The constitutionality of Solitary Confinement in the United States of America

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THE CONSTITUTIONALITY OF
SOLITARY CONFINEMENT IN THE
UNITED STATES OF AMERICA

An International Comparative Approach

By: George Cornell
I. INTRODUCTION

Tommy Silverstein awakes not sure whether he has fallen asleep and dreamt he was a prisoner being held in extreme isolation or if he hasn’t slept at all. He arises from his cot and takes a look at his familiar surroundings: a 6 x 7 foot cell, in which he can stand and simultaneously touch the two white concrete walls surrounding him and reach up and touch the ceiling.\(^1\) Other than his small cot and a small toilet attached to a sink, there is nothing else in his cell. He is dressed in only underwear, as he has not been given any other clothing to wear. After washing his face at his small sink, he sits back on his cot and tries to determine what time of day it is and, more importantly, what day it is. He has no wristwatch or clock in his cell and it is impossible for him to have any sense of time due to the fact that the bright, artificial lights that illuminate his cell are never turned off. He is, however, fairly sure that it is summer, due to the unbearably hot temperature in his cell, in which there is no air conditioning or heating. After he begins perspiring from merely sitting on his cot for a couple of hours, he decides that it is time to undergo his only form of relief; pouring water from his sink onto the cell floor and lying naked on the ground to cool himself down.

So begins another day in solitary confinement in United States Penitentiary, Atlanta (USP Atlanta) for Mr. Silverstein, notoriously known as America’s “most isolated man.” He has no idea how long he has been a prisoner in this facility, in which he is confined in his small cell for twenty three hours a day with no television, radio, tape

player or reading material other than a bible. He is, literally, alone in a cell the size of a king size mattress with a cot, toilet and sink. With nothing to distract his attention from his extreme living conditions, he can only hope that today is his “outdoor recreation” day, the one day a week in which he is allowed to go outside for one hour. He’s not allowed to see other inmates and there is no exercise equipment in this outside area. When he realizes that today is not his recreation day, he lays back down on the wet floor and wonders when this hell will end. He does not know that he has been in USP Atlanta for eight months, or that he will have to endure these conditions for another four years.

This paper will discuss the constitutionality of solitary confinement, particularly prolonged solitary confinement, in the United States of America. Although the conditions Mr. Silverstein was subjected to for four years in USP Atlanta are considered as “extreme isolation,” the unfortunate truth is that they are not so different from conditions of solitary confinement that American prisoners are currently being subjected to. The even more unfortunate truth is that solitary confinement has become a normal rather than exceptional practice in the United States prison system; approximately 25,000 prisoners are being held in such isolation today. Due to the overwhelming international disapproval of solitary confinement, this paper will ultimately advocate as to why the Supreme Court should be influenced by the analysis and determinations of international courts regarding solitary confinement and how it can implement those influences into its constitutional analysis of the practice.

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First, Part II of this paper will briefly discuss the international rise of solitary confinement and how facilities known as supermax prisons came to be in the United States. It will also discuss the damaging physical and psychological effects that prolonged solitary confinement can have on a prisoner. Part III will analyze the current constitutional state of the practice in the United States, specifically focusing on how the Supreme Court has handled Eighth Amendment challenges with regard to prison conditions. Part IV will then discuss how international courts, including the European Court of Human Rights and the Inter-American Court of Human Rights, have analyzed solitary confinement when challenged under human rights provisions similar to the Eighth Amendment. Finally, Part V will compare and contrast the Supreme Court’s solitary confinement analysis with these international courts and will ultimately advocate that looking to such authorities is necessary for the Court to conclude that prolonged solitary confinement is a constitutional violation.

II. BRIEF OVERVIEW OF SOLITARY CONFINEMENT

A. Definition and History

Solitary confinement is a form of imprisonment in which a prisoner is put in physical and social isolation, typically in a small cell, for 22 to 24 hours a day.\(^3\) As this paper will reflect, however, the conditions a prisoner is subjected to while in solitary confinement differ depending on the country and the prison; indeed, there is no universally accepted definition of solitary confinement. There is also no universal definition as to what constitutes prolonged solitary confinement, however the Special

\(^3\) Id.
Rapporteur of the Human Rights Council, in a report to the United Nations, defines “prolonged” as being 15 days.\footnote{Id. at 9.}

The modern international use of prolonged solitary confinement began in the United States in the 1820s under what was known as the “Pennsylvania” model of imprisonment.\footnote{Id. at 8.} Under this model, it was believed that by subjecting prisoners to complete isolation, they would be forced to morally reflect on their criminal conduct and thus it was a form of extreme rehabilitation.\footnote{Thomas L. Hafemeister & Jeff George, Article, The Ninth Circle of Hell: An Eighth Amendment Analysis of Imposing Prolonged Supermax Solitary Confinement on Inmates with a Mental Illness, 90 DENV. U. L. REV. 1, 9-10 (2012).} This prison model was initially largely accepted, first in the United States and eventually worldwide. For example, hundreds of prisons using similar isolation methods were constructed across Europe, including in England, France, Germany, Holland, Belgium, Portugal, Norway, Sweden, and Denmark.\footnote{Id. at 10.} However, the damaging effects of solitary confinement quickly became evident first to prison officials and then to the general public, prompting national and international prisons to largely abandon the practice. Officials at the infamous Eastern State Penitentiary, where the “Pennsylvania” model was born, began noticing the connection between isolation and serious mental disorders including dementia and monomania.\footnote{Id. at 11.} It was during this time that the first challenge to solitary confinement reached the Supreme Court. \textit{In re: Medley}, although failing to conclude that the practice was a violation of the Eighth Amendment, the Court condemned it for its failure to
rehabilitate prisoners and for its damaging physical and psychological effects.\footnote{Peter Smith, \textit{The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature,} 34 CRIME \& JUST. 441, 467 (2006); see generally In re: Medley, 134 U.S. 160 (1890).} Accordingly, the use of systemic prolonged solitary confinement was largely abandoned in the United States and internationally, and remained that way for nearly ninety years.\footnote{Hafemeister \& George, \textit{supra} note 6 at 12.}

Due in large part to the tremendous growth in America's prison population by the 1970s, solitary confinement made a resurgence.\footnote{\textit{Id.} at 13.} The prison population growth brought more violence within prisons, prompting the need for more control over the inmates. It was also during this time that the American prison system reverted back to its view that retribution, incapacitation, and deterrence were the primary purposes of incarceration.\footnote{\textit{Id.}} What resulted was the modern supermaximum prison, commonly referred to as "supermax" prisons, marked by the first of such institutions in Marion, Illinois.\footnote{Supermax Prison, WIKIPEDIA, http://en.wikipedia.org/wiki/Supermax_prison\#cite_note-2 (last visited November 30, 2014).} These facilities are buildings with individual cells for each inmate, in which they are confined for twenty-three hours a day with minimal contact with staff and other inmates for indefinite periods of time.\footnote{Daniel P. Mears, Research Report, \textit{Evaluating the Effectiveness of Supermax Prisons,} Preface at ii (March 2006), available at http://www.urban.org/UploadedPDF/411326_supermax_prisons.pdf.} The cells are usually windowless with concrete walls and a port through which meals are served.\footnote{\textit{Id.}} These institutions reflect the modern view of the American prison system: one of "command and control."\footnote{Shira Gordon, Note, \textit{Solitary Confinement, Public Safety, and Recidivism,} 47 U. MICH. J.L. REFORM 495, 501 (2014).} By the 1980s, similar types
of isolation prisons were built in Canada, Mexico, South America, Europe, Africa, Asia and Australia. These institutions were titled “high-security” prisons and mainly used to confine dangerous individuals such as terrorists.\(^{17}\) Thus, solitary confinement once again became a worldwide practice and continues to be today.

\textit{B. Justifications and Effects}

According to the Special Rapporteur’s Report to the United Nations, there are five general justifications for the use of solitary confinement put forth by countries across the world: (1) to punish an individual, as part of his sentence and/or for in-prison conduct, (2) to protect vulnerable inmates, (3) to facilitate prison management, (4) to protect or promote national security, and (5) to facilitate pre-charges or pretrial investigations.\(^{18}\) As this paper will reveal, the justification a particular country has for implementing solitary confinement usually has a direct correlation with the conditions inmates are subjected to while isolated and with the prevalence of the practice in that country.

The damaging effects solitary confinement can have on an inmate, both physically and psychologically, are well documented. Indeed, it has been established beyond doubt that solitary confinement produces a higher rate of psychiatric and psychological health problems than ‘normal’ imprisonment.\(^{19}\) A wide range of psychological symptoms have been consistently documented as a result of its use, including anger, hatred, stress, loss of the sense of reality, depression, hallucinations, paranoia and insanity.\(^{20}\) Furthermore, studies have shown that inmates in isolation frequently suffer from physical effects,

\(^{17}\) Wikipedia, \textit{supra} note 13 (as will be further discussed, most foreign countries that use solitary confinement do so only when there is a substantial threat to security).

\(^{18}\) United Nations: General Assembly, \textit{supra} note 2 at 12.

\(^{19}\) Smith, \textit{supra} note 9 at 476.

\(^{20}\) \textit{Id.} at 488-91.
including severe headaches, heart palpitations, oversensitivity to stimuli, dizziness, fainting and problems with digestion.\textsuperscript{21} Recent studies have also shown that solitary confinement, in contrast to the justification that prolonged isolation facilitates rehabilitation, actually increases violence and recidivism.\textsuperscript{22}

III. THE CONSTITUTIONALITY OF SOLITARY CONFINEMENT IN THE UNITED STATES

A. Brief History

The Eighth Amendment of the United States Constitution bans the infliction of cruel and unusual punishment.\textsuperscript{23} The Supreme Court of the United States has never held that solitary confinement is a \textit{per se} violation of the Eighth Amendment. The Court has, however, concluded that solitary confinement is a form of punishment subject to scrutiny under the Eighth Amendment.\textsuperscript{24} From this, it is reasonable to conclude that the Court could hold as much, the question is when or how it would do so.

The first time the Court addressed the use of solitary confinement was in 1890, where it examined a new Colorado statute that required the warden of a prison to keep a prisoner in solitary confinement prior to the infliction of the death penalty.\textsuperscript{25} The Court held that the statute was unconstitutional due to ex post facto prohibition, and therefore did not address whether the practice was constitutional under other Amendments, such as

\begin{footnotes}
\item[21] \textit{Id.} at 489-90.
\item[22] Gordon, \textit{supra} note 16 at 498.
\item[23] "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.
\item[25] \textit{Medley}, 134 U.S. at 167.
\end{footnotes}
the Eighth.\textsuperscript{26} It did, however, cite various articles and studies on solitary confinement in ultimately condemning the practice, noting that it had been “found to be too severe.”\textsuperscript{27}

Since \textit{Medley}, the Court has rarely addressed the constitutionality of solitary confinement, but did so in the landmark case \textit{Hutto v. Finney} in 1978.\textsuperscript{28} There, a group of state prisoners brought actions against prison officials alleging violations of the Eighth Amendment for the conditions in their isolation cells. In its analysis, the Court, for the first time, stated, “confinement in a prison or in an isolation cell is a form of punishment subject to scrutiny under Eighth Amendment standards.”\textsuperscript{29} The Court agreed with the District Court that although punitive isolation was not \textit{per se} unconstitutional, “it may be, depending on the duration of the confinement and the conditions thereof.”\textsuperscript{30} Using these guiding principles, the Court upheld the District Court’s thirty-day solitary confinement limitation.\textsuperscript{31} In doing so, the Court concluded that the deplorable conditions of solitary confinement in the prison, in addition to the indefinite periods of time prisoner’s were held, violated the prohibition against cruel and unusual punishment.\textsuperscript{32} It is important to note that \textit{Hutto} was decided prior to the current framework that is applied when determining the constitutionality of prison conditions under the Eighth Amendment.\textsuperscript{33}

\textsuperscript{26} \textit{Id.} at 171.
\textsuperscript{27} \textit{Id.} at 168.
\textsuperscript{28} In \textit{Wilkinson v. Austin} the Court discussed the due process rights prisoners in solitary confinement were afforded under the 14\textsuperscript{th} Amendment, but did not discuss the implications under the 8\textsuperscript{th} Amendment.
\textsuperscript{30} \textit{Id.} at 685.
\textsuperscript{31} \textit{Id.} at 687.
\textsuperscript{32} \textit{Id.}
\textsuperscript{33} Prior to \textit{Hutto}, only the subjective prong of the framework had been developed, the objective test would not be included in the Court’s analysis until 1991.
B. Current Framework

The current Eighth Amendment framework with regard to prison conditions is a two-step test that analyzes the objective and subjective aspects of the challenged condition.\textsuperscript{34} In order for a violation to occur, the condition must be objectively sufficiently serious, and the prison official(s) had to act with a subjective deliberate indifference to inmate health or safety.\textsuperscript{35} As stated in Farmer v. Brennan:

"First, the deprivation alleged must be, objectively, ‘sufficiently serious’; a prison official's act or omission must result in the denial of ‘the minimal civilized measure of life's necessities.’ For a claim (like the one here) based on a failure to prevent harm, the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm. The second requirement follows from the principle that ‘only the unnecessary and wanton infliction of pain implicates the Eighth Amendment.’ To violate the Cruel and Unusual Punishments Clause, a prison official must have a ‘sufficiently culpable state of mind.’ In prison-conditions cases that state of mind is one of ‘deliberate indifference’ to inmate health or safety."

A number of Supreme Court cases have applied this two-step analysis to a variety of prison conditions and, in doing so, have shed light on what must be shown to satisfy both

\begin{footnotes}
\footnote{Hafemeister & George, \textit{supra} note 6 at 23.}
\footnote{Farmer v. Brennan, 511 U.S. 825, 834 (1994).}
\end{footnotes}
the objective and subjective tests. In applying the framework, the Court has stressed that
the Eighth Amendment must evolve to reflect "contemporary standards of decency."\textsuperscript{37}

Under the objective prong, the Court has suggested that denying prisoners adequate safety, food, warmth, exercise, basic hygiene and medical care results in the denial of minimal civilized life necessities.\textsuperscript{38} The Court has stated that the objective test "requires a court to assess whether society considers the risk that the prisoner complains of to be so grave that it violates contemporary standards of decency to expose anyone unwillingly to such a risk. In other words, the prisoner must show that the risk of which he complains is not one that today's society chooses to tolerate."\textsuperscript{39} Importantly, the Court has also stated that a current or actual injury need not be shown to satisfy the objective prong, rather the threat of injury constituting a substantial risk of serious harm will suffice.\textsuperscript{40} Therefore, a two-step test has evolved within the objective prong, with the critical inquiry being whether "(1) the risk involved was 'unreasonable' in that the challenged conditions were 'sure,' 'very likely,' or 'imminent[ly]' likely to cause 'serious' damage to the inmate's future health, and (2) whether society considers the risk to be 'so grave that it violates contemporary standards of decency to expose anyone unwillingly to such a risk.'"\textsuperscript{41}

In 1976, through the case \textit{Estelle v. Gamble}, the Court announced the standard necessary to satisfy the subjective prong of the test as being a "deliberate indifference" to

\begin{footnotesize}
\begin{itemize}
\item[38] Hafemeister & George, \textit{supra} note 6 at 23, citing Wilson, 501 U.S. at 303 and \textit{Estelle}, 429 U.S. at 103-4.
\item[40] Hafemeister & George, \textit{supra} note 6 at 23, citing Helling, 509 U.S. at 34.
\end{itemize}
\end{footnotesize}
a prisoner’s serious medical needs. However, what exactly deliberate indifference meant, i.e. what constitutes such a mental state, was not provided until 1994 in the case *Farmer v. Brennan*. There, the Court concluded that deliberate indifference equates to a “conscious disregard” of a substantial risk of serious harm. In order to satisfy the subjective prong of the test the Court held that it must be shown that a prison official knew of and disregarded a substantial risk of serious harm by failing to take reasonable measures to abate it. In determining whether the official knew of the risk, it must be shown that the official was both “aware of facts from which the inference could be drawn . . . and [that] he also [drew] the inference.” Furthermore, it is not necessary to prove that the official was sure that harm would actually occur; rather, it must be shown that a sufficiently substantial risk of future harm to the prisoner existed. In so holding, the Court echoed the proposition in *Helling* that actual injury is not necessary and that a threat of sufficient harm will suffice. Finally, while the determination that a condition is objectively serious is a question of law for the court to decide, this subjective inquiry is a question of fact “subject to demonstration in the usual ways and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious.”

*C. Modern Framework’s Application to Solitary Confinement*

The Supreme Court has not yet applied the two-step Eighth Amendment framework to solitary confinement, standing alone. Therefore, while there is a clear

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42 *Estelle*, 429 U.S. at 104.
43 *Farmer*, 511 U.S. at 835.
44 *Id.* at 847.
45 *Id.* at 837.
46 *Id.* at 843.
47 *Id.* at 842.
framework that is to be applied to prison conditions under an Eighth Amendment claim, it is not clear how the Supreme Court would analyze prolonged solitary confinement today. The biggest question concerns whether the Court would find psychological harm to be akin to the physical harms it has already enunciated as being objectively sufficient. In *Hudson v. McMillian*, however, Justice Blackmun, in a concurring opinion, stated that he did not read the majorities holding to limit a cognizable injury to physical harm, noting that, “[i]t is not hard to imagine inflictions of psychological harm—without corresponding physical harm—that might prove to be cruel and unusual punishment” under the Court’s requirements.\(^{48}\) Furthermore, the Court recently ruled that adequate mental health care constitutes “basic sustenance,” and therefore the denial of such care arguably satisfies the objectively sufficiently serious harm requirement.\(^{49}\)

In the wake of this two-step analysis, there has been one important limitation put on the use of solitary confinement at the Federal level. In *Madrid v. Gomez*, a California District Court held that it was unreasonable to subject inmates to solitary confinement when they showed a “particularly high risk for suffering very serious or severe injury to their mental health.”\(^{50}\) In essence, the District Court concluded that placing inmates in solitary confinement who were already mentally ill, or were highly susceptible to becoming mentally ill if isolated, satisfied both prongs and is a violation of the Eighth Amendment.\(^{51}\) The District Court made clear, however, that segregating inmates in

\(^{48}\) *Hudson*, 503 U.S. at 16 (Blackmun, J., concurring).


\(^{51}\) *id.* at 1265.
solitary confinement is not a per se violation of the Eighth Amendment, even for lengthy or indefinite terms.\textsuperscript{52}

IV. INTERNATIONAL JUDICIAL REVIEW OF SOLITARY CONFINEMENT

A. The European Court of Human Rights

Article 3 of the European Convention on Human Rights ("The European Convention") states, "[n]o one shall be subjected to torture or to inhumane or degrading treatment or punishment."\textsuperscript{53} The European Convention has been implemented into the draft constitution of the European Union, and thus has jurisdiction over the individual states therein.\textsuperscript{54} The European Court of Human Rights ("ECHR"), like the Supreme Court, has never held that solitary confinement is a per se violation of Article 3. Its analysis in determining Article 3 violations for prison conditions, however, is markedly different from the Supreme Court's. It is also important to note that the ECHR has frequently considered how solitary confinement comports with Article 3, whereas the Supreme Court has yet to apply its two-step constitutional analysis to prolonged solitary confinement in any meaningful way.

In determining whether a prison condition falls under Article 3 review, the condition must meet a "minimum threshold of severity."\textsuperscript{55} In order to meet that minimum threshold, the ECHR applies a totality of circumstances approach.\textsuperscript{56} Relevant factors the court considers are: "the context of the treatment or punishment, the manner

\textsuperscript{52} Id. at 1261.
\textsuperscript{56} Id. at ¶ 89.
and method of its execution, its duration, its physical or mental effects and, in some instances, the sex, age and state of health of the victim.”

With regard to solitary confinement specifically, the ECHR has repeatedly held that such measures “should be resorted to only exceptionally and after every precaution has been taken” and only for a limited duration. If the conditions meet the minimal threshold of severity, the court then applies a proportionality test, requiring the government to provide a security-based justification for the use of solitary confinement. A violation “depend[s] on the particular conditions, the stringency of the measure, its duration, the objective pursued and its effects on the person concerned.” The level of isolation imposed on a prisoner is an important factor for the court, as it considers whether the isolation is “relative” or “total.” These propositions are reflected in ECHR cases in which solitary confinement is challenged as a violation of Article 3.

The ECHR dealt directly with the question of solitary confinement in the case of Ramirez Sanchez v. France. There, a terrorist sentenced to life imprisonment in France for the murder of two police officers claimed that his detention in solitary confinement for eight years constituted a violation of his Article 3 rights. After applying the framework required under its Article 3 analysis, the court concluded that the inmate’s

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57 Id. at ¶ 100.
61 Ahmad, supra note 60 (emphasis added).
solitary confinement did not constitute a violation.\textsuperscript{63} In coming to its conclusion, the court reasoned that the justifications put forth by the government, namely the danger that the prisoner imposed as a well-known terrorist, outweighed the circumstances of his isolation.\textsuperscript{64} Of particular importance to the court's analysis was the fact that the prisoner's isolation was relative rather than total, in that he had access to books, a television, an exercise yard for two hours a day,\textsuperscript{65} received twice-weekly visits from a doctor and frequent visits from his lawyer who was also his wife.\textsuperscript{66} Although the court expressed concern to the length of his detention in isolation, it ultimately concluded that the circumstances of his detention were proportional to the justifications put forth by the government. The court did, however, note that solitary confinement even of a "relative" nature may not be imposed on a prisoner indefinitely and that independent judicial authority review as to the merits of and reasons for prolonged solitary confinement must be afforded to the prisoner.\textsuperscript{67}

Perhaps the most important case, in the context of comparing American and European judicial review of solitary confinement, is Soering v. The United Kingdom. There, the ECHR found the extradition of a United Kingdom citizen to the United States for the double-murder he committed in Virginia as a violation of his Article 3 rights. The prisoner argued that, if extradited, he would be subjected to prolonged solitary confinement while on death row at the Mecklenburg Correctional Center in Virginia, therefore violating his Article 3 rights. The court agreed, concluding that the "very long

\textsuperscript{63} Ramirez Sanchez, supra note 58 at ¶ 150.
\textsuperscript{64} Id. at ¶ 149.
\textsuperscript{65} Id. at ¶ 128.
\textsuperscript{66} Id. at ¶ 131.
\textsuperscript{67} Id. at ¶ 145.
period of time” spent in extreme isolation would expose him to a “real risk of treatment going beyond the threshold set by Article 3.” The court also noted that the existence of other alternatives to achieve the purpose of extradition “which would not involve suffering of such exceptional intensity or duration” was relevant in their determination.

In contrast to Sanchez, in which the court found no violation due in large part to the “relative” isolation the prisoner was subjected to, the “total” isolation the prisoner would have been subjected to in the United States appeared to be crucial in the court’s decision. This case, therefore, allows one to infer that the ECHR would find the conditions of solitary confinement in the United States, namely in supermax prisons, as being violations of Article 3.

As discussed, the analysis applied by the ECHR in determining violations of Article 3 is a totality of the circumstances approach that ultimately questions whether the condition is proportional to the reason set forth for its use. This principle of proportionality is prominently displayed in the case of Messina v. Italy. There, a member of the Mafia incarcerated in an Italian prison alleged various violations of The European Convention, specifically his right to respect for his family life under Article 8, due to the four years he spent under the “special regime” of the prison. The special

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68 Soering, supra note 55 at ¶ 111. (The court noted that prisoners are usually held on death row for six to eight years due to the appeal process).
69 Id.
70 Id. at ¶ 61-8 (the court describes the conditions for inmates on death row in Mecklenburg Correctional Center).
regime was essentially solitary confinement, wherein the prisoner was not allowed access to a telephone, was not allowed to converse or correspond with other prisoners, could not meet with third parties, could only meet with family members for one hour per month and was allowed no more than two hours per day outdoors.\textsuperscript{73} In concluding that the conditions the inmate was subjected to were not violations of Article 3 or 8, the court weighed the legitimate aim put forth by the government in applying such conditions and the interference with the prisoner’s rights that they created.\textsuperscript{74} In explaining its analysis, the court stated, “to be necessary ‘in a democratic society’ the interference must correspond to a pressing social need and, in particular, must remain proportionate to the legitimate aim pursued.”\textsuperscript{75} The Court took into consideration the fact that the prisoner was a dangerous member of the Italian Mafia and the government’s aim to therefore limit his communication and contact with other prisoners and with visitors.\textsuperscript{76} The court held that in light of those circumstances the restrictions placed on the prisoner “did not go beyond what is necessary in a democratic society for the protection of public safety and the prevention of disorder or crime.”\textsuperscript{77}

\textit{B. The Inter-American Court of Human Rights}

The jurisprudence of the Inter-American Court of Human Rights (“IACHR”), an autonomous South American court that upholds the provisions set forth in the American Convention on Human Rights (“The American Convention”), has been definitively

\textsuperscript{73} \textit{Messina, supra} note 71 at ¶ 13.
\textsuperscript{74} \textit{Id.} at ¶ 71-74. Although it is not explicitly stated in this case, the ECHR explained that this analysis included alleged violations of the claimant’s Article 3 rights in a later case (\textit{Ahmad} at ¶ 126).
\textsuperscript{75} \textit{Id.} at ¶ 64.
\textsuperscript{76} \textit{Id.} at ¶ 70.
\textsuperscript{77} \textit{Id.} at ¶ 74.
against the use of solitary confinement.\textsuperscript{78} Article 5, subsection 2 of The American
Convention states, "[n]o 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 respect for the inherent dignity of the human person."\textsuperscript{79} Unlike the Supreme Court
and the ECHR, the IACHR does not apply a framework or undergo a proportionality test
in determining whether keeping a prisoner in prolonged solitary confinement violates
Article 5. Rather, the court has conclusively held that "prolonged isolation and
deprivation of communication are in themselves cruel and inhuman treatment . . . such
treatment, therefore, violates Article 5 of the Convention."\textsuperscript{80}

As already suggested, unlike other national and international courts, where
solitary confinement \textit{may} violate constitutional rights depending on the circumstances
and/or the failure to justify it, the IACHR has definitively held, in a number of cases, that
solitary confinement is cruel and inhumane treatment in and of itself. In the case of
\textit{Loayza-Tamayo v. Peru}, for example, the court found an Article 5 violation for holding a
woman in solitary confinement in a tiny cell with no natural light for a period of nine
days.\textsuperscript{81} Similarly, in \textit{Suarez-Rosero v. Ecuador}, the court concluded that holding a
detainee in incommunicado isolation for thirty-six days was a violation of Article 5.\textsuperscript{82}
The court's analysis in coming to this conclusion was rather limited, stating, "the mere

\textsuperscript{78} United Nations: General Assembly, \textit{supra} note 2 at 11.
\textsuperscript{79} American Convention on Human Rights, art. 5, ¶ 2, November 22, 1969, \textit{available at}
\textit{available at} http://www.coreidh.or.cr.
\textsuperscript{81} Loayza-Tamayo v. Peru, Pet. No. 11.154, ¶ 58 (Inter-Am. Ct. H.R. 1997), \textit{available at}
http://www.coreidh.or.cr.
\textsuperscript{82} Suarez-Rosero v. Ecuador, Pet. No. 11.273, ¶ 91 (Inter-Am. Ct. H.R. 1997), \textit{available at}
http://www.coreidh.or.cr.
fact that the victim was for 36 days deprived of any communication with the outside world, in particular with his family, allows the Court to conclude that Mr. Suarez-Rosero was subjected to cruel, inhuman and degrading treatment."^83

The conclusion that solitary confinement is, on its face, a violation of Article 5 appears to be the result of the IACHR considering the well-documented detrimental effects of its use to the plain language of the Article. Its cases frequently cite to international standards for protection, particularly for the proposition that torture can be inflicted through acts that create "severe physical, psychological or moral suffering in the victim."^84 It has concluded, "isolation from the outside world produces moral and psychological suffering in any person."^85 Furthermore, even in extraordinary situations, such as terrorism, "[such circumstances] must not be allowed to restrict the protection of a person's right to physical integrity."^86 The IACHR has, therefore, deemed solitary confinement as inhumane treatment that is almost never justified, and thus represents one of the most progressive courts with regard to defining solitary confinement as a violation of basic human rights.

V. ANALYSIS AND CONCLUSION

A. Comparisons and Differences

In comparing and contrasting the judicial review of solitary confinement between the Supreme Court and international courts, it is important to note that the phenomena that is supermax prisons appears to be largely an American model. While "high-security"

^83 Id.
^85 Suarez-Rosero, supra note 82 at ¶ 90.
^86 Loayza-Tamayo, supra note 81 at ¶ 57.
prisons exist in many countries, the extreme conditions prisoners are subjected to and the prolonged and/or indefinite amount of time they are subjected to them in supermax facilities separates America from the rest of the world. Indeed, the popularity of sending individuals to these prisons makes it clear that, in America, solitary confinement is the normal rather than exceptional practice. As such, foreign and international courts have rarely had to analyze conditions comparable to those that exist in these American facilities.87 Furthermore, the Supreme Court has yet to decide on the constitutionality of subjecting prisoners to prolonged solitary confinement in these institutions under the Eighth Amendment. The failure to consider whether such confinement constitutes an Eighth Amendment violation is a product of the Court’s extreme deference to prison officials88 and, many scholars argue, the Court’s foregone conclusion that psychological harm alone cannot rise to the sufficiently serious standard of harm necessary to bring such a claim.89

There are, however, observations one can make when comparing and contrasting the judicial review of solitary confinement between these courts. First, the justifications for implementing solitary confinement set forth by a country’s government correlates to

87 The ECHR did so in Soering, and those implications are more fully discussed later in this paper.
88 David Stoelting, Supermax Confinement in U.S. Prisons, THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, COMMITTEE ON INTERNATIONAL HUMAN RIGHTS, at page 2 (September 9, 2011), available at http://www2.nycbar.org/pdf/report/uploads/20072165-TheBrutalityofSupermaxConfinement.pdf (“Courts in recent years have largely deferred to prison administrators with regard to the implementation and expansion of supermax confinement, stretching the limits of constitutionality so that supermax is largely immunized from judicial review.”).
89 Stoelting, supra note 88 (“Indeed, as long as a prisoner receives adequate food and shelter, the extreme sensory deprivation that characterizes supermax confinement will, under current case law, almost always be considered within the bounds of permissible treatment.”).
the severity of the conditions of confinement. For example, most European countries resort to solitary confinement in extreme circumstances when the need for security is strong. It is not used to merely create command and control over the inmates of a prison, or to punish them, as is the case in the United States. Accordingly, the conditions of isolation are markedly less severe in European prisons, frequently defined as "relative" isolation by the ECHR. Rather than using the practice to create a sense of fear and control over its inmates, European prisons use isolation in response to legitimate and serious security concerns and, in effect, there is no need to make the conditions of isolation extreme. When faced with a situation of total isolation, the ECHR has repeatedly found violations of Article 3 because the conditions create an extreme breach of the prisoner's basic human rights that are usually not proportional to the legitimate aim pursued.⁹⁰

Second, it is clear that the Supreme Court's two-step framework creates harder legal standards to prevail on than for those who bring challenges to the ECHR or IACHR. As is usual for constitutional issues, the Supreme Court has developed "tests" that it must consider rather than engage in a totality of the circumstances or proportionality review approach. The latter forms of analysis have been embraced by both the ECHR and IACHR, reflecting the view that when faced with the question as to whether someone's basic human rights have been violated, particularly while incarcerated, judges must consider all of the circumstances of the situation and ask whether the condition is necessary and/or proportional to justify it. The fact that both of these courts have consistently found human rights violations due to solitary confinement does not

⁹⁰See supra note 55.
necessarily mean that their respective legal standards are “easy”, rather, it goes to show that subjecting someone to extreme isolation for prolonged periods of time does not comport with modern standards of decency in today’s international community.

B. The Influence of Foreign Courts on the Supreme Court

The question then becomes, to what extent should the Supreme Court look to these courts in determining whether prolonged solitary confinement is “cruel and unusual” punishment. While the practice of looking to foreign and international courts and laws is relatively rare in Supreme Court jurisprudence, it has done so before, specifically in interpreting the Eighth Amendment.91

For example, the Court recently looked to the laws of other countries and to international authorities to assist in its interpretation of the Eighth Amendment in Roper v. Simmons.92 In holding that it is a violation of the Eighth and Fourteenth Amendments to sentence a minor to the death penalty, the Court noted that although international opinion is not controlling, it “provides respected and significant confirmation” for the Court’s determination that the penalty is disproportionate punishment for offenders under 18.93 Importantly, regarding the Eighth Amendment, the Court noted that The United Kingdom’s customs have particular relevance “in light of the historic ties between our countries and in light of the Eighth Amendment’s own origins.”94 Furthermore, as far back as 1890, in discussing the severity of solitary confinement and why it could not therefore be applied by a law ex post facto, the Supreme Court noted that Great Britain repealed the practice due to “public sentiment [that] revolted against th[e] severity” it

91 Lobel, supra note 59 at 122.
93 Roper, 543 U.S. at 577.
94 Id.
entails. These references to foreign and international authorities confirm that looking to such authorities is not only permissible for the Court to do, it also shows that doing so allows the court to go outside its strict test-driven frameworks and take a more practical approach to determine whether someone’s basic human rights, protected under the Constitution, have been violated.

C. How the Court Should Apply its Framework Today

Considering the persuasive value that foreign and international authorities can have on the Supreme Court, it is hard to make sense of the fact that the overwhelming opinion of these authorities is the condemnation of solitary confinement while the Court has refused to do the same. As discussed, there has not been any meaningful review of the constitutionality of solitary confinement, standing alone, by the Supreme Court since the inception of its two-pronged framework. However, in light of the Court’s application of the framework to other types of prison conditions and practices, it seems doubtful that solitary confinement would satisfy both prongs necessary to deem it a violation of the Eighth Amendment without a change to the Court’s analysis.

The current framework reflects the way in which the Court almost always addresses constitutional issues and, therefore, it is highly doubtful that it will overrule the framework for a wholly new approach. However, looking to the reasoning and conclusions made by courts such as the ECHR and IACHR in applying the framework could influence the Court to better realize the detrimental effects of solitary confinement, especially for prolonged or indefinite sentences. The Court should therefore look to these authorities in determining whether conditions of solitary confinement satisfy the

\[95\] Medley, 134 U.S. at 170.
objective and subjective prongs of its current Eighth Amendment framework. The conclusion that solitary confinement is a per se violation is not likely, even with the influence of international authorities; however, prolonged or indefinite terms of isolation are circumstances that can and should satisfy the two-step framework.

As discussed, the claimant must first show that the harms of solitary confinement are “sufficiently serious” enough to implicate the Eighth Amendment. So far, the Court has only held that certain physical harms have reached the level of severity to be deemed likely to cause serious damage to an inmate’s health and thus violate contemporary standards of decency.96 Due to recent Supreme Court case law developments and the conclusions made by international courts, however, the conclusion that psychological harm is a sufficiently serious harm under the objective prong is one the Supreme Court can and should make.

First, there appears to be a current trend towards finding psychological harm as being sufficiently serious in Supreme Court jurisprudence. The trend began with Justice Blackmun’s concurrence in Hudson v. McMillian, in which he concluded that he did not read the majority’s opinion to limit a cognizable injury under its Eighth Amendment framework to physical injury, stating, “[i]t is not hard to imagine inflictions of psychological harm – without corresponding physical harm – that might prove to be cruel and unusual punishment.”97 Furthermore, the recent ruling in Brown v. Plata, that affording prisoners adequate mental health care constitutes basic sustenance, is now established precedent one can use to argue that by placing a prisoner in prolonged solitary

96 See supra note 38.
97 Hudson, 503 U.S. at 16 (Blackmun, J., concurring).
confinement, the prisoner is being denied a minimal life necessity, which is the underlying standard that the objective prong is founded on.98

Beyond its own precedents, however, the Supreme Court should be heavily influenced by courts such as the ECHR and the IACHR in determining whether solitary confinement, particularly prolonged, creates risks of harm that violate current standards of decency in today’s world. As the Court has constantly repeated, its Eighth Amendment analysis should be guided by evolving standards of decency that mark the progress of a maturing society.99 Simply put, the strong international opinion condemning the use of prolonged solitary confinement should be an indicator to the Court that the practice does not comport with today’s standards of decency. Courts such as the ECHR and IACHR have been convinced that prolonged solitary confinement is detrimental to the physical and mental health of an individual and have reached that conclusion due to countless empirical data. The ECHR has stated that treatment arousing feelings of “fear, anguish and inferiority capable of humiliating and debasing” is degrading and therefore an Article 3 violation and has consistently used this language to describe the conditions of solitary confinement.100 The foregone conclusion held by the IACHR that placing a prisoner in extreme isolation is a violation of their basic human rights should also influence the Court. Indeed, the IACHR’s stance that solitary confinement is akin to torture in some circumstances is certainly relevant in determining whether placing someone in such confinement for an indefinite amount of time creates a risk of harm that today’s society chooses not to tolerate. Clearly then, if the Court were

98 See supra note 49.
99 Hudson, 503 U.S. at 8; Rhodes, 452 U.S. at 346; Estelle, 429 U.S. at 102.
100 Ramirez-Sanchez, supra note 58 at ¶ 118.
to look to these courts in analyzing whether prolonged solitary confinement creates a risk of sufficiently serious harm, it would be difficult for it to justify not coming to such a conclusion.

If and when the Supreme Court concludes that the risks of psychological harm inherent in the use of solitary confinement are sufficiently serious, the conclusion that the subjective prong of the framework is also satisfied should flow therefrom, particularly in supermax facilities. In supermax prisons, where solitary confinement is a systematic practice, a claimant should be able to successfully argue that such institutions always involve a deliberate indifference on the part of those prison officials. In other words, because prolonged solitary confinement creates risks of sufficiently serious harm to prisoner mental health, supermax prisons in and of themselves are models of incarceration that are deliberately indifferent to inmate health and safety.

Most American prisons, of course, do not implement solitary confinement as the sole model of incarceration. Many state and federal prisons place general population inmates in isolation for any number of reasons, most prominently for infractions while incarcerated.\textsuperscript{101} In determining whether the subjective prong has been satisfied in these types of situations, the conclusions and reasoning of foreign and international courts can be influential on the Court's analysis. Looking to the ECHR's proportionality test, for example, can aid the Court in determining whether the prison official consciously failed to abate a risk of sufficiently serious harm. As the ECHR has held, placing a prisoner in indefinite isolation can never be justified and is a violation of Article 3, even if the

\textsuperscript{101} Sal Rodriguez, \textit{Solitary Confinement FAQ}, SOLITARY CONFINEMENT: NEWS FROM A NATION IN LOCKDOWN (2012), http://solitarywatch.com/facts/faq/ ("‘Disciplinary segregation’ is time spent in solitary as punishment for violating prison rules, and usually lasts from several weeks to several years.").
isolation is considered relative.\textsuperscript{102} Furthermore, that court has reasoned that the existence of applicable alternatives usually makes solitary confinement unjustified.\textsuperscript{103} When an American prison official places an inmate in prolonged solitary confinement as punishment, therefore, the Court should conclude that they have acted with deliberate indifference. There is simply no reason that can justify keeping someone in prolonged or indefinite solitary confinement other than to control and demoralize. Such goals reveal more than a deliberate indifference; an official acts with intent to seriously injure the mental health of a prisoner in these circumstances and such intent is more than enough to satisfy the subjective prong.

The ECHR's condemnation of indefinite isolation is founded on the idea that solitary confinement is a practice of last resort to be used in extraordinary circumstances. For the ECHR, keeping someone in solitary confinement for an extended period of time becomes unjustified at some point and therefore an indefinite sentence is not proportional to any purported reason for keeping the prisoner isolated. This principle has been articulated by the Supreme Court in \textit{Hutto}, where it upheld a thirty-day limit on punitive isolation and stated that the length of confinement cannot be ignored in determining whether it meets constitutional standards.\textsuperscript{104} The Court has drifted away from this reasoning since \textit{Hutto} was decided in 1978, a case that aligned with the reasoning and conclusions reached by courts such as the ECHR and IACHR. If the Court was convinced that prolonged isolation did not comport with standards of decency in 1978, it should certainly be able to reach the same conclusion today, especially in light of modern

\textsuperscript{102} See \textit{supra} note 67.
\textsuperscript{103} See \textit{supra} note 69.
\textsuperscript{104} \textit{Hutto}, 437 U.S. at 686.
day research and the opinions of international courts and authorities. Placing a limit on
the amount of time a prisoner can be held in solitary confinement is a conclusion the
Supreme Court should reinstate, and it should hold that a violation of that limit is a
violation of the Eighth Amendment.

In conclusion, the Supreme Court should look to foreign and international courts
in applying their two-step framework in determining whether prolonged solitary
confinement is a violation of the Eighth Amendment. The Court’s inability to find such a
violation separates it from the majority of international authorities who have addressed
the same issue. The ECHR’s conclusion in Soering should be of particular concern to the
Supreme Court, where subjecting someone to the conditions of solitary confinement in an
American prison were held to be violations of Article 3’s ban on inhumane or degrading
treatment. Although strides have been made in recent years to limit the practice of
solitary confinement, it is evident that the current two-step framework creates hard legal
standards for a claimant to satisfy. The conclusions reached by courts such as the ECHR
and IACHR, however, can influence the Court in its analysis of both the objective and
subjective prongs of the framework. If it looks to these authorities, it is feasible for the
Court to conclude that prolonged solitary confinement is a violation of the Eighth
Amendment in the near future.