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Assessing the Legality of Solitary Confinement

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Class 2823

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Dedication

I have several to thank for their help in putting together this paper. Dr. James R. Acker, my faculty advisor, for his unfailing desire to help his students. We have worked on several projects together this year, notwithstanding the two classes I have taken with him. I have him to thank for showing me how to “standardize” my approach to legal analysis and review. Second only in order, but never in importance, I would like to thank my parents for serving as my *de facto* editors. I lost track of how many errors they caught that I couldn’t find on first glance. I can only hope to make them proud with every paper of mine that they read.

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Introduction

Many issues regarding imprisonment have been resolved with respect to the Eighth Amendment, which prohibits “cruel and unusual punishments.” Solitary confinement, for the purposes of this paper, is segregated custody of convicted inmates whereby social interaction is severed to a negligible minimum. This manner of housing is still argued on constitutional grounds today. There are many reasons for both sides of the debate, both for and against its continued use. Most argue there is a third side: allowing for its use, but limiting it to certain contexts. Of course, a legal discussion would be incomplete without consideration of psychological evidence and reports about solitary confinement, in an attempt to study the risks of cruelty within this form of housing. In the following paragraphs, I will describe solitary confinement, briefly outline its history, analyze both supporting and dissenting arguments, as well as examine psychological studies done on inmates, and finally conclude with possible solutions considering the precedent and evidence for both sides.

The History of Solitary Confinement

First, let us review the history of the use of solitary confinement. As surprising as it may be considering all the legal challenges advanced today, solitary confinement launched in the early 19th century in an attempt to rehabilitate offenders. One religious group, the Philadelphia Quakers used it so that offenders would “reflect on their bad ways, repent, and reform.”¹ It gained notoriety and acclaim in the mid-19th century, resulting in its use in European prisons as well.² However, by the 1860s, an increasing volume of evidence showing the increased mental illness and death suffered by inmates caused the U.S. to re-think its position.³

The U.S. Supreme Court got a chance to re-consider that position a quarter century later. On September 24, 1889, James Medley was convicted of murdering his wife.⁴ He was sentenced

to a 30-day stay in the county jail and subsequently, death by hanging.⁵ However, between his conviction and sentence, the Colorado law was changed, and he was to spend 30 days of solitary confinement at the state penitentiary, and subsequently, death by hanging.⁶ Medley petitioned the Court, saying that the imposition of the new law as opposed to the old (without a “bridging clause” allowing his sentence to stand under the old law) was so cruel as to be *ex post facto*.⁷ While he sought relief on Fifth Amendment grounds, he did so on the basis that solitary confinement was such a substantially more severe punishment, an Eighth Amendment issue. In *In re Medley*, 134 U.S. 160 (1890), the Court agreed, and ordered his immediate release from prison, despite his conviction.⁸ While finding that solitary confinement was “an additional punishment of the most important and painful character,” the Court stopped short of prohibiting the practice all together.

Following *In re Medley*, the use of solitary confinement at an institution-wide level declined, though most prisons continued the practice for short-term punishment.⁹ Of note was the “D Block” on Alcatraz Island, which was a solitary confinement hallway to house roughly 24 of the nation’s most incorrigible offenders.¹⁰ These men were rarely let out of their cells and had minimal social contact.¹¹ The most famous cell in this hallway was “The Hole,” where a prisoner was kept naked, in the dark, fed only bread and water slipped through a hole in the floor.¹²

After World War II, the United States re-examined solitary confinement through a series of experiments conducted at McGill University surrounding sensory and perceptual deprivation.¹³ In these experiments, the participants were placed in dark, soundproof rooms, and some wore padded gloves to stop them from feeling their surroundings.¹⁴ Since this experiment was replicated by many universities, the surroundings the participants resided in varied.¹⁵ They

were submerged in water, confined to a bed, or simply placed in rooms.¹⁶ It is noteworthy that these men were told to stay in the rooms as long as they could stand, meaning they were free to leave at any time: most stayed between less than one hour to two weeks.¹⁷ I will discuss these results when I examine the psychological effects of solitary confinement. Needless to say, these experiments served as inspiration for a new model of prisons: the supermax.¹⁸

Traditionally, the “worst of the worst” offenders were dispersed into maximum-security prisons with the idea of minimizing the effect these problem inmates had on those who were less dangerous.¹⁹ But on October 22, 1983, riot broke out at a federal maximum-security facility in Marion, IL, killing two prison guards.²⁰ The prison used a “lockdown” policy, which severed prisoner’s work or education programs, restricted their movements and subjected them to indefinite solitary confinement.²¹ Other prisons noticed that this policy of institution-wide solitary confinement (later termed supermaximum security facility or “supermax”) lowered inmate violence.²² Several states took after Marion’s policy and created prisons intentionally modeled on its lockdown system.²³ Pelican Bay State Prison, located in California, was created in 1989 and is credited for being the first modern facility built for prisoners to be housed in isolation, as there was no cafeteria, classrooms, workshops, or exercise yard.²⁴ To date, 36 states have adopted prisons resembling the Marion “lockdown” model (i.e. have supermaxes,) including one at the federal level,²⁵ and as many as 100,000 inmates are housed in supermax facilities.²⁶

Conditions of Solitary Confinement

Before I evaluate the legality of solitary confinement, it would be helpful to describe its conditions. Humans are social beings, and as such solitary confinement has drawn objections based on its severing of all human contact, absent when meals are served, often through small

slots in a cell door. For 22 or as much as 23 ½ hours per day, inmates spend all their time in windowless, relatively barren cells, roughly eight feet by six feet in size, devoid of any contact.²⁷ A cell typically contains: a concrete writing desk, a concrete bed, a stainless steel sink and toilet.²⁸ Even the remaining time (in which inmates are allowed to leave their cells for showering or recreation) is spent in solitude.²⁹ Prisoners are not permitted to talk or yell to prisoners in accompanying cells.³⁰ The size of recreation pens (which are entirely enclosed) closely mirror the size of the cells.³¹ Even when permitted to leave for these purposes, inmates must go through a visual strip search, visible by the central tower, in other words, the accompanying guards and anyone who can see through available security cameras.³² This practice has led some inmates to forgo recreational time due to the degrading nature of these cavity searches.³³

I mentioned earlier that the only human contact occurred when inmates were served meals through a slot in their cells. While technically this would qualify as “human contact,” it is negligible at best, as meals are eaten inside the cell: the barest socialization available to prisoners in the general population; that is, being able to talk briefly at mealtimes, is removed from these inmates.³⁴ On the subject of meals, the quality of prison food it is not for debate within this paper; however, whatever variation there is for the general population is often eliminated in solitary confinement. Some prisons have debuted “Nutraloaf,” a tasteless but nutrient-filled “food product” which requires no utensils for consumption.³⁵

The Purposes of Solitary Confinement: It’s Not All About Punishment

Solitary confinement analysis is further complicated by the fact that discipline is but one of several reasons an inmate may be sent to solitary. It is true that inmates who commit crimes or other disciplinary infractions after their placement at the prison may be placed in solitary;³⁶

however, there are three main other reasons relevant to our analysis: protection, administrative security, and a group I will call alternative placement inadequacy.³⁷ First, inmates who are convicted of certain crimes, such as child molestation or embezzlement could be sent to solitary for fear of attacks by other inmates.³⁸ Also, certain inmate groups like former prison guards, police officers, the young, and especially in recent times, the transgendered are particularly vulnerable as well and may be sent to solitary.³⁹ Again, these two groups are not being punished; they are sent to solitary for their own protection (though it is not irrelevant that they may be sent both by their own request and at the discretion of prison staff.)⁴⁰ Inmates who are deemed too dangerous to house with others are sent for placement in the hopes of quelling future incidents of violence, though they may not have been cited for misconduct (gang members are the primary example.) This would be an illustration of prison regulation-related placements. Finally, some inmates are sent to solitary because there are no other viable alternatives for them. For example, staff might determine that a mentally ill inmate shouldn't be housed with other inmates, but no wing exists for those who are mentally ill. Inmates with contagious diseases have also been sent to solitary due to the inadequacies of prison hospitals and the fear of infection for other inmates. For these inmates, until another solution arises, solitary serves as the "safest" alternative. Supermax is no different; one might think that only the most hardened offenders are sent there, but there actually is a mix of all four categories currently housed there.⁴¹

Punishment, but not Punishment?

Solitary confinement may be implemented for several reasons, only one of which is disciplinary. We must consider the question of whether transfers to solitary for nonpunitive reasons are subject to Eighth Amendment analysis. The issue of administrative segregation arose for Lavarita Meriwether, a transgendered inmate who was placed in solitary confinement for

nonpunitive, protective reasons. While she had “female mannerisms” and considered herself to be female since age fourteen and had been receiving estrogen treatments for gender dysphoria, members of the medical staff treated her “as any other anatomical male.”⁴² The U.S. Court of Appeals struck down Respondent’s appeal for a summary judgment, arguing that whether or not Meriwether was placed in solitary for punitive reasons or not was irrelevant; she still had every right to appeal that her Eighth Amendment rights had been violated and submit the conditions of her confinement for subsequent review.⁴³

Consider another case of protective segregation. In July 1981, Richard Allgood requested a transfer to a different building a month after an inmate punched him,⁴⁴ though not to a segregated unit. Two days after he was transferred, Allgood wrote a last will and testament which he sent to his mother, who contacted Edward Morris, Warden of the Mecklenberg Correctional Center.⁴⁵ In September 1981, when asked if he wanted a transfer, Allgood refused, noting that it would mean loss of recreational and canteen privileges.⁴⁶ Finally, in October 1981, Allgood was stabbed by another inmate, and after his stay at South Hill Hospital, he was transferred to solitary confinement for his own safety. He petitioned the U.S. Court of Appeals, Fourth Circuit, claiming (among other things) that there must be an alternative to protective segregation for a prisoner seeking safety from physical harm, and that placement in solitary confinement for someone who has not violated prison rules was unconstitutional.⁴⁷ The Court disagreed with him on both grounds.

The Process of Being Sent to Solitary

Now that I have briefly outlined solitary confinement’s history, conditions, purposes, and inmate groups, it would be helpful to turn to the process by which someone may be sent to solitary. The processes The Fourteenth Amendment states, in relevant part, that “[n]o State

shall...deprive any person of life, liberty, or property, without due process of law.” When a person is tried for a crime, they have certain rights which must be respected prior to their incarceration for conviction of that crime. However, what satisfies due process is unclear when inmates are involved: “[l]awful imprisonment necessarily makes unavailable many rights and privileges of the ordinary citizen, a ‘retraction justified by the considerations underlying our penal system.’”⁴⁸ However, “a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain between the Constitution and the prisons of this country.”⁴⁹ It is this balance between an individual inmate’s rights and the government’s rights that one must make a determination on whether due process is respected.

The Supreme Court considered the Due Process claims of transferred prisoners. After a series of fires at the medium-security Massachusetts Correctional Facility at Norfolk, Arthur Fano (and five others) received notice that prison authorities received information that they had contraband or were otherwise involved with at least one of these fires.⁵⁰ After hearings where they were allowed to present testimony, have representation, and call witnesses, the prison review board recommended moving one inmate to administrative segregation for 30 days, three to Walpole, a maximum-security facility, and two to Bridgewater, which also has a maximum-security facility.⁵¹ The inmates were not aware of the reasons for the board’s action beyond the “general import of the...allegations.”⁵² The Court concluded that “...given a valid conviction, the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him...The Constitution does not...guarantee that the convicted prisoner will be placed in any particular prison.”⁵³ Here, the Court determined that a liberty interest, a necessary prerequisite for a requirement of due process, was not implicated by a transfer to a more secure prison. Justice White noted for the majority that “[the fact] that life in one prison is much more

disagreeable than in another does not itself signify that a...liberty interest is implicated when a prisoner is transferred to the institution with the more severe rules.”⁵⁴

Four years later, the Court considered whether a prisoner’s transfer to a mental hospital implicated Due Process protections. Larry Jones was convicted of robbery on May 31, 1974 and sentenced to 3 to 9 years’ imprisonment.⁵⁵ Seven months later, he was transferred to the Nebraska state penitentiary hospital; two days after which he was placed in solitary confinement and then burned himself and his mattress.⁵⁶ He was treated at a private hospital and, following his release (in accordance with Nebraska statute §83-180,) a hearing determined that he was suffering from a mental illness that could not be adequately treated at the penitentiary, and he was transferred to a state mental institution.⁵⁷ He then challenged the constitutionality of the Nebraska statute.

The Court concluded that the involuntary transfer of the inmate to the mental hospital did implicate a liberty interest requiring Due Process protections.⁵⁸ The transfer “...constituted a major change in the conditions of confinement amounting to a ‘grievous loss’ that should not be imposed without the opportunity for notice and an adequate hearing.”⁵⁹ However, the Court qualified in *Meachum* that “[w]e reject at the outset the notion that *any* grievous loss visited upon a person by the State is sufficient to invoke the procedural protections of...Due Process.”⁶⁰ More specifically, they noted that “the stigmatizing consequences of a transfer to a mental hospital for involuntary psychiatric treatment coupled with the subjection of the prisoner to mandatory behavior modification as a treatment for mental illness[,] constitute the kind of deprivations of liberty that requires procedural protections.”⁶¹ Since a liberty interest was established, *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) established that there were three main considerations for Due Process: the right of the State to segregate inmates who are mentally

ill and need treatment as well as the burden that additional procedural requirements may entail, the (albeit reduced but still substantial) right of the inmate to avoid such involuntary treatment, and whether the risk of error is great enough to warrant Due Process protections to avoid them.⁶² These protections included: (1) notice of the impending hearing and the inmate's rights, (2) an adversarial hearing where the prisoner has the time to prepare documentary evidence and be present, (3) the assistance of counsel (though only a plurality agreed Due Process mandated this,) (4) the opportunity to present and cross-examine witnesses "...except upon a finding, not arbitrarily made, of good cause for not permitting such presentation, confrontation, or cross-examination," (5) an independent decision-maker, and (6) a written statement by the fact-finder as to the evidence used in rendering the decision.⁶³

In *Vitek*, the Court made reference to *Wolff v. McDonnell*, 418 U.S. 538, 571-572 (1974) that a transfer to solitary confinement could justify an extension of due process protections because it "represents a major change in the conditions of confinement and is normally imposed only when it is claimed and proved that there has been a major act of misconduct;" however, the case was actually centered on the removal of good-time credits. Recently, the Court considered Due Process claims surrounding the method by which inmates may be sent to solitary confinement directly when a class of current and former inmates at the Ohio State Penitentiary (OSP) supermax facility filed a claim against the prison.⁶⁴ OSP's policy regarding placement in solitary is twofold: inmates are considered when entering the system if they committed a certain offense (such as participated in organized crime,) or if an inmate already in the system has demonstrated certain conduct (such as leading a gang.)⁶⁵ Under the new policy, an inmate must have the right to factual basis leading to his placement, and a "fair opportunity for rebuttal" at the hearings, though they may not call witnesses on their behalf.⁶⁶ Hearings occur at three levels,

with placement occurring after the third reviewer confirming that placement is an appropriate action.⁶⁷

The Court concluded that inmates do have a legitimate liberty interest in avoiding placement in OSP; while 30-day review occurs after placement and annually thereafter, the terms of confinement themselves are indefinite, ending only when the inmate finishes his sentence.⁶⁸ Also, the inmate is ineligible for parole consideration while housed at OSP.⁶⁹ However and more importantly, the Court also found that the “informal, non-adversar[ial]” processes for determining placement were sufficient to satisfy Due Process.⁷⁰ When considering the inmate’s interest in avoiding placement at the supermax facility, the prison’s interest in inmate and personnel safety, and the risk of erroneous deprivation through the procedures in place, the Court concluded that the prison’s interest is “a dominant consideration...[the] first obligation must be...safety.”⁷¹ Inmates’ interest “must...be evaluated within the context of the prison system and its attendant curtailment of liberties.”⁷² Finally, the multiple levels of review including the last initial hearing 30 days after placement and power to overturn lower level decisions “minimize[s]...the risk of an erroneous placement.”⁷³

The *Wilkinson* Court drew on *Hewitt v. Helms*, 459 U.S. 460 (1983) for the required prison procedures for Due Process compliance. Prison officials must conduct an “informal, non-adversary review” of evidence presented with respect to a prisoner’s misconduct, which includes a prisoner’s own statement, if he wishes to make one.⁷⁴ However, they are not required to: (1) give advance notice to prisoners of their placement, (2) allow prisoners to present any evidence (except the statement) or witnesses, (3) provide or allow legal representation, or even (4) a formal hearing.⁷⁵ The Court has repeatedly considered the difference between the “...curtailment of liberties” attendant to a free citizen being imprisoned and a prisoner having to

move to more restrictive settings, and they have decided at several junctures that the former deserves far more protections than the latter.⁷⁶ I do not object to the Court's finding, admittedly far more changes in freedom are undergone when a free citizen is first imprisoned as opposed to when an already imprisoned inmate transfers to a more secure facility; that fact, along with the prison's legitimate interest in safety creates a different set of requirements for Due Process accorded to inmates.

Legal Challenges: *Per se* Unconstitutional?

The Court has agreed that the use of solitary confinement in accordance with the procedural protections I discussed earlier meets the requirements of Due Process. But solitary confinement has also been facially challenged on other constitutional grounds. First, the Eighth Amendment has been implicated; however, courts across the country have been reluctant to rule that solitary in and of itself violates the Eighth Amendment.⁷⁷ The Seventh Circuit Court expressly defeated that claim in *Bono v. Saxbe*, 620 F.2d 609 (7th Cir. 1980). Solitary confinement has been challenged on First Amendment grounds as well.

While rarer, some cases have been challenged on Fifth Amendment grounds, more specifically, that the use of solitary confinement constitutes "double jeopardy." In *People v. Vazquez*, 89 N.Y.2d 521 (N.Y., 1997), the N.Y. Supreme Court ruled that "sanctions imposed in the context of prison disciplinary proceedings 'do not constitute criminal punishment triggering double jeopardy provisions'" and thus "[a] prisoner who commits a crime while in prison breaks both sets of rules [criminal law and prison procedures,] and may thus be sanctioned by both..."⁷⁸ "While disciplinary sanctions do have a deterrent effect, that deterrent effect is aimed exclusively at deterring conduct within the prison setting."⁷⁹ Penal laws, by contrast are aimed at maintaining public (free citizens') interests.⁸⁰

Restrictions on use?

With the facial challenges defeated, one must then ask whether or not solitary confinement in a particular case violates an inmate's Eighth Amendment rights. Unfortunately, at least with respect to length, there is little oversight: there are no federal guidelines to duration, and only a single state, Washington, statutorily set the maximum length at twenty days.⁸¹ Eighth Amendment violation claims have been subjected to a case-by-case review of the conditions of confinement to evaluate whether or not the conditions of solitary confinement meet the threshold of cruel and unusual punishment; however, courts have clearly indicated that, as a general rule, confinement decisions are typically reserved for prison administrators.⁸²

First of all, prisoners have the right to raise constitutional objections if the conditions of their confinement are sufficiently "cruel and unusual."⁸³ In *Rhodes v. Chapman*, 452 U.S. 337, 346-347 (1981) the Supreme Court defined "cruel and unusual" prison conditions as ones that "result in the 'wanton and unnecessary infliction of pain,'" "are grossly disproportionate to the severity of the crime," "or result in the 'unquestioned and serious deprivation of basic human needs.'" It however, may become so if the length of incarceration becomes excessive or is grossly disproportionate to the gravity of the offense (not the crime for which a prisoner was convicted; rather, the infraction for which he was placed in solitary confinement.)⁸⁴

Eighth Amendment Standards of Review

Concluding that solitary confinement does not by itself violate the Eighth Amendment, the Court, through several important decisions, have laid the groundwork for the process by which Eighth Amendment conditions of confinement claims are to be analyzed, provided an inmate has followed the procedural guidelines laid out in the preceding paragraph. Notwithstanding the cases mentioned earlier, judgments into the early 20th century, including

Weems v. United States, 217 U.S. 349 (1910) which accorded the idea that the Eighth Amendment text would “evolve as social conditions did.”⁸⁵ In *Trop v. Dulles*, 356 U.S. 86 (1958), the denaturalization of a World War II deserter was deemed unconstitutional.⁸⁶ Trop did not petition the Court until being denied a passport in 1952, after serving a three-year sentence.⁸⁷ The Court held that denaturalization in this context was in violation of the Eighth Amendment in that “[i]t subjects the individual to a fate of ever-increasing fear and distress.”⁸⁸ Here was the first admission by the Court after *In re Medley* that mental anguish and suffering could rise to the level of constitutional violation.⁸⁹

It should be noted that these guidelines apply to all conditions of confinement cases, but for the purposes of this paper, I will focus on cases where an inmate in solitary filed a claim, where available. In *Hutto v. Finney*, 437 U.S. 678, 685-686 (1978), the Court, stated that “[c]onfinement in a prison or isolation cell is a form of punishment subject to scrutiny under Eighth Amendment standards,” and that “punitive isolation is not necessarily unconstitutional, but it may be, depending on the duration of the confinement and the conditions thereof.” It is under this framework that courts may review solitary placement decisions with respect to the Eighth Amendment: case-by-case analysis.

The Court set up a test to decide whether or not one’s conditions of confinement are constitutional. To successfully contest an inmate’s conditions of solitary confinement on Eighth Amendment grounds, the inmate must demonstrate that overall conditions of solitary confinement have denied them “the minimal civilized measure of life’s necessities, which is the ‘objective’ component and (2) that prison administrators acted with deliberate indifference toward the inmate, which is the ‘subjective’ component”.⁹⁰

The objective prong of this test was created by the Court in *Rhodes v. Chapman*, 452 U.S. 337 (1981). This was not a case of inmates in special housing units; however, the Court's discussion about confinement conditions and the Eighth Amendment is relevant to our analysis. In response to unexpected overcrowding, a maximum-security facility in Ohio put two inmates in a cell ("double celling").⁹¹ Evidence considered included the reduction of inmate space from 50-55 square feet to 31.5, the housing of inmates 38% beyond the design capacity, the reduction of time allowed outside the cell, psychological testimony about the "tension and aggression" of being housed with their cellmates longer, and the fact that this was not a temporary condition.⁹² However, there was no evidence that these prisoners had been denied essential human needs such as food or medical care, nor was there any showing of an increase in violence within the prison.⁹³ The Court denied the inmates' request for injunctive relief. More importantly for our analysis, Justice Scalia stated that "[t]he Constitution does not mandate comfortable prisons," and "the task of running prisons is entrusted in the first instance to the 'legislature and prison administration rather than a court.'"⁹⁴

The Court created the subjective prong of this test with respect to medical care in *Estelle v. Gamble*, 429 U.S. 97 (1976). The Court held that "inadvertent failure to provide adequate medical care," or a "negligent...diagnosis" with respect to an inmate's 17 visits to the infirmary over three months was not "cruel and unusual."⁹⁵ However, the Court did state that the Eighth Amendment jurisprudence "proscribe more than physically barbarous punishments."⁹⁶ In other words, courts may consider other forms of suffering, such as psychological and emotional.

The Court expanded the scope of the *Gamble* standards to general conditions of confinement in *Wilson v. Seiter*, 501 U.S. 294 (1991) even when the inmates cite unconstitutional prison conditions (as opposed to denial of medical care.) Pearly L. Wilson cited

“...overcrowding, excessive noise, insufficient locker storage space, inadequate heating and cooling, improper ventilation, unclean and inadequate restrooms, unsanitary dining facilities and food preparation, and housing with mentally and physically ill inmates” in his complaint of alleged unconstitutional confinement.⁹⁷ The Court declined to analyze the nature of Wilson’s claims with respect to whether they denied a human need (as I imagine some may not have,) because the Court “...rejected a reading of the Eighth Amendment that would allow liability to be imposed on prison officials solely because of the presence of objectively inhumane prison conditions”⁹⁸. Also, the Court rejected the “totality of the circumstances approach” stating that “[n]othing so amorphous as ‘overall conditions’ can rise to the level of cruel and unusual punishment when no specific deprivation of a single human need exists,” As a result, inmates must specifically state a claim for which relief could be granted.⁹⁹ However, the Court realized that human needs may be denied because of a combination of circumstances, such as a low cell temperature and the absence of blankets would constitute a denial of warmth, so long as the conditions together constituted denial of a human need.¹⁰⁰

The *Wilson* Court cited *Whitley v. Albers*, 475 U.S. 312 (1986), where an inmate was shot by a prison guard who was attempting to quell a riot.¹⁰¹ Even were a prisoner to objectively prove cruel conditions, there must be “more than ordinary lack of due care for the prisoner’s interests or safety” to warrant a constitutional violation.¹⁰² “[T]he ‘wantonness’ of conduct depends not on its effect on the prisoner, but on the constraints facing the official.”¹⁰³ An example of this would be *Hodges v. Klein*, 421 F.Supp. 1224 (D.C.N.J., 1976) where the Court was determined that despite placement in empty cells, a lack of beds, blankets, hot water, or clothes, the fact that an emergency situation existed made the conditions, at least in the very short term, constitutional.

Farmer v. Brennan, 511 U.S. 825 (1994) lent some explanation to this subjective “deliberate indifference” standard to Eighth Amendment claims. Dee Farmer, serving time for credit card fraud at the Federal Correctional Institute in Oxford, Wisconsin, was a pre-operative transsexual who was transferred to administrative segregation at the United States Penitentiary in Terre Haute, Indiana for disciplinary reasons in March, 1989.¹⁰⁴ Later, she was transferred to the general population, where two weeks later, she was sexually assaulted.¹⁰⁵ She petitioned the Court, seeking civil redress and arguing that the guards acted with deliberate indifference to the possibility that she would be harmed by other prisoners.¹⁰⁶ The parties disagreed on what standard of proof ought to be used in determining the subjective prong of Eighth Amendment claims.¹⁰⁷ The Court, reaffirming the deliberate indifference standard, stated that

prison official[s] cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of the facts from which the inference could be drawn that a substantial risk of serious harm exists, and [they] must also draw the inference.

The standard of proof is on par with criminal and civil recklessness.¹⁰⁸

The Supreme Court clarified what amount of harm was sufficient for a constitutional claim of deliberate indifference (i.e., what amount of harm constitutes “serious harm” as explained in *Farmer*.) Keith Hudson, while housed in a Louisiana State Prison, was beaten to the point that he suffered bruises, facial swelling, and cracked teeth, petitioned the Court, arguing his rights were violated.¹⁰⁹ McMillian contended that Hudson did not seek medical treatment for his injuries, thus the injuries sustained were not significant enough to warrant constitutional review.¹¹⁰ The Supreme Court, in *Hudson v. McMillian*, 503 U.S. 1 (1990), on the other hand,

concluded that the U.S. Court of Appeals' requirement that Hudson show "significant injury" was unconstitutional, so long as they were not *de minimus*.¹¹¹

The Court also ruled that the harm need not have been suffered prior to the claim. William McKinney, a inmate in Nevada, sued the prison, alleging that the prison staff's failure to warn him of second-hand smoke's potential side effects, and his involuntary placement in a cell that exposed him constituted deliberate indifference to his medical needs, an issue discussed more fully in *Gamble*.¹¹² In the original jury trial, the presiding magistrate held that since McKinney could not demonstrate any health problems related to exposure to cigarette smoke, he found no constitutional violation.¹¹³ In *Helling v. McKinney*, 509 U.S. 25 (1993) the Supreme Court ruled that prisoners need not wait until sufficient harm has been inflicted to seek relief from unconstitutional conditions.¹¹⁴ However, the Court left to McKinney the burden of proving on remand that both prongs of the Eighth Amendment confinement analysis test were present.¹¹⁵

The Prison Litigation Reform Act: "Administrative Exhaustion"

In 1996, President Clinton signed a bill into law in an attempt to streamline cases brought for review with respect to conditions of confinement by restricting the cases eligible for judicial review, titled the Prison Litigation Reform Act (referred subsequently as The Act or The PLRA.) The Act had four major provisions, two of which are relevant for our review. "No action shall be brought with respect to prison conditions under section 1983 under this title, or any other Federal law...until such administrative remedies as are available are exhausted."¹¹⁶ While some courts may grant a temporary injunction if they see that it will take too long to exhaust administrative outlets before irreparable harm is done (as the Court granted in *Jones'El v. Berge*, 164 F.Supp.2d 1096 (W.D.Wis., 2001), there has never been an "irreparable harm exception" accepted across the federal jurisdiction.¹¹⁷ In most courts, as long as the prison demonstrates that appropriate

administrative procedures exist for reviewing claims and those were not followed, cases failing to exhaust other possibilities must be summarily dismissed irrespective of whether or not the prison actually committed the alleged violations.¹¹⁸

A fuller discussion of the Alpha One (most dangerous) Unit cells at the Wisconsin Supermax Correctional Facility at Biscobel in *Jones'El* is necessary to help make the reader understand the severity of potential injury necessary for prospective relief (in this case, via a temporary injunction) prior to exhaustion, a situation not covered by the PLRA.¹¹⁹ Constant illumination in solitary cells caused disorientation and disturbed sleep patterns, especially in those inmates who were already mentally ill.¹²⁰ The heat indexes of the cells in the summer often exceeded 100 degrees, with little chance for break due to restrictions on showers, which posed substantial risk to those who were mentally ill.¹²¹ While exercise was permitted, these inmates were allotted only 4 hours a week, in a room barely larger than their cells, with no equipment whatsoever, leading to 90% rejection of exercise time.¹²² Access to a law library was allowed; however, the physical constraints placed on these witnesses were so severe as to make it relatively meaningless.¹²³ Inmates were only allowed a single, six minute phone call each month, person-to-person visits with their lawyers; they had to make other visits through a video monitor (which was particularly burdensome for those who were mentally ill and began to believe these images were concocted by prison staff.)¹²⁴ Perhaps worst, there was no maximum time limit for those inmates to spend in Alpha One. Mentally ill inmates, having much difficulty conforming to prison regulations often find themselves unable to free themselves from these rules.¹²⁵

The Court clarified the Act's exhaustion requirement, first in *Booth v. Churner*, 532 U.S. 731 (2001). and *Booth*, while housed at the State Correctional Institution at Smithfield,

Pennsylvania, accused prison guards of bruising his wrists by tightening handcuffs, throwing cleaning materials at him, and denying him medical care afterward.¹²⁶ Booth sought relief through a transfer, an injunction, and compensatory damages.¹²⁷ The existing grievance system didn't have a provision for recovering monetary damages, so he filed an initial grievance, but when the prison ruled against him, he did not make an appeal (thus exhausting the administrative process.)¹²⁸ In a unanimous decision, the Court ruled that even where the prison grievance system didn't provide for monetary damage claims, an inmate must exhaust those avenues before filing a suit in federal court where he sought only monetary damages.¹²⁹ They concluded that the text, implications, and justifications for the statute mandate exhaustion, or else the Act wouldn't accomplish its intended purpose (streamlining cases before the courts.)¹³⁰

The Court further clarified exhaustion in *Woodford v. Ngo*, 548 U.S. 81 (2006). In October 2000, Viet Mike Ngo was placed in solitary confinement for disciplinary problems for approximately two months.¹³¹ Four months after he was returned to general population, he filed a grievance against the prison, contending that while he was in solitary, he was prohibited from participating in "special programs," including religious activities, but his case was summarily dismissed because he failed to file within the 15 day time limit.¹³² He then filed a lawsuit in federal district court, alleging that he had exhausted every administrative remedy available to him.¹³³ The Court ruled that, contrary to Ngo's position (what he called "exhaustion *simpliciter*,") the Act called for "proper exhaustion," which included following all the procedures the prison laid out for filing claims.¹³⁴ Since he had failed to do so because of late filing, he had not exhausted his claim and had no grounds to sue the prison. The Court claimed two main reasons for proper exhaustion: protection of the authority for prisons to review their cases informally, and efficiency of handling claims.¹³⁵ Obviously, allowing prisoners to simply wait

out the clock until they could no longer file a grievance would defeat the purpose of the grievance process.

Lower court decisions show that the exhaustion requirement has exceptions, however. The United States District Court granted a temporary injunction, holding that the Prison Litigation Reform Act still didn't change the Court's ability to do so; granting it because the inmates (1) demonstrated a greater than negligible chance of success on the merits of their case and that (2) the inmates made a clear showing of evidence that failure to do so could result in irreparable damage that an award (even after a trial) would be insufficient to correct the violations.¹³⁶ Following these proceedings, prison staff entered a consent agreement to air condition the cells and construct a new recreational facility; however, two years later, the Court denied (in *Jones-El v. Berge*, 2003 WL 23109724) the inmates' petitions for "Nutraloaf" use restriction and replacing video monitors for visits.¹³⁷ I discussed *Jones-El* only in relevant part pertaining to the PLRA; this case shows several points otherwise relevant to Eighth Amendment analysis: consideration of grounds for relief including exercise, visits, ventilation, etc., and as done at the preliminary hearing, the consideration of the psychological effects these conditions had on its inmates, including one provision to mandate that 5 seriously mentally ill inmates be permanently transferred from supermax.¹³⁸

The Prison Litigation Reform Act: Limitations of Available Damages

The Act makes reference to damages allegedly suffered by prisoners which are eligible or ineligible for review. "No federal civil action may be brought by a prisoner...for mental or emotional injury suffered while in custody...without a prior showing of physical injury."¹³⁹ The physical injuries must not be "*de minimus*," but they need not be "significant" either.¹⁴⁰ Like

Eighth Amendment conditions of confinement claims, the line between violative and *de minimus* harm suffered by inmates is decided on a case-by-case basis.

I must point out here that there is a vast difference between the text of the PLRA and the interpretation Federal Courts have used in their rulings. The Courts disagree on two relevant factors for our Eighth Amendment inquiry: (1) whether the statute summarily excludes any possibility for relief, or (2) whether the constitutional nature of these challenges allows for relief. Judge Gertner's U.S. District Court decision in *Shaheed-Muhammed v. Dipaolo*, 393 F.Supp.2d 80 (D.Mass., 2005) lends us guidance in how the statute has been applied, stating that in the D.C. and Eleventh Circuit, claims for relief absent physical damages are summarily dismissed, as was the case in *Harris v. Garner*, 190 F.3d 1279 (C.A.11 (Ga.), 1999); the Seventh and Ninth Circuits have held that constitutional lawsuits alleging damages other than emotional or mental are not covered by this provision.¹⁴¹ Some Courts on the other hand, have taken a middle of the road approach, as was the case in *Thompson v. Carter*, 284 F.3d 411 (C.A.2 (N.Y.), 2002) where the case was not summarily dismissed absent physical abuse, but no compensatory damages could be awarded (nominal and punitive damages, as well as injunctive and declaratory relief of conditions could still apply.)¹⁴²

The Application Process

Now that I have examined the relevant case law and statutory provisions, I will briefly re-summarize the process by which an inmate may file a civil complaint against a prison. First, a prisoner must exhaust the administrative grievance process available at the prison. While it is one case, I will describe the process the Pennsylvania Department of Corrections used for grievances, as the Court described in *Booth*. A written charge was to be filed within 15 days of the incident, which is referred to a grievance officer for investigation and resolution.¹⁴³ If the

action did not satisfy the inmate, they may appeal to an intermediate reviewing authority, and finally, a final appeal to a central review committee.¹⁴⁴ Following this exhaustion, the inmate may then file a claim in court under 42 U.S.C.A. § 1983 which provides that

[e]very person who under color of any statute, ordinance, regulation, custom or usage, of any State...subjects, or causes to be subjected, any citizen of the United States...to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding of redress...

Inmate lawsuits typically seek one (or both) of two types of sanctions: injunctive and monetary.¹⁴⁵ I have covered temporary (prospective) injunctions prior to the showing of cases on its merits in court. Suffice to say, the injunction requires the prison to correct conditions so as to operate within the constitution. With respect to money, there are three types of damages prisoners most often seek in these lawsuits: nominal, punitive, and compensatory.¹⁴⁶ Once again, to establish a claim, the inmate must demonstrate that the prison has denied him an essential human need and that they did so acting with deliberate indifference. The reviewing court then reviews the conditions of confinement and any evidence of harm suffered (to re-iterate, whether or not they consider evidence of non-physical harm is up to the discretion of the Court) to decipher the validity of both parties' claims. In civil court, one who proves his case by a preponderance of the evidence prevails. The rest of this paper will be devoted to cases for Eighth Amendment relief, what constitutes an essential human need, as well as legal and policy solutions for the proper use of solitary confinement.

One final issue I will address briefly is that of qualified immunity, which prohibits public servants from civil liability.¹⁴⁷ Prison guards must deal with many situations in the performance

of their duties and would be ill-advised to have their every move scrutinized by reviewing courts. Worst of all would be prison guards under-enforcing policies, allowing inmates to behave as they pleased for fear of civil and criminal redress.¹⁴⁸ To this end, qualified immunity is an important defense often raised by prison officials. Qualified immunity was primarily disseminated in *Scheuer v. Rhodes*, 416 U.S. 232 (1974), a case surrounding the government officials who had roles in the Kent State Massacre in 1970.¹⁴⁹ While this case was not about prison guards *per se*, the rationales the Supreme Court adopted would apply, as prison guards are government officials bound to following governmental regulations for public purposes. The Court found that, where government officials (1) “had a good faith belief that his actions were constitutional and (2) there were reasonable grounds for the belief,” he would be immune to civil prosecution.¹⁵⁰ The Supreme Court amended its analysis in *Johnson v. Jones*, 515 U.S. 304 (1995), concluding that the denial of governmental qualified immunity must be based on the fact that the government’s conduct was objectively unreasonable in light of clearly established law.¹⁵¹

Cases Reviewed for Eighth Amendment Relief

It is difficult to organize the cases presented here because inmates file for relief based on many aspects of their conditions (however, as I discussed earlier, a “totality of the circumstances” analysis is not allowed when considering these cases: there must be a specific human need deprived as basis for relief grounds.)¹⁵² The cases listed within this analysis are by no means comprehensive, but are rather representatives of different grounds for relief based on all the cases that have come before the courts.

Hutto, described earlier in relevant part as far as the standards of review were concerned, is arguably the pinnacle case for establishing the minimum conditions that must be granted to inmates in solitary. But before the case reached the Supreme Court, a District Court granted

remedial relief to the inmates on Eighth Amendment grounds.¹⁵³ The District Court reviewed the conditions of the isolation cells in an Arkansas penal complex, noting that on average 4 but as many as 10 or 11 inmates were placed in windowless, 80 square foot cells, with a toilet that could only be flushed from the outside, for an indeterminate period of time.¹⁵⁴ Worse, the inmates in isolation were given primarily “vegetable grue” squares to eat, consisting of less than 1,000 calories a day.¹⁵⁵ Some inmates suffered from hepatitis or venereal disease, yet their mattresses were removed and randomly redistributed the following night.¹⁵⁶

The Court did not explicitly instruct the prison staff how to ensure that the conditions for those in isolation were in constitutional accord, but rather ordered the prison to “‘make a substantial start’ on improving conditions and file reports on its progress.”¹⁵⁷ When the prison’s progress was deemed insufficient, the District Court once again allowed the prison to try to find a solution to the constitutional violations, but this time made specific reference to isolation cells.¹⁵⁸ Finally, after the District Court accepted the progress the prison made, the U.S. Court of Appeals judged that the conditions of the prison were worse than before in many respects.¹⁵⁹ On remand, the District Court disallowed the “grue diet,” allowed only one bed per prisoner, set a maximum limit on the number of inmates per cell, and set a 30 day maximum for the duration spent in solitary.¹⁶⁰

The U.S. Court of Appeals quantified those essential human needs required by the Eighth Amendment by stating that “[o]n remand, the [D]istrict [C]ourt’s decree should be amended to ensure that prisoners placed in punitive solitary confinement are not deprived of basic human necessities including light, heat, ventilation, sanitation, clothing, and a proper diet.”¹⁶¹ The Supreme Court later ruled that “the District Court had ample authority to go beyond earlier orders and to address each element contributing to the violation,”¹⁶² and that “[c]onfinement in a

prison or an isolation cell is a form of punishment subject to scrutiny under the Eighth Amendment.”¹⁶³ Having established that the conditions of confinement within an isolation cell are to be scrutinized for Eighth Amendment accordance and that food, light, heat, ventilation, sanitation, and clothing are the first explicitly listed essential human needs, I may begin to disseminate specific grounds for relief and limits other courts have set.

While listed last in the opinion, the most quintessential basic human need is a satisfactory diet. *Hutto* established that vegetable gruel, failing to satisfy a prerequisite quantity of food was unconstitutional, but next we can examine what quality standards food must meet for constitutional accordance. *Kirsch v. Endicott*, 549 N.W.2d 761 (Wis.App., 1996) informs us that inmates in solitary confinement need not be served hot food (in this case, they were given “bag lunch” substitutes); only when there is a significant difference in nutrition does the food served become an Eighth Amendment issue.¹⁶⁴ (I will note that *Kirsch* was a due process review, but the Wisconsin Court of Appeals did make mention of the Eighth Amendment and the standard of review had it been invoked in that case.) Also, *Miles v. Konvalenka*, 791 F.Supp 212 (N.D.Ill., 1992) rejected the claim that an inmate in segregated housing viewing a dead mouse in another inmate’s food and denied morning coffee did not constitute an Eighth Amendment violation.¹⁶⁵

I described Nutraloaf as an ever-growing food product gaining popularity among inmates in solitary. As such, it has undergone large-scale constitutional challenge. Best described as a plethora of whatever meat and vegetables are available which is ground up, baked and served without utensils, courts have been hesitant to rule its use a constitutional violation because of prison officials demonstrations that it meets all nutritional guidelines, as was the case in *Arnett v. Snyder*, 769 N.E.2d 943 (Ill.App. 4 Dist., 2001). It was not irrelevant that Arnett in fact gained

weight while placed on the Nutraloaf diet; there was no evidence that the inmates had been denied the necessary nutritional requirements.¹⁶⁶ The Court stopped short of directly addressing the question of whether or not the food was in and of itself a punishment; however, they sided with the prison by deferring to their interpretation of the Department of Correction policy of prohibiting the denial of food for disciplinary purposes.¹⁶⁷ The prison argued the statute meant one could not deny an inmate nutritionally sufficient food for disciplinary purposes, and the Court agreed, saying that to interpret the statute literally “...would produce absurd results.”¹⁶⁸

Borden v. Hofmann, 974 A.2d 1249, 1249-1250 (Vt., 2009) presented the question of whether the use of Nutraloaf was a punishment at all. The facts indicated that an inmate who committed “serious breaches” of conduct would be placed on “the Loaf” for seven days, to be served with as much water as the inmate desired.¹⁶⁹ The Court concluded that “Nutraloaf [is] a purposefully unappetizing alternative to standard prison food [which] may be served along with the implements used to commit the targeted malfeasance...until the inmate decides to stop engaging in the offended [sic] conduct.”¹⁷⁰ Nutraloaf was deemed a punishment; its distribution to inmates in solitary was a deliberate attempt to deter offenders from throwing trays, other bodily fluids, among other offenses.¹⁷¹ While it is not stated whether the inmates were housed in solitary confinement in this particular case, in New York State for example, inmates who display misconduct while already in solitary are placed on such a diet.¹⁷²

Consider another essential human need: hygiene products. Dale Gross was an inmate at a state prison in Colorado, and spent money on his post conviction appeals and this particular Eighth (and Fourteenth) Amendment challenge to his confinement.¹⁷³ However, he was then unable to purchase hygiene products from the prison commissary, and the officials working there refused to classify him as an “indigent” inmate, and was denied soap, toothpaste, a razor, for an

extended duration.¹⁷⁴ He also claimed that the warden refused to give him access to forms where he could claim that his cell was not heated properly and that he did not have access to these hygiene products.¹⁷⁵ By the time of his petition, he had still been denied these items; claiming that he had suffered from psoriasis and risked tooth decay without them.¹⁷⁶ In *Gross v. Koury*, 78 Fed.Appx. 690 (C.A.10, (Colo.), 2003), the Court ruled that while hygiene is an essential human need and the prolonged deprivation of it may implicate the Eighth Amendment, he had in essence made the choice between legal fees and hygiene products, thus there was no violation. With respect to that choice, “he ha[d] not alleged that foregoing some litigation costs, in lieu of purchasing a bar of soap or a tube of toothpaste, would prejudice him in any legal proceedings...”¹⁷⁷ The Court also failed to see how not having a razor would constitute a denial of a human need, as one need not be shaved to be sanitary.¹⁷⁸

Consider another case surrounding the need for isolation cell sanitation. Kenneth Young was housed in a dry cell for four days as part of his five month stay in the Special Housing Unit at the United States Penitentiary at Lewisburg.¹⁷⁹ Young was accosted by his cellmate for sex, then was moved to a different cell, and again received threats.¹⁸⁰ Despite several attempts to be moved again, prison officials denied his requests, citing his HIV as a reason.¹⁸¹ Young eventually banged on the walls in an attempt to get guards’ attention, but they refused to attend to him.¹⁸² Finally, he flooded his cell by overflushing the toilet, and was transferred to a “dry cell,” or a cell essentially without plumbing.¹⁸³ While in this cell, Young contended that he was given no toilet paper, water, a shower, was repeatedly denied use of the facilities and only allowed to use them on two occasions, and was not allowed to wash his hands before eating.¹⁸⁴

With respect to the Eighth Amendment, the Court found that there was enough evidence presented to justify a violation. Even if Young was properly confined to the dry cell, that in

itself did not give prison guards the right to institute unconstitutional living conditions.¹⁸⁵ It was also not irrelevant that Young had HIV and thus was more susceptible to infection (the guards knew of his condition as they rejected his initial requests to be moved because of it and one guard gave him a blanket despite another's orders not to do so.)¹⁸⁶ Again, there were several conditions that led to the violation (lack of a shower, not able to wash his hands, no toilet paper, water, no use of the facilities,) but all these conditions fall under the heading of one ground for relief: lack of sanitation.

I described within the conditions of confinement that prisoners, while being secluded, still were transported for daily exercise; however, the U.S. Court of Appeals did not directly mention exercise as an essential human need in *Finney*. *Gamble* informs us that “[a]lthough deprivation of exercise *per se* does not violate the...[Eighth Amendment], prisoners are not wholly unprotected; such a deprivation may constitute an impairment of health forbidden under the Eighth Amendment. *Spain v. Procunier*, 600 F.2d 189 (C.A.Cal., 1979) informs us that indefinite and categorical denial of exercise for a floor of inmates in solitary confinement did constitute a violation. The Court noted that “...regular outdoor exercise is extremely important to the physical and psychological well being of the inmates;” however, as in *Gamble*, they expressly declined to rule that lack of exercise *per se* violated the Eighth Amendment.

In *Hudson v. Commissioner of Correction*, 707 N.E.2d. 1080 (Mass.App.Ct., 1999), the denial of exercise activities for 17 days during a six to seven week period in which an inmate was housed in administrative segregation did not meet the standard of an Eighth Amendment violation, the Court noted that there was no demonstration that the prison guards acted with deliberate indifference or in the attempt to inflict wanton pain that was grossly disproportionate

to the offense.¹⁸⁷ Analyzing this case under *Finney*, there is no evidence that this denial of exercise led to any harm he suffered.

The Court has iterated at several junctures that length of solitary confinement is relevant both to proportionality analysis, Due Process, and conditions of confinement claims. No analysis would be complete without including Lemuel Smith, perhaps the most well-known criminal in New York to be housed by that method. Smith was convicted in 1979 of four murder counts and one robbery count and sentenced to four life sentences.¹⁸⁸ In 1981, while housed in Green Haven Correctional Facility, he was convicted of murdering prison guard Donna Payant.¹⁸⁹ Smith avoided the mandatory death sentence sought against him by challenging the constitutionality of the applicable New York State law;¹⁹⁰ however, he was sentenced to 15 years' solitary confinement. He petitioned the court, claiming his confinement violated (among many others,) his Eighth Amendment rights. However, the U.S. Court of Appeals, 2nd Circuit upheld his sentence in 1992.¹⁹¹ Upon completion of his sentence in 1997, the state determined that he should remain in solitary, considering his three rule violations and substantial risk he posed to female guards.¹⁹² Smith appealed New York's decision, but the sentence was upheld.¹⁹³ As of 2007, Smith is still being housed in solitary confinement, 26 years after Payant's murder.¹⁹⁴ As lengthy as his sentence was, Herman Wallace was sentenced to solitary confinement in 1972 following a conviction for murdering a prison guard at the Louisiana State Penitentiary at Angola.¹⁹⁵ He lost his appeal to end his solitary term last year, making his now 38 years.¹⁹⁶ It was his fourth recorded hearing to challenge his confinement; his appeals were also denied in 1987,¹⁹⁷ 1990,¹⁹⁸ and 1993.¹⁹⁹

Contact visits have been challenged on Eighth Amendment grounds, as in *Tuissant v. McCarthy*, 801 F.2d 1080 (9th. Cir., 1986) where inmates in solitary at California Department of

Correctional Facilities at San Quentin and Folsom challenged that the denial of contact visits violated their Eighth Amendment rights. The Court concluded that while allowing contact visits may be rehabilitative, it did not constitute an "...infliction of pain," a necessary prerequisite to a claim established in *Rhodes*.²⁰⁰ Even if it were, it must be "wanton[,] unnecessary...and without penological justification"²⁰¹ to support a claim. *Lynott v. Henderson*, 610 F.2d 340 (C.A.Ga., 1980) informs us that "convicted prisoners have no absolute constitutional right to visitation;" however, "limitations on visitation may be imposed only if they are necessary to meet legitimate penological objectives, such as rehabilitation and the maintenance of security and order."²⁰² Meaningful access to the courts and to the assistance of counsel as needed implicates the Fifth, Sixth, and Fourteenth Amendments, and thus I have not discussed those inherent rights here.

International Standards and Restrictions on Solitary Confinement

Certainly, as has been pointed out several times by the Supreme Court, international standards are not controlling: each nation is certainly free to place their own values and impose sanctions they think are appropriate. The United States has made it clear that with a few exceptions, solitary confinement is a legitimate form of punishment advancing penological goals (mostly of safety.) However, one can get an understanding of the relative cruelty of sanctions from other countries. The topic of solitary confinement garnered study as early as the 19th century: fully 37 articles were released in Germany documenting the nature of psychological suffering of inmates in segregated confinement.²⁰³ Prison conditions in general garnered significant U.N. discussion following World War II with the Universal Declaration of Human Rights in 1948 and the Geneva III (a specific discussion on the treatment of prisoners of war, published as part of the Geneva Convention Proceedings in 1949.) However, the clauses in these declarations are somewhat vague, and none specifically relate to solitary confinement. Geneva

III basically states that minimum standards must be obliged for prisoners with respect to clothing, food, shelter, and safety, and the U.N. Declaration of Human Rights states that “no one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment.”²⁰⁴

In 1982, Europe took a major step for prison rights in *Krocher v. Switzerland*, App. No. 8463/78 by saying that “[c]omplete sensory isolation coupled with total social isolation, can destroy the personality and constitutes a form of treatment which cannot be justified by the requirements of security or any other reason.”²⁰⁵ This ruling (and other subsequent decisions) led to a revision of the “Standard Minimum Rules for Prisoners,” specifically requiring that a mental health specialist ensure that inmates are psychologically fit enough to withstand the effects of solitary confinement both prior to and during the confinement.²⁰⁶

Psychological Effects of Solitary Confinement

As I stated in the history, it has been known that prisoners suffered mental problems as a result of solitary confinement since the Civil War era, but studies of sensory deprivation (as applied to solitary confinement) really took off after World War II. First, we can examine the results of the sensory deprivation study. The symptoms cited by many of the studies that the volunteers experienced mainly included hallucinations and hearing voices; however, others included memory problems, drops in EEG wave frequencies indicative of stupor and delirium, and sleep disruptions.²⁰⁷ I should say; however, these were volunteers who were housed in sensory-deprived rooms for a relatively brief period compared to inmates today; the findings were just the tip of the iceberg.

There is almost universal agreement that solitary confinement has negative psychological consequences which can manifest themselves in physical forms on inmates.²⁰⁸ Only two post-World War II studies have confirmed otherwise.²⁰⁹ One found many of the symptoms

mainstream researchers have found (such as insomnia, anger, and apathy,) but dismissed them as insignificant; the other was a longitudinal study which was conducted only 4 days after the inmate was placed in solitary.²¹⁰ The list of psychological symptoms suffered (and this list is by no means exhaustive) includes: headaches, heart palpitations, oversensitivity to stimuli, fainting spells, inability to concentrate, hallucinations, depression, anxiety, problems with impulse control, violent outbursts, lethargy, and suicidal ideations and attempts.²¹¹

There is some disagreement; however, on the onset, extent, and duration of these side effects. With respect to onset, most of the experiments conclude that on average, psychological symptoms may commence within a few days or at most two weeks after placement in solitary;²¹² With respect to duration, while each additional day in solitary increases the risk of harm, many studies reported patients recovering after leaving solitary.²¹³ Others, however, note that many inmates never recover and suffer life-long effects.²¹⁴ Disagreements as to the extent of symptoms suffered arise because it is difficult to generalize conclusions from experiments since inmates' symptoms can vary widely, and relatively few inmates are willing to talk about their experiences in solitary: a fact that has some scientists' finding that the inmates are adapting to their surroundings, whereas others interpret it as a sign of social withdrawal.²¹⁵ Also, it is difficult to create perfect causation experiments as prisoners are exponentially more likely to suffer from psychological problems prior to placement.²¹⁶

Craig Haney has worked on many studies of inmate effects from solitary confinement, even presenting evidence in *Madrid v. Gomez*, 889 F.Supp. 1146 (N.D., Cal., 1995) (notably before the passage of the Prison Litigation Reform Act) lent some guidance as to the mental suffering of prisoners at Pelican Bay State Prison, CA, Secure Housing Unit, a supermax facility. One hundred inmates were randomly surveyed and observed for psychological health. Haney,

the leading researcher associated with the case, reported that 91% suffered from anxiety and nervousness, 70% felt on the verge of an emotional breakdown and 77% suffered from chronic depression.²¹⁷ While it was in violation of the Eighth Amendment to “subject inmates who showed a ‘particularly high risk for suffering very serious or severe injury to their mental health’ to solitary confinement, not all inmates met this risk, and thus the imposition of the supermax prison was not *per se* unconstitutional (“...however, for many inmates, it does not appear that the degree of mental injury suffered significantly exceeds the kind of generalized psychological pain that courts have found compatible with Eighth Amendment standards.)²¹⁸

Psychological research found a place in another important case, *Ruiz v. Johnson*, 37 F.Supp.2d 855 (S.D., Tex., 1999). Dr. Haney testified and presented evidence similar to that in *Madrid*; considering the suffering of all the inmates he visited in the Texas Department of Corrections. While the case was reversed on appeal two years later,²¹⁹ the Court considered the substantial evidence presented, ruling that while

“in the past, courts faced with horrendous conditions of confinement have focused on the basic components of physical sustenance[,...]in light of the real maturation of our society’s understanding of the very real psychological needs of human beings...[the] levels of psychological deprivation that violate the...Constitution...”²²⁰

While Haney’s findings that he presented in *Madrid* may be criticized for lacking control groups, the percentages presented far exceeded those inmates who coexist in non-solitary settings in other studies.²²¹ Haney summarizes the psychological evidence best by stating “[t]here is not a single published study of solitary or supermax-like confinement lasting for longer than 10 days, where participants were unable to terminate their isolation at will, that failed

to result in negative psychological side-effects.”²²² The *Ruiz* court didn’t limit themselves to bare physical examination of conditions, a method we know is incomplete. One can only hope the PLRA will be expanded to allow this analysis in the future.

Conclusions: What Should Be Done?

Having established the preceding precedents, we must ask ourselves: what legal or public policy measures would satisfy opponents of solitary confinement, but still be reasonably effective and balance the state’s legitimate penological interests? The answer is not a simple one as the line between individual rights of inmates and the state’s right to maintain order and adequately punish offenders is a delicate one. First, let me say that I do not believe the highly theoretical notion that solitary confinement, in any capacity, is cruel and unusual. I will elaborate further about this point. For now, suffice to say the state has a legitimate interest in keeping inmates and prison personnel safe.

One possible solution could be taking after Washington’s example and setting a mandatory maximum to terms of solitary confinement; recall that theirs is twenty days. However, considering the psychological research, even twenty days of confinement may be cruel and unusual. The research presented has shown that, even after only a few days, the mental status of offenders changes greatly. That being said, a bright-line rule would square with the benefits of federalism: states are allowed to vary their maximum lengths as they see fit; the line where solitary confinement crosses into cruel and unusual punishment is one that is fuzzy enough without having 50 separate courts and 50 separate studies evaluate exactly where that line is. I am not arguing that extreme cases of decade-long incarceration might be unconstitutional, but Eighth Amendment analysis solely based on length is at best, questionable, at worst, fruitless.

Length being a problematic solution, one could give more oversight to the actual conditions themselves. But how would this be done in a way that did not clog the court system with frivolous lawsuits? One solution would be to get rid of the deliberate indifference standard, leaving only the question of whether or not an inmate was denied an essential human need. The Supreme Court has informed us at several junctures, insofar as Eighth Amendment violations are concerned, objective factors should be depended upon whenever possible. Courts across the country have varied on their interpretations, but, have reasonably high agreement on what constitutes human needs (a representative discussion of which was presented earlier.) In my judgment, the emphasis of these investigations must, as a matter of law, be centered on the alleged Eighth Amendment violation itself.

However, this solution has its problems as well. Is it the case that the state of mind of prison officials is never relevant? The main purpose of holding prison officials responsible through civil action is to ensure that they will obey the Constitution in guarding inmates, that is, deter them from violating it. If, however, the deliberate indifference standard were eliminated and the situation like in *Herges* were to reappear (a prison riot,) then any deprivation of essential human needs as in that case, beds, food, clothing, etc. would constitute grounds for a violation. It would be unfair at best to punish prison guards for making a reasonable choice during a riot that safety is the most important issue and other essentials will have to wait until the situation is quelled. I would not go so far to argue that this would give inmates positive incentive to start riots in an attempt to make it impossible to obey the Eighth Amendment, but getting rid of the deliberate indifference standard would deter behavior other than that which we are truly trying to eliminate.

Another problem that would result would be there would not be any objective prerequisite level of harm necessary for a violation (remember that the standard of “more than *de minimus* but not necessarily serious” arises from the Supreme Court’s discussion about deliberate.) In my effort to patch one “hole of subjectivity,” I leave another wide open: how much “denial” is enough to substantiate a claim? Should an inmate who was denied blankets on a cold night get relief? One could make the claim of an essential human need, but I fear that would edge back toward frivolous lawsuits we originally intended to avoid. Finally, while replacing the deliberate indifference standard with a negligence standard may seem like an appropriate compromise, I fear the two-prong test is not in and of itself mutually exclusive. In my judgment, were an inmate to prove the objective component (a clear denial of need,) it would be quite difficult for the prison staff to assert (knowing that prison staff have, asserted a rudimentary custodial responsibility for the basic care of the inmates) that the subjective component is not met. If proving one component helps you prove the other, a two-prong test may not be the most viable solution.

Another resolution could be conducting conditions of confinement analysis in a similar fashion as proportionality analysis.²²³ Proportionality analysis uses inter- and intra-jurisdictional examination to see if there is evidence of gross disproportionality between crime and sentence.²²⁴ However, to paraphrase the Court, “absent a federally imposed uniformity inimical to the traditional notions of federalism, one state will always bear the burden of treating...[inmates] more harshly than in any other state,” and this fact alone is insufficient for a valid Eighth Amendment claim.²²⁵ Also, the first component of proportionality analysis would be a balancing of the offense to the punishment. This component is present in the analysis to ensure that it is not the case that popular means of punishment are necessarily constitutional. However, such

unfettered discretion at the court level runs the substantial risk of overstepping a clear pattern of judicial deference. Besides, outside the capital context, the courts have been reluctant to hold sentences disproportionate, and length of time spent in solitary might be even less likely to be scrupulously reviewed.²²⁶

While no one is exempt from Constitutional violations, courts have traditionally granted prisons substantial deference because they, unlike free citizens, have a much more pressing task in ensuring safety. Consider the Due Process argument voiced earlier in *Wilkinson*; while inmates have a significantly reduced liberty interest, one could argue the government's interest is greater as a main reason prisons reject witnesses or confrontation in these proceedings is in the interest of safety. Put succinctly, they must act with greater speed and under more duress than public servants in the free world. In my judgment, prison staff should not be required to constantly look at how other jurisdictions handle the use of solitary confinement.

Perhaps creating a whole new system of Eighth Amendment review or principle is unnecessary; maybe the solution lies within the existing system. The two-prong test in place, perhaps only restructuring the PLRA is necessary to strike a balance between individual and state rights. Clarification is needed to aid in our understanding of what the PLRA means and how it should be applied. Giving lawmakers the benefit of the doubt, I might agree that they did not intend to have the PLRA used as a bar for legitimate (albeit non-physical) claims of Eighth Amendment violations. Even so, the textual reading “[n]o federal civil action...” could not be clearer.²²⁷ When courts extend this interpretation further to infer what sort of damages the Act was intended to cover, or whether or not a constitutional civil action may be barred by a federal statute, they are only further complicating the issue. If the lawmakers did not intend for the law to be applied literally, it would be in everyone's best interest to simply have the lawmakers re-

write the law. One of the benefits of the federalist system is that different states can affix different relative values to their laws; however, I fear the interpretations have varied too much so as to diminish the clarity and significance of the Act.

With regard to its re-writing, I think the PLRA should be constructed to include emotional and psychological suffering, and the word “prior” removed with respect to the physical harm description. The Supreme Court all but did so in *Helling*. It would be dubious of us as a nation when confronted with over 200 years of evidence both in our country and abroad to exclude a clear showing of the psychological damage solitary confinement can do even to inmates who do not otherwise suffer from mental disorders. While I can understand the Court’s efforts to keep prison conditions of confinement claims from becoming a battle of adversarial experts, I also think the Supreme Court should give some thought to its conclusion in *Rhodes*, namely that “...expert opinion regarding what constitutes cruel and unusual punishment is entitled to little weight.”²²⁸

I am not arguing that the Act should be repealed. For example, the administrative exhaustion section legitimately makes inmates go through informal processes so as not to flood the federal court system with frivolous claims, and doing so does not appear to deny inmates meaningful access to the courts. The exhaustion requirement is beneficial for other reasons: it allows deference to the prison system, which has unique expertise in dealing with inmates, and allows them to proceed more quickly to either dispel the claim and continue housing as is in the interest of safety, or correct the violation more quickly to satisfy the inmate. However, this decision does not take place in a vacuum: prisons need to closely examine these grievances. Considering the psychological evidence presented, the exhaustion provision might force the inmate to wait longer than his psyche can bear. While I believe the court correctly defers to

prison authority, any major showing of negligence or recklessness on the prison's part in filing the claims in an orderly fashion or failing to meaningfully consider the inmate's claims would constitute a Due Process violation. At that point, the courts must be willing to reign in prison authority, but for now, the existing setup appears outwardly sufficient.

Perhaps the U.S. could take Europe's lead and enact a public policy solution whereby mental health professionals must constantly check on prisoners to ensure that they are not suffering adverse mental effects. This would be a viable solution for two reasons: first, it would (ideally) alleviate the psychological suffering, or at least quickly identify it, giving the prison staff a better chance at alleviating it. This psychological harm is the main argument opponents cite for evidence why it violates the Eighth Amendment. Second, it could diffuse future confrontations between prisoner and guard. By establishing trust with inmates, these professionals could help inmates deal with the reality of their situation and make it more likely they would be able to transfer back into the general population (at least if their conduct was the reason they were transferred in the first place.)

A public policy solution may well be the path to ending psychological harm from solitary, but this does not close the legal discussion. There is a profound difference between a policy solution and encouraging everyone to follow it and a legal solution punishing those who fail to follow it until they do. That is, inmates may gain from being around other people, but that does not prove that inmates have a constitutional right to be around people, as they do to eat food or be sanitary. For example, there is almost no case history supporting the claim that inmates have a right to visitation for Eighth Amendment purposes. If they did, it is likely that solitary confinement would be *per se* unconstitutional. This is the logjam between psychology and the

law with respect to solitary. While it might be far from the best policy, it would not have been replicated by so many state maximum security facilities if it was not somewhat effective.

Re-visiting the Constitution, our final inquiry hinges upon whether or not denial of the right to be around other people is in some way “cruel and unusual,” or more specifically denies inmates of an essential human need. While it may not be a primary biological need as food or warmth are, a case could be made (though perhaps not easily) that socialization is an essential human need. I would just conclude by saying the answer is unclear. The two terms used interchangeably to describe the objective factor of conditions of confinement analysis are denial of life’s necessities, and an essential human need. The U.S. District Court found in *Hutto* that light and clothing are essential human needs, though I fail to see how they are, in and of themselves, necessary for life. That being said, the needs we deem important in a civilized society to basic minimum living standards may surpass those of bare survival. The issue could better be phrased to surround minimal human dignity as well, which is derived partly from the psychological research. One would logically conclude that it would violate the minimum of life’s necessities to subject inmates to punishment that damaged them in a significant and possibly irreparable way. Were we to interpret the language of the minimum of life’s necessities that way, I would conclude that the right to meaningful social contact would be included, and the prolonged denial of it would, if it caused sufficient harm, constitute a violation of the Eighth Amendment and be cruel and unusual.

Notes

¹ Jeffrey Smith McLeod, *Anxiety, Despair, and the Maddening Isolation of Solitary Confinement: Invoking the First Amendment’s Protection Against State Action That Invades the Sphere of Intellect and Spirit*, 70 U. Pitt. L. Rev. 647, 650 (2009)

² McLeod, at 651.

³ *Id.*

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- ⁴ *In re Medley*, 134 U.S. 160, 161 (1890)
- ⁵ Stuart Grassian, *The Psychiatric Effects of Solitary Confinement*, 22 Wash. U. J.L. & Pol’y, 325, 330 (2006)
- ⁶ *Id.*
- ⁷ *In re Medley*, at 161.
- ⁸ *Id.* at 172.
- ⁹ McLeod, at 652.
- ¹⁰ *Id.*
- ¹¹ *Id.*
- ¹² *Id.*
- ¹³ *Id.* at 653.
- ¹⁴ *Id.*
- ¹⁵ Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Overview of the Literature*, 34 Crime. J. 441, 470 (2006)
- ¹⁶ *Id.*
- ¹⁷ *Id.*
- ¹⁸ McLeod, at 652.
- ¹⁹ *Id.* at 653-654.
- ²⁰ *Id.* at 654.
- ²¹ Laura Sullivan, “Timeline: Solitary Confinement in U.S. Prisons,” *NPR*, at <http://www.npr.org/templates/story/story.php?storyId=5579901>
- ²² McLeod, at 654.
- ²³ *Id.*
- ²⁴ Sullivan.
- ²⁵ *Id.*
- ²⁶ Tracy Hresko, *In the Cellars of Hollow Men: The Use of Solitary Confinement in U.S. Prisons and its Implications Under International Laws Against Torture*, 18 Pace Int’l L. Rev. 1, 8 (2006)
- ²⁷ Shireen A. Barday, *Prison Conditions and Inmate Competency to Waive Constitutional Rights*, 111 W. Va. L. Rev. 831, 833 (2009)
- ²⁸ Hresko, at 10.
- ²⁹ Barday, at 833.
- ³⁰ *Id.*
- ³¹ Hresko, at 9.
- ³² *Id.*
- ³³ *Id.*
- ³⁴ *Id.*
- ³⁵ *Id.*
- ³⁶ *Id.* at 5.
- ³⁷ Sharon Shalev, *Solitary Confinement Sourcebook*, 25-26 (2008)
- ³⁸ *Id.*
- ³⁹ *Id.*
- ⁴⁰ *Id.*
- ⁴¹ McLeod, at 654.
- ⁴² *Meriwether v. Faulkner*, 821 F.2d 408, 410 (C.A.7 (Ind.), 1987)
- ⁴³ *Id.* at 417.
- ⁴⁴ *Allgood v. Morris*, 724 F.2d 1098 (C.A.Va., 1984)
- ⁴⁵ *Id.*
- ⁴⁶ *Id.*
- ⁴⁷ *Id.*
- ⁴⁸ *Wolff v. McConnell*, 418 U.S. 539, 557 (1974)
- ⁴⁹ *Id.*
- ⁵⁰ *Meachum v. Fano*, 427 U.S. 217-219 (1976)
- ⁵¹ *Id.* at 218.
- ⁵² *Id.* at 215, 218-219.
- ⁵³ *Id.* at 215, 224.
- ⁵⁴ *Id.* at 215, 225

⁵⁵ *Vitek v. Jones*, 445 U.S. 480, 488 (1980)
⁵⁶ *Id.*
⁵⁷ *Id.*
⁵⁸ *Id.* at 487.
⁵⁹ *Id.* at 488.
⁶⁰ *Meachum*, at 224.
⁶¹ *Vitek*, at 494.
⁶² *Id.* at 495.
⁶³ *Id.* at 494-495.
⁶⁴ *Wilkinson v. Austin*, 545 U.S. 209 (2005)
⁶⁵ *Id.*
⁶⁶ *Id.* at 210.
⁶⁷ *Id.*
⁶⁸ *Id.* at 209.
⁶⁹ *Id.*
⁷⁰ *Id.*
⁷¹ *Id.* at 212.
⁷² *Id.* at 211.
⁷³ *Id.*
⁷⁴ *Hewitt*, at 472.
⁷⁵ *Hresko*, at 14.
⁷⁶ *Wilkinson*, at 211.
⁷⁷ William H. Danne, Jr., Prison Conditions As Amounting to Cruel and Unusual Punishment, 51 A.L.R.3d 111, see §9 [a] Segregated Confinement *per se*—General Rule
⁷⁸ *Vazquez*, at 522.
⁷⁹ *Id.*
⁸⁰ *Id.*
⁸¹ *Hresko*, at 13.
⁸² *Id.* at 15.
⁸³ *Inmates of Attica Correctional Facility v. Rockefeller*, 453 F.2d 12 (C.A.2, 1971)
⁸⁴ Danne, at §9 [c] Segregated Confinement *per se*—Cruel and Unusual Punishment Established or Sufficiently Alleged
⁸⁵ *Weems*, at 376-377.
⁸⁶ *Trop*, at 91.
⁸⁷ *Id.* at 90.
⁸⁸ *Id.* at 102.
⁸⁹ *Vasiliades*, at 88.
⁹⁰ *McLeod*, at 663.
⁹¹ *Rhodes*, at 340.
⁹² *Id.* at 343-344.
⁹³ *Id.* at 350.
⁹⁴ *Id.* at 354.
⁹⁵ *Estelle*, at 105-106.
⁹⁶ *Id.* at 102.
⁹⁷ *Wilson*, at 296.
⁹⁸ *Id.* at 299-302.
⁹⁹ *Id.* at 305.
¹⁰⁰ *Id.* at 300-302.
¹⁰¹ *Whitley*, at 314-317.
¹⁰² *Id.* at 319.
¹⁰³ *Wilson*, at 303.
¹⁰⁴ *Farmer*, at 830.
¹⁰⁵ *Id.*
¹⁰⁶ *Id.*
¹⁰⁷ *Id.* at 834.

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- ¹⁰⁸ *Id.* at 837.
- ¹⁰⁹ *Hudson v. McMillian*, 527 U.S. 1, 5 (1990)
- ¹¹⁰ *Id.* at 5-7.
- ¹¹¹ *Id.* at 16.
- ¹¹² *Helling v. McKinney*, 509 U.S. 25, 29 (1993)
- ¹¹³ *Id.*
- ¹¹⁴ *Id.*
- ¹¹⁵ *Id.* at 36.
- ¹¹⁶ 42 U.S.C. § 1997e(a)
- ¹¹⁷ John Boston, The Legal Aid Society, “The Prison Litigation Reform Act,” 14 (2004)
- ¹¹⁸ *Id.*
- ¹¹⁹ *Jones-El*, at 1116.
- ¹²⁰ *Id.* at 1100.
- ¹²¹ *Id.*
- ¹²² *Id.*
- ¹²³ *Id.*
- ¹²⁴ *Id.* at 1101.
- ¹²⁵ *Id.* at 1100.
- ¹²⁶ *Booth*, at 734.
- ¹²⁷ *Id.*
- ¹²⁸ *Id.* at 734-735.
- ¹²⁹ *Id.* at 733-734
- ¹³⁰ *Id.* at 736-739
- ¹³¹ *Woodford*, at 86.
- ¹³² *Id.* at 87.
- ¹³³ *Id.*
- ¹³⁴ *Id.* at 89.
- ¹³⁵ *Id.* at 93.
- ¹³⁶ *Jones-El*, at 1116.
- ¹³⁷ *Jones-El v. Berge*, 2003 WL 23109724, 3 (2003)
- ¹³⁸ *Jones-El*, at 1125-1126.
- ¹³⁹ 42 U.S.C. § 1997e(e)
- ¹⁴⁰ Boston, at 14.
- ¹⁴¹ *Shaheed-Muhammed*, at 107.
- ¹⁴² *Id.* at 107-108.
- ¹⁴³ *Booth*, at 734.
- ¹⁴⁴ *Id.*
- ¹⁴⁵ Black’s Law Dictionary, 8th Edition (2004) defines an injunction as “[a] court order commanding or preventing an action.” As I discussed earlier, “the complainant must show that there is no plain, adequate, and complete remedy at law and that an irreparable injury will result unless the relief is granted.”
- ¹⁴⁶ Black’s Law Dictionary, 8th Edition (2004) defines nominal damages as “trifling sum[s] awarded when a legal injury is suffered but when there is no substantial loss or injury to be compensated.” Punitive damages are “damages awarded in addition to actual damages when the defendant acted with recklessness...intended to punish and thereby deter blameworthy conduct.” Compensatory damages are “[d]amages sufficient in amount to indemnify the injured person for the loss suffered.”
- ¹⁴⁷ Black’s Law Dictionary 8th Edition (2004)
- ¹⁴⁸ Stephen W. Miller, Rethinking Prisoner Litigation: Shifting From Qualified Immunity to a Good Faith Defense in §1983 Prisoner Lawsuits, 84 Notre Dame L. Rev. 929, 937 (2009)
- ¹⁴⁹ *Id.*
- ¹⁵⁰ *Id.*
- ¹⁵¹ *Johnson*, at 313, 319-320.
- ¹⁵² Christine Rebman, The Eighth Amendment and Solitary Confinement: The Gap In Protection From Psychological Consequences, 49 DePaul L. Rev. 567, 591 (1999)
- ¹⁵³ *Hutto*, at 680.
- ¹⁵⁴ *Id.* at 682.

¹⁵⁵ *Id.* at 683.
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¹⁵⁷ *Id.* at 683, citing *Holt v. Sarver*, 300 F.Supp. 325, 333-334 (Ark, 1969)
¹⁵⁸ *Hutto*, at 683.
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¹⁶² *Hutto*, at 687.
¹⁶³ *Id.* at 685.
¹⁶⁴ *Kirsch*, at 775.
¹⁶⁵ 2007 (7) AELE Mo. L. J. 301, 304-305.
¹⁶⁶ *Arnett*, at 950-951.
¹⁶⁷ *Id.* at 948.
¹⁶⁸ *Id.*
¹⁶⁹ *Borden*, at 1251-1252.
¹⁷⁰ *Id.* at 1254.
¹⁷¹ *Id.*
¹⁷² Matthew Purdy, “What’s Worse than Solitary Confinement? Just Taste This” *New York Times*, August 4, 2002.
¹⁷³ *Gross v. Koury*, 78 Fed.Appx. 690 (C.A.10 (Colo.), 2003)
¹⁷⁴ *Id.* at 695.
¹⁷⁵ *Id.*
¹⁷⁶ *Id.* at 694.
¹⁷⁷ *Id.* at 695.
¹⁷⁸ *Id.*
¹⁷⁹ *Young v. Quinlan*, 960 F.2d 351, 353 (C.A.3 (Pa.), 1992)
¹⁸⁰ *Id.* at 353-354.
¹⁸¹ *Id.* at 354.
¹⁸² *Id.* at 355.
¹⁸³ *Id.* at 356.
¹⁸⁴ *Id.* at 355-357.
¹⁸⁵ *Id.* at 354.
¹⁸⁶ *Id.* at 354-357.
¹⁸⁷ *Hudson*, at 1082.
¹⁸⁸ Rochelle Thompson, Keith Taylor, Cori Trask, and Brittany Taylor, “Psycho Killers: Lemuel Smith” timeline, 3
¹⁸⁹ Thompson et. al., 3
¹⁹⁰ *People v. Smith*, 63 N.Y.2d 41, 77-79 (N.Y., 1984)
¹⁹¹ William Wilbanks, *True Heroines: Policewomen Killed in the Line of Duty Throughout the United States*, 48
(2000)
¹⁹² *Id.*
¹⁹³ *Id.*
¹⁹⁴ “Debunking Myths: New Yorkers Against the Death Penalty” *NYDAP.org*, June 11, 2007
¹⁹⁵ *State v. Wallace*, 19 So.3d 4, 2008-1258 (La., 2009)
¹⁹⁶ *Id.*
¹⁹⁷ *State v. Wallace*, 503 So.2d 5 (La., 1987)
¹⁹⁸ *State v. Wallace*, 566 So.2d 390 (La., 1990)
¹⁹⁹ *State v. Wallace*, 616 So.2d 679 (La., 1993)
²⁰⁰ *Rhodes*, at 346.
²⁰¹ *Id.*
²⁰² *Lynott*, at 340.
²⁰³ Elizabeth Vasiliades, Solitary Confinement and International Human Rights: Why the U.S. Prison System Fails
International Standards, 21 Am. U. Int’l. L. Rev. 71, 78 (2005)
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²⁰⁵ *Id.* at 93.
²⁰⁶ *Id.* at 94.
²⁰⁷ *Grassian*, at 345.

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- ²⁰⁸ Barday, at 835.
- ²⁰⁹ *Id.*
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- ²¹¹ Smith, at 488-494.
- ²¹² *Id.* at 495.
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- ²¹⁴ *Id.*
- ²¹⁵ Barday, at 836.
- ²¹⁶ Smith, at 494.
- ²¹⁷ Smith, at 480.
- ²¹⁸ *Madrid*, at 1265.
- ²¹⁹ In *Ruiz v. United States*, 243 F.3d 941 (C.A.5 (Tex.), 2001)
- ²²⁰ *Ruiz*, at 914-915.
- ²²¹ Barday, at 837-839.
- ²²² McLeod, at 656.
- ²²³ Alexander A. Reinert, Eighth Amendment Gaps: Can Conditions of Confinement Litigation Benefit From Proportionality Theory?, 36 Fordham Urb. L. J. 53
- ²²⁴ *Id.* at 69.
- ²²⁵ *Rummel v. Estelle*, 445 U.S. 265, 283 (1980)
- ²²⁶ Reinert, at 86.
- ²²⁷ 42 U.S.C. § 1997e(e)
- ²²⁸ *Rhodes*, at 348, see note 13.