https://perma.cc/A6RV-E2JP].

54. Haney & Lynch, *supra* note 33, at 490 (citing CALIFORNIA ASSEMBLY SELECT COMMITTEE ON PRISON REFORM AND REHABILITATION, ADMINISTRATIVE SEGREGATION IN CALIFORNIA'S PRISONS 27 (1973)).

55. Finney v. Hutto, 410 F. Supp. 251, 275 (E.D. Ark. 1976).

56. Chammah, *supra* note 53 (quoting James Austin, former director of the Institute on Crime, Justice, and Corrections at George Washington University).

II. PUNISHMENT THEORY

A. Is Solitary Confinement Punishment?

The legality of solitary confinement in terms of punishment theory turns on whether it is simply a prison administration procedure or a form of punishment. This distinction is especially significant because a showing of the state action as punishment, and sometimes even specifically as *criminal* punishment, is a threshold requirement to be able to challenge prison conditions on several different constitutional grounds.[57] There are many varying definitions of punishment, but in general, criminal punishment is a condition imposed on one who allegedly committed a legal offense, by a legally authorized state actor, which is intended to be burdensome or unpleasant.[58] Traditionally, legal scholars believed punishment only consisted of the intentional hardships imposed by an authorized sentencing authority.[59] Under this formulation, the realities of incarceration, such as the foreseeable risk of violence, sexual assault, or physical or psychological consequences of solitary confinement, would not be considered as part of punishment because they are either "unlawful or unintended by the sentencing authority."[60]

The traditional narrow interpretation of the scope of punishment harmfully ignores the realities of the experience of incarceration and allows states and the federal government to avoid responsibility for what happens to inmates under their care. Further, the narrow definition of punishment confined to what is intended is unusable in practice.[61] The imposition and administration of punishment is carried out by numerous actors with varying intentions.[62] Not only would it be impossible to trace a single intention throughout the process of an offender's incarceration, but such an exercise would be a mere fabrication of legal reasoning when the incarceration experience varies so significantly between prisoners, and is known to include unintended but foreseeable risks of violence, sexual assault, or physical or mental harm stemming from prolonged isolation. Instead, under Thomas K. Landry's 'governmentalist' definition, punishment must encompass the "terms of the penal statute and sentence, but

57. *See* Ristroph, *supra* note 10, at Part III.A.

58. *See generally* Antony Duff and Zachary Hoskins, *Legal Punishment*, STANFORD ENCYC. OF PHIL. (Winter 2019 Edition), https://plato.stanford.edu/archives/win2019/entries/legal-punishment/; Antony Duff, *Punishment, Communication, and Community*, *in* DEBATES IN CONTEMPORARY POLITICAL PHILOSOPHY: AN ANTHOLOGY 387 (Derek Matravers & Jon Pike eds., 2001).

59. E. Lea Johnston, *Vulnerability and Just Desert: A Theory of Sentencing and Mental Illness*, 103 J. CRIM. L. & CRIMINOLOGY 147, 188 (2013).

60. *Id.* at 189.

61. *See* Ristroph, *supra* note 10 (critiquing constitutional law's emphasis on state intentions and analyzing the imprecision of determinations of legislative and state actors' punitive or penological purposes that significantly hinder constitutional challenges to punishment).

62. Johnston, *supra* note 59, at 187 n.196; Alice Ristroph, *Sexual Punishments*, 15 COLUM. J. GENDER & L. 139, 167–71 (2006) (arguing that the foreseeable realities associated with imprisonment, including sexual violence, are part of the punishment inflicted by the state).

also those conditions and events in prison that are attributable to the punitive intent of the government in its role as monopolist over the machinery of punishment."[63] This far more realistic definition would most definitely include all forms of solitary confinement.

Recent cases challenging solitary confinement under Eighth Amendment and due process grounds have wrestled with the degree of difference between segregation and regular incarceration, and further, the significant legal implications of the extent of such difference. In the due process context, adequate due process is only required after meeting the threshold question of possession of a protected interest in life, liberty, or property. In *Wilkinson v. Austin*, the Supreme Court held that a prisoner does have a protected liberty interest against indefinite placement in a supermax facility, but distinguished supermax placement from disciplinary movement out of general population to solitary confinement due to its temporary nature.[64] The Supreme Court spoke further on this distinction in *Sandin v. Conner*, describing administrative, protective, or punitive segregation as not presenting a "dramatic departure from the basic conditions of [the inmate's] sentence."[65] They did, however, imply that a liberty interest might be found if such a change in conditions imposed "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life."[66] Given the plethora of information available today on the mental and physical harms associated with solitary confinement, and the many instances of prolonged solitary that are originally meant to be temporary, it is hard to deny that both indefinite placement in a supermax prison and isolation for even minimal periods of time can be a significant hardship,[67] atypical from regular general population incarceration.

Due to its severity, possibility of permanence, and secretive nature, this Note argues that solitary confinement is a unique correctional environment, distinct from regular incarceration, that fits within the legal definition of punishment and, thus, should require the same public support, process, and oversight as regular sentencing. The view of solitary confinement as an altogether different form of punishment than regular imprisonment is not at all a novel idea; it can be seen echoed in the 1890 case *In re Medley*, where the Supreme Court struck down the application of a mandatory solitary confinement law as applied to a prisoner whose sentencing occurred before its passage. In that case, Justice Miller specifically distinguished solitary confinement as an

63. Thomas K. Landry, *"Punishment" and the Eighth Amendment*, 57 OHIO ST. L.J. 1607, 1607 (1996).

64. Wilkinson v. Austin, 545 U.S. 209, 220 (2005).

65. Sandin v. Conner, 515 U.S. 472, 485 (1995). The Supreme Court had previously acknowledged a liberty interest in remaining in general population rather than segregation in Hewitt v. Helms, but this case was later overruled. Hewitt v. Helms, 459 U.S. 460, 470–71 (1983).

66. *Sandin*, 515 U.S. at 472.

67. *See* Brian Sonenstein, *Even Brief Exposure to Solitary Confinement May Increase Risk of Death After Prison*, SOLITARY WATCH (Feb. 13, 2020), https://solitarywatch.org/2020/02/13/even-brief-exposure-to-solitary-confinement-may-increase-risk-of-death-after-prison/.

"additional punishment of the most important and painful character"[68] separate from imprisonment and death, as opposed to "a mere unimportant [prison] regulation as to the safe-keeping of the prisoner."[69]

B. Changing Justifications for Punishment Over Time

Throughout the history of changing penal technologies, justifications for punishment have gone through cycles of popularity.[70] Typically when reformers or policymakers fail to achieve their proposed objectives, there is an accompanying shift in opinion about punishment rationales that brings forth seemingly "new" penal technologies. Justifications of punishment spark endless debates by academics and politicians, which can lead to harsh and irrational consequences in practice. Erik Luna described the punishment theory divide as such:

> Punishment theories inform the practice of sentencing, as codified in the penal law or administered by criminal justice actors, and the transition from theory to practice can produce troublesome consequences in the real world, with politicians and political movements co-opting theories to justify otherwise irrational sentencing policies. The end results are often sanctioning schemes and practices that cannot be squared with any theory.[71]

This irrationality is the exact consequence of the history of debate and re-packaging of solitary confinement to fit whatever rationale is in fashion at the time.

From a case law perspective, courts have been far from consistent in their recognition of certain penological principles or justifications of punishment. This inconsistency is evidenced by Judith Resnik's recent article tracing the court's analysis of questions related to punishment over the past two centuries.[72] She found:

> In their opinions, judges are neither careful philosophers (drawing distinctions among purposes, principles, and constraints or delineating means and ends) nor rigorous empiricists (cautious about making causal claims). Rather, courts proffer a laundry list of what they deem to be legitimate state goals, including deterrence, incapacitation, retribution, and rehabilitation as well as administrative convenience, community and institutional safety, and

68. *In re* Medley, 134 U.S. 160, 171 (1890).

69. *Id.* at 167, 170 ("It was considered as an additional punishment of such a severe kind that it is spoken of in the preamble as a further terror and peculiar mark of infamy to be added to the punishment of death."). *See also* Hutto v. Finney, 437 U.S. 678, 686 (1978) (confirming that punitive isolation is a form of punishment).

70. *See generally* Phillip Goodman, Joshua Page & Michelle Phelps, *The Long Struggle: An Agonistic Perspective on Penal Development*, 19 THEORETICAL CRIMINOLOGY 315 (2015).

71. Erik Luna, *Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 UTAH L. REV. 205, 206 (2003).

72. Resnik, *supra* note 12.

> expense. Many Justices describe themselves as taking these concerns into account as they assess whether a particular sanction is excessively severe or disproportionate, entails the unnecessary infliction of pain, fails to reflect the decency of the social order, or undermines values such as equality, liberty, religious freedom, and dignity. . . . [J]udges regularly import theories from nineteenth and twentieth-century sociology, penology, and criminology to construct the rationales for and to explain the modes of punishment. Further, punishment opinions interact with the intellectual currents and popular agendas playing out in politics and in law at the time when decisions are rendered.[73]

The propensity for judges, like legal scholars, to shift punishment rationales with the times is just another aid in the re-branding of solitary confinement that has kept this outdated and misused practice in place for so long. These shifts have real consequences for imprisoned people in that the success of constitutional challenges to punishment often hinge on the court's finding of legislative or state intent and the relationship between the challenged punishment and these actors' purported penological or punitive purposes.[74]

Most of these past punishment theory debates focused on the justifications for state-imposed punishment and the source and limitations on the power of the state to punish citizens: searching for answers to the question of what constrains the sovereign's power to punish.[75] But historically, there has been little focus on how these answers affect the allocation and distribution of actual punishment in practice.[76] Distributive theories instead focus on the "type and quantity of punishment the state should order a particular offender to suffer for a particular crime relative to the penalties other offenders should receive for their offenses."[77]

One distributive theory that has risen in popularity amidst the mass incarceration dilemma and warrants further consideration is just desert theory, which focuses on proportionality in sentencing policies aimed at balancing culpability and the seriousness of the harm with the severity of punishment in

73. Resnik, *supra* note 12, at 367.

74. *See* Ristroph, *supra* note 10, at Part III; Rhodes v. Chapman, 452 U.S. 337, 347 (1981) (hinging the cruel and unusual punishment determination under the Eighth Amendment on whether prison conditions served any "penological purpose"); Ewing v. California, 538 U.S. 11, 29 (2003) (recognizing the significance of the state's "penological goal"). These determinations have significant impact for challenges to solitary confinement based on Eighth Amendment concerns. *See* Ristroph, *supra* note 10, at 1375 ("Penological purposes, or the state's intentions in punishing, are central to the Eighth Amendment proportionality analysis. In deciding whether a punishment is disproportionately severe, and thus cruel and unusual, courts identify the state's penological purposes and ask whether the punishment is excessive in relation to those purposes.").

75. Resnik, *supra* note 12, at 366.

76. Johnston, *supra* note 59, at 183.

77. *Id.*

individual cases.[78] Just desert theorists propose that within the proportionality analysis, there needs to be consideration of the disparate impact of incarceration on vulnerable populations of offenders and their foreseeable risks of harm.[79] This is especially relevant in the context of solitary confinement, given the known harmful effects of segregation on typical offenders, and further, the exponential effect on inmates suffering from any kind of mental illness who make up a disproportional percentage of the isolated population.[80]

C. Does Solitary Confinement Serve Legitimate Punishment Objectives?

When eighteenth-century humanitarians discussed the ideal prison experience, they considered solitary confinement as a type of enhanced punishment that would greater serve utilitarian deterrent, incapacitation, and reformative or rehabilitative purposes.[81] It was clear from the start that the practice led to higher instances of mental disease than traditional incarceration, but the mental effects were viewed by some as success in reforming the prisoner and forcing him or her to change from the inside out.[82] These reformative efforts can be seen in early east coast prisons where inmates received weekly visits from a moral instructor.[83] By applying the maximum amount of control over prisoners, supporters argued they could achieve the kind of self-awareness needed to begin down the road of reformation.[84]

78. ANDREW VON HIRSCH & ANDREW ASHWORTH, PROPORTIONATE SENTENCING: EXPLORING THE PRINCIPLES 4 (2005) ("The desert rationale rests on the idea that the penal sanction should fairly reflect the degree of reprehensibleness (that is, the harmfulness and culpability) of the actor's conduct.").

79. Johnston, *supra* note 59, at 188 ("[E]valuation of punishment severity for purposes of sentencing should include foreseeable, substantial risks of serious harm that [are] proximately caused by the state in the context of incarceration.").

80. Inmates with mental illness are more likely to end up in solitary as their symptoms often cause them to fail to adhere to prison rules, or they are seen as an administrative nuisance easier to deal with tucked away in isolation. For example, one in four inmates in Arizona's special management unit is mentally ill, and mentally ill inmates in Indiana prisons are five times more likely to be placed in supermax. Isaacs & Lowen, *supra* note 48, at 4, 17, 18–22.

81. Utilitarianism is a camp of justifications of punishment (including deterrence, rehabilitation, and incapacitation) with the underlying principle that punishment can only be imposed to the extent that its benefits to society outweigh its costs. In general, "[s]ociety punishes crime to enhance the 'common good' (i.e., increase aggregate social utility); the common good is served by preventing future crime (where crime is a type of social 'disutility'); and potential offenders are warded off by, for example, the threat of imprisonment (general deterrence)." Luna, *supra* note 71, at 209.

82. *See supra* Part I.B. *See also* CHRISTOPHER HIBBERT, THE ROOTS OF EVIL: A SOCIAL HISTORY OF CRIME AND PUNISHMENT 160 (1963); Martha Grace Duncan, *In Slime and Darkness: The Metaphor of Filth in Criminal Justice*, 68 TUL. L. REV. 725, 788 (1994).

83. Rubin & Reiter, *supra* note 2, at 1615.

84. Pieter Spierenburg, *From Amsterdam to Auburn An Explanation for the Rise of the Prison in Seventeenth-Century Holland and Nineteenth-Century America*, 20 J. SOC. HIST. 439, 455 (1987).

Although hopes of successful reformation helped spread the Pennsylvania model of complete isolation prisons to similar institutions in the Auburn State and Western State Penitentiaries, the devastating psychological effects proved fatal rather than reformative for most prisoners, as evidenced by inmates "beg[ging], with the greatest earnestness, that they may be hanged out of their misery."[85] After touring an American prison in 1831, French Historian Alexis de Tocqueville commented: "[Solitary confinement] devours the victim incessantly and unmercifully; it does not reform, it kills."[86] Even after early prison experimentation revealed solitary confinement's failure to reform, the idea re-emerged in late-twentieth century as another attempt to re-brand the practice and justify the rise of supermax prisons. For example, a 1982 article described the value of supermax prisons "as a desirable time-out from the pressures and impositions of the general prison routine" and that they may promote reformation through concentration and self-awareness,[87] although interestingly the same author previously acknowledged that "punitive isolation has not been associated with reductions in recidivism or productive change among inmates."[88]

Given that solitary confinement has been shown not to successfully serve reformative punishment objectives, the other possible rationales are incapacitation and deterrence.[89] One main justification for the use of solitary and supermax prisons is the idea that separating the most violent offenders from other inmates and correctional staff reduces institutional violence by limiting opportunity.[90] While this incapacitation idea seems to make sense logically, research has shown otherwise. In general, several studies have reported that increasing the use of coercive control measures has actually led to more incidence of violence.[91] The desired mitigating effect of removing the most

85. LOUIS P. MASUR, RITES OF EXECUTION: CAPITAL PUNISHMENT AND THE TRANSFORMATION OF AMERICAN CULTURE, 1776–1865, at 83 (1989).

86. Myra A. Sutanto, Wilkinson v. Austin *and the Quest for a Clearly Defined Liberty Interest Standard*, 96 J. CRIM. L. & CRIMINOLOGY 1029, 1031 (2006) (quoting Torsten Eriksson, THE REFORMERS, AN HISTORICAL SURVEY OF PIONEER EXPERIMENTS IN THE TREATMENT OF CRIMINALS 49 (1976)). *See generally* Roger Boesche, *The Prison: Tocqueville's Model for Despotism*, 33 WESTERN POL. Q. 550 (1980); Richard Avramenko & Robert Gingerich, *Democratic Dystopia: Tocqueville and the American Penitentiary System*, 46 POLITY 56 (2014).

87. Peter Suedfeld, Carmenza Ramirez, John Deaton & Gloria Baker-Brown, *Reactions and Attributes of Prisoners in Solitary Confinement*, 9 CRIM. JUST. & BEHAV. 308 (1982).

88. Chad S. Briggs, Jody L. Sundt & Thomas C. Castellano, *The Effect of Supermaximum Security Prisons on Aggregate Levels of Institutional Violence*, 41 CRIMINOLOGY 1341, 1345 (2003); Peter Suedfeld, *Solitary Confinement in the Correctional Setting: Goals, Problems, and Suggestions*, 141 CORRECTIVE SOC. PSYCHIATRY 10 (1974).

89. *See* Kurki & Morris, *supra* note 7, at 391–93.

90. Briggs et al., *supra* note 88, at 1345.

91. *See generally* Brad Bennett, Jamie Kizzire & Will Tucker, *Solitary Confinement: Inhumane, Ineffective, and Wasteful*, SOUTHERN POVERTY L. CTR. (Apr. 4, 2019), https://www.splcenter.org/20190404/solitary-confinement-inhumane-ineffective-and-wasteful; *see also* Israel L. Barak-Glantz, *The Anatomy of Another Prison Riot*, 63 PRISON J. 3 (1983); Anthony E. Bottoms, *Interpersonal Violence and Social Order in Prisons*, 26 CRIME & JUST. 205 (1999);

violent or disruptive inmates from the general population can be confounded by a "replacement effect," where lower-level inmates in the power chain take the place of those removed to solitary.[92] This is especially prevalent where alleged gang leaders are removed, and subsequently replaced within the gang by the "next-in-line."[93] A 2003 study of state prisons in Minnesota, Illinois, and Arizona found that use of supermax prisons to combat system-wide prison violence and disorder was ineffective, if not counterintuitive, and cannot be justified as a way to achieve greater inmate and staff safety as levels of violence between inmates remained unchanged, while violence between inmates and staff actually increased.[94] Similarly, a 2006 report revealed that a third of prisoners subjected to solitary confinement for a period of three months or more were more likely to commit a violent crime.[95]

Original reformers, as well as later supporters of solitary and supermax prisons to curb levels of prison violence, often use justifications focused on violence at the individual level. They believe that they can reduce prison violence by targeting "problem" prisoners and isolating them from staff and other inmates. However, this approach has been criticized as a mischaracterization of institutional violence.[96] Instead, an interactionist approach recognizes the significance of organizational and situational factors such as administrative policies, overcrowding, inmate autonomy, and relations with correctional officers that affect whether or not an inmate will engage in violence.[97] This approach reveals that prison administrators may have better success achieving safety and security goals through changes in policies and programs rather than isolation tactics. One example of this approach in practice can be seen in Colorado prisons, which decreased their use of solitary

MARK COLVIN, THE PENITENTIARY IN CRISIS: FROM ACCOMMODATION TO RIOT IN NEW MEXICO (1991); HANS TOCH, CORRECTIONS: A HUMANISTIC APPROACH (1997); Keramet Reiter, *Parole, Snitch, or Die: California's Supermax Prisons and Prisoners, 1997-2007*, 14 PUNISHMENT & SOC'Y 530, 547–51 (2012).

92. Briggs et al., *supra* note 88, at 1349.

93. Jody L. Sundt, Thomas C. Castellano, & Chad Briggs, *The Sociopolitical Context of Prison Violence and Its Control: A Case Study of Supermax and its Effect in Illinois*, 88 THE PRISON J. 94, 101 (2008); *see generally* Paige H. Ralph & James M. Marquart, *Gang Violence in Texas Prisons*, 71 THE PRISON J. 38 (1991); *see also* JOHN IRWIN AND JAMES AUSTIN, IT'S ABOUT TIME: AMERICA'S IMPRISONMENT BINGE (2d ed. 1997).

94. Briggs et al., *supra* note 88, at 1370–71. This study, as well as several others, further indicates that there are more effective alternative measures for preventing prison violence other than isolation tactics, such as behavioral programs and management strategies. *See* Bottoms, *supra* note 91; Paul Gendreau & David Keyes, *Making Prisons Safer and More Humane Environments*, 43 CANADIAN J. CRIMINOLOGY 123 (2001).

95. Robert G. Morris, *Exploring the Effect of Exposure to Short-Term Solitary Confinement Among Violent Prison Inmates*, 32 J. QUANTITATIVE CRIMINOLOGY 1 (2016).

96. *See* Briggs et al., *supra* note 88, at 1347.

97. *See* Bottoms, *supra* note 91; HANS TOCH, KENNETH G. ADAMS & GRANT J. DOUGLAS, COPING: MALADAPTATION IN PRISONS (1989).

confinement by 85% in 2014 in favor of alternative non-isolation measures and has seen the lowest level of inmate violence on correctional staff since 2006.[98]

As for deterrence, research has shown that both disciplinary segregation for initial violence[99] and supermax isolation[100] fail to deter individuals from committing further violence in prison. One study found no clear deterrent effect associated with isolation practices (including administrative, punitive, or protective segregation),[101] while another showed that inmates released from isolation exhibited higher rates of recidivism than those in general population, although it is difficult to account for the types of inmates more likely to be put in isolation and whether the isolation itself is to blame for the rise in recidivism.[102] A 2001 interview with a correctional officer at Pelican Bay illustrated a common scenario where a member of a prison gang is ordered to do a hit on a rival gang member.[103] If they acquiesce, they will likely get caught and have ten or more years added to their sentence. If they refuse, either by not following through or requesting a move to highly stigmatized protective custody, they risk personal retaliation for the rest of their sentence, or even after release. This guard found that inmates in these kinds of situations may instead try to get put in punitive solitary or transferred to a supermax prison through violence, such as non-fatally attacking a guard.[104] Solitary confinement has contradictory effects outside of prison as well. Not only do isolation policies fail to make prisons safer, they fail to make communities safer. Studies show that inmates who have been in solitary confinement are more likely to commit crimes after their release than inmates in general population. Further, several reports indicate higher than average rates of recidivism, and violent recidivism, in inmates released from supermax prisons.[105]

Given that isolation practices have been shown to serve neither reformative nor utilitarian incapacitation or deterrence goals, the only other traditional punishment rationale can be retributive,[106] thus reinforcing the notion

98. Center on Sentencing & Corrections, *FAQ: Safe Alternatives to Segregation*, VERA INST. OF JUST., nn.10–12 (last visited Mar. 23, 2020), https://www.safealternativestosegregation.org/faq/.

99. Morris, *supra* note 95.

100. Briggs et al., *supra* note 88, at 1370.

101. Israel L. Barak-Glantz, *Who's in the "Hole"?*, 8 CRIM. JUST. REV. 29 (1983).

102. Lawrence L. Motiuk & Kelley Blanchette, *Characteristics of Administratively Segregated Offenders in Federal Corrections*, 43 CANADIAN J. CRIMINOLOGY 131 (2001).

103. JOSEPH T. HALLINAN, GOING UP THE RIVER: TRAVELS IN A PRISON NATION 121(2001).

104. *Id.*

105. *Confronting Confinement: A Report of the Commission on Safety and Abuse in America's Prisons*, VERA INST. OF JUST. (May 2006), https://www.vera.org/publications/confronting-confinement; Daniel P. Mears & William D. Bales, *Supermax Incarceration and Recidivism*, 47 CRIMINOLOGY 801 (2009).

106. One dictionary defines *retributive punishment* as follows:

> Retributive punishment is punishment intended to harm the wrongdoer as a response to the wrongfulness of the criminal act. Retribution is seen as a moral obligation of the state from two different perspectives. The first emphasizes the relationship between the criminal and the state, the state exacts punishment equal to the violation of the moral

that solitary is used as punishment rather than policy. With the fall of rehabilitation as a predominant goal of incarceration in the late-twentieth century, retribution has survived as the general basis of punishment today.[107] In accepting retribution as the main justification for punishment, we must also accept its core tenet that just punishment be proportional to the severity and harmfulness of the crime committed.[108]

> The retribution theory justifying punishment is premised on the belief that the wrongdoer should get his just deserts, and that the public should be purged of the wrong he committed. It has long been believed that where retributive punishment is imposed, it ought to equate in degree to the severity of the wrong committed.[109]

For punishment to be proportional, the legislature authorizing punishment or the sentencing judge or jury[110] imposing it must "take into account the suffering the defendant is likely to endure over the course of his sentence, even if this suffering is an unintended part of the punishment."[111]

Solitary confinement does not serve retributive punishment goals because it goes against this central idea of proportionality. Given the statistics on the prevalence of solitary confinement as a likely experience of incarceration, its psychological effects cannot be ignored by legislatures in promulgating sentencing guidelines. When the possibility of solitary confinement is not considered during an inmate's sentencing, its later use is not a reflection of the initial crime committed and punishment is thus not proportional to the crime. Additionally, even with punitive solitary for violation of prison rules, the severity of solitary is often far more punishment than deserved for the particular alleged offense. As previously discussed in Part I.C, punitive solitary is sometimes used in response to even minor rule infractions. For example, in a report about conditions in New York Prisons from 2007–2011, researchers found that the Department of Corrections used solitary confinement as

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> obligation of the criminal. The second emphasizes the state as standing in the shoes of the non-criminals who are owed vengeance not only for the wrong done to them but also vindication for their obedience.

Stephen Michael Sheppard, *Retributive Punishment*, BOUVIER LAW DICTIONARY (2012).

107. Richard C. Boldt, *Rehabilitative Punishment and the Drug Treatment Court Movement*, 76 WASH. U. L. Q. 1205, 1219–23 (1998).

108. *See* Weems v. United States, 217 U.S. 349, 367 (1910) (stating "it is a precept of justice that punishment for crime should be graduated and proportioned to offense").

109. Artway v. Attorney General of N.J., 876 F. Supp. 666, 688 (D. N.J. 1995).

110. *See* Laura I. Appleman, *Retributive Justice and Hidden Sentencing*, 68 OHIO ST. L.J. 1307 (2007).

111. Johnston, *supra* note 59, at 156; Adam J. Kolber, *Unintentional Punishment*, 18 LEGAL THEORY 1, 15–16 (2012) (arguing that under the "justification-symmetry principle," state actors imposing punishment must provide the same justification for harm or risk of harm associated with punishment as would be required for an individual).

punishment in over 68,000 rule violations, only 16% of which were for any type of violence or weapons-related infractions.[112]

One devastating illustration of this disproportionality is the case of Kalief Browder. At age sixteen, Browder was arrested for allegedly stealing a backpack. Unable to make the $3,000 bail, he spent his three years awaiting trial on Rikers Island. During these three years, he spent more than seventeen months in Rikers's Central Punitive Segregation Unit, confined to a twelve-by-seven-foot cell for twenty-three-hours a day, where he attempted suicide five times.[113] The case against him was ultimately dismissed, but the psychological damage Browder endured in solitary continued to plague him on the outside.[114] After numerous suicide attempts, he succeeded in taking his own life just two years after his release.[115] Even if Browder had been convicted of the robbery as opposed to awaiting trial, and even if the accusations of participation in prison brawls that got him sent to punitive solitary were true, the public outcry from this case and subsequent legislative changes illustrate a general consensus that the punishment did not fit the crime. While Browder's case is one of the more shocking examples, the same kind of disproportionality occurs in almost all uses of solitary confinement or assignment to supermax prisons as such conditions are not normally mandated by the legislature or weighed during sentencing.

Even in rare cases where the legislature or sentencing authority under statutory mandate does consider the realities of incarceration during sentencing, there are three ways an inmate's sentence, rightfully decided, can later become unjust punishment: inhumane conditions of confinement, unjustified conditions of confinement not serving the purpose of the sentence, and disproportionate punishment based on the inmate's experience.[116] Solitary confinement practices are riddled with all three of these paths to unjust punishment.

112. GROWING UP LOCKED DOWN, *supra* note 39, at 52. *See also* Shames et al., *supra* note 5, at 12–15.

113. Jennifer Gonnerman, *Kalief Browder Learned How to Commit Suicide on Rikers*, NEW YORKER (June 2, 2017), www.newyorker.com/news/news-desk/kalief-browder-learned-how-to-commit-suicide-on-rikers.

114. *Id.*

115. *Id*. *See also* Benjamin Weiser, *Kalief Browder's Suicide Brought Changes to Rikers. Now It Has Led to a $3 Million Settlement*, N.Y. TIMES (Jan. 24, 2019), https://www.nytimes.com/2019/01/24/nyregion/kalief-browder-settlement-lawsuit.html; Jennifer Gonnerman, *A Boy Was Accused of Taking a Backpack. The Courts Took the Next Three Years of Life.*, NEW YORKER (Sept. 29, 2014), https://www.newyorker.com/magazine/2014/10/06/before-the-law.

116. E. Lea Johnston, *Modifying Unjust Sentences*, 49 GA. L. REV. 433 (2015) (arguing for the greater use of judicial sentence modification, which would afford greater legitimacy and transparency to the use of extraordinary prison policies like solitary confinement).

III. DECISIONAL POWER

A. Democratic Legitimacy and the Principle of Legality

While the legislature is often thought to have the first say in the administration of punishment, prison administrators play a central role in designing incarceration policies and have broad discretion in their application.[117] Most legislatures have little to no effective oversight measures to ensure the punishment delivered in practice matches the punishment prescribed.[118] Without due process through democratically accountable channels, prison administrators are "illegitimately augmenting punishment" that is, in turn, disproportionate to the severity of the original crime or rule infraction and out of bounds with any legitimate punishment objectives.[119]

In viewing solitary as an additional form of punishment, the major retributive tenet of proportionality requires that there be an initial determination by the authorized state actor that such punishment is deserved. As described by Professor McCleod in relation to death row, but is equally applicable to general solitary confinement as well:

> Retributive justifications for punishment are evaluated more properly by the legislature than by prison administrators, for they entail questions of proportionality and desert that do not admit of empirically correct or provable answers—choices about how wrong an action is and how much suffering a human being should be forced to endure.[120]

Choices about the severity of a crime and the corresponding proportional punishment are not empirical questions with right or wrong answers; they are about what society believes, which is best communicated by the most democratically accountable branch of government. Because the "power of punishment is vested in the legislature[,]"[121] legislatures should be the bodies prescribing sentencing mechanisms by statute, and should have to include additional punishment conditions, such as solitary confinement, in regular sentencing structures if they decide they reflect the kind of punishment society deems is deserved for specific offenses.[122]

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117. *See* THE LIMAN PROGRAM, YALE LAW SCH. & ASS'N OF STATE CORR. ADM'RS, TIME-IN-CELL: THE ASCA-LIMAN 2014 NATIONAL SURVEY OF ADMINISTRATIVE SEGREGATION IN PRISON (Aug 2015), https://www.law.yale.edu/system/files/documents/pdf/asca-liman_administrative_segregation _report_sep_2_2015.pdf [https://perma.cc/A6RV-E2JP].

118. *See* MONA LYNCH, SUNBELT JUSTICE: ARIZONA AND THE TRANSFORMATION OF AMERICAN PUNISHMENT (2010); KERAMET REITER, 23/7: PELICAN BAY PRISON AND THE RISE OF LONG-TERM SOLITARY CONFINEMENT (2016).

119. McLeod, *supra* note 15, at 590.

120. *Id.* at 567.

121. *See id.* at 569, n.205.

122. *See* Appleman, *supra* note 110 (arguing for greater protections for the Sixth Amendment's right to a jury trial, including the jury's role in sentencing).

Further, statutory authorization of punishment is a required principle of legality. To continue to allow prison administrators to prescribe solitary confinement without prior statutory authorization violates the principle of legality and its instantiations in the Due Process and Ex Post Facto Clauses.[123] The Ex Post Facto Clause prohibits retroactive application of penal statutes that disadvantage the offender affected by them. More specifically, for purposes of this Note, it prohibits laws or application of laws that inflict a greater punishment than the law annexed to the crime when committed.[124] *In re Medley* dealt with a law requiring solitary confinement before execution as applied to prisoners sentenced before the law came into effect. This could come into play in any future laws requiring solitary confinement applied to prisoners after their original sentencing, as well as those moved from regular prisons to supermax prisons as the opinion included both the lack of proscription via the original statute in place, as well as the lack of the practice having been in use at the time.[125] In that case, Justice Miller described the Ex Post Facto issue as such:

> Any law passed after the commission of the offence for which a person accused of crime is being tried which inflicts a greater punishment on the crime that the law annexed to it at the time when it was committed, or which alters the situation of the accused to his disadvantage, is an ex post facto law within the meaning of that term as used in the Constitution of the United States.[126]

Clearly the prescription of solitary confinement after regular sentencing, shown to be punitive in nature and a reality of incarceration, fits within Justice Miller's description. Inmates in solitary are disadvantaged both mentally and physically and lose out on regular prison opportunities such as parole.

B. Separation of Powers

Can or should legislatures delegate the power to decide to prison administrators? States and the federal government differ in their approaches to agency decisions, but unless a statute mandates solitary confinement in certain circumstances, "the law should not be read to allow prison administrators the power to establish it. For any such prescription of additional punishment ought to be express in order to satisfy the principle of legality and the rule of lenity that helps enforce it."[127] Even if legislatures in some states are legally allowed to delegate confinement authority to prison administrators, they should not. Prison administrators have incentives to hold onto penal technologies that they believe offer them control of inmates, and history has shown they continually

123. *Id.* at 567.

124. *See* U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any . . . ex post facto Law . . . ."). *See also* Calder v. Bull, 3 U.S. 386, 390–92 (1798); Collins v. Youngblood, 497 U.S. 37, 52 (1990).

125. *In re* Medley, 134 U.S. 160, 167 (1890).

126. *Id.* at 171.

127. McLeod, *supra* note 15, at 587.

re-brand solitary confinement, cloaking it in different terms, in the face of public critique.[128] The cycle needs to end.

One solution is to hold all current solitary confinement polices as void in states with strict separation of powers. Then let the legislatures choose whether to reinstate the practice, require it to be prescribed by sentencing authorities under statutory guidance, or limit the use to be only available for certain specified crimes or prison rule violations. Given the trend in public opinion advocating for an end to solitary confinement due to its inequity and harsh psychological effects, along with the availability of data proving its ineffectiveness and high expense, legislatures faced with the choice to reinstate solitary confinement practices today are unlikely to do so. If they do decide to continue the practice, it must be clearly accepted and justified based on its retributive nature as a form of deserved punishment, not simply as an administrative tool for prisoner control.

CONCLUSION

Punishment is society's expression of condemnation for a given offense. The public's recognition of the unjust severity of solitary confinement practices and their negative psychological effects on incarcerated people has been shown through the rise of nationwide calls for and moves towards legislative reform. Solitary confinement is an altogether different and additional form of punishment that should require the same legislative sanction as regular imprisonment. Not only does the practice not have the public support it should in order to be an actual societal expression, but it fails to serve traditional punishment goals: solitary does not rehabilitate or reform the inmate, it does not decrease aggregate levels of violence within prisons, it does not deter individuals from committing further violence or crimes, and its lack of proportionality goes against the core tenet of retribution. There can be no true justice when our current system of punishment so often imposes punishments that are disproportionate to the crime committed, especially in a system that has culminated in the current mass incarceration epidemic in America. Solitary confinement should be abolished, unless it can be specifically mandated by legislatures as a kind of punishment their constituents feel displays the condemnation deserved for specified crimes.

128. Rubin & Reiter, *supra* note 2, at 1610.