BEYOND CRUEL AND UNUSUAL: SOLITARY CONFINEMENT AND DIGNITARY INTERESTS

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INTRODUCTION

"The degree of civilization in a society can be judged by entering its prisons."[1] While these words were originally written by Fyodor Dostoyevsky in the nineteenth century, U.S. Supreme Court Justice Anthony Kennedy recently lamented that "[t]here is truth to this in our own time."[2] Our nation's prison system has witnessed a disturbing trend in the increasing use of prolonged solitary confinement.[3] In fact, according to a recent Amnesty International report, the United States is "virtually alone in the world in incarcerating thousands of prisoners in long-term or indefinite solitary confinement."[4] Despite state-to-state variances in the practice's use and other shortcomings in data gathering,[5] currently available estimates indicate that as many as 100,000 prisoners are being held in some form of solitary confinement[6]—"a figure that includes juveniles and people with mental illness."[7]

Although solitary confinement was originally conceived as a rare and short-term punishment, this type of confinement has become both widespread and prolonged.[8] For example, as of 2006, there were at least fifty-seven "supermax" prisons—comprised entirely of long-term isolation cells—in forty states housing approximately 20,000 prisoners.[9] On an average day in 2011–2012, the Bureau of Justice Statistics found that

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1. THE YALE BOOK OF QUOTATIONS 210 (Fred R. Shapiro ed. 2006).

2. Davis v. Ayala, 135 S. Ct. 2187, 2210 (2015) (Kennedy, J., concurring).

3. Jules Lobel, *Prolonged Solitary Confinement and the Constitution*, 11 U. PA. J. CONST. L. 115 (2008); *see also* Wilkinson v. Austin, 545 U.S. 209, 213 (2005) ("The use of Supermax prisons has increased over the last 20 years . . . .").

4. AMNESTY INT'L, ENTOMBED: ISOLATION IN THE US FEDERAL PRISON SYSTEM 2 (2014), www.amnestyusa.org/sites/default/files/amr510402014en.pdf [hereinafter AMNESTY INTERNATIONAL REPORT].

5. Sal Rodriguez, *FAQ*, SOLITARY WATCH (2015), http://solitarywatch.com/facts/faq/.

6. *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 ii (2015), https://www.law.yale.edu/system/files/area/center/liman/document/asca-liman_administrative segregationreport.pdf. This report estimates that "between 80,000 and 100,000 people were in isolation in prisons as of the fall of 2014." *Id.* at 3. The estimate was based on a finding that in thirty-four states housing 73% of the 1.5 million persons incarcerated in the United States, over 66,000 prisoners were placed in restrictive housing. *Id.* (not accounting for persons incarcerated in local jails, juvenile detention centers, or military and immigration facilities).

7. Barack Obama, *Commentary: The President's Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 830 (2017) (citing LIMAN PROGRAM, YALE LAW SCH. & ASS'N OF STATE CORR. ADM'RS, *supra* note 6, at 3).

8. Shannon H. Church, *The Depth of Endurance: A Critical Look at Prolonged Solitary Confinement in Light of the Constitution and a Call to Reform*, 103 KY. L.J. 639, 640 (2015); Michael Montgomery, The Ctr. for Investigative Reporting & KQED, *This Is What Solitary Confinement Does to Your Face*, POLITICO MAG. (Jan. 9, 2014, 9:44 PM), http://www.politico.com/magazine/gallery/2014/01/this-is-what-solitary-confinement-does-to-your-face/001562-022211.html#BOO.VZ2RVOuZ7jQ.

9. Lobel, *supra* note 3, at 115; *cf.* AMNESTY INTERNATIONAL REPORT, *supra* note 4, at 2.

roughly 10% of all prison inmates had spent thirty days or longer in restrictive housing.[10] Of the 80,000 to 100,000 U.S. prisoners estimated to be in isolation as of the fall of 2014,[11] "[a]s many as 25,000 inmates are serving months, even years of their sentences alone in a tiny cell, with almost no human contact."[12]

While definitions of "solitary confinement" and "segregation" vary considerably within the correctional context,[13] the ABA's Criminal Justice Standards define the term "segregated housing" as the "housing of a prisoner in conditions characterized by *substantial isolation* from other prisoners, whether pursuant to disciplinary, administrative, or classification action . . . includ[ing the] restriction of a prisoner to the prisoner's assigned living quarters."[14] In practice, such conditions amount to "placing a person alone in a cell approximately the size of a parking space for 22 to 24 hours a day with little to no human contact, reduced or no natural light, and severe constraints on visitation."[15]

Moreover, the justifications for the use of segregation generally fall into two broad categories: disciplinary and administrative.[16] A prisoner is assigned to administrative segregation "when a prison administrator deems a person a threat to himself, other inmates, or prison officials."[17] In evaluating the constitutionality of solitary confinement, this Note focuses solely on administrative segregation for several reasons.

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10. ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, USE OF RESTRICTIVE HOUSING IN U.S. PRISONS AND JAILS, 2011–12, at 1 (2015), http://www.bjs.gov/content/pub/pdf/urhuspj1112.pdf.

11. *See supra* note 6 and accompanying text.

12. Barack Obama, Opinion, *Barack Obama: Why We Must Rethink Solitary Confinement*, WASH. POST (Jan. 25, 2016, 8:01 PM), https://www.washingtonpost.com/opinions/barack-obama-why-we-must-rethink-solitary-confinement/2016/01/25/29a361f2-c384-11e5-8965-0607e0e265ce_story.html?utm_term=.a9cd08eae85f; *cf.* AMNESTY INTERNATIONAL REPORT, *supra* note 4, at 2.

13. *See* NATASHA A. FROST & CARLOS E. MONTEIRO, NAT'L INST. OF JUSTICE, ADMINISTRATIVE SEGREGATION IN U.S. PRISONS 2–3 (2016), https://www.ncjrs.gov/pdffiles1/nij/249749.pdf. This Note uses the terms "solitary confinement" and "segregation" interchangeably.

14. ABA CRIMINAL JUSTICE STANDARDS: TREATMENT OF PRISONERS § 23-1.0(r), at 13 (AM. BAR ASS'N CRIMINAL JUSTICE STANDARDS COMM., 3d. ed. 2011) (emphasis added); *accord* Margo Schlanger, *Regulating Segregation: The Contribution of the ABA Criminal Justice Standards on the Treatment of Prisoners*, 47 AM. CRIM. L. REV. 1421, 1430 (2010).

15. Brief of *Amici Curiae* Corrections Experts in Support of Petitioner at 9–10, Prieto v. Clarke, 136 S. Ct. 319 (2015) (mem.) (No. 15-31), 2015 WL 4720277, at *9–10 [hereinafter *Prieto*, Correctional Experts Amicus Brief] (citing Wilkinson v. Austin, 545 U.S. 209, 223–24 (2005); Leena Kurki & Norval Morris, *The Purposes, Practices, and Problems of Supermax Prisons*, 28 CRIME & JUST. 385, 395 (2001)).

16. Elli Marcus, Comment, *Toward a Standard of Meaningful Review: Examining the Actual Protections Afforded to Prisoners in Long-Term Solitary Confinement*, 163 U. PA. L. REV. 1159, 1161 (2015).

17. *Id.* at 1162. While administrative segregation has, on occasion, been characterized as a "catchall," Hewitt v. Helms, 459 U.S. 460, 468 (1983), *overruled in part by* Sandlin v. Conner, 515 U.S. 472, 482–84 (1995), this Note will avoid using it as an umbrella term by adhering to the definition stated above.

First, because this determination is based on the prediction of a prisoner's future behavior,[18] it could theoretically be made on a recurring basis, resulting in potentially permanent confinement in such conditions.[19] Second, although this Note argues that prolonged solitary confinement is a categorically inhumane practice, prisoners deemed a risk to themselves or others and placed in administrative segregation inevitably "belong to some of the most vulnerable populations within a prison, including people struggling with substance abuse and mental illness."[20] Third, because courts afford great deference to prison officials,[21] it may be harder in the disciplinary context for an individual's liberty interest to outweigh the state's interest in maintaining institutional control.[22] And finally, unlike disciplinary segregation, prisoners are typically placed in administrative segregation for reasons other than bad behavior.[23] Thus, unlike its disciplinary counterpart, administrative segregation doesn't fall neatly within a purely *textual* reading of the word "punishment," as it is used in the Eighth Amendment.[24]

This Note will address the indignity of solitary confinement within the bounds set by the foregoing definitions. Part I will briefly survey the history of solitary confinement as well as its modern criticisms. Part II will next consider the constitutional theories that might be used to challenge

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18. Marcus, *supra* note 16, at 1161.

19. *See* Lobel, *supra* note 3, at 115 ("[I]n many state systems and in the federal system there are some prisoners who have been effectively sentenced to harsh forms of solitary confinement for the rest of their lives."); *see also* ALISON SHAMES ET AL., VERA INST. OF JUSTICE, SOLITARY CONFINEMENT: COMMON MISCONCEPTIONS AND EMERGING SAFE ALTERNATIVES 15 (2015), http://archive.vera.org/sites/default/files/resources/downloads/solitary-confinement-misconceptions-safe-alternatives-report_1.pdf ("As a matter of policy within the federal prison system and in at least 19 states, corrections officials are permitted to hold people in segregated housing indefinitely. While placement in administrative segregation can, with some level of periodic review, be open-ended, a term in disciplinary segregation is almost always a defined period of time." (footnote omitted)).

20. Marcus, *supra* note 16, at 1162 (citing Sharon Dolovich, *Exclusion and Control in the Carceral State*, 16 BERKELEY J. CRIM. L. 259, 323 (2011)).

21. *See generally* Cruz v. Beto, 405 U.S. 319, 321 (1972) (per curiam) ("We are not unmindful that prison officials must be accorded latitude in the administration of prison affairs, and that prisoners necessarily are subject to appropriate rules and regulations.").

22. To be sure, this is still a legitimate state interest in the administrative context. *See, e.g.*, Scarver v. Litscher, 434 F.3d 972, 976–77 (7th Cir. 2006). *But see* SHAMES ET AL., *supra* note 19, at 18 ("[T]here is little evidence to support the claim that segregated housing increases facility safety or that its absence would increase in-prison violence."). It is the position of the author, however, that this interest will be stronger in the disciplinary context where segregation is justified on the basis of previous behavior and not a mere threat of future harm.

23. Marcus, *supra* note 16, at 1161.

24. *See infra* Part II.C; *see also* Kansas v. Hendricks, 521 U.S. 346, 363 (1997) (holding that the involuntary civil commitment scheme at issue did not constitute punishment because "the mere fact that a person is detained does not inexorably lead to the conclusion that the government has imposed punishment," and further reasoning that restricting freedom of the dangerously mentally ill is a legitimate, nonpunitive governmental objective (quoting United States v. Salerno, 481 U.S. 739, 746 (1987))).

solitary confinement. While other academics have commented on procedural due process issues in the solitary confinement context, this Note takes a slightly different approach. Specifically, this Note will illustrate why solitary confinement may violate prisoners' substantive constitutional rights—either because it violates the Eighth Amendment ban on cruel and unusual punishment[25] or because it violates a dignitary interest that the Court has arguably implicitly recognized as a part of the liberty guarantee protected by the Fourteenth Amendment's Due Process Clause.[26]

To be sure, other commentators have discussed the inhumanity of solitary confinement as an Eighth Amendment issue. While this Note does not intend to cover the same ground, the Eighth Amendment is relevant to the extent that the Court finds dignity to inform its decisions concerning Eighth Amendment violations. At the other end of the spectrum, other commentators have also explored the role played by "human dignity" in substantive due process jurisprudence generally, even in the prison context. Accordingly, a substantial portion of this Note is dedicated to fully unpacking the dignitary aspects of the Constitution, as outlined by other scholars in the field. Part III will build upon these theories by transferring their application to a different context—the conditions imposed by solitary confinement. Specifically, Part III will explain how administrative solitary confinement might be challenged as a matter of substantive due process and why its inhumane and degrading conditions arguably violate a "right" to human dignity inherent in the liberty guarantee of the Fourteenth Amendment's Due Process Clause.

The main premise of this Note is that although prisoners, by definition, are not entitled to the fullest extent of the protections afforded by the "liberty" guarantee of the Due Process Clause, the Constitution sets a floor for their treatment. In other words, prisoners retain the right to be treated with dignity even when the Constitution no longer protects their right to liberty in the most traditional sense of the word—freedom from incarceration.[27] This Note argues that this right to be treated with dignity—even if only a background norm—has the potential to exist outside the purview of the Eighth Amendment and may conceptually live within those substantive liberty guarantees inherent in the Due Process Clause. By breaking from traditional notions of how solitary confinement might be categorically challenged (i.e., on Eighth Amendment grounds), this Note hopes to spark conversation in the legal community regarding an alternative theory to challenging the indignity of solitary confinement.

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25. *See* U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted*." (emphasis added)).

26. *See* U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .").

27. *See generally* Brown v. Plata, 563 U.S. 493, 510 (2011).

I. A HISTORY OF SOLITARY CONFINEMENT IN THE UNITED STATES AND ITS MODERN CRITICISMS

As Justice Kennedy pointed out in his concurrence in *Davis v. Ayala*, "[t]he human toll wrought by extended terms of isolation long has been understood, and questioned, by writers and commentators."[28] Charles Dickens serves as an early example in his recount of his nineteenth-century tour of Philadelphia's Eastern State Penitentiary.[29] Built in 1829, the Eastern State Penitentiary was the first U.S. prison to experiment with solitary confinement, based on "Quaker belief that prisoners isolated in stone cells with only a Bible would use the time to repent, pray and find introspection."[30] Yet the practice had quite the opposite effect, driving men to the brink of insanity, and in some cases, even to commit suicide.[31]

Indeed, Charles Dickens described the practice as "cruel and wrong" after touring the Eastern State Penitentiary.[32] While Dickens was convinced that solitary confinement was, in its intention, "kind, humane, and meant for reformation," he was nevertheless "persuaded that those who devised th[e] system . . . d[id] not know what it [wa]s that they [we]re doing."[33] In attempting to describe the mental torture inflicted on prisoners housed in such confinement, he wrote:

> I hold this slow and daily tampering with the mysteries of the brain, to be immeasurably worse than any torture of the body: and because its ghastly signs and tokens are not so palpable to the eye and sense of touch as scars upon the flesh; because its wounds are not upon the surface, and it extorts few cries that human ears can hear; therefore I the more denounce it, as a secret punishment which slumbering humanity is not roused up to stay.[34]

In the late 1800s, even the Supreme Court recognized that solitary confinement constituted "an additional punishment of the most important and painful character."[35] But fast-forwarding over a century later, the

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28. 135 S. Ct. 2187, 2209 (2015) (Kennedy, J., concurring).

29. *See generally* CHARLES DICKENS, AMERICAN NOTES FOR GENERAL CIRCULATION AND PICTURES FROM ITALY 81–94 (Chapman & Hall, Ltd. 1914).

30. Laura Sullivan, *Timeline: Solitary Confinement in U.S. Prisons*, NAT'L PUBLIC RADIO (July 26, 2006, 7:52 PM), http://www.npr.org/templates/story/story.php?storyId=5579901.

31. *Id.*

32. DICKENS, *supra* note 29, at 81–94.

33. *Id.* at 83.

34. *Id.* at 83–94.

35. *In re* Medley, 134 U.S. 160, 171 (1890) (striking down a Colorado statute, which required placement in solitary confinement until execution, as unconstitutional under the ex post facto clause). The Supreme Court noted that even after a short period of such confinement, "[a] considerable number

practice persists. In fact, the use of solitary confinement has significantly increased over time,[36] despite scientific research "firmly establish[ing] that prolonged solitary confinement causes severe psychological harms by imposing social isolation and sensory deprivation."[37]

Perhaps in light of international trends moving away from the use of solitary confinement, or even the recent attention paid to criminal justice reform generally, the practice has been the focus of growing public concern.[38] Several recent events suggest that all three branches of the federal government, and even the United States as an institution itself, have taken notice of this heightened public awareness and expressed some interest in exploring alternatives to the practice. For example, in March 2015, Justice Kennedy and Justice Breyer testified before the House Appropriations Subcommittee regarding the Supreme Court's 2016 budget.[39] In response to a question from a Republican representative regarding solutions to mass incarceration, Justice Kennedy noted that "this idea of total incarceration just isn't working, and it's not humane."[40] Justice Kennedy explained that "solitary confinement literally drives men mad" and further emphasized the need to look at the system we have and

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of the prisoners fell . . . into a semi-fatuous condition . . . and others became violently insane; others still, committed suicide." *Id.* at 168.

36. *See supra* notes 8–12 & accompanying text; *cf.* SHAMES ET AL., *supra* note 19, at 6 ("There are indications that the use of segregated housing has grown substantially in recent years (perhaps as much as by 42 percent between 1995 and 2005) . . . .").

37. Brief of *Amici Curiae* Professors and Practitioners of Psychiatry and Psychology in Support of Petitioner at 3, Prieto v. Clarke, 136 S. Ct. 319 (2015) (mem.) (No. 15-31), 2015 WL 4720278, at *3 [hereinafter *Prieto*, Psychiatry/Psychology Professors and Practitioners Amicus Brief]; *see also* Thomas L. Hafemeister & Jeff George, *The Ninth Circle of Hell: An Eighth Amendment Analysis of Imposing Prolonged Supermax Solitary Confinement on Inmates with a Mental Illness*, 90 DENV. U. L. REV. 1, 35 (2012) ("[T]he personal accounts, descriptive studies, and systematic research spanning multiple continents over more than a century is virtually unanimous in its conclusion: prolonged supermax solitary confinement can and does lead to significant psychological harm." (citing Atul Gawande, *Hellhole*, NEW YORKER, Mar. 30, 2009, at 37)). For a more thorough depiction of solitary confinement through the eyes of penology and psychology experts, see Jonathan Simon & Richard Sparks, *Introduction: Punishment and Society: The Emergence of an Academic Field*, *in* THE SAGE HANDBOOK OF PUNISHMENT AND SOCIETY (Jonathan Simon & Richard Sparks eds., 2013), Fatos Kaba et al., *Solitary Confinement and Risk of Self-Harm Among Jail Inmates*, 104 AM. J. PUB. HEALTH 442 (2014), and Jeffrey L. Metzner & Jamie Fellner, *Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for Medical Ethics*, 38 J. AM. ACAD. PSYCHIATRY & L. 104–08 (2010). For an account of the psychological toll solitary confinement exacts on prisoners, see Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J.L. & POL'Y 325 (2006) (discussing common side effects of solitary confinement).

38. *See* Davis v. Ayala, 135 S. Ct. 2187, 2210 (2015) (Kennedy, J., concurring) ("There are indications of a new and growing awareness in the broader public of the subject of corrections and of solitary confinement in particular.").

39. Nicole Flatow, *Supreme Court Justices Blast the Corrections System*, THINKPROGRESS (Mar. 24, 2015), http://thinkprogress.org/justice/2015/03/24/3637885/supreme-court-justices-implore-congress-reform-criminal-justice-system-not-humane/.

40. *Supreme Court Fiscal Year 2016 Budget*, C-SPAN (Mar. 23, 2015), http://www.c-span.org/video/?324970-1/supreme-court-budget-fiscal-year-2016&live. Justice Kennedy's testimony on the issue begins at 29:45.

consider alternatives.[41] In particular, he opined that the European system of placing difficult, recalcitrant prisoners in groups of three or four, thereby allowing for human contact, seemed to work much better.[42] Justice Kennedy concluded by characterizing the United States' system as broken.[43] This testimony came only weeks after an Illinois senator called on the Federal Bureau of Prisons to reform the practice of solitary confinement in the United States.[44]

The issue of solitary confinement also caught the attention of President Barack Obama in 2015. In his speech given to the NAACP's annual convention, President Obama made the following remarks:

> We should not tolerate conditions in prison that have no place in any civilized country. . . .
>
> . . . I've asked my Attorney General to start a review of the overuse of solitary confinement across American prisons. The social science shows that an environment like that is often more likely to make inmates more alienated, more hostile, potentially more violent. Do we really think it makes sense to lock so many people alone in tiny cells for 23 hours a day, sometimes for months or even years at a time?[45]

Following this review ordered by the President, the Department of Justice released its report and recommendations on the use of restrictive housing.[46] This report includes an analysis of the ways in which the Justice Department can help encourage states to reduce their use of solitary confinement.[47] In 2015, the Justice Department's Bureau of Justice

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41. *Id.*

42. *Id.*

43. *Id.* (reasoning that "we haven't given nearly enough study, nearly enough thought, nearly enough investigative resources, to looking at our corrections system").

44. Lydia Wheeler, *Durbin Wants to Rein In Prison Use of Solitary Confinement*, HILL (Feb. 27, 2015, 1:37 PM), http://thehill.com/regulation/234132-durbin-calls-for-reform-of-solitary-confinement-in-prison.

45. Barack Obama, Remarks by the President at the NAACP Conference (July 14, 2015), https://www.whitehouse.gov/the-press-office/2015/07/14/remarks-president-naacp-conference. Notably, President Obama recently published a law review article on the President's role in addressing criminal justice reform, which also denounces the use of solitary confinement in prison. *See* Obama, *supra* note 7.

46. U.S. DEP'T OF JUSTICE, REPORT AND RECOMMENDATIONS CONCERNING THE USE OF RESTRICTIVE HOUSING (2016), https://www.justice.gov/dag/file/815551/download. President Obama ultimately adopted these recommendations in January 2016. *See* Press Release, Office of the Press Sec'y, FACT SHEET: Department of Justice Review of Solitary Confinement (Jan. 25, 2016), https://www.whitehouse.gov/the-press-office/2016/01/25/fact-sheet-department-justice-review-solitary-confinement.

47. U.S. DEP'T OF JUSTICE, *supra* note 46, at 2, 79–82.

Statistics also published its first-ever national study of the prevalence of solitary confinement in the United States.[48]

The United States itself has also signaled its support for reform on a much larger scale in recent years. In May 2015, the United Nations (U.N.) Crime Commission approved revised Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules),[49] which

> flatly ban solitary confinement that is indefinite or prolonged (over 15 consecutive days), and require that even shorter term solitary confinement be "used only in exceptional cases as a last resort, for as short a time as possible and subject to independent review, and only pursuant to the authorization by a competent authority."[50]

Although not legally binding, these reforms are notable given the positive role played by the United States.[51]

Finally, and most importantly for the purposes of this Note, Justice Kennedy—notoriously the "swing vote" of the Supreme Court—recently chastised the practice of solitary confinement in the Court's decision in *Davis v. Ayala*.[52] While *Davis* was not a case challenging the practice itself, a brief discussion during oral argument revealed that the appellee death row inmate had served a great majority of his twenty-five years in custody in solitary confinement.[53] This fact prompted Justice Kennedy's concurrence, which did not discuss the merits of the case but focused instead on the "terrible price" paid by those enduring prolonged isolation in prison.[54]

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48. *See* Amy Fettig et al., SOLITARY WATCH, http://solitarywatch.com/resources/timelines/milestones/ (last visited Jan. 2, 2017). For the full report, see Beck, *supra* note 10.

49. *See* Economic and Social Council Res. 24/6, U.N. Standards Minimum Rules for the Treatment of Prisoners (Mandela Rules) (May 21, 2015), http://www.unodc.org/documents/commissions/CCPCJ/CCPCJ_Sessions/CCPCJ_24/resolutions/L6_Rev1/ECN152015_L6Rev1_e_V1503585.pdf [hereinafter Mandela Rules].

50. Fettig et al., *supra* note 48 (citing Mandela Rules, *supra* note 49). The U.N. Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has also deemed the conditions of solitary confinement to constitute torture, if endured by juveniles or persons with mental illness or if endured by any person for more than fifteen days. Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Interim Rep. of the Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ¶¶ 76–78, U.N. Doc. A/66/268 (Aug. 5, 2011).

51. David Fathi, *Victory! UN Crime Commission Approves Mandela Rules on Treatment of Prisoners*, AM. CIV. LIBERTIES UNION, (May 27, 2005, 4:30 PM), https://www.aclu.org/blog/speak-freely/victory-un-crime-commission-approves-mandela-rules-treatment-prisoners ("The U.S. delegation strongly supported adopting the rules and naming them in honor of Nelson Mandela . . . . [I]t fought back against efforts to insert language that would allow countries to disregard certain rules for cultural and religious reasons. Perhaps most important, the U.S. delegation included the corrections directors from Washington and Colorado, two states that have significantly reduced solitary confinement and pioneered other progressive reforms.").

52. 135 S. Ct. 2187, 2208–10 (2015) (Kennedy, J., concurring).

53. *Id.* at 2208.

54. *Id.* at 2210.

Notably, Justice Kennedy stressed that if the Court was presented with a case on the issue in the future, it "may be required, within its proper jurisdiction and authority, to determine whether workable alternative systems for long-term confinement exist, and, if so, whether a correctional system should be required to adopt them."[55]

Justice Kennedy's call for a case to address the widespread use of segregation was answered less than a month later in *Prieto v. Clarke*.[56] In *Prieto*, a prisoner on death row challenged Virginia's policy of automatically placing death row inmates, based solely on their security classification, in solitary confinement until their execution date on procedural due process grounds.[57] Many organizations filed amicus briefs,[58] and several large, national news outlets even weighed in—opining that this was "the" case Justice Kennedy was looking for in his *Davis* concurrence.[59] Ultimately, however, the petitioner was executed by the state of Virginia before the Supreme Court made a decision regarding the motion to stay his execution[60] or his petition for writ of certiorari.[61] While the Court did not necessarily *refuse* to address the issue given Prieto's execution, it did deny a motion to intervene filed by another death row

55. *Id.*

56. Petition for Writ of Certiorari, Prieto v. Clarke, 136 S. Ct. 319 (2015) (mem.) (No. 15-31), 2015 WL 4100302 [hereinafter *Prieto*, Petition for Writ of Cert.].

57. *Id.* at 5–10. The plaintiff brought this action under 42 U.S.C. § 1983, alleging that his ongoing confinement violated his procedural due process rights under the Fourteenth Amendment. *Id*. The District Court granted summary judgment in his favor, finding he had established a liberty interest under the Due Process Clause and that the state had violated his right to due process. Prieto v. Clarke, No. 1:12cv1199 (LMB/IDD), 2013 WL 6019215, at *1, *9–10 (E.D. Va. Nov. 12, 2013), *rev'd,* 780 F.3d 245 (4th Cir. 2015), *cert. dismissed*, 136 S. Ct. 319 (2015) (mem.). But in a divided decision before a three-judge panel, the Fourth Circuit reversed, holding the plaintiff had not established a liberty interest in avoiding such confinement in the first place. *Prieto*, 780 F.3d at 255. For more information regarding the details of this case, see Carimah Townes, *Federal Appeals Court Permits Virginia to Send Death Row Inmates to Solitary Confinement for Life*, THINKPROGRESS, (Mar. 12, 2015), http://thinkprogress.org/justice/2015/03/12/3633040/solitary-confinement-in-virginia/.

58. *See, e.g.*, Brief for the Constitutional Accountability Center as Amicus Curiae in Support of Petitioner, Prieto v. Clarke, 136 S. Ct. 319 (2015) (mem.) (No. 15-31) 2014 WL 10212435 (U.S. filed Aug. 7, 2015); *Prieto*, Correctional Experts Amicus Brief, *supra* note 15; *Prieto*, Psychiatry/Psychology Professors and Practitioners Amicus Brief, *supra* note 37.

59. *See, e.g.*, Robert Barnes, *If Kennedy is Looking for a Solitary-Confinement Case, an Inmate Has One*, WASH. POST (Aug. 9, 2015), www.washingtonpost.com/politics/courts_law/if-kennedy-is-looking-for-a-solitary-confinement-case-an-inmate-has-one/2015/08/09/b59a6444-3e0a-11e5-b3ac-8a79bc44e5e2_story.html.

60. *Prieto*, 136 S. Ct. 29 (dismissing Prieto's motion to stay his execution as moot). *See generally* Cristian Farias, *Supreme Court Responds to Man on Death Row After Man is Already Dead*, HUFFINGTON POST (Oct. 3, 2015, 9:52 AM), http://www.huffingtonpost.com/entry/supreme-court-alfredo-prieto_560f993fe4b0af3706e1016d.

61. *Prieto*, 136 S. Ct. 319 ("Petition for writ of certiorari . . . dismissed as moot."). *See generally* Richard Wolf, *Supreme Court Won't Decide if Solitary Confinement is Constitutional*, USA TODAY (Oct. 13, 2015, 10:19 AM), http://www.usatoday.com/story/news/2015/10/13/supreme-court-solitary-confinement-virginia/73824406/.

inmate who was subject to the same policy of the Virginia Department of Corrections, which would have kept the case alive.[62]

Whatever the reason for the Court's denial of the motion to intervene in *Prieto*, this decision has come at a time "when some of the justices have expressed interest in the matter and officials across the country are rethinking solitary confinement as it applies not only to death row inmates, but to other inmates with lesser sentences as well."[63] Given the aforementioned developments that suggest the Supreme Court will take up the issue in the near future, this Note seeks to add to the academic discussion surrounding the constitutional issues implicated by solitary confinement and suggest a new line of legal attack against it. Although *Prieto* did not facially challenge the practice of solitary confinement as a whole, there is fertile ground for such constitutional challenges for the reasons discussed in Parts II and III.

II. POTENTIAL CONSTITUTIONAL THEORIES FOR CHALLENGING SOLITARY CONFINEMENT

The Due Process Clause of the Fourteenth Amendment provides that the government shall not "deprive any person of life, liberty, or property, without due process of law."[64] The Supreme Court has held that, although a prisoner's "rights may be diminished by the needs and exigencies of the institutional environment, [he] is not wholly stripped of constitutional protections when he is imprisoned for crime."[65] To provide proper foundation for the analysis set forth in Part III, this Part will first attempt to identify those constitutional protections that remain upon incarceration.

First, similar to the challenge presented in *Prieto*, prisoners have occasionally challenged solitary confinement on procedural due process grounds. In this context, "[a] liberty interest may arise from the

62. *Prieto*, 136 S. Ct. 319. Like Prieto, Mark Eric Lawlor—the hopeful intervenor—was sentenced to death and was subjected to "identical" conditions of solitary confinement. Motion to Intervene or Join on Behalf of Mark Eric Lawlor at 1, *Prieto*, 136 S. Ct. 319, (No. 15-31), https://assets.documentcloud.org/documents/2447749/lawlor-motion-to-intervene.pdf.

63. Ariane de Vogue, *Supreme Court Won't Hear Solitary Confinement Case, But Issue Isn't Going Away*, CNN: POLITICS (Oct. 13, 2015, 11:18 AM), http://www.cnn.com/2015/10/13/politics/supreme-court-solitary-confinement/. Even BuzzFeed provided a comprehensive report of the progress in *Prieto*, updating readers on all of the legal maneuverings in the case. *See* Chris Geidner, *Virginia Executes Serial Killer Before Supreme Court Rules on Final Request,* BUZZFEED NEWS (Oct. 1, 2015, 10:54 PM), http://www.buzzfeed.com/chrisgeidner/terry-mcauliffe-has-to-decide-whether-to-allow-virginia-to-e#.bhEvnXbYP.

64. U.S. CONST. amend. XIV, § 1.

65. Wolff v. McDonnell, 418 U.S. 539, 555 (1974). While the *Wolff* Court ultimately found that there was no right to good-time credits earned for good behavior in prison, it emphasized that "[t]here is no iron curtain drawn between the Constitution and the prisons of this country" before reaching its conclusion. *Id.* at 555–56.

Constitution itself, by reason of guarantees implicit in the word 'liberty,' or it may arise from an expectation or interest created by state laws or policies."[66] In *Sandin v. Conner*[67] and *Wilkinson v. Austin*,[68] the Supreme Court held that inmates had a state-created liberty interest in avoiding conditions of confinement that impose an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life."[69] Notwithstanding the existence of this test, the Court has yet to articulate a bright-line rule concerning the procedural protections afforded to prisoners living in solitary confinement under the Due Process Clause.[70] In fact, the entire thrust of the petitioner's argument in *Prieto* in urging the Supreme Court to grant his petition for certiorari relied upon two circuit splits regarding this test for whether a liberty interest exists in the first instance within the prison context.[71] The first circuit split relates to the threshold question of whether inmates still need to point to an entitlement to a liberty interest in state law before reaching the *Sandin* test set out above.[72] The second split surrounds the baseline against which an atypical and significant hardship must be measured—specifically, what the *Sandin* Court meant by "ordinary incidents of prison life."[73]

Despite these developments in the procedural due process context,[74] the Supreme Court has *not* addressed the constitutionality of the practice of

66. Wilkinson v. Austin, 545 U.S. 209, 221 (2005) (citation omitted); *accord* Hewitt v. Helms, 459 U.S. 460, 466 (1983) ("Liberty interests protected by the Fourteenth Amendment may arise from two sources—the Due Process Clause itself and the laws of the States."), *overruled in part by* Sandin v. Conner, 515 U.S. 472, 482–84 (1995).

67. 515 U.S. 472.

68. 545 U.S. 209.

69. *Id.* at 223 (quoting *Sandin,* 515 U.S. at 484).

70. Marcus, *supra* note 16, at 1164–65; *id.* at 1174 ("*Sandin*'s and *Wilkinson*'s vaguenesses, however, permit creative readings of the standard.").

71. *Prieto*, Petition for Writ of Cert., *supra* note 56, at 1.

72. In *Wilkinson*, the Court noted that "[a]fter *Sandin*, it is clear that the touchstone of the inquiry . . . is not the language of regulations regarding th[e] conditions [of confinement] but the nature of those conditions themselves 'in relation to the ordinary incidents of prison life.'" 545 U.S. at 223 (quoting *Sandin*, 515 U.S. at 484). In contrast with a majority of circuits that have found *Sandin* to announce a new standard, the Second and Fourth Circuits interpret *Sandin* to require a two-part test that still incorporates the need to point to a state statute or regulation in addition to showing "atypical and significant hardship." *See Prieto*, Petition for Writ of Cert., *supra* note 56, at 13–21 (describing the split and outlining the approach adopted by the majority of appellate courts).

73. *See Prieto*, Petition for Writ of Cert., *supra* note 56, at 13–21; *see also* Skinner v. Cunningham, 430 F.3d 483, 486–87 (1st Cir. 2005) (describing the split). In *Wilkinson*, the Court recognized that "the Courts of Appeals have not reached consistent conclusions for identifying the baseline from which to measure what is atypical and significant in any particular prison system." 545 U.S. at 223. The Court noted that while the "divergence indicate[d] the difficulty of locating the appropriate baseline," it didn't need to decide the issue because the facts of the case satisfied the hardship requirement, measured against any plausible baseline. *Id.*

74. The issue of whether a prisoner can demonstrate a liberty interest for purposes of establishing a procedural due process claim is outside the scope of this Note. For a comprehensive review of the precedent related to procedural due process protections in the prison context as they relate to solitary confinement, see Marcus, *supra* note 16. For a similar discussion, see Church, *supra* note 8, Kaitlin

solitary confinement as a whole. Accordingly, this Note will focus on the substantive protections afforded by the Due Process Clause, which bar certain government actions "regardless of the fairness of the procedures used to implement them" and encompass "all fundamental rights comprised within the term liberty."[75]

The Due Process Clause of the Fourteenth Amendment incorporates most of the substantive liberty interests guaranteed in the Bill of Rights,[76] including the Eighth Amendment's prohibition on cruel and unusual punishment.[77] Because the Supreme Court has held that the Eighth Amendment applies to prison conditions,[78] the Eighth Amendment is undeniably the most obvious choice for a substantive challenge to solitary confinement. Importantly, however, the Bill of Rights does not "mark[] the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects,"[79] and there remains "a realm of personal liberty which the government may not enter."[80] Thus, in an effort to propose a new approach to challenging solitary confinement that reaches beyond the textual bounds of the Eighth Amendment, this Part will also address an entirely separate line of cases—those recognizing the unenumerated rights deemed to fall within the "liberty" guarantee of the Fourteenth Amendment's Due Process Clause. The Court's substantive due process precedent is not traditionally relied upon in the prisoner-rights context, let alone in the context of solitary confinement.[81] But, like the Court's Eighth

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Cassel, *Due Process in Prison: Protecting Inmates' Property After* Sandin v. Conner, 112 COLUM. L. REV. 2110 (2012), and Myra A. Sutanto, Wilkinson v. Austin *and the Quest for a Clearly Defined Liberty Interest Standard*, 96 J. CRIM. L. & CRIMINOLOGY 1029 (2006).

75. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846–47 (1992) (plurality opinion) (first quoting Daniels v. Williams, 47 U.S. 327, 331 (1986); then quoting Whitney v. California, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring)).

76. *Id.* at 847.

77. The Eighth Amendment ban on cruel and unusual punishment was arguably incorporated in *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947). *See id.* at 463 ("Prohibition against the wanton infliction of pain has come into our law from the Bill of Rights . . . [and] identical words appear in our Eighth Amendment. The Fourteenth would prohibit by its due process clause execution by a state in a cruel manner."). Without a doubt, however, *Robinson v. California*, 370 U.S. 660 (1962), establishes such incorporation. *Id.* at 666 ("[A] law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." (citing *Resweber*, 329 U.S. at 459)); *see* Estelle v. Gamble, 429 U.S. 97, 101 (1976) (citing *Robinson* for the same proposition).

78. Farmer v. Brennan, 511 U.S. 825, 832 (1994) ("[I]t is now settled that 'the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment.'" (quoting Helling v. McKinney, 509 U.S. 25, 31 (1993))).

79. *Casey*, 505 U.S. at 848.

80. *Id.* at 847; *see also* Lawrence v. Texas, 539 U.S. 558, 573–74 (2003) ("The *Casey* decision again confirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.").

81. This is probably due to the Court's general unwillingness to apply substantive due process analysis where the offending conduct violates a more specific constitutional right. *See* Cty. of Sacramento v. Lewis, 523 U.S. 833, 843 (1998) ("[I]f a constitutional claim is covered by a specific

Amendment jurisprudence, this line of cases includes at least implicit references to the value of human dignity.

Part II.A will briefly summarize the scholarship on human dignity and its role as a constitutional value generally.[82] This Note adds to the current scholarship by addressing an additional and unanswered question: whether there is room for the inhumane conditions of solitary confinement to fall within the protection of such a dignitary interest under the Constitution. Accordingly, Part II.B will then survey the importance of "human dignity" in the two separate lines of cases that are implicated here. Part II.C concludes that while the Eighth Amendment is the more obvious choice under the Supreme Court's current jurisprudence, challenges to administrative segregation may be properly housed in a right to substantive due process under the Fourteenth Amendment.

A. Human Dignity as a Constitutional Value

The concept of human dignity has only recently emerged as a constitutional value.[83] Following the adoption of the Universal Declaration of Human Rights (UDHR) after World War II, which encouraged the recognition of "the dignity and worth of the human person,"[84] one nation "after another made the right to human dignity fundamental."[85] The U.S. Constitution contains no express mention of "human dignity" in its text, but some Supreme Court Justices began to recognize its value following World

constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process." (quoting United States v. Lanier, 520 U.S. 259, 272 n.7 (1997))). Nevertheless, some courts have looked to substantive due process after rejecting a claim alleged under a more specific right. *See, e.g.*, Flaim v. Med. Coll. of Ohio, 418 F.3d 629 (6th Cir. 2005). Furthermore, very occasionally a court might consider whether the conduct violates both the constitutional standard attendant to the more specific right and substantive due process. *See* Morris v. Dearborne, 181 F.3d 657 (5th Cir. 1999). Notwithstanding these potential limitations, and fully acknowledging that the Court has technically held confinement in an isolation cell to be subject to the Eighth Amendment, *see infra* note 99 and accompanying text, this Note will address the tenability of an unenumerated-but-fundamental substantive due process argument in the solitary context, assuming the Court has decided to apply such analysis in the first instance.

82. This question has been addressed quite extensively by many other scholars. *See, e.g.*, Erin Daly, *Human Dignity in the Roberts Court: A Story of Inchoate Institutions, Autonomous Individuals, and the Reluctant Recognition of A Right*, 37 OHIO N.U. L. REV. 381 (2011); Maxine D. Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 NEB. L. REV. 740 (2006); Benjamin F. Krolikowski, Brown v. Plata*: The Struggle to Harmonize Human Dignity with the Constitution*, 33 PACE L. REV. 1255 (2013).

83. Krolikowski, *supra* note 82, at 1257.

84. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

85. Daly, *supra* note 82, at 381; *see also* Erin Daly, *The New Liberty*, 11 WIDENER L. REV. 221, 239 (2005) ("Many of the world's modern constitutions explicitly and prominently protect dignitary interests.") (citing language from the draft European Constitution, the Indian Constitution of 1949, and the South African Constitution of 1996, all of which explicitly protect dignitary interests)).

War II.[86] Although this Note does not intend to thoroughly document the origins of the term in Supreme Court jurisprudence,[87] it is generally accepted that human dignity did not enter the Court's lexicon "as an independent constitutional concept . . . until the middle part of the twentieth century."[88] As Professor Erin Daly points out, these initial war-related cases in which certain Justices heralded the constitutional concept of dignity are remarkable in the sense that these Justices were willing to recognize the dignity of war criminals and thus embrace the concept of dignity embodied by the UDHR, the U.N. Charter, and other international instruments.[89] In other words, they were willing to recognize that "dignity is inherent in the nature of human beings and . . . no matter who they are or what they have done, human beings are entitled to have their dignity respected."[90]

Several other commentators have already opined that the Supreme Court "has changed the content of U.S. constitutional law to name dignity as a distinct and core value,"[91] with some even referring to human dignity as a "fundamental" constitutional value.[92] This Note will build upon the existing scholarship concerning the value of human dignity and narrowly focus on the cases in which the Court has recognized human dignity as an underlying constitutional value of an express or implied fundamental right. As Professor Maxine Goodman aptly explains, it is only by advancing

86. Daly, *supra* note 82, at 391.

87. For further discussion of the history of the Court's recognition of dignity as a constitutional value, see Goodman, *supra* note 82, at 753–57. At least one other commentator has also surveyed the Court's use of dignity, identifying five different "conceptions" of the term. *See* Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 189–90 (2011).

88. Krolikowski, *supra* note 82, at 1258. Others have similarly traced its origin to the 1940s and '50s. Professor Goodman describes the history as follows: "Justice Frank Murphy used the term 'dignity' in his dissent from the 1944 case of *Korematsu v. United States* . . . . Two years later in *Yamashita v. Styer*, . . . Justice Murphy [in his dissent] again called forth the notion of dignity, this time 'human dignity . . . .'" Goodman, *supra* note 82, at 753–55 (footnote omitted). Goodman also points out that "Justice Robert H. Jackson, Justice Murphy's contemporary, also referred to human or individual dignity in constitutional jurisprudence during the mid-1940s and early 1950s." *Id.* at 755 (citing Brinegar v. United States, 338 U.S. 160, 180–81 (1949) (Jackson, J., dissenting); Skinner v. Oklahoma, 316 U.S. 535, 546 (1946) (Jackson, J., concurring)).

89. Daly, *supra* note 82, at 397.

90. *Id.*

91. Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921, 1941 (2003); *see also* Goodman, *supra* note 82, at 747 n.41 (noting that in their article, Resnik and Suk "contend the Supreme Court has 'embedded the term dignity into the U.S. Constitution.'" (quoting Resnik & Suk, *supra*, at 1926)).

92. Goodman, *supra* note 82, at 747 (quoting William A. Parent, *Constitutional Values and Human Dignity*, *in* THE CONSTITUTION OF RIGHTS, HUMAN DIGNITY AND AMERICAN VALUES 47 (Michael J. Meyer & William A. Parent eds.,1992)); *see also* Henry, *supra* note 87, at 172 ("Like Justice Brennan, legal theorist Ronald Dworkin has declared that 'the principles of human dignity . . . are embodied in the Constitution and are now common ground in America.'" (alteration in original) (quoting Ronald Dworkin, *Three Questions for America*, N.Y. REV. BOOKS, Sept. 21, 2006, at 24, 26)).

human dignity that these decisions fulfill a particular constitutional guarantee.[93]

The constitutional claims relevant to this Note are based on either (a) the Eighth Amendment's ban on cruel and unusual punishment[94] or (b) the right to substantive due process (grounded in the "liberty" interest guaranteed by the Fourteenth Amendment's Due Process Clause). Professor Goodman argues that while human dignity is a "well-developed and robust core value," it is only so in certain types of cases.[95] Because Professor Goodman's analysis is accordingly organized by specific types of constitutional cases, her article provides a useful framework to employ here.[96] With respect to Eighth Amendment claims, Professor Goodman argues that the Court's reference to dignity has been "inconsistent and sporadic."[97] Part II.B.1 will discuss these references. But with respect to the latter liberty-interest line of cases, Professor Goodman argues that the Court recognizes human dignity "as a constitutional value and ground[s] its decision[s], at least in part, on this recognition."[98] Ultimately agreeing with her conclusion in this regard, Part II.B.2 seeks to establish that solitary confinement falls within a dignitary interest that has arguably been judicially recognized as implicit in the "liberty" guarantee of the Fourteenth Amendment's Due Process Clause. Part II.B.3, in turn, will evaluate which of these two constitutional provisions is perhaps better suited to house a right to dignity, particularly a prisoner's right to dignity in the solitary confinement context.

B. Grounds for Substantive Challenges

1. The Eighth Amendment

There is no question that confining prisoners in total isolation raises serious Eighth Amendment concerns. In its 1978 decision of *Hutto v. Finney*, the Supreme Court officially held that "[c]onfinement in . . . an isolation cell is a form of punishment subject to scrutiny under Eighth

93. Goodman, *supra* note 82, at 748. "In other cases, while acknowledging human dignity concerns, the Court has failed to heed these concerns in light of competing interests." *Id.*

94. In referring to the Eighth Amendment generally, this Note also intends to refer to its incorporation via the Fourteenth Amendment's Due Process Clause and thus its applicability to the states.

95. Goodman, *supra* note 82, at 748.

96. *See generally id.* at 759–62, 772–78 (analyzing the role of dignity in Eighth and Fourteenth Amendment claims).

97. *Id.* at 757.

98. *Id.*

Amendment standards."[99] But the Court has not yet decided whether prolonged solitary confinement constitutes cruel and unusual punishment under the Eighth Amendment.[100] Moreover, notwithstanding the Court's decision in *Hutto*, the federal courts have not, "with some exceptions, . . . found that solitary confinement violates the Eighth Amendment."[101] Importantly, *no* federal court has found solitary confinement to be a per se violation.[102]

Nevertheless, challenges to solitary confinement have typically been grounded in the Eighth Amendment. The Supreme Court first recognized that prison conditions could violate the Eighth Amendment in *Estelle v. Gamble*.[103] To prevail on a conditions-of-confinement claim under the Eighth Amendment, a prisoner must satisfy two basic requirements: (1) he must show an objectively and sufficiently serious deprivation, i.e., conditions that pose a substantial risk of serious harm to the prisoner; and (2) he must establish that the prison officials manifested deliberate indifference toward his health or safety.[104]

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99. 437 U.S. 678, 685 (1978) (upholding a thirty-day judge-imposed cap on days spent in solitary confinement).

100. *See* Elizabeth Bennion, *Banning the Bing: Why Extreme Solitary Confinement Is Cruel and Far Too Usual Punishment*, 90 IND. L.J. 741, 763 (2015) ("[T]he Supreme Court has never considered a case in which a party argued that solitary confinement as generally practiced in the United States is per se cruel and unusual . . . ."); *see, e.g.*, Wilkinson v. Austin, 545 U.S. 209, 229 (2005) ("Prolonged confinement in Supermax may be the State's only option for the control of some inmates, and claims alleging violation of the Eighth Amendment's prohibition of cruel and unusual punishments were resolved, or withdrawn, by settlement in an early phase of this case. Here, any claim of excessive punishment in individual circumstances is not before us.").

101. Lobel, *supra* note 3, at 119–20. *See generally* Jennifer Wedekind, *Fact Sheet: Solitary Confinement and the Law*, SOLITARY WATCH, http://solitarywatch.com/wp-content/uploads/2011/06/FACT-SHEET-Solitary-Confinement-and-the-Law1.pdf (last visited Dec. 28, 2015). Two examples of such "exceptions" are Madrid v. Gomez, 889 F. Supp. 1146, 1230–32 (N.D. Cal. 1995), and Ruiz v. Johnson, 37 F. Supp. 2d 855, 914–15 (S.D. Tex. 1999), *rev'd sub nom. in part on other grounds*, Ruiz v. United States, 243 F.3d 941 (5th Cir. 2001).

102. Shira E. Gordon, *Solitary Confinement, Public Safety, and Recidivism*, 47 U. MICH. J.L. REFORM 495, 511–13 (2014) ("Federal courts have held that . . . long-term solitary confinement can violate the Eighth Amendment. Decisions have also restricted the use of solitary confinement for mentally ill prisoners. Despite these restrictions, courts have refused to find that solitary confinement is per se unconstitutional." (footnotes omitted)); *see, e.g.*, Johnson v. Wetzel, Civil Action No. 1:16-CV-863, 2016 WL 5118149, at *7 (M.D. Pa. Sept. 20, 2016) ("It is undisputed that a prisoner's placement in solitary confinement does not, in itself, violate the Constitution. However, the Supreme Court . . . has admonished that *duration* of confinement 'cannot be ignored' in determining whether challenged conditions withstand constitutional scrutiny." (citations omitted) (quoting *Hutto*, 437 U.S. at 686)).

103. 429 U.S. 97 (1976); *see* Brittany Glidden, *Necessary Suffering?: Weighing Government and Prisoner Interests in Determining What Is Cruel and Unusual*, 49 AM. CRIM. L. REV. 1815, 1820 (2012) ("Over the next decade, the Supreme Court and lower courts grappled with what was required to successfully challenge a prison condition under *Estelle*.").

104. Farmer v. Brennan, 511 U.S. 825, 834 (1994). In *Wilson v. Seiter*, the Court established that the deliberate indifference standard would be applied in all conditions cases. 501 U.S. 294, 303 (1991). This standard is to be distinguished from the maliciousness standard that will apply in a use-of-force context. *See, e.g.*, Whitley v. Albers, 475 U.S. 312 (1986).

The Eighth Amendment concerns implicated by solitary confinement and the application of this two-part test to the conditions of such confinement are well documented in the literature.[105] Relevant to this Note, however, is the Eighth Amendment jurisprudence that recognizes human dignity as a value underlying and informing the Court's decisions. Specifically, this Note builds upon the considerable scholarship regarding the importance of human dignity in the Eighth Amendment context[106] by transferring its application to the conditions of solitary confinement.

To be sure, the Court has repeatedly declared that "human dignity underlies the prohibition against cruel and unusual punishment."[107] In the landmark case of *Trop v. Dulles*, the Court held that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man."[108] The Court further held that "the [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[109] Although *Trop* concerned the forfeiture of citizenship, this standard has been reiterated in several prisoner civil rights and death penalty cases brought under the Eighth Amendment.[110] Importantly, in *Estelle v. Gamble*, the Court explained that the Eighth Amendment "embodies 'broad and idealistic concepts of dignity, civilized standards, humanity, and decency . . . ,' against which [the Court] must evaluate penal measures."[111] Several decades later in *Hope v. Pelzer*, the Court held that the Alabama Department of Corrections' treatment of its prisoners constituted cruel and unusual punishment, describing the treatment as "antithetical to human dignity" where the plaintiff "was hitched to a post for an extended period of time in a position that was painful, and under circumstances that were both degrading and dangerous."[112]

The Court has similarly invoked the concept of dignity in the death penalty context. In the same year the Court decided *Hope*, it also decided *Atkins v. Virginia*.[113] In *Atkins*, the Court held the execution of a "mentally

105. For a comprehensive review of the Eighth Amendment concerns implicated by solitary confinement, see Bennion, *supra* note 100, and Lobel, *supra* note 3. Similar discussions may be found in Church, *supra* note 8, at 643–44; Glidden, *supra* note 103; and Gordon, *supra* note 102, at 511–13.

106. *See* Daly, *supra* note 82, at 401–04; Goodman, *supra* note 82, at 773–78; Krolikowski, *supra* note 82; Resnik & Suk, *supra* note 91.

107. Goodman, *supra* note 82, at 773.

108. 356 U.S. 86, 100 (1958).

109. *Id.* at 101.

110. Goodman, *supra* note 82, at 773.

111. 429 U.S. 97, 102 (1976) (alteration in original) (citation omitted) (quoting Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968)). In the context of the denial of medical care, the Court held that it was only deliberate indifference to prisoners' serious medical needs that could "offend 'evolving standards of decency' in violation of the Eighth Amendment." *Id.* at 106.

112. 536 U.S. 730, 745 (2002).

113. 536 U.S. 304 (2002).

retarded" defendant violated the Eighth Amendment in light of then-existing standards of decency.[114] Under *Atkins* and *Hope*, human dignity informs the meaning of the Eighth Amendment and serves as a key factor in the Court's "analysis of the excessiveness of the punishment."[115] The Court recently affirmed the role of human dignity in Eighth Amendment analysis in *Roper v. Simmons*,[116] where it held that the death penalty, as applied to a 17-year-old convicted of a capital crime, violated the Eighth Amendment.[117] Notably, in the first paragraph laying out the legal foundation for the Eighth Amendment challenge, the *Roper* Court reasoned that "[b]y protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons."[118]

But notwithstanding these broad pronouncements of the importance of human dignity, the Supreme Court has rarely found challenged conditions violate "individual dignity."[119] Moreover, while the Court expressly incorporates the value of human dignity in its Eighth Amendment analysis, which prison conditions are subject to, it is unclear what role dignity will play in the future given the Court's failure to provide any real substantive definition of dignity in this area.[120]

Two recent Supreme Court decisions illustrate this point.[121] In *Brown v. Plata*, Justice Kennedy, writing for the majority, stated:

> As a consequence of their own actions, prisoners may be deprived of rights that are fundamental to liberty. Yet the law and the Constitution demand recognition of certain other rights. Prisoners retain the essence of human dignity inherent in all persons. Respect for that dignity animates the Eighth Amendment prohibition against cruel and unusual punishment.[122]

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114. Goodman, *supra* note 82, at 775; *see Atkins*, 536 U.S. at 311 (quoting Trop v. Dulles, 356 U.S. 86 (1958) in reciting the dignitary concerns underlying the Eighth Amendment).

115. Goodman, *supra* note 82, at 790.

116. 543 U.S. 551, 589 (2005) (reciting the standard set forth in *Trop*, 356 U.S. at 100–01).

117. *Id.* at 598–604.

118. *Id.* at 560.

119. Daly, *supra* note 82, at 402–03 (citing *Hewitt v. Helms*, 459 U.S. 460, 472 (1983), *overruled in part by Sandin v. Conner*, 515 U.S. 472, 482–84 (1995) as an example, where the Court held that "the process accorded for administrative detention satisfied procedural due process").

120. *See* Goodman, *supra* note 82, at 778 ("The Eighth Amendment jurisprudence demonstrates the need for the Court to develop a test or standard for consistent decision-making with regard to human dignity. . . . At present, the Court's language regarding human dignity underlying the Eighth Amendment is meaningless.").

121. *See generally* Krolikowski, *supra* note 82.

122. 563 U.S. 493, 510 (2011).

In *Plata*, five Justices affirmed a ruling by a three-judge panel that the defendants failed to provide constitutionally adequate care to prisoners with serious medical and mental health needs.[123] One commentator argues that by insisting that human dignity animates the Eighth Amendment protections afforded to prisoners in *Plata*, the Supreme Court has suggested that "the judiciary cannot hide behind deference to the decisions of prison administrators and decline to enforce the rights of prisoners where such egregious violations of constitutional rights persist."[124]

Yet this shift toward a stronger statement of the importance of respecting the dignity of prisoners may be undermined by a more recent decision also penned by Justice Kennedy—*Florence v. Board of Chosen Freeholders.*[125] While *Florence* addresses an alleged Fourth Amendment violation,[126] the case still arguably signals a retreat back to affording great deference to prison officials.[127] Thus, the role of human dignity in the Eighth Amendment context—and the potential for its importance to be trumped by deference to prison officials, particularly in the context of the placement of prisoners in solitary confinement—remains unclear. Notwithstanding the potential efficacy of a future challenge brought under the Eighth Amendment,[128] this Note turns to an alternative source for challenging solitary confinement: the Fourteenth Amendment.

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123. *Id.* at 1932–36.

124. *See* Krolikowski, *supra* note 82, at 1282.

125. 132 S. Ct. 1510 (2012).

126. Specifically, a mandatory strip-search policy as applied to individuals arrested for minor offenses.

127. *See* Krolikowski, *supra* note 82, at 1283–84. ("*Florence* . . . raises significant questions about the breadth of the *Plata* decision, particularly the relevance of human dignity to constitutional analysis. The Court once again pays significant deference to the concerns of prison administrators allowing for the proliferation of troublesome practices at the expense of prisoners."); *see also Florence*, 132 S. Ct. at 1515 ("The difficulties of operating a detention center must not be underestimated by the courts. . . . Maintaining safety and order at these institutions requires the expertise of correctional officials, who must have substantial discretion to devise reasonable solutions to the problems they face. The Court has confirmed the importance of deference to correctional officials and explained that a regulation impinging on an inmate's constitutional rights must be upheld 'if it is reasonably related to legitimate penological interests.'" (quoting Turner v. Safley, 482 U.S. 78, 89 (1987))).

128. An issue brief recently published by the American Constitution Society contemplates this issue in greater depth, setting forth a convincing argument as to how one might present a dignity-based argument challenging solitary confinement under the Eighth Amendment. *See* Laura Rovner, *Dignity and the Eighth Amendment: A New Approach to Challenging Solitary Confinement,* AM. CONST. SOC'Y FOR L. & POL'Y (Sept. 2015), https://www.acslaw.org/sites/default/files/Dignity_and_the_Eighth_Amendment.pdf. Accordingly, while Part III's application section continues with this Note's broad focus on the role dignity might play in solitary confinement challenges generally, it is more concerned with the application of the novel approach set forth by this Note, grounded exclusively in the Fourteenth Amendment's Due Process Clause.

2. The Fourteenth Amendment

Over the last fifty years or so, there has been a gradual expansion of those rights that have been both characterized as fundamental and determined to fall within the liberty interest guaranteed in the Fourteenth Amendment's Due Process Clause. Yet we have not seen the same parallel in the prison context. As discussed *supra* in Part II.B.1, any mention of human dignity in the prison context has generally been limited to challenges brought under the Eighth Amendment. Nevertheless, this second line of substantive due process cases that concern those fundamental rights recognized as falling within the implicit protection of "liberty" are considered here as a constitutional alternative. In other words, this Note posits that this second line of cases should be considered as a different ground under which the Court might consider prisoners' rights in the solitary confinement context.

The Supreme Court first recognized a fundamental right to privacy in *Griswold v. Connecticut*, where it found a law prohibiting the use of contraceptives by married couples to be unconstitutional.[129] In doing so, it emphasized the importance of marriage as an institution and the privacy that ought to be given to such a relationship: "We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred."[130] This decision set the stage for *Roe v. Wade*, which found the right to privacy to extend to a woman's decision whether to terminate a pregnancy.[131]

Although these early cases did not explicitly mention human dignity, later cases concerning a woman's right to have an abortion did.[132] For example, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, which involved a challenge to several provisions of a Pennsylvania law regarding abortion, the Court revisited its decision in *Roe*.[133] The Court repeated its precedent "afford[ing] constitutional protection to personal

129. 381 U.S. 479 (1965).

130. *Id.* at 486.

131. 410 U.S. 113, 153 (1973); *see also* Lawrence v. Texas, 539 U.S. 558, 565 (2003) ("*Roe* recognized the right of a woman to make certain fundamental decisions affecting her destiny and confirmed once more that the protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person.").

132. *See, e.g.*, Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 772 (1986) ("Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision—with the guidance of her physician and within the limits specified in *Roe*—whether to end her pregnancy."), *overruled by* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

133. 505 U.S. 833 (1992).

decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education,"[134] and affirmed *Roe* to the extent that it found the right to terminate a pregnancy to be a fundamental right protected by the liberty guarantee in the Due Process Clause of the Fourteenth Amendment.[135] Importantly, the Court found "[t]hese matters, involving the most intimate and personal choices a person may make in a lifetime, *choices central to personal dignity and autonomy*, [to be] central to the liberty protected by the Fourteenth Amendment."[136] In this regard, *Casey* arguably marked a shift in language from privacy to dignity: "The right . . . is expounded in terms of dignitary interests, not privacy interests."[137]

Indeed, Justice Stevens's opinion concurring in part and dissenting in part in *Casey* contains an even stronger statement of the importance of dignity: "The authority to make such traumatic and yet empowering decisions is an element of basic human dignity."[138] The Stevens opinion connects dignity not only to liberty itself, by underscoring the importance of dignity to the freedom of choice,[139] but also to respect, by stressing that "[a] woman who decides to terminate her pregnancy is entitled to the same respect as a woman who decides to carry the fetus to term."[140]

Overall, *Casey* is important to the evolution of human dignity in substantive due process cases because the term expressly informs the Court's decision to uphold a woman's liberty interest in terminating pregnancy. *Lawrence v. Texas*[141] later reaffirmed the importance of human dignity and, importantly, the aforementioned shift away from privacy in substantive due process cases "back toward its textual anchor, *liberty*."[142] Justice Kennedy uses broad language to arguably describe a "right" to human dignity and respect as a part of liberty in *Lawrence*. First, Justice Kennedy wrote "adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons,"[143] emphasizing that such a choice is "central to

134. *Id.* at 851 (citing Carey v. Population Servs. Int'l, 431 U.S. 678, 685 (1977)).

135. *Id.* at 846; *id.* at 912 (Stevens, J., concurring in part and dissenting in part); *id.* at 923–24 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

136. *Id.* at 851 (plurality opinion) (emphasis added).

137. Daly, *supra* note 82, at 410.

138. *Casey*, 505 U.S. at 916 (Stevens, J., concurring in part and dissenting in part).

139. Goodman, *supra* note 82, at 760–61; *see Casey*, 505 U.S. at 920 (Stevens, J., concurring in part and dissenting in part) ("Part of the constitutional liberty to choose is the equal dignity to which each of us is entitled.").

140. *Casey*, 505 U.S. at 920 (Stevens, J., concurring in part and dissenting in part); Goodman, *supra* note 82, at 761 n.132.

141. 539 U.S. 558, 578 (2003).

142. Daly, *supra* note 85, at 233.

143. *Lawrence,* 539 U.S. at 567.

personal dignity and autonomy, [and is] central to the liberty protected by the Fourteenth Amendment."[144] Justice Kennedy further stressed "the indignity of a conviction under the Texas law"[145] and reasoned that upholding *Bowers v. Hardwick*[146] would "demean[] the lives of homosexual persons."[147]

Some have considered *Lawrence* to be the true shift from privacy to liberty: that is, "a significant step toward subsuming the textually questionable 'right of privacy' into a textually respectable 'right of liberty.'"[148] Other commentators have characterized the decision as signaling a more substantial shift by "[l]ooking beneath what the Court called Lawrence's constitutional claim[to] find the Court['s] advanc[ement of] human dignity as part of affording liberty."[149]

Whatever the significance of *Lawrence*, dignity unquestionably plays a pivotal role in *Obergefell v. Hodges*,[150] one of the Court's more recent substantive due process decisions.[151] In *Obergefell*, the Court once again held that liberty interests "extend to certain personal choices central to individual dignity and autonomy,"[152] finding "dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices."[153] In fact, Justice Kennedy concluded his opinion by stating: "They ask for equal dignity in the eyes of the law. The Constitution grants them that right."[154]

A rudimentary study of the evolution of the Court's substantive due process cases from *Griswold* to *Obergefell* demonstrates the Court's

144. *Id.* at 574 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992)).

145. Goodman, *supra* note 82, at 762. In *Lawrence*, Justice Kennedy stated that "[t]he stigma th[e] criminal statute imposes, . . . is not trivial. The offense, to be sure, is but a class C misdemeanor, a minor offense . . . . Still, it remains a criminal offense with all that imports for the *dignity* of the persons charged. The petitioners will bear on their record the history of their criminal convictions." 539 U.S. at 575 (emphasis added).

146. 478 U.S. 186 (1986), *overruled by Lawrence*, 539 U.S. at 578.

147. *Lawrence*, 539 U.S. at 575.

148. Goodman, *supra* note 82, at 762 (quoting James W. Paulsen, *The Significance of* Lawrence v. Texas, HOUS. LAW., Feb. 2004, at 33, 38). While privacy undeniably played some role in the *Lawrence* decision given the Court's emphasis on the fact that the conduct took place in the privacy of the home, "one senses that this attention to the home was more of a limitation on the principle [of individual liberty] than a definition of it." Daly, *supra* note 85, at 234.

149. Goodman, *supra* note 82, at 762.

150. 135 S. Ct. 2584, 2591 (2015).

151. *See* Rovner, *supra* note 128, at 13. *See generally* Yuvraj Joshi, *The Respectable Dignity of* Obergefell v. Hodges, 6 CALIF. L. REV. CIR. 117, 117 (2015) (noting that the nine "[r]eferences in *Obergefell* to 'dignity' are in important respects the culmination of Justice Kennedy's elevation of the concept, dating back to . . . *Casey*." (footnote omitted)).

152. 135 S. Ct. at 2597.

153. *Id.* at 2599.

154. *Id.* at 2608. One commentator has opined that *Obergefell* shifts the focus of dignity "from respect for the freedom to choose toward the respectability of choices and choice makers," criticizing its implication that dignity depends on prior social acceptance. Joshi, *supra* note 151, at 117.

commitment to human dignity as an important constitutional value in its individual rights jurisprudence. At the same time, however, the concept of dignity and its role in constitutional law has been criticized not only by legal scholars[155] but also by Supreme Court justices themselves.[156] Furthermore, it is clear that the Court has yet to *expressly* recognize dignity as a separate constitutional right.[157] Some argue that the reasoning behind the Court's reluctance to embrace human dignity as a judicially recognized right "may lie precisely in dignity's broad appeal: it is the right that can be all things to all people."[158] Indeed, the evolution of the meaning of dignity in the Court's substantive due process jurisprudence arguably confirms the malleability of its substance.[159] Nevertheless, this malleability may be inevitable given the fact that the liberty interest that the value of dignity elucidates is itself broad in scope and varies in meaning depending on the context and the interference alleged.

3. Making the Case for Substantive Due Process

If the Court recognizes the importance of dignity in both its Eighth Amendment and substantive due process jurisprudence (as discussed above), and solitary confinement violates basic principles of human dignity (as discussed below in Part III), then the question remains: What is the best constitutional avenue for challenging the indignity of solitary confinement? At least one scholar in constitutional law has made a compelling case for why solitary confinement conditions rise to the level of violating the current two-prong test for determining whether prison conditions violate the Eighth Amendment.[160] Others have criticized the Court's current two-

155. *See* Elizabeth B. Cooper, *The Power of Dignity*, 84 FORDHAM L. REV. 3, 15 (2015) ("The concept of dignity is not without its critics."); *see also* Goodman, *supra* note 82, at 747 ("Others [sic] commentators believe the Court has not recognized human dignity as a constitutional value." (citing Jeremy Rabkin, *Law and Human Dignity: What We Can Learn About Human Dignity From International Law*, 27 HARV. J.L. & PUB. POL'Y 145, 146 (2003))); Goodman, *supra* note 82, at 747 ("Another commentator describes the role of human dignity in our constitutional jurisprudence as 'episodic and underdeveloped.'" (quoting Vicki Jackson, *Constitutional Dialogue and Human Dignity: States and Transnational Discourse*, 65 MONT. L. REV. 15, 17 (2004))).

156. Cooper, *supra* note 155, at 15 ("The dissenters in *Lawrence* and *Obergefell* express great disdain for the majority's use of this term."); *see also id.* at 15–16 ("In particular, Justice Thomas's *Obergefell* dissent asserts that 'the Constitution contains no "dignity" Clause' and states that, even if such a clause did exist, 'the government would be incapable of bestowing dignity.'" (quoting *Obergefell*, 135 S. Ct. at 2639 (Thomas, J., dissenting))).

157. Daly, *supra* note 82, at 417–18 ("[I]t cannot be denied that the Court has so far declined to embrace human dignity as the definition of any judicially recognized constitutional right.").

158. *Id.* at 418.

159. *Cf.* Joshi, *supra* note 151, at 125 ("Fortunately, though dignity's place in constitutional jurisprudence seems entrenched, its meaning is not. Therefore, more respectful and less respectable meanings of dignity might yet prevail in impending cases involving dignitary claims . . . .").

160. *See* Rovner, *supra* note 128, at 16–18.

part framework and offered reasons why solitary confinement is "cruel and unusual" under new proposed standards.[161] Still others "see Eighth Amendment jurisprudence as having departed too far afield from the requirements of the text"[162]—particularly the meaning of the word "punishment."[163] These scholars maintain that *Estelle v. Gamble*, the first case to recognize the Eighth Amendment's applicability to prison conditions, did not focus on the meaning of "punishment" at all.[164]

While there is a "general consensus . . . that we should not simply look at which specific punishments were considered *cruel and unusual* at the time of the founding,"[165] there is first the preliminary question of what is considered punishment to begin with.[166] This Note doesn't take up the issue of whether the Eighth Amendment is textually the proper constitutional basis for analyzing prison conditions as a categorical matter. But it does suggest that alternative avenues should be considered where, as here, the imposition of the conditions in question—conditions in administrative segregation—are expressly not for the purposes of punishment.[167] Moreover, while we primarily see the use of solitary confinement in the prison context, the practice has been used in other contexts as well.[168] Thus,

161. Bennion, *supra* note 100, at 770–78.

162. *Id.* at 772.

163. *See* Thomas K. Landry, *"Punishment" and the Eighth Amendment*, 57 OHIO ST. L.J. 1607, 1607 (1996) ("The Supreme Court has unduly softened the [Eighth] Amendment's central limitation: its applicability to nothing but 'punishments.'" (citing U.S. CONST. amend. VII)).

164. *Id.* at 1614–15.

165. Bennion, *supra* note 100, at 773 (emphasis added).

166. In *Estelle*, the Court acknowledged that while "the primary concern of the drafters was to proscribe 'torture[s]' and other 'barbar[ous]' methods of punishment," more recent case law had held that "the [Eighth] Amendment proscribes more than physically barbarous punishments." 429 U.S. at 102 (first and second alteration in original) (quoting Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CALIF. L. REV. 839, 842 (1969)) (citing *Gregg*, 428 U.S. at 171; Trop v. Dulles, 356 U.S. 86, 100–01 (1958); Weems v. United States, 217 U.S. 349, 373 (1910)). The Court later cited this holding in *Hutto v. Finney*, when it held the Eighth Amendment applied to solitary confinement. 437 U.S. 678, 685 (1978). But importantly, that case concerned the imposition of *punitive* isolation.

167. *See supra* notes 16–17, 23–24 and accompanying text.

168. *See* THE LIMAN PROGRAM, YALE LAW SCH., *supra* note 6 (noting that the estimated 80,000 to 100,000 state prisoners housed in solitary confinement in 2014 did not include prisoners housed in local jails or juvenile, military and immigration facilities); Rodriguez, *supra* note 5 ("The census figures do not include prisoners in solitary confinement in juvenile facilities, immigrant detention centers, or local jails; if they did, the numbers would certainly be higher."). On the use of solitary confinement for pre-trial detainees, see, for example, Chris Vogel, *For Their Own Good*, HOUS. PRESS (May 27, 2009), http://www.houstonpress.com/news/for-their-own-good-6573408 (documenting the story of a fifteen-year-old awaiting charges on aggravated robbery with a deadly weapon who spent twenty-three hours a day in an isolation cell at a local county jail even though he had not been convicted of a crime). For an account of the use of solitary confinement in detention centers and county jails that contract with U.S. Immigration and Customs Enforcement, see generally NAT'L IMMIGRANT JUSTICE CTR., INVISIBLE IN ISOLATION: THE USE OF SEGREGATION AND SOLITARY CONFINEMENT IN IMMIGRATION DETENTION (Sept. 2012), http://www.immigrantjustice.org/sites/immigrantjustice.org/files/Invisible%20in%20

its constitutional implications should transcend the text of the Eighth Amendment.

Accordingly, while the analysis in Part III focuses heavily on why solitary confinement violates basic principles of human dignity generally and studies how such a violation may run afoul of a constitutional dignitary interest (in theory, no matter where such an interest is housed), the primary goal of this Note is to highlight the Fourteenth Amendment as an alternative avenue. When the Court is finally presented with the issue, it would be wise to at least consider whether challenges to the indignity of solitary confinement, as applied to prisoners placed in administrative segregation, are more properly characterized as substantive due process, as opposed to Eighth Amendment, challenges.

III. THE INDIGNITY OF SOLITARY CONFINEMENT AS A VIOLATION OF SUBSTANTIVE DUE PROCESS

While it is clear that the Supreme Court has relied upon the concept of human dignity even though it is not mentioned in the Constitution, this Note does not dispute the Court's failure, at present, to embrace human dignity as a separate constitutional right. Instead, in light of the argument that solitary confinement unquestionably violates basic principles of human dignity expounded upon in Part III.B, this Note explores the constitutional implications of this indignity. Because there appears to be "no consistent rationale for the use or nonuse of the concept of human dignity as a reference point for certain rights,"[169] the legal community has been left to wonder what that rationale might be. Accordingly, Part III.A will reiterate the reasoning set forth by other scholars regarding how the Court might formally recognize a right to dignity under the umbrella of substantive due process given the precedent discussed above. This threshold discussion is crucial: this Note cannot purport to answer why solitary confinement violates basic principles of human dignity and therefore the Constitution without first offering an explanation of *how* the Court might approach recognizing a dignitary interest in the first place.

In his article contemplating a constitutional right to dignity, Professor Rex Glensy explains that the judiciary has only evoked the idea of such a right in an ad hoc manner and therefore attempts to fill the gap by offering four possible meanings of the invocation of dignity rights in judicial opinions.[170] The possible approaches that are relevant to this Note are

Isolation-The%20Use%20of%20Segregation%20and%20Solitary%20Confinement%20in%20Immigration%20Detention.September%202012_7.pdf.

169. Rex D. Glensy, *The Right to Dignity*, 43 COLUM. HUM. RTS. L. REV. 65, 92 (2011).

170. *See generally id.*

(1) the recognition of dignity as a *positive* and substantive legal right—protected through "government mandates," and (2) the recognition of dignity as a *negative* right and background norm—protected through "proscriptions on government activity."[171] Both of these approaches treat dignity as an independent constitutional right in some facet,[172] and thus provide a useful framework for analyzing whether solitary confinement burdens a constitutional dignitary interest in violation of substantive due process. This framework is developed in Part III.A below.

Part III.B builds upon Professor Glensy's framework as well as the other scholarship described in Part II regarding dignity and the Constitution, particularly its role in substantive due process cases. Although this Note argues that the Supreme Court should affirmatively recognize a right to dignity, it does not attempt to conclusively establish the basis for that right in the first instance, given the extensive academic scholarship that already builds upon the precedents discussed above. Rather, the purpose of Part III.B is to explore how solitary confinement may fit within a right to human dignity (assuming the Court will in fact recognize it for all the reasons set forth by the current scholarship) and how such a right should further require the proscription of solitary confinement under almost *all* circumstances, including for purposes of administrative segregation.

A. Possible Approaches to Human Dignity

Professor Glensy's first proposed approach recognizes human dignity as a substantive legal right under the positive rights theory.[173] Under this first theory, the government would be required to provide "a minimum set of standards to ensure that each person's human dignity is protected."[174] As Professor Glensy points out, advocates of this theory "have emphasized that '[h]uman dignity . . . also implies a duty to care for individuals.'"[175] But, as discussed below, while respecting human dignity in the prison context requires the state to provide life's basic necessities, the Court does

171. *Id.* at 110.

172. *See id.* at 126 ("The first two ways of approaching a right to dignity within American jurisprudence treat dignitary rights as existing independently of other rights, duties, and responsibilities that are already granted within the legal sphere.").

173. *Id.* at 111.

174. *Id.* ("The premise for this view . . . would come from an understanding that in a democracy, state authority is actually derived from individuals freely expressing their personal preferences without interference from the state—the ultimate consequence of respect for human dignity. This concept implies that respect for human dignity is not merely a vague goal, but a normative abstraction given substance through both general principles of law and more specific legal rules.").

175. *Id.* at 114 (alterations in original) (quoting Aart Hendriks, *Personal Autonomy, Good Care, Informed Consent and Human Dignity—Some Reflections From a European Perspective*, 28 MED. & L. 469, 473, 477 (2009)).

not need to recognize dignity as a positive right, requiring the state to take certain action, in order to find the indignity of solitary confinement to be of constitutional consequence. Rather, it is easier to conceptualize a prohibition on solitary confinement as falling within Professor Glensy's second proposed approach, which recognizes human dignity as a background norm in light of the negative-rights theory. Under this second approach, "the right to dignity would add dignitary interests to those rights that the state would be unable to impinge[,] . . . [serving as] a de facto background norm and an independent consideration to contend with when a claimant alleges a violation that would impact human dignity."[176] In essence, this approach recognizes a person's "right to have rights."[177]

The difference between these two potential theories for approaching dignity can best be understood by way of example in the Eighth Amendment context. Although the text of the Eighth Amendment does not contain a textual directive regarding dignity, the Supreme Court has nevertheless developed rules that require the state to affirmatively respect such dignity, giving the right an element of positivism.[178] "Thus, in the context of the duties owed to prisoners under the Eighth Amendment, the Supreme Court has stated that the government has affirmative obligations to provide medical care, to ensure safety, to supply adequate nutrition, to maintain standards of sanitation, and to furnish appropriate climactic conditions for inmates."[179] Under the negative-rights approach, dignity is viewed as the background norm of the Eighth Amendment inquiry, requiring the Court to "square the accused state practice with the individual's dignitary interest" in every case involving cruel and unusual punishment.[180] According to Professor Glensy, the negative-rights approach is also exemplified by other prisoner-treatment cases that fall outside the purview of the Eighth Amendment.[181] These cases "exhibit much of the positive rights approach but also include a significant negative component that has dignity as its motivating seed."[182]

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176. *Id.* at 121.

177. *Id.* at 126 (quoting John F. Stinneford, *Incapacitation Through Maiming: Chemical Castration, the Eighth Amendment, and the Denial of Human Dignity*, 3 U. ST. THOMAS L.J. 559, 592 (2006)).

178. *See id.* at 112.

179. *Id.* (citing Estelle v. Gamble, 429 U.S. 97. 103–04 (1976); Youngberg v. Romeo, 457 U.S. 307, 315–16 (1982); Hutto v. Finney, 437 U.S. 678, 686–87 (1978); Wilson v. Seiter, 501 U.S. 294, 304 (1991)).

180. *Id.* at 123 ("Some cases have implicitly employed this approach, such as when the Court was tasked to decide whether executing the insane constituted a violation of the Eighth Amendment.").

181. *See id.* at 124.

182. *Id.* (citing Johnson v. Avery, 393 U.S. 483, 485 (1969) (prisoner's right to access the courts); Pell v. Procunier, 417 U.S. 817, 822 (1974) (right to free speech); Cruz v. Beto, 405 U.S. 319, 322 (1972) (right to worship)).

Thus, at least factually, one can imagine how dignity might operate as a motivating force *behind* a particular constitutional claim where a prisoner alleges treatment that violates basic tenets of humanity—here, by way of imposing harsh conditions of solitary confinement. But because this Note fuses together the factual context of prisoner-treatment cases with the legal framework of substantive due process cases, it is equally important to understand whether substantive due process rights are generally viewed as positive or negative. Although Professor Glensy does not touch upon these rights in his discussion of either approach, he does, in describing the role of dignity in U.S. law generally, emphasize the distinction between the references to dignity in this line of cases. Glensy notes that, "[u]nder the liberty rubric identified in *Lawrence*, dignity seems to be called upon as a marker of value granted to individuals on the ground of their status as a human being. In other words, humans command respect for their dignity rights for no reason other than their existence."[183] He concludes that *Lawrence* appears to "locate[] the right to dignity outside of the constitutional sphere while, at the same time, finding clauses, such as the Fourteenth Amendment's liberty clause, that embody this extra-positive source of law."[184]

Applying this framework in the solitary confinement context, the Court need not conceptually elevate a constitutional dignitary interest, which this Note argues exists within the liberty guarantee of the Fourteenth Amendment's Due Process Clause, to impose affirmative obligations on the State. It is true that solitary confinement can, in some respects, be considered a "positive right" to the extent that it requires prison officials to affirmatively treat prisoners with human dignity. But at the same time, prison officials already have a duty to provide life's basic necessities to prisoners. In fact, the indignity of solitary confinement is not grounded in the notion that prisoners should be *provided* with certain benefits—it is grounded in the notion that prisoners should not be *deprived* of the "benefits" that the Constitution already requires the state to provide.[185]

Thus, conceptually, proscribing solitary confinement can more easily be understood as preventing the transfer of prisoners from general population to more restrictive and degrading conditions, because doing so would interfere with a prisoner's right to be treated with a minimum amount of dignity (which he should retain despite his incarceration). Because the argument would rely on the notion that such affirmative action by prison officials burdens an individual's liberty interest in being treated

183. *Id.* at 91.

184. *Id.*

185. For example, arguments that the right to education or the right to healthcare should be deemed fundamental by the Court, *see, e.g.*, *id.* at 112–14, are arguably closer to a positive-rights approach.

with human dignity, the Court should therefore focus on the negative-rights theory. Framing the right in the negative may abate potential concerns about the breadth of a positive right, such as the inability to weigh countervailing government interests against an "absolute" right and the potential for endless and frivolous litigation over the right to dignity.[186]

Indeed, if a right to dignity is conceptually framed as being inherent in the liberty interest guaranteed by the Fourteenth Amendment's Due Process Clause, the Court will ultimately have to weigh it against important government interests, such as that of security and efficient prison administration. *Washington v. Harper*[187] provides a useful illustration of how the violation of an individual liberty interest may be analyzed in the prison context. In *Harper*, the Supreme Court held that the involuntary administration of antipsychotic medication implicated a significant liberty interest.[188] The Court recognized, however, that this right may be outweighed by competing governmental interests,[189] such as the interest of prison administrators not only "in ensuring the safety of prison staffs and administrative personnel" but also in "tak[ing] reasonable measures for the prisoners' own safety" to satisfy the state's constitutional obligations.[190] The Court ultimately balanced these interests and concluded that "the Due Process Clause permits the State to treat a prison inmate who has a serious mental illness with antipsychotic drugs against his will, if the inmate is dangerous to himself or others and the treatment is in the inmate's medical interest."[191]

Thus, *Harper* recognizes that while liberty interests of prisoners are necessarily limited, particularly where the safety of others or the prisoner himself is concerned,[192] prisoners nevertheless retain significant liberty

186. *Id.* at 118–20 (surveying major criticisms to recognizing dignity as an affirmative right and concluding that it is more likely that the Court would find a right to dignity using one of the other alternative approaches offered in the article, such as the negative-rights theory).

187. 494 U.S. 210 (1990).

188. *Id.* at 221–22 ("We have no doubt that . . . [the prisoner] possesses a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment.").

189. *Id.* at 223–25.

190. *Id.* at 225. Specifically, the Court applied its holding from *Turner v. Safley*, 482 U.S. 78 (1987), where it held that "the proper standard for determining the validity of a prison regulation claimed to infringe on an inmate's constitutional rights is to ask whether the regulation is 'reasonably related to legitimate penological interests.'" *Harper*, 494 U.S. at 223 (quoting *Turner*, 482 U.S. at 89). The Court found three of the *Turner* factors relevant to its determination of whether the policy at issue was reasonable: (1) "a 'valid, rational connection' between the prison regulation and the [stated] legitimate governmental interest"; (2) "the impact accommodation . . . will have on guards and other inmates, and on the allocation of prison resources generally"; and (3) "the absence of ready alternatives." *Harper*, 494 U.S. at 224–25 (quoting *Turner*, 482 U.S. at 89–90).

191. *Id.* at 227.

192. *See id.* at 225 ("There are few cases in which the State's interest in combating the danger posed by a person to both himself and others is greater than in a prison environment, ...").

interests that the state cannot infringe upon, no matter how much process is provided.[193] In *Harper*, for example, the State could not forcibly medicate a prisoner who was not deemed a danger to himself or others; it is only once that factual finding is made that the contours of the process that is due enters the equation.[194]

By comparison, prisoners should similarly not lose the right to be treated in a way that is consistent with basic principles of human dignity.[195] And here, as in *Harper*, the Court should also attempt to set forth clear and coherent constitutional minimum standards where a prisoner's dignitary interest in avoiding prolonged solitary confinement categorically trumps these institutional concerns.[196] The first step to devising such standards is to determine a "tipping point"—i.e., the point at which the scales will categorically tip in favor of the individual's liberty interest.[197] In weighing the individual and state interests in this context, the Court should keep in mind that the state interest in placing prisoners in administrative segregation is arguably less significant than it is in the *Harper* context. Prison administrators undoubtedly retain an interest in maintaining institutional control, which can be achieved by removing some prisoners whose behavior is perceived as threatening to themselves or others from general population. But in *Harper*, the Court also cited the state's interest in protecting the prisoners' own safety. And in striking a proper balance, the Court articulated a substantive due process standard that required the use of forcible medication to be in the prisoner's medical interest.[198] Thus,

193. *See id.* at 221–22.

194. *See id.* at 227–28; *see also id.* at 220 ("[T]he substantive issue is what factual circumstances must exist before the State may administer antipsychotic drugs to the prisoner against his will; the procedural issue is whether the State's nonjudicial mechanisms used to determine the facts in a particular case are sufficient.").

195. In fact, three justices in *Harper* recognized the implication of human dignity even in the context of that case. *See id.* at 258 (Stevens, Brennan & Marshall, JJ., concurring in part and dissenting in part) ("I continue to believe that 'even the inmate retains an unalienable interest in liberty—at the very minimum the right to be treated with *dignity*—which the Constitution may never ignore.'" (emphasis added) (quoting Meachum v. Fano, 427 U.S. 215, 233 (1976) (Stevens, J., dissenting))).

196. If the Court does not seek to flat out ban the use of solitary confinement, another alternative might also more distantly resemble the standard that currently exists in the abortion context. Under *Planned Parenthood of Southeastern Pennsylvania v. Casey*, a woman retains the constitutional right to have an abortion prior to viability of the fetus without undue interference from the state. 505 U.S. 833, 846 (1992). But it is clear this right is not absolute: The state has the "power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health." *Id.* at 846. If the right to dignity were deemed fundamental, it would require a test similarly tailored to special problems presented by the right itself. Just as the right to an abortion is eventually superseded by the value of the life of the fetus, the right to dignity in the solitary confinement context may require certain external factors to influence the "tipping point" in weighing the competing interests.

197. Under current precedent, that tipping point will be the point at which an administrative segregation regulation is not "reasonably related to legitimate penological interests." *Harper*, 494 U.S. at 223 (quoting Turner v. Safley, 482 U.S. 78, 89 (1987)); *cf.* Florence v. Bd. of Chosen Freeholders, 566 U.S. 318, 326 (2012).

198. *Harper*, 494 U.S. at 227.

in *Harper*, the incursion on liberty was justified, at least in part, because it was therapeutic.[199] As Part III.B makes clear, however, solitary confinement is not only antitherapeutic, but also extremely physically and psychologically harmful.[200]

Striking the ultimate balance here will also require an understanding of exactly how and when the infliction of such harm causes conditions of solitary confinement to dip below basic standards of decency (and dignity). Outside professionals and experts in the psychology field should be the ones to make this determination. For example, as described in Part III.B, dignity requires a certain degree of human contact and conditions of confinement that are humane. Therefore, determining the tipping point will depend on a medical consensus regarding the norm with respect to the need for human contact and life in humane conditions as well as the point at which these norms are violated—in other words, how much solitary confinement is too much. Under the Mandela Rules, the consensus is that any amount of solitary confinement is unacceptable for certain populations, such as juveniles and persons suffering from mental illness.[201] The Mandela Rules also "prohibit" prolonged solitary confinement, which they define as a period in excess of fifteen consecutive days.[202] If fifteen days is to be set as the constitutional minimum under any circumstances, experts should confirm that this amount of time spent in isolation and without environmental stimulation will not deprive prisoners of basic principles of human dignity.[203]

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199. *See id.*; *see also id.* at 243 (Stevens, J., concurring in part and dissenting in part) ("Crucial to the Court's exposition of this substantive due process standard is the condition that these drugs 'may be administered for no purpose other than treatment,' and that 'the treatment in question will be ordered only if it is in the prisoner's medical interests, given the legitimate needs of his institutional confinement.' Thus, although the Court does not find . . . an absolute liberty interest of a competent person to refuse psychotropic drugs, it does recognize that the substantive protections of the Due Process Clause limit the forced administration of psychotropic drugs to all but those inmates whose medical interests would be advanced by such treatment." (quoting *id.* at 222, 226 (majority opinion)). The dissent is correct that the policy at issue did not mention the prisoner's medical interest. *Id.* at 243–46. But by assuming a doctor would take this interest into account as a part of its holding, the majority nevertheless made the prisoner's medical interest a part of its test. *See id.* at 222–23, 227 (majority opinion).

200. Distinguish the potential harm caused by side effects of antipsychotic medication, which the *Harper* Court acknowledged was the subject of "considerable debate" but ultimately found insufficient to render the forcible medication policy unreasonable, noting that there was "little dispute in the psychiatric profession that proper use of the drugs is one of the most effective means of treating and controlling a mental illness likely to cause violent behavior." *Id.* at 226.

201. Mandela Rules, *supra* note 49, at 18–19 (Rule 45(2)).

202. *Id.* at 18 (Rule 43(1)(b) and Rule 44).

203. In 2011, prior to the adoption of the revised Mandela Rules, the U.N. Special Rapporteur on Torture and Cruel, Inhuman, and Degrading Treatment submitted a written report that defined "prolonged" solitary confinement (a practice that he strongly advocated against) as being greater than fifteen days. Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Interim Report of the Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Doc

Moreover, time should not be the only consideration in setting a constitutional minimum[204]—medical experts should confirm the conditions in which prisoners are placed do not cause serious psychological harm even for that period of fifteen days. If psychological harm is properly considered just as harmful as its physical counterpart,[205] it is not difficult to see how forcing prisoners to endure conditions of solitary confinement that cross the threshold of inflicting serious psychological harm for *any* amount of time is troublesome. For example, suppose a prison system is underfunded and its officials, looking to make certain budget cuts, propose that the prison only feed prisoners every two weeks because they won't experience organ failure until day fifteen. If a court would not hesitate in striking such a practice down as unconstitutional, why should "the point of no return"—the point of potentially irreversible psychological harm—serve as the boundary between acceptable and unacceptable in the solitary confinement context, where the harm is psychological? While only a hypothetical, this example illustrates why courts should look to more than the time suffered in isolation alone in determining a constitutional minimum standard.

The Court will ultimately strike a fair balance if it affirmatively sets a floor of human dignity that must be respected in the solitary confinement context, but simultaneously gives prison officials broad discretion to determine exactly how it will avoid dipping below that constitutional floor.

A/66/268 (Aug. 5, 2011). The Special Rapporteur acknowledged "the arbitrary nature of the effort to establish a moment in time which an already harmful regime becomes prolonged and therefore unacceptably painful," but settled on fifteen days as the limit after surveying literature that suggested "some of the harmful psychological effects of isolation can become irreversible." *Id.* ¶ 26 (citing Craig Haney, *Mental Health Issues in Long-Term Solitary and "Supermax" Confinement*, 49 CRIME & DELINQ. 124, 124–56 (2003)).

204. For example, as a result of the widespread recognition of solitary confinement's harmful effects, as discussed in Part III, there is a general consensus regarding

> three critically important limits that must be applied to such confinement: 1) the time or duration that a person is exposed to solitary confinement must be kept to an absolute minimum, 2) the risks of harm are so great that [it] should be used only when it is absolutely necessary and as a last resort, and 3) the added risk of harm to vulnerable . . . prisoners means that they should be exempted entirely from prolonged solitary confinement.

Expert Report of Professor Craig Haney, Ph.D., J.D., at 142, Braggs v. Dunn, No. 2:14-cv-00601-MHTTFM (M.D. Ala. July 13, 2016), https://www.splcenter.org/sites/default/files/documents/doc._555-6_-_expert_report_of_dr._craig_haney.pdf (expert report written by one of the nation's leading segregation experts in a class action lawsuit challenging the provision of mental health care in state prisons).

205. At least in the Eighth Amendment context, it is clear that "[f]ailure to provide basic psychiatric and mental health care states a claim of deliberate indifference to the serious medical needs of prisoners." Rogers v. Evans, 792 F.2d 1052, 1058 (11th Cir. 1986) (citing Hoptowit v. Ray, 682 F.2d 1237, 1253 (9th Cir. 1982)). Thus, courts have apparently recognized that psychological harm can be equally painful.

B. Why Solitary Confinement Violates Basic Principles of Human Dignity

Solitary confinement has been described as a punishment worse than death. In an essay on his twenty-five years spent in solitary confinement, William Blake wrote: "If I took a month to die and spent every minute of it in severe pain, it seems to me that on a balance that fate would still be far easier to endure than the last twenty-five years have been."[206] Another prisoner, who suffered in solitary confinement for significantly less time than Blake, described it as "one of the most barbaric and in[h]umane aspects of our society."[207] In his book *Just Mercy*, Bryan Stevenson describes the similar experience of Ian Manuel, a thirteen-year-old minor housed in one of Florida's toughest prisons.[208] Manuel's time in isolation was extended every time he cut himself and attempted suicide—actions arguably driven by the toll such confinement took on his mental health in the first place.[209] In total, Manuel "spent eighteen years in uninterrupted solitary confinement."[210]

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206. Voices from Solitary, *Voices from Solitary: A Sentence Worse Than Death*, SOLITARY WATCH (Dec. 25, 2014), http://solitarywatch.com/2014/12/25/voices-from-solitary-a-sentence-worse-than-death-2/. Albert Woodfox, one of the "Angola 3" who spent more time in solitary confinement than any other U.S. prisoner, was held in isolation almost continuously for forty-three years. Ed Pilkington, *Albert Woodfox Released From Jail After 43 Years in Solitary Confinement*, GUARDIAN (Feb. 19, 2016), https://www.theguardian.com/us-news/2016/feb/19/albert-woodfox-released-louisiana-jail-43-years-solitary-confinement. He commented on his experience of sitting in a cell twenty-three hours a day for forty years to a blogger in 2014:

> I'm afraid I'm going to start screaming and not be able to stop . . . .
>
> I'm afraid I'm going to turn into a baby and curl up in a fetal position and lay there like that day after day for the rest of my life. I'm afraid I'm going to attack my own body, maybe cut off my balls and throw them through the bars the way I've seen others do when they couldn't take any more.
>
> No television or hobby craft or magazines or any of the other toys you call yourself allowing can ever lessen the nightmare of this hell you help to create and maintain.

Id.

207. Conor Friedersdorf, *Solitary Confinement: 'One of the Most Barbaric, Inhumane Aspects of Our Society,'* ATLANTIC (July 2, 2015), http://www.theatlantic.com/politics/archive/2015/07/solitary-confinement-one-of-the-most-barbaric-inhumane-aspects-of-our-society/397634/.

208. BRYAN STEVENSON, JUST MERCY 151–53 (2014).

209. *Id.*

210. *Id.* at 153. In describing the conditions of solitary in Ian's prison in Florida, Stevenson states:

> Solitary confinement at Apalachee means living in a concrete box the size of a walk-in closet. You get your meals through a slot, you do not see other inmates, and you never touch or get near another human being. If you "act out" by saying something insubordinate or refusing to comply with an order . . . you are forced to sleep on the concrete floor of your cell without a mattress. If you shout or scream, your time in solitary is extended; if you hurt yourself by refusing to eat or mutilating your body, your time in solitary is extended; if you complain to officers or say anything menacing or inappropriate, your time in solitary is extended. You get three showers a week and are allowed forty-five minutes in a small caged area for exercise a few times a week. *Otherwise you are alone, hidden away in your concrete box, week after week, month after month*.

Id. at 152 (emphasis added).

In *Davis v. Ayala*, Justice Kennedy noted in his concurrence that if the petitioner's confinement in segregation followed the "usual pattern," it was likely he had been held

> for all or most of the past 20 years or more in a windowless cell no larger than a typical parking spot for 23 hours a day; and in the one hour when he le[ft] it, he likely [wa]s allowed little or no opportunity for conversation or interaction with anyone.[211]

This description is telling—solitary confinement not only "socially isolates prisoners" but also "deprives them of environmental stimuli."[212] Such conditions are inhumane for several reasons.

First, "the distinctive patterns of psychological harm that can and do occur when persons are placed in isolation" are well documented.[213] Researchers and practitioners have acknowledged that "meaningful social interactions and social connectedness can have a positive effect on people's physical and mental health and, conversely, that social isolation in general is potentially very harmful and can undermine their health and psychological well-being."[214] In particular, experts have opined that the conditions of solitary confinement "predictably can impair the psychological functioning of . . . prisoners" and that these impairments may be "permanent and life-threatening."[215]

Indeed, there is no shortage of evidence proving such conditions cause serious psychological harm.[216] Psychological trauma resulting from extreme isolation may include "anxiety, headaches, troubled sleep, or lethargy, heart palpitations, obsessive ruminations, confusion, irrational anger, withdrawal, violent fantasies, hallucinations, perceptual distortions, emotional flatness, and depression."[217] In fact, neurological studies confirm

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211. 135 S. Ct. 2187, 2208 (2015) (Kennedy, J., concurring).

212. *Prieto*, Psychiatry/Psychology Professors and Practitioners Amicus Brief, *supra* note 37, at 8.

213. Expert Report of Professor Craig Haney, Ph.D., J.D., *supra* note 204, at 107.

214. *Id.* at 109.

215. *Id.* at 109–10. *See generally* Kristin G. Cloyes et al., *Assessment of Psychosocial Impairment in a Supermaximum Security Unit Sample*, 33 CRIM. JUST. & BEHAV. 760 (2006); Craig Haney, *Mental Health Issues in Long-Term Solitary and "Supermax" Confinement*, 49 CRIME & DELINQ. 124 (2003); Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 CRIME & JUST. 441 (2006).

216. *See generally Prieto*, Psychiatry/Psychology Professors and Practitioners Amicus Brief, *supra* note 37, at 10–12.

217. *Prieto*, Correctional Experts Amicus Brief, *supra* note 15, at 13–14 (citing Haney, *supra* note 215, at 130–31). For a more detailed description of recent studies on the physical symptoms and psychological reactions produced by solitary confinement, see Expert Report of Professor Craig Haney, Ph.D., J.D., *supra* note 204, at 111–12. Furthermore, there are significant aspects to the psychological pain and dysfunction produced by solitary confinement that are not as easily measured—"Depriving people of normal social contact and meaningful social interaction over long periods of time can damage

that such confinement can dramatically alter the brain's ability to function in just a matter of days.[218]

Second, although social deprivation is the source of the greatest psychological pain experienced by prisoners housed in solitary confinement, and places them at the greatest risk of harm,[219] prisoners housed in solitary confinement also experience serious sensory deprivation. Because these prisoners spend virtually all of their time—the span of which is potentially indefinite—confined in a windowless box, they are not only forced to "sleep, eat, and defecate . . . in spaces that are no more than a few feet apart from one another,"[220] but they are also denied access to normal and necessary human activity.[221] Constrained to the same extremely limited physical environment on a daily basis, prisoners' positive environmental stimuli are reduced to a bare minimum, which may result in "atrophy of important skills and capacities."[222] Sensory deprivation also extends to human touch. While psychologists have long recognized the need for caring human touch as fundamental to development,[223] prisoners housed in solitary confinement are deprived of virtually all human contact.[224] In fact, many "go for months or years without ever touching another person with affection."[225]

Unsurprisingly, the aforementioned risks are exacerbated for persons suffering from mental illness. As Dr. Craig Haney explains, "there are very sound theoretical reasons that explain why prisoners who suffer from serious mental illness have a much more difficult time tolerating the painful

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or distort their social identities, destabilize their sense of self and, for some, destroy their ability to function normally in free society." *Id.* at 120–21.

218. Nadia Ramlagan, *Solitary Confinement Fundamentally Alters the Brain, Scientists Say*, AM. ASS'N FOR ADVACENEMENT SCI. (Feb. 15, 2014), http://www.aaas.org/news/solitary-confinement-fundamentally-alters-brain-scientists-say. According to Huda Akil, a neuroscientist at the University of Michigan, each individual condition imposed by solitary confinement—the lack of both physical and social interaction, as well as touch and visual stimulation—"by itself is sufficient to dramatically change the brain." *Id.*

219. Expert Report of Professor Craig Haney, Ph.D., J.D., *supra* note 204, at 126.

220. *Prieto*, Psychiatry/Psychology Professors and Practitioners Amicus Brief, *supra* note 37, at 8 (quoting *Reassessing Solitary Confinement: The Human Rights, Fiscal, and Public Safety Consequences: Hearing Before the Subcomm. on the Constitution, Civil Rights & Human Rights of the S. Comm. on the Judiciary*, 112th Cong. 75 (2012) (prepared statement of Dr. Craig Haney)).

221. Expert Report of Professor Craig Haney, Ph.D., J.D., *supra* note 204, at 127 n.96. Moreover, even when prisoners are allowed to leave their cells, "it is [only] to exercise either in a metal cage or in an enclosed concrete pen, 'areas that are so constraining they are often referred to as "dog runs."'" *Prieto*, Psychiatry/Psychology Professors and Practitioners Amicus Brief, *supra* note 37, at 8 (citation omitted) (quoting Haney, *supra* note 215, at 126).

222. Expert Report of Professor Craig Haney, Ph.D., J.D., *supra* note 204, at 127 n.97.

223. *See id.* at 128–29.

224. *Prieto*, Psychiatry/Psychology Professors and Practitioners Amicus Brief, *supra* note 37, at 9 ("Virtually all solitary-confinement units prohibit contact visits.").

225. Expert Report of Professor Craig Haney, Ph.D., J.D., *supra* note 204, at 128.

experience of isolation or solitary confinement."[226] Not only are persons suffering from mental illness more vulnerable to the stressful, traumatic conditions that characterize solitary confinement, but some of the extraordinary conditions of isolation also "adversely impact the particular symptoms from which mentally ill prisoners suffer (such as depression) or directly aggravate aspects of their pre-existing psychiatric conditions."[227]

Indeed, several courts have reached the same conclusion about the vulnerability of mentally ill prisoners placed in isolation, albeit in the context of the Eighth Amendment.[228] For example, in *Madrid v. Gomez*, the district court concluded that the conditions of solitary confinement at Pelican Bay—namely, extreme isolation and environmental deprivation—constituted cruel and unusual punishment as applied to mentally ill prisoners.[229] The court found certain inmates faced "a particularly high risk for suffering very serious or severe injury to their mental health, including overt paranoia, psychotic breaks with reality, or massive exacerbations of existing mental illness as a result of the conditions in the SHU."[230] The court reasoned that placing these inmates in segregation was "the mental equivalent of putting an asthmatic in a place with little air to breathe."[231]

In addition to the consensus regarding the painful and harmful effects of isolation in the scientific community, there is also a growing consensus among state correctional systems regarding the psychological risks of

226. *Id.* at 148–49.

227. *Id.* at 149. This evidence of the deterioration and decompensation that may occur as a result of placement in isolation is particularly troubling given that researchers have found a higher prevalence of self-mutilation and suicide in isolated, punitive housing units such as administrative segregation. *See id.* at 113–14, 150–53.

228. *See, e.g.*, Ruiz v. Johnson, 37 F. Supp. 2d 855, 913–15 (S.D. Tex. 1999), *rev'd sub nom. in part on other grounds*, Ruiz v. United States, 243 F.3d 941 (5th Cir. 2001); Madrid v. Gomez, 889 F. Supp. 1146, 1261–65 (N.D. Cal. 1995) (holding that security unit conditions constituted cruel and unusual punishment with regard to seriously mentally ill inmates); *see also* Wilkerson v. Stalder, 639 F. Supp. 2d 654, 678 (M.D. La. 2007) ("While the defendants urge the court not to recognize social interaction and environmental stimulation as basic human needs, the failure to identify them would be inconsistent with jurisprudence recognizing mental health as worthy of Eighth Amendment protection, and the requirement that Eighth Amendment protections change to reflect 'evolving standards of decency that mark the progress of a maturing society.'" (quoting *Ruiz*, 37 F. Supp. 2d 855)); Jones'El v. Berge, 164 F. Supp. 2d 1096, 1117–21 (W.D. Wis. 2001) (holding seriously mentally ill inmates at a supermax facility demonstrated more than a negligible chance of success on the merits on their Eighth Amendment claim, pointing to conditions of almost complete isolation and sensory deprivation).

229. 889 F. Supp. at 1261.

230. *Id.* at 1265. The court reasoned that this group of inmates to be excluded from solitary confinement should include "the already mentally ill, as well as persons with borderline personality disorders, brain damage or mental retardation, impulse-ridden personalities, or a history of prior psychiatric problems or chronic depression." *Id.*

231. *Id.*; *see also id.* at 1265–66 ("The risk is high enough, and the consequences serious enough, that we have no hesitancy in finding that the risk is plainly 'unreasonable.' Such inmates are not required to endure the horrific suffering of a serious mental illness or major exacerbation of an existing mental illness before obtaining relief." (quoting Helling v. McKinney, 509 U.S. 25, 34 (1993))).

solitary confinement.[232] Indeed, some states have taken steps to reduce the use of solitary. In 2014, for example, ten states adopted measures aimed at curtailing the use of solitary confinement as a result of either legislation or litigation, "abolishing solitary for juveniles or the mentally ill, improving conditions in segregated units, or gradually easing isolated inmates back into the general population."[233] New York saw a major overhaul to the use of solitary confinement in its state prison system, at least as applied to certain groups of prisoners, following a settlement agreement in *Peoples v. Fischer*.[234] Similar strides affecting the long-term use of solitary confinement were made in California as the result of a settlement agreement.[235] Notably, Colorado's governor signed a bill banning the use of solitary confinement for the seriously mentally ill "at the urging of the state corrections chief, Rick Raemisch, who spent a night in solitary confinement and wrote about it in a New York Times Op-Ed, concluding that its overuse is 'counterproductive and inhumane.'"[236]

Furthermore, "the American Bar Association and virtually every major human rights and mental health organization in the United States as well as internationally have taken public stands in favor of significantly limiting solitary or isolated confinement use (if not abandoning it altogether)."[237]

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232. *See generally* Expert Report of Professor Craig Haney, Ph.D., J.D., *supra* note 204, at 131–33.

233. Eli Hager & Gerald Rich, *Shifting Away from Solitary*, MARSHALL PROJECT (Dec. 23, 2014, 1:12 PM), https://www.themarshallproject.org/2014/12/23/shifting-away-from-solitary#.q1cHAy7dE (highlighting reforms in Arizona, California, Colorado, Indiana, Michigan, Nebraska, New Mexico, New York, Ohio, and Wisconsin). For a timeline including important milestones in reform, see Fettig et al., *supra* note 48.

234. 898 F. Supp. 2d 618 (S.D.N.Y. 2012); *Historic Settlement Overhauls Solitary Confinement in New York*, N.Y. CIV. LIBERTIES UNION (Dec. 16, 2015), http://www.nyclu.org/news/historic-settlement-overhauls-solitary-confinement-new-york; *see also* Mark Binelli, *Inside America's Toughest Federal Prison*, N.Y. TIMES MAG. (Mar. 26, 2015), http://www.nytimes.com/2015/03/29/magazine/inside-americas-toughest-federal-prison.html. Unfortunately, however, this agreement does not extend to prisoners placed in administrative segregation. *See* Jean Casella, *How the New Settlement Will—and Will Not—Change Solitary Confinement in New York's Prisons (Redux)*, SOLITARY WATCH (Apr. 4, 2016), http://solitarywatch.com/2016/04/04/how-the-landmark-settlement-will-and-will-not-change-solitary-confinement-in-new-yorks-prisons-redux/.

235. Hager & Rich, *supra* note 233.

236. Binelli, *supra* note 234; *see* Hager & Rich, *supra* note 233; *see also* Rick Raemisch, Opinion, *My Night in Solitary*, N.Y. TIMES (Feb. 20, 2014), https://www.nytimes.com/2014/02/21/opinion/my-night-in-solitary.html?_r=0. Colorado has since passed another law banning solitary confinement for juveniles. *See* Fettig et al., *supra* note 48.

237. Expert Report of Professor Craig Haney, Ph.D., J.D., *supra* note 204, at 133–34. These organizations include the U.N. Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the American Academy of Child and Adolescent Psychiatry; the American Public Health Association; various faith-based organizations; and the American Psychiatric Association. *Id.* at 134–36, 142–46. Just this year, the National Commission on Correctional Health Care (NCCHC) issued a Position Statement declaring that solitary confinement for more than fifteen days constitutes "cruel, inhumane, or degrading treatment of inmates" and advocates for the exclusion of juveniles, mentally ill individuals, and pregnant women from the practice for *any* duration. *Id.* at 140–41.

The Mandela Rules described in Part II,[238] for example, signify a step in the right direction on behalf of the international community, including the United States. These rules signal a trend toward abolishing the practice, at least to the extent that they ban prolonged solitary confinement, confinement of prisoners with disabilities in such conditions, and the placement of prisoners in dark or always-lit cells.[239]

This shift away from the use of solitary confinement in a growing number of states, as well as the international community as a whole, is not insignificant. In overturning *Bowers v. Hardwick*, the *Lawrence* Court pointed not only to the growing number of state courts declining to follow *Bowers* in construing parallel provisions of the Fifth and Fourteenth Amendments in their own state constitutions but also to other nations' rejection of the reasoning and holding in *Bowers*.[240]

But while the growing consensus certainly serves as a marker of at least *some* progress, the practice of prolonged solitary confinement remains. Sadly, the practice remains despite all of the aforementioned evidence documenting its harmful and painful effects. So long as the Court refuses to recognize stronger constitutional protections against placement in solitary confinement, prisoners housed in prolonged isolation in states where progress has *not* been made face a serious risk of psychological harm.[241] Such conditions, which deprive prisoners of "the most elemental form of human dignity,"[242] should categorically carry constitutional consequence.

CONCLUSION

Our nation's current approach to solitary confinement is inhumane and treats prisoners as inanimate objects that are not worthy of human decency or respect. Accordingly, the practice degrades prisoners in a way that

238. *See supra* notes 49–51 and accompanying text.

239. Fettig et al., *supra* note 48.

240. Lawrence v. Texas, 539 U.S. 558, 576 (2003).

241. Alabama serves as a particularly troubling example of the need for constitutional protection. In his expert report in a federal class action lawsuit challenging the provision of mental health care in Alabama, Dr. Craig Haney found the Alabama Department of Corrections to overuse segregation, especially for those prisoners suffering from mental illness. *See generally* Expert Report of Professor Craig Haney, Ph.D., J.D., *supra* note 204, at 21–23. He characterized all of the units he saw as "dehumanizing and degrading, and subject[ing] prisoners not only to extreme forms of isolation but to severe deprivations in almost every conceivable way." *Id.* at 21. His report, which found the Alabama system to be "in clear violation of . . . every one of the 17 'principles' pertaining to solitary confinement that the NCCHC declared in its recent Position Statement," *id.* at 141, also reminds us that the promulgation of aspirational standards, such as those published by the NCCHC, are only signs of "progress" insofar as states actually adhere to those standards.

242. R. George Wright, *What (Precisely) Is Wrong with Prolonged Solitary Confinement?*, 64 SYRACUSE L. REV. 297, 311 (2014).

violates basic principles of human dignity. The academic conversation surrounding how the Supreme Court might one day address the issue should not be limited to the possibility for procedural due process challenges, as solitary confinement arguably violates a substantive due process right as well.

Furthermore, the discussion of potential substantive rights under the Fourteenth Amendment need not be limited to the incorporation of the Eighth Amendment. A proper approach to constitutionally challenging the practice may eventually also lie within a dignitary interest falling within a right to substantive due process—that is, the liberty guarantee of the Fourteenth Amendment's Due Process Clause. Given the severity of the deprivation of dignity in the solitary context due to the imposition of total social isolation and virtually complete deprivation of environmental stimuli—as well as the proven psychological and neurological toll wrought by prolonged confinement in such conditions—it is clear that solitary confinement would run afoul of such a dignitary interest.

In 1890, the Supreme Court recognized that, "even for prisoners sentenced to death, solitary confinement bears 'a further terror and peculiar mark of infamy.'"[243] Yet over 125 years later, the practice remains, leaving some prisoners "hidden away in [a] concrete box, week after week, month after month."[244] This Note intends to jumpstart a more thorough discussion in the legal community of the viability of a substantive due process approach to challenging solitary confinement, including its advantages and disadvantages when compared to other potential theories. It also seeks to provide a roadmap to litigators heeding Justice Kennedy's call to action and insistence that we no longer shut prisoners away, "out of sight, out of mind."[245]

Shelby Calambokidis[*]

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

244. STEVENSON, *supra* note 208, at 152.

245. *Davis*, 135 S. Ct. at 2209.

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