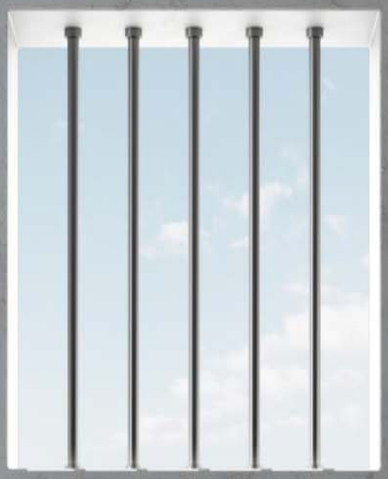

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http://www.law.unc.edu/documents/academics/humanrights/solitaryconfinement/fullreport.pdf

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Table of Contents

APPENDICES

Executive Summary

The Immigration/Human Rights Policy Clinic (I/HRP) (now the Human Rights Policy Seminar) at the University of North Carolina School of Law is committed to exposing violations of the basic human rights of both citizens and visitors of this state and nation.[1] This policy report seeks to contribute to a growing national advocacy movement that has identified solitary confinement as cruel, inhuman, and degrading form of punishment that is—or at the very least approximates—torture and a severe form of human rights violation and seeks to bring about the end of its use.

Torture is one of the basest violations of human rights and shared democratic ideals. Under North Carolina's state constitution, the federal constitution, as well as international law, the nation and the state of North Carolina must not be complicit in any act that falls within this category of atrocity. The duty to take responsibility for human rights violations encompasses the obligation to enlarge an understanding of that which constitutes torture and how it is manifested in various institutions and implemented by various actors. In this interest, as citizens, as concerned human beings, and as advocates, students, faculty, and collaborating advocacy partners endeavored to investigate and shine a light on the realities of the use of solitary confinement within the prison system with a focus on the state of North Carolina.

To this end, the authors have relied on a wide range of sources to parse out not only the practice and the outcomes of isolation, but also the evolution of the substantive response to this condition of confinement. This report examines the U.S. Constitution and its protections, the international standards that the United States as a nation has endorsed, as well as North Carolina

[1] *See Immigration Human Rights Clinic*, UNC SCHOOL OF LAW, (currently *Human Rights Policy Seminar*) http://www.law.unc.edu/academics/transitiontopractice/hrpolicy.aspx.

state legal protections. The conclusion reached is stark and straightforward: solitary confinement is ineffective at decreasing violence within prisons; it is ineffective at preserving public safety; it is ineffective at managing scarce monetary resources; and it violates the boundaries of human dignity and justice. Present efforts to redress this injustice have been, thus far, largely ineffective. Laws and the courts that interpret them must evolve according to the growing body of research that demonstrates that solitary confinement violates basic constitutional and human rights.

This report is presented in three parts.

SECTION ONE gathers data on the issue of solitary confinement and seeks to define, expose, and delegitimize the practice as inhumane and ineffective. It commences with the narratives of prisoners who have suffered or are suffering long term isolation. These in-depth stories are complemented by the results of a survey that was sent to North Carolina prisoners as a means to get a broader view of conditions of confinement from those on the inside. Added to this evidence are statistics derived from the Department of Public Safety's own database. SECTION ONE also recounts narratives from prisoners in other states who tell similar stories of deprivation and the struggle to maintain their sanity while confined to conditions of isolation. It then reviews the findings of research and studies by mental health professionals, penologists, and criminologists and summarizes the effects of solitary confinement from the perspectives of these experts. SECTION ONE concludes with an overview of the findings from other national advocacy and reform efforts.

SECTION TWO explores the substantive legal policy issues related to solitary confinement. It begins with an overview of constitutional jurisprudence, with a focus on Eighth Amendment concerns and the applicability of due process protections. It demonstrates how the current state of the law fails prisoners who would try to challenge their conditions of solitary confinement as a

matter of conceptual legal norms and application. It reveals the obstacles prisoners face even when they can show objectively that solitary confinement puts them at extreme risk of irreparable mental or other harm, and the difficulties they face in overcoming the burden of showing deliberate indifference by the officers who sent them to solitary because those officers can point to forty years of jurisprudence holding otherwise. It reveals the need for a different and evolved Eight Amendment interpretation—one that is based on the reality of the practices of prolonged isolation, the research that demonstrates its wrongfulness and ineffectiveness, and basic principles of human dignity. SECTION TWO then turn to the standards of international human rights that have been established by various treaties to which this nation is a signatory. The Convention Against Torture, the International Covenant on Civil and Political Rights, as well as other firmly established international and regional human rights norms prohibit the use of torture under any circumstances, and these prohibitions are fully applicable to solitary confinement. Lastly SECTION TWO considers national standards promulgated by the American Bar Association and the American Correctional Association, possible approaches and remedies based on the laws of state of North Carolina and then compares North Carolina to such national standards.

Finally, SECTION THREE offers recommendations for reform. It begins from the premise that solitary confinement is both immoral and ineffective. It considers, as preliminary steps toward the abandonment of the use of isolation as a form of punishment, "technical" reforms that would strictly limit and regulate the practice. More to the point, it then suggests systemic reforms including reducing prison populations, emphasizing rehabilitation, changing institutional prison culture, and ultimately advocates for a complete ban on solitary confinement. SECTION THREE identifies advocacy strategies for reaching reform goals, including litigation, legislative

initiatives, and community outreach and organizing. As stated at the outset of this Executive Summary, the conclusion reached is stark and straightforward: solitary confinement is ineffective at decreasing violence within prisons; it is ineffective at preserving public safety; it is ineffective at managing scarce monetary resources; and it violates the boundaries of human dignity and justice.

The conclusion reached is stark and straightforward: solitary confinement is ineffective at decreasing violence within prisons; it is ineffective at preserving public safety; it is ineffective at managing scarce monetary resources; and it violates the boundaries of human dignity and justice.

Definitions

Solitary Confinement: Solitary confinement, isolation, or extreme isolation are not legal or statutory terms, but rather are common terms that can have a wide breadth of meaning. For the purposes of this policy brief, these terms will be referenced by the following understanding. Within statutes and regulations the concept of isolating a prisoner may be referred to as Administrative Segregation, Disciplinary Segregation, Special Housing Units, Segregative Housing Units, Special Management Units, "Supermax" and others. These designations refer to the process of isolating a prisoner from the general prison population for anywhere from 22 to 24 hours a day.[2] In most cases, prisoner privileges are severely restricted including limitations on visitation, recreational time, and access to telephones. Often prisoners are only permitted to leave their cells for one hour, three to five days a week to go to areas often as small and controlled as their cell for recreation.[3] When they do leave their cells, prisoners are often shackled and accompanied by multiple guards. When they do get visitation with either immediate family or attorneys, they often are denied actual contact and usually conduct visits behind a Plexiglas window while shackled. Generally used as a punishment, prisoners can also find themselves isolated for safety reasons, control during investigation or transfer, while on death row, or awaiting assignment. In non-punitive situations, prisoners can maintain some privileges, but they are still subjected to being isolated from human contact except for prison staff. Often the duration of their isolation is indefinite.

For the purposes of this paper, "solitary confinement," "isolation," and "extreme isolation" will be used as interchangeable with "segregation," "segregation unit," and "control unit." The latter three are terms used by prisons and Departments of Corrections, and for all intents and purposes, they are the means by which these institutions subject prisoners to the torturous and barbaric practice of solitary confinement.

Segregation and Control Units: A separate unit within a correctional facility where prisoners can be held in isolation. The North Carolina Department of Corrections maintains nine categories of segregation from the general population: Administrative Segregation (Aseg), Disciplinary Segregation (Dseg), Death Row, Safekeepers, Protective Control, Intensive Control (Icon), Maximum Control (Mcon), High-security, Maximum Control (Hcon), and Therapeutic Control. For the purposes of this paper we are focusing on the five categories generally associated with a punitive purpose or a "control" function: Aseg, Dseg, Icon, Mcon, and Hcon.

Administrative Segregation (ASeg) - Administrative Segregation is the North Carolina classification status for inmates that the prison has determined must be temporarily segregated from the general inmate population. This segregation status may be in a single cell or other housing unit determined appropriate by the facility head. According to North Carolina policy, initial placement is primarily utilized for short-term removal from the regular population for administrative purposes, purportedly based upon one or more of the following conditions: (1) to protect staff and other inmates from the threat of harm by the inmate; (2) to minimize the risk of escape by the inmate or others influenced by his/her actions; (3) to preserve order; (4) to provide

[2] At least one state is redefining solitary confinement for incarcerated minors as being isolated for more than 16 hours in a day. S.B. 107, 2013 Leg., 77th Sess. (Nev. 2013), http://www.leg.state.nv.us/Session/77th2013/Reports/history.cfm?ID=270 (last visited Apr. 24, 2013).

[3] *See* SECTION ONE. I.A. *See also* UNC I/HRPC NC Prisoner Survey (on file with authors).

necessary control while completing an investigation; or (5) to remove an inmate from the population as a "cooling off measure."[4] However, based on survey responses this initial placement can be, and often is, easily extended so that this can often become a long-term or even indefinite confinement.[5]

Disciplinary Segregation (DSeg) -Disciplinary Segregation is the classification status assigned to inmates who are subject to punishment after having been found guilty of a rule violation. Disciplinary Segregation housing units are established at most facilities within the Division of Prisons.[6]

Only certain facilities have Control Units. These units are used for longer-term isolation and higher restrictions. There are three levels of Control Units in the NC Department of Corrections system. The following definitions have been taken directly from the NC Department of Public Safety Prison Policy and Procedure rules. The determinations of prisoner conduct required within in the definitions to justify isolation may or may not actually reflect the conduct or character of the prisoner so confined.

Icon is a classification status for inmates "who have shown disruptive behavior through disciplinary offenses, assaultive actions or confrontations, or who are so continuously a disruptive influence on the operation of the facility that they require more structured management by prison authorities."[7]

Mcon is the classification status which requires the isolation of inmates "who pose an imminent threat to the safety of staff or other inmates or who otherwise pose a serious threat to the security and operational integrity of the prison facility."[8]

Hcon is the classification status established for inmates "who pose the most serious threat to the safety of staff and other inmates or who pose the most serious threat to the security and integrity of prison facilities and require more security than can be afforded in Maximum Control."[9] Polk Correctional Institution has a High-Security, Maximum Control Unit, which is considered the state's only "Supermax" facility.

Torture: any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person—for such purposes as (1) obtaining from him or a third person information or a confession, (2) punishing him for an act he or a third person has committed or is suspected of having committed, (3) intimidating or coercing him or a third person, or (4) for any reason based on discrimination of any kind—when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering only arising from, inherent in, or incidental to lawful sanctions.[10]

It is important to distinguish this last part to not mean that an official act "can be deemed lawful simply because the punishment has been authorized in a procedurally legitimate manner, i.e.

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[4] N.C. Dep't of Public Safety Prisons Policy and Procedure Ch. C § .1200.

[5] *See supra* note 3. *See also* N.C. Dep't of Pub. Safety Prisons Policy and Procedure Ch. B §.0204(e)(9), Ch. C § .1201(g).

[6] *See supra* note 4.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987) [hereinafter Convention Against Torture], http://www1.umn.edu/humanrts/instree/h2catoc.htm.

through the sanction of legislation, administrative rules or judicial order."[11] "To accept this view would be to accept that any physical punishment, no matter how torturous and cruel, can be considered lawful, as long as the punishment has been duly promulgated under the domestic law of a State."[12]

Cruel, inhuman, or degrading treatment: Actions which fall short of torture but are nevertheless treated the same for purposes of establishing the unlawfulness of the act. They are generally assessed based on the severity of the harm caused by the act, the intent to inflict severe harm both mental and physical, and the "nature, purpose and consistency of the acts committed."[13]

Cruel and Unusual Punishment: Has been defined as a moral judgment based on the "evolving standards of decency that mark the progress of a maturing society."[14] This should be based on nothing less than the concept of the "dignity of man."[15]

[11] David Weissbrodt & Cheryl Heilman, *Defining Torture and Cruel, Inhuman, and Degrading Treatment*, 29 LAW & INEQ. 343, 391 (2011) (citing the UN Special Rapporteur on Torture, Professor Juan Méndez).
[12] *Id.* at 391.
[13] *Id.* at 382–384.
[14] *Graham v. Florida*, 130 S. Ct. 2011, 2021 (2010).
[15] *Trop v. Dulles*, 356 U.S. 86, 100 (1958).

Introduction

"To first and foremost say it's been a long time coming for this crucial and horrible thing called 'SEGREGATION'…D.O.C. staff have done so much wrong to us…There's men that's been on lock-up for 20 or 30 years and without write-ups. There's no reason that anyone should've stayed on lock-up for 25 years, but it's true. We need people to speak up for us, with us, and to the public. Could you be the ones to actually change some things for the better?"
-Prisoner Respondent

For many prisoners, solitary confinement is a sentence worse than death.[16] In the present day United States, it very well could be one of the most barbaric sentences imposed on human beings. After interviewing survivors, and researching the pronounced psychological effects of solitary confinement, the authors of this report conclude that solitary confinement is "torture." In North Carolina, prisoners are confined for 22-24 hours a day to small concrete boxes. The air is recirculated, reeking of the putrid environment in which it is trapped. Human interaction is limited to the give-and-take with corrections officers, who often suffer institutional dehumanization that leaves them indifferent to the suffering of their wards. If they are lucky, prisoners may be able to shout through ventilation ducts to their neighbors. Contact with the outside world and their families is severely limited and strictly regulated. A reprieve from their concrete boxes is typically nothing more than a slightly smaller box inside the prison or something that resembles a dog cage outside.

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In North Carolina, an inordinately high proportion of prisoners are put into solitary confinement. As of June 28, 2013, there were at total of 37,628 prisoners

[16] William Blake, *Voices from Solitary: A Sentence Worse Than Death*, SOLITARY WATCH: NEWS FROM A NATION IN LOCKDOWN (Mar. 11, 2013), http://solitarywatch.com/2013/03/11/voices-from-solitary-a-sentence-worse-than-death/.

in North Carolina.[17] On October 4, 2012, 3,388 out of 3,801 beds in control units were filled by NC prisoners.[18] That represents nearly 10% of the prison population in a long-term solitary confinement unit. Shockingly, this number does not appear to include disciplinary and administrative segregation, which could push the number of prisoners in solitary conditions much, much higher. Defenders of this system often cite the need to maintain order and protect staff and other prisoners from the "worst of the worst" offenders. As this report will show, however, many of those who suffer the extreme isolation of solitary confinement are actually being punished with extremely long sentences in solitary confinement for non-violent offenses that do not implicate safety issues at all. Moreover, the practice is ineffective at achieving any legitimate goal of punishment.

The fact that at least 21% of prisoners in North Carolina's "control" units have been identified to require some sort of mental health treatment makes the above numbers even more troublesome.[19] This state of affairs can create a vicious cycle of mental health disability-caused disciplinary infractions that land a disturbed prisoner in conditions of isolation that exacerbate his or her disease--which then can lead to more infractions.[20] A recent study of Unit 1[21] at Central Prison in Raleigh highlighted the unusually high percentage of prisoners who have had multiple admissions to the crisis unit for mental health issues.[22] The authors of that report concluded that this high rate was indicative of systemic problems that point to inadequate

[17] *DOC Legacy Resources*, NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, http://www.doc.state.nc.us/ (last visited June 28, 2013).
[18] *See* JEFFREY L. METZNER & DEAN AUFDERHEIDE, CENTRAL PRISON HEALTHCARE COMPLEX (CPHC) CONSULTATION REPORT 1 (Oct. 5, 2012) (on file with authors) (This report was obtained via a public records request from the Department of Corrections).
[19] See *supra* note 18.
[20] *See, e.g., Madrid v. Gomez*, 889 F. Supp. 1146, 1215 (N.D. Cal. 1995).
[21] Unit 1 is a Maximum Control Special housing Unit at Central Prison that houses prisoners in long term isolation.
[22] See *supra* note 18.

treatment in both Unit 1 and the crisis unit, and the strong possibility that conditions are so harsh in Unit 1 as to be causative.[23]

All North Carolinians should care about the conditions these prisoners face. In 2012, approximately 23,500 prisoners were released by the North Carolina Department of Corrections into our hometowns and communities.[24] Those who has been held in a solitary confinement unit were released directly to the street—an enormous and jarring transition that is unsafe and inhumane. As citizens, are we prepared to bear the burden of the psychological damage that solitary confinement causes? Are we prepared to continue to spend roughly *double* the average annual cost to incarcerate our fellow North Carolinians in solitary confinement? The total cost to the state of North Carolina for operating the Department of Corrections in 2010 was $1.2 billion, with an average of $29,965 spent per prisoner.[25] Though North Carolina does not reveal the cost of a year's confinement in solitary confinement, published sources reveal that it is typical for a prison to spend at least double on this type of housing because of the inefficiency of holding people in individual cells, and serving meals and medication to those cells.[26] It is the duty of citizens to know and understand how these state funds are being used.

Across the nation, and around the world, there is a growing movement challenging the use of solitary confinement within prison walls.[27] The abusive practice of solitary confinement is a rampant and the details of its use are often unpublished and invisible to the public. In New

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[23] *Id*.
[24] *Offender Population Statistics*, NC DIVISION OF ADULT CORRECTION OFFICE OF RESEARCH AND PLANNING, http://randp.doc.state.nc.us/kimdocs/0003560.htm.
[25] *The Price of Prisons, North Carolina: What Incarceration Costs Taxpayers Fact Sheet*, Vera Institute (Jan. 2012) *available at* http://www.vera.org/files/price-of-prisons-north-carolina-fact-sheet.pdf.
[26] National Religious Campaign Against Torture, "Frequently Asked Questions about Prolonged Solitary Confinement in the United States," http://www.nrcat.org/torture-in-us-prisons/learn-more-/faqs#cost (last visited Mar. 10, 2014).
[27] Organizations and individuals such as the ACLU, the NYCLU, Solitary Watch, the Center for Constitutional Rights, the Quakers, and the UN Rapporteur Against Torture among others have all called for much tighter restrictions, if not an outright end to the practice.

York, for example, through detailed examination of previously un-published records, the NY Civil Liberties Union has recently revealed that approximately 4,500 prisoners suffer extreme isolation—out of a total state prison population of 56,000 (about 8%).[28] This widespread pattern and the conditions in which those prisoners find themselves have led the NYCLU to file a successful class action lawsuit against the New York prison system.[29]

Across the nation, and around the world, there is a growing movement challenging the use of solitary confinement within prison walls.

A comparison of numbers reveals that North Carolina's use of solitary is even more widespread than what occurs in New York State. This fact alone justifies the undertaking of this project to describe the conditions in our state's prison system. Furthermore, a mosaic of information regarding each state's use of this barbaric punishment is necessary to spark change at the state level; documenting its vagaries and depravity is an ethical imperative.

[28] Scarlet Kim, *et al.*, NYCLU, BOXED IN: THE TRUE COST OF EXTREME ISOLATION IN NEW YORK'S PRISONS 1, *available at* http://www.nyclu.org/files/publications/nyclu_boxedin_FINAL.pdf.
[29] *Id. NYCLU Lawsuit Secures Historic Reforms to Solitary Confinement*, *http://www.nyclu.org/news/nyclu-lawsuit-secures-historic-reforms-solitary-confinement*. (last visited Feb. 23, 2014).

SECTION ONE

In an effort to better understand the day-to-day patterns and practices and consequences of solitary confinement, this Section reviews the data concerning prolonged isolation. It draws from I/HRP interviews with North Carolina prisoners who currently are or recently have been in solitary confinement, other published narratives of individuals who have suffered solitary confinement in North Carolina, results of the I/HRP survey of North Carolina Prisoners, statistical data obtained from the North Carolina Department of Public Safety Data including materials obtained through Public Records Requests. In addition to information specific to North Carolina, this Section also examines national data, including testimonials and media reports about solitary confinement. It reviews the studies and findings from experts in the fields of mental health and criminology.

The information obtained from those who have suffered prolonged isolation, together with the scholarly studies leads to an inescapable conclusion: solitary confinement is cruel and unusual, and is tantamount to torture. This Section reviews the growing response to this abhorrent and unlawful practice as a means to fully understand the national advocacy campaigns underway.

The people who come out of Mcon or Icon are *not* the same.

I. NORTH CAROLINA DATA

A. Interviews

"Solitary confinement changes you." Lisa, who spoke with us during her time at the North Carolina Correctional Institute for Women, describes the women she knew both before and after they experienced a prolonged stay in solitary confinement. "The people who come out of Mcon or Icon are *not* the same." North Carolina is one of the many states that over-employ solitary confinement as a form of extreme punishment in its prisons without regard to the harsh

conditions created for the prisoners. In an effort to understand the inner workings of prisons and the practice of solitary confinement, the authors of this report conducted interviews with prisoners. The experience of visiting individuals subjected to extreme isolation is an impactful one that endures and is an additional indicator of the devastation that results from the practice of solitary confinement.

1. Interview with Michael[30]

On a bright spring day, I walked out of my car and up to the large cement building completely encompassed at every angle by barbed wire. I was entering the Polk Correctional Institution. I signed in and prepared myself for what I thought would be a difficult interview, but I realized quickly after walking into the heart of the darkness and hearing the heavy, automatic door click shut behind me that this would be far from anything I could have prepared for.

I was brought to a small room with two chairs and a concrete slab for a "desk" where I would have my legal visit with Michael, a twenty-something year-old prisoner who has been in Polk's Hcon facility for about 22 months. Michael recently had his third classification hearing, at which time the review board was supposed to analyze the necessity of keeping Michael in solitary. These reviews take place every 4-6 months. . Michael was initially placed in isolation for two violent assaults, for gang affiliation, and for having been caught with a weapon. He spent almost two months at Alexander Correctional Institution's Aseg unit before being moved to Polk's Hcon facility. At this point, Michael has been infraction free for over 15 months,.

Michael and I talked through thick plexiglass where our voices were filtered through to each other by the means of metal grates. Michael hopped up on the concrete to press his ear to the metal grates to hear my questions. Throughout the entirety of the meeting, I heard the constant kicking of the prisoner in the cell above the visitation room. I heard the shouts of the

[30] All prisoner names have been changed.

other prisoners stuck in their cells, the constant banging, and their futile attempts at communicating with each other through the ventilation systems.

"It's hell in here." These were Michael's first words when asked about his thoughts and experiences in solitary confinement. He described the small space in which he lives, his daily activities, and the general interactions with guards. Michael lives in a small cell with a concrete slab with a thin mattress for a bed, a shower that turns on at a specified time, a toilet attached to a sink with an unbreakable mirror over it, and a concrete jutting that constitutes a desk. He wakes up at 5:00 am every morning for breakfast, then he reads and talks to himself to run through everything he is going to do for the day. He is allowed to listen to NPR, and does so with particular interest to the news and the Diane Rehm show. He sleeps a little until lunch at 11:00 am and then starts drinking water to prepare for his workout at 1:00 pm. He exercises in his room by doing burpees (squat thrusts), push-ups, and running around in circles as a way of passing the time and trying to cope with being in solitary. He works out until around 4:00 pm until his dinner is brought to him and shoved through the little metal slot in his door. After dinner, he tries to read until his shower comes on in the evening.

"It's hell in here."

Michael underwent a mental health evaluation when he was moved to Hcon in Polk. However, Michael, like other prisoners, believes these psychiatric evaluations are rubber-stamps—they simply do not prevent the isolation of prisoners with mental health illnesses, nor do they adequately measure the mental health impact of such confinement. Michael talked about the constant noise in the solitary unit—the banging, kicking and screaming. Michael wakes up every night to the middle-of-the-night incomprehensible screams of a prisoner in the same facility who is clearly in need of access to a mental health expert.

"Does it really take a psychology Ph.D. or whatever to see these people don't need to be in here?" Michael asks emphasizing the arbitrary nature of the process. "They gonna put you where they want to put you," he adds. While prisoners can request psychological assistance, such requests often result in their confinement in a strip cell, and thus exacerbate the symptoms that caused mental health impairments in the first place. Any help that may be provided to the prisoners is likely coming too late; they have already developed psychological conditions that cause them to suffer. Michael explained that once a prisoner's plea for help is finally heard, the prisoner is put into an observation cell. The prisoner is generally stripped naked, although policy technically requires that he at least be given something to cover his privates (i.e. boxers). He is placed in a cold room without any property—not even a mattress. He does not have toilet paper or soap. The time a prisoner spends in such conditions serves to worsen any symptoms he has rather than to treat his psychological problems.

Though Michael talks about a feeling of having found personal strength, he also discusses his feelings of frustration and the fixations that cause him to have violent and angry thoughts. Michael's efforts at rehabilitation have come largely from his self-selected readings and self-reflections because he does not have access to any programs that would help him in his rehabilitation efforts, nor does he have access to programs that would allow him to develop skills to function productively in the world after his sentence is completed. Michael noted that the use of solitary relies on "deprivation to dehumanize prisoners." Prisoners have no access to the daily touchstones that most people take for granted. Michael explained, "We don't see no sun, no fresh air, no outside recreation time."

The one hour of recreation time Michael is allowed about 5 times a week consists of no more than access to a slight enlargement of his cell. The automatic lock on his cell door "pops"

open, and he is permitted into the sally port that separates his cell and the next prisoner's cell. There is nothing in this space—just more sterile, white, cinder block walls. There is a small window at the top that is supposed to allow for some access to the outside world – some access to fresh air. However, the window is so high up that Michael has to jump up and down to even get a whiff of non-recycled air. The same type of metal grates that Michael and I talked through—grates that barely allow for the passage of sound—also cover the barely cracked window.

We don't see no sun, no fresh air, no outside recreation time.

Within a few months of having been confined to Polk's Hcon unit, Michael describes a scene out of a torture movie—something we should not expect from our U.S. prison systems. He talks about his experiences with guard brutality. His most vivid memory of experiences while in solitary confinement sent chills down my back as I listened to him describe being beaten by the correctional officers on the stairs where their actions cannot be captured by the cameras. Michael's anguish was evident as he talked about being left lying on the cold ground in a pool of his own blood only to be dragged off to the hospital. He was labeled a security threat, although he was in full restraints (handcuffs, waist restraint, and shackles on his feet). Multiple guards had beaten him. It's the "worst of the worst if they label you as a security threat," Michael confided. That way, they do not have to let you have witnesses during your disciplinary hearings. He remembers crying in his cell at night at the injustices of the system, when the corrections officers charged with protecting and upholding the ideals of society are acting worse than the prisoners.

As I walked out of the prison, my step a little quicker than normal, I looked up at the sky, and realized how lucky I was to be able to see the sunlight. I came to more fully realize and appreciate the impact of solitary confinement where the prisoners breathe recycled air every day

for years on end, where they cannot remember the last time they saw sunlight, where they crave even the slightest bit of attention, human contact, and acknowledgement of one's own humanity. To those who may be skeptical as to whether to call solitary confinement torture, I say one thing to you: I was one among your numbers until I saw their conditions, until I talked with the prisoners, until I heard story after story of abuse by prison guards against prisoners who have no real legal relief.

2. Interview with Malik

Malik has been in isolation for over a decade. Over three years ago, he was demoted to the High-Security, Maximum Control Special Housing Unit (Hcon) at Polk Correctional Institution. Gang affiliated, and in prison for life, Malik is not sure when, or if, he will get out of the concrete box he finds himself in up to 24 hours a day.

Malik has no control over the environment he is in. The fluorescent light turns on every morning at 5:00 am and illuminates the room in its unforgiving, humming light until 9:00 at night. Sometimes, he might try to dim it with newspaper, a rule violation for which he risks disciplinary punishment. His shower and toilet are controlled by the officers outside; they are set to a rigid schedule. Then, there is the noise. The block where Malik is housed is a constant cacophony of shouting, banging, banter, and kicking. The latter is a means by which prisoners attempt to call for the attention of guards, and to communicate with the world outside their cells. Correction officers most often choose to ignore these calls for help or attention—and thus, they usually continue for hours on end. Throughout our interview with Malik, the noise of the kicking could be heard to produce a slow, constant beat. According to Malik, the noise never stops. Other prisoners call out, kick, and scream throughout the night. Malik reported that some even use tin foil and batteries to start fires in their cells. All of this behavior is the result of human beings

who are desperate for attention, desperate to be seen and heard, if only to convince themselves that they still exist.

The noise never stops.

Hcon is a deliriously horrible place. Malik reminisced almost nostalgically about his time at Scotland Correctional Institute where he had been held in a Maximum Control unit. At least in Mcon, he was able to call his family on the holidays. When he met with a visitor, he could be in the same room, face to face. Twice a week in Mcon, Malik could go to an outside recreation cage. At Hcon, he can barely remember what it is like to feel fresh air on his skin. The air in Hcon is stale and recycled; its smell is almost overwhelming. It was the first thing we noticed when we stepped into the entrance port of the block. The closest Malik can come to the outside and fresh air is to jump up to the small, cracked, metal-grate covered window during recreation and try to catch a hint of the world on the outside. Recreation here is nothing more than the opening of the cell door and allowing the prisoner to enter the sally port that connects his cell and his neighbor's cell to the block. One hour and slightly less than double the space is what he gets five days a week.

Our interview was conducted through a Plexiglas window. Malik was in a waist constraint attached to handcuffs with his ankles in shackles. He looked aged beyond his 30-some years. Black circles rimmed his eyes, and his speech was labored and slow. I asked him about his mood, and how he was doing. Ironically, his last infraction, one that will likely keep him in Hcon for years to come, was for an offense that helped bring Malik back from what he described as a "dark place." Before discussing what the infraction was, we inquired as to what he meant by a dark place.

"I didn't care about anything. I thought I was never gonna get out," he told us. He felt "stressed-out" and suffered anxiety. His appetite disappeared and he could not eat. His sleep

patterns changed; he stayed up all night and slept intermittently through the day. He had panic attacks and hyperventilated. He made requests for a psychiatric evaluation, and after an interview, he was given a series of different drugs. He was left feeling like he "was a guinea pig" upon whom the doctors were experimenting with a barrage of pills (anti-depressants, anti-stress, anti-anxiety) until they found the right medicine that would make a difference on his mood, without causing side effects such as tremors. He is not sure what they are giving him now, but he feels calmer.

We asked Malik to describe his last infraction and how it related to coming back from his trauma and anxiety. The offense, it turned out, was possession of a cell phone. He told us he had purchased the phone from an officer. He was able to keep it concealed for almost a year. With it, he was able to communicate with his family and some friends. The phone was his lifeline that enabled Malik to recover from his feelings of depression and anxiety that he had referred to as that "dark place." That lifeline came at a cost for Malik; another officer found out he had a phone. They removed him from his cell. They stripped him naked. They placed him in a "dry cell," that is, a cell that has no plumbing, no bed, nothing. It is a concrete room, smaller than his cell, and this time the walls were smeared with feces. When he banged and kicked, demanding some underwear to cover his privates and recover some dignity, he was maced from head to toe. The officers left him there, naked and freezing, but on chemical fire for over 48 hours. I asked if he thought what the officers did to him was punishment or normal procedure for investigating contraband. He said, "Hell yes it was punishment. That's all this is."

I get pills three times a day," he told us. He explained it becomes a cycle. A prisoner begins to get stressed, he cannot sleep, and his eating patterns change. These psychological issues develop into a more severe mental problem for a prisoner who begins to fixate on the

There is also the problem of the corrections officers. They become just like the prisoners: dehumanized, reactionary, and bored.

isolation, and then he begins to need attention. A prisoner then acts out; he kicks, assaults an officer, refuses restraints, or sets a fire. The officers extract him; he gets an infraction; he gets continued on Hcon. Every six months, a prisoner on Hcon has his classification reviewed before a committee. If he has remained infraction-free, there is a chance he could be promoted to Mcon. If not, his punishment is continued, and he has to face six more months of the same condition. If the prisoner is labeled a security risk or is thought to be gang affiliated (based on secret, unreviewable evidence), even being infraction free will not necessarily result in promotion. Malik said, "It just seems like they have already decided before you even sit down in front of them."

Some prisoners get so desperate for contact or become so dysfunctional that they collect their own feces; they throw it, smear it, and even try to throw it in other prisoners' cells if they can. Malik's neighbor did this to him once. I asked him what he did in response. He said, "That guy's already messed up, man. I ain't gonna oppress another prisoner. I asked the officers to clean it up, but I didn't file no report. I ain't gonna make it worse for him."

There is also the problem of the corrections officers. They become just like the prisoners: dehumanized, reactionary, and bored. They all provoke each other. Officers will pick on prisoners; they will egg them on until the prisoner reacts. Prisoners will push officers until they react. When I asked Malik about experiences or memories that epitomize his perceptions about solitary, he talked about the officers. When I asked him if there was one thing he could tell the outside world about his existence, he wanted to tell the world about the officers.

Malik's most vivid memory on Hcon was early in his stint. His neighbor was being extracted from the cell. He was a small man and the officers had him in restraints. They pulled

him into the sally port and pulled up his shirt. They placed a shock shield (an electrified shield) against his back and electrocuted hm. What struck Malik was that: "They was laughing. It was like they were enjoying it."

The correction officers have ways of getting at prisoners. There are blind spots on the block where the cameras do not point and there is no recording. Officers can strike prisoners, usually in the stomach, back, or chest where no marks will be left. When the officers get too out of control, or leave marks, Malik explained that there is no use in filing a grievance because it is the word of the officer against the word of the prisoner. If a prisoner does file a grievance, the Superintendent will often just send it to the block Sergeant, who will protect the officers by saying that the prisoner is lying.

Malik said that it often feels like they are being tortured. When Malik was transferred from Scotland Correctional Institute, he was on "restriction" at the time; his property had been confiscated and was being kept in storage. The officers in charge of his confiscated property informed him that they lost all his stuff: his pictures of his family, his legal documents, basically his lifeline at the time.

Malik said that it often feels like they are being tortured.

More than anything else about solitary confinement, Malik wanted the outside world to know about the corruption that exists in the ranks of the corrections officers. The cell phone that was confiscated from him and resulted in his last infraction was purchased from an officer. They sell other contraband, including drugs. They beat prisoners, punish them extrajudicially, and leave them debilitated and in pain. Just recently Hcon was searched unit wide. A Prison Emergency Response Team ("PERT") was brought in, and all the prisoners' clothes and bedding was removed from their cells. They were left in their underwear. The corrections officers told them they would be reissued clothes after

the PERT left. However, it was not until two days later that they were finally issued new clothes.

As he recounted his story, Malik looked as if he was boiling underneath. It seemed he was holding it together, but barely. Life on Hcon is a "constant struggle," he said, and "there is always a time when you are vulnerable. You are always lonely. You never touch anyone." I asked him how he copes. He talked about being "gang affiliated," which he believes protects him from minor altercations with the officers. They do not want to stir up trouble with a gang. This affiliation forces him to "keep it together," to shave, to read, to educate himself, and to exercise. Someone who is affiliated with a gang will only be able to continue to get protection if he maintains some semblance of personal discipline. This type of protection, he observed, extends to helping each other cope. Malik explained, "We stand at the windows a lot, we get moved around some, to medical, to visits. If I see someone affiliated looking like they are getting bad: not shaving, their body language, not eating, I will do what I can. Maybe I'll pay an officer to send some books to them. We can try to talk through the ventilation, I check in with them, talk to them."

Malik stood there, shackled and stoic, knowing that when the door closed behind us he would be escorted back to his box by four officers to spend the rest of the day alone. I, personally, was anxious to feel the air and sun on my face again. The three hours we had spent in the Hcon unit was enough, I was beginning to feel it close in on me, and I had the freedom to leave.

3. Interview with Sandy

Sandy walked into the interview and was immediately informed by the correctional officer that she could not cross her legs and had to sit in the chair that would be visible from

outside of the room. Sandy has spent close to a year in a maximum control unit (Mcon) in a North Carolina correctional institution. She explained that she was put in segregation because of an infraction related to mail. At the time of the charge, the corrections officer put her in handcuffs and would not tell her anything as to why she was being transferred to a small cell with just a bare mattress. Nothing was available in the cell for her to keep warm and the air conditioning made for freezing cold conditions. That day, the prison officers brought up her possessions from her previous cell, including clothes and towels but not her thermals, keeping her in an unbearably cold state. She was kept in this cell with only a bare mattress for three days before she was informed as to why she had been transferred. A correctional officer slipped a yellow sheet of paper under her door which listed her charge. Sandy was finally taken to the Sergeant's office and read her rights and at that point, was informed of the charges.

Sandy was always embarrassed and felt degraded when she had to ask a male officer for these supplies, yet she had to do so many times because they would only give them two at a time.

An investigation took place. For her defense, Sandy was limited to producing written statements from other prisoners who were essentially denied any information about the circumstances about which they were being asked to provide information, rendering it impossible for Sandy to effectively make use of these witnesses . She was denied the right to call live witnesses. Sandy found this process useless. If allowed a fuller opportunity, and information about the charges, her closest friend in prison would have been able to submit a written statement providing evidence that would help to prove that Sandy was not guilty of the infraction; however, Sandy was denied the right to submit meaningful evidence. After an initial hearing, she appealed and the Discipline Hearing Officer ("DHO") gave her forty-five days in disciplinary segregation. However, the prison warden rejected the forty-five day sentence and

independently decided that she should be placed in Mcon. Sandy was then transferred to segregation and placed into a small room with a small frosted window that prevented her from seeing the world outside of her cell.

At the beginning of her punishment, Sandy tried to sleep most of the day to make the time go by faster. However, this proved to be more difficult than one would think due to the fact that she was deprived of sufficiently warm clothing including thermal clothing, although prisoners are allowed thermals in general population. Her bed was situated directly under the air vent which blew out freezing cold air twelve months out of the year, including in the dead of winter. Because prisoners are not allowed to cover up the air vent without getting a disciplinary "write-up," she did not want to risk having her time in segregation extended. Instead, she, like other prisoners in this circumstance, was forced to pile on all clothing and towels she had in order to try to keep warm.

In segregation, Sandy was isolated and alone. She could not communicate with the other prisoners in segregation because she would have had to scream through the cracks of the door which then echoes through the lobby in order to be heard. She could not understand the screams of other prisoners, and the conditions were too chaotic for her, so she kept to herself. She communicated with the correctional officers by slipping a note on a piece of paper through the door. She was not allowed anything unless she asked for it, including toilet paper and feminine products. Sandy was always embarrassed and felt degraded when she had to ask a male officer for these supplies, yet she had to do so many times because they would only give them two at a time.

Ants crawled all over her and she was bitten all over, but the officers did not do anything to correct it.

Because she had to rely on the officers for everything, she was at their mercy when things did not work in her cell. For

example, at one point there was no water in her cell. The sink and toilet also did not work properly and even after she informed the officers, she had to stay in the cell without running water and was not moved to a new cell for three days. Another time, one of her cells had an ant infestation. Ants crawled all over her and she was bitten all over, but the officers did not do anything to correct it. In a feeble attempt to solve the problem, she plugged all the tiny holes she could find in the walls with toothpaste. To this day Sandy still wakes up terrified that ants are crawling all over her body as a result of the trauma she suffered from the insect infestation.

Sandy could not take advantage of the limited so-called exercise hours because she was not allowed to go outside, and she would be handcuffed and shackled in a dog cage smaller than her cell where it was even more difficult to move and virtually impossible to exercise. Like other prisoners in solitary confinement, she was fed less food than those in the general population. Sandy lost fifteen pounds during her time in segregation as a result of the reduced quantity and quality of food; much of it was inedible and she could not eat it even though she was hungry.

Sandy and the other prisoners in segregation were allowed to shower three times a week for fifteen minutes. However, the shower curtain was short and did not shield their bodies from the male officers who were on duty. It was traumatic and humiliating. Further, the water was either scalding hot or freezing cold. Female prisoners were not permitted to groom or shave their legs. The soap was harsh and caused abrasions to her skin. Sandy filed a sick-call form to see a doctor about it because she had a rash that caused her to wake up covered in blood from scratching her skin in her sleep. The officers were annoyed about the fact that they had to get her new clean clothes; they expressed little concern for the health condition she suffered. Sandy did not get to see a doctor until two months passed. She finally received prescription soap and lotion, but she still has scars on her body from the rash.

While Sandy was in Mcon, it took her months to fall into a routine, but once she did, she followed her routine every single day as a way to try to maintain her mental health. If she was allowed to get a magazine or newspaper, she read and did puzzles to keep her mind busy. For a while, she wrote letters or listened to the radio. Sandy used the different radio shows as a cue to herself of when to change to the next activity. She would go to sleep early, and if she could, she would sleep thirteen to fourteen hours. Sleeping, however, was often a challenge due to the volume of noise, especially the screaming of the other prisoners in segregation.

No one performed a mental health evaluation during or after her time spent in Mcon.

Not only did her physical health deteriorate during her time in segregation, but her mental health did as well. She found herself extremely depressed and had suicidal thoughts. Sandy considered different methods of suicide; she pondered how she would commit suicide, and when. She cried much of the time. Because of her mental state, she found it difficult to write letters and to concentrate on the activity she was performing.

Sandy had one "evaluation" before she entered Mcon; however, the employee only took her blood pressure and asked if she had any prior injuries. No one performed a mental health evaluation during or after her time spent in Mcon. Sandy is not alone. Another prisoner that served three years in a control unit has been in and out of mental health for years and is constantly in the hospital for suicide attempts. Sandy states that this woman has never been the same since she was put in segregation. Sandy described her as "crazy." Another prisoner who spent nine months in segregation now has developed irrational phobias.

The correctional officers are, for the most part, not helpful. In segregation, prisoners have to ask these officers for everything and usually have to ask multiple times in order for the officers to take any action. There is a high turnover rate for officers, and many guards will leave

because they cannot handle the people with whom they work, or they do not want to be associated with them. Sandy stood up for her rights and the rights of other prisoners and wrote grievances about correctional officers' treatment of prisoners. This creates a high probability that a prisoner's life in prison will be even more difficult since the corrections officer will see the grievance and know who filed it. This did not stop Sandy. Sandy knew that she and the other prisoners did not deserve to be treated like animals and that they do have rights even though they are in prison.

The shift back to general population was even more problematic because after eleven months in isolation, she had lost all sense of what day-to-day prison life was like around others. She was confused, shell-shocked, and in a state of heightened anxiety that she might forget the rules.

Sandy's transition back into general population was extremely difficult. Everything was very loud, noisy, and chaotic for her. The shift back to general population was even more problematic because after eleven months in isolation, she had lost all sense of what day-to-day prison life was like around others. She was confused, shell-shocked, and in a state of heightened anxiety that she might forget the rules. She no longer knew where she was in terms of her physical space. The prisoners who knew Sandy before she went to segregation and saw her after have told her that they can see a difference in her and comment on how she has changed and has lost her ability to be social. She spends her time alone and reading in her cell.

As the corrections officer entered the room at the one-hour mark of our interview, Sandy concluded her personal views about prisons as a system. Prison, she explained, is not about rehabilitation anymore, and solitary confinement is overused and extremely abused. Sandy believes it is used as retaliation for grievances and letters to others in the Department of Corrections. She considers the Department's justification of solitary confinement as an attempt to maintain control over the prisoners, especially those like Sandy who stand up for prisoners'

rights. She further believes that in order for prison to be helpful to society, prisoners need to have an opportunity to learn to be part of a community, to help others, and to obtain successful employment. Speaking from her own personal experience and those of others, locking people up in solitary confinement does not work as punishment, nor does it serve as deterrence.

4. Interview with Lisa

When Lisa entered the room, her face was glowing with excitement. She politely thanked the guard, and shook my colleague's and my hands with glowing eyes. The juxtaposition between herself and our earlier interviewee, Sandy, was stark. But the story she had to tell about both her time in solitary and what she observed of others experiencing solitary held the same dark truths about the effects of extreme isolation.

> Every time Lisa had to use the restroom, she was at the whim of the guard who may or may not have felt like responding promptly to her request for toilet paper.

Lisa spent a month in "lock-up" while in the Cumberland County jail about three years ago. She was at the jail on a detainer order while her charges in a Cumberland County court were pending. Her story is typical. She was a polite, quiet young woman who had the bad luck to be paired with a cellmate who just wanted one thing: a cell to herself. Lisa's cellmate made the claim that Lisa had stolen her socks. Consequently, Lisa was pulled out of her cell and placed in the solitary confinement facility in the back of the jail. She received a slip under her door at the end of the day informing her of her sentence. Because of the short length of the sentence, one month, and the transitional nature of the jail, there was no time for the lengthy review process to challenge her cellmate's claim. Thus, Lisa spent a month in solitary confinement simply because her cellmate made allegations that, as a result of an ineffective and unresponsive "procedural remedy," went untested and unchallenged.

Lisa's face clouds up when she speaks of her 28 days in solitary confinement. Her experience at the Cumberland County jail facility was entirely at the whim of the guards on duty that day. Some days were better than others—the "good" guards would let her shower more frequently than the regulation of once-every-72-hours and would provide her with enough hygiene supplies to last a full day or two. But when it was a "bad" rotation of guards, her experience was very different. Some of the guards would provide toilet paper on a single-use basis. Every time Lisa had to use the restroom, she was at the whim of the guard who may or may not have felt like responding promptly to her request for toilet paper. But most jarringly, it was during this rotation of the guards that Lisa would go days without communicating with people. "It feels like the walls were closing in," described Lisa. "You stayed in your own head." Throughout her stay in solitary confinement, Lisa described her emotions like a Ferris wheel—rotating between anger, feelings of hostility to the guards, and profound sadness. When one emotion finally passed, it was replaced by another, more lonesome and discouraging than the first. The injustice of having been put there to suffer such severe harm on the basis of an allegation she was unable to contest visibly frustrates Lisa to this day.

It feels like the walls were closing in.

During her time at the North Carolina Correctional Institute for Women, Lisa has been luckier than many. She explained that with her sunny disposition and ebullient optimism, she has made it easy for the guards to like her. Her patience and perspective help her to stay removed from the intra-unit tensions that so often afflict community life in prison. But even so, she stresses that it is *impossible* to remain infraction-free. Her voice catches with the frustration and sense of injustice with her last infraction. After a memo was distributed to state that inmates could no longer keep three cans of soda at a time, Lisa was written up because she had two sodas and a juice box. While she did not earn any time

in the "hole" for this infraction, she feels the anxiety and pervasive threat that she may be on the verge of being sent to segregation for another minor and arbitrary infraction.

5. Other North Carolina Narratives on Solitary Confinement

In addition to the interviews and surveys that we undertook for this report, there are also existing published narratives that detail similar conditions in North Carolina's solitary confinement units.

Saiyd Muhammad wrote and published an account while he was a prisoner in solitary confinement in the Polk Correctional facility in Butner, North Carolina. He describes it as "mausoleum tomb" and "concrete vaults [that] house the living."[31] The "broken spirits" are a norm in solitary confinement.

> There is nothing sadder than to hear the broken spirit of an adult human being, except to hear the broken spirit of young adults, boys. There should be NO QUESTION that this is in-human treatment is a slow but sure psychological death sentence.[32]

Prisoners try to find ways to end their stay in isolation. Muhammad describes the desperation of those in solitary confinement to exit, even if it means by taking their own lives:

> I know of at least two young men, 23 & 25 years young, who tried to kill themselves. One swallowed ten (10) AA batteries. The other young man swallowed dozens of psychotropic pills, i.e. drugs like Therozine (Chlorpromazine) and Tegrator (lithium carbonate).[33]

Muhammad has also written about the flagrant misuse of the process of mental health evaluation of prisoners before assigning them to solitary confinement. Prisoners are required to undergo psychiatric evaluations before being admitted into solitary confinement to comply with the American Bar Association's Criminal Justice Standards on the Treatment of Prisoners rules

[31] Saiyd Muhammad, Voices from the Tombs of HCON, *available at* http://prisonbookscollective.files.wordpress.com/2012/08/Hcontorture.pdf) (last visited June 29, 2013).
[32] *Id.* at 3.
[33] *Id.*

that prohibit those with a significant mental health history from being assigned to solitary confinement.[34] Nonetheless, prisoners with mental health impairments are often subjected to such conditions of extreme violation. Muhammad explains:

> Not only did the two young men I speak of have a very significant mental health history, but they also had a well-documented history of attempted suicides and self-mutilations. There are also several other inmates with a well-documented history of suicides also had been wrongly cleared for Hcon. Most of them attempted suicide only after a few months of Hcon. Some had even committed vicious acts of self-mutilation….[35]

The situation is exacerbated by the mental health system within the prison. Doctors often clear prisoners for confinement in solitary notwithstanding a documented history of mental illness.[36]

> Staff knows that these doctors will wrongfully clear mentally ill inmates for isolation…. Most inmates with no prior mental health issues will certainly have mental health concerns after Hcon ("Super-max"), no matter how strong an individual is, as a result of the inhumane treatment and torturous conditions of Hcon or any Super-max Units in the U.S., he will have post-traumatic stress disorder (PTSD) concerns thereafter.[37]

Chris McBride, another prisoner in North Carolina's Central Prison, also provided a published narrative:

> Solitary confinement is hell. I agree with the public – it is a form of torture. It is a tiny cell about 6 feet by 8 feet. It has a steel toilet, with a sink built in the top. There is a steel bed, with an extremely thin mattress. There is a small shelf to put your things, and a very small little desk hanging off the wall, but no chair. There is a window, that is about 5 inches wide and about 4 feet tall, but you can't see out

[34] *See* American Bar Association, ABA STANDARDS FOR CRIMINAL JUSTICE: TREATMENT OF PRISONERS (3d ed. 2011) [hereinafter ABA STANDARDS], (passed by the House of Delegates, February 2010; approved by Standards Committee, June 2011), *available at available at* http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/Treatment_of_Prisoners.authcheckdam.pdf.
[35] *Id.*
[36] Jeffrey L. Metzner & Jamie Fellner, *Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for Medical Ethics*, HUMAN RIGHTS WATCH (Mar. 1, 2010), http://www.hrw.org/news/2010/03/22/solitary-confinement-and-mental-illness-us-prisons.
[37] *Id.*

> of it. It's fog/clouded glass. Plus it's covered by steel with little holes in it. The door window is the same. The light stays on 24 hours a day.[38]

McBride was locked in Icon for refusing to return to his kitchen shift.[39] The kitchen shifts were 10 hours a day every day of the week, and the prisoners earned $1 or less per hour they worked.[40] McBride was placed in Icon in January of 2012, and was still in solitary confinement as of the date of the story, July 4, 2012.[41] He counts up the hours he is allowed out of his cell:

> So if you add up five 1-hour recs, and three 10-minute showers, that's 5 ½ hours. Let's round that up to 6 hours. There's your answer. Out of 168 hours in a week, we are out of our cell 6 hours. If that ain't a form of torture, I don't know what is.[42]

Michael Williams is yet another example of an individual held in solitary confinement in North Carolina under conditions that are inhumane. According to a lawsuit filed in the U.S. District Court for the Eastern District of North Carolina, Williams--who has a lengthy history of severe mental illness--has been subjected to "leg shackles and handcuffs, which are locked behind his back and attached to a waist chain… for four hours at a time."[43] He has been subjected to cruel and dangerous discipline because, as a function of his mental illnesses, he is disruptive. He has been deprived of all property, including bedding, and deprived of any out-of-cell recreations.[44]

Out of 168 hours in a week, we are out of our cell 6 hours. If that ain't a form of torture, I don't know what is.

B. Surveys Results[45]

In order to obtain additional data about the experiences of North Carolina prisoners who have been held in conditions of extreme isolation, UNC I/HRP mailed surveys to prisoners in

[38] Billy Ball, *What Life is Like in Solitary Confinement in North Carolina's Central Prison*, INDY WEEK (Oct. 31, 2012), http://www.indyweek.com/indyweek/what-life-is-like-in-solitary-confinement-at-north-carolinas-central-prison/Content?oid=3182175.
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] Brief for the Plaintiff, *Williams v. Branker et al.*, No. 11-6329 (4th Cir.2012) (on file with authors).
[44] *Id.*
[45] UNC I/HRP Survey Results are compiled in a database on file with the authors.

The surveys demonstrate a general denial of meaningful process affecting assignment to and release from solitary confinement, including deficiencies with mental health screenings, which bear on whether they may be held in extreme isolation. Second, once in solitary, prisoners reported on the conditions of their confinement, which violate minimum standards of human decency. Third, prisoners described the assaultive and cruel behaviors of many of the guards in solitary and the lack of meaningful procedures for filing grievances for wrongs committed against the prisoners.

solitary confinement.[46] The results of the surveys reveal egregious violations of our most basic notions of humanity. Some of the individuals who provided narrative information in the survey described the facts of their cases and a number of them acknowledged fault and wrongful, if not criminal, behavior on their part. Their behavior though, however wrongful, provides no justification for their dehumanizing treatment.

The survey information reveals three general categories of harm and human rights violations. First, the surveys demonstrate a general denial of meaningful process affecting assignment to and release from solitary confinement, including deficiencies with mental health screenings, which bear on whether they may be held in extreme isolation. Second, once in solitary, prisoners reported on the conditions of their confinement, which violate minimum standards of human decency. Third, prisoners described the assaultive and cruel behaviors of many of the guards in solitary and the lack of meaningful procedures for filing grievances for wrongs committed against the prisoners.

1. Due Process: Assignment to Solitary Confinement.

(a). Procedural Due Process Violations

The majority of prisoners in solitary reported that they did receive a hearing for alleged infractions; an overwhelming majority of the prisoners described the hearing process as a "joke." Sometimes, the hearings took place after the prisoner had already been sent to solitary. Prisoners described a biased proceeding where the result already had been determined before the hearing

[46] A blank copy of the survey sent to the prisoners is located in Appendix II.

began. One prisoner wrote that he was given a hearing, "but not fairly." He elaborated: "They already had me guilty in the computer. That's one of their tactics. They do a hearing because it by law but [they] don't follow proper procedure when it comes to inmates' rights."

The survey data leads to a conclusion that the hearing is a meaningless procedure that denies prisoners the right to contest the charges and demonstrate their innocence.

In principle, and as a matter of procedural due process, prisoners have the right to call witnesses and present evidence at their hearings. One prisoner echoed the voices of the majority of survey respondents who commented about their experiences with due process requirements: "[T]hey say that, but I never have the opportunity because they find me guilty before." Another inmate commented that the process is "a joke." "They threaten inmate witnesses." The survey data leads to a conclusion that the hearing is a meaningless procedure that denies prisoners the right to contest the charges and demonstrate their innocence.

(b). Failure to Conduct Mental Health Assessments

Prisoners must have a mental health screening prior to an assignment to solitary. However, many prisoners do not have mental health screenings until after already serving time in solitary. One prisoner was visited by a mental health expert after approximately forty-five days in Hcon. On the occasions when mental health experts do make rounds, they do not ask questions sufficient to elicit responses with regards to the mental health of the prisoners. One prisoner describes the interactions:

> No, a mental health personnel sometimes comes around with an officer and asks people a series of questions such as "are you okay," "have you had any thoughts of hurting yourself or others," etc. These types of questions are asked in front of an officer and within hearing distance of other inmates. I have not noticed a set time that this happens (ex, once a month), seems like it's done when they want to.

A majority of prisoners indicate that mental health personnel make rounds, although survey responses indicate that they are not regularly scheduled. The process generally includes a simple question asking the prisoners if they are "okay"—while the prisoner remains locked behind his door, and within earshot of guards and other inmates. This inadequate access to mental health treatments and evaluations is a violation of domestic and international law and causes prisoners with serious mental illnesses to suffer and be punished as a result of their health conditions. One prisoner comments on his suffering in segregation compared to being in general population:

> I've seen mental health numerous times over the years for depression and anxiety while on seg. I think the first time was back in 2000(?). Once I was back in reg. pop. Where I can be active, talk to my family on the phone, get regular exercise & eat better the depression doesn't bother me as much. The anxiety remains, but I don't like to take medication.

The consequences of solitary confinement are especially significant for persons with serious mental illness who, as the result of the additional stress, isolation and lack of meaningful social contact, and unstructured days will suffer a worsening of symptoms of illness.

Without these assessments, the consequences of solitary confinement are especially significant for persons with serious mental illness who, as the result of the additional stress, isolation and lack of meaningful social contact, and unstructured days will suffer a worsening of symptoms of illness.[47]

2. Conditions in Solitary Confinement

The conditions described by the prisoners should shock the conscience of the people of North Carolina. Most prisoners wrote that the temperature in the cell is generally extremely cold. Some wrote that the temperature, which is controlled by the guards, is very hot in the summer and very cold in the winter. One prisoner wrote that he has been confined to cells that are "freezing cold for days and cells that were hot you could hardly breathe, [and] [c]omplaints to the staff mostly go ignored." One prisoner estimated that it was "below 45 [degrees] AC on in

[47] Metzner & Fellner, *supra* note 36.

the winter season." The prisoners have only two sheets on their beds and a thin blanket with which to keep warm.

The cells are poorly ventilated and are often very dusty. The survey responses indicate the majority of prisoners feel that their cells are too dirty, and they are unable to adequately clean them. They are not given adequate supplies with which to clean their cells, and are even prohibited from cleaning certain areas of the cell. Said one prisoner, "there are areas in the cell you can't clean but yet you can see the mold growing." Another prisoner indicated that they "don't get to clean [their] cell[s] enough, [they] get put in nasty cells for days." Prisoners can "clean only two times a week and only shower 3 times a week."

In addition to being unable to clean their cells, prisoners wrote that basic plumbing needs were often dysfunctional. Said one prisoner, "something is always broke, the showers in the cells or the toilets; if it rains consistently the showers will flood or the hallway drains will backup with sewer water." Another wrote, ". . . sometimes we didn't trust the water because it smelled like sewer water. Our clothes were always terrible, in way worse condition than regular population." Prisoners moved from cell to cell noticed that they were not cleaned: "Cells are not cleaned between occupants and personal hygiene is not enforced. Twice I was moved into a cell with open biological contaminants."

Prisoners are often unable to take care of their personal hygiene. The prisoners' survey responses reveal that many prisoners are unable to maintain proper personal hygiene due to an insufficient amount of supplies and inadequate access to showers. Most only have access to the showers three times a week for about 5-15 minutes each time. The prisoners struggle to maintain their meager hygiene kits for the allotted amount of time. Wrote one individual: "If you are I-

Prisoners are often unable to take care of their personal hygiene.

con, you can't buy deodorant, lotion, cotton swabs, shampoo, pens, legal envelopes. It's hard if you don't have money. Because they give you a hygiene kit once a month and the stuff is no good." The hygiene kits are full of "cheap stuff that don't last" and they "get an indigent pack every 30 days," with an insufficient quantity of supplies.

Almost every single one of the prisoners surveyed responded that they suffer from hunger and do not get enough food while in segregation. The small portions that they were given were hardly edible. One prisoner describes the food he was served: "small portions of poorly cooked, often bad tasting, food. Lots of processed meats and simple carbs with low nutritional value." Another prisoner stated that he "can't even describe it because sometimes I didn't even know what it was." Generally, the food is found to be:

Whether by intent or willful negligence on the part of prison officials or correctional officers, prisoners in solitary confinement have been dehumanized. These conditions violate domestic and international standards and constitute cruel, inhuman, and degrading treatment.

> [C]old. Nasty. It's not the same food as in general population. It's leftovers and sometimes you get the same meat two times a day and two days in a row. Twice I've had the food I ate give me a headache and stomachache then throwing up. Also, the portions of food are very small. If you have spoiled milk for breakfast, you don't get another, same things with moldy breads. You get no meat for breakfast.

The majority of the prisoners who responded to the survey have experienced conditions designed to cause suffering and harm. They have been denied a modicum of decency and have been forced to reside in overly punitive conditions. Whether by intent or willful negligence on the part of prison officials or correctional officers, prisoners in solitary confinement have been dehumanized. These conditions violate domestic and international standards and constitute cruel, inhuman, and degrading treatment.

3. Treatment by the Corrections Officers and the Lack of Remedies

The abusive, if not brutal, treatment of prisoners in solitary confinement by the guards has been the most significant finding of the survey. While not every guard acted in a manner contrary to laws and regulations, most of the prisoners suffered significantly because of guards who "used their jobs to get back at" the prisoners. One prisoner says about 30% of the guards act in accordance with penal standards, while 70% are cruel and in fact instigate problems leading to infractions. A survey respondent stated prisoners in solitary find that "prison guards are like irrational children with the power of a Greek god."

When guards are not getting into altercations with or inciting altercations among prisoners, they pay little attention to the needs of the prisoners. One prisoner writes: "[T]he majority of the guards are, at the least, apathetic to any requests or concerns. Most of the time you have to raise hell to get them to do something as simple as bring a roll of toilet paper. They are often hostile, verbally abusive, and antagonistic." Many prisoners feel as though the guards treat them like animals and make them feel like they do not exist and have no value, or as though they are less than human beings.

A survey respondent stated prisoners in solitary find that "prison guards are like irrational children with the power of a Greek god."

Prisoners have a grievance system where they can file a report about matters, including poor treatment by officers, lack of medical treatment, inadequate food, and other matters pertaining to their confinement. Most prisoners that responded to the survey indicated that filing grievances is "a waste of time" and that grievances are "totally ignored." Some who did receive responses found them to be "negative and disrespectful." Some have even suffered adverse effects for filing grievances because the prison administration responded by stating that the prisoner's complaint was wholly unfounded and then charging him with an infraction for lying.

One prisoner commented, "They always make up excuses or cited policy or stuck up for the guard you complained on." Sometimes the prison administration will cite to a policy that is completely unrelated to the nature of the prisoner's grievance.

The overwhelming finding from the prisoners' narratives from the prisoners we personally interviewed, as well as the narratives from media reports indicates that these prisoners feel hopeless. They feel as though they have no way out. These prisoners are denied their basic human rights.

The survey shows that prisoners in solitary confinement in North Carolina may not only be abused by the guards, but they have no remedy for violations of their rights. These circumstances make solitary confinement that much more punitive and unlawful. Prisoners are entitled to have meaningful consideration of their grievances without fear of retaliation.

These narratives demonstrate the horrendous nature of solitary confinement and its effects on the prisoners who are banished there. Individuals are arbitrarily confined and abused by the correctional guards. They suffer irreparable harm, and are given mental health screenings that are cursory, at best. The overwhelming finding from the prisoners' narratives from the prisoners we personally interviewed, as well as the narratives from media reports indicates that these prisoners feel hopeless. They feel as though they have no way out. These prisoners are denied their basic human rights.

C. Statistical Data: NC Department of Public Safety

The following information was taken from the public data maintained by the North Carolina Department of Public Safety on their website.[48]

As of March 18, 2014, there were a total of 37,465 prisoners in North Carolina.[49] On March 10, 2014, there were 3,464 out of 3,801 beds in control units filled by North Carolina

[48] OFFENDER PUBLIC INFORMATION: DOWNLOADS, NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, http://webapps6.doc.state.nc.us/opi/downloads.do?method=view (last visited June 29, 2013).
[49] *DOC Legacy Resources*, NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, http://www.doc.state.nc.us/ (last visited Mar. 18, 2014).

prisoners.[50] That represents nearly 10% of the prison population in solitary confinement. Compared to other prison systems, this represents a significant proportion of North Carolina's prisoners held in long-term solitary confinement at any given time. In 2011, only about 6% of Texas's total prison population was held in solitary confinement.[51] In 2013, the U.S. Bureau of Prisons maintained about 5.7% of its prison population in solitary.[52] Before New York settled a lawsuit regarding overuse of isolation in 2014, it held about 8% of its population in that manner.[53]

Table 1: North Carolina prisoners in solitary

Control status

Control Status	
ADMIN SEGREGATION	622
DISCIPLINARY SEGREGATION	1461
HIGH SECURITY/MAX CONTROL	48
INTENSIVE CONTROL	699
MAXIMUM CONTROL	215
MODIFIED HOUSING	419

While some of these prisoners are staying in solitary after serious or dangerous disciplinary infractions, far too many end up there as a result of relatively minor misbehavior. For instance, among all North Carolina prisoners—including Black, White, male, and female inmates—the two most commonly-incurred disciplinary infractions are "Disobey Order" and "Profane Language." These are by far the most frequently-issued "write-ups" in our state

[50] *See* Metzner & Aufderheide, *supra* note 18.
[51] Diane Schiller, "Some prisoners in solitary for years in Texas," HOUSTON CHRONICLE, Aug. 15, 2011, http://www.chron.com/news/houston-texas/article/Some-prisoners-in-solitary-for-years-in-Texas-2132621.php
[52] U.S. Government Accountability Office, "Improvements Needed in Bureau of Prisons' Monitoring and Evaluation of Impact of Segregated Housing," (May 2013).
[53] *NYCLU Lawsuit Secures Historic Reforms to Solitary Confinement*, http://www.nyclu.org/news/nyclu-lawsuit-secures-historic-reforms-solitary-confinement. (last visited Feb. 23, 2014).

prisons. And, because the definitions of these infractions are extremely broad and open to interpretation, they vest extraordinary amounts of discretion in a ground-level correctional officer, who is the judge and jury as to whether the order that he gave an inmate was properly obeyed, or whether any language that he heard an inmate use was offensive. Indeed, in New York, the New York Civil Liberties Unit (NYCLU) has recently filed suit against that state's use of solitary, specifically targeting the latitude given to staff to use solitary confinement as a "disciplinary tool of first resort for violating almost any prison rule, no matter how minor."[54] More substantive infractions—such as "Unauthorized Tobacco Use," and "Substance Possession"—are less discretionary in nature (though still non-violent), because the misconduct they describe is less subject to interpretation, and requires physical evidence.

Tables 2 & 3: Most-common disciplinary infractions

Top 10 Infractions for all years 2007 - 2012, ***Males***

Infraction	MALE
DISOBEY ORDER	81,982
PROFANE LANGUAGE	40,709
UNAUTHORIZED TOBACCO USE	39,716
SEXUAL ACT	18,366
FIGHTING	14,821
SUBSTANCE POSSESSION	13,278
NO THREAT CONTRABAND	12,430
UNAUTHORIZED LEAVE	12,423
UNAUTHORIZED LOCATION	10,911
LOCK TAMPERING	10,323

Top 10 Infraction for all years, 2007 - 2012 ***Females***

Infraction	FEMALE
DISOBEY ORDER	7,363
PROFANE LANGUAGE	2,913
UNAUTHORIZED TOBACCO USE	1,646
SEXUAL ACT	1,424

[54] *NYCLU Lawsuit Challenges New York State's Use of Solitary Confinement*, NYCLU, http://www.nyclu.org/news/nyclu-lawsuit-challenges-new-york-states-use-of-solitary-confinement (last visited June 29, 2013).

FIGHTING	1,257
UNAUTHORIZED LOCATION	988
NO THREAT CONTRABAND	927
BARTER/TRADE/LOAN MONEY	830
MISUSE/UNAUTH-USE PHONE/MAIL	781
UNAUTHORIZED LEAVE	776

Troublingly, there are strong indications that correctional officers' vast discretion may not be deployed in an even-handed way. Instead, there are racial disparities in the proportion of "discretionary" infractions imposed on Black inmates, as compared to White inmates. During the studied time period, over one third (36%) of the total infractions assigned to Black male inmates were for "Disobey Order" or "Profane Language." During the same time frame, only 26% of the total infractions assigned to White male inmates were for "Disobey Order" or "Profane Language." Meanwhile, a greater proportion of the infractions that White males received were for the substantive infractions "Unauthorized Tobacco Use" or "Substance Possession."

Similarly, among female inmates, a greater proportion of Black females' total infractions were for the most open-to-interpretation misbehavior. Almost half (49%) of the infractions that Black females received were for "Disobey Order" or "Profane Language." Meanwhile, only 38% of the infractions that White females received were for this sort of misbehavior. Comparatively, 10% of White females' infractions were for "Unauthorized Tobacco Use," while only 4% of Black females' infractions were for that offense. To be clear, this analysis examines only the *proportion* of each group's total infractions. Whenever a Black inmate is being punished in our prisons, it is more likely that he or she is being punished for a "discretionary" infraction that leaves much to the officer's interpretation. Whenever a White inmate is punished,

it is more likely to be for a "substantive" infraction that relies on physical evidence rather than merely an officer's perception.

Tables 4 & 5: Racial Disparities in the Imposition of "Discretionary" Infractions

Top 10 Infractions (alphabetical order) for all years (2007 – 2012) by race, ***Males*** *(%'s are based on total for each race category)*

Infraction (Males)	BLACK	BLACK %	WHITE	WHITE %	OTHER	OTHER %
DISOBEY ORDER	58,715	23.86%	19,135	17.77%	4,132	19.35%
FIGHTING	9,965	4.05%	3,899	3.62%	957	4.48%
LOCK TAMPERING	7,628	3.10%	2,131	1.98%	564	2.64%
NO THREAT CONTRABAND	6,637	2.70%	4,753	4.41%	1,040	4.87%
PROFANE LANGUAGE	28,941	11.76%	9,930	9.22%	1,838	8.61%
SEXUAL ACT	16,067	6.53%	1,505	1.40%	794	3.72%
SUBSTANCE POSSESSION	7,834	3.18%	4,530	4.21%	914	4.28%
UNAUTHORIZED LEAVE	7,669	3.12%	3,898	3.62%	856	4.01%
UNAUTHORIZED LOCATION	7,320	2.97%	2,964	2.75%	627	2.94%
UNAUTHORIZED TOBACCO USE	17,949	7.29%	19,831	18.41%	1,936	9.07%

Top 10 Infractions (alphabetical order) for all years (2007 – 2012) by race, ***Females*** *(%'s are based on total for each race category)*

Infraction (Females)	BLACK	BLACK %	WHITE	WHITE %	OTHER	OTHER %
BARTER/TRADE/LOAN MONEY	305	2.54%	492	4.54%	33	3.66%
DISOBEY ORDER	4,058	33.75%	3,058	28.23%	247	27.38%
FIGHTING	745	6.20%	458	4.23%	54	5.99%
MISUSE/UNAUTH-USE PHONE/MAIL	299	2.49%	441	4.07%	41	4.55%
NO THREAT CONTRABAND	408	3.39%	480	4.43%	39	4.32%
PROFANE LANGUAGE	1,799	14.96%	1,040	9.60%	74	8.20%
SEXUAL ACT	704	5.86%	667	6.16%	53	5.88%
UNAUTHORIZED LEAVE	388	3.23%	347	3.20%	41	4.55%
UNAUTHORIZED LOCATION	528	4.39%	422	3.90%	38	4.21%
UNAUTHORIZED TOBACCO USE	474	3.94%	1,086	10.02%	86	9.53%

Indeed, the power and control that the individual correctional officer enjoys over prisoners is even greater when considering the overwhelming likelihood of a guilty verdict. To

charge an inmate with an infraction is tantamount to finding him or her guilty of the infraction. To begin with, about half of charged inmates will plead guilty, accepting a lesser punishment in exchange for the plea. Of the half of prisoners who do seek a hearing, only about one-half of one percent (0.50%) are found not-guilty. Over 80% of the time, they are found guilty, and the rest of the time, the charges are either sent back for "re-investigation" due to errors in the paperwork, or the charges are dismissed due to errors in the paperwork. In other words, if a prisoner seeks a hearing, his only real chance at avoiding a guilty verdict is to hope that the correctional officer filled out the paperwork incorrectly.

> To charge an inmate with an infraction is tantamount to finding him or her guilty of the infraction.

Tables 6 & 7: Disciplinary Hearing Verdicts

Verdicts based on appeal/Disciplinary Hearing Officer by race, all years (2007 – 2012), ***Male***

Race	DISMISSED	GUILTY	NOT GUILTY	RE-INVESTIGATE	Grand Total
BLACK	10.28%	81.43%	0.41%	7.88%	100.00%
WHITE	10.13%	82.86%	0.57%	6.44%	100.00%
OTHER	10.47%	81.29%	0.56%	7.68%	100.00%
Grand Total	**10.25%**	**81.79%**	**0.46%**	**7.50%**	**100.00%**

Verdicts based on appeal/Disciplinary Hearing Officer by race, all years (2007 – 2012), ***Female***

Race	DISMISSED	GUILTY	NOT GUILTY	RE-INVESTIGATE	Grand Total
BLACK	14.10%	75.17%	0.48%	10.24%	100.00%
WHITE	12.04%	80.05%	0.56%	7.34%	100.00%
OTHER	13.44%	79.52%	0.22%	6.83%	100.00%
Grand Total	**13.19%**	**77.43%**	**0.51%**	**8.87%**	**100.00%**

Asking for a disciplinary hearing is a big risk to take. For those who go to a hearing and are found guilty, solitary confinement is likely—even for vague, discretionary offenses like

"Disobey Order" and "Profane Language," and even for utterly non-violent offenses like "Unauthorized Tobacco Use." On average, male prisoners receive about 17 days in solitary for a charge of "Disobey Order" and about 16.5 days in solitary for a charge of "Profane Language." They receive an average of about 28 days for "Unauthorized Tobacco Use." The UN Special Rapporteur on Torture, Professor Juan Méndez has opined that any sentence over 15 days is torturous and causes irreversible psychological damage.[55] Other experts would put that number at just ten days.[56] Just after a few days in solitary, a measurable change in brain activity can be registered. Certainly, over six months in solitary—as individuals on Hcon, Mcon, and Icon experience—is certain to lead to psychological harm.

Table 8: Segregation Days Analysis

*Average days of segregations, all years, **male** by gender*

Infraction	BLACK	WHITE	OTHER
DISOBEY ORDER	17.12	17.43	17.52
FIGHTING	15.20	15.32	15.31
PROFANE LANGUAGE	16.59	16.57	16.55
SEXUAL ACT	31.03	30.54	30.12
UNAUTHORIZED TOBACCO USE	28.87	28.95	29.56
Grand Total	**20.30**	**20.85**	**20.70**

D. Data: NC Department of Public Safety Consultation Report

In October 2012, the North Carolina Department of Public Safety ("DPS") completed a consultation report summarizing its assessment of the mental health services provided to inmates at the Central Prison Healthcare Complex ("CPHC") located in Raleigh, North Carolina.[57] Additionally, the report focused on issues relevant to the mental healthcare system throughout

[55] U.N. GAOR, 66th Sess., § 76, U.N. Doc. A/66/268 (Aug. 5, 2011).
[56] Sharon Shalev, A SOURCEBOOK ON SOLITARY CONFINEMENT, MANNHEIM CENTRE FOR CRIMINOLOGY (Oct. 2008), *available at* http://solitaryconfinement.org/uploads/sourcebook_web.pdf.
[57] *See* Metzner & Aufderheide, *supra* note 18, at 1.

the entire North Carolina correctional system.[58] Over a four-day period, Jeffrey Metzner, M.D, and Dean Aufderhide, Ph.D., visited CPHC where they interviewed members of the prison's mental health staff, attended team staffing meetings, and met with a variety of prisoners from the complex's multiple housing units.[59] Dr. Metzner and Dr. Aufderheide made several findings regarding the mental health services offered system wide and identified multiple areas for improvement within CPHC, which they reported to John S. Carbone, M.D., J.D., Director of Mental Health Services for DPS.[60] The report and its findings are relevant to the issues of solitary confinement.

1. Inmate Population Statistics Throughout North Carolina

As of October 1, 2012, the total inmate population in the state was 37,707.[61] Of those inmates, 4,531 were receiving mental health treatment, representing 12% of all inmates in North Carolina.[62] Within the Department of Corrections, mental health status is classified according to the following scale:

M1: No mental health treatment needs
M2: Mental health treatment provided by psychology staff only
M3: Thought treatment provided by both psychology and psychiatry staffs
M4: Residential treatment level of care
M5: Inpatient psychiatric treatment of care[63]

Of the 4,531 inmates that were classified as M2 or higher, 3,142 were at least at the M3 level, meaning they were taking one or more psychotropic medications, and the remaining 1,359 M2 inmates were only receiving outpatient therapy services.[64] System wide, there are 3,809 beds

[58] *Id.*
[59] *Id.* at 2-3.
[60] *See generally id.* at 1.
[61] *Id.* at 3.
[62] *Id.*
[63] *Id.*
[64] *Id.*

that are assigned for long-term control status—either Icon, Mcon, or Hcon.[65] Of those 3,809 beds, 708 were filled by inmates with M2-M5 status, accounting for 21% of the occupied control-status beds.[66]

2. Staffing at CPHC and System wide

One of the key problems detailed in the report was the shortage of staff both within CPHC and throughout the entire state prison system. The majority of the vacancies within the CPHC Mental Health Facility were identified in the clinical services department, where there was a lack of physicians, psychologists, nurses, social workers, and multiple other positions.[67] Unfortunately, this problem is challenging to correct due to the alleged bureaucratic hiring process as well as noncompetitive employee salaries.[68] Per the report, "[i]t is very likely that significant vacancies will continue unless salaries have been increased in a manner that make them competitive with other state agencies and similar positions in the community."[69] Until the staffing vacancy rate significantly decreases, the current flaws in the mental health services provided at CPHC will persist and likely increase.

Similar issues with staffing have been identified throughout the statewide correctional mental health system. The most notable vacancies system wide consisted of psychology program manager and staff psychologist positions.[70] Dr. Metzner and Dr. Aufderheide reported that some prison facilities do not have mental health staff available to work, negatively impacting inmate access to mental healthcare and reportedly resulting in transfers to CPHC that

[65] *Id.*
[66] *Id.*
[67] *Id.* at 3-5.
[68] *Id.* at 4.
[69] *Id.* at 5.
[70] *Id.*

were not actually necessary.[71] Again, as with CPHC this staff shortage can be remedied by confronting the salary and hiring process issues plaguing the system.

3. General Structure of CPHC

CPHC is a recent addition to Central Prison, providing a new medical center and mental health facility for inmates throughout North Carolina who are suffering from health problems.[72] The mental health unit, also known as Unit 6 at Central Prison, consists of 216 inpatient inmate beds, 160 medical employees, and an estimated 1,200 admissions annually.[73] Unit 6 consists of three levels of inpatient mental health housing, including Crisis Level Housing, Intensive Level Housing, and Long-term/Residential Housing.[74]

On October 1, 2012, there were 119 inmates housed in the mental health unit, and 67 of these inmates were on some kind of lockdown status—either DSeg, ASeg, or Hcon status.[75] Essentially, these inmates were locked in their cells for 23 hours per day.[76] Furthermore, all inmates in the behavioral unit and 19 inmates in the general population units were classified as one of these lockdown statuses.[77]

4. Observations of and Interviews with Line Mental Health Staff

Upon speaking with and observing mental health staff, Dr. Metzner and Dr. Aufderheide learned that typically staff were not regularly assigned to particular housing units, leading to "significant difficulties in the context of attempts to establish a therapeutic milieu and obstacles to establishing routine operational practices within the unit."[78] Additionally, many staff members were unable to identify the level of medical care that was to be offered to the inmates

[71] *Id.* at 6.
[72] *Id.*
[73] *Id.* at 7.
[74] *Id.* at 7-8.
[75] *Id.* at 8.
[76] *Id.*
[77] *Id.*
[78] *Id.* at 9.

in the mental health units, creating confusion and inconsistency in patient treatment.[79] Staff also displayed discomfort in working with general population inmates in group treatment settings.[80]

5. Intensive Level Housing Unit for Control Status Inmates

While the report looked at the conditions and level of care provided in several units throughout Central Prison, the unit most pertinent here is the Intensive Level Housing Unit for Control Status Inmates, particularly because many of the inmates housed in this unit were held in their cells for up to 23 hours per day.[81] The main complaints of these inmates were that they were not offered any opportunities to partake in group or individual therapy, any clinical contacts they had were not private as they were conducted cell front, and they were stressed due to their confinement.[82] Dr. Metzner and Dr. Aufderheide determined that the "treatment being offered to control status inmates in the intensive level housing units was not adequate."[83]

To remedy the issues they found, they met with correctional and mental health administrative staff and proposed a corrective action plan for improving the level of care provided to control status inmates in Unit 6.[84] Their recommendations included: (1) starting a treatment program with these inmates that consists of two 1-hour structured therapeutic group sessions per week per inmate; (2) allowing eligible inmates to weigh in on the groups in which they would prefer to participate; (3) offering inmates weekly confidential, out-of-cell clinical contacts; (4) offering inmates a minimum of 10 hours of unstructured out-of-cell recreational time each week; (5) permanently assigning correctional officers to the housing units (for at least

[79] *Id.*
[80] *Id.* ("Staff also appeared to be uncomfortable in providing group treatment to general population inmates related to, in part, safety concerns and custody staffing patterns.").
[81] *Id.* at 15.
[82] *Id.*
[83] *Id.*
[84] *Id.* at 16.

six-month rotations); and (6) giving inmates at least 10 hours of structured out-of-cell therapeutic activity time each week.[85]

6. Out-of-Cell Time for Inmates

One of the main concerns with allowing control status inmates to attend structured therapeutic activities outside of the confines of their cells was that of safety. In an essay included as an appendix to the report, Dr. Metzner discussed the most effective methods for providing inmates with structured out-of-cell group therapy while also protecting the safety of correctional and mental health staff as well as of the inmates themselves.[86] The first option Dr. Metzner suggested was to use "therapeutic modules" (also known as "programming cells," or "cages" by their critics).[87] "These metal enclosures permit inmates to participate in group social or therapeutic activities while physically separated from other inmates and staff."[88] While in these cells that are about twice the size of an old-fashioned telephone booth, inmates are not cuffed, and the cells are typically arranged in a semicircle to enable inmates to interact with one another in a group setting.[89]

Dr. Metzner also described two alternatives to the modules, including "restart" chairs and "spider tables." Restart chairs are designed similar to traditional school desks, and they allow for inmates to be cuffed to the chair by one arm and both legs while they are sitting in the chair.[90] The benefit of restart chairs is that they appear like a less restrictive restraint method than the therapeutic modules, but the downside is that inmates have very limited physical movement while seated in the chairs.[91] Another commonly utilized restraint for group therapy sessions is

[85] *Id.*
[86] *See id.* at 18.
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] *Id.*

modified "spider tables." Similar to restart chairs, these tables are structured so that inmates are cuffed to them, but instead of just one inmate per table, there are generally two or more at each table, depending upon the size of the table.[92]

In concluding his essay, Dr. Metzner emphasized the importance of permitting inmates with mental health illnesses who are confined in long-term supermax prison units to have out-of-cell time, regardless of the setting in which they spend this time.[93] As he pointed out: "[S]tructured therapeutic out-of-cell activities are better than unstructured out-of-cell time activities, which are better than being locked down 23-24 hours per day in a cell. Not surprisingly, the more out of cell time, the better from a mental health perspective."[94]

7. Summary of Metzner and Aufderheide Findings

In concluding their report, Dr. Metzner and Dr. Aufderheide summarized the most significant positives and negatives that they observed at CFHC. On the plus side, they found that there already existed:

1. An ideal physical plant that was designed with needed programming space that is required in order to accomplish its mission which is to "ensure all patients in our custody receive exceptional healthcare consistent with the community standard."
2. A warden who clearly is committed to facilitating implementation of the CPHC's mission.
3. Adequate mental health staffing allocations.
4. The director of mental health position has just been filled.
5. Strong support from central office.[95]

Nonetheless, the issues that they found were substantial, including:

1. Significant vacancies exist in both leadership positions (psychology and nursing) in addition to line mental health and nursing staffs.
2. Barriers to decreasing these vacancies include noncompetitive salaries, concerns re: privatization and a hiring process that is much too long.

[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Id.* at 22.

3. The treatment programs throughout Unit 6 are not adequate as summarized in the body of this report, especially in the context of lack of group therapies/activities and the usual 23 hours of cell confinement of control status inmates in Unit 6. Additional correctional officer allocations will be needed for escort purposes re: the out of cell structured therapeutic activities to be provided for control status inmates.
4. The institutional culture remains problematic and has contributed to the lack of treatment, in part, related to staff's safety concerns.
5. An adequate QI system does not exist at CPHC at the present time.
6. Significant revisions to policy and procedures are needed, especially re: restraint and seclusion, suicide prevention and the initial comprehensive mental health evaluation that is required as part of the admission process to Unit 6.
7. The current housing units within Unit 6 have mixed clinical and custody populations as explained in the body of the report that make it extremely difficult to implement adequate treatment programming.
8. The identified "revolving door" phenomenon for a significant number of Unit inmates who are periodically admitted to Unit 6.[96]

Overall, this assessment indicates that while the conditions in the Central Prison Healthcare Complex and the mental healthcare system throughout North Carolina provided opportunities for improvement, there were many aspects system-wide that were in dire need of improvement as of the date the report was circulated.

E. Central Prison's Response to the Consultation Report

On March 13, 2013, Central Prison distributed a Mental Health Plan of Improvement to address many of the issues raised in the DPS Consultation Report.[97] The improvement plan is encouraging, as it conveys that Central Prison is working towards treating and resolving some of the central problems that the report exposed. For instance, since January 2013, Central Prison states that it has been holding group therapy sessions for control status inmates held in the intensive level housing units, and staff psychologists have been conducting weekly rounds to monitor the inmates, particularly those with severe mental illness.[98] Senior staff members are

[96] *Id.* at 22-23.
[97] CENTRAL PRISON, MENTAL HEALTH PLAN OF IMPROVEMENT 1(Mar. 13, 2013) (on file with authors).
[98] *Id.* 1-2.

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also researching and developing more effective policies and practices for treating inmates in CPHC.[99]

Furthermore, on May 5, 2013, Raleigh's News and Observer ("N&O") published an article online commending Central Prison for their efforts in improving their treatment of the mentally ill.[100] The article reports that in late 2012, Central Prison began implementing crisis intervention team training in order to teach correctional officers and medical staff how to handle inmates in the prison's mental health unit when challenging situations arise.[101] Though this type of training has been utilized throughout the country over the past twenty-five years, this is the first time the training has been tested in North Carolina.[102] The emphasis of the training is on exercising verbal communication with the inmates rather than automatically resorting to physical conduct.[103]

Applying the skills taught through the training is especially important for staff working in the mental health unit. The article notes that Central Prison's "mental health approach is markedly different from the days when the state's mentally ill were locked away in solitary cells and forgotten."[104] As the alarming conditions in Central Prison's solitary units have been uncovered in recent years, prison officials now have the opportunity to effect changes in order

[99] *Id.* at 1, 3-4.
[100] Craig Jarvis, *Central Prison Changes Way of Dealing with Mentally Ill*, NEWSOBSERVER.COM (May 5, 2013), http://www.newsobserver.com/2013/05/05/2873172/central-prison-changes-way-of.html.
[101] *Id.*
[102] *Id.*
[103] *Id.* (The training has been described as follows: "It is mostly verbal . . . and less moving hands, body, not advancing, talking to the subject. Teaching them you don't have to go hands-on. There's less risk of being hurt. It's effective. It just works.").
[104] *Id.*

help treat rather than further harm inmates.[105] As recommended in the DPS Consultation Report, the N&O article reports that in addition to initiating crisis intervention training, Central Prison has started hiring more mental health staff and social workers, and allowing prisoners to leave their cells in order to attend group and/or individual therapy.[106]

In the summer of 2013, Central Prison also released two documents labeled, "Central Prison: Mental Health Internal Review 2011" and "Interim Report Reference Central Prison Inpatient Mental Health Program," which both referenced an internal review conducted between February 2011 and May 2011 by the Mental Health Quality Assurance Coordinator and the Central Office Assistant Director of Nursing.[107] The initial reported named the goal of the review as a "quality improvement activity to assess the delivery of services."[108]

The document, "Central Prison: Mental Health Internal Review 2011" highlighted a number of key areas of concern in regard to the treatment of those under psychiatric care that include, but are not limited to the following:

1. Inadequate medical and psychiatric staffing;[109]
2. Lack of Standard Operating Procedures for a number of areas, including frequency of psychiatric and psychological visits, and response to self-injurious behavior;[110]
3. Medical record issues, including labs in wrong patient's records, misfiled observational logs, and missing documents;[111]
4. Errors in medication administration, including incorrect prescribing practices, and failure to implement medication orders;[112]
5. Lack of a Comprehensive Treatment Plan and active treatment programming for a substantial number of those receiving services in the Inpatient Mental Health Unit;[113]

[105] *Id.*
[106] *Id.*
[107] CENTRAL PRISON: MENTAL HEALTH INTERNAL REVIEW 2011 (August 2013) (on file with authors).
[108] NORTH CAROLINA DEPARTMENT OF CORRECTION Memorandum (August 2013) (on file with authors).
[109] CENTRAL PRISON: MENTAL HEALTH INTERNAL REVIEW 2011, 3-10.
[110] *Id.* 8-9,16.
[111] *Id.* 12.
[112] *Id.* 21-24.
[113] *Id.* 30.

6. Infection control and environmental issues, including lack of appropriate handwashing supplies, multiple areas frequently smelling of urine, cells of those in therapeutic seclusion not being cleaned, and unhygienic practices by nurses and lab technicians;[114]
7. Broken and lack of equipment, including, but not limited to fax machines, hole punchers, telephones, and an automatic blood pressure machine.

These deficiencies raise serious concerns about the welfare and treatment of those in need of psychiatric care while in Central Prison, considering basic sanitation, medical, and therapeutic needs were admittedly not being met.

But it appears that with these small changes noted in the N & O article, prison officials are already witnessing big improvements, including decreases in violence within the mental health unit.

For each of these areas, as well as those unmentioned, the reviewers suggested appropriate recommendations to address the concerns identified. The second document, "Interim Report Reference Central Prison Inpatient Mental Health Program" discussed, "those corrections accomplished and future plans to continue addressing specific deficiencies identified."[115] Examples of said corrections include:

1. Scheduling follow up reviews to insure procedural adjustments;
2. Reassigning supervision of certain tasks, such as medical records;
3. Charging clinicians with developing comprehensive treatment plans;
4. Developing and instituting a revised Self Injurious Behavior policy; and
5. Implementing a new and aggressive sanitation and maintenance schedule.[116]

However, the interim summary also listed a number of remaining issues that have failed to be addressed, including staffing vacancies, the lack of active treatment planning, and other matters.[117] The interim report demonstrates progress but significant changes still needed in regard to the current treatment of those under psychiatric care at Central Prison. But it appears that with these small changes noted in the N & O article, prison officials are already witnessing

[114] *Id.* 35-37.
[115] NCDOC Memorandum.
[116] NCDOC "Interim Report Reference Central Prison Inpatient Mental Health Program," (August, 2013) (on file with authors), 1-4.
[117] *Id.* 2-3.

big improvements, including decreases in violence within the mental health unit.[118] They do admit that changing the culture inside the prison has not been simple, especially because "it requires persuading correctional officers to get in touch with difficult prisoners' emotions."[119] While prior to undergoing training, it is not uncommon for officers to exhibit "skeptical or outright hostile" attitudes towards practicing new techniques for dealing with mentally ill inmates, after a few days of training, they often are "enthusiastic" about carrying forward what they have learned.[120]

Central Prison is to be commended for any improvements that are undertaken and hopefully this new mentality will continue to spread throughout correctional facilities not only in North Carolina but also around the nation. The overall picture, however, remains bleak, and a commitment to structural changes, including an end to the abusive practices of solitary confinement, are required in order to assure that prisoners are no longer subject to egregious violations of their human rights.

on rehabilitation rather than punishment and aims to increase overall prison safety. Central Prison is to be commended for any improvements that are undertaken and hopefully this new mentality will continue to spread throughout correctional facilities not only in North Carolina but also around the nation. The overall picture, however, remains bleak, and a commitment to structural changes, including an end to the abusive practices of solitary confinement, are required in order to assure that prisoners are no longer subject to egregious violations of their human rights.

II. National Data

National attention has been drawn to the issue of solitary confinement. Media scrutiny of the issue demonstrates a growing concern with what has been identified as an overused, misused, and abusive practice. Published reports and articles offer two related sources of information that illuminate the wrongfulness of extreme isolation as a form of punishment and/or prison

[118] *Id.* (Central Prison's warden, Kenneth Lassiter, has stated that this new attitude towards mental health inmates "is truly working.").
[119] *Id.*
[120] *Id.*

management: the devastating impact on individuals so confined, and the burgeoning evidence from experts as to the mental health consequences. This part offers an overview and summary of the extensive national data on solitary confinement.

A. Prisoner Narratives and Media on Solitary Confinement in Other States

1. Prisoner Narratives

Through a number of media sources, the narratives of the prisoners in solitary confinement across the country speak for themselves and describe the torture they endure. Joe, a prisoner at Tamms Correctional Institute in Illinois describes his surroundings:

> The C-MAX was said to have been designed to house the IDOC's 'worst of the worst' in an effort to help state authorities re-gain control of their prison system. This couldn't be further from the truth because most of us have been sent here based merely on the fact that we have mental illnesses or in retaliation for filing lawsuits, grievances, or past disciplinary histories...This facility functions more as a mental institution than a prison of rehabilitation and it serves no penalogical purpose other than to warehouse prisoners. As the duration of our isolation drags on and the degree of our conditions of confinement deteriorate you begin to see the psychological effect that this place has on us. We know that we will spend all day in these cells with absolutely nothing constructive to do with our time and we do not know if we will ever leave here. This knowledge overwhelms many of us and it leads many of us to insanity, causing attempted suicide, suicide, body mutilation, hanging, eating and throwing feces, and other extreme acts. — Joe[121]

Rodney, another prisoner at Tamms wrote about the soul crushing torture he encountered in solitary that has caused him to develop psychological problems:

> I was the 40 person to be housed at Tamms. This place steal a man will to continue living. The isolation it selve make a man do desperate act to get some kind of physical, the conditions is inhumane and causing a person to develop psychological problems (mental suffering.) Being way down he in a no man zone, away from civilizing and a prison visit system that is design to keep people..away. The man in Tamms being violated every with cruel acts and not being fed, living

[121] ILLINOIS DEPARTMENT OF CORRECTIONS, TAMMS CORRECTIONAL CENTER CLOSING-FACT SHEET, THE STATE OF ILLINOIS 142, *available at* http://cgfa.ilga.gov/upload/TammsMeetingTestimonyDocuments.pdf (last visited June 29, 2013)

> in dirt....Being at Tamms, I have developed a psychological problem and is now living in a psychiatric unit in Tamms that's making it even worse....Programs and privilege are not therapeutic. It's to mislead peoples in thinking the programs are good. It's a lot of pressure and is causing abnormal amount of stress. We are not being protected by security abuses such as harass, fouling, encouraging inmates to himselve retaliation. Mental health staff are doing the same. I need some supporting help in stopping these acts. — Rodney[122]

Psychological problems are a common theme throughout solitary confinement, and the ways in which prisoners deal with their torture varies, as described by the following comment from Tamms:

> I've seen prisoners in solitary degrade quickly and slowly, depending on their psychological strength and grasp on more in life than rap music no meaningful life experiences. Suicide is preferable to long-term segregation (and long prison sentences). Those who don't kill themselves learn to compress their hatred that grows like cancer while being forced to suppress their true emotions, in a form of Stockholm Syndrome tactics, to survive. This promotes recidivism and violence. A person, like a dog at a kennel, can only be compressed so much before they either explode or implode. Either way, none is good. Prisoners teach deception to survive and force prisoners to become manipulative of DOC policies and staff because the truth and honesty only leads to negative treatment by D.O.C. staff. For example, to get adequate food, one must feint a medical condition requiring more just to get enough.[123]

> The prisoner recently hung himself here in Upstate SHU. . . . They kept writing this prisoner up with misbehavior reports while he came to SHU on a minor incident years ago. Instead of giving him treatment, they chose to keep him suffering alone in a cell. This is definitely a case of abuse of human life.

Tamms prisoners are not the only ones who suffer from psychological disorders as a result of their confinement in solitary. A prisoner at Washington State's Monroe Correctional Complex where prisoners often spend most of their prison term in solitary confinement writes:

[122] *Id.*
[123] *Id.*

> One can never be open with staff or even prison psychologists (help that hurts) because it is not confidential; is often interpreted and repeated by untrained staff and it is best to simply internalize and put on a fake (happy) front and never reveal any true feelings, or the prisoner will end up longer in solitary; in a strip cell (where they take away all your clothes, bedding, etc, and put you on a dirty, hands only diet) or some other adverse treatment.[124]

A prisoner held in solitary confinement in New York at the Upstate Correctional Facility wrote about the death of a mentally ill prisoner who did not receive the proper medical treatment or care while he was in solitary.

> The prisoner recently hung himself here in Upstate SHU. . . . They kept writing this prisoner up with misbehavior reports while he came to SHU on a minor incident years ago. Instead of giving him treatment, they chose to keep him suffering alone in a cell. This is definitely a case of abuse of human life.[125]

Many prisoners have difficulty staying in touch with their families after being put in solitary confinement, especially with regards to prison mail censorship so that the prisoners do not know whether or not their mail is being properly handled.

> Out of the past ten years I've been incarcerated on two arson charges for burning two cars. I got 24 years for [it] (no one was hurt) while racking up repeated appeals, most of that has been in solitary confinement. I have a college degree and worked professionally for years before this mess came down. I'm now 53-years old; my family won't communicate with me and most of all, my two sons won't communicate despite my still never forgetting their birthdays and holidays with cards and such. Prison mail censorship has frustrated communications so much, most people simply give up trying to keep up.[126]

The following narrative is about the life of Cesar Francisco Villa, a fifty-one year-old prisoner at Pelican Bay State Prison's SHU in California. He has been held in solitary confinement for 11 years and is subject to an indefinite term in solitary confinement. Cesar was

[124] *Voices from Solitary: "Suicide Is Preferable to Long-Term Segregation" in Solitary Confinement*, SOLITARY WATCH (Mar. 21, 2013), http://solitarywatch.com/2013/03/21/voices-from-solitary-suicide-is-preferable-to-long-term-segregation/#more-7899

[125] *Testimony for IACHR Thematic Hearing on Solitary Confinement*, NYCLU (Mar. 12, 2013), http://www.nyclu.org/content/testimony-iachr-thematic-hearing-solitary-confinement.

[126] *See Voices from Solitary: Suicide Is Preferable to Long-Term Segregation" in Solitary Confinement, supra* note 124.

put in solitary confinement because prison officials suspected him of being an active gang member. To be eligible for release from solitary confinement, Cesar would have to turn over gang information. This is a problem for Cesar who is not a gang member, and therefore, has no information to turn in. His narrative captures the essence of the treatment prisoners face in solitary confinement, and the mental anguish that takes over their faculties.

> There's a definite split in personality when good turns to evil. The darkness that looms above is thick, heavy and suffocating. A snap so sharp, the echo is deafening. A sound so loud you expect to find blood leaking from your ears at the bleakest moment.
>
> The waking is the most traumatic. From the moment your bare feet graze the rugged stone floor, your face begins to sag, knuckles tighten—flashing pale in the pitch of early morning. The slightest slip in a quiet dawn can set a SHU personality into a tailspin: If the sink water is not warm enough, the toilet flushes too loud, the drop of a soap dish, a cup … In an instant your bare teeth, shake with rage. Your heart hammers against ribs, lodges in your throat. You are capable of killing anything at this moment. Flash attack; a beating, any violent outburst that will release rage.
>
> This would be the time it's best to hold rigid. Take a deep breath. Try to convince yourself there's an ounce of good left in you. This is not a portrait you wish anyone to see. And then a gull screeches passing outside—another tailspin and you're checking your ears for blood.
>
> And this is a good day.
>
> Eleven years has passed since I entered the SHU on gang validation. This year I'll be 52-years-old. My cognitive skills over this past decade has taken an odd turn. The deterioration is discernible. When I first arrived I was attentive and if you'll excuse the expression, bright-eyed. I thought I could beat "this thing" whatever "this thing" was. I confess—I was ignorant.
>
> Today, I could be found at my cell front. My fingers stuffed through the perforated metal door—I hang limp—a mechanism forged of heavy gauge. My head angled in a daze. My mind lost in a dense fog of nothingness. I'm withering away—I know it—and I no longer care. Hopelessness is a virus I hide under my tongue like some magic pebble, as if the shiny stone could assist in organizing thoughts; decipher warbled language from convicts without stones without tongues in a cellblock of grunts and floods of ignorance. Concentration is an abstract invention for those with half a mind if half a mind is a terrible thing to waste. And someone screams behind me, "waste not want not." But what's to waste when all you are is a virus that no one's allowed to touch.

….

> …We've been undone, unwound. The inside of our plastic skulls—raked and routed. A composition of cracks and fissures where nothing will ever be the same again.[127]

2. Media Reports on Solitary Confinement

The New Yorker published an article by Dr. Atul Gawande, a surgeon, journalist, and associate professor at Harvard Medical School, who described the effects of solitary confinement and concluded that "all human beings experience isolation as torture.

Solitary confinement has been examined by different media sources throughout the United States, with all of them concluding that it is ineffective and torturous. Many of these articles illuminate the findings of mental health experts on the consequences of solitary confinement. The New Yorker published an article by Dr. Atul Gawande, a surgeon, journalist, and associate professor at Harvard Medical School, who described the effects of solitary confinement and concluded that "all human beings experience isolation as torture."[128] The article went on to compare the mental abuse inflicted by solitary confinement to physical torture: "A US military study of almost a hundred and fifty naval aviators returned from imprisonment in Vietnam . . . reported that they found social isolation to be as torturous and agonizing as any physical abuse they suffered."[129] Referring to the experiences of Senator John McCain to make this same point in an interview, Dr. Gawande stated:

> Solitary confinement is even more damaging than physical torture… John McCain had two and a half years in solitary confinement and had his legs and arm broken during his imprisonment, but he described the two and a half years that he

[127] *Voices from Solitary: "*Where Cold, Quiet and Emptiness Come Together," SOLITARY WATCH (Mar. 16, 2013), http://solitarywatch.com/?s=Where+Cold%2C+Quiet+and+Emptiness+Come+Together.
[128] Atul Gawande, *Hellhole: The United States Holds Tens of Thousands of Inmates in Long-Term Solitary Confinement. Is This Torture?*, NEW YORKER (Mar. 30, 2009), http://www.newyorker.com/reporting/2009/03/30/090330fa_fact_gawande.
[129] *Id.*

spent in solitary confinement as the most cruel component and the most terrifying aspect of what he went under.[130]

The New York Times has published on the deleterious effects of solitary confinement.[131] These articles and opinion pieces by experts draw attention to the abuses of solitary confinements, if not the alternatives available to prison officials to meet the needs of prison discipline and security without jeopardizing the mental health of prisoners.[132] So too has the Washington Post covered the cruel and abusive nature of solitary confinement.[133] Conservative newspaper columnist George Will has decried solitary confinement, writing that "tens of thousands of American prison inmates are kept in protracted solitary confinement that arguably constitutes torture and probably violates the Eighth Amendment prohibition of 'cruel and unusual punishments.'"[134] The Nation has also brought to light the irreparably destructive consequences of solitary confinement. Jean Casella, a media writer and editor, together with journalist James Ridgeway published an article on the findings of Dr. Stuart Grassian, a

Conservative newspaper columnist George Will has decried solitary confinement, writing that "tens of thousands of American prison inmates are kept in protracted solitary confinement that arguably constitutes torture and probably violates the Eighth Amendment prohibition of 'cruel and unusual punishments.'"

[130] *Dr.Atul Gawande: Solitary Confinement Is Torture*, DEMOCRACY NOW! (Jan. 5, 2011), http://www.democracynow.org/2011/1/5/dr_atul_gawande_solitary_confinement_is. For additional information on the findings of mental health experts on the consequences of solitary confinement, *see infra* SECTION ONE, III.A.
[131] Erica Goode, *Prisons Rethink Isolation, Saving Money, Lives and Sanity*, N.Y. TIMES, Mar. 11, 2012, at A1; *The Abuse of Solitary Confinement*, N.Y. TIMES, Mar. 16, 2012, at A26; Lisa Guenther, *The Living Death of Solitary Confinement*, N.Y. TIMES (Aug. 26, 2012), http://opinionator.blogs.nytimes.com/2012/08/26/the-living-death-of-solitary-confinement/?_r=1.
[132] *Id.*
[133] Ruth Marcus, *The Cruelest Punishment*, WASHINGTON POST (Oct. 16, 2012), http://www.washingtonpost.com/opinions/ruth-marcus-why-are-we-subjecting-our-youths-to-solitary-confinement/2012/10/16/76a7bc50-17b6-11e2-9855-71f2b202721b_story.html; Dylan Matthews, *Making Prison Worse Doesn't Reduce Crime. It Increases It*, WASHINGTON POST (Aug. 4, 2012), http://www.washingtonpost.com/blogs/wonkblog/wp/2012/08/24/making-prison-worse-doesnt-reduce-crime-it-increases-it/; *The Harm of Solitary Confinement in Prisons*, WASHINGTON POST (July 1, 2012), http://www.washingtonpost.com/opinions/the-harm-of-solitary-confinement-in-prisons/2012/07/01/gJQAiNqgGW_story.html.
[134] George Will, *When Solitude is Torture*, WASHINGTON POST (Feb. 20, 2013), http://articles.washingtonpost.com/2013-02-20/opinions/37198669_1_solitary-confinement-supermax-prison-suicides.

psychiatrist who studied the impacts of solitary confinement and concluded that it induces a range of significant mental health impairments.[135]

The growing national media attention illuminates a sea change in the attitudes towards prison conditions and particularly solitary confinement. The experts who write and publish on the consequences of extreme isolation provide a foundation for the call to an end of the practice. The irreparable damages to prisoners, the consequences to prison culture and communities, and the financial costs suggest that solitary confinement no longer comports with evolving standards of decency.

B. Expert Data and Findings

1. Mental Health Professionals

For decades now, experts have studied the effects of solitary confinement and have concluded that conditions of extreme isolation cause harm to the mental health of prisoners so confined—often irreparable and always significant. Human beings are meant to spend time with people socializing in an elemental way: "simply to exist as a normal human being requires interaction with other people."[136] Social interaction is a "fundamental human need."[137]

It's a standard psychiatric concept, if you put people in isolation, they will go insane. . . . Most people in isolation will fall apart.

Studies demonstrate that isolation can cause people to become more impulsive as a result of the change in brain functionality attributed to isolation.[138] When placed in solitary

[135] Jean Casella & James Ridgeway, *New York's Black Sites*, THE NATION (July 11, 2012), http://www.thenation.com/article/168839/new-yorks-black-sites.
[136] Gawande, *supra* note 128.
[137] Christy Carnegie Fujio, *et al.*, *Buried Alive: Solitary Confinement in the US Detention System*, PHYSICIANS FOR HUMAN RIGHTS (Apr. 2013) (quoting Gawande, *supra* note 116).
[138] *Solitary Confinement*, NATIONAL GEOGRAPHIC (Apr. 11, 2010), http://channel.nationalgeographic.com/channel/videos/solitary-confinement/.

confinement, many prisoners meet their breaking point. They cannot mentally handle the conditions and end up engaging in self-mutilation and/or attempting suicide.[139] A psychiatrist in California prisons concisely explained: "It's a standard psychiatric concept, if you put people in isolation, they will go insane. . . . Most people in isolation will fall apart."[140] Even just a "short" period of time in extreme isolation can make a prisoner feel as if the walls are closing in[141] and can produce ongoing physiological and psychological harm:[142]

> For many prisoners, the absence of regular, normal interpersonal contact and any semblance of a meaningful social context in these isolation units creates a pervasive feeling of unreality. Because so much of our individual identity is socially constructed and maintained, the virtually complete loss of genuine forms of social contact and the absence of any routine and recurring opportunities to ground thoughts and feelings in a recognizable human context lead to an undermining of the sense of self and a disconnection of experience from meaning. Some prisoners experience a paradoxical reaction, moving from initially being starved for social contact to eventually being disoriented and even frightened by it. As they become increasingly unfamiliar and uncomfortable with social interaction, they are further alienated from others and made anxious in their presence. In extreme cases, another pattern emerges: this environment is so painful, so bizarre and impossible to make sense of, that they create their own reality—they live in a world of fantasy instead. Finally, the deprivations, restrictions, the totality of control, and the prolonged absence of any real opportunity for happiness or joy fills many prisoners with intolerable levels of frustration that, for some, turns to anger, and then even to uncontrollable and sudden outbursts of rage.[143]

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[139] *Hearing on Solitary Confinement Before the S. Judiciary Subcomm. on the Constitution, Civil Rights, and Human Rights* (June 19, 2012) (testimony of Professor Craig Haney) [hereinafter Haney's Testimony], *available at* http://www.judiciary.senate.gov/pdf/12-6-19HaneyTestimony.pdf.

[140] *Written Statement of the American Civil Liberties Union For the Inter-American Comm. on Human Rights: Hearing on Solitary Confinement in the Americas*, ACLU (Mar. 12, 2013) (statement of Jamil Dakwar, Director, Human Rights Program, American Civil Liberties Union) [hereinafter *Solitary Confinement Hearing*] (citing HUMAN RIGHTS WATCH, ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS 149 n. 513 (2003), *available at* http://www.aclu.org/files/assets/aclu_testimony_to_iachr.pdf).

[141] Lisa's Prisoner Interview, *supra* SECTION ONE, 1.A.

[142] *See* Fujio et al., *supra* note 137.

[143] *See* Haney's Testimony, *supra* note 139.

Craig Haney, a psychology professor at the University of California–Santa Cruz and an expert on the psychological effects of solitary confinement, found that "there is not a single published study of solitary or supermax-like confinement in which nonvoluntary confinement lasting for longer than 10 days, where participants were unable to terminate their isolation at will, that failed to result in negative psychological effects."[144] Putting aside the debates about proper responses to address deviant behavior, including appropriate prison sentences for people who break the law, the research demonstrates that it is imperative to consider the consequences of prison discipline so that when individuals finish their time in prison, they may be able to function and contribute as productive members of society.[145]

"There is not a single published study of solitary or supermax-like confinement in which nonvoluntary confinement lasting for longer than 10 days, where participants were unable to terminate their isolation at will, that failed to result in negative psychological effects."

a. **Mental Health Symptoms Resulting from Solitary Confinement**

A large number of prisoners in solitary confinement suffer from psychological and psychiatric conditions as a result of their confinement.[146] With the many studies conducted on the effects of solitary confinement after sixty days, researchers agree that prisoners endure negative psychological effects.[147] Experts who conducted these studies, reviewed clinical materials, and conducted additional research reported that "[t]he overall consistency of these findings – the same or similar conclusions reached by different researchers examining different

[144] *See* Fujio et al., *supra* note 137 (quoting Craig Haney, *Mental Health Issues in Long-Term Solitary and "Supermax" Confinement*, 49 CRIME & DELINQUENCY 124, 132 (2003)).
[145] *Reassessing Solitary Confinement*: *Before the Comm. on S. Judiciary Subcomm. on Constitution, Civil Rights, and Human Rights* (June 19, 2012) (opening statement of Patrick Leahy, Chairman, Senate Judiciary Committee) [hereinafter Leahy].
[146] *See* Haney's Testimony, *supra* note 139 (citing C. Haney, Mental Health Issues in Long-Term Solitary and "Supermax" Confinement, 49 Crime & Delinquency 124-156 (2003)).
[147] *See Solitary Confinement Hearing*, *supra* note 140 (citing Brief of Professors and Practitioners of Psychology and Psychiatry as Amicus Curiae Supporting Respondent at 4, *Wilkinson v. Austin*, 545 U.S. 209 (2005) (No. 04-4995) [hereinafter Brief of Amicus Curiae]. In *Wilkinson*, a unanimous court concluded that the conditions in Ohio's supermax facility, the Ohio State Penitentiary (OSP) gave rise to a liberty interest in avoiding them: "we are satisfied that that assignment to OSP imposes an atypical and significant hardship under any plausible baseline.") *Wilkinson*, 545 U.S. at 223.

facilities, in different parts of the world, in different decades, using different research methods – is striking."[148] In a systematic study conducted by Professor Haney, he discovered that more than seventy-five percent of isolated prisoners in the solitary confinement representative sample suffered from conditions including:

> [S]ignificantly increased negative attitudes and affect, irritability, anger, aggression and even rage; many experience chronic insomnia, free floating anxiety, fear of impending emotional breakdowns, a loss of control, and panic attacks; many report experiencing severe and even paralyzing discomfort around other people, engage in self-imposed forms of social withdrawal, and suffer from extreme paranoia; many report hypersensitivity to external stimuli (such as noise, light, smells), as well as various kinds of cognitive dysfunction, such as an inability to concentrate or remember, and ruminations in which they fixate on trivial things intensely and over long periods of time; a sense of hopelessness and deep depression are widespread; and many prisoners report signs and symptoms of psychosis, including visual and auditory hallucinations.[149]

In Hans Toch's study of over 900 prisoners, including those in solitary confinement, he created the term "Isolation Panic" in order to describe isolated prisoners' experiences.

In Professor Haney's 1993 study of 100 prisoners in Pelican Bay Security Housing Unit, he found that the randomly selected prisoners suffered from psychological trauma: ninety-one percent of the prisoners selected suffered from anxiety and nervousness; eighty percent suffered from "headaches, lethargy and trouble sleeping"; and seventy percent were afraid that they would have a breakdown.[150] In addition to those psychological conditions, prisoners suffer from other conditions: more than fifty percent of the selected prisoners in this Pelican Bay Security Housing Unit study had "nightmares, dizziness and heart palpitations and other mental-health problems caused by isolation, which included ruminations, irrational anger and confused through processes (more than 80% of prisoners sampled), chronic depression (77%), hallucinations (41%) and overall

[148] *See Solitary Confinement Hearing*, *supra* note 140 (citing Brief of Amicus Curiae).
[149] *See* Haney's Testimony, *supra* note 139 (citing Haney, *The Social Psychology of Isolation: Why Solitary Confinement is Psychologically Harmful*, 181 PRISON SERVICE JOURNAL UK (Solitary Confinement Special Issue), 12-20 (2009)).
[150] Shalev, *supra* note 56.

deterioration."[151] "[I]t is not uncommon in these units to encounter prisoners who have smeared themselves with feces, sit catatonic in puddles of their own urine on the floors of their cells, or shriek wildly and bang their fists or their heads against the walls that contain them."[152]

In Hans Toch's study of over 900 prisoners, including those in solitary confinement, he created the term "Isolation Panic" in order to describe isolated prisoners' experiences.[153] "Isolation Panic" symptoms include:

> A feeling of abandonment … dead-end desperation… helplessness, tension. It is a physical reaction, a demand for release or a need to escape at all costs… [Isolated prisoners] feel caged rather than confined, abandoned rather than alone, suffocated rather than isolated. They react to solitary confinement with surges of panic or rage. They lose control, break down, regress....[154]

Prisoners may be aware of their deteriorating mental state. One prisoner, held in solitary confinement for five years, said that he spoke to a fly that stayed in his cell for two days.[155] When the fly flew out of the cell, the prisoner "broke down in tears."[156]

One prisoner, held in solitary confinement for five years, said that he spoke to a fly that stayed in his cell for two days. When the fly flew out of the cell, the prisoner "broke down in tears."

In his keynote address about solitary confinement at the Midwest Coalition on Human Rights, Terry Kupers, a clinical psychiatrist and expert in forensic mental health, listed predictable symptoms that isolated prisoners will most likely suffer when put in solitary confinement. These include: headaches; sleep deprivation; anxiety/panic attacks; anger; dread that anger will lead to further trouble; paranoid; illusion development (because of isolation in a cell); trouble concentrating and thinking; memory

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[151] *Id.*
[152] *See* Haney's Testimony, *supra* note 139.
[153] *See* Shalev, *supra* note 56.
[154] *Id.* (citing Hans Toch, *Mosaic of Despair: Human Breakdown in Prison*, AMERICAN PSYCHOLOGICAL ASSOCIATION (1992).
[155] John D. Sutter, *No Kid Should Be in Solitary Confinement*, CNN, (Apr. 15, 2013, 10:46 AM), http://www.cnn.com/2013/04/15/opinion/sutter-solitary-confinement/index.html?hpt=op_t1.
[156] *Id.*

problems; compulsive acts (cleaning, pacing); and depression (despair because the prisoner thinks that they are never going to get out).[157]

Electroencephalograms (EEGs), which record electrical activity of the brain, show that isolated "prisoners' brain waves shift toward a pattern characteristic of stupor and delirium" after just a few days in solitary confinement.[158] The consequences are further exacerbated when a prisoner suffers sensory deprivation. A study conducted at Montreal's McGill University in 1952 showed that when sensory deprivation is included in the analysis—"when researchers eliminate sight, sound and, with the use of padded gloves, tactile stimulation"—the subjects entered "a hallucinatory state in as little as 48 hours."[159]

Electroencelphalograms (EEGs), which record electrical activity of the brain, show that isolated "prisoners' brain waves shift toward a pattern characteristic of stupor and delirium" after just a few days in solitary confinement.

Through his research and findings, Haney has determined that "all studies of prisoners who have been detained involuntarily in solitary confinement in regular prison settings for longer than ten days have demonstrated some negative health effects[.]"[160] In 1984, Siegel conducted a study on thirty-one people subjected to "isolation, visual deprivation and restraint on physical movement in different situations (hostages, POWs, prisoners) and for varying times[.]"[161] Siegel concluded that within *hours* of being isolated, these people reported visual and auditory hallucinations, which became more critical after some time.[162]

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[157] Dr. Terry Kupers, Keynote Address at The Midwest Coalition for Human Rights Strategic Convening on Solitary Confinement and Human Rights (Nov. 9, 2012).
[158] Jeffry Kluger, *Are Prisons Driving Prisoners Mad?*, TIME MAGAZINE (Jan. 26, 2007), http://www.time.com/time/magazine/article/0,9171,1582304,00.html#ixzz2O8PXI8YE.
[159] *Id.*
[160] *See* Shalev, *supra* note 56.
[161] *Id.*
[162] *Id.*

Even prisoners who did not have any prior history of mental illness will show "severe confusional, paranoid, [] hallucinatory features" and "random, impulsive, often self-directed violence"[1] after time spent in solitary confinement.

Dr. Stuart Grassian, a board-certified forensic psychiatrist, studied prisoners in solitary confinement in the super-max penitentiary in Walpole, Massachusetts.[163] He found that many prisoners had cases of "hyperresponsivity to external stimuli;" "perceptual distortions, illusions, and hallucinations;" "panic attacks;" "difficulties with thinking, concentration, and memory;" "intrusive obsessional thoughts: emergence of primitive aggressive ruminations;" "overt paranoia;" and "problems with impulse control."[164] These symptoms together all form "an acute organic brain syndrome: delirium" that is unique to solitary confinement prisoners.[165] The findings include a low level of alertness and EEG abnormalities.[166] Even prisoners who did not have any prior history of mental illness will show "severe confusional, paranoid, [] hallucinatory features" and "random, impulsive, often self-directed violence"[167] after time spent in solitary confinement.

In the North Carolina Prisoner Survey, prisoners that are or have been in solitary confinement were asked whether they experienced a number of symptoms during their time in solitary confinement.[168] Out of the fifty-one prisoners who promptly responded to the survey: forty-one prisoner got headaches; thirty-three replied that they experienced perceptual distortions and hallucinations; thirty-four had increased anxiety and nervousness; thirty-five experienced revenge fantasies, rage, and irrational fear; twenty-six faced severe and chronic depression; and thirty-two prisoners talked to themselves.[169]

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[163] Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH U. J.L. & POL'Y 325, 333-36 (2006).
[164] *Id.* at 335-36.
[165] *Id.* at 337.
[166] *Id.* at 338.
[167] *See* Fujio *et al.*, *supra* note 137.
[168] North Carolina Prisoner Survey; SHU Questionnaire, Medical 8.
[169] *Id.*

The research and science demonstrates that an isolated prisoner's brain can change rapidly. Studies reveal how difficult it is for these prisoners to function at the same level as before they were sent to solitary confinement. These findings are dramatic and sound an alarm that should be heard by prison officials, judges, and legislatures everywhere. It seems reasonable that prison officials and proponents of prison discipline should agree that prolonged involuntary solitary confinement is significantly risky to these prisoners.[170]

Professor Juan Méndez, UN Special Rapporteur on Torture, has expressed that solitary confinement could not possibly further the penitentiary goals of rehabilitation and reformation of prisoners, since long periods of isolation have the opposite effect.[171] He strongly argues that any use of solitary confinement past fifteen days constitutes torture, or at least cruel, inhuman, or degrading treatment, depending on the circumstances.[172] Looking at the North Carolina Prisons statistical and data analysis, around forty-four percent of prisoners are sent to disciplinary segregation for fifteen days, around thirty-one percent of prisoners are sent for thirty days, and around thirteen percent are sent for forty-five days.[173] However, the amount of days might be more than the record shows because a prisoner could have been demoted to a higher level of security or given a write-up forcing him or her to stay in solitary confinement for a longer period of time. Méndez has called upon both the national and international communities to act upon his proposed fifteen-day maximum limit and issue a ban on any solitary confinement in excess of that amount.[174] In light of the increasing number of studies on the mental health effects of solitary confinement, his recommendations should be acted upon with all due speed.

This study demonstrates that, "[w]ithout sustained social interaction, the human brain may become as impaired as one that has incurred a traumatic injury."

[170] *See* Shalev, *supra* note 56,
[171] U.N. GAOR, *supra* note 55.
[172] *Id.*
[173] North Carolina Prison Statistical and Data Analysis.
[174] *See* U.N. GAOR, *supra* note 55.

b. Physical Effects of Solitary Confinement

Solitary confinement causes physiological changes among prisoners held in extreme isolation and may result in loss of life. For decades, EEG studies have portrayed prisoners' brains with slowing brain waves after a prisoner has spent a week or more in solitary confinement.[175] Comparing EEG results of prisoners in solitary confinement to those EEG-like results of prisoners of war who spent six months in detention camps in the former Yugoslavia, these fifty-seven prisoners of war had brain abnormalities even months after their release.[176] The most severe brain abnormalities were in those prisoners who had suffered head trauma rendering them unconscious and those who were placed in solitary confinement.[177] This study demonstrates that, "[w]ithout sustained social interaction, the human brain may become as impaired as one that has incurred a traumatic injury."[178] Prisoners in segregation may also experience "sleep disturbances, headaches, and lethargy[,] . . . dizziness and heart palpitations"[179] Additional physical effects include: appetite loss, weight loss, digestive problems, "diaphoresis, back and joint pain, deterioration of eyesight, shaking, feeling cold, aggravation of preexisting medical problems[,]" self-harm, and suicide.[180]

Prisoners in solitary confinement are almost more likely to engage in self-harm, self-mutilation and/or suicide.

North Carolina prisoners serving time in solitary confinement suffer these same consequences. Of the fifty-one prisoners in the North Carolina Prisoner Survey: forty-one prisoners have suffered headaches; thirty-eight have problems sleeping; nineteen prisoners have heart palpitations; twenty-four have experienced dizziness; and twenty-five have experienced

[175] *See* Gawande, *supra* note 128.
[176] *Id.*
[177] *Id.*
[178] *Id.*
[179] *See* Fujio et al., *supra* note 137.
[180] *Id.*

appetite loss and weight loss.[181] Prisoners in solitary confinement are almost more likely to engage in self-harm, self-mutilation and/or suicide. From the many studies conducted on the effects of solitary confinement, it can be said that solitary confinement essentially causes suicide.[182] Not all prisoners in solitary confinement engage in self-harm or suicide, but many at least think about it. In the North Carolina Prisoner Survey, twenty-five of the fifty-one respondents admitted that they had thoughts of suicide while in segregation.[183]

Prisoners placed in solitary confinement commit an average of fifty percent of the suicides committed in prisons.

Sandy, a prisoner who spent eleven months in Mcon in a North Carolina correctional institute, confessed that she not only contemplated it, but thought about how she would do it and when she could do it in order to be successful.[184] Prisoners placed in solitary confinement commit an average of fifty percent of the suicides committed in prisons.[185] Both 19th century historical reports and contemporary studies have repeatedly shown acts of suicide and self-mutilation are far more common in solitary confinement where a prisoner is isolated than in general population.[186] For example, in California in 2004, less than ten percent of the state's prison population was in solitary confinement, but seventy-three percent of all suicides in that prison occurred while prisoners were held in isolation.[187] Self-mutilation is so common in solitary confinement because isolation causes extreme frustration and prisoners and have no other

[181] North Carolina Prisoner Survey; SHU Questionnaire, Medical 8.
[182] *See* Kupers, *supra* note 157.
[183] North Carolina Prisoner Survey; SHU Questionnaire, Medical 3.d.
[184] Sandy's Prisoner Interview, *supra* SECTION ONE, I.A.
[185] *See* Kupers, *supra* note 157.
[186] *See* Shalev, *supra* note 56.
[187] *Hearing on Solitary Confinement in the Americas*, ACLU (Mar. 12, 2013) (written testimony of the American Civil Liberties Union for the Inter-American Commission on Human Rights) [hereinafter ACLU Written Testimony], *available at* http://www.aclu.org/files/assets/aclu_testimony_to_iachr.pdf (citing Expert Report of Professor Craig Haney at 45-46 n. 119; *Coleman v. Schwarzenegger*, 2008 WL 8697735 (E.D. Cal. 2010) (No: Civ S 90-0520 LKK-JFM P)).

Prisoners notice permanent and long-term changes in each other when someone is released from solitary confinement and placed back in general population.

physical outlet except self-addressed aggression.[188] A different research study concluded that extremely isolated prisoners engaged in self-mutilation as a means to "liberate the self from unbearable tension – the physical pain becomes a compensatory substitute for psychic pain or shame.[189] Former prisoners who were in solitary confinement and engaged in this type of self-harm have testified that they did so because "it asserted that they were still alive."[190]

c. Long-Term Effects of Solitary Confinement

Research suggests that the consequences of solitary confinement including "sleep disturbances, nightmares, depression, anxiety, phobias, emotional dependence, confusion, impaired memory and concentration" endure well after a prisoner is released from conditions of extreme isolation environments.[191] In a 1983 solitary confinement prisoner study in Massachusetts where state legislation requires prisoners be taken out of solitary confinement for at least twenty-four hours once every fifteen days, Dr. Grassian reported a reduction of symptoms associated with solitary confinement during the periods when prisoners were allowed to have social contacts.[192] These studies may imply some irreversibility, but the long-term effects of solitary confinement endure and are manifested "in social settings and with interpersonal relationships."[193]

Once released, many prisoners find themselves without the social skills needed to live a "normal" life and cannot recover. They report that they "continue to live in relative social

[188] *See* Shalev, *supra* note 56.
[189] *Id.* (citing DABROWSKI (1937), cited in MCCLEERY 303, (1961)).
[190] *Id.*
[191] *Id.*
[192] *Id.*
[193] *Id.*

isolation after their release."[194] Prisoners notice permanent and long-term changes in each other when someone is released from solitary confinement and placed back in general population. Whether it be prisoners feeling discomfort around others and thus "choosing" to remain isolated, continued suicide attempts even out of segregation, newly developed phobias, or a "blankness," prisoners released from solitary confinement are never the same as they were before, nor will they ever be again.[195] Prisoner 15, a prisoner at a correctional institution in North Carolina, describes his feeling after his transition into general population from solitary confinement as "vulnerable."[196] He felt anxious, nervous, and paranoid.[197] Due to his extremely limited human interaction in solitary confinement, he has trouble maintaining eye contact since he is not used to seeing the person with whom he is speaking.[198] He struggles to hold a conversation and touching his family during visitation feels unnatural to him.[199]

Anthony Graves, a wrongfully convicted person who was in solitary confinement on death row in Texas, further explains how solitary confinement breaks down a person's sprit and will to live.[200] He describes how he still has difficulty being around people without feeling overcrowded and uncomfortable because he spent ten or his eighteen years that he was incarcerated without having any physical contact with any other person.[201] Even though years have passes since his release, Anthony still has not had a good night's rest. Neither his mind nor his body have adjusted and he has suffered mood swings and emotional breakdowns.[202] After

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[194] *Id.*
[195] Sandy's and Lisa's Prisoner Interviews, *supra* SECTION ONE, I.A.
[196] Prisoner 15's North Carolina Prisoner Survey response.
[197] *Id.*
[198] *Id.*
[199] *Id.*
[200] *Reassessing Solitary Confinement*: *Before the Comm. on S. Judiciary Subcomm. on Constitution, Civil Rights, and Human Rights* (June 19, 2012) (statement of Anthony C. Graves, Founder, Anthony Believes) [hereinafter Anthony Believes].
[201] *Id.*
[202] *Id.*

Anthony was released, he visited another prisoner on death row before his execution. The prisoner told Anthony that he was ready for what was about to happen and that "[h]e would rather die than continue existing under such inhumane conditions."[203]

These narratives demonstrate that the United States prison system is failing in its goal to rehabilitate offenders and to assure that they successfully reintegrate into society upon their release.

These narratives demonstrate that the United States prison system is failing in its goal to rehabilitate offenders and to assure that they successfully reintegrate into society upon their release.[204] Instead, solitary confinement is making it more difficult and more dangerous when prisoners are released from prison and reintegrated into the real world beyond the prison gates. As Senator Patrick Leahy argued, if prisons give prisoners "the tools to better themselves through job skills training, treatment and counseling, and support for transitional housing programs designed to ease the reentry process," not only will the prisoners be positively affected, but so will the community upon release.[205] Solitary confinement accomplishes none of these goals.

d. Solitary Confinement and Mentally Ill Prisoners

The effects of solitary confinement are far more damaging when the prisoners involved are mentally ill.[206] Terry Kupers often testifies as an expert about the needs of mentally ill prisoners and mental health services in prisons.[207] He has described how mental health episodes are often met with punishment[208] since corrections officers often do not understand mentally ill prisoners and why they may react in the way that they do. "By definition, someone who is

[203] *Id*.
[204] *See* Shalev, *supra* note 56,
[205] *See* Leahy, *supra* note 145.
[206] *Id*.
[207] *See* Kupers, *supra* note 157.
[208] *Id*.

psychotic has difficulty understanding and following orders."[209] Since corrections officers just look at them as "bad" instead of sick, they give them "write-ups" for rule violations as a way to manage them with as little effort as possible on the part of the prison system.[210] By making their job easier, the corrections officers "exacerbate[] the underlying mental illness of the inmates, driving them deeper and deeper into mental illness."[211]

The process is cyclical: if a prisoner has behavioral problems, he or she cannot control his or her behavior and, therefore, cannot show good behavior to get out.

Prisoners in solitary confinement will be allowed out for good behavior at the end of their punishment sentence, but when people have behavioral problems to begin with, they are not often able to control their behavior in ways that allow them to get out.[212] An U.S. Department of Justice special report on mental health problems of prisons and jails found that those prisoners with mental health problems were more likely to break rules.[213] The process is cyclical: if a prisoner has behavioral problems, he or she cannot control his or her behavior and, therefore, cannot show good behavior to get out.[214] A prisoner recalls:

> [A] prisoner in New Mexico who was floridly psychotic . . . used a makeshift needle and thread from his pillowcase to sew his mouth completely shut. Prison

[209] *Reassessing Solitary Confinement*: *Before the Comm. on S. Judiciary Subcomm. on Constitution, Civil Rights, and Human Rights* (June 19, 2012) (statement of Pat Nolan, President, Justice Fellowship) [hereinafter Nolan].
[210] *Id.*
[211] *Id.*
[212] Interview with prison psychologist (Feb. 27, 2013).
[213] Doris J. James & Lauren E. Glaze, *Mental Health Problems of Prison and Jail Inmates*, Bureau of Justice Statistics Special Report, U.S. DEP'T OF JUSTICE (Sept. 2006, revised Dec. 14, 2006), *available at* http://bjs.gov/content/pub/pdf/mhppji.pdf. "Among State prisoners, 58% of those who had a mental health problem, compared to 43% of those without, had been charged with rule violations. . . . An estimated 24% of State prisoners who had a mental health problem, compared to 14% of those without, had been charged with a physical or verbal assault on correctional staff or another inmate. Among Federal prisoners who had a mental health problem, 15% had been charged with a physical or verbal assault on correctional staff or another inmate compared to 7% of those without a mental problem." *Id.* "In South Carolina mentally ill inmates are twice as likely to be in solitary confinement as inmates without mental illness (15.81% v. 7.85%); two and a half times as likely to receive a sentence in solitary that exceeds their release date from prison (4.65% v. 1.86%); and over three times as likely to be assigned to an indefinite period of time in solitary (8.66% v. 2.78%)." *Reassessing Solitary Confinement*: *Before the Comm. on S. Judiciary Subcomm. on Constitution, Civil Rights, and Human Rights* (June 19, 2012) (statement of Stuart M. Andrews, Jr., Partner, Nelson Mullins Riley & Scarborough LLP).
[214] Interview with prison psychologist (Feb. 27, 2013)

> authorities dutifully unstitched him, treated the wounds to his mouth, and then not only immediately returned him to the same isolation unit that had caused him such anguish but gave him a disciplinary infraction for destroying state property (i.e., the pillowcase), thus ensuring that his stay in the unit would be prolonged.[215]

The studies and the North Carolina survey demonstrate that the use of solitary confinement as a way of responding to the symptoms of mentally ill prisoners is cruel and irrational.

The issue of mentally ill prisoners and solitary confinement does not only pertain to prisoners with pre-existing diagnosed conditions. As the research demonstrates, if a prisoner enters solitary confinement without mental illness, he or she may develop psychological problems and become psychotic.[216] Despair is a common symptom of being in isolation, but it also causes prisoners to lose control of their behavior resulting in further infractions and extended punishment in solitary confinement.[217] Another prisoner explains the cycle beginning with a prisoner getting stressed.[218] He then cannot sleep and changes his eating habits.[219] The prisoner then becomes obsessed about the isolation and craves attention.[220] He will commonly act out in some way earning an infraction, which keeps him in isolation longer, and the cycle continues.[221]

Prisoners with mental health problems in North Carolina suffer from a significant lack of services and from the impositions of conditions that surely exacerbate their mental illnesses. In October 2012, Dr. Jeffrey Metzner and Dr. Dean Aufderheide submitted their report and findings on the Central Prison Healthcare Complex in Raleigh, North Carolina.[222] The report found that twenty-one percent of those prisoners occupying beds in segregated housing were prisoners

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[215] *See* Haney's Testimony, *supra* note 139.
[216] *Reassessing Solitary Confinement*: *Before the Comm. on S. Judiciary Subcomm. on Constitution, Civil Rights, and Human Rights* (June 19, 2012) (opening statement of Dick Durbin, Chairman, Judiciary Committee) [hereinafter Durbin].
[217] *See* Kupers, *supra* note 157.
[218] Malik's interview, *supra* SECTION ONE, I.A.
[219] *Id.*
[220] *Id.*
[221] *Id.*
[222] *See* Metzner & Aufderheide, *supra* note 18.

receiving some type of mental health treatment.[223] Their findings demonstrate that given the prevalence of mental health patients in solitary confinement, better mental health services are required.[224] Currently, there is a significant deficit in the provision of mental health services as demonstrated by the number of vacant positions negatively impacting the health and well-being of mentally ill prisoners.[225] Dr. Metzner and Dr. Aufderheide made a number of suggestions pertaining to staffing and mental health infrastructure and addressed treatment needs for mentally ill prisoners.[226]

Solitary confinement makes our criminal justice system the criminal.

The studies and the North Carolina survey demonstrate that the use of solitary confinement as a way of responding to the symptoms of mentally ill prisoners is cruel and irrational. Similarly, the failure to recognize and then appropriately respond to prisoners whose mental health deteriorates as a result of solitary confinement perpetuates a cycle of dysfunction and inappropriate discipline. Senator Dick Durbin who has called for a study of the use of solitary confinement in federal prisons has stated that severely mentally ill prisoners "require intensive monitoring and treatment, the exact opposite of isolation."[227] Solitary confinement is particularly inappropriate for prisoners with pre-existing mental illnesses or for those whose mental health deteriorates as a result of such confinement.

Anthony Graves states the problem this way: "Solitary confinement makes our criminal justice system the criminal."[228] Because of extreme isolation, a prisoner's social skills deteriorate during the period of his confinement, and by the time the prisoner is released, the lack of activity and rehabilitation affects him in dramatic and most often irreparable ways. Many

[223] *Id.*
[224] *Id.*
[225] *Id.*
[226] *See supra* note 84 and accompanying text.
[227] *See* Durbin, *supra* note 216.
[228] *See* Anthony Believes, *supra* note 200.

prisoners leave solitary confinement "damaged and functionally disabled, and some are understandably enraged by the ways in which they have been mistreated."[229] The long-term consequences of solitary confinement will continue to affect those who were subjected to this form of punishment that has been recognized as tantamount to torture well after they are released back into our communities.

In the field of criminology, there exists a vast body of literature exploring—and ultimately condemning—the excessive use of solitary confinement now practiced in the United States.

The studies and research findings by mental health experts described above together with the North Carolina Prisoner Survey findings underscore the need to implement the Special Rapporteur on Torture's recommendations to limit solitary confinement to no more than fifteen days. If implemented, such recommendations would be an incremental measure toward mitigating the consequences of solitary confinement. Ultimately, however, it is incumbent on government and prison officials to allocate sufficient and proper resources so that prisons might develop the means to discipline as well as rehabilitate prisoners, and to treat the mentally ill who are incarcerated without ever confining anyone to conditions of extreme isolation. In sum, it is imperative to ban solitary confinement as an unacceptable practice in all situations.

2. Solitary Confinement: A Criminological Perspective

In the field of criminology, there exists a vast body of literature exploring—and ultimately condemning—the excessive use of solitary confinement now practiced in the United States. While employed in the past to achieve the reformation of the convict or the modification of the prisoner's behavior, the present aim of using solitary confinement in prisons is to isolate

[229] *See* Haney's Testimony, *supra* note 139.

and incapacitate prisoners.[230] However, not only does the use of solitary confinement in prisons fail to adequately meet its stated goals, it incurs a disproportionately high cost to individual prisoners, the prison staff assigned to control them, and the community it is meant to keep safe.

a. How Solitary Confinement Came Into Being

To best understand how the use of solitary confinement fails as a widespread penal strategy, it is necessary to understand the underlying dynamics that have permitted the practice to develop into its current state.

(1). Origins of Solitary Confinement

The practice of solitary confinement in the United States first arose as a result of a well-intentioned penal reformation movement in the early nineteenth century. In Pennsylvania, community leaders became concerned with the reformation of society's convicts. Believing that the root cause of these convicts' evil was not inherent to the individual, but rather a result of having been exposed to the evils of modern society, convicts began to be housed in monk-like solitary cells in an effort to "ensure the absolute and total isolation of the offender from any evil and corrupting influences."[231] Indeed, the enforced isolation was meant to have the added benefit of giving the convict time to reflect on his crimes and become penitent.[232] Yet the effects of such extreme isolation soon made themselves known. After eighty-three prisoners were placed in "small cells with no exercise and no work," the result was "a series of self-mutilations,

[230] *See* Sharon Shalev, SUPERMAX: CONTROLLING RISK THROUGH SOLITARY CONFINEMENT 24-25 (2009).
[231] *See* Grassian, *supra* note 163, at 340.
[232] Shalev, *supra* note 56, at 339-40 (citing Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 140 AM. J. PSYCHIATRY 1450 (2006)); Bruce A. Arrigo & Jennifer Leslie Bullock, *The Psychological Effects of Solitary Confinement on Prisoners in Supermax Units : Reviewing What We Know and Recommending What Should Change*, 52 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 622, 623 (2008). The early goal of encouraging penitence in convicts is the origin of the term "penitentiary." *Id.* (citing Robert Rogers, *Solitary Confinement*, 37 J. OFFENDER THERAPY & COMP. CRIMINOLOGY 339 (1993)).

suicides, and other deaths."[233] The Supreme Court roundly condemned the practice of solitary confinement in 1890, describing it as a "punishment of the most important and painful character."[234]

However, interest in using solitary confinement in prisons reemerged. Following the return of several American POWs during the Korean War, psychologists began exploring the potential impact of solitary confinement.[235] The POWs' experiences intrigued researchers because of the potential brainwashing effect of solitary confinement.[236] Indeed, it was this potential that caught the imagination of penologists, who thought to apply the experience in a positive fashion by utilizing such brainwashing as a form of behavior modification for prisoners.[237]

(2). Goals of Solitary Confinement

Though the earliest uses of solitary confinement were for the purposes of reform in the case of the nineteenth-century Pennsylvania prison model and rehabilitation in the case of

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[233] Robert Rogers, *Solitary Confinement*, 37 J. OFFENDER THERAPY & COMP. CRIMINOLOGY 339, 339 (1993). "In less than a year five of the eighty-three had died, one became an idiot, another, when his door opened for some chance purpose, dashed himself from the gallery into the fearful area below, and the rest, with haggard looks and despairing voices, begged pitifully to be taken back to the shops and set to work. This was suffering applied to both the body and mind." HENRY HALL, THE HISTORY OF AUBURN 351 (1869).

[234] *See In re* Medley, 134 U.S. 160, 170 (1890). In condemning the use of solitary confinement, the Court described the adverse effects of its use:

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

Id. at 168. See *supra* SECTION TWO, I.A for further discussion of *In re Medley* and the development of the Eighth Amendment.

[235] *See* Shalev, *supra* note 56, at 17.

[236] *See id*.

[237] *See id.* A particular advocate of this technique was Edgar Schein, a Massachusetts Institute of Technology psychologist. At a conference of prison wardens in 1962, he advocated "think[ing] of brainwashing, not in terms of politics, ethics or morals, but in terms of the deliberate changing of human behavior and attitudes by a group of men who have relatively complete control over the environment in which the captive populace lives.'" Attending the conference was Dr. Martin Groder, a psychiatrist who had the opportunity to try these techniques when helping develop the infamous H-Unit at the federal penitentiary in Marion, Illinois. Marion's H-Unit was the precursor to the Marion prison becoming the nation's first "supermax" institution. *Id.* at 18; *see also supra* notes 26-29 and accompanying text..

behavior modification in the 1960s,[238] neither of these purposes spawned the aggressive growth of solitary confinement that has taken place in the last three decades. Rather, the purpose is *incapacitation*, which has resulted in the widespread overuse of solitary confinement seen today.

Today, the principal goals of solitary confinement and supermax prison facilities are generally articulated "in terms of their usefulness as tools for managing prison estates."[239] The most prominent goals are prison safety—controlling risk by incapacitating potentially dangerous prisoners—and deterrence of disruptive or violent prisoner behavior.[240] The basic theory underlying the use of solitary confinement is that removing dangerous individuals from the general population will limit their opportunity to commit institutional violence.[241]

The consequences of premising the use of solitary confinement on the goal of incapacitation are extensive. Numerous criminologists have observed that "[s]uch a mindset endorses harsher punishments, stricter regulations, and tougher sentences for offenders."[242]

The amorphous definition of what may constitute a threat therefore invites prison officials to over-admit prisoners to long-term solitary confinement in supermax facilities.

The focus on incapacitation is articulated as an extension of the broad goal of ensuring prison safety. It leads to an over-inclusive admissions policy for sending prisoners to long-term solitary confinement.[243] The majority of states list "threat to institutional safety" as an admission criteria

[238] Though the underlying aim of solitary confinement in the 1960s and 1970s was rehabilitation of the prisoner, it was not necessarily viewed to be the direct effect. Rather, penologists sought to use isolation "to make prisoners more docile and susceptible to rehabilitation programs." *Id.* at 19.
[239] *Id.* at 47.
[240] *Id.*
[241] *See* Chad S. Briggs, *et al.*, *The Effect of Supermaximum Security Prisons on Aggregate Levels of Institutional Violence*, 41 CRIMINOLOGY 1341, 1345 (2003).
[242] H. Daniel Butler, *et al.*, *What Makes You the "Worst of the Worst?" An Examination of State Policies Defining Supermaximum Confinement*, 20 CRIM. JUST. POL'Y REV. 1, 3 (2012).
[243] *See id.* at 13.

to supermax facilities.[244] The abstract wording of this characteristic is actually relied upon by a number of states, with the effect of it becoming a broad catchall phrase.[245] The amorphous definition of what may constitute a threat therefore invites prison officials to over-admit prisoners to long-term solitary confinement in supermax facilities. An additional consequence of focusing on the incapacitation of prisoners includes their dehumanization, an effect that is discussed below.[246]

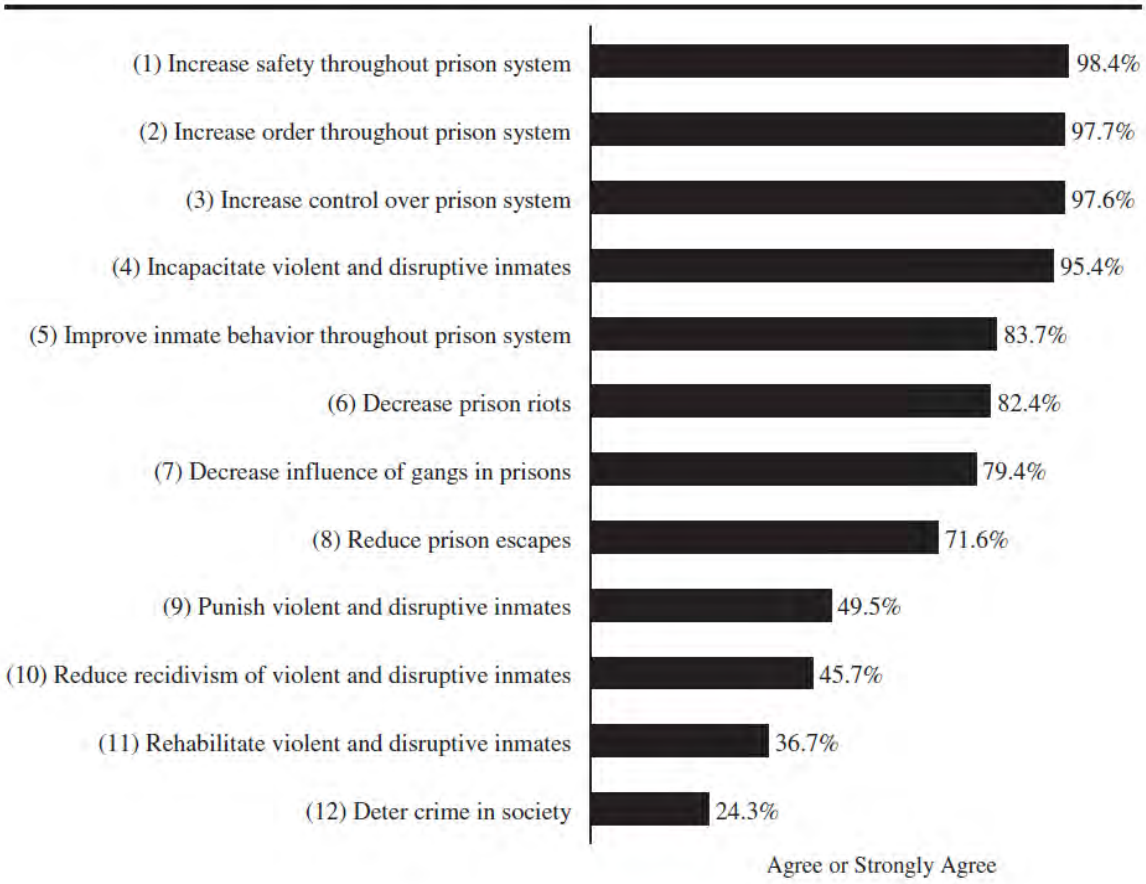
Over the last three decades, the United States has experienced an aggressive growth in the use of solitary confinement.

In 2006, Daniel Mears and Jennifer Castro reached out to almost one thousand prison wardens nationwide, both state and federal, to learn their views on the use of supermax prisons.[247] Of particular interest, responding wardens were asked about the goals of supermax prisons.[248] Over 95% of responding prison wardens viewed the goal of supermax prisons to include: (1) increased safety throughout the prison system; (2) increased order throughout the prison system; (3) increased control over the prison system; and (4) incapacitating violent and disruptive prisoners.[249] Just below these top four reported goals, deterrence—articulated here as improving prisoner behavior throughout the prison system—was listed as a goal by 83.7% of prison wardens.[250] Only 49.5% of responding wardens reported punishment of violent and disruptive prisoners as a goal of supermax prisons. The three lowest-reported goals were: (1) reducing recidivism of violent and disruptive prisoners (45.7%); (2) rehabilitating violent and disruptive prisoners (36.7%); and (3) deterring crime in society

[244] *Id.* at 11-12. Ninety-eight percent of states, or 41 of the 42 states represented in a study, listed "threat to institutional safety" as an admissions characteristic. *Id.*
[245] *Id.* at 13-14.
[246] *See* SECTION ONE, II B.
[247] Daniel P. Mears & Jennifer L. Castro, *Wardens' Views on the Wisdom of Supermax Prisons*, 52 CRIME & DELINQUENCY 398, 408 (2006). Of the 948 wardens to whom questionnaires were sent, 601 responded. *Id.* at 403.
[248] See below for a graphical representation of these figures is provided.
[249] *Id*. Strikingly, the three higher-rated concerns of system-wide safety, order and control were slightly more predominant (over 97%) than the goal of incapacitating individual prisoners (95.4%). *Id.*
[250] Mears & Castro, *supra* note 247, at 408.

(24.3%).[251] That only 37% of wardens view supermax prisons as having any rehabilitative purpose is a striking affirmation of the observation that the present purpose of solitary confinement is now very far removed from its original purposes.

State Prison Warden Views About the Goals of Supermax Prisons[252]



(3). Ideologies and Politics Leading to the Rise of Solitary Confinement

Over the last three decades, the United States has experienced an aggressive growth in the use of solitary confinement.[253] In a period spanning less than ten years, the total number of

[251] *Id.*
[252] *Id.*
[253] Butler *et al.*, *supra* note 242, at 3.

states with supermax facilities increased from thirty-four to forty-four.[254] Its rapid rise is the result of a confluence of ideologies and politics that have led the nation down this dark path.

The prison facility credited with being the nation's first "supermax" facility is the federal penitentiary in Marion, Illinois. The Marion prison opened in 1963 to replace Alcatraz, which had until that point been viewed as "the prison system's prison."[255] In 1978, the prison was reclassified as the nation's highest-security prison, with the express purpose of "provid[ing] long-term segregation within a highly controlled setting for prisoners who threatened or injured other prisoners or staff, possessed deadly weapons or drugs, disrupted the orderly operation of a prison, [or] escaped or attempted to escape."[256] In the following years, the prison "increased its use of solitary confinement to coerce prisoners to participate in therapy and to control dissident convicts."[257] The average length of time prisoners spent in solitary confinement increased along with the overall number of prisoners being confined to solitary confinement.[258] In response to a prison revolt in 1983, the entire prison facility entered into a permanent "lock-down" status.[259] It is this moment of lock-down that is seen as "the birth of the supermax doctrine."[260]

[254] *Id.* at 3 (citing figures from Roger King, *The Rise of Supermax: An American Solution in Search of a Problem?* 1 PUNISHMENT & SOC'Y 163 (1999), and Daniel P. Mears, URBAN INSTITUTE – JUSTICE POLICY CENTER, EVALUATING THE EFFECTIVENESS OF SUPERMAX PRISONS (2006)).
[255] *A Brief History of Alcatraz*, FEDERAL BUREAU OF PRISONS, http://www.bop.gov/about/history/alcatraz.jsp (last visited Apr. 14, 2013).
[256] Shalev, *supra* note 56, at 20.
[257] Arrigo & Bullock, *supra* note 232, at 624.
[258] *Id.*
[259] Shalev, *supra* note 56, at 21.
[260] *Id*.

The popularity of using solitary confinement as a prison management tool is most simply explained by the sharp rise in prison populations and prison officials' not-unjustified concerns about prison management. The "war on drugs" in the 1980s and early 1990s quickly began filling prisons, despite the fact that crime rates were actually falling during this time period.[261] The increasing prison populations led to a rise in "problematic" prisoners, and wardens became concerned.[262] It was claimed that to manage the ever increasing prison populations, "chronically disruptive prisoners . . . had to be isolated and tightly controlled for long periods of time, as short-term solitary confinement had failed to control them in the past."[263] It was reported that prison wardens visiting the Marion supermax facility commented that they "had died and gone to heaven."[264]

This rise in incarceration rates accompanied a "mean season" of corrections, where "what passed for 'penal philosophy' amounted to little more than devising 'creative strategies to make offenders suffer.'"

This rise in incarceration rates unfortunately accompanied a "mean season" of corrections, where "what passed for 'penal philosophy' amounted to little more than devising 'creative strategies to make offenders suffer.'"[265] Supermax prisons were emerging in "an era in which many politicians and members of the public were indulging a powerful 'rage to punish.'"[266] Crime was seen as "residing entirely in the internal makeup of the persons who engage in it," that their "badness or wickedness" was "intractable," and thus, "there was no hope for reform, rehabilitation, or redemption."[267] The result of this jaded perspective and sharp move away from believing that prisoners could be rehabilitated was the growing perception that

[261] *See* Butler *et al*., *supra* note 242, at 2.
[262] *Id*.
[263] Shalev, *supra* note 56, at 22.
[264] *Id*. at 21 (citing David A. Ward & Thomas G. Werlich, *Alcatraz and Marion: Evaluating Supermaximum Custody*, 5 PUNISHMENT & SOC'Y 53, 59 (2003)).
[265] Craig Haney, *A Culture of Harm: Taming the Dynamics of Cruelty in Supermax Prisons*, 35 CRIM. JUST. & BEHAV. 956, 961-62 (2008).
[266] *Id*. at 961.
[267] *Id*. at 962.

"continued troublemaking inside prison could indicate only one thing: that this particular prisoner was even worse—'more wicked'—than the others and therefore in need of being punished even more."[268]

(4) Current Status: The Supermax Boom

Conditions in long-term solitary confinement are deliberately calculated to "raise the punishment close to that of psychological torture."

Today, the use of solitary confinement in the United States has reached its zenith. There are more than 80,000 individuals being held in solitary confinement across the nation, when in 1995 this number measured only 57,000.[269] Forty-four states house supermax facilities for long-term solitary confinement.[270] The rapid growth of supermax facilities has been fueled by political engines that are seeking to appear "tough on crime."[271] It is easier to keep recalcitrant prisoners in jail than it is to work for their rehabilitation. With the sharp rise in prison populations nationwide, solitary confinement has become the primary tool for managing the nation's prison populations.[272] While a number of states are taking positive steps to reduce the numbers of prisoners held in solitary confinement, such as Mississippi and New York, they are only doing so after being prompted by legal action. And in April 2013, President Barak Obama announced his support for the proposed opening and operation of an additional federal supermax prison in Thomson, Illinois.[273]

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[268] *Id.*
[269] Written Testimony of Michael Jacobson, President & Director of Vera Institute of Justice, submitted to the Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights Hearing on Solitary Confinement (June 19, 2012), *available at* http://www.vera.org/files/michael-jacobson-testimony-on-solitary-confinement-2012.pdf.
[270] Daniel P. Mears, URBAN INSTITUTE – JUSTICE POLICY CENTER, EVALUATING THE EFFECTIVENESS OF SUPERMAX PRISONS 4 (2006), *available at* http://www.urban.org/UploadedPDF/411326_supermax_prisons.pdf.
[271] *See* Butler, *et al*., *supra* note 242, at 2.
[272] *See* Arrigo & Bullock, *supra* note 232, at 623.
[273] *Obama Seeks Funding to Reopen Thomson Prison*, CORRECTIONAL NEWS (Apr. 17, 2013), http://www.correctionalnews.com/articles/2013/04/17/obama-seeks-funding-reopen-thomson-prison.

b. A Criminological Perspective: Conditions and Effects

> Reflect for a moment on what a small space that is not much larger than a king-sized bed looks, smells, and feels like when someone has lived in it for 23 hours a day, day after day, for years on end . . . odors linger, and the air is sometimes heavy and dank.[274]

Conditions in long-term solitary confinement are not warm, comforting, or cozy. They are deliberately calculated to "raise the punishment close to that of psychological torture."[275] The atmosphere is "antiseptic and sterile; you search in vain for humanizing touches or physical traces that human activity takes place there."[276] These "stark, severe and highly controlled environments" are justified as "absolutely necessary for managing dangerous and high-risk prisoners and to ensure prison security." [277] As Craig Haney, a psychologist who has studied the psychological effects of solitary confinement for over thirty years,[278] explains,

> Supermax prisons are built on a model of profound deprivation. They are structured to deprive prisoners of most of the things that all but the most callous commentators would concede are basic necessities of life—minimal freedom of movement, the opportunity to touch another human being in friendship or with affection, the ability to engage in meaningful or productive physical or mental activity, and so on. . . . [It] is nearly impossible for supermax prisoners to eke out a meaningful life . . . as opposed to a mere existence.[279]

Isolation and control are but two of the principles governing the construction of segregation cells. As Sharon Shalev observes, "when it comes to the 'worst of the worst,' isolation is seen as a necessary but insufficient measure."[280] Thus, provisions are extremely restricted and belongings are heavily regulated. The control and restriction of food is one

[274] Haney, *supra* note265, at 968.
[275] Shalev, *supra* note 56, at 133 (citing Norval Morris, *Prisons in the USA: Supermax – The Bad and the Mad*, *in* PRISON ARCHITECTURE: POLICY, DESIGN AND EXPERIENCE (Leslie Fairweather & Sean McConville eds., 2000).
[276] *Id.* (citing Craig Haney, *Infamous Punishment: The Psychological Consequences of Isolation*, 9 NAT'L PRISON PROJECT J. 3 (1994)).
[277] *Id.* at 22-23.
[278] *See* Haney's Testimony, *supra* note 139.
[279] Haney, *supra* note265, at 967.
[280] Shalev, *supra* note 56, at 144.

example. Prisoners in solitary confinement are served different food from the general population, which is often justified in terms of safety. Yet prisoners in solitary confinement in North Carolina are never served meat with their breakfast, which for many prisoners is supposed to be "the best meal of the day."[281] The rationale behind this deprivation is to keep prisoners' calorie-count down, as they exert less energy through-out the day.[282] Some commenters assert these food restrictions serve a punitive purpose.[283]

(1). A "Toxic Ideological Atmosphere"[284]

The inherent dynamics within a solitary confinement housing unit are unique in this world. The extensive control exercised over every aspect of a prisoner's life in solitary confinement results in an atmosphere that can only be described as toxic. What's more, it is the very philosophy and base assumptions that underlie solitary confinement facilities that are poisonous—a phenomenon that Craig Haney, in his much-cited article on supermax prison facilities entitled "A Culture of Harm," describes as "ideological toxicity."[285]

At its foundation, solitary confinement facilities are intended to house "the worst of the worst."[286] The very construction of a long-term solitary confinement facility is designed so that prisoners receive as little human contact as possible.[287] Prisoners are typically kept in pods, which are specifically arranged so that corrections officers may observe every cell from a central vantage point—a feature that drastically reduces the amount of human contact prisoners receive on a daily basis.[288] The lack of contact between prisoners and corrections officers, the extensive

[281] *See supra* SECTION ONE, I.A.
[282] *See supra* SECTION ONE, I.A.
[283] *See* Shalev, *supra* note 56, at 146.
[284] Haney, *supra* note 265, at 961.
[285] *Id.* at 958.
[286] *Id.* at 963; Arrigo & Bullock, *supra* note 232, at 626.
[287] *See* Shalev, *supra* note 56, at 102.
[288] *Id.*

control that corrections officers exercise over every aspect of prisoners' lives, and the presumption that those who are sent to solitary confinement are "the worst of the worst" contribute to a base dehumanization of prisoners housed in solitary confinement.[289] As Haney describes,

> The "worst of the worst" designation defines the inhabitants of supermax as fundamentally "other" and dehumanizes, degrades, and demonizes them as essentially different, even from other prisoners. It provides an immediate, intuitive, and unassailable rationale for the added punishment, extraordinary control, and severe deprivation that prevail in supermax.[290]

This dehumanization perpetuates another myth: "the notion that they are somehow impervious to the pains of imprisonment."[291] The effects of this ideology cannot be underscored enough. Prisoners are presumed to be inherently bad or wicked, with "no hope for reform, rehabilitation, or redemption."[292]

The effect of prisoners being labeled "the worst of the worst," with no hope for redemption or rehabilitation, cannot come as a surprise. Indeed, the "self-fulfilling prophecy" is a well-documented psychological phenomenon, where individuals who are treated as if they possess certain characteristics, even when they do not possess such characteristics, will develop or exacerbate such characteristics as a direct result of the treatment.[293] Yet even though it is the public's impression and the impression of many corrections officers that solitary confinement is filled with "the vilest and most despicable offenders in the U.S. penal system," this is generally not the case.[294] The vast majority of prisoners held in solitary confinement arrive there because they commit a number of nonviolent disciplinary infractions, were perhaps involved in a single

[289] *See id.*; Haney, *supra* note 265, at 963.
[290] Haney, *supra* note 265, at 963.
[291] *Id.*
[292] *Id.* at 962.
[293] *See* Kate King, *et al.*, *Violence in the Supermax: A Self-Fulfilling Prophecy*, 88 PRISON J. 144, 162 (2008).
[294] *See* Arrigo & Bullock, *supra* note 232, at 626.

fight, or have been identified as members of a gang.[295] When prisons place these individuals in solitary confinement and then treat them as "the worst of the worst," the toxic assumptions that underlie the prison's treatment of these prisoners may in fact be teaching them to behave as we expect.

(2). Prison Staff

As reported in a 1999 study conducted by the U.S. Department of Justice's National Institute of Corrections, it is widely recognized that staffing is the "single most important factor in ensuring safe, secure, and humane operations" in solitary confinement facilities.[296] Yet within the isolation units of solitary confinement, there is a heightened potential for abuse that is exacerbated by the general dehumanization of these prisoners discussed above.[297]

When prisons place these individuals in solitary confinement and then treat them as "the worst of the worst," the toxic assumptions that underlie the prison's treatment of these prisoners may in fact be teaching them to behave as we expect.

Inherent to the nature of solitary confinement facilities being generally removed from public scrutiny, prison staff working in solitary confinement facilities have more leeway in their treatment of prisoners. This, coupled with the "exercise of power [as] a defining characteristic of correctional facilities," results in a constant potential for abuse.[298] Any abuse that occurs is underscored by a general presumption—an extension of prisons viewing prisoners in solitary as "the worst of the worst"—that whatever happens in solitary confinement, including any "extreme or abusive behavior on the part of the guards," is "invariably the prisoners' fault, a

[295] *Id*.
[296] Chase Riveland, NATIONAL INSTITUTE OF CORRECTIONS, SUPERMAX PRISONS: OVERVIEW AND GENERAL CONSIDERATIONS 16 (1999), *available at* http://static.nicic.gov/Library/014937.pdf.
[297] *See* SECTION ONE, II B. 2.(b) .
[298] *See* Arrigo, & Bullock *supra* note 232, at 634; John J. Gibbons & Nicholas de B. Katzenbach, VERA INSTITUTE OF JUSTICE, COMM'N ON SAFETY & ABUSE IN AMERICA'S PRISONS, CONFRONTING CONFINEMENT 15 (2006), *available at* http://www.vera.org/sites/default/files/resources/downloads/ Confronting_Confinement.pdf.

product of their intrinsic wickedness."[299] This mindset will absolve officers for any responsibility they may feel for the "day-to-day excesses [or] overreactions" that can occur as a byproduct of the stress and freedom from oversight inherent to working in a solitary confinement facility.[300] This potential for abuse has been most clearly documented in what is widely known as the Stanford Prison Experiment: over the course of just 6 days, university students assigned to act as guards and placed in a position of power over their fellow classmates who were acting as prisoners began demonstrating wildly extreme behaviors towards these "prisoner-classmates."[301] Their behavior, even after only a handful of days, included spraying their classmates with a fire extinguisher, stripping them naked, and forcing them to urinate and defecate in a bucket in the corner of their cell.[302] The experiment demonstrated that "whenever near absolute power is wielded over a group of derogated and vilified others . . . there is great risk that even good, normal people can be led to do bad, sadistic things."[303] Without effective training, leadership, and oversight, patterns of abuse become all too easy.

Corrections officers are particularly susceptible to feeling alienated in their work environment, which may directly lead to increased abuse and violence as they carry out their duties.

Corrections officers are particularly susceptible to feeling alienated in their work environment, which may directly lead to increased abuse and violence as they carry out their duties. In addition to having an "us versus them" mentality against prisoners, it is also common for corrections officers who work the floors to be in an "us versus them" position with prison

[299] Haney, *supra* note 265, at 965.
[300] *See id.*
[301] Philip Zimbardo, *et al*., *Reflections on the Stanford Prison Experiment: Genesis, Transformations, Consequences*, in OBEDIENCE TO AUTHORITY: CURRENT PERSPECTIVES ON THE MILGRAM PARADIGM 193, 207 (Thomas Blass ed., 2000).
[302] Philip Zimbardo et al., THE STANFORD PRISON EXPERIMENT: A SIMULATION STUDY OF THE PSYCHOLOGY OF IMPRISONMENT 6-7 (1971), *available at* http://dams.stanford.edu/ depts/spc/uarch/exhibits/spe/Narration.pdf.
[303] Haney, *supra* note 265, at 958-59.

staff leadership.[304] This can result in a general sense of alienation, making the situation more susceptible to abuse in the officers' treatment of prisoners. One article reports that "when violence occurs on a regular basis, it is the handiwork of alienated officers who feel abandoned or betrayed by the institution and come to feel authorized to make their own rules."[305] This sense of alienation can lead to problematic officers banding together. Indeed, this same article reports that most acts of violence are committed with group support.[306] Haney further elaborates that "at almost every turn, guards are implicitly encouraged to respond and react to prisoners in essentially negative ways—through punishment, opposition, force, and repression."[307] Haney terms this negative environment in solitary confinement facilities as an "ecology of cruelty."[308] More than simply facilitating opportunities of abuse, this ecology of cruelty also affects upstanding corrections officers by providing few ways in which officers may actually reward prisoners. Any reward that would alleviate the conditions of deprivation "would represent an implicit violation of the punishment-based logic on which the unit is premised."[309]

> Both prisoners and guards become lost in their own animosity toward one another… guards . . . not only become indifferent to the suffering of prisoners but begin to take initiative to worsen it.

Prison staff must work every day in one of the most difficult, tense, and overpowering environments imaginable. They are subject to extreme forces that implicitly encourage cruelty and alienation from the individuals with whom they work. The result is that, as Haney describes,

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[304] Interview with Arthur F. Beeler, former federal prison warden and Visiting Instructor in the Department of Criminal Justice at North Carolina Central University, in Durham, N.C. (May 1, 2013). Mr. Beeler has worked for the federal Bureau of Prisons for thirty-five years, serving twenty-two years as prison warden of various federal corrections facilities. According to Mr. Beeler, one manifestation of this divide between prison leadership and staff is that it is necessary for prison leadership to consistently verify that corrections officers are conducting the duties required of them by policy, such as making the necessary number of rounds on time and consistently.
[305] King *et al*., *supra* note 293, at 156.
[306] *Id.*
[307] Haney, *supra* note 265, at 958.
[308] *Id.* at 967.
[309] *Id.* at 971.

> these forces combine and coalesce over time to produce a culture of harm—one in which both prisoners and guards become lost in their own animosity toward one another and where guards . . . not only become indifferent to the suffering of prisoners but begin to take initiative to worsen it.[310]

To overcome these processes, strong leadership, training, and oversight are essential to preserve the humanity of prison corrections officers who work with prisoners held in solitary confinement. As former Minnesota Warden James Bruton has written, "Security and control—given necessities in a prison environment—only become a reality when dignity and respect are inherent in the process."[311]

The conditions of extreme isolation experienced by prisoners in solitary confinement aggravate a prisoner's mental illness,[1] thus creating a vicious cycle where a prison's most vulnerable population is perpetually set up to fail.

(3). Special Populations: Conditions and Effects

Although this policy paper does not address the particularized effect of extreme isolation on discrete populations, certain populations are particularly vulnerable to the harsh conditions of solitary confinement.

Prisoners suffering from mental illness are especially at risk of experiencing the most negative effects of solitary confinement.[312] However, this risk is exacerbated by the fact that prisoners with preexisting mental illness are at much greater risk for being placed in solitary confinement.[313] Indeed, it is not uncommon for prison management to deliberately place prisoners suffering from mental illness in solitary confinement as a prison management strategy.[314] Further, the conditions of extreme isolation experienced by prisoners in solitary

[310] *Id.* at 979.
[311] Gibbons & de B. Katzenbach, *supra* note 298, at 55.
[312] *See* Arrigo & Bullock, *supra* note 232, at 632.
[313] *Id.* ("Behavior stemming from psychiatric illness is often used as justification to place prisoners in solitary confinement.").
[314] *See id.*

confinement aggravate a prisoner's mental illness,[315] thus creating a vicious cycle where a prison's most vulnerable population is perpetually set up to fail. The two most oft-cited cases addressing mental illness and solitary confinement are *Madrid v. Gomez*[316] and *Jones 'El v. Berge*.[317] The court in *Jones'El et al*. articulates the matter clearly:

> Most inmates have a difficult time handling these conditions of extreme social isolation and sensory deprivation, but for seriously mentally ill inmates, the conditions can be devastating. Lacking physical and social points of reference to ground them in reality, seriously mentally ill inmates run a high risk of breaking down . . . .[318]

Juvenile prisoners placed in solitary confinement are further vulnerable to experiencing the worst effects incurred by time spent in extreme isolation. These effects have been highlighted in a 2012 report issued by the ACLU, "Growing Up Locked Down."[319] In many states, 16- and 17-year-olds may be prosecuted as adults, thus exposing them to the same conditions of incarceration as full adults.[320] Juveniles who spend time in solitary confinement are especially at risk of experiencing psychological harm, physical harm, and stunted development from their time in isolation.[321] It can exacerbate preexisting mental health concerns, and sharply increases the risk of suicide.[322] Physically, youth are particularly susceptible to the negative effects of insufficient exercise and inadequate nutrition.[323] Socially,

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[315] *Id.*; Terry Kupers *et al*., *Beyond Supermax Administrative Segregation: Mississippi's Experience Rethinking Prison Classification and Creating Alternative Mental Health Programs*, 36 CRIM. JUSTICE & BEHAV. 1037, 1038 (2009), *available at* http://www.aclu.org/images/asset_upload_file359_41136.pdf.
[316] 889 F. Supp. 1146 (N.D. Cal. 1995).
[317] 164 F. Supp. 2d 1096 (W.D. Wis. 2001).
[318] *Id.* at 1098.
[319] HUMAN RIGHTS WATCH & ACLU, GROWING UP LOCKED DOWN: YOUTH IN SOLITARY CONFINEMENT IN JAILS AND PRISONS ACROSS THE UNITED STATES (2012), *available at* http://www.aclu.org/files/assets/us1012webwcover.pdf.
[320] *See* Mark Soler, *et al.*, *Juvenile Justice: Lessons for a New Era*, 16 GEO. J. ON POVERTY L. & POL'Y 483, 492 (2009).
[321] *See* GROWING UP LOCKED DOWN, *supra* note 319, at 29-47.
[322] *See* Lindsay M. Hayes, NATIONAL CENTER ON INSTITUTIONS AND ALTERNATIVES, JUVENILE SUICIDE IN CONFINEMENT: A NATIONAL SURVEY 42 (2004).
[323] *See* GROWING UP LOCKED DOWN, *supra* note 319, at 37-41.

attention and reciprocal interaction are essential to the healthy development of the juvenile mind.[324] The effects of placing juveniles in solitary confinement are particularly far-reaching, as the vast majority of all juveniles placed in such conditions will return to their communities—without the benefit of healthy physical, psychological, or social development.

The power dynamics between corrections officers and prisoners coupled with the intimate situations in which corrections officers observe women prisoners invites abuse.

Lastly, women and girls are vulnerable to additional risks when placed in solitary confinement. For adolescent girls, connections with others are particularly necessary for healthy psychological development, and thus, social isolation can be particularly damaging.[325] Women held in solitary confinement facilities are particularly at risk of experiencing sexual harassment and even abuse by male prison staff.[326] Male corrections officers may monitor female prisoners when they shower or use the toilet, and may conduct strip searches.[327] While not every interaction between male prison staff and female prisoners results in abuse or harassment, the power dynamics between corrections officers and prisoners coupled with the intimate situations in which corrections officers observe women prisoners invites abuse.

C. Effectiveness

For proponents of solitary confinement, the oft-perpetuated argument is that solitary confinement "works" in achieving its primary goals of "controlling violent and disruptive prisoners" and "managing risk."[328] Yet this is not the case. Furthermore, the use of solitary confinement comes at a high price: irreversible harm to prisoners' psychological health and well-being, increased risk to communities who receive these prisoners after their release, and a huge

[324] *See* David E. Arredondo, *Child Development, Children's Mental Health and the Juvenile Justice System: Principles for Effective Decision-Making*, 14 STAN. L. & POL'Y REV. 13, 16 (2003).
[325] ACLU, CUSTODY AND CONTROL: CONDITIONS OF CONFINEMENT IN NEW YORK'S JUVENILE PRISONS FOR GIRLS 107 (2006).
[326] Arrigo & Bullock, *supra* note 232, at 634.
[327] *Id.*
[328] *See* Shalev, *supra* note 56, at 207-08.

financial burden on society to build and maintain solitary confinement units.[329] Solitary confinement is ineffective as a tool of prison management, endangers prison safety by encouraging recidivism, and traumatizes prisoners in such a way that they must return to their communities scarred and at risk of further reoffending and harm.

(1). Prison Management

As discussed above, one of the primary goals of solitary confinement and the use of "supermax" prisons is prison management—reducing overall prison violence by managing risk and controlling violent and disruptive prisoners.[330] Several studies indicate, however, that this goal is not achieved. While some studies merely demonstrate that prison violence does not decrease with increased use of solitary confinement, others in fact demonstrate that prison violence may *increase* with greater use of solitary confinement, especially within supermax facilities.[331]

A study published in 2003 by criminologists Chad Briggs, Jody Sundt, and Thomas Castellano found that confinement in supermax facilities did not reduce prisoner-on-prisoner violence.[332] Indeed, it has already been well established that using "coercive control strategies" will result in an escalation of violence.[333] Furthermore, though there was a moderate decrease in prison violence in the two years after California's Pelican Bay supermax prison opened, the levels of prison violence in California prisons steadily *increased* over the next fifteen years, from 1992 to 2006.[334] Indeed, the 2006 rate of prison violence in California prisons was the highest

[329] *Id*. at 218-19.
[330] *See supra* notes 239-241and accompanying text; *see also supra* note 99 and accompanying text.
[331] *See* Shalev, *supra* note 56, at 209-11.
[332] Briggs, *et al*., *supra* note 241, at 1367.
[333] *Id.* at 1350 (citing Israel L. Barak-Glantz, *The Anatomy of Another Prison Riot*, 63 PRISON J. 3 (1985), Anthony E. Bottoms, *Interpersonal Violence and Social Order in Prisons*, 26 CRIME & JUST. REV. (1999), MARK COLVIN, THE PENITENTIARY IN CRISIS: FROM ACCOMMODATION TO RIOT IN NEW MEXICO (1991), and HANS TOCH, CORRECTIONS: A HUMANISTIC APPROACH (1997)).
[334] Shalev, *supra* note 56, at 209-10.

The extensive costs of solitary confinement facilities likely contribute to *reduced* funding for vital aspects of effective prison management, such as staffing, training, programming, and treatment.

yet,[335] which is particularly significant in light of the fact that the primary justification for building and utilizing solitary confinement facilities has been to *decrease* overall levels of prison violence. Lastly, the stringent use of discipline and exasperation of the "us vs. them" mentality that accompany the operation of solitary confinement facilities may in fact lead to a particularly disastrous result: an increase in the number of prisoners being assaulted or killed by prison staff.[336]

That solitary confinement may actually encourage increased levels of violence has been explained in several ways. As early as 1961, it was observed that "the overall impact of the [isolation] unit in penal practice probably is one that intensifies tendencies to criminal attitudes and behavior."[337] As the prison warden of a Mississippi prison described the phenomenon, "The environment [in a solitary confinement facility] . . . increases the levels of hostility and anger among inmates and staff alike."[338] As Briggs, Sundt, and Castellano observed in their study on supermax facilities and inmate violence, "patterns of inmate behavior will remain unchanged without addressing the context in which prison violence occurs and how inmates and staff interact in that context."[339]

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[335] In 2006, the rate of prisoner-on-prisoner violence measured 3.2 assaults per 100 prisoners, and the rate of prisoner-on-staff violence measured 2.4. Between 1980 and 1990 (the period before the Pelican Bay supermax facility was put into operation), the average of the corresponding rates of violence was 2.1 and 1.4, respectively. *See id.* at 210.
[336] *See id.* at 211. The number of prisoners who were shot and killed by prison staff increased system-wide after the introduction of supermax facilities in California. *Id.*
[337] *Id.* at 211 (quoting RICHARD MCCLEERY, AUTHORITARIANISM AND THE BELIEF SYSTEM OF INCORRIGIBLES 301 (1961)).
[338] Gibbons & de B. Katzenbach, *supra* note 298, at 54.
[339] Briggs et al., *supra* note 241, at 1367.

In addition to prison violence, challenges to effective prison management often cited by wardens in Daniel Mears's and Jennifer Castro's 2006 survey[340] include budget and staffing concerns. The construction and operating costs of solitary confinement facilities such as supermax prisons have actually served as directly antithetical to these goals. The extensive costs of solitary confinement facilities likely contribute to *reduced* funding for vital aspects of effective prison management, such as staffing, training, programming, and treatment.[341]

(2). Recidivism

In addition to the unintended consequence of potentially fostering violent tendencies in prisoners and prison staff alike, subjecting prisoners to the extreme isolation of solitary confinement increases the difficulty these prisoners have assimilating back into their communities upon release from prison.[342] First, an increase in recidivism rates can be found among individuals who have experienced solitary confinement.[343] Furthermore, this phenomenon is aggravated even more when prisons release prisoners directly from solitary confinement back into the community—a surprisingly common occurrence.[344] More disturbingly, a 2009 study conducted by Daniel Mears and William Bales found that prisoners housed in supermax units were more likely than their general population prisoners to

Prisoners housed in supermax units were more likely than their general population prisoners to recidivate for *violent* crimes.

[340] *See supra* note 247and accompanying text.
[341] *Id.* at 418.
[342] Gibbons & de B. Katzenbach, *supra* note 298, at 55.
[343] Laurence L. Motiuk & Kelley Blanchette, *Characteristics of Administratively Segregated Offenders in Federal Corrections*, 43 CANADIAN J. CRIMINOLOGY 131, 139-140 (2001). A correlational analysis is also revealing. For instance, before an Illinois supermax facility was opened in 1999, the general rate of recidivism was 42%. Within two years of its opening, the rate of recidivism rose to 46%, and in 2001 the rate had risen to 54%. Put another way, the opening of supermax did not, in fact, reduce recidivism through an intended deterrent effect, but rather, may have directly contributed to an increase in overall recidivism. *See* Stephen F. Eisenman, *The Resistible Rise and Predictable Fall of the U.S. Supermax*, MONTHLY REVIEW (Nov. 2009), http://monthlyreview.org/2009/11/01/the-resistable-rise-and-predictable-fall-of-the-u-s-supermax.
[344] *See* David Lovell, *et al.*, *Recidivism of Supermax Prisoners in Washington State*, 53 CRIME & DELINQUENCY 633, 649-50 (2007); *see also* Gibbons & de B. Katzenbach, *supra* note 298, at 55.

Against such odds, it seems impossible for prisoners to overcome the trauma inflicted by experiencing solitary confinement and achieve successful reintegration back into society.

recidivate for *violent* crimes.[345] Indeed, this would indicate a distinct lack of any substantial deterrence benefit that solitary confinement is meant to incur.[346]

The reasons for this increased rate of recidivism may, at first, seem clear—individuals who end up in solitary confinement may be the more violent and more poorly behaved prisoners, and thus recidivate at higher rates than prisoners in the general population. Yet this does not account for the sharp rise in recidivism rates for those prisoners released directly from solitary confinement back into society. The poor conditions and little opportunity for rehabilitation available to prisoners in solitary confinement may easily account for this phenomenon. As described above, prisoners in solitary confinement receive scant rehabilitative programming or education, and experience almost complete denial of all forms of human interaction. As described by Mears and Bales in their 2009 study on recidivism,

> [Solitary confinement] may reduce social bonds to others and induce strain and possibly embitterment and rage. It also may undermine inmates' beliefs in conventional moral codes and impede efforts to prepare inmates for reentry. . . . [T]he transition back into society constitutes a considerable challenge and that, as a general matter, it involves adapting to social circumstances far different from that of prison. . . . [Being housed in solitary confinement] does little to assist inmates in developing effective, nonviolent strategies to achieve goals or to manage interpersonal conflict [and] might create feelings of anger and hostility as well as defiance.[347]

Indeed, against such odds, it seems impossible for prisoners to overcome the trauma inflicted by experiencing solitary confinement and achieve successful reintegration back into society. The implications of traumatizing our prisoners and releasing them back into our communities should

[345] *See* Daniel P. Mears & William D. Bales, *Supermax Incarceration and Recidivism*, 47 CRIMINOLOGY 1131, 1154 (2009).
[346] *See id.*
[347] *Id.* at 1154-55.

not be lost. Through use of solitary confinement, prisons are setting up prisoners to react as an abused, caged dog would react upon his release: with violent distrust and scars that lead him to hurt even those who he may love. As a report issued by the Commission on Safety and Abuse in America's Prisons observed,

> What happens inside jails and prisons does not stay inside jails and prisons. It comes home with prisoners after they are released and with corrections officers at the end of each day's shift. We must create safe and productive conditions of confinement not only because it is the right thing to do, but because it influences the safety, health, and prosperity of us all.[348]

The manner in which prisons treat the "worst of the worst" can—and does— directly affect our communities and our neighborhoods.[349]

In sum, solitary confinement is specifically designed to create a harsh, impersonal, and indeed inhumane living environment for its occupants. Though originally intended as a path to rehabilitation, solitary confinement has become a falsely pragmatic tool intended to simply facilitate prison management. Yet even in this goal, solitary confinement fails. It inflicts the harshest conditions imaginable upon individuals, leading directly to increased prison violence and higher rates of prisoner recidivism.

C. NATIONAL CAMPAIGNS AND NATIONAL RESPONSE

North Carolina is hardly isolated in its use of solitary confinement. As reported by the Vera Institute, a Department of Justice census report from 2005 put the figure of the amount of prisoners in some form of segregated housing at 81,622.[350] These numbers do not include the use of solitary confinement in immigration detentions nor in youth corrections facilities. A state-by-

[348] Gibbons & de B. Katzenbach, *supra* note 298, at 11.
[349] *See* Butler, *et al.*, *supra* note 242, at 17.
[350] Angela Browne, *et al.*, *Sentencing Within Sentencing*, 24 FEDERAL SENTENCING REPORTER 46 (October 2011).

state look is difficult as many states do not make public these statistics. According to the Washington Post, at least 44 states operate segregated housing of some kind.[351]

> What happens inside jails and prisons does not stay inside jails and prisons. It comes home with prisoners after they are released and with corrections officers at the end of each day's shift. We must create safe and productive conditions of confinement not only because it is the right thing to do, but because it influences the safety, health, and prosperity of us all.

The national studies show that these numbers could have dire impacts on prison safety and population numbers. According to a report entitled "Confronting Confinement," there is little evidence to indicate that isolating dangerous offenders has any impact on decreasing violence in prisons.[352] To the contrary, there is evidence that indicates that officers who worked in a segregation unit are more likely to be assaulted than those working in general population.[353] The report also linked a higher recidivism rate to those prisoners who spent longer than three months in a segregated unit. In fact those that were released directly from isolation showed recidivism rates over 50% higher than prisoners who spent some time in general population before being released.[354]

The high numbers of prisoners in solitary confinement comes at a great economic cost as well. In Ohio, for example, it cost more than double to house a prisoner in their "supermax" facility than in general population, where one officer is required for every 1.7 prisoners.[355] In the now closed Illinois supermax facility, Tamms, the state spent $61,522 per prisoner to isolate

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[351] Anita Kumar, *Va. Prisons' Use of Solitary Confinement Is Scrutinized*, WASHINGTON POST (Jan. 7, 2012), http://www.washingtonpost.com/local/dc-politics/va-prisons-use-of-solitary-confinement-is-scrutinized/2011/11/28/gIQAkKHuhP_story.html.
[352] Gibbons & Katzenbach, *supra* note 298.
[353] *Id.*
[354] *Id.*
[355] *See supra* note 340 and accompanying text..

a prisoner that would have cost the state only $22,043 in another prison.[356] There is a human cost as well. Not only is the experience dehumanizing and cruel to prisoners, correction officers are affected by working in segregated units as well.[357]

These realities—the widespread use, the ineffectiveness, and the cost (both economic and human)—have motivated advocates, courts, and governments to begin the process of reconsidering solitary confinement and reforming this abusive and untenable system. This section will provide an overview of national movements and review what others have been doing to end or at least curtail the use of solitary confinement. As this policy paper was underway, more and more creative and dedicated advocates have begun to compile reports and policy papers describing the wrongfulness and inefficiencies of solitary confinement and in February 2014, many advocates contributed to the United States Senate Judiciary Subcommittee on the Constitution, Civil rights, and Human Rights, Hearing on Reassessing Solitary Confinement II: The Human Rights, Fiscal, and Public Safety Consequences.[358] In this report, we give particular attention to the recent call by U.S. Senator Dick Durbin and the Senate Judiciary Committee's Subcommittee on the Constitution, Civil Rights and Human Rights for a full review by the Bureau of Prisons of the use of solitary confinement in the federal system. Second, this section will review reform efforts by State

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[356] Dick Durbin, United States Senate, *Statement on Federal Bureau of Prisons Assessment of its Solitary Confinement Practices* (Feb. 4, 2013), http://www.durbin.senate.gov/public/index.cfm/pressreleases?*ID*.=07260483-4972-4720-8d43-8fc82a9909ac.
[357] Kim *et. al*., *supra* note 28.
[358] *See* Reassessing Solitary Confinement II: The Human Rights, Fiscal, and Public Safety Consequences, *http://www.judiciary.senate.gov/meetings/reassessing-solitary-confinement-ii-the-human-rights-fiscal-and-public-safety-consequences*. *See also Solitary Watch*, "a web-based project aimed at bringing the widespread use of solitary confinement out of the shadows and into the light of the public square" for transcripts, video, testimony and other submissions made to the subcommittee. http://solitarywatch.com/resources/testimony/

legislatures from across the country. Third, this section will summarize current claims making their way through the federal courts seeking injunctive and other relief for prisoners suffering in extreme isolation, with the caveat that many more advocacy developments are underway that are not included in this report.

1. Federal Response

The Federal Bureau of Prisons operates the largest prison system in the country. Currently they hold approximately 218,000 active prisoners, with nearly 11,000 of them in some form of isolated confinement.[359] In one facility, the U.S. Penitentiary Administrative Maximum facility in Florence, Colorado ("ADX"), prisoners filed a class action lawsuit against the Federal Bureau of Prisons and others in June of 2012.[360] Detailing their experience in the complaint, the prisoners accused ADX (where prisoners spend at least 20 and up to 24 hours a day isolated in their cells) of failing to provide adequate mental health care.[361] They also claimed that an erratic and inconsistent step down system caused prisoners to "experience a fundamental loss of even basic social skills and adaptive behaviors, and predictably find themselves paranoid about the motives and intentions of others."[362] This has led to violent incidents, including a murder witnessed and unchecked by security personnel.[363]

It is these inhumane conditions and others that came to light in Congressional hearings in 2012 that led Senator Durbin to announce that the Bureau of Prisons is contracting with the National Institute of Corrections ("NIC") to conduct a full review of the use of solitary

[359] James Ridgeway & Jean Casella, *Welcome to the New Federal Supermax*, MOTHER JONES (Feb. 11, 2013, 4:02 AM), http://www.motherjones.com/politics/2013/02/thompson-federal-supermax-solitary-illinois-dick-durbin.
[360] *Id.*
[361] Complaint, *Bacote et al. v. Federal Bureau of Prisons et al.*, No. 12-CV-01570 (D. Colo. June 18, 2013), *available at* http://www.supermaxlawsuit.com/Complaint-and-Exhibits-Bacote-v-Federal-Bureau-of-Prisons.pdf. The case is now *Cunningham v. Federal Bureau of Prisons et al.* and will be heard with *Vega v. Davis*, Civil Action 1:12-cv-01144-RPM, filed in June of 2012. *See* http://www.supermaxlawsuit.com/
[362] *Id.* at 13.
[363] *Id.*

confinement in the Federal prison system.[364] The NIC has worked with several states in reforming and reducing their use of solitary, including Mississippi, which has reduced the number of prisoners being held in solitary by 75 percent.[365] Senator Durbin stated, "We can no longer slam the cell door and turn our backs on the impact our policies have on the mental state of the incarcerated and ultimately on the safety of our nation."[366]

But we now know that solitary confinement isn't just used for the worst of the worst. Instead, we are seeing an alarming increase in isolation for those who don't need to be there – and for vulnerable groups like immigrants, children, LGBT inmates, supposedly for their own protection.

In his opening statement at the hearing before the Senate Committee on the Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights, Senator Durbin not only painted a stark picture of the conditions in which those confined to solitary were forced to live, he also alluded to its over-use and abuse: "But we now know that solitary confinement isn't just used for the worst of the worst. Instead, we are seeing an alarming increase in isolation for those who don't need to be there – and for vulnerable groups like immigrants, children, LGBT inmates, supposedly for their own protection."[367] Senator Durbin went on to make some recommendations including reform of prison rape standards so that victims are not further traumatized by being placed in solitary unless absolutely necessary.[368] He also alluded to the need to ensure that solitary is not used on children and immigrants who have not been convicted of any crime.[369] Durbin stated, "All of these issues lead to the obvious conclusion: we need to

[364] Reassessing Solitary Confinement: The Human Rights, Fiscal, And Public Safety Consequences, June 19, 2012, http://www.judiciary.senate.gov/hearings/hearing.cfm?id=6517e7d97c06eac4ce9f60b09625ebe8.
[365] *Id.*
[366] *Id.*
[367] *Id.*
[368] *Id.*
[369] *Id.*

reassess solitary confinement and honestly reform policies which do not make us safer."[370] We anticipate the results of NIC's review.

On February 25, 2014, the U.S. Senate held a second hearing before the Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights.[371] Dozens of civil rights, prisoner advocacy, and religious groups provided both oral and written testimony to respond to the explosion in the use of solitary confinement in prisons in the United States. Much of the testimony described the horrific practices that amount to torture and the consequences of such confinement suffered by prisoners, the correctional system and society generally.[372] Based on the testimony, and as urged by USA Amnesty International, "Congress should require, and the federal government institute, reforms to the use of solitary and isolated confinement in all BOP facilities so that they meet with the above standards and fully conform to international law and standards for humane treatment." [373]

2. State Legislative Reform

Some states across the country have taken the lead in reforming their prison systems and its use of solitary confinement. California has recently introduced Senate Bill SB970, which would limit any facility that houses juveniles from placing youths in solitary confinement unless there is an immediate and substantial risk of harm to others and the prison has exhausted all other

[370] Dick Durbin, United States Senate, *Durbin Chairs First-Ever Congressional Hearing on Solitary Confinement* (June 19, 2012), *available at* http://www.durbin.senate.gov/public/index.cfm/pressreleases?ID.=7d4f1128-4d15-4112-aa48-5315cb395142.
[371] *See supra* note 358.
[372] *See e.g., Written Statement of the National Lawyers Guild Before the United States Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights Hearing on Reassessing Solitary Confinement II: The Human Rights, Fiscal, and Public Safety Consequences*, Feb. 25, 2014, available at http://www.nlg.org/sites/default/files/Reassessing%20Solitary%20Confinement%20II%20FINAL_0.pdf
[373] Amnesty USA *Submission on Reassessing Solitary Confinement-The Human Rights, Fiscal, and Public Safety Consequences Hearing Before the Senate Judiciary Subcommittee on the Constitution, Civil Rights and Human Rights*,25 February 2014, *available at* http://www.amnesty.org/en/library/asset/AMR51/013/2014/en/e735e778-cb3b-4de9-8ea6-6416c3930de9/amr510132014en.pdf.

options.[374] Colorado, Florida, Nevada, and other states have introduced or enacted legislation in the last year addressing solitary for children too.[375]

As a result of giving high risk prisoners the chance to work themselves out of Unit 32 through the step down program, the population in the Unit was reduced from 1000 to 150, until the unit was eventually closed.

Maine instituted sweeping reforms for their use of solitary confinement. Before reform, Maine's prisons structured solitary confinement, which they labeled Special Management Units (SMU), much like North Carolina and other states.[376] They maintained a system of administrative segregation with questionable due process, disciplinary segregation with its lack of process and possible indefinite duration, and high risk segregation.[377] The latter was designed for the "worst of the worst" type prisoners, which in a similar vein to many "step-up" type control units further punished prisoners when the conditions of confinement in the other types of segregation disabled their ability to cope with their surroundings.[378]

Maine's response to the problems and expenses of their segregation system encouraged them to eliminate the high risk segregation altogether.[379] They created a separate Emergency Observation Status that locks the prisoner down in their usual housing environment and does not allow a transfer to a SMU without approval of supervisory staff.[380] For disciplinary measure, Maine adopted sanctions that can be carried out in general population and segregation is only considered when the prisoner is a high escape risk or a serious threat to himself or others, or is at risk from others.[381] As a result of these reforms:

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[374] David Greenwald, *Court Watch: Statewide Reforms on Solitary Confinement and Bail*, Feb. 17, 2014.
[375] *See Stop Solitary – State-Specific Resources*, ACLU, http://www.aclu.org/prisoners-rights/stop-solitary-state-specific-resources.
[376] *See Change Is Possible*, ACLU MAINE, http://www.aclumaine.org/changeispossible.
[377] *Id.* at 14-16.
[378] *Id.*
[379] *Id.*
[380] *Id.*
[381] *Id.*

- Fewer people are sent to solitary;
- Prisoners sent to solitary spend less time there;
- Prisoners in solitary are held in better conditions;
- Prisoners in solitary are given access to more care and services to prevent decompensation and deterioration of mental health;
- Prisoners in solitary are given a clear path, based on achievable goals, for earning their way out of solitary.[382]

Mississippi has also instituted reforms. Tough-on-crime sentencing reform in the 1990's caused Mississippi's prison population to explode, so that by 2007 Mississippi was spending $327 million a year to house 22,800 inmates.[383] Most striking was Unit 32, Mississippi's maximum security unit at Parchman Correctional Institute. Through an investigation, the ACLU discovered that almost 800 of Unit 32's 1,000 prisoners did not meet the criteria to be assigned there.[384] As a result of a lawsuit on behalf of a prisoner suffering in isolation in Unit 32 while on death row, the Commissioner of the Mississippi Department of Corrections entered into a consent decree and began the process of reforming their system.[385] Based on input from NIC, they used incentives to release small group by small group from Unit 32.[386] Additionally correctional officers in step down units were provided special training to deal with prisoners with mental health issues.[387] As a result of giving high risk prisoners the chance to work themselves out of Unit 32 through the step down program, the population in the Unit was reduced from 1000 to 150, until the unit was eventually closed.[388] The state passed laws enabling non-violent offenders to be eligible for parole after 25% of their sentence was served, which also helped to

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[382] *Id.* at 12
[383] John Buntin, *Mississippi's Corrections Reform: How America's Reddest State – and Most Notorious Prison – Became a Model of Corrections Reform*, GOVERNING (June 2010), http://www.governing.com/topics/public-justice-safety/courts-corrections/mississippi-correction-reform.html.
[384] *Id.*
[385] *Id.*
[386] *Id.*
[387] Kupers *et al.*, *supra* note 315.
[388] *Written Statement of the American Civil Liberties Union: Hearing on the Proposed Closure of Tamms Correctional Center*, ACLU (April 2, 2012), *available at* http://www.aclu.org/files/assets/aclu_statement_re_tamms_closure-final.pdf.

reduce the prison population overall.[389] In a statement made at hearings to review Illinois's push to close its supermax facility, the ACLU summarized that Mississippi officials "estimate that diverting prisoners from solitary confinement under the state's new model saves about $8 million annually … [and] changes in management … reduced violence levels by 70%."[390]

More than a dozen states have begun this process of reforming their use of solitary confinement.[391] The models follow along the above examples in some form or another: heighten the bar for assigning a prisoner to solitary confinement, have a more appropriately trained staff, give prisoners incentives to work their way out of isolation, have more meaningful and more frequent reviews of confined prisoners' cases, and in some cases do away with supermax prisons.[392]

3. Litigation

Since at least 1921, advocates have brought legal challenges to the misuse of solitary confinement.[393] Currently, there are three high-profile, high-impact lawsuits pending across the country that serve as good examples of the current tactical approach advocates are utilizing to challenge the use of solitary confinement. In New York, the NYCLU filed a class action in federal court on behalf of prisoners who are currently serving their time in solitary units although they are non-violent offenders.[394] The suit challenges the problem of over-classification, or sending prisoners to solitary confinement although their conduct or circumstances do not meet

[389] *See* Buntin, *supra* note 383.
[390] *See Written Statement of the American Civil Liberties Union: Hearing on the Proposed Closure of Tamms Correctional Center*, *supra* note 319.
[391] *See Stop Solitary – State-Specific Resources*, *supra* note 361..
[392] *Id*.
[393] *See Solitary Watch, Federal District/Circuit Court Cases, available at* http://solitarywatch.com/resources/federal-district-circuit-court-cases/ and *Solitary Watch, State Supreme Court Cases, available at* http://solitarywatch.com/resources/state-supreme-court-cases/
[394] *NYCLU Seeks Class-Action Status in Challenge to Use of Solitary Confinement in NY Prisons*, NYCLU (Mar. 6, 2013), http://www.nyclu.org/news/nyclu-seeks-class-action-status-challenge-use-of-solitary-confinement-ny-prisons.

any stated criteria for being assigned to segregated housing.[395] Prison officials often over-classify and misuse solitary confinement to reduce overcrowding in general population, to increase financial gain for the facility related to cost per prisoner metrics, to assure that supermax facilities remain full, and to expedite the resolution of issues that relate to "problem prisoners" by moving them to other facilities.[396]This lawsuit, based on a proportionality argument, resulted in an important victory. The NYCLU announced:

> "an unprecedented agreement to reform the way solitary confinement is used in New York State's prisons, with the state taking immediate steps to remove youth, pregnant inmates and developmentally disabled and intellectually challenged prisoners from extreme isolation. With the agreement, New York State becomes the largest prison system in the United States to prohibit the use of solitary confinement as a disciplinary measure against prisoners who are younger than 18.[397]

In California, the Center for Constitutional Rights ("CCR") is litigating on behalf of prisoners sentenced to long term isolation for being labeled "gang-validated" and recently granted class certification.[398] The CCR is utilizing two theories for this suit. First, they are challenging long term (over ten years) isolation as cruel and unusual punishment under the Eighth Amendment.[399] Second, they argue that the process officials employ to label prisoners as gang-affiliated is in violation of their due process rights.[400] The case addresses a question left open by the

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[395] Joseph B. Allen, *Extending Hope into the Hole: Applying Graham v Florida to Supermax Prisons*, 20 WM. & MARY BILL RTS. J. 217, 225 (2011).
[396] *Id.*
[397] *NYCLU Lawsuit Secures Historic Reforms to Solitary Confinement*, Feb. 14, 2014, available at http://www.nyclu.org/news/nyclu-lawsuit-secures-historic-reforms-solitary-confinement.
[398] *See Ruiz v. Brown*, http://ccrjustice.org/files/Ruiz-Amended-Complaint-May-31-2012.pdf. Paige St. John, *Judge Grants Class Action to Inmates' Solitary Confinement Case*, June 2, 2104, Los Angeles Times, http://www.latimes.com/local/political/la-me-ff-class-action-prison-solitary-confinement-20140602-story.html.
[399] *Id.*
[400] *Id.*

U.S. Supreme Court as to whether long term confinement may reach a level that would cross the threshold of cruel and unusual punishment.[401] CCR and the prisoners they represent recently prevailed in a motion to dismiss filed by the state.

As courts begin to reconsider the emerging expert and scholarly evidence and as more challenges make their way through the courts addressing the misuse and abusive use of solitary confinement, we may see new legal developments, including the start of a ripening subject that the Supreme Court could take up in the future.

The Disability Rights Network of Pennsylvania has filed a lawsuit in that state on behalf of eight hundred prisoners with severe mental illness who are currently assigned to solitary confinement.[402] The claim focuses on the conditions of the cells, the extent of isolation, and the lack of adequate mental health care.[403] Advocates in other states are either in the process of litigating or settling lawsuits with regard to various solitary confinement practices.[404] As discussed in the section on the Eighth Amendment, the Fourth Circuit has refrained from finding that the psychological effects of solitary rise to the level of cruel and unusual. As courts begin to reconsider the emerging expert and scholarly evidence and as more challenges make their way through the courts addressing the misuse and abusive use of solitary confinement, we may see new legal developments, including the start of a ripening subject that the Supreme Court could take up in the future. North Carolina advocates along with national advocates have reason to hope that these cases signal a change in society's mores regarding the use of solitary confinement.

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[401] Order Denying Motion to Dismiss, *Ashker v. Brown*, No. 09-CV-05786-CW (N.D. Cal. Apr. 9, 2013), *available at* http://ccrjustice.org/files/Order%20Denying%20Motion%20to%20Dismiss%204.9.13.pdf [hereinafter *Ashker* Order]

[402] Sal Rodriguez, *Lawsuit Filed Against Solitary Confinement of 800 "Seriously Mentally Ill" in Pennsylvania*, SOLITARY WATCH (Mar. 18, 2013), http://solitarywatch.com/2013/03/18/lawsuit-filed-against-solitary-confinement-of-800-seriously-mentally-ill-in-pennsylvania/.

[403] *Id*.

[404] *See Solitarywatch, Lawsuits/Litigation, at* http://solitarywatch.com/category/lawsuitslitigation/.

SECTION TWO: SUBSTANTIVE LEGAL ISSUES

It is clear from the extensive data available from states across the nation, from North Carolina, and from countless experts, solitary confinement is a problem. With any widespread problematic practice, solitary confinement brings with it numerous legal implications. This section discusses the various legal frameworks at the federal, international, and state levels, provides some guidance as to how to maneuver within these frameworks, and explores how legal norms must be reframed to adequately address the problems that arise with solitary confinement.

I. CONSTITUTIONAL INQUIRY

Introduction

In the United States, when the government deprives someone of a fundamental right or treats him or her in a way that undermines concepts of justice, those who are wronged may turn to constitutional principles to test the legitimacy of the action taken or denied. Constitutional protections apply to individuals who serve time in prisons, including, as Senator Patrick Leahy noted recently in the context of solitary confinement, the "obligation[] to continue to treat them fairly and humanely."[405] This obligation is derived from the enumerated rights provided by the Constitution and its underlying relationship to notions of human decency.[406] Assuring that prisoners are treated in a humane manner and are protected from physical and mental harm also reflects the simple logic that individuals who are subject to brutally punitive conditions of confinement will be irreparably harmed in ways that will affect the maintenance of a safe and sane society. Indeed, the majority of these prisoners will be released back into society, and the

[405] Leahy, *supra* note 145.
[406] *See, e.g.*, *Graham v. Florida*, 130 S. Ct. 2011, 2021 (2010).

manner in which our prisons treat them will affect their abilities to reenter and reintegrate into society.[407]

Given the studies that demonstrate the irreparable harm that is caused by solitary confinement, more—not less—due process rights are required compared with other prison disciplinary circumstances.

Thirty years ago, solitary confinement was seldom used: only the most threatening offenders were confined to conditions of extreme isolation.[408] Today, current research on prison practices demonstrates that solitary confinement is no longer used solely for the exceptional cases. Studies reveal that in recent years the number of prisoners who have been sent to solitary confinement has dramatically increased. Their confinement to isolation, moreover, can rarely be justified on the basis of prison safety or for reasons related to prisons discipline. Most do not deserve to be in solitary confinement.[409]

Although the U.S. Supreme Court has said that prisoners are not entitled to the full panoply of rights, the Court has also made clear that they are not stripped of all of their due process rights. In determining what due process rights are owed a prisoner who faces the possibility of serving time in solitary confinement, a court must consider the interests at stake. Given the studies that demonstrate the irreparable harm that is caused by solitary confinement, more—not less—due process rights are required compared with other prison disciplinary circumstances. The same is true for prisoners who are mistreated in solitary confinement and who are well hidden behind the walls of our prisons. These individuals must have meaningful opportunities to grieve and remedy their mistreatment. These obligations are due to prisoners:

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[407] *See* Leahy, *supra* note 145.
[408] *Reassessing Solitary Confinement*: *Before the Comm. on S. Judiciary Subcomm. on Constitution, Civil Rights, and Human Rights* (June 19, 2012) (statement of Christopher Epps, Chairman, Commissioner Mississippi Dep't of Corrections) [hereinafter Epps].
[409] *See* Durbin, *supra* note 216.

the Court has repeatedly affirmed that "the State must respect human attributes, even of those who have committed serious crimes."[410]

Based on principles that should readily guide the rights and treatment of prisoners, how is it that this nation has reached a point where over 80,000 prisoners are being held in solitary confinement and denied their rights?[411] Many of these prisoners are held for such untenable (and sometimes indefinite) periods of time and in such extreme isolation that it should shock the conscious of an evolved society.[412] The following sections will explore how both Eighth Amendment and due process jurisprudence have failed prisoners suffering the depravity of solitary confinement, but more importantly, how current circumstances and new understandings point to the changes that are due.

A. Eighth Amendment Jurisprudence

1. Introduction

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The Eight Amendment of the US Constitution is written in the plainest terms: the State, when meting out punishment for deviant behavior, shall be constrained from the absolute imposition of its will. This is not an idea that originated with the Constitution; it dates to a 1688 Act of Parliament in response to the excesses of the British Crown.[413] However, this historical barrier to certain types of punishment has not created a steadfast rule, but rather, the endeavor to define the parameters of "cruel and unusual" has been an evolution: when it was invoked in the United States' founding documents, slavery was in full force, children toiled in

[410] *Graham*, 130 S. Ct. at 2025.
[411] *See supra* note 269 and accompanying text.
[412] *See* for instance, Interview with Malik, SECTION ONE I.A. *See also Madrid v. Gomez*, 889 F. Supp. 1146 (N.D. Cal. 1995); *Ruiz v. Johnson*, 37 F. Supp. 2d 855 (S.D. Tex. 1999).
[413] Richard J. Dunn, *The Eighth Amendment and Prison Conditions: Shocking Standards and Good Faith*, 44 FORDHAM L. REV. 950, 951-952 (1976) (citing *Weems v. United States*, 217 U.S. 349, 371 (1910)).

sweatshops, prisoners were routinely whipped, and many still believed those convicted of some crimes deserved to be mutilated.[414] Like those outdated and proscribed institutions, the time has come for the use of solitary confinement to be seen as the degrading and inhumane punishment it is and be ruled as contravening the Eighth Amendment as cruel and unusual.

To determine whether a punishment is cruel and unusual, courts must look beyond historical conceptions to the evolving standards of decency that mark the progress of a maturing society.

Developing a standard for what constitutes cruel and unusual punishment can prove to be elusive in a society that allows prisoners to be put to death. The Supreme Court answered that conundrum when it found it cruel and unusual to strip a deserter of his citizenship, commenting that "it is equally plain that the existence of the death penalty is not a license to the Government to devise any punishment short of death within the limit of its imagination" because "the basic concept underlying the Eighth Amendment is nothing less than the dignity of man."[415]

Today, an Eighth Amendment standard for what constitutes cruel and unusual punishment has been understood to be linked to an evolving view of human decency rather than being bound to the historical punishment practices once meted out. This was most recently iterated in the Supreme Court's finding that life without parole for juvenile offenders is unconstitutional. "To determine whether a punishment is cruel and unusual, courts must look beyond historical conceptions to the evolving standards of decency that mark the progress of a maturing society. This is because '[t]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.'"[416]

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[414] *Id.* at 952.
[415] *Trop v. Dulles*, 356 U.S. 86, 100 (1958).
[416] *Graham* 130 S. Ct. at 2021 (internal citations omitted). It is important to note that this decision turned on a question of proportionality rather than conditions of confinement. It might be possible that this argument will gain

In stark contradiction to this high-minded language, the Eighth Amendment standard in terms of challenging the use of solitary confinement has evolved in ways that offer little or no protection for prisoners suffering this untenable punishment. Despite a well-developed body of expert evidence[417] that demonstrates that the harm prisoners suffer is a result of what we ought to consider "barbaric" by present day standards, except in the narrowest of categories, the Federal Judiciary has failed to end its use. Solitary confinement as a condition of confinement ought to shock the conscience: as Malik described in our interview, it is a "constant struggle" to keep one's head above the rising tide of insanity caused by isolation. As prisoners descend into what Stuart Grassian deemed "SHU Syndrome,"[418] they do what they can to exist in their environment stripped of so much necessary stimuli: as what has been seen in our survey, they talk to themselves, they ruminate on revenge, and they harm themselves; some go so far as to set fires, vandalize their cell with feces, and even try to end it all via suicide. According to our survey respondents, the corrections officers often respond with laughter and deriding indifference at best and violence at worst.[419]

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Ironically, it was the Supreme Court of a hundred years ago reviewing the conditions suffered by those in solitary confinement that most embodied the idealistic language of human

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traction for solitary confinement cases in the future, especially for long term sentences for non-violent offenders and punitive disciplinary isolation that spirals into long term isolation. The NYCLU has filed a complaint in Federal Court for which it *See*ks class action status for all prisoners being held in solitary confinement in New York state prisons. "The lawsuit maintains that thousands of individuals incarcerated in New York prisons are subjected to grossly disproportionate sentences of extreme isolation for disciplinary infractions, in violation of the U.S. Constitution." *NYCLU Seeks Class-Action Status in Challenge to Use of Solitary Confinement in NY Prisons*, *supra* note 394.

[417] *See* SECTION ONE, III.A.

[418] *See* Grassian, *supra* note 163, at 331..

[419] *See* SECTION ONE, I.A.

dignity and the progressive mores of a maturing society.[420] The enlightened view of the past languished behind deference to states' power to police their own citizens and was not resurrected when the Federal Courts began to address conditions in states' prisons once again.[421] The Eighth amendment jurisprudence regarding solitary confinement that evolved in the latter half of the last century fails prisoners for the following reasons. First, courts have declined to ban the use of solitary confinement per se because of deference to prison administrators and reluctance by the courts to accept the mental and emotional pain and suffering caused by extreme isolation. Second, this state of affairs has left prisoners anguishing in solitary with only a case by case challenge to their particular conditions of confinement or the disproportionality of their being sentenced to isolation. The modern rule regarding a conditions of confinement challenge requires prisoners to prove a standard of harm that is both unnecessarily excessive and lacking in recognition of the harm caused by extreme isolation to a prisoner's mental well-being. The second part of the conditions of confinement test, the need to find the requisite intent of deliberate indifference, obstructs prisoners from relief when they are only able to show objectively inhumane conditions. Third, the combination of the courts' failure to recognize the inescapable deleterious effect of solitary confinement on the mental health of prisoners and the narrow modern rule has created a circular argument where prisoners only have a case when the trauma of their confinement has brought them to a breaking point of mental and emotional sanity.

The combination of the courts' failure to recognize the inescapable deleterious effect of solitary confinement on the mental health of prisoners and the narrow modern rule has created a circular argument where prisoners only have a case when the trauma of their confinement has brought them to a breaking point of mental and emotional sanity.

[420] *See In re* Medley, 134 U.S. 160 (1890).
[421] *See McElvaine v. Brush*, 142 U.S. 155 (1891). *See also Burns v. Swenson*, 430 F. 2d 771, 777 (8th Cir. 1970) (Neither the District Court nor the Court of Appeals developed or reviewed a record looking at the mental effects of isolation.).

The current jurisprudence for considering solitary confinement under the Eighth Amendment no longer functions under the evolving standard of this maturing and civil society. First, there are enough prison administrators and penologists who say that extreme isolation is not an effective mechanism and that there are better alternatives for ensuring prison security such that the courts' overwhelming deference on the issue is no longer warranted. This argument is bolstered by the growing reform movement and public outcry at this practice. Second, courts must reconsider the requisite intent of the conditions of confinement analysis in light of the vast body of literature and increasing common knowledge of how incredibly harmful isolation is on the mental health of prisoners so that prison officials who continue to abuse solitary confinement are presumed to be acting with a deliberate indifference to a known risk. Third, our society's evolving understanding of the importance of mental well-being and the knowledge of the serious and permanent damage that is a consequence of extreme isolation can no longer be denied as being barbaric and shocking to the conscience.

2. Historical Perspectives

The Supreme Court has repeatedly found that the Cruel and Unusual Punishments Clause prohibits the imposition of inherently barbaric punishments under all circumstances.[422] Ultimately, Eighth Amendment jurisprudence has underscored "the essential principle that … the State must respect human attributes, even of those who have committed serious crimes."[423] The Court had once been more sympathetic to the dire position of a prisoner found alone in the depths of the penitentiary than what is now seen in the Federal Judiciary.

[422] *See, e.g.* , *Hope v. Pelzer*, 536 U.S. 730 (2002) (outlawed per se the practice of tying prisoners to a hitching post as a punitive measure); *see also Wilkerson v. Utah*, 99 U.S. 130, 136 (1879).("[P]unishments of torture," for example, "are forbidden.").
[423] *Graham*, 130 S. Ct at 2025.

In 1890, the highest Court released a convicted murderer because his jailors had confined him in isolation until the time of his execution.[424] The gravamen of this case centered on *ex post facto*, as the law ordering segregation for death row prisoners was passed after the appellee had been convicted.[425] The majority was quite aware, however, of the depravity of solitary confinement and popular sentiment against its use:[426]

> [E]xperience demonstrated that there were serious objections to it. A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others, still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community. It became evident that some changes must be made in the system … and it is within the memory of many persons interested in prison discipline that some thirty or forty years ago the whole subject attracted the general public attention, and its main feature of solitary confinement was found to be too severe. [427]

This hopeful ruling quickly met its demise when, just a year later, a prisoner filed a *habeas* petition protesting his being held in solitary confinement awaiting execution based on the language in *Medley.*[428] The court set aside the thoughtful treatment of solitary confinement in Medley as dicta.[429] The majority ruled that the federal judiciary should not "obstruct the ordinary administration of the criminal laws of the States through their own tribunals."[430] It was not until seventy years later as much of the Bill of Rights, including the Eighth Amendment, were being incorporated via the Fourteenth Amendment, that federal courts began to review conditions in state prisons again.[431]

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[424] *See In re Medley*, 134 U.S. at 160.
[425] *Id*.
[426] *Id*.
[427] *Id.* at 168.
[428] *See McElvaine*, 142 U.S. at 155.
[429] *Id*. at 159.
[430] *Id.* at 160.
[431] *See, e.g.*, *Robinson v. California*, 370 U.S. 660 (1962) (proportionality claim against California law criminalizing addiction). *See also Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1968) (enjoining the use of the strap in Arkansas).

3. Reboot: Building the Wall of Deference

When we interviewed Michael, he explained the hopelessness of the situation in which a prisoner finds himself once in solitary.[432] The struggle to keep one's head above water in isolation was also expressed by Malik; he suffered from depression and anxiety, and he saw both physiological and psychological changes in himself.[433] Michael related the unbearable noise he is exposed to daily, "banging, kicking, and screaming."[434] He spoke of how he wakes every night to the screams of a fellow prisoner, who is incoherent and in need of intervention.[435] The response, Michael claimed, is often worse: stripped and placed in an observation cell with even less amenities than before, a scenario that only serves to worsen the prisoner's condition.[436]

The courts give great deference to prison administrators when hearing Eighth Amendment claims by prisoners. It is the major obstacle between a finding of a court-enforced end to the practice of isolating prisoners and the case by case process of individuals asserting the mounting evidence of the practice's deleterious effects.

The survey that we administered seems to confirm the narrative offered by both Michael and Malik.[437] A majority of our respondents reported presenting symptoms of Grassian's "SHU Syndrome."[438] The survey also confirms the sentiment that the psychological and therapeutic resources available to prisoners in isolation are insufficient.[439] As Dr. Metzner and Dr. Aufderheide point out in their report to the North Carolina Department of Public Safety regarding Unit 1 at Central Prison in Raleigh, it is either the lack of adequate care or the severe conditions of that facility's solitary unit that is causative for an alarmingly high rate of multiple crisis unit admissions.[440] Even when faced with similar

[432] *See supra* note 416 and accompanying text.
[433] *Id.*
[434] *Id.*
[435] *Id.*
[436] *Id.*
[437] *See* UNC I/HRPC NC Prisoner Survey (on file with authors).
[438] *Id.*
[439] *Id.*
[440] See Metzner and Aufderheide, *supra* note 18.

overwhelming evidence[441] that solitary confinement is at least inhumane and pushes the boundaries of cruel and barbaric, the judiciary has consistently failed to find that it contravenes the Eighth Amendment per se and has only recently begun to chip away at that precedent in the narrowest of circumstances.

The courts give great deference to prison administrators when hearing Eighth Amendment claims by prisoners. It is the major obstacle between a finding of a court-enforced end to the practice of isolating prisoners and the case by case process of individuals asserting the mounting evidence of the practice's deleterious effects.[442] The balance situated somewhere between the minimal fundamental rights retained by prisoners and prison administrators' wide discretion to maintain order forces prisoners trying to assert those rights into courts that "are naturally reluctant to interfere with a prison's internal discipline, whether the institution is federal or state."[443]

The Second Circuit Court of Appeals in 1971 worked through the jurisprudence of the Eighth Amendment shockingly paralleling where we still stand today, forty years later. In *Sostre v. McGinnis*, a prisoner sued for being held arbitrarily in isolation for over a year in administrative segregation so the prison could investigate a murder.[444] The lower court, so shocked by the tremendous mental suffering inflicted in isolation, held that no prison in New York could subject a prisoner to isolation for more than fifteen days.[445] The appellate court fully acknowledged the maturing sensitivity in our culture to the plight suffered in the plaintiff's

[441] *See, e.g.*, *Madrid*, 889 F. Supp. at 1262, *State v. Carroll*, 195 S.E. 2d 306 (N.C. App. 1973), *Ruiz*, 37 F. Supp. 2d at 855, *In re Long Term Administrative Segregation*, 174 F.3d 464 (4th Cir. 1999).
[442] This topic has been treated widely: in 1976, Richard Dunn wrote for the Fordham Law Review that this deference was based in separation of powers, lack of judicial expertise, and the fear that intervention would "subvert prison discipline." Dunn, *supra* note 413, at 933. *See also* Gertrude Strassburger, *Judicial Inaction and Cruel and Unusual Punishment*: *Are Super-Maximum Walls too High for the Eighth Amendment*, 11 TEMP. POL. & CIV. RTS. L. REV. 199 (2001).
[443] *Burns*, 430 F.2d at 775.
[444] *Sostre v. McGinnis*, 442 F.2d 178 (2nd Cir. 1971).
[445] *Id*. at 190.

case.[446] The court gave due weight to the well-developed expert testimony that illuminated the fact that the conditions of the plaintiff's confinement were a "gross departure" from the contemporary standards of treatment of prisoners.[447] The court reiterated that the standard for cruel and unusual punishment must be held up to the light of "the evolving standards of decency that mark the progress of a maturing society."[448] Nonetheless, the court invoked its deference to prison administrators based on both the historical and contemporaneous use of isolation as a necessary convention in prisons regardless of "however counter-productive as a correctional measure or however personally abhorrent the practice may seem to some of us."[449] The threshold for finding that a punishment was cruel and unusual was reaffirmed by the court at the impossibly high standard of "barbarous" or "shocking to the conscious."[450]

An additional obstacle, though not nearly as onerous as deference to prison administrators, has been modern courts' reluctance to consider the psychological impact of isolation on prisoners. For example, in affirming prior refusal by courts to find a per se violation of the Eight Amendment for solitary confinement, the Eighth Circuit in *Burns v. Swenson* deferred to the District Court conclusion that the physical conditions of the cells, after a visit to the prison, did not constitute cruel and unusual punishment.[451] The court did pay heed to the idea that mental abuse could rise to the level being "such base, inhumane, and barbaric

[446] *Id.*
[447] *Id.*
[448] *Id.* at 191.
[449] *Id.* at 193.
[450] *Id.*
[451] *Burns*, 430 F.2d at 777 (string citing several cases that have drawn the same conclusion). It is *Burns* that is cited in *State v. Carroll*, the North Carolina case declining to find a per se violation of the Eighth for the use of solitary confinement in this state. *Carroll*, 195 S.E.2d at 306.

> The court did pay heed to the idea that mental abuse could rise to the level being "such base, inhumane, and barbaric proportions so as to shock and offend a court's sensibilities and the Eighth Amendment as well."

proportions so as to shock and offend a court's sensibilities and the Eighth Amendment as well."[452] However, by holding that the in-person view of the cell by the District Court judge was enough to understand that this situation did not apply signaled two possible conclusions. The judges showed either a lack of understanding about the psychological consequences of isolation as determined by experts, or a refusal to believe that there is a causal relationship between the extreme isolation suffered inside the 8 foot by 10 foot concrete cells and the psychological outcomes displayed by prisoners.

This refusal by courts to understand the effect of solitary confinement on the prisoner's psychological well-being when he is isolated within its walls was made abundantly clear in a Fourth Circuit decision in a case that challenged long term isolation in a segregation unit. The Court in *In re Long Term Administrative Segregation* found that the depression and anxiety suffered by the prisoners caused by isolation "are unfortunate concomitants of incarceration; they do not, however, typically constitute the extreme deprivations . . . required to make out a conditions-of-confinement claim."[453] The Fourth Circuit has declined to go as far as the *Madrid v. Gomez* court to find that the already mentally ill should not be placed in isolation. In a case from the Fourth Circuit brought by a prisoner in North Carolina who suffered from severe mental illness, the federal court used this same quote to dismiss his contention that isolation exacerbated his illness to the point of "caus[ing] him present and ongoing injury to his mental health."[454]

[452] *Id.*
[453] *See In re Long Term Administrative Segregation*, 174 F.3d at 464.
[454] *Williams v. Branker*, 462 Fed. App'x 348 (4th Cir. 2012).

4. The Modern Rule

Today, in terms of challenges to the conditions imposed by solitary confinement, a prisoner must meet a standard of proof that has evolved through the last forty years of Eighth Amendment jurisprudence. This standard offers little or even no protection to those who find themselves enclosed in a cell for up to twenty-four hours a day. The Supreme Court has articulated two paths by which someone can argue that they are the victims of cruel and unusual punishment under the Eighth Amendment.[455] This bifurcated approach differentiates between the conditions in which prisoners might find themselves once incarcerated and the conditions of confinement that are imposed as a punishment. A prisoner has to show that either he is being exposed to an "unnecessary and wanton infliction of pain" or his sentence was "grossly disproportionate to the severity of the crime warranting imprisonment."[456]

The disproportionality argument for widespread injunctive relief may see new light outside of capital punishment cases after the *Graham* decision.[457] As noted above, the New York Civil Liberties Union successfully filed a class action suit in federal court challenging the use of solitary confinement in New York based on a disproportionality argument.[458] That case is may create a new path to relief for non-violent offenders and those that pose no safety risk but still find themselves locked away in the prisons within the prisons.

However, most cases where prisoners are challenging their confinement fall under the unnecessary and wanton infliction of pain argument that has become known as a conditions of confinement challenge, a two part rule.[459] The first part of the rule requires an objective finding

[455] *See Rhodes v. Chapman*, 452 U.S. 337, 345 (1981).
[456] *Id.* at 345-46.
[457] *See* Strassburger *supra* note 442.
[458] *See supra* notes 394-397 and accompanying text.
[459] Strassburger *supra* note 442, at 230.

of a sufficiently serious deprivation.[460] The deprivation can be sufficiently grave because it serves no penological purpose such as the denial of medical care or necessary medication to prisoners who are dependent on the facility to do so.[461] The deprivation can also meet the standard of objectively serious enough to justify a finding of cruel and unusual if it resulted in unquestioned and serious deprivations of basic human needs."[462] The Court in *Rhodes v. Chapman* refined this spectrum of deprivation by narrowing the standard of wanton infliction of pain as those deprivations that deny "the minimal civilized measure of life's necessities."[463] The Court later defined this to mean that a prison "must provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must 'take reasonable measures to guarantee the safety of the inmates.'"[464] The Court also recognized that a combination of conditions that resulted in a deprivation of such needs could be found to violate the Cruel and Unusual Clause.[465]

This standard has proven unnecessarily high for those prisoners trying to challenge their confinement in extreme isolation. In *Madrid v. Gomez*, for example, the court held specifically that the "depression, hopelessness, frustration, and other such psychological states" as well as the "psychological pain" prisoners in solitary confinement were likely to experience are "not sufficient to implicate the Eighth Amendment."[466] As noted above, the Fourth Circuit has

[460] *See Rhodes*, 452 U.S. at 346.
[461] *Id.* at 347 (citing *Estelle v. Gamble*, 429 U.S. 97, 103 (1976)).
[462] *Id.* (citing *Hutto v. Finney*, 437 US 678 (1978)). *Hutto* was a case where the conditions in Arkansas prisons were so egregious with multiple inmates crowded into small cells without control of the water, sharing diseased mattresses, and living on a diet of "gruel," that the court allowed the District Courts injunctive relief, limiting the use of solitary and demanding that it be reformed. *Hutto*, 437 U.S. at 678.
[463] *Id.*
[464] *Farmer v. Brennan*, 511 U.S. 825, 832 (1994).
[465] *Wilson v. Seiter*, 501 U.S. 294, 304 (1991).
[466] *Madrid*, 889 F. Supp. at1262. The District Court did go on to find that placing prisoners already suffering from mental illness would be something that today's society would choose to tolerate. *Id.* at 1266.

similarly found these general psychological implications of isolation to not reach the objective standard of a sufficiently grave deprivation.

A prisoner can find relief for the conditions in which he finds himself, but if "the pain inflicted is not formally meted out as punishment by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify."

The second element of a "conditions of confinement" analysis "follows from the principle that only the unnecessary and wanton *infliction* of pain implicates the Eighth Amendment."[467] In order "[t]o violate the Cruel and Unusual Punishments Clause, a prison official must have a sufficiently culpable state of mind."[468] This is to preclude incidents where prisoners suffered because the cause of their suffering was unknown, accidental, or even negligent.[469] A prisoner can find relief for the conditions in which he finds himself, but if "the pain inflicted is not formally meted out as punishment by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify."[470] The *Wilson* Court went on to define this culpable state of mind as deliberate indifference.[471] The Supreme Court clarified the inconsistent tests adopted by the different appellate courts in defining what it meant by the deliberate indifference standard it applied in *Wilson* by articulating a standard similar to criminal recklessness where a prison official *must* "know of and disregard an excessive risk to inmate health or safety."[472] The Court contrasted this standard to a civil standard of recklessness that would allow for liability when someone *should* have known a substantial risk would exist.[473] Again referring to the Eighth Amendment's ban on punishment and its implied requisite of intent, the Court dismissed

[467] *Farmer*, 511 U.S. at 834.
[468] *Id.*
[469] *See Wilson*, 501 U.S. at 299-300.
[470] *Id.* at 300.
[471] *Id.* at 302.
[472] *Farmer*, 511 U.S. at 837-38.
[473] *Id.*

this civil law-based standard quickly as basically trying to impose liability for an objectively inhumane prison condition as had been denied in the *Wilson* decision.[474]

> In short, while courts will reject Eighth Amendment claims where there is no persuasive evidence that the challenged conditions lead to serious mental injury, where such injury can in fact be shown, Eighth Amendment protections clearly come into play.

5. The Double Bind of the Courts' Circular Logic

The narrow standard in the rule for conditions of confinement case law has carried forward the deference of prison administrators to historical Eighth Amendment cases in a way that creates a bind on prisoners trying to prove cruel and unusual punishment. A prison official can place a prisoner into a condition (i.e. solitary confinement) without any fear of judicial interference until it becomes obvious that an excessive risk of harm exists. Paralleling this logic is the fact that courts decline to hold that isolation is a risk to the mental health of all prisoners under such conditions because of their reluctance to hamper prison administration. Therefore, they are never able to overcome the threshold of severe deprivation nor force prison officials to become aware of the existence of an excessive risk. In other words, even if prisoners can show objectively that solitary confinement puts them at extreme risk of irreparable mental harm, they will still likely fail to overcome the burden of showing deliberate indifference by the officers who sent them to solitary because those officers can point to forty years of jurisprudence holding otherwise.

This predicament is demonstrated in *Madrid v. Gomez* where the court declined to accept the plaintiffs' arguments that: "[T]he conditions of extreme social isolation and reduced environmental stimulation in the SHU inflict psychological trauma, and in some cases deprive inmates of sanity itself. As such, [the plaintiffs] urge the Court to find that the SHU, as currently

[474] *Id.*

operated, deprives inmates of one of the 'basic necessities of human existence.'"[475] The court turned to the tried and true deference argument to uphold the use of isolation in most cases, reminding that: "[G]iven the 'limitations of federalism and the narrowness of the Eighth Amendment' it is not the Court's function to pass judgment on the policy choices of prison officials. . . . They may impose conditions that are 'restrictive and even harsh;' they may emphasize idleness, deterrence, and deprivation over rehabilitation."[476] This reasoning leaves prisoners in isolation in a dangerous bind because "before a condition of confinement is considered cruel and unusual, the conditions must be so terrible that they actually make an inmate lose his mind before relief is given. Inmates who retain their sanity or do not show outward signs of mental illness are forced to endure the daily isolation for years on end." [477] As the *Madrid* court put it, "In short, while courts will reject Eighth Amendment claims where there is no persuasive evidence that the challenged conditions lead to serious mental injury, where such injury can in fact be shown, Eighth Amendment protections clearly come into play."[478]

It is becoming ever more obvious that the current Eighth Amendment jurisprudence in regards to solitary confinement is no longer applicable under evolving mores of our society. The deference courts have unquestioningly given to prison administrators in using isolation to maintain order behind prison walls is no longer warranted. The Senate Judiciary Committee hearings looking into the use of solitary confinement demonstrate the need for a different Eight Amendment interpretation—one that is based on the reality of the practices of prolonged isolation and basic principles of human dignity. As a result of testimony from advocates, academics, and the UN Special Rapporteur on Torture, Juan Méndez, the practice of solitary

[475] *Madrid*, 889 F. Supp. at 1261.
[476] *Id.* at 1262.
[477] Strassburger, *supra* note 442, at 216.
[478] *Madrid*, 889 F. Supp. at 1264.

confinement must cease. Indeed, the growing body of academic, professional, and advocacy reports point to an undeniable conclusion that exposure to extreme isolation causes severe and often irreparable harm not only to their physical condition but also to the mental and emotional well-being of prisoners so confined.

The growing body of academic, professional, and advocacy reports point to an undeniable conclusion that exposure to extreme isolation causes severe and often irreparable harm not only to their physical condition but also to the mental and emotional well-being of prisoners so confined.

More recently, some lower courts seem to be signaling a shift in their views. These courts have expressed some understanding that the need for psychological well-being is as basic a human need as physical well-being, and have pointed out that the extreme deprivation occasioned by long term isolation could endanger the psychological health of a prisoner so confined.[479] In light of this growing common knowledge, courts should reconsider the subjective analysis of a "conditions of confinement" challenge, making prison administrators aware of the risk of severe damage to which they expose prisoners when confining them to solitary confinement.

Finally, the mounting body of psychological evidence about the devastating effects on prisoners so confined cannot be denied much longer by a maturing society. Court decisions based on this perspective have already begun to protect those already afflicted with some form of mental disease or have found against prisons for their lack of protocol for dealing with the mental disturbances likely to be encountered in solitary.[480] Reforms have begun to ban the practice from being imposed on minors as well. All of this points to our society's evolving understanding of the importance of mental well-being, and the knowledge of the serious and

[479] *Ruiz*, 37 F. Supp. 2d. at 914.
[480] *Id*. at 915. *See* also *Madrid*, 889 F. Supp. At 1259-60.

permanent damage that is a consequence of extreme isolation can no longer be denied as being a form of punishment or practice that is barbaric and shocking to the conscience.

B. Due Process

It is a well-established principle that individuals convicted of crimes who are serving time in prisons are entitled to dignity and protection of their human rights. Senator Patrick Leahy reiterated this principle in his comments before the Senate Judiciary Committee's hearing on solitary confinement in prisons in the United States advised of the obligation to treat prisoners confined to solitary "fairly and humanely."[481] The majority of these prisoners who suffer conditions of extreme isolation will be released back into society.[482] The treatment that they endure in prison will impact their ability to successfully reenter and reintegrate into society in ways that have consequences beyond their individual lives, immediate families, or particular communities.

The use of solitary confinement as a means of prison discipline and administrative strategy has exploded. As a matter of substantive due process, solitary confinement is a disproportionate punishment meted out unnecessarily. Thirty years ago, solitary confinement was reserved for only the most immediately threatening offenders.[483] Today, based on current prison data, solitary confinement is no longer used only for the exceptional cases; research demonstrates that there are a growing number of prisoners for whom assignment to solitary confinement cannot be justified for any purpose.[484] Although the Supreme Court has said that prisoners are not entitled to the full panoply of rights, the Court also made clear that they are not

[481] *See* Leahy, *supra* note 145.
[482] *Id*.
[483] *See* Epps, *supra* note 408.
[484] *See* Durbin, *supra* note 216.

Thirty years ago, solitary confinement was reserved for only the most immediately threatening offenders. Today, based on current prison data, solitary confinement is no longer used only for the exceptional cases; research

stripped of all of their due process rights. Yet those held in solitary have been denied any meaningful opportunity to challenge the initial decision to place them in such a condition, and are further deprived of the opportunity to contest prison official determinations to extend such confinement.

The increasing prevalence of confining prisoners to conditions of extreme isolation, together with an expanded body of research that demonstrates the often irreparable harm caused by such confinement points to the need to reconsider due process jurisprudence in the context of solitary confinement. Where prisoners face the possibility of serving time in solitary confinement, more rights are due given the devastating impact of solitary confinement.

1. General Due Process Principles

It is axiomatic that when people are put in prison they do not lose their constitutional rights. Indeed, there are certain due process requirements to which a person is entitled under all circumstances no matter where they are. The Due Process Clause of the Fourteenth Amendment "protects persons against deprivations of life, liberty, or property; and those who seek to invoke its procedural protection must establish that one of these interests is at stake."[485] In the context of imprisonment, for example, a hearing is required before a prisoner is deprived of property.[486] However, in prisons, the constitutional interest usually at stake is that of liberty.

[485] *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005).
[486] *Vitek v. Jones*, 445 U.S. 480 (1980).

Admittedly prisoners do not have all of the same rights as other citizens.[487] According to the Supreme Court "[a] prisoner is not wholly stripped of constitutional protections, and though prison disciplinary proceedings do not implicate the full panoply of rights due a defendant in a criminal prosecution, such proceedings must be governed by a mutual accommodation between institutional needs and generally applicable constitutional requirements."[488] The Court justified its determination that prisoners are not entitled to the full panoply of rights in prison disciplinary proceedings on the basis that these proceedings are not criminal prosecutions, and therefore, such rights may be limited.[489] According to the Court, in these circumstances, there is less at stake, and the rights due to a prisoner must be balanced between "institutional needs and objectives and the provisions of the Constitution that are of general application."[490] However, it is also well understood that a prison official's authority to restrict some of the rights usually due to a citizen is not unlimited.[491] Rights may only be restrained when related to a valid penal objective, and the deprivations must be administered with due process.[492]

Given the wealth of information that demonstrates the irreparable harm caused to prisoners, prison administration, and society by the misuse of solitary confinement, the outcome of balancing test weighs in favor of greater procedural and substantive protections before a prisoner can be placed in solitary.

In *Kentucky Department of Corrections v. Thompson*,[493] the U.S. Supreme Court used a two-step inquiry to analyze the validity of a procedural due process claim:

> First, the court asks whether the plaintiff has alleged a deprivation of a legally cognizable interest -- that is, "whether there exists a liberty or property interest

[487] *Wolff v. McDonnell*, 418 U.S. 539 (1974).
[488] *Wolff v. McDonnell* at 540.
[489] *Id.* at 556.
[490] *Id.*
[491] Jerald Jay Director, *Relief, under Federal Civil Rights Act, to State Prisoners Complaining of Conditions Relating to Corporal Punishment, Punitive Segregation, or Other Similar Physical Disciplinary Measures*, 18 A.L.R. FED. 7 (1974) (citing *Landman v. Royster*, 333 F. Supp. 621 (E.D. Va. 1971)).
[492] *Id.*
[493] 490 U.S. 454 (1989).

> which has been interfered with by the State." If the court finds that the plaintiff has alleged such a deprivation, it will then proceed to the second stage of the inquiry, asking "whether the procedures attendant upon that deprivation were constitutionally sufficient.[494]

The "constitutionally sufficient" inquiry turns to the *Mathews v. Eldridge*[495] three-part balancing test:

> Under this test, the Court must weigh: (1) the "private interest that will be affected" by the challenged government action; (2) "the risk of erroneous deprivation of such interest" under current procedures and the "probable value, if any, of additional or substitute procedural safeguards"; and (3) the "[g]overnment's interest" in the official action, including the cost of providing additional procedures.[496]

Due process principles must be applied in context. The burgeoning body of data and research on the consequences of solitary confinement give new context to the interests at stake that must be incorporated into any due process analysis. To put it differently, given the wealth of information that demonstrates the irreparable harm caused to prisoners, prison administration, and society by the misuse of solitary confinement, the outcome of the paradigmatic due process balancing test weighs in favor of greater procedural and substantive protections before a prisoner can be placed in solitary.

2. Minimum Due Process Rights Due To Prisoners Who Face Assignment To Solitary Confinement: Insufficient on Their Face; Insufficient as Applied

The question of what rights are due to prisoners who face confinement in a segregated housing unit has been examined in a number of settings. General due process "[i]n a prison setting . . . means a fair process that is meaningful and not routine. The process should be

[494] *Ashker* Order, *supra* note 401(citing *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 460 (1989)).
[495] *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).
[496] *Ashker* Order, *supra* note 401.

customized, inquiry driven, and object based. It should never . . . [be] fast, undiscerning, abstracted, and impersonal."[497]

The current due process jurisdiction is insufficient to address the circumstances of solitary confinement. Supreme Court has held that the Due Process Clause of the Fourteenth Amendment is satisfied during the informal process by providing some notice to a prisoner of the charges against him and an opportunity to be heard by prison officials before making a decision whether to send him to administrative segregation.[498] Beyond notice and an opportunity to be heard, the Court developed additional due process requirements that apply to individuals in prison. These requirements are:

- Advance written notice of charges no less than 24 hours prior to appearance before the adjustment committee.[499]
- A written statement by the fact finder of evidence relied on and the reasons for the action taken.[500]
- The prisoner can call witnesses and present evidence, with the exception of potentially hazardous situations to institutional safety and correctional goals.[501]
- The prisoner is entitled to have a neutral, detached hearing body hear his or her case.[502]

a. Right to a Witness

Current legal principles do not provide a prisoner with the right to confrontation and cross-examination as a routine matter, as they are generally not required in prison disciplinary measures.[503] But, there are particular circumstances where the right to confrontation is required, such as in situations involving an involuntary transfer of a prisoner to a mental hospital.[504] If a

[497] Angela A. Allen-Bell, *Perception Profiling & Prolonged Solitary Confinement Viewed Through the Lens of the Angola 3 Case: When Prison Officials Become Judges, Judges Become Visually Challenged, and Justice Becomes Legally Blind*, 39 HASTINGS CONST. L.Q. 763, 766 (Summer 2012).
[498] *See* Director, *supra* note 491.
[499] *Wolff*, 418 U.S. at 540.
[500] *Id.*
[501] *Id.*
[502] *Id.* at 559.
[503] *Id.* at 540.
[504] *Vitek*, 445 U.S. at 480.

prisoner is labeled as a "security threat," the prison is not required to let him call witnesses during the disciplinary hearing.[505] Although most prisoners are not permitted to bring in live witnesses to their disciplinary hearing, they can usually have other prisoners submit a written statement to be read at the hearing.[506] However, this process is often administered in ways that render the written statement useless and irrelevant.

> Often, when they technically were allowed to have witnesses, many inmates would not participate because the prison administration threatened them, and they had other fears of prison official retaliation.[1] Other survey respondents explained that the witnesses did not matter because the result was already decided.

Sandy, a prisoner at a North Carolina correctional institute, described the disciplinary hearing that resulted in her assignment to solitary confinement as worthless.[507] Her closest friend in the prison would have been able to submit a witness statement explaining her situation in ways that would have exculpated her. The prison administration, however, did not provide this potential witness with any information about Sandy's charge. The potential witness had no idea what the hearing was about. Such procedures deprived Sandy from the opportunity to present any relevant or mitigating information that might have assisted her case and helped her to avoid solitary confinement.[508] It rendered useless her right to submit a statement.

The North Carolina Prisoner Survey asked the fifty-one respondents whether they were ever allowed to call witnesses and present evidence during their hearings.[509] According to the results, twenty-three of the fifty-one respondents answered "no."[510] Although twenty prisoners answered that they were able to call witnesses, nine of the respondents included clarifications.

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[505] *See* Michael's Prisoner Interview, *supra* SECTION ONE, I.A.
[506] North Carolina Prisoner Survey results.
[507] Sandy's Prisoner Interview, *supra* SECTION ONE, I.A.
[508] *Id.*
[509] North Carolina Prisoner Survey results, Segregation: General 1.c.iv.E.
[510] *Id.*

Often, when they technically were allowed to have witnesses, many inmates would not participate because the prison administration threatened them, and they had other fears of prison official retaliation.[511] Other survey respondents explained that the witnesses did not matter because the result was already decided. In addition, witnesses were not allowed to be present at the hearing but could only submit written statements which, as a consequence of the opaqueness of the process were often too vague and lacking in specific information to be useful.[512] Another prisoner described how the prison found him guilty before he had a chance to call a witness.[513] These prison tactics make a mockery of any semblance of fairness and due process. The lack of process contributes to the imposition of a cruel and degrading form of punishment with irreparably damaging consequences.

b. Right to Counsel

Prisoners have no right to counsel,[514] except where they are deemed to be illiterate or where their cases present uniquely complex issues.[515] As a practical matter, the great majority of prisoners will always be denied counsel. Prisoners without counsel have no meaningful access or resources with which to defend themselves, and their ability to present their defense is so limited, particularly balanced against the severe consequences of solitary confinement they suffer when they are found guilty of various prison infractions.[516]

> The burden of providing prisoners with counsel when balanced against the likelihood of harm to them warrants such right and is in keeping with the fundamental principles of due process.

The right to counsel is not automatic, but it is appropriate in certain circumstances, such as, when a prisoner is indigent and the State is treating

[511] Prisoner 8's North Carolina Prisoner Survey response, Segregation: General 1.c.iv.E.
[512] *Id.*
[513] Prisoner 6's North Carolina Prisoner Survey response, Segregation: General 1.c.iv.E.
[514] *Wolff*, 418 U.S. at 540-41.
[515] *Gagnon v. Scarpelli*, 411 U.S. 778 (1973).
[516] *See* Allen-Bell, *supra* note 497.

him as mentally ill.[517] In *Gagnon v. Scarpelli*,[518] the Court held that counsel could be provided at probation revocation hearings on a case-by-case basis depending on certain factors including: "(i) the existence of factual disputes or issues which are 'complex or otherwise difficult to develop or present,' and (ii) 'whether the probationer appears to be capable of speaking effectively for himself.'"[519]

The consequences of solitary confinement are on par with any circumstance where counsel has been deemed to be appropriate. The irreparable damage to mental and physical health and well-being suggest that prisoners should have maximum safeguards when faced with the possibility of solitary confinement. The burden of providing prisoners with counsel when balanced against the likelihood of harm to them warrants such right and is in keeping with the fundamental principles of due process.

c. Special Due Process Needs: Mental Illness

Due process protections are afforded a prisoner who is mentally ill and who faces involuntarily transfer to a mental hospital given his or her liberty interest protected by the Due Process Clause of the Fourteenth Amendment.[520] In *Vitek v. Jones*, the Court analyzed several due process issues, including a failure to provide notice to the prisoner; a failure to provide an opportunity to be heard before an independent decision-maker; a failure to provide the prisoner with a written statement of the evidence relied upon and the reasoning behind the decision; and a denial of available counsel to represent the indigent prisoner.[521] The *Vitek* Court expanded on due process protections and stated that "[a] convicted felon also is entitled to the benefit of

[517] *Vitek*, 445 U.S. at 495.
[518] *Gagnon*, 411 U.S. at 778.
[519] *Vitek*, 445 U.S. at 498 (quoting *Gagnon*, 411 U.S. at 790).
[520] *Id.* at 480.
[521] *Id.*

procedures appropriate in the circumstances before he is found to have a mental disease and transferred to a mental hospital."[522]

A federal district court also treated the question of what substantive due process is due in the circumstances of transfer to a mental hospital.[523] The court determined the necessity for performing a balancing test between the "liberty of the individual and the demands of organized society," and "the individual's interest in liberty against the State's asserted reasons for restraining individual liberty."[524] Furthermore, the court enunciated the obligation to apply a professional judgment standard in order to determine whether a treatment decision is an "accepted professional judgment, practice, or standard[]."[525]

The Court's reasoning in *Vitek* is instructive to the circumstances of prisoners facing solitary confinement. These individuals will face conditions that are likely to have permanent consequences and implicate their rights to liberty, if not life itself. They are thus deserving of expanded protections including the right to counsel. Moreover, *Vitek* underscores due process concerns related to the right to professional judgment before a sentence of solitary confinement is imposed. As demonstrated by the research, a substantial number of prisoners who are sent to solitary have mental health problems that are the cause of their inability to comport themselves with prison disciplinary standards.[526] Prisoners who are confined to solitary must be assessed for mental health problems prior to such confinement.[527] Moreover, the mental health status of prisoners confined to solitary confinement rapidly deteriorates.[528] These individuals should be

[522] *Id.* at 493.
[523] *See West v. Macht*, 235 F. Supp. 2d 966 (E.D. Wis. 2002).
[524] *West*, 235 F. Supp. 2d at 973, (citing *Youngberg v. Romeo*, 457 U.S. 307, 320 (1982)).
[525] *West*, 235 F. Supp. 2d at 975.
[526] *See supra* SECTION ONE, III.A.4.
[527] *See supra* SECTION ONE, III.A.
[528] *See supra* SECTION ONE, III.A.1.

entitled to counsel and mental health assessment before their confinement to solitary might be extended.

d. The Lack of Due Process Through Meaningful Periodic Reviews

When an outcome is predetermined and prison officials who provide the review do so as a formality without any genuine or individualized consideration of the case or the person, due process is not satisfied.

The Supreme Court requires meaningful periodic review of prisoners in segregation to ensure that "process" is not simply "a pretext for indefinite confinement."[529] Prisoners in segregation are entitled to periodic reviews and may not be indefinitely confined in segregation.[530] However, research shows that often prisons have not established policies or procedures for regularly reviewing each case in order to assure that ongoing prisoner isolation is warranted.[531] As a result, prisoners remain in solitary confinement for longer periods of time than necessary, further injuring their mental and physical conditions.[532]

Nothing less than a "meaningful hearing" is required in order to comport with due process standards.[533] When an outcome is predetermined and prison officials who provide the review do so as a formality without any genuine or individualized consideration of the case or the person, due process is not satisfied.[534] Prolonged isolation thus implicates precious liberty issues.

There has been no specific standards or procedural guidelines that set forth the elements

[529] *Hewitt v. Helms*, 459 U.S. 460, 477 n.9 (1983).
[530] *Id.* at 493-94.
[531] Nolan, *supra* note209.
[532] *Id.*
[533] *Leary v. Daeschner*, 228 F.3d 729, 744 (6th Cir. 2000).
[534] Jules Lobel, *Prolonged Solitary Confinement and the Constitution*, 11 U. PA. J. CONST. L. 115, 126 (2009).

of an adequate review.[535] Prisoner 15, a prisoner in a North Carolina prison, describes the review process as a "farce and done only to comply with policy/law" on a superficial basis, but they do not follow their own policy regarding infraction-free prisoners.[536] Relatedly, the plaintiffs at Pelican Bay State Prison are not given any information about how to get themselves out of the SHU.[537] They request "meaningful notice of how they may alter their behavior to rejoin general population, as well as meaningful and timely periodic reviews to determine whether they still warrant detention in the SHU."[538] Prison administration should advise prisoners on how long it will take for the prison to reduce their security level classification and what type of behavior will allow that prisoner to be promoted to a lower-level of segregation or transferred out of solitary confinement entirely.[539]

3. Grievance Mechanisms and the Lack of Due Process in North Carolina

Prisoners have the opportunity to file grievances against corrections officers if they are treated badly or have a complaint. However, North Carolina prisoners have lost faith in the process because it is little more than a correction officer's word against the prisoner's.[540] One prisoner in a correctional institution in North Carolina explained how easy and common it is for officers to strike prisoners in the camera "blind spots" of the facility where cameras do not record.[541] Despite the odds against him, if a prisoner decides to file a grievance, the Superintendent usually sends it to the Block Sergeant who routinely denies the grievance and classifies the prisoner as a "liar."[542]

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[535] Allen-Bell, *supra* note 497.
[536] Prisoner 15's North Carolina Prisoner Survey response, Segregation: General 1.f.
[537] *Ashker* Order, *supra* note 401.
[538] *Id.*
[539] *See Wilkinson*, 545 U.S. at 221.
[540] North Carolina Prisoner Surveys and Prisoner Interviews.
[541] Malik's Prisoner Interview, *supra* SECTION ONE, I.A.
[542] *Id.*

Filing grievances can also be a reason why prisoners are assigned to solitary confinement to begin with.[543] Prisoners who demand rights for themselves and their fellow prisoners are often put in solitary confinement.[544] They are vulnerable to additional abuse by corrections officers who have been made aware of and often read the grievances filed by the prisoner.[545] By not allowing prisoners complaints to be heard and taken seriously under a strict process, the grievance process in North Carolina prisons does not come close to securing the prisoners' due process rights.

4. North Carolina Data: No Meaningful Due Process

The failure to provide meaningful data has been demonstrated through the data and statistical analysis of North Carolina prisons. In the years from 2010 to 2013, only about half of a percent of the cases resulted in a verdict for the prisoner of "not guilty," where almost 52 percent of the cases found the prisoner "guilty."[546] This information corroborates the many survey responses explaining how the hearings are pointless because the prison has already made up their mind on the verdict and a prisoner will rarely win if it is his or her word against that of a correctional officer's.[547]

a. Time for Change

In recent years, greater attention has been brought to bear on the question of what due process protections are due to prisoners facing solitary confinement. U.S. courts have "ruled that placement in solitary confinement, by virtue of lack of contact, loss of privileges, and dearth of work or educational opportunities imposes an 'atypical and significant hardship' which gives rise

[543] Sandy's Prisoner Interview, *supra* SECTION ONE, I.A.
[544] *Id.*
[545] *Id.*
[546] North Carolina Prison Statistical and Data Analysis.
[547] North Carolina Prisoner Survey results.

to constitutional protections."[548] The harms done in solitary confinement are overwhelming to the prisoner who is almost certain to suffer extreme damage.[549] The prison has alternative measures to handle prisoners who might be a threat to themselves or others without jeopardizing the goal of maintaining prison control.[550] When solitary confinement is at issue, the harms and risks of the prisoner's health and well-being, irreparable after a certain amount of time, outweighs any notion of limited due process rights.

Although due process jurisprudence has yet to be sufficiently expanded to provide requisite protections to those facing solitary confinement, there are some favorable currents. For example, in *Wilkinson v. Austin*,[551] the U.S. Supreme Court held that assignment to an Ohio supermax prison violates a prisoner's liberty interest, "due to the extreme isolation and the limited environmental stimulation they face at that facility."[552] In addition to the important findings by the U.S. Supreme Court on the consequences of solitary confinement, other policy groups and human rights entities have refocused their attention to the onerous practices and effects of solitary confinement and the need for expanded due process protections. Studies have demonstrated that extreme isolation conditions are of such a "significant hardship" and thus require that prisoners be given a meaningful opportunity to

Extreme isolation conditions are of such a "significant hardship" and thus require that prisoners be given a meaningful opportunity to challenge the transfer to solitary confinement.

[548] *Written Statement of the American Civil Liberties Union of Maine Before the Inter-American Comm. on Human Rights: Thematic Hearing on Human Rights and Solitary Confinement in the Americas* (Mar. 12, 2013) [hereinafter *Written Statement of the ACLU of Maine*] (citing *Colon v. Howard*, 215 F.3d 227, 231-32 (2nd Cir. 2000) (finding 305 days in segregated housing unit to be an atypical and significant hardship); *Hatch v. District of Columbia*, 184 F.3d 846, 858 (D.C. Cir. 1999) (ruling that on remand, court should determine whether twenty-nine weeks of segregation is atypical); *Williams v. Fountain*, 77 F. 3d 372 n.3 (11th Cir. 1996) (finding one year in solitary confinement atypical and significant)).
[549] *See supra* SECTION ONE, III.A.
[550] *See infra* SECTION THREE.
[551] *Wilkinson*, 545 U.S. at 209.
[552] *Id*. at 224; *see also Written Statement of the ACLU of Maine*, *supra* note 548.

challenge the transfer to solitary confinement.[553] The need to expand due process protections for prisoners facing solitary confinement was recently before the Inter-American Commission on Human Rights.[554]

Due process jurisprudence is steeped in the fundamental principles of fairness and balance. The scales of justice are weighted differently now than in past situations when courts have considered what due process rights were owed to prisoners facing solitary confinement. The emerging research on the irreparability of harm caused by solitary confinement shifts the balance. Similarly, the overuse of solitary confinement suggests the need to rethink legal protections.[555] Given these circumstances, the existing due process standards are outdated. They are no longer sufficient to protect against the harms at issue. Prisoners facing solitary confinement must be afforded counsel, as well as a meaningful and effective opportunity to confront the evidence against them and to present a fully considered defense. It is not enough to argue for the implementation of existing limited due process. The circumstances of solitary confinement require the expansion of due process rights for any prisoner facing such assignment. The irreparable harm likely caused by such confinement compels a reconsideration of due process jurisprudence. The overuse and misuse of such punishment in a prison setting where there is little transparency of process suggests that prisoners should be afforded counsel, a meaningful right to confront the evidence against them, and an opportunity to call witnesses and present other evidence.

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[553] *See* Fujio et al., *supra* note 137.
[554] *Written Statement of the ACLU of Maine*, *supra* note 548. The ACLU of Maine issued a statement pronouncing that "despite the seriousness of solitary confinement, prisoners in disciplinary hearings were rarely provided assistance understanding the process of a meaningful opportunity to present a defense." *Id.*
[555] *See* Fujio et al., *supra* note 137. "Both medical and prison experts agree that the harm inflicted on a person kept in solitary confinement outweighs any benefit in all but the most extreme cases." *Id.*

C. Conclusion: Constitutional Issues

Prisoners are entitled to both due process rights and to be treated with basic human dignity regardless of the fact that they are in prison. However, evidence shows that prisoners are generally deprived of the rights to which they are entitled by the Due Process Clause of the Fourteenth Amendment. Nor are they sufficiently protected from the barbaric conditions of extreme isolation by the Eighth Amendment's ban on cruel and unusual punishment.

Prisoners facing solitary confinement must be afforded counsel, as well as a meaningful and effective opportunity to confront the evidence against them and to present a fully considered defense.

Along with the right to the basic necessities of life, prisoners are entitled to a fair and meaningful hearing before being sent to solitary confinement. They are entitled to periodic reviews to determine whether they are required to or mentally fit to stay in solitary confinement. Because due process requirements must be adapted to the risks and burdens of a given context, and given the significant risks posed by solitary confinement conditions, the scales of justice are weighted toward greater due process rights for prisoners facing a possible solitary confinement sentence. Furthermore, because it is becoming more and more evident that our society's maturing mores will no longer tolerate the dire outcomes of imposing isolation on prisoners, Eighth Amendment jurisprudence is due for reconsideration and revision so that solitary confinement may be recognized as constituting cruel and unusual punishment.

II. International Law Applies to Solitary Confinement in the United States

A. The Convention Against Torture (CAT) Applies to the United States and Does Not Support the Use of Solitary Confinement in American Prisons.

1. Substantive provisions of the Convention Against Torture and their relation to solitary confinement

a. Article 1 of the Convention Against Torture

The Convention Against Torture ("CAT") was signed by President Ronald Reagan on April 18, 1988, and ratified by the Senate on October 21, 1994.[556] Acts of torture are proscribed by the treaty as a human rights violation. Torture is defined in the Article 1 of the Convention Against Torture as:

> *any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person* for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.[557]

According to the CAT's definition, torture can be analyzed by examining four elements: severe pain or suffering, intent, purpose, and state involvement. The act of confining prisoners to extreme isolation, generally known as solitary confinement, fits within this definition.

The UN Special Rapporteur has observed that CAT is a "legally binding instrument at the universal level concerned exclusively with the eradication of

[556] The treaty is fully applicable for the USA, but this paper does not address the foundational jurisprudence or legal premises for the applicability of treaties. For information on this issue, *see* Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Office for the High Commissioner of Human Rights, Committee Against Torture, Status of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and Reservations, Declarations and Objections Under the Convention, CAT/C/2/Rev.5 (Jan. 22, 1998), http://www.unhchr.ch/tbs/doc.nsf/0/fa6561b18d8a4767802565c30038c86a?Opendocument (last visited June 22, 2012) [hereinafter CAT]

[557] *Id.* (emphasis added).

torture."[558] According to the CAT's definition, torture can be analyzed by examining four elements: severe pain or suffering, intent, purpose, and state involvement. The act of confining prisoners to extreme isolation, generally known as solitary confinement, fits within this definition. The United Nations Special Rapporteur on Torture found in his 2011 report to the UN General Assembly that solitary confinement can especially amount to torture when it is indefinite and prolonged.[559] As this report discusses, prisoners who are subjected to conditions of solitary confinement experience significant and severe mental and physical pain and suffering, inflicted with the intent to and for the purpose of punishment by government officials who assign the prisoners to conditions of extreme isolation.

The Committee against Torture, established under CAT to monitor the implementation of the provisions of CAT, has recognized the harmful physical and mental effects of prolonged solitary confinement. It has expressed grave concern about its use as a preventive measure during pre-trial detention, as well as a means of discipline.[560]

The international standards promulgated under the CAT establish that solitary confinement amounts to torture, especially when it is prolonged and indefinite, as is the case for most prisoners in North Carolina's prisons. According to these standards, Omar Reed's circumstances reflect he has been subjected to torture and cruel, inhuman, and degrading treatment. Mr. Reed has been held in solitary confinement for eleven years. He has spent much of that time without

The U.N. Special Rapporteur has concluded that solitary confinement can amount to cruel, inhuman, or degrading treatment or punishment (and, as noted above, even torture) as a result of the serious psychological and physiological effects of isolation.

[558] The 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, delivered to the General Assembly, U.N. Doc. A/66/268 (Aug. 5, 2011) (by Juan Mendez) [hereinafter Special Rapporteur].
[559] *Id.*
[560] *Id.*

being accused of committing infractions nor has there been other reasons provided to justify much of his time in solitary. Just as tellingly, the times when he has been accused of behavior to warrant confinement to extreme isolation, his behavior has been attributable to mental stress and the traumatic effects of solitary confinement. Mr. Reed, like other individuals in his circumstances, often "acts out" in order to seek attention and human contact through whatever methods possible. His prolonged and indefinite confinement in isolation is in violation of the international standards set forth in CAT. His story is one among many that demonstrates that the use of solitary confinement is prohibited under the treaty.

b. Article 16 of the Convention Against Torture

In addition to international human rights norms that address solitary confinement as torture, international legal standards also address the practice as constituting cruel, inhumane or degrading treatment. Article 16 of the CAT requires all member states to "undertake to prevent in any territory under its jurisdiction other acts of cruel, inhumane or degrading treatment or punishment which do not amount to torture as defined in Article 1."[561] This provision serves to prohibit treatment that does not amount to torture but is still unacceptable and prohibited under the statute. The Committee Against Torture has "stressed that ill-treatment is often conducive to torture, and therefore torture and cruel, inhuman and degrading treatment are closely intertwined."[562] The U.N. Special Rapporteur has found the key elements in differentiating between cruel, inhuman, and degrading treatment and torture are the powerlessness of the victim and the purpose of the act.[563] In his 2011 report to the United Nations General Assembly, he

[561] CAT, *supra* note 557, Art. 16.
[562] UN Human Rights Council, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak : Addendum, 5 February 2010, A/HRC/13/39/Add.5, http://www.unhcr.org/refworld/docid/4cf8f3192.html (last visited March 20, 2013).
[563] *Id.*

concluded that solitary confinement can amount to cruel, inhuman, or degrading treatment or punishment (and, as noted above, even torture) as a result of the serious psychological and physiological effects of isolation.[564] Thus, if solitary confinement is viewed as something less than torture, it is still used in violation of the United States' international obligations by virtue of Article 16 of CAT.

The European Committee for the Prevention of Torture, created under the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, which echoes the provisions of the CAT[565], finds that solitary confinement:

> can amount to inhuman and degrading treatment' and [the Committee] has on several occasions criticized such practices and recommended reform – i.e. either abandoning specific regimes, limiting the use of solitary confinement to exceptional circumstances, and/or securing inmates a higher level of social contact.[566]

2. Article 2 of the Convention Against Torture

Article 2 of the CAT treaty requires state parties to "take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction," and "[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."[567]

This means that the United States and North Carolina must undertake the appropriate legal measures to ensure that the CAT is followed in the United States. This can be done through

[564] *See* Special Rapporteur, *supra* note 558.
[565] *The CPT in Brief*, EUROPEAN COMMITTEE FOR THE PREVENTION OF TORTURE AND INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, http://www.cpt.coe.int/en/about.htm (last visited June 28, 2013).
[566] *Id*.
[567] CAT, *supra* note 557, Art. 2(2).

the legislature expressly abolishing or limiting the use of solitary confinement in the United States and also in North Carolina as has been done in other states.[568]

3. Article 11 of the Convention Against Torture

Article 11 of the Convention Against Torture requires that each state party actively prevent against any act that could be considered torture:

> Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.[569]

The United States and North Carolina should closely regulate and supervise the conditions of imprisonment in a manner consistent with its obligations under the CAT. Specifically, it should ban the use of cruel, inhumane, or degrading treatment or punishment or torture as required by the United States' international human rights obligations. The lack of oversight by government officials or even those at the top of the chain within the prison leave room for guard brutality and the improper distribution of medical care. For example, prisoners who suffer from mental illnesses often find themselves in solitary confinement under conditions that substantially worsen their mental illnesses. If prisoners ask for medical care, they are likely to be placed in an observation cell. An observation cell is an even worse fate than the solitary cells. A prisoner will often be put in the observation cell naked or with just boxers on; the observation cell does not include a mattress and is often unbearably cold in the winter or hot and humid in the summer. Prisoners suffering from mental health impairments suffer exponentially in those conditions. Increased oversight of the practices in the prisons could improve prison conditions and assure compliance with the international obligations under the CAT.

[568] *See supra* SECTION ONE, Part II.C.

B. The International Covenant on Civil and Political Rights ("ICCPR") Applies to the United States and Prohibits Torture.

1. The ICCPR's authority and applicability to the United States

The United Nations adopted and ratified the ICCPR in 1966. The ICCPR came into force as an international treaty in 1976 and was ratified in the United States on June 8, 1992, coming into force for the United States in September 1992.[570] The Human Rights Committee was created by the ICCPR. The function of the Committee is to serve as a mechanism for oversight and treaty interpretation.[571] The Human Rights Committee defined the purpose of the ICCPR as a treaty that:

> create[s] legally binding standards for human rights by defining certain civil and political rights and placing them in a framework of obligations which are legally binding for those States which ratify; and to provide efficacious supervisory machinery for the obligations undertaken.[572]

The Preamble of the ICCPR notes that the preserved rights "derive from the inherent dignity of the human person" and are "in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights."[573]

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[570] Kristin Emerson et al., *A Call to Uphold The Core Principles of Responsibility and Protection of Human Rights: Extraordinary Rendition, Torture, and North Carolina*, UNIVERSITY OF NORTH CAROLINA SCHOOL OF LAW IMMIGRATION AND HUMAN RIGHTS POLICY CLINIC, *available at* http://www.law.unc.edu/documents/clinicalprograms/ertorturencbriefweb.pdf (last visited June 30, 2013).
[571] Human Rights Committee: Monitoring civil and political rights, OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, http://www2.ohchr.org/english/bodies/hrc/ (last visited June 30, 2013) [hereinafter Human Rights Committee].
[572] Hum. Rts. Comm. General Comment No. 24 (52), ¶¶ 11, 18–19, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994) [hereinafter General Comment 24].
[573] International Covenant on Civil and Political Rights, 999 UNTS 171, 6 ILM 368 (1966), pbml., available at http://www2.ohchr.org/english/law/ccpr.htm [last accessed, 3/18/2013 at 9:46PM EST]. [hereinafter ICCPR].

2. Substantive provisions of the ICCPR that apply in the case of solitary confinement

a. Freedom from torture (Article 7 of the ICCPR)

The most important language relevant to the issue of solitary confinement as torture is found in Article 7 of the ICCPR, which recognizes the right of every person to protection against torture or cruel, inhuman, and degrading treatment or punishment.[574] In 2008, the United Nations General Assembly's Secretary General addressed the specific issue of solitary confinement and its relationship to torture. In his report to the UN, he noted that solitary confinement may amount to torture if the use is prolonged, indefinite, and disproportionate in breach of Article 7 of the ICCPR.

Solitary confinement may amount to torture if the use is prolonged, indefinite, and disproportionate in breach of Article 7 of the ICCPR.

The Human Rights Committee created by the ICCPR consists of a group of independent experts who monitor the implementation and interpretation of the provisions of the ICCPR by State Parties to the convention.[575] The Human Rights Committee similarly advocates the abolition of the use of solitary confinement, especially during pre-trial detention, and deems it a type of confinement that should be under strict judicial supervision.[576] In General Comment No. 20 (1992), the Human Rights Committee stated that the use of prolonged solitary confinement may amount to a breach of Article 7 of the ICCPR[577]

b. Right against arbitrary arrest (Article 9 of the ICCPR)

Article 9 of the ICCPR provides that "[e]veryone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his

[574] *Id*, art. 7.
[575] *See* Human Rights Committee, *supra* note 571.
[576] *Id.*
[577] UN General Assembly, Torture and other cruel, inhuman or degrading treatment or punishment: note / by the Secretary-General, 28 July 2008, A/63/175, http://www.unhcr.org/refworld/docid/48db99e82.html (last visited Mar. 19, 2013) [hereinafter UN General Assembly Note].

liberty except on such grounds and in accordance with such procedure as are established by law."[578] Article 9 does not permit the use of torture, including those circumstances where the individual is provided due process of law. More troubling under the terms of Article 9, however, are those instances where prisoners are sent to solitary confinement without having been afforded a fair disciplinary hearing.

Project surveys indicate that the prisoners are not afforded anything approximating meaningful due process disciplinary hearings. Prisoners report that it is evident that the correctional officials have predetermined the outcome and that the decision to impose solitary confinement is a "fait accomplit." Moreover, correctional officers often create baseless disciplinary "write-ups" that prisoners are unable to effectively contest. As a result, a prisoner's assignment to solitary confinement may be arbitrarily extended by months, if not years.

c. Right to be treated with humanity (Article 10 of the ICCPR)

Article 10 of the ICCPR provides that "[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."[579] The stories of prisoners in solitary all differ with regard to the extremity of their individual suffering, but one theme remains constant: they suffer severe abuse at the hands of correctional officers who often instigate problems between the prisoners and jeopardize the safety of those they are charged with protecting. Prisoners complain of degrading and brutal treatment by correctional officers who beat them and otherwise mistreat them.

The conditions in solitary confinement are so degrading and dehumanizing as to constitute a violation of the standards set forth in the ICCPR. As one prisoner wrote:

[578] ICCPR, *supra* note 573, Art. 9.
[579] *Id.*, Art. 10.

> We have absolutely NO access to outdoor and outside activities. We receive absolutely NO fresh air. Absolutely NO direct sun light (a basic human essential I would add). We have absolutely NO human contact… The showers in the cells that are controlled by the staff electronically from the officer's booth. Not only are the showers controlled by the guards, so are the toilets. The toilets are programmed to flush twice every hour… We do not have permission to place a hand on the glass as a way of expressing to our loved ones affection for them; even though by virtue of such separation, there is no possible way to touch them! So while we are not on death row, we are really dying a substantial death inside: emotionally & internally from the lack of humane treatment and the lack of other basic human essentials.[580]

This type of treatment does not respect the basic human dignity of the prisoners and violates the ICCPR.

d. The obligation to respect and ensure human rights (Article 2)

Under Article 2 of the ICCPR, each "State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant."[581] With regard to solitary confinement, state and federal government officials who have jurisdiction over the prisoners held in state and federal prisons are obligated to comply with these provisions.

Prisoners typically do not have proper recourse for a violation of their basic human rights. Survey results and prisoner narratives reveal that the prisoners feel their grievances are seldom, if ever, positively addressed.

The survey information and the prisoners interviewed for this report, as well as other information about the state of solitary confinement, clearly establish that individuals held in extreme isolation are treated as less than human. The conditions of solitary confinement, the lack of fair process that triggers the imposition of such punishment, the seeming inability to get out of solitary confinement except after long periods of time, and the occasional

[580] Muhammad, *supra* note 31 (Saiyd Muhammad is a prisoner held in solitary confinement at Polk Correctional Institution in Butner, NC).
[581] ICCPR, *supra* note 573, Art. 2.

brutality of correctional officers taken together or alone amount to a deprivation of human rights in violation of Article 2.

e. The obligation to implement domestic legislation (Article 2.2)

A State Party to the ICCPR has the obligation to implement domestic legislation to further treaty purposes. Article 2.2 of the ICCPR provides:

> Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.[582]
>
> Additionally, a State Party to the ICCPR is required to ensure that appropriate measures exist for the fulfillment of the State Party's legal human rights obligations. This includes providing a "domestic forum for those aggrieved by human rights violations."[583]

Prisoners typically do not have proper recourse for a violation of their basic human rights. Survey results and prisoner narratives reveal that the prisoners feel their grievances are seldom, if ever, positively addressed. Prisoners fear filing grievances because the correctional officers are likely to retaliate against the prisoners if they do so. The United States must promulgate legislation that provides a means to challenge the imposition of solitary confinement generally and the specific conditions of such confinement in accordance with Article 2.2.

Article 2.3 provides that there must be an "effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity" for any violations of recognized rights.

f. The obligation to ensure effective relief or recourse for violations of obligations set forth in the ICCPR (Article 2.3).

Article 2.3 provides that there must be an "effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity" for any violations of

[582] ICCPR, *supra* note 573, Art. 2.2.
[583] General Comment 24, *supra* note 572, ¶ 14.

recognized rights.[584] The State Parties also have a duty to investigate and redress to determine if there are any violations of the ICCPR.[585]

Prisoners in solitary confinement need an effective remedy to their prolonged confinement. The prisoners who have been subjected to solitary confinement should have legal recourse for their prolonged and indefinite confinement in isolation. This is especially significant given that the United Nations Oversight Committee found the issue of misuse of solitary confinement to be so prevalent in the United States that the Committee included the use of solitary confinement in its list of concerns about the United States meeting its international human rights obligations.[586]

North Carolina is bound by the international obligations of the United States as a whole, and is therefore also required to implement a system that prohibits the use of torture or cruel, inhuman, or degrading treatment or punishment. As a result, North Carolina should abolish solitary confinement in the states' prisons. At the very least, the use of solitary confinement in North Carolina should be reduced or limited both in terms of the prevalence of use, the amount of time prisoners are kept in solitary confinement, and the conditions under which they are held.

C. International Norms Prohibit the Use of Torture in Any Form and for Any Reason

1. The Istanbul Protocol

The Istanbul Protocol is a set of international guidelines designed to protect individuals from torture.[587] It defines solitary confinement for the international community as a form of

[584] ICCPR, *supra* note 573, Art. 2.3.
[585] *Id*.
[586] List of Issues to be Taken up in Connection with the Consideration of the Fourth Periodic Report of the United States of American (CCPR/C/USA/4), adopted by the committee at its 107th Session, 11 – 28 March 2013, Human Rights Committee, http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G12/429/66/PDF/G1242966.pdf?OpenElement.
[587] MANUAL ON THE EFFECTIVE INVESTIGATION AND DOCUMENTATION OF TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (ISTANBUL PROTOCOL), OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, ¶¶ 145(M), 234, http://www.solitaryconfinement.org/Istanbul (last visited March 19, 2013) [hereinafter Istanbul Protocol].

torture.[588] According to the document, solitary confinement includes "physical isolation of individuals who are confined to their cells for twenty-two to twenty-four hours a day," with very minimum contact with others, a quantitative and qualitative reduction in stimuli, and very occasional social contacts.[589]

The UN Special Rapporteur on Torture 2011 report reviews the Istanbul Protocol in the context of the goal of the office of the Rapporteur to create "new rules" with regards to solitary confinement. Such new rules, notes the report, are to be based on the collective opinions of a task force of mental and physical health experts who have researched the consequences of solitary confinement and its effects on a prisoner's health.[590] These experts found that:

> between one third and as many as 90% of prisoners experience adverse symptoms in solitary confinements. A long list of symptoms ranging from insomnia and confusion to hallucinations and psychosis has been documented. Negative health effects can appear after only a few days in solitary confinement, and the health risks increase with each additional day spent in such conditions.[591]

The experts further went on to find that, "[w]hen the element of psychological pressure is used on purpose as part of isolation regimes, such practices become coercive and can amount to torture."[592]

The Istanbul Protocol and the revised standards that are under development demonstrate the collective concern of the international community to end the practice of solitary confinement because it arises to the level of torture. North Carolina should take heed of these norms and find alternative forms of prison discipline that do not cause the irreparable harm known to be the result of solitary confinement.

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[588] *Id.*
[589] *Id.*
[590] UN General Assembly Note, *supra* note 577, Ch. IV, ¶ 84.
[591] Istanbul Protocol, *supra* note 587.
[592] *Id.*

2. The Basic Principles for the Treatment of Prisoners

The Basic Principles of the Treatment of Prisoners is a UN General Assembly resolution and is binding on the United States. Principle 1 echoes the language of the CAT and ICCPR discussed above and requires that every prisoner be treated with the "respect due to their inherent dignity and value as human beings."[593] Principle 5 provides that:

> Except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in … the International Covenant on Civil and Political Rights and the Optional Protocol thereto, as well as such other rights as set out in other United Nations Conventions.[594]

This Principle reinforces that the CAT and ICCPR provisions must be upheld. Principle 6 requires giving prisoners access to "cultural activities and education aimed at the full development of the human person."[595] Prisoners in solitary are denied access to rehabilitation programs that promote education and teach skills prisoners can use when their sentences are served and they are reintegrated back into society.

The language of Principle 7 of the Basic Principles for the Treatment of Prisoners also informs U.S. obligations to end the practice of solitary confinement: "Efforts addressed to the abolition of solitary confinement as a punishment, or to the restriction of its use, should be undertaken and encouraged."[596]

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[593] Basic Principles for the Treatment of Prisoners, UN General Assembly Resolution A/Res/45/111, Principle 1 (Dec. 14, 1990), http://www.un.org/documents/ga/res/45/a45r111.htm (last visited Apr. 8, 2013) [hereinafter Basic Principles for the Treatment of Prisoners].
[594] *Id.* at Principle 5.
[595] *Id.* at Principle 6.
[596] *Id.* at Principle 7.

3. Revision Of Standard Minimum Rules Of Detention To Include A Ban On Prolonged And Indefinite Solitary Confinement

The Standard Minimum Rules were adopted in 1957 as a soft law instrument and apply to the treatment of prisoners.[597] Since it is a soft law instrument, it is not binding; however, it establishes that it is intended to influence the practice of states.[598]

In recent years, the concerns of the international community have increased as a result of the overuse of solitary confinement and the abusive conditions therein. A growing number of states worldwide have reduced and limited the use of solitary confinement. Accordingly, the Standard Minimum Rules are currently under review to determine the best mechanisms to strengthen the applicability of international human rights norms to prevent the wrongful use of solitary confinement. Prison Reform International and the Quaker Office of the UN are working on revising the Standard Minimum Rules to prohibit prolonged and indefinite solitary confinement or any solitary confinement over 15 days.[599] These efforts demonstrate an important trend in international law towards restricting the use of solitary confinement.

These emerging practices and standards may inform customary international legal norms and thus, have binding effects on the members of the United Nations including the United States and North Carolina. Customary International Law is defined under the International Court of Justice Statute Article 38(1)(b) as "evidence of a general practice accepted as law."[600] General practices can be determined by the general practices of states and what states have accepted as

[597] Adopted by the First UN Congress on the Prevention of Crime and the Treatment of Offenders in 1955, and approved by the Economic and Social Council in Resolution 663 C (XXIV) of 31 July 1957.
[598] Alan Boyle, *Some Reflections on the Relationship of Treaties and Soft Law*, 48 INT. & COMP. LAW. Q. 901, 901-913 (Oct. 1999).
[599] Interview with Professor Juan Mendez, U.N. Special Rapporteur on Torture, in Washington, D.C. (Apr. 3, 2013).
[600] Statute of the International Court of Justice, I.C.J., http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0 (last visited June 30, 2013).

law.[601] New standards that drive state practices will soon require that the United States conform to their practices and prohibit the continued confinement of prisoners to extreme isolation.

4. Actions of other countries that serve to create and establish international norms

Other countries and regional lawmakers around the world have found solitary confinement to be an impermissible method of managing prisoners. The Criminal Tribunal for the Ex Yugoslavia has held, as a general standard that "[t]o the extent that the confinement of the victim can be shown to pursue one of the prohibited purposes of torture and to have caused the victim severe pain and suffering, the act of putting or keeping someone in solitary confinement may amount to torture.'"[602] The European Court of Human Rights in the Case of *Ramírez Sánchez v. France* established that "protracted sensory isolation coupled with complete social isolation can no doubt ultimately destroy the personality; thus, it constitutes a form of inhuman treatment, which cannot be justified out of concerns for security or anything else."[603]

The European Court of Human Rights ruled that the extradition of Haroon Aswat to the United States, a terror suspect currently located in the United Kingdom, would be a violation of Article 3 of the European Convention on Human Rights.[604] Article 3 of the European Convention prohibits inhuman and degrading treatment.[605] The European Court of Human Rights found that the conditions at the ADX Florence federal maximum-security prison in

[601] Yoram Dinstein, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 5 (Cambridge University Press 2004).
[602] United Nations, Human Rights Committee, General Comment No. 20: Prohibition of torture and cruel treatment or punishment (Article 7), adopted at the 44th session (1992), ¶ 6. In: Compilation of General Comments and General Recommendations adopted by human rights treaty bodies, Volume I, HRI/GEN/1/Rev.9 (Vol. I) 239, adopted May 27, 2008.
[603] *Ramírez Sánchez v. France*, App. No. 59450/00, 2006 Eur. Ct. H.R. 1.
[604] Owen Bowcott & Vikram Dodd, *Human Rights Court Blocks Extradition of UK-Based Terror Suspect to the US*, THE GUARDIAN (Apr. 16, 2013), http://www.guardian.co.uk/law/2013/apr/16/human-rights-extradition-terror-suspect.
[605] *See id.*; *see also* Convention for the Protection of Human Rights and Fundamental Freedoms, art. 3, Nov. 4, 1950, E.T.S. 5.

Colorado were unacceptable, especially in light of the prisoner's mental health conditions.[606] ADX Florence in Colorado is a super maximum security prison that keeps its prisoners in solitary confinement for 22-23 hours a day. This was held to be inhuman and degrading treatment where the prisoner already suffers greatly from mental health disorders.[607]

The Council of Europe issued a set of voluntary guidelines that are intended to govern incarcerations in the European Union, known as the European Prison Rules.[608] Rule 60.5 recognizes the serious mental and physical health risks to prisoners as a result of solitary confinement, and finds that solitary confinement "shall be imposed as a punishment only in exceptional cases and for a specified period of time, which shall be as short as possible.[609]"

Elsewhere, solitary confinement has been construed as a tool of torture under the guise of punishment. Juan Méndez concludes that the use of solitary confinement as punishment or for disciple can never be justified "because it imposes severe mental pain and suffering beyond any reasonably retribution for criminal behavior."[610] A United Nations High Commissioner for Refugees ("UNHCR") report examining solitary confinement in Rwanda incorporated the findings of the senior advisor to the Africa Division at Human Rights Watch who observed that "[p]rolonged solitary confinement is cruel and inhuman treatment."[611] Indeed, the report concludes that "[s]olitary confinement for prolonged periods of time violates the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 7 of

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[606] *Id.*
[607] *Id.*
[608] Council of Europe: Committee of Ministers, Recommendation (2006) of the Committee of Ministers to Member States on the European Prison Rules (Jan. 11, 2006), https://wcd.coe.int/ViewDoc.jsp?id=955747.
[609] *Id.* at Rule 60.5.
[610] Special Rapporteur, *supra* note 558.
[611] *Rwanda: End Lifetime Solitary Confinement*, HUMAN RIGHTS WATCH (Jan. 29, 2009), http://www.unhcr.org/refworld/docid/498703b81a.html.

the International Covenant on Civil and Political Rights (ICCPR), and Article 5 of the African Charter on Human and Peoples' Rights."[612]

D. The Inter American System: The American Convention on Human Rights Prohibits the Use of Torture and Applies to the United States

1. Substantive provisions of the American Convention and the American Declaration on the Rights and Duties of Man Relating to Solitary Confinement

The American Convention on Human Rights ("Convention") was signed by the member nations on November 22, 1969 and came into force on July 18, 1978. It established the Inter-American Commission on Human Rights ("IACHR") and the Inter-American Court of Human Rights both of which are part of the Organization of the American States ("OAS"). Although the United States has signed (but not yet ratified) the American Convention, it is nonetheless obliged by the terms because of its membership in the OAS.[613]

Prison policies allowing for the use of solitary confinement are a violation of regional human rights standards found within the Inter-American system that mirror the language of the international treaties which protect against torture and other forms of cruel, inhuman, or degrading treatment or punishment.[614] Parallel language to the prohibition on torture in the ICCPR, CAT, and the Universal Declaration of Human Rights can be found in the American Convention on Human Rights.[615] Article 5(2) of the American Convention on Human Rights

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[612] *Id.*

[613] Charter of the Organization of American States, Department of International Law, *available at* http://www.oas.org/dil/treaties_A-41_Charter_of_the_Organization_of_American_States.pdf (last visited June 28, 2013).

[614] American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States May 2, 1948, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L/V/1.4 rev. 13, June 30, 2010; U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ratified by the United States Oct. 21, 1994, S. TREATY DOC. NO. 100-20, 1465 U.N.T.S. 85; International Covenant on Civil and Political Rights, ratified by the United States June 8, 1992, S.EXEC.DOC.E, 95-2, 999 U.N.T.S. 171.

[615] The United States is a signatory to the Convention but has not yet ratified the American Declaration. American Convention on Human Rights, Art. 5(2), 22 (Nov. 22, 1969), http://www.cidh.org/Basicos/English/Basic3.American%20Convention.htm (last visited March 19, 2013); Though

states that "no one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with the inherent dignity of the human person."[616] The Article 5(6) of the American Convention on Human Rights states that the "essential aim" of the corrections system should be the reformation and social rehabilitation of the prisoners.[617]

a. Inter-American Commission on Human Rights (IACHR)

The Inter-American Commission on Human Rights ("IACHR"), the body that contributes to the interpretation and application of the American Convention, reported on the visit of its Rapporteur on the Rights of Persons Deprived of Liberty to Santiago, Chile in 2008. The IACHR highlighted the Rapporteur's observations concerning the conditions at all of the prison facilities he visited in which he found the use of solitary confinement to be excessive in unlit and unventilated cells where the prisoners:

> often are forced into a state of uncertainty regarding the reasons why and the circumstances in which disciplinary sanctions are applied; and that no oversight mechanism is in place nor is any opportunity for them to file complaints.[618]

Article 5(2) of the American Convention on Human Rights states that "no one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with the inherent dignity of the human person."

The Rapporteur's report demonstrates the trend in the Western Hemisphere, if not the international community, of examining the practices and use of solitary confinement with a critical eye. The report emphasizes the harm that prisoners suffer when their fate in solitary confinement is indefinite and uncertain.

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the Universal Declaration is non-binding, it serves as a guide and base point for the international human rights treaties that have followed.

[616] *Id.* at Art. 5(2).

[617] *Id*, at Art. 5(6); ICCPR, *supra* note 573, at Art. 10.

[618] IACHR, Press Release 39/08-Rapporteurship on the Rights of Persons Deprived of Liberty concludes visit to Chile. Santiago, Chile, August 28, 2008; IACHR, Public hearing: Information on Alleged Acts of Torture in Chile, 117º Ordinary Period of Sessions, requested by: Center for Justice and International Law (CEJIL) (Mar. 24, 2003).

As indicated in our surveys, many prisoners in solitary confinement in North Carolina prisons suffer the same conditions criticized in the Rapporteur's report. They have no way of knowing how much time they will actually serve in solitary confinement and have no control over their ability to exit from extreme isolation. Jeremy Hannah indicated during his interview that the sentencing committee might arbitrarily decide to continue a prisoner's time in solitary, even if the prisoner has been infraction free, as he had been for over 18 months. While prisoners in the North Carolina prisons can write grievances and give them to correctional officers to turn in to the prison administration, the overwhelming amount of data suggests that they do not have reason to believe that their grievances are actually considered.

The Report on the Human Rights of Persons Deprived of Liberty in the Americas revealed the grave mental health consequences suffered as a result of solitary confinement. The report found that such conditions often lead to acts of suicide by the prisoners as a result of the dehumanizing and degrading conditions of confinement.[619] The Inter-American Commission on IACHR found that:

> the incarceration of an individual in isolation conditions … constitutes a risk factor for suicide. Therefore, the physical and mental health of the inmate should be kept under close medical supervision throughout the time that this measure is enforced. The isolation or solitary confinement of a person deprived of liberty shall only be permitted as a measure that is strictly limited in time, as a last resort, and in accordance with a series of safeguards and guarantees set down in the applicable and international instruments.[620]

b. Inter-American Court

Similarly, the Inter-American Court has expressed a desire to limit and reduce the use of solitary confinement. In the *Suárez Rosero* case, the court considered the use of solitary

[619] Report on the Human Rights of Persons Deprived of Liberty in the Americas, OEA/Ser.L/V/II., Doc. 64, (Dec. 31, 2011), *available at* http://www.oas.org/en/iachr/pdl/docs/pdf/PPL2011eng.pdf (last visited Mar. 19, 2013).
[620] *Id.*

confinement for the purposes of a criminal investigation. The court held as a fundamental principle that "[i]ncommunicado detention is an exceptional measure" and should not be overused. The court's reluctance to permit the use of the isolated confinement in that case reflects the overall desire of the Inter-American Court to reduce and limit the use of solitary confinement and the length of time prisoners are subjected to isolated confinement.

In the *Montero Aranguren et al*. (*Reten de Catia*) case, the Inter-American Court held that isolation cells:

> Must only be used as disciplinary measures or for the protection of persons during the time necessary and in strict compliance with the criteria of reasonability, necessity and legality. Such places must fulfill the minimum standards for proper accommodation, sufficient space and adequate ventilation, and they can only be used if a physician certifies that the prisoner is fit to sustain it. [621]

The Inter-American court's decision demonstrates its recognition of the need to limit the use of solitary confinement and reveals its unfavorable view of the practice. Although the court concedes that solitary confinement may be necessary at times, it defines minimum regulations to govern such confinement instead of leaving it to the individual prison or corrections officer. The court emphasizes that the use of solitary confinement must be strictly monitored. It set forth additional criteria to protect the prisoner, including a requirement that solitary confinement can only be imposed after a mental health evaluation has been completed to ensure the prisoner's ability to withstand the pressures of extreme isolation. Importantly, in the case of *Castillo Petruzzi et al*., the court held that

The Inter-American court's decision demonstrates its recognition of the need to limit the use of solitary confinement and reveals its unfavorable view of the practice.

[621] *Id.*

prolonged solitary constitutes a form of cruel, inhuman, or degrading treatment and would therefore be prohibited by Article 5 of the American Convention on Human Rights.[622]

Conclusion

It is becoming widely accepted that solitary confinement should very seldom be used, if ever. The CAT, ICCPR, American Declaration, and Basic Principles for Treatment of Prisoners all call for a prohibition on torture or cruel, inhuman, or degrading treatment or punishment. The Istanbul Protocol discusses the effects of solitary confinement on prisoners and finds, along with the U.N. Special Rapporteur on Torture, that solitary confinement amounts to torture, especially where it is prolonged and indefinite. In North Carolina, prisoners are arbitrarily held in solitary confinement for undefined periods of time. As the interviews and survey results indicate, most prisoners tend to have their sentences continued during their review hearings, prolonging their stay in solitary. This prolonged and indefinite detention amounts to torture, or at the very least cruel, inhuman or degrading treatment or punishment and is a violation of the United States' international obligations. The United States and North Carolina should abolish or limit the use of solitary confinement to be in accordance with their international obligations.

The United States and North Carolina should abolish or limit the use of solitary confinement to be in accordance with their international obligations.

[622] *Id.*; *Castillo Petruzzi et al. v. Peru*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 52, § 194 (May 30, 1999).

III. Model National Standards: Overview

The American Bar Association ("ABA") has promulgated standards directly addressing conditions and procedures for holding prisoners in solitary confinement.[623] These standards indicate the level to which responsible prisons should aspire in implementing policies and maintaining appropriate facilities for the use of solitary confinement. The ABA has promulgated its standards to "set out principles and functional parameters to guide the operation of American jails and prisons, in order to help the nation's criminal justice policy-makers, correctional administrators, legislators, judges, and advocates protect prisoner's rights while promoting the safety, humaneness, and effectiveness of our correctional facilities."[624]

Extreme isolation is not about physical protection of prisoners from each other. It is a method of deterrence and control—and as currently practiced it is a failure.

In establishing its standards, the ABA has thoughtfully considered the academic literature highlighting the dangerous psychological and social effects of overzealous use of solitary confinement. In its own words:

> Some dangerous prisoners pose a threat to others unless they are physically separated. But such separation does not necessitate the social and sensory isolation that has become routine. Extreme isolation is not about physical protection of prisoners from each other. It is a method of deterrence and control—and as currently practiced it is a failure. The segregation units of American prisons are full not of Hannibal Lecters but of "the young, the pathetic, the mentally ill."[625]

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624 *Id.* at 1.

625 *Id.* at 34 (quoting Walter Dickey, former secretary of the Wisconsin Department of Corrections).

The ABA advocates for several reforms with solitary confinement, drawing in large part from the extensive report published by the Vera Institute's Commission on Safety and Abuse in America's Prisons.[626] Through these standards, the ABA advocates the following reforms:

- Provide **sufficient process** prior to placing or retaining a prisoner in segregation to be sure that it is warranted.
- **Limit the permissible reasons for segregation**. Disciplinary segregation should generally be brief and should rarely exceed one year.[627] Longer-term segregation should be imposed only if the prisoner poses a continuing and serious threat. Segregation for protective reasons should take place in the least restrictive setting possible.
- **Decrease isolation** within segregated settings. Even prisoners who cannot mix with others can be allowed in-cell programming, supervised (and physically isolated) out-of-cell exercise time, face-to-face interaction with staff, access to television or radio, phone calls, correspondence, and reading material.
- **Decrease sensory deprivation** within segregated settings. Limit the use of auditory isolation, deprivation of light and reasonable darkness, punitive diets, etc.
- Allow prisoners to **progress gradually towards more privileges and fewer restrictions**, even if they continue to require physical separation.
- Do not place prisoners with serious mental illness in what is an anti-therapeutic environment. Maintain appropriate secure mental health housing for them, instead.
- Carefully **monitor prisoners in segregation for mental health deterioration**, and deal with it appropriately if it occurs.[628]

The ABA seeks to achieve these goals by defining a set of standards that, if they were implemented, would improve the well-being of the prisoner while allowing the prison facility to successfully maintain comfortable control over the entire prison population. The ABA's standards work to promote the health and well-being of prisoners held in solitary confinement in several ways. First, when placing prisoners in solitary confinement, the ABA states that it "should be for the briefest term and under the least restrictive conditions practicable and

[626] *See id.* at 34-35 (citing Gibbons & Katzenbach, *supra* note 298, at 52-60).
[627] ABA Standards in this regard (one year) do not comport with international standards, which would limit solitary to 15 days. *See supra* SECTION 2, II. However, as noted below, the ABA standards would not allow extreme isolation in any event. *See infra* text accompanying note 630.
[628] ABA STANDARDS, *supra* note 34, at 35.

consistent with the rationale for placement and with the progress achieved by the prisoner."[629] Furthermore, these standards expressly and fully prohibit the use of "extreme isolation," which the ABA defines as including "a combination of sensory deprivation, lack of contact with other persons, enforced idleness, minimal out-of-cell time, and lack of outdoor recreation."[630] Prisoners in short- and long-term solitary confinement should be provided with meaningful mental, social, and physical stimulation to prevent mental deterioration depending on an independent assessment of their needs and the accompanying risks of the forms of stimulation.[631] The forms of stimulation should include: (i) in-cell programming if a prisoner may not leave his or her cell; (ii) additional out-of-cell time if this is needed for the prisoner's mental, social, and physical well-being; (iii) opportunities to exercise in the presence of others, even if it is necessary to separate them by security barriers; (iv) daily face-to-face interactions with both corrections officers and civilian staff; and (v) access to radio or television for programming or mental stimulation.[632] In addition to providing for prisoner's mental, social, and physical well-being, prisoners should also be provided with programming and stimulation that both prevents any mental deterioration, prepares them for their eventual reentry into a social milieu, promotes good behavior, and works to reduce recidivism.[633] Lastly, the ABA standards specifically mandate a "step-down" program, which states that prisoners who are due to be released back into the community should be returned to lower levels of custody for the final months before their release.[634] A structured breakdown of the most important ABA standards as they compare to related North Carolina regulations is available in Appendix V.

[629] *Id.* at Standard 23-2.6(a).
[630] *Id.* at Standard 23-3.8(b).
[631] *Id.* at Standard 23-3.8(c).
[632] *Id.*
[633] *Id.* at Standard 23-8.2(a)-(b).
[634] *Id.* at Standard 23-2.9(f).

With these standards, correctional institutions have a clear guide as to what the conditions of solitary confinement should resemble. Unfortunately, this is not the reality of the situation.

IV. North Carolina State Inquiry

The problems articulated above concerning federal jurisprudence and its gross inadequacies in protecting prisoners from the devastating harms of solitary confinement[635] are largely reflected in North Carolina's established jurisprudence and regulatory scheme. North Carolina's approach to regulating and minimizing the use of solitary confinement, in that it largely tracks the federal regime, also falls extremely short. However, North Carolina's jurisprudence, legislature, and regulatory bodies need not be constrained to the shadow of the inadequate federal regime. The mounting evidence from criminologists, psychologists, and psychiatrists establishing that solitary confinement is cruel, inhumane, and unnecessary demands that North Carolina set itself a path to rectification by honestly and legitimately providing for prisoner's health, welfare, and humane treatment.[636]

A. Dire Straits

Just as federal jurisprudence is seriously lacking in providing the basic protections against cruel or unusual punishment under the evolving standards of our maturing society, so too is North Carolina failing to protect its citizens' basic human rights. By restraining itself to merely tracking federal jurisprudence and not providing better protections through its regulations of the conditions of solitary confinement, North Carolina is leaving a vast number of prisoners deprived of their basic human needs.

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[635] *See supra* SECTION TWO, II.

[636] *See infra* text accompanying notes 649- 651. The language "health," "welfare," and "humane treatment" comes directly from the North Carolina legislature's provisions of minimum standards to prisoners held in local confinement facilities. *See* N.C. GEN. STAT. §153A-221(a).

1. Tracking Federal Jurisprudence

Thus far, North Carolina has largely tracked the jurisprudential limitations established by the federal courts regarding a prohibition against cruel and unusual punishment and the requirement that adequate process be provided.

a. *"Cruel or Unusual Punishments" Shall Not Be Inflicted*

As the Eighth Amendment of the U.S. Constitution protects against cruel and unusual punishment, so too does the North Carolina Constitution. The relevant text of the constitution states that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted."[637] North Carolina jurisprudence in this arena has generally followed the U.S. Supreme Court's application of the Eighth Amendment. However, North Carolina courts have not specifically addressed solitary confinement as a violation of the state constitution's protection against "cruel or unusual punishments." It has merely echoed, with very little consideration, that "segregated confinement of a prison inmate in solitary or maximum security is not *per se* banned by the Eighth Amendment as cruel and unusal [sic] punishment."[638] In this short two-page opinion issued by the state's intermediate appellate court, the court simply stated that solitary confinement "is a question of internal administration and discipline of prisoners normally within the discretion of prison officials."[639] This lack of consideration shows a blind deference to

The mounting evidence from criminologists, psychologists, and psychiatrists establishing that solitary confinement is cruel, inhumane, and unnecessary demands that North Carolina set itself a path to rectification by honestly and legitimately providing for prisoner's health, welfare, and humane treatment.

[637] N.C. CONST. art. I, § 27.
[638] *State v. Carroll*, 195 S.E.2d 306, 308 (1973) (*citing Burns v. Swenson*, 430 F.2d 771 (8th Cir. 1970), *cert. denied*, 404 U.S. 1062 (1972).
[639] *Id.*

federal jurisprudence when it may be that the North Carolina Constitution provides broader protections against cruel or unusual punishments than its federal counterpart.[640]

b. *Guarantees of Due Process*

The North Carolina Constitution provides that: "No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land."[641] In direct parallel to federal jurisprudence,[642] procedural due process under the North Carolina constitution has been held to require "notice and an opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case before a competent and impartial tribunal having jurisdiction of the cause."[643] These process requirements almost exclusively track the requirements imposed by federal jurisprudence. In the context of prisoners' liberty interests, North Carolina's tracking of federal jurisprudence was recently emphasized in 2010 in *Jones v. Keller*[644] in citing the U.S. Supreme Court's holding in *Hewitt v. Helms*,[645] a case involving solitary confinement, that "an inmate's liberty interests derived from the Fourteenth Amendment are limited, given the nature of incarceration."[646] However, North Carolina courts have only applied this holding to habeas corpus cases. Thus far, the N.C. Supreme Court has failed to speak directly to the due process protections provided to individuals held in solitary confinement under the North Carolina Constitution.

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[640] *See infra* discussion at notes 731-43 and accompanying text.
[641] N.C. CONST. art. I, § 19.
[642] For an in-depth discussion of the federal jurisprudence regarding procedural due process and solitary confinement, see *supra* SECTION TWO, I.B.
[643] *In re* Appeal of Ramseur, 463 S.E.2d 254, 258 (1995) (internal quotation marks omitted).
[644] *Jones v. Keller*, 698 S.E.2d 49 (2010).
[645] *Hewitt v. Helms*, 459 U.S. 460 (1983).
[646] *Jones*, 698 S.E.2d at 55 (citing *Helms*, 459 U.S. at 467).

2. North Carolina Legislation and Regulations

North Carolina legislation does not provide much by way of direct guidance on the matter of conditions of confinement or solitary confinement, except to delegate the authority to establish regulations governing every aspect of state prisons to the Secretary of the Department of Public Health.[647] The regulations, therefore, are what govern an analysis of North Carolina's requirements as to the care of prisoners within the North Carolina correction's system.

Notably, the North Carolina legislature does not provide guidance even as to any minimum standards for conditions of confinement in the statewide correctional system. This is a particularly significant omission as the legislature does, in fact, provide some guidance to the Secretary for setting minimum standards for conditions of confinement in *local* confinement prisons.[648] In pertinent part, the minimum standards required for the operation of local confinement facilities must be "developed with a view to providing secure custody of prisoners and to protecting their health and welfare and providing for their humane treatment."[649] Furthermore, the standards developed to provide this care "*shall* provide . . . [any provisions] necessary for the safekeeping, privacy, care, protection, and welfare of prisoners."[650]

The Director of Prisons, appointed by the Secretary of Correction, is the entity responsible for "developing and maintaining the agency's operation manuals," including the "policies, procedures, rules, and regulations of the agency."[651] These regulations provide a myriad of standards that pertain to prisoners being held in confinement.[652]

[647] N.C. GEN. STAT. § 148-4 (West 2012).
[648] N.C. GEN. STAT. § 153A-221 (West 2012).
[649] *Id.* § 153A-221(a).
[650] *Id.*
[651] N.C. Department of Correction Division of Prisons Policy & Procedure A .0601 (2008).
[652] The N.C. Department of Public Safety has published the regulations governing the state's prison system online. Prisons: Policy & Procedure Manual, N.C. DEP'T OF PUB. SAFETY, http://www.doc.state.nc.us/dop/policy_procedure_manual/ (last visited May 3, 2013).

a. *Classifications for Assignment to Solitary Confinement*

The regulation that has the most immediate impact on prisoners who may be placed in segregation is that which provides for the system of segregation classifications. North Carolina provides eight separate classifications for holding individual prisoners in solitary confinement: (1) Maximum Control ("Mcon"); (2) Death Row; (3) Intensive Control ("Icon"); (4) Administrative Segregation (Aseg); (5) Protective Custody; (6) Disciplinary Segregation (Dseg); (7) Safekeeper; and (8) High Security Maximum Control ("Hcon").[653] Five of these classifications are most relevant to the scope of this policy paper, and include, in approximate ascending order of severity:

- Administrative Segregation[654]
- Disciplinary Segregation
- Intensive Control
- Maximum Control
- High Security Maximum Control

(1). Administrative Segregation (Aseg)

While Aseg might be perceived as one of the least severe forms of being placed in solitary confinement, the policies for placing individuals in Aseg are among the most troubling. Specifically, the category of Aseg is the most flexible classification for prisoners to be placed in solitary confinement for vague, amorphous reasons, so long as there is some minimal nexus with "preserving order."

Prisoners may be placed in administrative segregation for a number of reasons. According to NC regulations, "initial placement is primarily utilized for short-term removal from

[653] N.C. Department of Correction Division of Prisons Policy & Procedure C .1201 (2011). While it is important to monitor and critique the conditions of confinement for prisoners classified under Death Row, Protective Custody, and Safekeeper statuses, this report focuses on the more prevalent classifications of Aseg, Dseg, Icon, Mcon, and Hcon.

[654] Though it may appear at first glance that Aseg is one of the least severe classifications for placing prisoners in solitary confinement, it is actually one of the more troubling classification policies.

the regular population for administrative purposes."[655] Five qualifying administrative purposes are defined:

> (A) to protect staff and other inmates from the threat of harm by the inmate; (B) to minimize the risk of escape by the inmate or others influenced by his/her actions; (C) to preserve order; (D) to provide necessary control while completing an investigation; or (E) to remove an inmate from the population as a cooling off measure.[656]

The third purpose, "to preserve order," is the most vague and troubling of the five enumerated purposes.[657] Indeed, it does not fall within the acceptable reasons promulgated by the ABA Standards. The relevant ABA standard states that "correctional authorities should not place prisoners in segregated housing except for reasons relating to: discipline, security, ongoing investigation of misconduct or crime, protection from harm, medical care, or mental health care."[658] However, the amorphous purpose of "preserving order" does not specifically relate to any of the ABA's acceptable reasons. This is similar to the broad catchall phrase "threat to institutional safety" that has been roundly criticized by criminologists as inviting prison officials to over-admit prisoners to solitary confinement.[659]

While the procedure governing Aseg provides target confinement periods, prisoners may be held in Aseg for up to 60 days.[660] The initial time limit provided by the procedure is that inmates may only be held for up to 72 hours if they have been placed in Aseg as a "cooling off"

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[655] N.C. Department of Correction Division of Prisons Policy & Procedure C .1201(a)(4) (2011).
[656] *Id*.
[657] Interestingly, the portion of the Policy & Procedures Manual that discusses Icon in-depth describes this purpose to be preserving order "where other methods of control have failed." But as this portion of the manual was last updated in 2008, it must be presumed that the more amorphous and open-ended "to preserve order" qualifier published in 2011 controls. *Compare* N.C. Department of Correction Division of Prisons Policy & Procedure C .0302 (2008) *with* N.C. Department of Correction Division of Prisons Policy & Procedure C .1201(a)(4) (2011).
[658] ABA STANDARDS, *supra* note 34, at Standard 23-2.6,
[659] *See* SECTION ONE, III.B.
[660] N.C. Department of Correction Division of Prisons Policy & Procedure C .0302(a)-(e) (2008).

measure.[661] To be held longer than 72 hours, the facility head or a designated representative must give their approval.[662] With such approval, a prisoner may be held in Aseg up to 15 days. Yet upon approval by a "facility classification committee," the prisoner can then be held up to 60 days.[663] While there is a procedure governing an extended stay in Aseg, these regulations do not provide any guidance as to what factors are pertinent when deciding to hold a prisoner longer than a standard 72-hour cooling off period.

(2). Disciplinary Segregation (Dseg)

Dseg is the "classification status assigned to inmates who are subject to punishment pursuant to authorized department disciplinary procedures."[664] The housing units are available to be used as Dseg units to "the extent necessary in order to enforce conduct rules."[665] There is an extensive list of infractions that will lead to a specified length of time in solitary confinement,[666] which is provided in Appendix VI and discussed in more depth below.[667] Prisoners may be held in Dseg for up to 60 days for the most serious offenses.[668]

(3). Intensive Control (Icon)

Prisoners are assigned to Icon status and placed in longer-term solitary confinement if they "have shown disruptive behavior through disciplinary offenses, assaultive actions or confrontations, or who are so continuously a disruptive influence on the operation of the facility that they require more structured management by prison authorities."[669] Specifically, prisoners may be placed in Icon in order to "(1) protect staff and other inmates from the threat of harm by

[661] *Id.* at (a).
[662] *Id.* at (b).
[663] *Id.* at (c)-(e).
[664] N.C. Department of Correction Division of Prisons Policy & Procedure C .1201(a)(6) (2011).
[665] *Id.*
[666] *See* N.C. Department of Public Safety Policy & Procedure B .0202(a)-(d) (2012).
[667] *See infra* notes 705-713 and accompanying text.
[668] N.C. Department of Public Safety Policy & Procedure B.0204(a) (2012).
[669] N.C. Department of Correction Division of Prisons Policy & Procedure C .1201(a)(3) (2011).

the inmate, (2) minimize the risk of escape by the inmate or others influenced by his actions, (3) preserve order where other methods of control have failed, or (4) to provide necessary control while completing an investigation."[670] Typically, however, individuals placed on Icon status are those individuals who were previously held in Aseg up to the maximum 60 day time period.[671] The procedure manual does not state a maximum length of time that a prisoner may be held on Icon status, but does state that each prisoner's assignment will be reviewed "at least once every six months."[672] A separate procedure section states that the status of prisoners in Icon will be reviewed every seven days for the first two months, and every 30 days thereafter.[673]

(4). Maximum Control (Mcon)

Prisoners who are held on Mcon status are those "who pose an imminent threat to the safety of staff or other inmates or who otherwise pose a serious threat to the security and operational integrity of the prison facility."[674] They are held in solitary confinement "for the period of time necessary to minimize their threat to staff and other inmates."[675] Conditions that allow a prisoner to be put on Mcon status include: (a) being found guilty "of a major disciplinary infraction involving an aggravated assault, active or passive participation in riot or mutiny, or seizing or holding a hostage or in any manner unlawfully detaining any person against their will;" or (b) even if there has been no overt act of violence or other proof of offense, if "the officer in charge has good cause to believe that in light of all circumstances, the inmate's presence in the general population poses a clear and present danger to the physical well-being of other inmates or members of the staff."[676] This second condition allows a disturbing level of

[670] N.C. Department of Correction Division of Prisons Policy & Procedure C .1301(a) (2011).
[671] *See* N.C. Department of Correction Division of Prisons Policy & Procedure C .1302(a) (2011).
[672] *Id.* at (e) (2011).
[673] N.C. Department of Correction Division of Prisons Policy & Procedure C .1201(g) (2011).
[674] N.C. Department of Correction Division of Prisons Policy & Procedure C .1201(a)(1) (2011).
[675] *Id.*
[676] N.C. Department of Correction Division of Prisons Policy & Procedure C .0401(a) (2011).

discretion on the part of the corrections officers. Perhaps to counter this, the procedures specify that "[n]either insolence toward officials nor the mere suspicion that an inmate may pose a potential threat to the order and the security of the institution is grounds for referral [to Mcon status]."[677] Like Icon, there is no maximum outer limit to the length of time a prisoner may spend on Mcon status, but each prisoner's classification must be reviewed at least every six months.[678] Also like Icon, a separate policy states that prisoners' statuses will be reviewed once every seven days for the first two months, and once every 30 days thereafter.[679]

(5). High Security Maximum Control (Hcon)

Hcon status, the most serious classification, is intended for prisoners "who pose the most serious threat to the safety of staff and other inmates or who pose the most serious threat to the security and integrity of prison facilities and require more security than can be afforded in Maximum Control."[680] All prisoners in North Carolina on Hcon status are housed at the Polk Correctional "Supermax" Institution in Butner, N.C.[681] The three enumerated conditions that warrant placing a prisoner in Hcon are:

> (i) The inmate has been found guilty of a major disciplinary infraction involving a serious assault, active or passive participation in riot or mutiny, or seizing or holding a hostage or in any manner unlawfully detaining any person against their will.
> (ii) There is clear and convincing evidence that the inmate has expressed threats to the life or well being of other persons while on maximum control; the inmate is in possession of a deadly weapon or illegal drugs while on maximum control; or the inmate is involved in an incident involving escape, attempting to escape, or planning to escape from maximum control.
> (iii Even though there has been no overt act of violence and no disciplinary offense proven, the facility administrator or designee as good cause to believe

[677] *Id.*
[678] *Id.* at (b)(1).
[679] N.C. Department of Correction Division of Prisons Policy & Procedure C .1201(g) (2011).
[680] *Id.* at (a)(8).
[681] *Polk Correctional Institution*, N.C. DEP'T OF PUB. SAFETY, https://www.ncdps.gov/index2.cfm?a=000003,002240,002371,002381,002258 (last visited May 3, 2013).

> that, in light of all circumstances, the inmate' presence in the general population or maximum control poses a clear and present danger to the physical well being of other inmates, staff or the operation of the Division of Prisons. [682]

Unlike Icon or Mcon, however, the statuses of prisoners in Hcon are not mandated to be reviewed once every seven days for the first two months and once every 30 days thereafter.[683] It is ordered that case managers meet with individuals on Hcon in order to "maintain communication," and that the case manager should review the prisoner's status once every 30 days.[684] The classification committee does not review the prisoner's status except "within six (6) months of the initial assessment."[685] Like Icon and Mcon, there is no maximum outer limit to a prisoner's stay in this solitary confinement status.

b. *Conditions of Confinement*

Under North Carolina's regulations, every minute aspect of prisoners' lives in solitary confinement is governed by specific policies. These policies govern prisoners' access to showers, standards of hygiene, how much and in what conditions they may exercise, what they may obtain from the prison's canteen, what reading materials they may have access to, and the extent to which they may be able to communicate to the outside world.

(1). *Confinement*

Prisoners held in solitary confinement are confined to their cells for 23 hours per day, seven days a week. Their cells are required to be "adequately heated, properly lighted, and adequately ventilated."[686] Typically, prisoners are only allowed out of their cells to exercise and

[682] N.C. Department of Correction Division of Prisons Policy & Procedure C .1701(a) (2011).
[683] N.C. Department of Correction Division of Prisons Policy & Procedure C .1201(g) (2011).
[684] N.C. Department of Correction Division of Prisons Policy & Procedure C .1702(b) (2011).
[685] *Id.*
[686] N.C. Department of Correction Division of Prisons Policy & Procedure C .1203(a) (2011). The reality of this standard being met, however, is in doubt, according to many replies received in response to the survey discussed *supra* SECTION ONE, I.C. A number of prisoners described their cells to be fully air-conditioned year round, including in the winter months.

to shower. If a prisoner assaults or threatens to assault staff or other inmates, his out-of-cell activities may be heavily restricted, including (i) movement to and from exercise or the shower will be in restraints; (ii) he will have to exercise while in restraints; (iii) he will have to *shower* in restraints; (iv) and his visitation privileges may be suspended.[687]

(2). *Hygiene & Exercise*

Prisoners may take at least three showers a week, though limited to a maximum of ten minutes.[688] Prisoners are generally allowed to exercise outside their cells for one hour a day, five days a week, unless "safety or security considerations dictate otherwise."[689] This exercise period is typically outside, unless there is inclement weather or security concerns.[690] Prisoners held in Hcon status, though, are excepted.[691] The regulations imply that their exercise facility is not outdoors.[692]

(3). *Canteen Privileges & Personal Property*

Prisoners held in Aseg have general canteen privileges, and may purchase items from the prison canteen up to three times a week.[693] Prisoners held in Dseg, however, are limited to only purchasing postage stamps, over-the-counter medicine, and "essential personal hygiene items."[694] Prisoners held in Icon, Mcon, and Hcon do not have general canteen privileges, but they are permitted to purchase a radio, a watch, shower shoes, limited over-the-counter medicine, postage stamps, and up to three radio batteries a week from the prison canteen.[695] Personal

[687] N.C. Department of Correction Division of Prisons Policy & Procedure C .1207(a).
[688] N.C. Department of Correction Division of Prisons Policy & Procedure C .1205(a).
[689] N.C. Department of Correction Division of Prisons Policy & Procedure C .1206(b).
[690] *Id.* at (c).
[691] *Id.*
[692] *Id.* The regulations state that prisoners held on Hcon status "will exercise in exercise areas consistent with the Progressive Behavioral Program level to which the inmate is assigned."
[693] N.C. Department of Correction Division of Prisons Policy & Procedure C .1209(a).
[694] *Id.* at (b).
[695] *Id.* at (b).

property for individuals held in solitary confinement may not exceed two cubic feet, including any authorized religious materials, books, or magazines.[696]

(4). *Mental stimulation*

In addition to being allowed a limited quantity of authorized books and magazines, individuals held in solitary confinement, except for those held in Dseg, may have radios. They may not, however, have televisions.[697] Prisoners in Dseg, likely because of the disciplinary nature of their confinement, are not permitted to have a radio.[698]

(5). *Communications with the Outside*

Prisoners held in all levels of solitary confinement are permitted to purchase stamps, and therefore, to mail letters to their friends and family outside the prison walls.[699] Prisoners held in Aseg, Icon, and Mcon are permitted telephone privileges as well, so they may make limited phone calls from time to time.[700] These telephone privileges do not extend to prisoners held in Dseg and Hcon, however, and these prisoners are limited to telephone calls to their attorney-of-record.[701] Most prisoners do maintain their visiting privileges while in solitary confinement, including individuals held in Dseg and Hcon, though these are noncontact visits.[702] Prisoners held in Icon, Mcon, and Hcon are limited to only two visits per thirty-day period.[703]

c. *Disciplinary Policies*

Under NC regulations governing prison discipline, inmate offenses are separated into four different categories.[704] The most serious offenses fall under Class A, while the least serious

[696] N.C. Department of Correction Division of Prisons Policy & Procedure C .1210 (a).
[697] N.C. Department of Correction Division of Prisons Policy & Procedure C .1212(a).
[698] *Id.* at (c).
[699] *See supra* notes 695-97 and accompanying text.
[700] N.C. Department of Correction Division of Prisons Policy & Procedure C .1214(a).
[701] *See id.* at (b).
[702] N.C. Department of Correction Division of Prisons Policy & Procedure C .1215(b).
[703] *Id.* at (d).
[704] N.C. Department of Public Safety Policy & Procedure B .0202(a)-(d) (2012).

offenses fall under Class D. For each class of offense, the policy articulates "presumptive punishments," any or all of which may be imposed on an inmate for any offense falling within the same class.[705] Appendix VI provides an overview of each class of offenses and their accompanying presumptive punishments.

> Yet without clearly articulated guidance for exercising caution and restraint in meting out punishment, there continues to be a heightened potential for abuse and overuse of solitary confinement.

The first, Class A, is for the most serious offenses.[706] These offenses range from very serious offenses, such as committing an assault with intent to commit a sexual act, to offenses that may seem less severe, such as spitting on an inmate, possessing a tape recorder, or refusing to take a drug or breathalyzer test.[707] An attempt to commit an enumerated Class A offense is also considered a Class A offense.[708] Class A presumptive punishments include: up to 50 hours of extra duty over a 60 day period; demotion from minimum custody to medium custody, or from medium custody to close custody; a weekly fine of up to $10.00 for up to 6 months; and confinement in disciplinary segregation for up to 60 days.[709]

By contrast, Class D includes the relatively mundane offenses, such as failing "to observe the basic standards of personal hygiene," "possess[ing] contraband *not* constituting a threat . . . or danger," or even assisting another person with legal matters.[710] Such non-threatening, non-dangerous contraband may include a third juice box, even empty, when you were only authorized to keep two juice boxes at a time.[711] Despite the fact that these are rather mundane offenses, the first presumptive punishment listed is 15 days in solitary confinement.

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[705] N.C. Department of Public Safety Policy & Procedure B .0204(a)-(d) (2012).
[706] N.C. Department of Public Safety Policy & Procedure B .0202(a) (2012).
[707] *Id.*
[708] *Id.*
[709] N.C. Department of Public Safety Policy & Procedure B.0204(a) (2012).
[710] N.C. Department of Public Safety Policy & Procedure B.0202 (d) (2012) (emphasis added).
[711] This was the case for one person we interviewed. *See supra* SECTION ONE, I.A.

Within the structure of inmate disciplinary procedures, there is room for facility heads or their designees to exercise discretion in meting out punishments.[712] Yet without clearly articulated guidance for exercising caution and restraint in meting out punishment, there continues to be a heightened potential for abuse and overuse of solitary confinement. Further, though these offenses are slated to allow corrections officers to place errant prisoners in Dseg, almost any disciplinary infraction can also be construed as constituting a threat to prison order—and thus would equally permit prison officials to haphazardly place disfavored prisoners in Aseg as easily as they would be placed in Dseg.

d. *Comparing North Carolina's Regulations to the ABA's National Standards*

It is clear from a glance that North Carolina's regulations concerning the process, conditions, and care provided to prisoners in solitary confinement are strongly lacking. A chart looking at the ABA standards and North Carolina's regulations is provided in Appendix V.

It is clear from a glance that North Carolina's regulations concerning the process, conditions, and care provided to prisoners in solitary confinement are strongly lacking.

North Carolina's regulations have a much lower threshold than the ABA standards in permitting prisoners to be placed in long-term solitary confinement. For instance, Dseg and Aseg may both be imposed, within minimal process, for up to 60 days.[713] By contrast, the ABA standards state that placement in solitary confinement for longer than 30 days is unacceptable if the basis of the placement is the *risk* that the prisoner poses to others, with very clearly defined exceptions.[714] These exceptions are all based on clear evidence of the prisoner's history (a "history of serious violent behavior in correctional facilities") or precise acts that have been committed or attempted ("escapes or attempted escapes," acts or threats of violence that would "destabilize the institutional

[712] *See* N.C. Department of Public Safety Policy & Procedure B. 0204 (2012).
[713] *Id*. at (a).
[714] ABA STANDARDS, *supra* note 34, at Standard 23-2.7.

environment *to such a degree* that the order and security *of the facility* is threatened," gang membership, or inciting group disturbances).[715] Under North Carolina's regulations, the reasons for which a prisoner may be placed in Icon, Mcon, or Hcon (confinement that is generally greater than 60 days) are much less precise. Prisoners may be placed in Icon (i) to protect others from harm; (ii) to minimize the risk of escape; (iii) to preserve order "where other methods of control have failed;" or (iv) to complete an investigation.[716] Prisoners may be placed in Mcon or Hcon because of single incidents of violence, if they were considered "aggravated" (Mcon) or "serious" (Hcon).[717] Furthermore, prisoners may be placed in Mcon or Hcon, the most restrictive levels of solitary confinement, if prison officials have "good cause to believe" that the prisoner may be a danger to the well-being of inmates or staff.[718] Because the reasons for placing individuals in Icon are much broader and more vague than the ABA standards, it is exponentially easier for North Carolina prisoners to be placed in long-term solitary confinement.

Because the reasons for placing individuals in Icon are much broader and more vague than the ABA standards, it is exponentially easier for North Carolina prisoners to be placed in long-term solitary confinement.

One requirement that the ABA standards promote is to have a mental healthcare professional sit on the classification committee when assigning individuals to solitary confinement.[719] While North Carolina does have a classification committee for its stricter levels of solitary confinement, it does not require that the mental healthcare professional be present when assigning individuals to long-term solitary confinement.

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[715] *Id.* at (b).
[716] N.C. Department of Public Safety Policy & Procedure C .1301(a) (2011).
[717] *See* N.C. Department of Public Safety Policy & Procedure C .0401(a) (2011); N.C. Department of Public Safety Policy & Procedure C .1701(a) (2011).
[718] *See* N.C. Department of Public Safety Policy & Procedure C .0401(a) (2011); N.C. Department of Public Safety Policy & Procedure C .1701(a) (2011).
[719] ABA STANDARDS, *supra* note 34, at Standard 23-2.9(a)(ii).

The ABA standards further provide better living conditions for the inmates. Specifically in the areas of out-of-cell time, the ABA standards provide a better quality of life that helps meet a prisoner's mental, social, and physical needs. First, the ABA standards require that prisoners be able to "shower as frequently as necessary to maintain general hygiene."[720] This is an improvement from the N.C. regulations, which specify only permitted prisoners to take showers three times a week, for up ten minutes.[721] Additionally, the ABA requires that prisoners be allowed to exercise up to one hour out-of-cell *every day*, rather than just five days a week.[722] While this difference may seem inconsequential to people not held in prison, who have the luxury of deciding to not exercise every day of the week, for those held in solitary confinement this would be a dramatic increase in their quality of life. Lastly, the ABA provides that whenever it is practicable, prisoners held in solitary confinement should take their meals in a communal setting, whether it is a "chow hall or the dayroom of a more self-contained unit."[723]

The other areas in which the N.C. regulations fall drastically short include: providing prisoners with affirmative protections against mental deterioration by providing social, mental, and physical stimulation, and providing prisoners with programming that would allow them to rehabilitate and successfully reintegrate upon release from solitary confinement.

The other areas in which the N.C. regulations fall drastically short include: providing prisoners with affirmative protections against mental deterioration by providing social, mental, and physical stimulation, and providing prisoners with programming that would allow them to rehabilitate and successfully reintegrate upon release from solitary confinement. While the ABA

[720] *Id.* at Standard 23-3.3(c).
[721] N.C. Department of Public Safety Policy & Procedure C. 1205(a) (2011).
[722] *See* ABA STANDARDS, *supra* note 34, at Standard 23-3.6(b); N.C. Department of Public Safety Policy & Procedure C. 1206 (b) (2011).
[723] ABA STANDARDS, *supra* note 34, at Standard 23-3.6(c).

North Carolina does not provide for any step-down program that would avoid or even mitigate the consequences of a direct release from solitary confinement into the community.

standards require that prisoners be provided with meaningful mental, social, and physical stimulation to prevent mental deterioration,[724] North Carolina's regulations make no mention of this as a priority or goal. Indeed, North Carolina only requires that prisoners held in solitary confinement be "personally observed by custody staff at least every thirty minutes on an irregular schedule."[725] This recognizes the security concerns of leaving prisoners without personal observation, but does not in any way acknowledge a need to provide prisoners with social interaction. By contrast, the ABA standards affirmatively require that prisoners be provided with "daily face-to-face interaction with both uniformed and civilian staff."[726] Furthermore, where the ABA standards state that prisoners should have opportunities "to develop social and technical skills, prevent idleness and mental deterioration, and prepare the prisoner for eventual release,"[727] North Carolina's regulations are silent. What's more, North Carolina does not provide for any step-down program that would avoid or even mitigate the consequences of a direct release from solitary confinement into the community.[728]

By having a very low threshold for placing prisoners in solitary confinement and almost a complete disregard of prisoners' average mental health needs, North Carolina falls extremely short in protecting prisoners' health and well-being in its implementation of solitary confinement.

B. A Path to Climb Out of the Quagmire

While North Carolina has thus far been content to follow the federal regime's lead, it is not without the resources to take a stand and be part of the growing national movement that

[724] *Id.* at Standard 23-8.3(c).
[725] N.C. Department of Public Safety Policy & Procedure C. 1201(e) (2011).
[726] ABA STANDARDS, *supra* note 34, at Standard 23-3.8(c)(iv).
[727] *Id.* at Standard 23-8.2(a).
[728] The ABA Standards provide for such a step-down program. *See id.* at Standard 23-2.9(f).

condemns and limits the use of solitary confinement. Through recognizing the broader protections that the North Carolina Constitution may afford, guiding our state regulatory bodies to provide increased protections for individuals within solitary confinement, and continuing a long tradition of righting moral wrongs, North Carolina is well-positioned to become a leader in disavowing the overzealous use of solitary confinement.

1. The North Carolina Constitution Can Provide Greater Protections

Though North Carolina has thus far opted to closely model its jurisprudence regarding the Cruel or Unusual Punishment and Due Process Clauses after the federal regime, the state is not bound to blindly mirror federal jurisprudence indefinitely. The North Carolina Constitution was authored independently of the federal Constitution, and may very well provide greater protections for its citizenry that its federal counterpart.[729] At present, the basic human needs of a large group of North Carolina citizens are being disregarded. Just as this state has risen above the long-presumed constitutionality of heinous acts such as flogging and involuntary sterilizations, so too may the North Carolina Constitution, through the Cruel or Unusual Punishment and Punishments Clauses, provide the protections we now recognize as critical to the welfare of North Carolina's prisoners.

North Carolina is well-positioned to become a leader in disavowing the overzealous use of solitary confinement.

a. *Cruel or Unusual Punishment and our Evolving Standards of Decency*

North Carolina's "cruel or unusual punishment" clause, found in Section 27 of Article I of the constitution, may indeed provide greater protections than the federally-mandated minimum protection against "cruel *and* unusual punishment." North Carolina's constitution, by contrast, prohibits "cruel *or* unusual punishment."[730]

[729] *See infra* note 734and accompanying text.
[730] N.C. CONST. art. 1, § 27.

The disjunctive term 'or' in the State Constitution expresses a prohibition on punishments *more inclusive* than the Eighth Amendment.

North Carolina is not the only state whose constitution protects against cruel *or* unusual punishment, and many states have interpreted this lexical distinction to impose a broader protection than that provided by the federal Constitution.[731] Furthermore, the door has already opened for North Carolina to broaden its protections against cruel or unusual punishment. In a concurrence penned in 1992, Justice Martin observed that "[t]he conjunction ['and'] in the federal Constitution has been interpreted to limit the Eighth Amendment's prohibition to punishments that are both cruel and unusual."[732] He concluded that "[t]he disjunctive term 'or' in the State Constitution expresses a prohibition on punishments *more inclusive* than the Eighth Amendment."[733]

Justice Martin's concurrence provides an avenue for the Supreme Court to recognize the North Carolina Constitution as providing broader protections than the federal "cruel and unusual punishment clause."[734] North Carolina would not be the first state to depart from federal jurisprudence on this precise basis. Indeed, both the states of California and Michigan have held that the intentional prohibition of "cruel *or* unusual punishment" rather than "cruel and unusual punishment" invites a different—and broader—constitutional interpretation from federal jurisprudence.[735] The Supreme Court, however, has suggested a need to have a compelling

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[731] *See infra* note 737 and accompanying text..
[732] *Medley v. North Carolina Dep't of Correction*, 412 S.E.2d 654, 659-60 (1992) (Martin, J., concurring) (citing *Stanford v. Kentucky*, 492 U.S. 361, 378, *reh'g denied*, 492 U.S. 937 (1989)).
[733] *Id.* (emphasis added).
[734] *See* Harry C. Martin, *The State as a "Font of Individual Liberties": North Carolina Accepts the Challenge*, 70 N.C. L. REV. 1749, 1755 (1992).
[735] *See People v. Anderson*, 493 P.2d 880, 885 (Cal. 1972) ("[T]he delegates modified the California provision before adoption to substitute the disjunctive 'or' for the conjunctive 'and' in order to establish their intent that both cruel punishments and unusual punishments be outlawed in this state."); *People v. Bullock*, 485 N.W.2d 866, 872 & n.11 (Mich. 1992) ("This textual difference does not appear to be accidental or inadvertent. . . . [I]t seems self-evident that any adjectival phrase in the form 'A *or* B' necessarily encompasses a broader sweep than a phrase in the form 'A *and* B.' The set of punishments which are *either* 'cruel' *or* 'unusual' would seem necessarily broader than the set of punishments which are *both* 'cruel' *and* 'unusual.'").

reason to adopt such a position.[736] In the present context, where the legislature has handed off the discretion to inflict years of physical deprivation and mental torture upon hundreds of North Carolina prisoners,[737] the onus is upon the North Carolina Supreme Court to follow the leads of California and Michigan and enforce the broader state constitutional guarantee of protection from "cruel or unusual punishment."[738]

North Carolina conducts its "cruel or unusual punishment" analysis in part by evaluating whether a punishment "comports with the evolving standards of decency in society."[739] This analysis is derived from federal Eight Amendment jurisprudence, where the U.S. Supreme Court established in *Trop v. Dulles*[740] that: "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards." [741] Furthermore, the U.S. Supreme Court made the crucial observation that these civilized standards are not locked within time: "[T]he words of the Amendment are not precise, and . . . their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[742]

The conditions of confinement found in North Carolina's segregation units offend "the evolving standards of decency that mark the progress of a maturing society," and should be considered a violation of North Carolina's guaranteed protection against cruel or unusual punishments.

What falls within these "evolving standards of decency in society" is thus a crucial question. For this, the

[736] Mention of needing a compelling reason was included in a footnote just six years following Justice Martin's observation. *See State v. Green*, 502 S.E.2d 819, 828 n.1 (1998).
[737] *See supra* note 647and accompanying text.
[738] North Carolina would not be the only state making progress in formulating an independent interpretation based on the disjunctive "or" in the Cruel or Unusual Punishments clause. Maryland has also "demonstrated an increased awareness of the potential for independent interpretation" of its clause, which also prohibits "cruel or unusual punishments." *See* Dan Friedman, THE MARYLAND STATE CONSTITUTION: A REFERENCE GUIDE 36 (2006).
[739] *See Green*, 502 S.E.2d at 829.
[740] 356 U.S. 86 (1958).
[741] *Id.* at 100.
[742] *Id.*

Court has previously looked to the legislature. "[T]he clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." [743] However, there is room for North Carolina to hold that heightened scrutiny is needed for "close calls" such as solitary confinement, where it may be that our legislature is not keeping up with the "evolving standards of decency." This is the case presently before us. Regarding solitary confinement, deference to a legislature who merely delegates—and who fails to even set minimum standards for those prisoners held in the state corrections system— may no longer be appropriate.[744] There is a broad consensus among criminologists and psychologists that not only does solitary confinement fail to meet its objectives of prison safety and discipline, it also inflicts irreparable psychological harm. Under the commonsensical observation by Justice Martin that "[t]he disjunctive term 'or' in the State Constitution expresses a prohibition on punishments *more inclusive* than the Eighth Amendment" and following the lead of both Michigan and California, North Carolina is well-positioned to adopt a broader interpretation of what should be considered to be cruel and unusual punishment. In the present case, the conditions of confinement found in North Carolina's segregation units offend "the evolving standards of decency that mark the progress of a maturing society," and should be considered a violation of North Carolina's guaranteed protection against cruel or unusual punishments.

[743] *Green*, 502 S.E.2d at 829 (quoting *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989).

[744] North Carolina's state courts have given shockingly little consideration to the import of responsible legislative involvement in setting standards of decency in the use of solitary confinement. A plain example is found in a two-page opinion issued by the North Carolina Court of Appeals, discussed *supra* at note 640, where the judge simply observed that: "[S]egregated confinement of a prison inmate in solitary or maximum security is not *per se* banned by the Eighth Amendment as cruel and unusal [sic] punishment. Rather, it is a question of internal administration and discipline of prisoners normally within the discretion of prison officials." *Carroll*, 195 S.E.2d at 308 (citing *Burns*, 430 F.2d at 771).

b. *North Carolina's Punishments Clause*

> Now is the time for a North Carolina court to hold that "in view of the enlightenment of this age, and the progress which has been made in prison discipline, we have no difficulty in coming to the conclusion that *solitary confinement* is not reasonable, and cannot be sustained."

In addition to the avenue of providing broadened protections to prisoners under North Carolina's cruel or unusual punishment clause, conditions of confinement have also been addressed under the North Carolina Constitution's Punishments Clause.[745] In 1914, the use of corporal punishments in North Carolina prisons was challenged as contravening the Punishments Clause.[746] This clause addresses what may and may not be meted out as punishment:

> The following punishments only shall be known to the laws of this State: death, imprisonment, fines, suspension of a jail or prison term with or without conditions, restitution, community service, restraints on liberty, work programs, removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under this State.[747]

Unsurprising for the time period, when solitary confinement was not widely used and had been strongly reprimanded just twenty years previous in *In re Medley*,[748] the 1914 Court stated that solitary confinement was permissible. The Court referred to solitary confinement as an example of what would be "reasonable punishment."[749] Indeed, it was during this time period that solitary confinement was still used with the aim of reforming or rehabilitating inmates.[750]

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[745] N.C. CONST. art. XI, § 1.
[746] *See State v. Nipper*, 81 S.E. 164 (1914).
[747] N.C. CONST. art. XI, § 1.
[748] 134 U.S. 160 (1890); *see also supra* SECTION ONE, III.B. After the practice was roundly condemned by the Supreme Court in 1890, the reemergence of solitary confinement as a widespread strategy to manage prisoners did not reemerge until after the Korean War, when psychologists began researching its use as a potential tool for behavior modification. Sharon Shalev, SUPERMAX: CONTROLLING RISK THROUGH SOLITARY CONFINEMENT 17 (2009).
[749] *Nipper*, 81 S.E. at 166 ("A convict who violates any of the prison regulations may be subjected to solitary confinement or such other reasonable punishment as the statute may authorize.").
[750] *See supra* SECTION ONE, III.B.

The Court proceeded to roundly reject the practice of flogging: "corporal punishment cannot lawfully be inflicted without legislative sanction." Indeed, the Court denounces the practice of flogging as antiquated and "descended to us from a former state of society."[751] Most astutely, the Court stated: "In view of the enlightenment of this age, and the progress which has been made in prison discipline, we have no difficulty in coming to the conclusion that corporal punishment by flogging is not reasonable, and cannot be sustained."[752] These words should prove prophetic. The same observation could—and should—be made concerning today's use of solitary confinement.

North Carolina should prioritize reducing the social isolation of its prisoners.

First, the practice of solitary confinement today is not the same as its use in the early twentieth century. The biggest difference is that solitary confinement is no longer used as a tool for rehabilitation or reformation of an inmate.[753] Rather, it is tool used simply for the goal of prison safety.[754] Its primary purpose is to incapacitate potential risks and ensure prison safety. This is an important distinction when considering the 1914 Court's endorsement of permitting solitary confinement in prisons. Second, we are indeed in an "age of enlightenment" when it comes to the effects and harm inflicted by solitary confinement. We are reaching new heights of uncontroverted understanding of the devastating effects of solitary confinement. With the same words as the 1914 Court used in condemning the practice of corporal punishment in prisons, now is the time for a North Carolina court to hold that "in view of the enlightenment of this age, and

[751] *Nipper*, 81 S.E. at 166.
[752] *Id.* at 165.
[753] Indeed, a 2006 study revealed that while "[a]ll but 2% of prison wardens agreed that supermaxes aim to increase safety, order, and control throughout the prison," only 37% of wardens said that supermax facilities existed to rehabilitate inmates. Mears & Castro, *supra* note 247, at 407. Further discussion of this study and the changes in the aims of solitary confinement over time is found above. *See supra* SECTION ONE, III.B.
[754] *See supra* SECTION ONE, III.B.

the progress which has been made in prison discipline, we have no difficulty in coming to the conclusion that *solitary confinement* is not reasonable, and cannot be sustained."[755]

2. North Carolina Can Reform Regulations to More Closely Track the American Bar Association's Standards in Treatment of Prisoners

The quickest path for North Carolina to improve the situation of prisoners being held in solitary confinement is for the North Carolina legislature to raise the standards of conditions and priorities for protecting the health and well-being of these prisoners. First, the North Carolina legislature should enact a "minimum standards" requirement for prisoners held in solitary confinement in the statewide prison system, as it has done for those held in local confinement facilities. Second, the legislature can require the Department of Public Safety to have a higher concern for the mental health needs of all prisoners being held in solitary confinement. A clear model is before us, provided in the ABA's Standards on the Treatment of Prisoners.[756]

North Carolina should prohibit direct releases from solitary confinement back into the community, and should implement step-down programs such as previously articulated in the ABA Standards.

In improving the regulations governing North Carolina's treatment of its prisoners held in solitary confinement. , North Carolina should prioritize reducing the social isolation of its prisoners Providing social stimulation does not have to come at a cost to safety and security. For instance, the ABA standards recommend that prisoners be allowed to exercise in the presence of others, even if security would require that they be physically separated by a barrier.[757] Furthermore, North Carolina's regulations should require that prisoners have daily *face-to-face* interactions with both corrections and civilian staff members. This moderate increase in opportunity for genuine social interaction would be a vast improvement from the general trend that all social

[755] *Nipper*, 81 S.E. at 165.
[756] *See supra* note 631-634and accompanying text.
[757] *See* ABA STANDARDS, *supra* note 34, at Standard 23-3.8(c).

interaction is curtailed. North Carolina should provide individualized assessments and programming to meet prisoners' needs for mental, physical, and social stimulation.[758]

Lastly, and at a minimum, North Carolina should prohibit direct releases from solitary confinement back into the community, and should implement step-down programs such as previously articulated in the ABA Standards.[759] This priority would have a direct impact on prisoners' mental health and social well-being, and would ensure that these prisoners do not return to their communities as a greater danger than when they left.

3. Continuing North Carolina's History of Righting Moral Wrongs

North Carolina has a long, proud history of righting moral wrongs in the field of civil protections. These wrongs have been righted by a conscientious Supreme Court and through the proactive measures of the North Carolina legislature.

North Carolina has a long, proud history of righting moral wrongs in the field of civil protections.

The North Carolina Constitution has a long history of providing protections where the federal constitution has been lacking. Indeed, former North Carolina Supreme Court Justice Harry C. Martin has described the North Carolina Constitution to be a "beacon of civil rights."[760] Furthermore, North Carolina has been a leader in the nation in broader protections.[761] For example, in *Jackson v. Housing Authority*,[762] the North Carolina Supreme Court held that jurors may not be selected on the basis of their race when only two other states had yet recognized protections against racial discrimination in jury selection.[763]

[758] *Id.*
[759] *Id.* at Standard 23-2.9(f).
[760] Martin, *supra* note 734, at 1753.
[761] *Id.* at 1752.
[762] 364 S.E.2d 416 (1988).
[763] *See* Martin, *supra* note 734, at 1752.

When the North Carolina Constitution has departed from the precise phrasing of the U.S. Constitution, the North Carolina Supreme Court has not shied away from providing protections under the state constitution where the federal government's protections have fallen short. In *Corum v. University of North Carolina,*[764] the N.C. Supreme Court cited North Carolina's long history of protecting civil liberties when it provided a direct remedy under the state constitution when a petitioner's rights to freedom of speech had been abridged.[765] The state Supreme Court provided this avenue to relief in direct contrast to the U.S. Supreme Court's sharp limitation on allowing remedies under the federal constitution.[766] Indeed, these are but two examples of North Carolina's constitutional protections waxing when federal protections are found to be lacking.[767] As Justice Martin proclaims, "[w]hen faced with an opportunity to provide its people with increased protection through expansive construction of state constitutional liberties, a state court should seize the chance."[768]

When faced with an opportunity to provide its people with increased protection through expansive construction of state constitutional liberties, a state court should seize the chance."

Broad constitutional protections under the state constitution are not the only avenue by which the state of North Carolina has redressed a long history of moral wrong. In recent years, the North Carolina legislative and executive bodies have actively provided greater protections to individuals who have been subjected to deplorable treatment at the hands of the state and denials of due process. In 2011, the Governor of North Carolina actively provided relief and healing for the thousands of North

[764] 413 S.E.2d 276 (1992).
[765] Martin, *supra* note 734, at 1756-57.
[766] *Id.* at 1757.
[767] *See id.*
[768] *Id.* at 1751. Indeed, Justice Martin explains that doing so is in the best interests of the state. In providing protections greater than those demanded by the federal constitution, "the court develops a body of state constitutional law for the benefit of its people that is independent of federal control . . . [which] may be better adapted to the particular needs and concerns of the state, and stands safe from the vicissitudes of the United States Supreme Court." *Id.*

Carolinians who had been victims of the state's sterilization program.[769] In 2009, the North Carolina legislature passed the Racial Justice Act to ensure that "when North Carolina hands down our state's harshest punishment . . . the decision is based on the facts and the law, not racial prejudice."[770] In doing so, the N.C. legislature took proactive steps to ensure that when meting out justice, it should be premised on fairness to the individuals subject to the state's harshest punishment.

Upon this backdrop of North Carolina being a national leader in the protection of individual rights, North Carolina now has a clear path to provide the crucial safeguards needed to protect our prisoners from the devastating effects of solitary confinement, effects that extend to endangering our communities.

[769] *See* N.C. Exec. Order No. 83 (Mar. 8, 2011). Interestingly, in 1976, involuntary sterilizations were ruled to *not* be considered "cruel or unusual punishment" on the sole basis that they were not inflicted through the criminal justice process. *See In re* Sterilization of Moore, 221 S.E.2d 307 (1976). This denial of justice may, in part, have contributed to the Governor's need to redress these wrongs.

[770] Seth Kotch & Robert P. Mosteller, *The Racial Justice Act and the Long Struggle with Race and the Death Penalty in North Carolina*, 88 N.C. L. REV. 2031, 2034 (2010). (citing Press Release, North Carolina Office of Gov. Bev Perdue, Gov. Perdue Signs North Carolina Racial Justice Act (Aug. 11, 2009), http://www.governor.state.nc.us/NewsItems/PressReleaseDetail. aspx?newsItemID=554).

SECTION THREE: RECOMMENDATIONS

I. Basic Normative Claims

A. Morals and Law

Solitary confinement does not work. Alternatives to its extreme use are necessary. Solitary confinement is not only immoral, it is meted out without adequate due process protections and crosses the threshold of acceptable punishment, thus, rendering it illegal.

Solitary confinement does not work. Alternatives to its extreme use are necessary. Solitary confinement is not only immoral, it is meted out without adequate due process protections and crosses the threshold of acceptable punishment, thus, rendering it illegal.

Solitary confinement can amount to cruel, inhuman, and degrading treatment, violating the Eighth Amendment, the International Covenant on Civil and Political Rights, the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment as well as other relevant human rights norms.[771] Prisons overuse solitary confinement, often times sending prisoners to solitary confinement for defending their rights, for minor infractions, or for no reason at all. As one recent study on solitary confinement has observed, "[i]nternational human rights authorities are unanimous that solitary confinement should be an exceptional measure imposed as a last resort, for as brief a period as possible."[772] The American Bar Association, calling for the *complete ending* of solitary confinement, agrees that some dangerous prisoners need to be physically separated, but that does not suggest that they need to be placed in extreme isolated circumstances or to suffer social and sensory deprivation.[773]

[771] *See supra* SECTION TWO, I.B; II.
[772] *See* Kim *et al.*, *supra* note 28, at 48.
[773] *Id.*

Solitary confinement cannot be used as the default method of punishment. Alternatives exist that would protect prisoners who are sent to solitary confinement for minor infractions, often without a fair hearing and rarely with the assistance of counsel. The effects of solitary confinement are retributive rather than rehabilitative. Just as importantly, the majority of prisoners in solitary confinement are one day going to reenter their communities after having suffered the irreparably damaging effects from their time spent confined to extreme isolation. The use of solitary confinement as an unnecessary and excessive punishment without due process protections or any meaningful opportunity to remedy extreme violations of human rights is tantamount to torture.

Because the modern approach to penology focuses on containment and incapacitation rather than its former pursuit of rehabilitation and reform,[1] the use of solitary confinement as a punitive measure invites "harsher punishments, stricter regulations, and tougher sentences for offenders," regardless of whether such graduated punishment is truly necessary or effective.

B. Effectiveness

The primary justification for using solitary confinement is that it is an "essential" tool in prison management.[774] However, solitary confinement is instead used primarily as a retributive tool that does not work to achieve its purported goals. Because the modern approach to penology focuses on containment and incapacitation rather than its former pursuit of rehabilitation and reform,[775] the use of solitary confinement as a punitive measure invites "harsher punishments, stricter regulations, and tougher sentences for offenders," regardless of whether such graduated punishment is truly necessary or effective.[776]

First, solitary confinement does not achieve the goals that have justified its cancerous growth in the last three decades. Several studies indicate that there is a notable lack of any

[774] *See supra* SECTION ONE, III.B.1.b.
[775] *See* Shalev, *supra* note 748, at 18-23.
[776] Butler, *et al*., *supra* note 242, at 3.

evidence that extensive use of solitary confinement reduces overall prison violence.[777] This lack is particularly significant, as deterrence is one of the most-oft touted goals in defense of building supermax prisons. Furthermore, there is some evidence to indicate that solitary confinement may increase incidents of institutional violence by raising tensions, creating resentment and rage, and fueling the antipathy that prisoners feel towards corrections officers and even their peers.[778]

Second, the trauma inflicted by the extreme isolation of solitary confinement sets prisoners up to fail upon their release back into the community. Psychiatrist Stuart Grassian has reported that a long-term stay in solitary confinement and its accompanying absence of stimulation can alter prisoners' abilities to adjust to new environments,[779] thus impairing their ability to adapt when they to return to a social milieu. Unsurprisingly then, prisoners who are released directly from solitary confinement back into the community recidivate at higher rates than prisoners released from general population.[780]

Lastly, the negative effects inflicted by solitary confinement do not just extend to the prisoners in their cells. Solitary confinement takes a huge toll on our communities and society. It cuts individuals off from their social bonds, induces immense stress and anger, and altogether fails at any preparation for re-socialization. Locking people away to experience the harshest psychological conditions imaginable leaves irreparable scars that these individuals then bring with them into the community. And corrections officers who spend eight hours a day working in an anxiety-filled, low-reward environment carry these scars home as well. As the Commission on Safety and Abuse in America's Prisons justly observed, "[w]e must create safe and productive

[777] *See, e.g.*, Mears & Bales, *supra* note 345, at 1154; Briggs et al. supra note 241, at 1345.
[778] *See* Shalev, *supra* note 748, at 209-10.
[779] *See* Grassian, *supra* note 163, at 331. A long-term lack of stimulation will result in any stimulation becoming "noxious and irritating." This undermines a prisoner's ability to adequately respond to new environments, and directly affects their ability to focus and their ability to *shift* their focus—two abilities that are psychologically essential to adequately respond to one's environment. *Id.*
[780] David Lovell, *et al.*, *supra* note 344, at 649-50; *see also* Gibbons & Katzenbach, *supra* note 298, at 55.

conditions of confinement not only because it is the right thing to do, but because it influences the safety, health, and prosperity of us all."[781]

II. Affirmative Recommendations

A. Alternatives to Solitary Confinement

Solitary confinement is one of the most despicable practices of the modern era. Yet there are alternatives available. While there may be resistance to ending solitary confinement as a practice that can be turned off with just the metaphorical flick of a switch, alternatives must be introduced to quickly phase out its use. In order to make effective strides in eliminating the practice of solitary confinement, several "smaller steps," which are referred to here as "technical reforms," can be taken. At the same time, prisons systems should work to the overarching goal of fully eradicating the need for and practice of solitary confinement. This goal can be achieved by working towards larger reforms, referred to here as "systemic reforms." In order to successfully reverse the overzealous use of solitary confinement that has arisen in the past thirty years, both levels of reforms should be pursued contemporaneously. Lastly, a number of states and countries have, or are in the processing of developing, penological strategies that do not call for solitary confinement. These developments should be monitored closely in order to learn how to best reduce our prisons systems' dependency on solitary confinement.

1. Technical Reforms

Technical reforms represent stepping stones that prisons should employ as they strive towards the greater goal of eliminating their need for solitary confinement.

(a). Solitary confinement should never be allowed to exceed fifteen days

As discussed above,[782] the harmful and irreversible effects that begin to develop for many individuals after spending fifteen days in prison is widely-recognized and cannot be disregarded.

[781] Gibbons & Katzenbach, *supra* note 298, at 11.

The effects are so detrimental that there is simply no justification for committing prisoners to solitary confinement for longer than fifteen days. It should be noted that this recommendation is a minimum recommendation and does not supplant the recommendation below which calls for a complete ban on solitary confinement. Moreover, as noted throughout these recommendations, solitary confinement must be redefined so that prisoners never experience extreme isolation and/or multiple levels of sensory deprivation.

(b). Solitary confinement should be used only as a method of last resort.

A number of alternatives to solitary confinement should be employed and prioritized before placing a prisoner in solitary confinement. Effective alternatives include targeted rehabilitative services, dispersing violent or disruptive prisoners, and reducing privileges.

(1). Provide targeted rehabilitative services

Studies have shown that targeted rehabilitative services will reduce institutional violence more than is accomplished by use of solitary confinement. One study demonstrated that targeted rehabilitative services can reduce prison misconduct by 17%.[783]

(2). Disperse violent or disruptive prisoners throughout a prison system.

A model of confinement recommended by a human rights approach to prison management is to separate problem prisoners into small units of up to ten prisoners, as with properly trained staff, it is possible "to develop a positive and active regime for even the most dangerous prisoners."[784]

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[782] *See* SECTION ONE, III.A.
[783] Paul Gendreau & David Keyes, *Making Prisons Safer and More Humane Environments*, 43 CANADIAN J. CRIMINOLOGY 123 (2001).
[784] Andrew Coyle, A HUMAN RIGHTS TO PRISON MANAGEMENT: HANDBOOK FOR PRISON STAFF 76 (2d ed. 2009).

(3). Reduce privileges, while still providing prisoners with mental, physical and social stimulation

Restricting prisoners' privileges, such as limiting their visiting, telephone, and canteen privileges, has been shown to be an effective disciplinary alternative to solitary confinement.[785] Restricting privileges for disruptive behavior and providing rewards for exemplary behavior should be a priority in every prison. Restricting privileges, however, should accompany a consideration of prisoners' needs for physical, mental, and social stimulation.[786]

(c). Raise the threshold as for what is necessary for a prisoner to be sent to solitary confinement

The ABA requires concrete evidence, such as a clear history of violence, acts or attempts of escape or inciting riots, or gang membership, before placing prisoners in solitary confinement for an extended period of time.[787]

(d). Solitary confinement should be under the least restrictive setting possible and consistent with the rationale for placement and with the progress achieved by the prisoner.[788]

Prisoners who have been placed in solitary confinement for disciplinary reasons should only remain in solitary confinement for as long as it would take for the prisoner to recognize his punishment. In many cases, one or two days, or even mere hours, would suffice. Prisoners who are placed in solitary confinement for protective reasons should have as much out-of-cell time as permitted by the situation's safety considerations. If a prisoner shows marked improvement in his behavior in solitary confinement, he should gain privileges such as supervised out-of-cell time to reward this improvement, and should be released as soon as his improved behavior warrants release.

[785] *See* Mears & Castro, *supra* note 247, at 419.
[786] *See* ABA STANDARDS, *supra* note 34, at Standard 23-3.8(c).
[787] *Id.* at Standard 23-2.7(b).
[788] *Id.* at Standard 23-2.6(a).

(e). Social isolation should be reduced.

Many of the most negative effects of solitary confinement are a direct result of social isolation. Complete social isolation, however, does not appear to serve any valid penological purpose, other than that of retribution against problematic prisoners. To mitigate these harmful effects, opportunities for social interaction should be provided as often as possible.

(1). Promote face-to-face interactions with staff

Presently, the majority of solitary confinement facilities do not permit face-to-face interactions with individuals standing outside a prisoner's cell.[789] Instead, prisoners must talk through a thin opening in the wall through which they are served food and receive their medications.[790] This unnecessarily limits the amount of natural interaction that could occur between prisoners and staff. The effect of this unnecessary isolation tactic is injurious, and its justification is insufficient. Prisons should be reconfigured to allow for face-to-face interactions, thus allowing prisoners additional social stimulation that they would otherwise have were it not for the barrier.

(2). Increase interactions between prisoners and non-corrections prison staff (such as staff psychologists and clergy)

In addition to providing for face-to-face interactions with the corrections officers who patrol a solitary confinement unit, prisoners should also be provided with daily opportunities to interact with prison staff who are not corrections officers, such as mental healthcare professionals, clergy members, or even upper prison management, like wardens. By taking away the dynamic of authority and control, the prisoner is further provided with the social stimulation

[789] Shalev, *supra* note 748, at 121
[790] *Id.*

needed to maintain his mental well-being.[791] This may be achieved in conjunction with Technical Reform #7, carefully monitoring prisoners for mental health deterioration.

(3). Supervised out-of-cell exercise time in the company of other prisoners[792]

Prisoners should be allowed to exercise in small groups, unless safety considerations deem otherwise. In such an instance, prisoners should be allowed to exercise in proximity to each other, even if a physical barrier such as a fence is necessary to separate them.

(4). Allow prisoners to eat in a congregate setting as often as possible[793]

Sharing meals is one of the most efficient ways to ensure that prisoners' needs for social interaction are being met. The ABA describes congregate eating as "a useful antidote for social isolation."[794] These congregate meals may be accompanied by measures that are necessary for security purposes, such as being held in a specialized room or the segregation unit's dayroom.

f. Allow prisoners to gain privileges and rewards, including supervised out-of-cell time, through good behavior.

While in solitary confinement, prisoners should still be able to earn rewards and privileges for their good behavior in solitary confinement. Such rewards could include fewer restrictions during out-of-cell time, extended time out-of-cell, increased programming, or return to a lower level of custody.[795]

[791] Interview with Arthur F. Beeler, former federal prison warden and Visiting Instructor in the Department of Criminal Justice at North Carolina Central University, in Durham, N.C. (May 1, 2013). Mr. Beeler discussed his personal practice of doing weekly rounds in the solitary confinement unit during his time as warden at Federal Correctional Complex in Butner, N.C., and his practice of encouraging the prison chaplain and mental health professionals to also do weekly rounds. In order to provide sufficient positive, non-stressful social interaction to prisoners, prisoners should be visited by a non-corrections staff member at least once a day.
[792] ABA STANDARDS, *supra* note 34, at Standard 23-3.6(b).
[793] *Id*. at Standard 23-3.6(c) (please note that the standard reads "whenever practicable").
[794] *Id*. at cmt.
[795] *Id*. at Standard 23-2.9(d).

g. Carefully monitor all prisoners for mental health deterioration

Because the risk of mental health deterioration is so widespread and yet individualized, all prisoners should be carefully monitored for signs of mental health deterioration. Corrections officers may keep a daily logbook to record the behaviors of the prisoner. Trained mental health care professionals should visit each prisoner and review the behavior logbook weekly.[796]

h. Increase staff training on policy, procedures, relationship skills, and meeting mental health needs

Prison staff is the key factor in whether a prisoner suffers unnecessarily in a solitary confinement setting. As discussed in SECTION ONE, prison staff are subject to the same stressors of working in such a difficult environment, and they should be supported by sufficient training on policy and procedure to prevent abuse and encourage respect and dignity. Furthermore, prison staff are the primary source for social interaction for prisoners. Developing a prison staff's relationship skills will have a direct contribution to ensuring that prisoners' social needs are being met. Lastly, training and helping prison staff to meet their own mental health needs is further encouraged to prevent staff from relieving their stress in abusive ways.

i. Remove prison staff who become abusive or engage in improper behavior

Because solitary confinement is a unique setting, which is uniquely exposed to the risk of abusive behaviors by corrections officers, there should be increased flexibility in removing staff from their position of authority over prisoners.

2. Systemic Reforms

While pursuing these various technical reforms to mitigate the harmful effects of solitary confinement, prison system should also strive to eradicating the need for solitary confinement all

[796] *Id.* at Standard 23-2.8(c).

together. A number of these systemic reforms should be pursued alongside the recommended technical reforms.

(a). prison crowding to reduce the need to resort to solitary confinement as a tool for prison management

One of the oft-most touted justifications for using solitary confinement is the need to maintain order and preserve security within prison systems. These problems could be resolved by a dedicated effort to reduce crowding in prisons. In North Carolina, for example, it has been estimated that by 2017, prisons may be over capacity by as many as 12,000 prisoners.[797] The rise in prison population is not considered a result of growing crime rates, but rather it is a product of changes in laws and policies resulting in harsher punishments.[798] There are many avenues to reduce the overcrowding of prisons, which would in turn negate the dynamic that led to the rise in solitary confinement in the first place.[799]

Furthermore, the effects of overcrowding on solitary confinement are proving to be detrimental, as the populations being held in solitary confinement are outpacing general prison populations.

(b). Promote productivity and emphasize rehabilitation of prisoners to reduce institutional violence

Promoting the productivity of prisoners and investing in programming that works to rehabilitate prisoners will over time reduce levels of institutional violence and result in behavior changes.[800] In recent years, faith-based and character building programs have begun to be promoted.[801] These programs have been shown to cultivate "life skills, anger management,

[797] NORTH CAROLINA SENTENCING AND POLICY ADVISORY COMMISSION, CURRENT POPULATION PROJECTIONS: FISCAL YEAR 2007/08 TO FISCAL YEAR 2016/17 (2008), *available at* http://www.nccourts.org/Courts/CRS/Councils/spac/Documents/2008populationprojections.pdf.
[798] Shalev, *supra* note 748, at 29.
[799] *See supra* SECTION ONE, III.B.
[800] Gibbons & Katzenbach, *supra* note 298, at 27.
[801] *Id*. at 28.

personal growth and faith, family relationships, and victim awareness." These, in turn, are effective in reducing disruptions and thus reducing the need to place disruptive prisoners in solitary confinement. Returning to the penological ideology of rehabilitation will not be an easy step, but it is essential in order to divert prison systems from their current ideology of incapacitation.[802]

(c). Change the institutional culture in prisons and in solitary confinement units

Currently, prison systems are places of punishment and confinement. In such conditions, it is easy to forget that your wards are human beings, and that you are responsible for their physical and mental welfare. Solitary confinement units magnify the intensity found in the general compound. Prison staff adopt an "us versus them" mentality, and as a result, are susceptible to engaging in abusive behaviors. As discussed below,[803] it is possible to change the institutional culture of prisons by (1) promoting a culture of mutual respect between prison staff and prisoners, (2) recruiting and retaining a qualified staff of corrections officers, and (3) supporting exemplary prison leaders in order to cultivate the next generation of prison staff leaders.[804]

(d.) Complete ban on solitary confinement

There is much evidence to indicate that irreversible mental harm may descend after mere hours of being held in solitary confinement.[805] The practice of inflicting extreme isolation on prisoners rises to the level of inflicting psychological torture. For this reason, solitary confinement should never be employed, and prisons should instead rely on other alternatives

[802] *See supra* SECTION ONE, III.B.
[803] *See supra* SECTION ONE, II.C.3.
[804] *See* Gibbons & Katzenbach, *supra* note 298, at 65.
[805] *See supra* SECTION ONE, III.A.

such as dispersion and rehabilitation to address the various challenges that arise in every prison setting.

3. Comparative Legal Developments

To successfully reform our prison systems to no longer rely on solitary confinement, states should constantly review new and progressive legal developments from other countries bound by the same international human rights standards, and revise punishment policies in accordance with sound penological and humane strategies. Lessons may be gleaned from strategies employed by countries such as the United Kingdom, where instead of relying on physical barriers to separate prisoners from prison staff, prisons ensure the safety of both staff and prisoners by maintaining a high prison staff to prisoner ratio whenever prisoners are out of their cells.[806]

B. Advocacy Strategies

1. Litigation

The Fourth Circuit is proving to be a difficult place to raise significant constitutional challenges to solitary confinement. It has repeatedly found that the psychological trauma from exposure to the conditions of extreme isolation do not rise to the level of cruel and unusual punishment.[807] Furthermore, the North Carolina Department of Corrections has promulgated policies and procedures that facially establish a system to address issues of due process, conditions of confinement, and the psychological dangers of solitary confinement.[808] This leaves advocates with few avenues to challenge conditions and lack of due process other than an "as applied" approach, pitting them against both the deference courts offer prison administrators and

[806] Roy D. King & Sandra L. Resodihardjo, *To Max or Not to Max: Dealing with High Risk Prisoners in the Netherlands and England and Wales*, 12 PUNISHMENT & SOC'Y 65 (2010).
[807] *See* SECTION TWO, I.A.3.
[808] *See* NC Dep't of Public Safety Prisons Policies and Procedures Ch. B .0200, Ch. C .0100 *et seq*.

the internal machinations of institutionalized self-preservation perpetuated by officers and low level supervisors.[809] However, the situation is not insurmountable. Complaints filed in other jurisdictions may provide new avenues to challenge the overuse and abysmal conditions of solitary confinement.

a. Cruel and Unusual Punishment

(1). Prisoners With Pre-existing Mentally Illness

Although the Fourth Circuit has declined to find that the deprivations suffered in solitary rise to level of cruel and unusual, advocates should still work to build the record and obtain more expert testimony before the court. Additional expert testimony may help to shift the understanding of the court about these issues regarding the impact isolation can have on the already mentally ill.

The report on Raleigh's Central Prison's inability to significantly address the mental health issues of prisoners confined to solitary in Unit 1 suggests that a large proportion of prisoners being held in solitary may already be suffering from mental illness and that conditions may even be causative.[810] It may be possible to challenge the NC DOC system for inadequate classification. Based on complaints from interviewees and surveys, it seems that screening for mental illness in control units is seriously lacking and that requests for screening once so confined receive inadequate response in particular units.[811] Similar challenges in other jurisdictions have seen some success, and building this record may help show how the basic mores of our society are changing.[812]

[809] *See* UNC I/HRP NC Prisoner Survey (on file with authors).
[810] *See* Metzner & Aufderheide, *supra* note 18.
[811] *Id*.
[812] *See* SECTION ONE, IV.C.

(2). Disproportionality

According to our statistics from the NC DOC the majority of infractions over the last four years were for non-violent infractions, and they both arose and were adjudicated at the unit level.[813] This parallels findings by the New York Civil Liberties Union that in the New York prison system almost two-thirds of disciplinary charges were brought at the unit level.[814] The NYCLU argues that this signals a disproportionate amount of power in the hand of officers directly involved with prisoners, which could be framed as arbitrary and as an abuse of power. A disproportionality claim may prove to be a successful maneuver around the extremely high standard for a condition of confinement claim, and could prove to be the bridge between current solitary confinement jurisprudence and the recent per se ban of life sentences for juveniles by the Supreme Court based on disproportionality.[815]

b. Due Process

(1). Inadequate Hearings

A common complaint from our interviewees and survey respondents is that the hearing process is not held in accordance with the regulations promulgated by NC DOC.[816] This cynical disbelief of the fairness and efficacy of the hearing process for disciplinary infractions seems to be bolstered by the data retrieved from the DPS website.[817] Further investigation into allegations of pre-determined responses, lack of counsel, and pressures against prisoner witnesses could all raise significant issues.

[813] *See* SECTION ONE, I.D.
[814] *NYCLU Seeks Class-Action Status in Challenge to Use of Solitary Confinement in NY Prisons*, *supra* note 394.
[815] *See Graham v. Florida*, 130 S. Ct. 2011, 2021 (U.S. 2010).
[816] *See* SECTION ONE I.A, *See also supra* note 813 and accompanying text.
[817] *Id*.

(2). Pre-Determined Review

Similar to the hearing process, interviewees and survey respondents complained of classification reviews that seemed pre-determined regardless of prisoner behavior.[818] Though the NC DOC claims it does not sentence inmates to indefinite solitary confinement,[819] the review process serves as a de facto indefinite sentence. As our interviewee, Michael, pointed out, even having served 15 months infraction free, he could not know whether he would be promoted to Mcon.[820] This may be linked to being labeled gang affiliated or a security risk. Based on statements from interviewees, it would be worthwhile investigating claims that these designations are the basis for continuations of control status for prisoners. As seen in the CCR suit against the California prison system, this could very well be sufficient to maintain a deprivation of due process suit.[821]

2. Legislation

Reducing the use and prevalence of solitary confinement in state prison systems has already saved states like Maine, Ohio, and Mississippi money and resources.[822] Their investigations into its use have provided record of its ineffectiveness in increasing prison safety, curbing prisoner disciplinary infraction, and rehabilitation.[823] Other states have followed their lead and have passed resolutions calling for full investigations into the outcome, cost, and effectiveness of solitary confinement.[824] The authors of this report call on the North Carolina legislature to follow suit and enact a bill that calls on The Joint Legislative Corrections, Crime

[818] *Id*.
[819] *See* Ryan Jacobs & Jaeah Lee, *Maps: Solitary Confinement, State by State*, MOTHER JONES (Nov./Dec/ 2012), http://www.motherjones.com/politics/2012/10/map-solitary-confinement-states.
[820] *See* SECTION ONE, I.A. 2.
[821] *See Torture: The Use of Solitary Confinement in U.S. Prisons*, CENTER FOR CONSTITUTIONAL RIGHTS, http://ccrjustice.org/solitary-factsheet (last visited June 30, 2013).
[822] *See* SECTION ONE, IV.2.
[823] *Id*.
[824] *Id*.

Control, and Juvenile Justice Oversight Committee on Justice and Public Safety to study: (1) the uses of solitary confinement, including administrative segregation, disciplinary segregation, and other forms of solitary confinement based on control status by the Department of Corrections; (2) the costs of such confinement compared with the costs of holding prisoners in the general population; (3) the impact on prisoners who have been held for prolonged periods of time in solitary confinement; and (4) the feasibility of limiting the widespread use of segregation for long periods of time, including at Unit 1 at Central Prison in Raleigh, and whether such limitation has any impact on safety within the prison facilities.[825]

One of the biggest obstacles facing reform of the use of solitary confinement in North Carolina prisons is the lack of public awareness of its widespread use and consequences. As advocates, we should utilize the current network of prisoner support and active organizing to disseminate these findings in this report as well as any more information that becomes available.

3. Community Outreach and Organizing

One of the biggest obstacles facing reform of the use of solitary confinement in North Carolina prisons is the lack of public awareness of its widespread use and consequences. As advocates, we should utilize the current network of prisoner support and active organizing to disseminate these findings in this report as well as any more information that becomes available.[826] Regionally, there is still lacking much needed data regarding our neighboring states use of solitary. Advocates and students should take it upon themselves to develop this record by attempting public records requests and contacting inmates directly.[827] We should at the very least look to put into the public record to determine:

- The number of people held in conditions of isolation
- How often jails rely on solitary confinement

[825] A full draft of proposed legislation can be found in Appendix VII.
[826] *See, e.g., North Carolina: Prison Resources*, HUMAN RIGHTS WATCH (July 20, 2010), http://www.hrw.org/news/2010/07/20/north-carolina-prison-resources.
[827] *See* Appendices II and IV for an example of a prisoner survey and sample public record request.

- How much time on average prisoners spend in solitary confinement
- The ethnic, racial, and gender makeup of isolated prisoners
- Review of the use of solitary confinement in terms of youth and immigrant detention

Bringing an end to this barbaric practice will require all of the above approaches, as well as litigation, legislative action, and grassroots organizing. This practice is expanding; we must act now.

C. North Carolina Specific

1. Investigating Claims of Abuse by Corrections Officers

The North Carolina Prisoner Survey responses and personal interviews point to corrections officer abuse and maltreatment as one of the most significant problems facing prisoners in solitary confinement.[828] Currently, there is no way for the system to police itself. In the North Carolina Prisoner Survey, around half of the fifty-one respondents described how the correctional officers treated the prisoners in solitary confinement as "poorly," "like an animal," "subhuman," and "disrespectfully."[829] Prisoner 9 described the correctional officers as "irrational children with the power of a Greek god."[830] One of the survey respondents, Prisoner 15, described one of his experiences with the correctional officers:

> I had a guard strike me with a baton while my hand was on my trap door and it cracked the bone in my finger. He was refusing to feed me so I was holding my trap door open asking to see the Sergeant. He struck me to get me to move my hand so he could secure my trap. I filed a grievance, was taken to medical and UNC Hospital. He had to justify using force while I was behind a locked cell door so he claimed I tried to assault him. I was found guilty of attempted assault on a staff member.[831]

[828] North Carolina Prisoner Survey results.
[829] North Carolina Prisoner Survey, Conditions 12.
[830] Prisoner 15's survey response to Conditions 12.
[831] Prisoner 15's survey response.

a. Independent Reviews Required

To prevent these abuses from the outset, prisons must implement a stricter hiring practice, testing, and continuous training for corrections officers.[832] When problems arise with corrections officers, the prisons must properly respond with appropriate consequences including disciplinary action.[833] Not only will the specific corrections officer learn that the prison will not tolerate abusive behavior, but when corrections officers and prison officials are held accountable for abusive conduct that violates individual rights, it is reasonable to expect cultural changes within the prison structure and that other corrections officers will change their behavior accordingly.[834]

> One North Carolina prisoner describes a corrections officer's reaction when he was found attempting suicide: "The officer saw me and he didn't try to stop me, he told me to do it. I start crying and I stop doing it and he start laughing at me."

Independent investigators with no ties to the prison should regularly study and review the behavior of corrections officers in a prison. Investigators should focus on those officers who have the most complaints and grievances filed against him or her. Due to the high number of misconduct and brutality complaints by prisoners, prison officials cannot afford to ignore the problem of prison abuse. To do so would encourage a climate of impunity and resulting human degradation with lasting consequences to the prisoner, the penal system, and society.

2. Rehumanization of Corrections Officers through Training

> "The conflicting goals of corrections—deterrence, incapacitation, rehabilitation and punishment—have gone out of balance. People are sentenced to prison as punishment, not for punishment. Some staff lose sight of that."
>
> –Kathleen Dennehy, Massachusetts Corrections Commissioner[835]

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[832] Carl ToersBijns, *A Correctional Officer's Challenge; Does Abuse or Neglect lead to Violence?*, CORRECTIONS.COM (June 4, 2012), http://www.corrections.com/news/article/30926.
[833] *Id.*
[834] *Id.*
[835] As cited in Gibbons & Katzenbach, *supra* note 298, at 66.

Corrections officers working in a solitary confinement unit have a tough job. The pressures are immense, tensions run high, and officers adopt an "us versus them" mentality to carry on through the day. These officers lose sight of the fact that the people with whom they work are human beings. It becomes remarkably easy for them to overreact and succumb to abusive treatment of the prisoners. One North Carolina prisoner describes a corrections officer's reaction when he was found attempting suicide: "The officer saw me and he didn't try to stop me, he told me to do it. I start crying and I stop doing it and he start laughing at me."[836] In addition to adopting a callous disregard of prisoners' well-being, corrections officers often end up taking their personal frustrations out on prisoners. Indeed, this phenomenon was well documented in the Stanford Prison Experiment.[837] To combat the propensity for abuse, resources must be invested in the rehumanization of the corrections officers working with prisoners held in solitary confinement.

3. Reform through Leadership

A report by the National Institute of Corrections observed in 1999 that "[i]ntegral to the operation of a quality and legally defensible extended control facility are strong, technically competent, and professional leadership and supervision at all levels—from the line-level supervising custody officer to the administrators of the agency."[838] Strong leadership

Leadership can help create a positive culture in North Carolina prisons that is grounded in ethics of respect and interpersonal communication.

[836] Prisoner 4's survey response.
[837] *See supra* SECTION ONE, III.B.
[838] Chase Riveland, NATIONAL INSTITUTE OF CORRECTIONS, SUPERMAX PRISONS: OVERVIEW AND GENERAL CONSIDERATIONS 17 (1999), *available at* http://static.nicic.gov/Library/014937.pdf.

that reinforces the humanity of prisoners is the key ingredient to ensuring that dignity and respect survive in this harsh work environment. As discussed above in SECTION ONE, it is dignity and respect that allow security and control to become a reality in a prison environment.[839]

Several steps can be taken to improve the institutional culture in our prisons. First, leadership can help create a positive culture in North Carolina prisons that is grounded in ethics of respect and interpersonal communication, a change that will benefit both prisoners and staff.[840] Second, leadership must act to recruit and retain a qualified staff of corrections officers.[841] This will require a reallocation of resources to better train and retain qualified individuals to work with one of North Carolina's most vulnerable populations. Third, and lastly, North Carolina must provide support to the prison leadership that will best use their positions to promote healthy, respectful, and safe prisons.[842] These leaders will in turn cultivate the next generation of prison leaders, to ensure that these solutions are not short lived.[843] Without strong leadership to attract the most qualified individuals to mid-level corrections positions, North Carolina prisons will continue to suffer the abuses and dehumanization afflicting prisons statewide.

These leaders will in turn cultivate the next generation of prison leaders, to ensure that these solutions are not short lived.

D. Conclusion.

Based on the narratives, data, expert studies, and the compelling work of advocates across the globe, it is uncontroverted that solitary confinement creates unacceptable risks to the individuals subjected to such "disciplinary practice." It is known to create risk of severe anxiety,

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[839] *See supra* SECTION ONE, III.B. In pertinent part, Minnesota Warden James Bruton explained that "[s]ecurity and control—given necessities in a prison environment—only become a reality when dignity and respect are inherent in the process." Gibbons & Katzenbach, *supra* note 298, at 55.
[840] Gibbons & Katzenbach, *supra* note 298, at 15.
[841] *Id.*
[842] *Id.*
[843] *Id.*

panic, mental illness including delusions, paranoia, and uncontrolled fear, rage, and loss of control. The Constitutional protections against cruel and unusual punishment when considered against the volume of expert findings, must be said to prohibit solitary confinement, as does the Due Process clause. Solitary confinement violates international human rights norms. As it is currently implemented across the United States, it constitutes cruel, inhuman, degrading, and constitutes a form of torture.

Our conclusion is straightforward and simple: solitary confinement is ineffective at decreasing violence within prisons; it is ineffective at preserving public safety; it is ineffective at managing scarce monetary resources; and it violates the boundaries of human dignity and justice. Prison officials and the courts must find a way to end the practice without delay.

Solitary confinement is ineffective at decreasing violence within prisons; it is ineffective at preserving public safety; it is ineffective at managing scarce monetary resources; and it violates the boundaries of human dignity and justice.

See Appendices

Appendix I:
http://www.law.unc.edu/documents/academics/humanrights/solitaryconfinement/appendix1.pdf

Appendix II:
http://www.law.unc.edu/documents/academics/humanrights/solitaryconfinement/appendix2.pdf

Appendix III:
http://www.law.unc.edu/documents/academics/humanrights/solitaryconfinement/appendix3.pdf

Appendix IV:
http://www.law.unc.edu/documents/academics/humanrights/solitaryconfinement/appendix4.pdf

Appendix V:
http://www.law.unc.edu/documents/academics/humanrights/solitaryconfinement/appendix5.pdf

Appendix VI:
http://www.law.unc.edu/documents/academics/humanrights/solitaryconfinement/appendix6.pdf

Appendix VII:
http://www.law.unc.edu/documents/academics/humanrights/solitaryconfinement/appendix7.pdf