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PLATONIC, THOMISTIC, AND LOCKEAN THOUGHT AND THE LAW ON SOLITARY CONFINEMENT

MATTHEW SCHWARTZ*

INTRODUCTION

Solitary confinement is a contemporary issue affecting the individuals who are incarcerated in detention facilities throughout the United States. This form of punishment is placed upon a wrongdoer for either their crimes committed or their misconduct within the detention facility. Courts across the country, including the Supreme Court have struggled to determine whether solitary confinement is a violation of the Eighth Amendment's "cruel and unusual punishment" clause. Due to the Supreme Court Justices and various circuit courts having different perspectives on solitary confinement, it may be useful to implement other thinker's theories of punishment to evaluate solitary confinement's lawfulness. Philosophical thinkers such as Plato, Thomas Aquinas, and John Locke all have different theories of punishment, which may be helpful in determining the fairness and usefulness of punishing through solitary confinement. Each thinker can be seen providing their own perspective on the punishment theories such as, retributivism[1] or utilitarianism.[2] This paper will argue solitary confinement may be in violation of the Eighth Amendment's "cruel and unusual punishment" clause where courts could benefit from considering other jurisprudential thinker's theories on punishment such as Plato, Aquinas, and Locke's when determining if solitary confinement is a wise and just means of punishment.

This paper explores the law of solitary confinement, its jurisprudential premises in American law, and how those principles might be viewed when evaluated against the thought of

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[1] A retributivist would argue people are punished because they deserve it based upon their prior actions. Kent Greenawalt, *Punishment*, 74 J. CRIM. L. & CRIMINOLOGY 343, 347 (1983).

[2] A utilitarian is more focused on the betterment of the individual and society. Due to this, a utilitarian theory of punishment allows for deterrence (general and individual), incapacitation, as well as reform in hopes it will provide the individual with a crime free lifestyle. *Id*.

three major philosophical and legal thinkers: Plato, Thomas Aquinas, and John Locke. In doing so, the paper delves into the definition of punishment, punitive theories that appear in American law, and how both relate to the law of solitary confinement. It then discusses how that law might look different based on the jurisprudential premises and punitive theories expressed by Plato, Aquinas, and Locke.

Part I of this paper will provide an overview of the legal definition and meaning of punishment as well as an analysis of many common punishment theories, especially as seen in the Model Penal Code, such as retributivism, and utilitarianism. Part I details the goals of these theories and how the Model Penal Code (MPC) incorporates them into its recommended approach for sentencing. The MPC has a hybrid approach, focused on proportionality, deterrence, and improving the offender's lifestyle.

Part II introduces the practice of solitary confinement in America's criminal justice system. Solitary confinement is a harsh reality for many individuals who are currently incarcerated in detention facilities. Part II describes solitary confinement: its history, how it is implemented, its conditions, the effect on the individual, judicial treatment by courts, and legislative responses. Building from the work of others and existing caselaw, Part II demonstrates how the prison and court systems implementing solitary confinement as a form of punishment may be violating the "cruel and unusual punishment" clause of the Eighth Amendment.

Part III introduces the philosophical-legal thought of Plato, Aquinas, and Locke as it relates to punishment. The Part provides a short biographical sketch of each figure before turning to their jurisprudential work, including on the topic of punishment. Interestingly, Part III indicates that none of these thinkers base their theories and understanding of punishment exclusively on retributivism and utilitarianism.

Part IV brings these principles into conversation with the contemporary problem of solitary confinement. It indicates how each might view whether or not the implementation of solitary confinement is wise and just, juxtaposed with existing Supreme Court precedent. As a result, it speculates whether each figure would agree or disagree with the implementation of solitary confinement as a means of punishment in the prison and court systems.

I. THE MEANING OF PUNISHMENT AND THE EXISTING PUNISHMENT THEORY DOCTRINES SEEN IN AMERICAN LAW

Punishment can arise in various forms, some harsher than others and depending on the theory will have different effects on the wrongdoer. For example, as one commentator has said, "[i]n the United States today, the word 'punishment' typically evokes the thought of imprisonment, yet it need not. . . . Other modes of punishment, some traditional (e.g., fines, community service, etc.) and some not so traditional (e.g., shaming), are available in lieu of incarceration."[3] To punish an individual, one must intentionally think to cause a harmful consequence because the other individual took part in a wrongdoing.[4] From this, there is a higher level of authority and capacity needed to punish; therefore, in most cases it occurs when the authoritative figure intends to punish the wrongdoer.[5] People wish to avoid being punished for their actions, especially when the particular punishment is excessive and intended to harm the individual.[6] The Supreme Court in *Coker v. Georgia*[7] explains, "[A] punishment is 'excessive' and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the

[3] JOSHUA DRESSLER, ET AL., CRIMINAL LAW: CASES AND MATERIALS, 31, (American Casebook Series, West Academic Publishing, 8th ed., 2019).
[4] Greenawalt, *supra* note 1, at 343–344.
[5] *Id*. at 344
[6] *Id*.
[7] Coker v. Georgia, 433 U.S. 584 (1977).

purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime."[8] Punishment can be seen in all walks of life, from menial punishment given to a child from their parent to the death penalty given to an individual who broke the law that is imposed by the criminal justice system.[9] Punishment must encompass the authoritative figure's intent to inflict harm onto another, where the wrongdoer is able to make a decision, and that decision is in violation of behavioral norms.[10] These inflictions of harm that are prevalent in punishment are subject to moral justifications, which philosophers have dedicated their time to providing these justifications.[11]

Punishment in the United States criminal justice system is used to ensure the country is a safer and law-abiding place for citizens, with a focus on retributing, rehabilitating/reforming, and deterring the wrongdoer and others from committing similar acts.[12] "Punishment ordinarily follows some breach of established rules of behavior; the notion that people should have fair warning as to what behavior is punishable, and to what degree, is now an established principle of most legal systems."[13] Punishment is used for those who deserve it based upon their actions as well as those that it would be useful to punish.[14] One use of punishment is to reform the individual from repeating the same act.[15] The promotion of reformation has influenced a drastic change in American sentencing practices.[16] The court in *People v. Du*[17] explains:

> . . . the objectives of sentencing a defendant: (1) to protect society; (2) to punish the defendant for committing a crime; (3) to encourage the defendant to lead a law-abiding life; (4) to deter others; (5) to isolate the defendant so she can't commit

[8] *Id.* at 592.
[9] Greenawalt, *supra* note 1, at 343.
[10] *Id*.
[11] Mitchell N. Berman, *Retributivism*, U OF PENN. CAREY LAW SCHOOL, (Pub. L. Research Paper No. 22-36 (2022)).
[12] Greenawalt, *supra* note 1, at 347.
[13] *Id*. at 345
[14] *Id*. at 353.
[15] *Id*. at 352.
[16] *Id*. at 358.
[17] People v. Superior Court (Du), 5 Cal. App. 4th 822 (2d Dist. 1992).

> other crimes; (6) to secure restitution for the victim; [and] (7) to seek uniformity in sentencing.[18]

The *Du* court shows an illustration that sentencing tries to simultaneously achieve these objectives without forming a sense of coherence as to which theory of punishment the court follows. The *Du* court provides a mixed theory approach with the purpose of these objectives, showing that the American legal system uses both retributivism and utilitarianism in accessing punitive punishment. As the Supreme Court in *Ewing v. California*[19] held, "A sentence can have a variety of justifications, such as incapacitation, deterrence, retribution, or rehabilitation."[20] There is a distinctive starting point to understanding the various punishment theories.[21] This starting point surrounds the question: Why should a person who is considered to be a wrongdoer be punished for their actions?[22]

There are two prevalent approaches to punishment justification and theories: retributivism and utilitarianism.[23] For those who consider themselves to follow retributivism, believe punishment is justified because the individual deserves it.[24] People who follow utilitarianism believe the justification relies on the useful purposes that the punishment is intended to serve.[25] The retributivist theory of punishment provides a stricter standard.[26] Whereas the utilitarianist theory is focused on helping the wrongdoer grow into a well-rounded individual and learn from their mistakes.[27] One commentator explains, "[t]oday, legislatures can draw from a hodgepodge of penal justifications, including retribution, deterrence, rehabilitation, incapacitation, or almost

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[18] *Id.* at 835.
[19] Ewing v. California, 538 U.S. 11 (2003).
[20] *Id.* at 25.
[21] Greenawalt, *supra* note 1, at 347.
[22] *Id*.
[23] *Id*. at 347.
[24] *Id*.
[25] *Id*.
[26] *Id*. at 345.
[27] *Id*. at 350.

any regulatory purpose."[28] Also, the MPC, which many states have either adopted or use when legislating criminal provisions, reflects certain theories of punishment in its various provisions.[29] The MPC has its own theory of punishment which blends retributivism and utilitarianism theories together to create a unique hybrid theory.[30]

A. *Retributivist Theory*:

Many United States jurisdictions justify punishing an individual by looking to retributivism, as well as turn to retributivism for issues such as sentencing.[31] A retributivist believes when an individual commits a crime, the wrongdoer should receive some form of desert[32] which is equal to the crime committed.[33] Retributivists seek to penalize an individual for their acts, hoping the punishment will reimpose the moral order or reasonableness that was breached due to the individual's wrongdoing.[34] For this theory, punishment is justifiable when society should impose a negative consequence or harm to wrongdoers.[35] The main premise surrounds the idea that under certain conditions wrongdoers deserve to suffer, or be subjected to a form of hardship as a consequences for the wrongdoing.[36] A retributivist would argue the implementation of legal penalties and punishment for an individual's wrongful conduct is a primary purpose of the public.[37]

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[28] John F. Stinneford, *Experimental Punishments*, 95 NOTRE DAME L. REV. 39, 41 (2019).
[29] Francis X. Shen et. al., *Sorting Guilty Minds*, 86 N.Y.U. 1307, 1308 (2011).
[30] Paul H. Robinson, et. al., *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 324 (2007).
[31] Stephen Galoob, *Retributivism and Criminal Procedure*, 20 NEW CRIM. L. REV. 465, 1-47, 4 (2017).
[32] To a retributivist, desert is the primary basis in which punishment is properly imposed upon an individual. Lloyd L. Weinreb, *Desert, Punishment, and Criminal Responsibility*, 49 DUKE U. L. REV. 3, 47-80, 47 (1986).
[33] Greenawalt, *supra* note 1, at 347-348.
[34] *Id*.
[35] *Id*.
[36] Berman, *supra* note 11, at 3.
[37] Greenawalt, *supra* note 1, at 349.

There are other variations of the retributivism theory which have emerged: negative retributivism and positive retributivism.[38] Negative retributivism is where it is morally unjust to punish an innocent person even if punishing that individual helps society.[39] Positive retributivism provides that, ". . . not only must an innocent person never be punished; but, affirmatively, one who is guilty of an offense must be punished."[40] Positive retributivism further encompasses two categories: "assaultive" retribution and "protective" retribution.[41] The "assaultive" retributivist theory is seen to be a vengeance based theory of punishment.[42] The second category of "protective" retribution, focuses on the idea that society has a right to punish a criminal, and the criminal has a right to be punished.[43]

Proportional consequences for one's actions is pivotal to retributivism.[44] ". . . [t]he severity of an offense provides at least a rough indication of the magnitude of moral wrong and that a punishment proportioned to the offense, . . . can give the offender approximately what he deserves."[45] This proportionality element follows the concept of 'an eye for an eye.'[46] Justice Scalia's concurrence in *Ewing v. California* explains, "Proportionality – the notion that the punishment should fit the crime – is inherently a concept tied to the penological goal of retribution."[47]

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[38] Judith M. Barger, *Innocence Found: Retribution, Capital Punishment, and the Eighth Amendment*, 46 LOY. L.A. L. REV. 1, 14 (2012).
[39] Joshua Dressler, *Hating Criminals: How Can Something That Feels So Good Be Wrong?*, 88 MICH. L. REV. 1448, 1451 (1990).
[40] *Id*.
[41] *Id*.
[42] Barger, *supra* note 38, at 15.
[43] Dressler, *supra* note 39, at 1452.
[44] Greenawalt, *supra* note 1, at 348.
[45] *Id*. at 349
[46] *Id*. at 347-348.
[47] Ewing v. California, 538 U.S. 11, 31 (2003).

B. *Utilitarian Theory*:

Utilitarian theories of punishment rest on different first principles than retributivism, because a utilitarian is aiming to achieve future consequences through the punishment. General utilitarian principles are found as the main source of inspiration for utilitarian theories of punishment in the criminal justice system.[48] "When attempting to determine whether a punishment is justifiable, utilitarians will attempt to anticipate the likely consequences of carrying out the punishment."[49] Utilitarianism provides ways to improve an individual who has committed a crime as well as prevent society from committing similar wrongdoings which include, general deterrence, individual deterrence, incapacitation, and reform.[50]

There are two forms of deterrence which utilitarianism focuses on, general deterrence and individual deterrence. Both forms of deterrence share the common goal of preventing future crimes from being committed in society. General deterrence is where an individual in society has knowledge that a specific form of punishment will follow when committing a crime, so it deters people from partaking in that crime.[51] It helps in preventing future violations of laws and crimes being committed in society as a whole. Also, it aims to incentivize an individual to decide not to commit a crime because it would result in the same punishment as the individual who has already committed a similar crime.[52] "Seeing others punished for certain behavior can create in people a sense of association between punishment and act that may constrain them even when they are sure they will not get caught."[53]

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[48] Matthew Haist, *Deterrence in a Sea of Just Deserts: Are Utilitarian Goals Achievable in a World of Limiting Retributivism*, 99 J. CRIM. L. & CRIMINOLOGY 789, 794 (2009).
[49] Kevin Murtagh, *Punishment*, INTERNET ENCYCLOPEDIA OF PHILOSOPHY: A PEER-REVIEWED ACADEMIC RESOURCE, John Jay College of Criminal Justice: https://iep.utm.edu/punishme/
[50] Greenawalt, *supra* note 1, at 352.
[51] *Id*. at 351.
[52] *Id*.
[53] *Id*.

Next, individual deterrence differs from general deterrence because it focuses on the individual who committed the crime rather than the general public. The main premise of individual deterrence is that the punishment will impose a fear that if the wrongdoer repeats the crime or action again, then that person will be punished again for it.[54] The punishment imposed upon the individual who repeats their actions should be an attempt to scare the person from committing this action again.[55] "For the utilitarian, more severe punishment of repeat offenders is warranted partly because the first penalty has shown itself ineffective from the standpoint of individual deterrence."[56]

Another tactic implemented through utilitarianism is incapacitation. This form of punishment "prevents persons of dangerous disposition from acting upon their destructive tendencies."[57] Incapacitation is typically justified only when the authority doing the sentencing can predict an offender's risk of committing future crimes and harm.[58] Incapacitation places convicted individuals into a jail or prison away from the population for a certain period of time or for life.[59] "The threat of imprisonment therefore deters some offenders from committing crimes in the first place, while the detention of previously convicted offenders prevents them from committing further crimes by depriving them of future criminal opportunities."[60]

The last goal of utilitarianism that will be analyzed is reform or rehabilitation. The idea behind reforming a wrongdoer is that punishment has the potential to reform the person so their thoughts to commit future crimes will be lessened.[61] Reforming an individual from committing

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[54] *Id*. at 352.
[55] *Id*.
[56] *Id*.
[57] *Id*.
[58] Dressler, *supra* note 3, at 40.
[59] Greenawalt, *supra* note 1, at 352.
[60] Thomas J Miceli, *Deterrence and Incapacitation Models of Criminal Punishment: Can the Twain Meet?* 2 (Univ. of Conn. Working Paper No. 2009-25, 2009).
[61] Greenawalt, *supra* note 1, at 352.

future crimes can hopefully lead to the individual being a happier and more impactful person to society.[62] Reform or rehabilitation involves steps to improving a convicted individual's character and skillsets.[63] Ultimately, this will allow for the individual to become reacquainted with society upon release from the person's conviction.[64]

Retributivism and utilitarianism differ in several ways. A retributivist would argue that individuals who commit a crime deserves a punishment that is proportional to the crime in which they have committed.[65] Retributivists seem to take the standpoint of an individual receiving just deserts for their actions because that is what they deserve.[66] While a utilitarian theorist would want to see the individual go through a series of steps that will benefit them in the long run and prevent them from committing crime in the future.[67] This is done in a variety of ways including, either general or individual deterrence, incapacitation, and reform.[68]

C. *The Model Penal Code*:

The Model Penal Code (MPC) contains many provisions that states implement in their criminal codes, including provisions relating to the meaning and purpose of punishment.[69] The majority of states have adopted or is influenced by the MPC which divided the culpable mental state of mind into purposeful, knowing, reckless, and negligent.[70] "The Model Penal Code is not merely a criminal code, but rather extends to the law governing the infliction of punishment."[71]

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62 *Id*.
63 *Id*.
64 *Id*.
65 *Id*. at 347.
66 *Id*. at 349.
67 *Id*.
68 *Id*.
69 Shen, *supra* note 29, at 1307–1308.
70 *Id*.
71 Robinson, *supra* note 30, at 324–325.

The MPC in § 2.02(5) explains, "if a crime requires a certain mental state then a person who commits the act with a more culpable mental state is still guilty of the crime."[72]

Article 1, Section 1.02(2) of the MPC, provides the general purposes of the provisions on sentencing. Section 1.02.(2)(a) lists factors that need to be considered that affect the sentencing of a wrongdoer.[73] In subsection (i) of this section, the punishment sentence must be proportional to the severity of the offense, the harm to the victims, and the fault of the individual who did the crime.[74] This proportionality element can be seen as a reflection of the retributivism theory.[75] Further, in subsection (ii), the MPC's theory of punishment focuses on rehabilitation, general deterrence, incapacitation, restitution for the victims, preservation of families, and the reentry of the wrongdoer into society.[76] Subsection (ii) seems to embody the goals of the utilitarian theory when punishing a wrongdoer.[77]

The MPC acknowledges the importance of retributivism; however, it favors the functions and goals of utilitarianism.[78] Utilitarianism guides the MPC's administration with its overall goals and focus.[79] The MPC's punishment theory appears to present the goal of taking the offender and transitioning them into leading a lifestyle that will improve society rather than hinder it. The MPC also offers a unique blend of punishment, which focuses on rehabilitation and incapacitation.[80] "The code's policy makes good sense if one's focus is on rehabilitation and incapacitation of the dangerous – an offender may be equally dangerous whether or not his conduct in fact causes the

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72 Shen, *supra* note 29, at 1308.
73 MODEL PENAL CODE § 1.02 (2)(a) (AM. L. INST., Proposed Official Draft 1962).
74 *Id*.
75 Greenawalt, *supra* note 1, at 348.
76 MODEL PENAL CODE § 1.02 (2)(a)(ii) (AM. L. INST., Proposed Official Draft 1962).
77 Greenawalt, *supra* note 1, at 351–352.
78 Robinson, *supra* note 30, at 324–325.
79 *Id*. at 322.
80 *Id*. at 328.

harm intended or risked."[81] The MPC's approach can be seen as a hybrid approach, where it takes elements of retributivism and utilitarianism, and blends them together.[82]

II. THE PROBLEMS WITH PUNISHING THROUGH SOLITARY CONFINEMENT

Solitary confinement is a contemporary issue imposed upon the individuals who are incarcerated in the United States prison system. The practice of solitary confinement is used by detention facilities to punish offenders, even though this practice is harmful to the individual.[83] The practice is administered by prison officials overseeing a prisoner's conduct and finding that conduct to be a risk to others in the facility.[84] Prison officials can impose indefinite solitary confinement to an individual without the approval from anyone outside the walls of the prison.[85] This leaves the discretion to isolate an inmate to the correctional officers and prison officials, sometimes imposing isolation for years and even decades.[86] An individual is ordered to solitary confinement when that individual violates a rule of the facility or an order of an official.[87] An inmate can be sent to solitary confinement for violent and dangerous acts to other prisoners and officers.[88] Disruptive behavior, such as talking back, being in the wrong place, failing to go to school or work duty, or not cleaning one's housing unit may lead to an inmate being placed in solitary confinement.[89] A court may impose solitary confinement upon an individual when they

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[81] *Id*. at 329.
[82] *Id*. at 324-325
[83] Alison Gordon, *Challenging Solitary Confinement Through State Constitutions*, 90 U. CIN. L. REV. 454, 454 (2021)
[84] Marie Gottschalk, *Staying Alive: Reforming Solitary Confinement in U.S. Prisons and Jails*, 125 YALE L. J. 253, 254 (2016).
[85] David M. Shapiro, *Solitary Confinement in the Young Republic*, 133 HARV. L. REV. 542, 545 (2019).
[86] *Id*.
[87] *Id*. at 584 (citing Alison Shames, Et. Al., *Solitary Confinement: Common Misconceptions and Emerging Safe Alternatives*, Vera Institute of Justice, 10 (2015), https://www.vera.org/downloads/publications/solitary-confinement-misconceptions-safe-alternatives-report_1.pdf).
[88] *Id*.
[89] *Id*.

are convicted for a serious crime where they would have previously been sentenced to the death penalty for their acts.[90] The law of solitary confinement in the United States has developed and contains jurisprudential elements in the way courts handle the conflict between its use and the "cruel and unusual punishment" clause of the Eighth Amendment.

A. *The History of Solitary Confinement*

Solitary confinement was introduced in the United States in the late 1700s.[91] At that time, solitary confinement was used in jails where the inmates were placed in one unit and not separated by age, gender, or crime committed.[92] In 1790, Philadelphia's Walnut Street Jail was the first jail to use the practice of solitary confinement to punish their inmates.[93] The Pennsylvania Prison Society believed, "the length of solitary confinement must reflect the severity of an inmate's crime, courts and legislature should determine the duration of solitary confinement for particular offenses, prison operations require external oversight and inspection, and isolation becomes cruel and immoral when prolonged."[94] Shortly after, in the early 1800s, New York and Pennsylvania built detention facilities, such as New York's Auburn Penitentiary and Pennsylvania's Eastern State Penitentiary, to house all the individuals who were segregated to solitary confinement.[95] Initial solitary confinement rules in New York's Auburn Penitentiary restricted inmates to lay down during the day and limited communication to only the chaplain.[96] By the mid 1800s, several states

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[90] *Id*. at 546.
[91] Gordon, *supra* note 83, at 455.
[92] *Id*.
[93] *Id*.
[94] Shapiro, *supra* note 85, at 545.
[95] Gordon, *supra* note 83, at 455 (citing ANDREW SKOTNICKI, RELIGION AND THE DEVELOPMENT OF THE AMERICAN PENAL SYSTEM 6 (2000)).
[96] *Id*. at 456 (citing SCOTT CHRISTIANSON, WITH LIBERTY FOR SOME: 500 YEARS OF IMPRISONMENT IN AMERICA, 113 (1998)).

implemented the practice of solitary confinement into their prisons.[97] By the late 1890s, the Supreme Court heard its first case on solitary confinement, *In re Medley*,[98] where the Court found solitary confinement as an improper way to punish a wrongdoer.[99] During the 1970s the usage of the practice began to decline.[100] However, solitary confinement was on the rise again in the 1980s and 1990s after an incident at the United States Penitentiary in Marion, Illinois where three prison guards were attacked, leading to one guard's death.[101] The Marion Penitentiary incident lead to supermax prisons being built in the United States, consisting of only solitary confinement cells.[102]

B. *Solitary Confinement Conditions and the "Cruel and Unusual Punishment" Clause*

Solitary confinement conditions have severe effects on an inmate which raises questions about the lawfulness of its practice under the "cruel and unusual punishment" clause of the Eighth Amendment. This form of punishment leaves a prisoner alone in a cell for almost the entire day with little opportunity to receive exposure to the outside world and social interaction.[103] Inmates who are subjected to the harsh reality of solitary confinement are placed in the detention facility's Special Housing Unit or the "SHU."[104] The "SHU" is a universal tactic used by detention facilities across the country to ensure the safety of the inmate, prison officials and staff, other inmates, and

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[97] *Id*.
[98] In re Medley, 134 U.S. 160 (1890).
[99] Shapiro, *supra* note 85, at 573.
[100] *Id*. (citing Terry Allen Kupers, Solitary: The Inside Story of Supermax Isolation and How We Can Abolish It. (University of California Press 2017)).
[101] Gordon, *supra* note 83, at 456-457.
[102] *Id*. (citing D.A. Ward, et. al. Alcatraz and Marion: *Evaluating Super-Maximum Custody*, 5 PUNISHMENT & SOCIETY 53, 59 (2003)).
[103] Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J. L. & POL'Y 325, 327 (2006).
[104] Madrid v. Gomez, 889 F. Supp. 1146, 1155 (N.D. Cal. 1995).

the public.[105] In *Madrid v. Gomez*,[106] the court describes the conditions a prisoner faces while in the "SHU":

> Inmates in the SHU can go weeks, months or potentially years with little or no opportunity for normal social contact with other people. Regardless of the reason for their assignment to the SHU, all SHU inmates remain confined to their cells for 22 and a half hours of each day.[107]

Further, the *Gomez* court explains that the opportunity for inmates in solitary confinement to communicate with others is forbidden.[108] This court makes an impactful analogy when describing the life of an individual in solitary confinement: ". . . some inmates spend the time simply pacing around the edges of the pen; the image created is hauntingly similar to that of caged felines pacing at a zoo."[109]

Solitary confinement may violate the "cruel and unusual punishment" clause of the Eighth Amendment. The Eighth Amendment states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[110] The Supreme Court in *Wilson v. Seiter*[111] explains, conditions of solitary confinement may establish an Eighth Amendment violation when the condition deprives the individual with basic necessities such as food, warmth, and exercise.[112] Depending on the facility, solitary confinement cells are not temperature controlled and could have severe insect infestations.[113] One commentator explains the Supreme Court's reasoning to mean, "If a punishment is too harsh in light of longstanding prior practice, it is cruel and unusual. That the Eighth Amendment directs us to use longstanding prior practice as

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[105] U.S. DEPT. OF JUSTICE: FEDERAL BUREAU OF PRISONS, SPECIAL HOUSING UNIT, §541.20: PURPOSE (2016).
[106] Madrid v. Gomez, 889 F. Supp. 1146 (N.D. Cal. 1995).
[107] *Id.* at 1229.
[108] *Id.*
[109] *Id.*
[110] U.S. CONST. amend. VIII.
[111] Wilson v. Seiter, 501 U.S. 294 (1991).
[112] *Id.* at 304.
[113] Gordon, *supra* note 83, at 457.

the measure of a punishment's cruelty indicates that 'cruel' likely refers to the effect of the punishment, not the intent of the punisher."[114]

To determine if solitary confinement conflicts with the Eighth Amendment, courts address this issue by turning to the conditions of the confinement. The court in *Silverstein v. Fed. Bureau of Prisons*,[115] the Tenth Circuit with respect to solitary confinement explains, "[t]o be considered cruel and unusual, the conditions of confinement must: 1) be grossly disproportionate to the severity of the crime warranting punishment, 2) involve the wanton and unnecessary infliction of pain, or 3) deprive an inmate of the minimal civilized measure of life's necessities."[116] This case focuses on determining whether the plaintiff's thirty years spent in solitary confinement violates "cruel and unusual punishment" clause.[117] The Fifth Circuit in *Hope v. Harris*,[118] when addressing a challenge on the lawfulness of solitary confinement, discusses that unsanitary conditions in a prison cell can violate the "cruel and unusual punishment" clause.[119] An example of a punishment which violates the "cruel and unusual punishment" clause is seen in *Coker v. Georgia*, ". . . the death sentence is imposed on Coker is a disproportionate punishment for rape."[120] The Supreme Court's reasoning for this holding is, "Rape is without a doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life."[121]

[114] John F. Stinneford, *The Original Meaning of 'Cruel'*, 105 GEORGETOWN L. J., 441-506, 471 (2017).
[115] Silverstein v. Fed. Bureau of Prisons, 559 Fed. Appx. 739 (10th Cir. 2014).
[116] *Id*. at 753. (citing Rhodes v. Chapman, 452 U.S. 337, 346 (1981)).
[117] *Id*. at 741.
[118] Hope v. Harris, 861 Fed. Appx. 571 (5th Cir. 2021).
[119] *Id.* at 584. (citing Taylor v. Stevens, 946 F.3d 211, 219-220 (5th Cir. 2019)).
[120] Coker v. Georgia, 433 U.S. 584, 599 (1977).
[121] *Id*. at 598.

Courts also address the conflict between solitary confinement and the Eighth Amendment by looking at the mental health ramifications which arise.[122] There is a risk of mental deterioration due to the conditions of solitary confinement despite the individual's history of mental health issues.[123] Solitary confinement is cruel and unusual because it inflicts harsh consequences on an individual's existing mental condition.[124] Dating back to 1890, with the case *In Re Medley*, the Supreme Court depicted the onset of mental health issues that arises from solitary confinement.[125] In this case, after experiencing solitary confinement, inmates were not reformed, became violent, and some committed suicide.[126] The Court held that the inmate (James J. Medley) should be discharged from solitary confinement due to the conditions he faced and the mental strain he endured.[127] The Court held:

> . . . the considerations which we have here suggested show that solitary confinement to which the prisoner was subject by the statute . . . and judgment of the court . . . was an additional punishment of the most important and painful character and is therefore forbidden by the provision of the Constitution of the United States.[128]

Through this holding, the Supreme Court deemed the excessive punishment of solitary confinement as unjust and a violation of the Constitution.[129] The Supreme Court further supports its belief that solitary confinement is a potential violation of the Constitution in *Hutto v. Finney*,[130] where the Court held, "Confinement in a prison or in an isolation cell is a form of punishment subject to scrutiny under the Eighth Amendment."[131] In the 2015, the Supreme Court case of *Davis*

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[122] Christopher Logel, *Ghastly Signs and Tokens: A Constitutional Challenge to Solitary Confinement*, 56 IDAHO L. REV. 365, 377. (2021)
[123] Federica Coppola, *The brain in solitude: an (other) eighth amendment challenge to solitary confinement*, 6 J. OF LAW AND THE BIOSCIENCES 184, 217 (2019) (citing *Helling v. McKinney*, 509 U.S. 25 (1993)).
[124] Grassian, *supra* note 103, at 329.
[125] In re Medley, 134 U.S. 160, 168 (1890).
[126] *Id*.
[127] *Id*. at 175.
[128] *Id*. at 171.
[129] *Id*.
[130] Hutto v. Finney, 437 U.S. 678 (1978).
[131] *Id*. at 685 (1978).

v. Ayala,[132] the dissent mentions that Justices Breyer, Ginsburg, and Sotomayor all agree that they are uncomfortable with the contemporary punishment practice of solitary confinement.[133]

Circuit courts have also ruled on the issue of solitary confinement and its effects on inmates, while upholding the principles laid out by the Supreme Court. In the Fourth Circuit case of *Porter v. Clarke*,[134] the court explains that several other courts from around the country have deemed solitary confinement violates the Eighth Amendment because the conditions impose an objective risk of mental and emotional harm to the individuals in isolation.[135] The *Porter* court agrees with the district court's holding that the plaintiff faced a "substantial risk" of harm from being punished by solitary confinement because it is in violation of the Eighth Amendment.[136] In the Third Circuit case *Porter v. Pa. Dep't of Corr.*,[137] the court upheld the practice provided by the Supreme Court regarding solitary confinement and the Eighth Amendment, when explaining that the plaintiff's Eighth Amendment right was violated due to his more than thirty years of isolation in solitary confinement, causing him serious health issues.[138] In *Quintanilla v. Bryson*,[139] the Eleventh Circuit held that constant exposure to unhygienic conditions for one year is a violation of the Eighth Amendment because it disregards an individual's basic human need for hygiene.[140]

C. *Legislative Intent in Addressing Solitary Confinement*

Legislatures across the country have drafted proposals and implemented regulations on the issue of solitary confinement. Over the past several years, the topic of solitary confinement has

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[132] Davis v. Ayala, 576 U.S. 257 (2015).
[133] *Id*. at 290.
[134] Porter v. Clarke, 923 F.3d 348 (4th Cir. 2019).
[135] *Id*. at 357.
[136] *Id*.at 364.
[137] Porter v. Pa. Dep't of Corr., 974 F.3d 431(3d. Cir. 2020).
[138] *Id*. at 447.
[139] Quintanilla v. Bryson, 730 Fed. Appx. 738(11th Cir. 2018).
[140] *Id*. at 747.

been at the forefront of judicial attention, legislative reform, and policy change in America.[141] Legislatures have proposed reform bills and various regulations on the issue of solitary confinement.[142] An example of a legislative response to reforming and addressing the issue of solitary confinement is seen with the Maine Department of Corrections when it implemented policies to reduce the number of individuals sent to solitary confinement, shortened the time spent, improved the conditions, gave inmates more access to care and service for mental health, and allowed the opportunity for inmates to be released from solitary confinement.[143] While solitary confinement may still be permissible, "[s]everal states including Colorado, Massachusetts, Nebraska, and New York passed legislation preventing the isolation of prisoners with mental illness."[144] New York also removed specific groups from the isolation that comes from solitary confinement, including the youth, women who are pregnant, and individuals who have developmental disabilities.[145] The state of New Jersey, in 2019, had its own legislative response to solitary confinement, where the state restricted the use of a long-term sentence of solitary confinement as well as abandoned the usage of solitary confinement on vulnerable groups of individuals.[146] Due to the cruel and unusual punishment brought about by the conditions of solitary confinement, state legislatures are taking steps in the right direction by creating limits and restrictions to the harsh and unjust punishment of solitary confinement.

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[141] MARGO SCHLANGER, ET. AL., INCARCERATION AND THE LAW: CASES AND MATERIALS*,* 187, (West Academic Publishing, 10th ed., 2020).
[142] Jessica Lee, *Lonely Too Long: Redefining and Reforming Juvenile Solitary Confinement*, 85 FORDHAM L. REV. 845, 862 (2016).
[143] Zachary Heiden, *Change Is Possible: A Case Study Of Solitary Confinement Reform In Maine*, Am. Civ. Liberties Union of Me., 1-37, 12-13 (2013).
[144] Schlanger, *supra* note 141*,* at 215; (quoting Brief of Corrections Directors and Experts as Amici Curiae in Support of Plaintiff-Appellant, *Porter v. Pennsylvania Department of Corrections* (3d. Cir. 2019) (No. 18-3505)).
[145] *Id*. at 218.
[146] State of New Jersey Governor Phil Murphy, *Governor Murphy Signs Legislation to Restrict the Use of Isolated Confinement in New Jersey's Correctional Facilities*, (2019), https://www.nj.gov/governor/news/news/562019/20190711b.shtml

III. PLATONIC, THOMISTIC, AND LOCKEAN APPROACHES TO PUNISHMENT

Philosophical and legal thinkers such as Plato, Thomas Aquinas, and John Locke have each provided their own theories of punishment. These figures do not follow the true implementation of existing punishment theories, rather they provide their own interpretation on what it means to be justly punished. As noted, retributivism, utilitarianism, and the MPC all have led the way for punishment theories. However, Plato, Aquinas, and Locke with their theories seemingly create their own version and ideology of punishment theory, which can be seen resembling aspects of retributivism and utilitarianism. For Plato's theory of punishment, he adopts a unique form of utilitarianism where his focus is on restitution for the injured party, rehabilitation for the criminal, and general deterrence.[147] Aquinas adopts a hybrid retributivist theory with his main premise surrounding just deserts for the wrongdoer, which should be proportional to the crime committed.[148] Aquinas also endorses deterrence in his theory as a secondary function.[149] Locke fully rejects the ideology behind retributivism, embracing his own version of utilitarianism and is focused on individual and general deterrence.[150]

A. *Plato's Theory of Punishment*

Plato's theory of punishment can be seen taking the form of a unique perspective on utilitarianism because he focuses on rehabilitation and general deterrence, as well as his interpretation of restitution.[151] Plato held there are elements that need to be met in order to properly

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[147] PLATO, THE LAWS, 933e6 – 934a1, (trans. T.L. Pangle, The Univ. of Chicago Press, 1st ed., 1988).
[148] PETER KARL KORITANSKY, THOMAS AQUINAS AND THE PHILOSOPHY OF PUNISHMENT, 105, (Catholic Univ. of Am. Press, 2006).
[149] *Id*. at 107.
[150] Alex Tuckness, *Retribution and Restitution in Locke's Theory of Punishment*, 72 THE J. OF POL. 720, 721 (2010).
[151] Plato, *supra* note 147, at 933e6 – 934a1.

punish a criminal.[152] Those elements include, ". . . a baseline amount that proportionally compensates the victim and an additional penalty that, first, reforms the criminal and, second, deters others from becoming unjust."[153] Through Plato's theory, there are glimpses of restitution for the victim, rehabilitation for the wrongdoer and general deterrence for the individuals in the public so that they do not take part in similar acts of the offender:

> With regard to the ways in which one person may harm another by theft or violence, if the harm be greater, he is to pay a greater indemnity to the one harmed, and if it be lesser, he is to pay a smaller penalty, but above all the person is to pay each time an amount sufficient to cure the injury. In addition, each must pay the judicial penalty attached to each evil deed for the sake of instilling moderation. . .[154]

Through Plato's *Laws*, he focuses on reimbursing the victim to fix the harm done by the wrongdoer.[155] When Plato discusses reform, he found that there are no restrictions on how it can be achieved.[156] By embracing this understanding, Plato allows for there to be discretion by the authoritative figure to impose the most effective means of achieving reform.[157] His understanding of reform allows actions to be imposed upon a wrongdoer by an authoritative figure in two ways: infliction of pain or bestowing pleasure.[158] By allowing the criminals to have access to the aspects in life that are pleasurable to them, Plato's sees this as the most effective way to accomplish reformation because it will improve their character.[159] Reformation resembles a utilitarian focus on rehabilitation. Further support that Plato follows a utilitarianist approach to punishment is not only seen in his theory of reform, but also through deterrence.[160] In Plato's *Laws*, the punishment

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[152] Matthew Adams, *Plato's Theory of Punishment and Penal Code in the Laws*, 97 AUSTRALASIAN J. OF PHIL. 1, 1 (2019).
[153] *Id*.
[154] Plato, *supra* note 147, at. 933e6 – 934a1.
[155] *Id*.
[156] Adams, *supra* note 152, at 4.
[157] *Id*.
[158] *Id*.
[159] *Id*.
[160] *Id*. (". . . Plato seems to be talking about the deterrence effect that the punishment of the criminal should have on the general population.")

he describes for slaves was a harsh form of corporal punishment and for citizens was fines, loss of civil rights, or even exile.[161] In *Laws*, this perspective on punishment to cause an infliction of some form of pain upon the criminal, will help to cure the individual's character with the hopes of them not committing a similar act.[162] Imposing exile on a wrongdoer in the form of solitary confinement could fit in Plato's interpretation of punishment.[163]

B. *Thomas Aquinas's Theory of Punishment*

Thomas Aquinas's theory of punishment follows a retributivist framework; however, he does not comport to the beliefs of a fully retributivist theorist.[164] Aquinas is known as one of the great historical figures from the thirteenth-century. He was born around the year 1225, near Aquino which is near Rome and Naples.[165] He wrote two of his most influential works while in Italy, including *Summa Contra Gentiles* and *Summa Theologiae*.[166] Also, he believed there are four internal senses that every human being embodies including, common sense, imagination, estimative or cogitative power, and memory.[167] "Aquinas thinks that a great deal of complex cognition occurs within the internal senses of the brain, but that those material powers are incapable of abstract thought."[168]

In Aquinas's *Summa Theologiae*, he provides his definition and understanding of the meaning of law: "The definition of law may be gathered; and it is nothing else than an ordinance of reason for the common good, made by him who has care of the community, and

[161] R.F. Stalley, *Punishment in Plato's "Laws,"* 16 HIST. OF POL. THOUGHT 469, 470 (1995).
[162] *Id.*
[163] *Id.*
[164] Koritansky, *supra* note 148, at 105.
[165] Robert Pasnau, *Thomas Aquinas*, THE STANFORD ENCYCLOPEDIA OF PHIL., (Edward N. Zalta & Uri Nodelman ed., 2023). https://plato.stanford.edu/archives/spr2023/entries/aquinas/.
[166] *Id.*
[167] *Id.*
[168] *Id.*

promulgated."[169] Based on a plain reading of Aquinas's definition, it appears that he would follow a utilitarian theory of punishment because he focuses on the "common good" and "care of the community." However, Aquinas embraces a unique retributivist theory.[170] "Without making the criminal suffer something 'contrary to what he would wish,' it is impossible to achieve the 'restoration of the equality of justice.' This remark shows us that Aquinas endorses a retributive theory of punishment of a kind."[171] Through this unique form of retributivism that Aquinas follows, he would want to see just deserts for wrongdoers as a response to their actions. Aquinas's understanding of just desert is:

> Not simply determined by the passions that those around him happen to harbor. In fact, those passions themselves are judged according to a higher standard. . . . Aquinas only suggests that the natural inclination to punish is determined according to something higher than by a mere consolation of emotions.[172]

Further, Aquinas' theory can be seen taking inspiration from restorative retributivism because he agrees punishment is both good and bad when going against the individual's will to restore order.[173]

Aquinas's definition of law informs his perspective on punishment. "Thomas Aquinas himself made arguments for the physical punishment of heretics, even with the infliction of the death penalty, and his own Order of Preachers was instrumental in the execution of the Spanish Inquisition, one of the darkest moments in the history of Christianity."[174] Aquinas would agree with physical punishment as a means of desert in the same sense that a retributivist would;

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[169] ST. THOMAS AQUINAS, SUMMA THEOLOGIAE, pt. I of pt. II, question 90, art 4 (Father of the English Dominican Province trans., Benziger Bros. ed. 1947).
[170] Koritansky, *supra* note 148, at 105.
[171] *Id*.
[172] Peter Karl Koritansky, *Two Theories of Retributive Punishment: Immanuel Kant and Thomas Aquinas*, 22 HIST. PHIL. Q. 319, 328-329 (2005).
[173] Brian M. Murray, *Restorative Retributivism*, 75 U. MIAMI L. REV. 855, 882 (2021). (Citing ST. THOMAS AQUINAS, SUMMA THEOLOGIAE, pt. I of pt. II, question 48, art 5 (Father of the English Dominican Province trans., Benziger Bros. ed. 1947).
[174] Koritansky, *supra* note 148, at 4.

however, his understanding of punishment does not completely mesh with a fully retributivist theorist.[175] A fully retributivist theorist, such as Immanuel Kant, understands punishment to protect criminals by recommending their punishment be no less or no more than what the criminal deserves.[176] Kant's perspective on punishment subscribes to the idea that a failure to punish a criminal who deserves it will leave guilt upon society.[177] Further, Kant is a harm-centric retributivist who sees punishment as a way to harm the wrongdoer in a similar fashion to the harm which the wrongdoer placed upon the victim.[178] Aquinas is not a harm-centric retributivist, rather he is a person-centric retributivist who seeks the common good and considers harm as an element of punishment.[179] Aquinas does not follow the usual retributivist theory that calls for a punishment to embrace the same kind of harm that the individual caused during the course of their actions.[180] He explains in *Summa Theologiae* that "[t]he punishment that is inflicted according to human laws, is not always intended as a medicine for the one who is punished, but sometimes only for others . . . that at least they may be deterred from crime through fear of punishment."[181] However, despite his efforts in his theory of punishment to deter individuals from future crime, he does not mean to embrace utilitarianism.[182] Through Aquinas's endorsement of a unique retributivist, his main focus is on desert, but deterrence as a secondary goal of punishment can reflect that of a utilitarian.[183]

"Evil" is the crux of Aquinas's theory of punishment.[184] ". . . Aquinas argues that punishment is a kind of evil. In fact, all evils that pertain to rational creatures must fall into one of

[175] *Id*. at 105.
[176] Koritansky, *supra* note 172, at 322.
[177] Greenawalt, *supra* note 1, at 347.
[178] HEATHER WILBURN, PHILOSOPHICAL THOUGHT: ACROSS CULTURES AND THROUGH THE AGES, Ch. 4 (Heather Wilburn & Jamie Homes 4th ed. 2022).
[179] Koritansky, *supra* note 172, at 325-326.
[180] Koritansky, *supra* note 148, at 105.
[181] Aquinas, *supra* note 169, at I of pt. II, question 97.3, art 2. Koritansky *supra* note 149, at 107.
[182] Koritansky, *supra* note 148, at 107.
[183] *Id*. at 105.
[184] *Id*. at 103.

two categories: punishment or fault."[185] As Aquinas sees it, there is a direct correlation between the ideology of evil and the punishment an individual receives for their acts. Aquinas, in *Summa Theologiae*, explains what leads to evil:

> In the action evil is caused by reason of the defect of some principle of action, either of principal or the instrumental agent; thus, the defect in the movement of an animal may happen by reason of the weakness of the motive power. . . . On the other hand, evil is caused in a thing, but not in the proper effect of the agent, sometimes by the power of the agent, sometimes by reason of a defect, either of the agent or of the matter.[186]

Aquinas believes that punishment is a form of evil which is created by a "defect" in the actions of the individual.[187] A "defect" as Aquinas explains can be a moment of "weakness" in the individual's thought, which will ultimately lead them to participate in an action that is a hinderance to either themselves or another's rights.[188]

Furthermore, "[b]ecause all evil consists in the privation of some good,"[189] Aquinas understands punishment to include all instances where rational creatures suffer harm of any kind. This would not only include the infliction of punishment by a court of justice, but all other so-called natural evils such as disease and physical disability."[190] Aquinas recognizes that punishment comes in many forms including the sentence or ruling imposed upon an individual in the court system.[191] He also recognizes that punishment can affect an individual in a more natural sense through the diseases or disabilities that impacts a person's livelihood.[192] Aquinas's theory of punishment has a focus on the harm a person suffers.[193] With his theory, he agrees with

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[185] *Id.*
[186] Aquinas, *supra* note 169, at I of pt. II, question 49, art 1.
[187] *Id.*
[188] *Id.*
[189] Koritansky, *supra* note 148, at 104.
[190] *Id.*
[191] *Id.*
[192] *Id.*
[193] *Id.*

Augustine's perspective, who explains that "fault is the evil we do, but punishment is the evil we suffer."[194] When justice is served as related to the harm an individual suffers, "Aquinas insists that although a man might be punished for someone else's crime, he must have some kind of relation to the guilty party which explains that he, rather than some other individuals, gets punished."[195]

Since Aquinas's theory of punishment has a focus on desert, both the degree of culpability as well as proportionality are vital to his theory. Regarding the crime of murder, Aquinas includes in his *Summa Theologiae* that killing another human is justifiable when it is done to preserve the common good.[196] Aquinas states, "Therefore if a man be dangerous and infectious to the community, on account of some sin, it is praiseworthy and advantageous that he be killed in order to safeguard the common good. . ."[197] Aquinas would agree with corporal punishment if a wrongdoer's crime is heinous enough to justify their death because the wrongdoer is culpable for their actions.[198] Aquinas also believes the criminal's punishment should be proportional to the crime they committed. For example, Aquinas includes that an individual who commits a murder may be exiled, incarcerated, or sentenced to death.[199] Aquinas thinks imprisonment is unlawful unless it done to seek justice through punishment or as a precaution against evil.[200]

C. *John Locke's Theory of Punishment*

John Locke's theory of punishment takes a unique form of utilitarianism, where he has a focus on the deterrence of similar wrongful acts and restitution for the victim.[201] Locke was born

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[194] Koritansky, *supra* note 148, at 104. (*Citing On Evil*, Q. 1, a. 4; Cf. Augustine, *On Free Choice*, book 1, chap. 1.)
[195] Stephanie Gregoire, *Punishment: Aquinas and the Classic Debate*, 86 ANGELICUM. 375, 381 (2009).
[196] Koritansky, *supra* note 148, at 138.
[197] Aquinas, *supra* note 169, at II of pt. II, question 64, art 2.
[198] Koritansky, *supra* note 148, at 138.
[199] *Id*. at 141.
[200] Aquinas, *supra* note 169, at pt. II of pt. II, question 65, art 3.
[201] Tuckness, *supra* note 150, at 720.

in 1632 in Wrington, and through his works became one of the most influential philosophers in Europe of the seventeenth century.[202] Locke has an illustrious catalogue of written work including, *Some Thoughts Concerning Education*, *Conduct of the Understanding*, and *The Two Treatises of Government*.[203] Locke was an advocate for education as he found it pivotal to a child's development.[204] "In advocating a kind of education that made people who think for themselves, Locke was preparing people to effectively make decisions in their own lives – to engage in individual self-government – and to participate in the government of their country."[205]

Locke's theory of punishment requires that there be a law in place and allows for an individual to punish another for that person's wrongdoing.[206] "Locke's theory of punishment initially appears to be a confused combination of retributive considerations that base punishment on desert and forward-looking considerations that base punishment on future benefits."[207] Locke does not adopt a retributivist theorist model in his punishment theory. "The purpose of punishment in the state of nature is, therefore, mutual protection through deterrence of similar criminal conduct."[208] His theory can fit within the utilitarian justification because he is interested in the deterrence of future crimes.[209]

Through Locke's theory, he introduces two grounds that punishment needs to accomplish, including the protection of society or deterrence as well as restitution or "reparation".[210] "It was in

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[202] William Uzgalis, *John Locke*, THE STANFORD ENCYCLOPEDIA OF PHIL. (Edward N. Zalta & Uri Nodelman ed., 2022), https://plato.stanford.edu/archives/fall2022/entries/locke/
[203] *Id*.
[204] *Id*.
[205] *Id*.
[206] Alex Tuckness, *Locke's Political Philosophy*, THE STANFORD ENCYCLOPEDIA OF PHIL. (Edward N. Zalta ed., 2020), https://plato.stanford.edu/archives/win2020/entries/locke-political/
[207] Tuckness, *supra* note 150, at 720.
[208] Matthew K. Suess, *Punishment in the State of Nature: John Locke and Criminal Punishment in the United States of America*, 7 WASH. U. J. REV. 367, 379 (2015).
[209] *Id*.
[210] Tuckness, *supra* note 150, at 721.

Two Treatises of Government that Locke described his state of nature."[211] In his *Two Treatises of Government*, he explains:

> . . . in the state of Nature, one man comes by a power over another, but yet no absolute or arbitrary power to use a criminal, when he has got him in his hands, according to the passionate heats or boundless extravagancy of his own will, but only to retribute to him so far as calm reason and conscience dictate, what is proportionate to his transgression, which is so much as may serve for reparation and restraint. For these two are the only reasons why one man may lawfully do harm to another, which is that we call punishment.[212]

While there is the use of the term "retribute," Locke's beliefs do not align to a typical retributivist theorist argument for punishment. Locke does not mention that an individual should receive a punishment because that person deserves it based upon their prior actions. "Locke's occasional use of words that to a modern reader signal the presence of a retributive theory actually show commonalities between him and earlier seventeenth-century thinkers who occasionally used such language while clearly rejecting retributive theories."[213] Locke's predecessors disagreed with various parts of punishment and retributivism.[214] Individual's such as Thomas Hobbes and Samuel Pufendorf rejected the theory of retributivism.[215] This is pivotal to Locke's perspective on punishment because he was greatly inspired and influenced by Pufendorf when drafting his *Two Treatises of Government*.[216] As such, Locke fully rejects retributivism.[217] Locke's goal in formulating his theory of punishment is the protection of society through deterrence.[218] Locke in his *Two Treatises of Government* explains when punishing an individual, where that individual violates a law or takes part in a wrongdoing, may have evil brought upon him in a form of

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[211] Suess *supra* note 208, at 372.
[212] JOHN LOCKE, TWO TREATIES OF GOVERNMENT §2.8 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).
[213] Tuckness, *supra* note 150, at 721.
[214] *Id.*
[215] *Id.*
[216] *Id.*
[217] *Id.*
[218] *Id.* at 723.

punishment to deter him from doing it again and use him as an example for others.[219] The second goal of Locke's theory is restitution, which differs from a utilitarian theory of punishment. "Restitution as a ground of punishment is different in that the restoration of the conditions that existed before the rights violation occurred constitutes a distinct reason for punishing."[220]

IV. <u>APPLYING PLATONIC, THOMISTIC, AND LOCKEAN THEORIES OF PUNISHMENT TO SOLITARY CONFINEMENT</u>

Applying the principles discussed in Part III yields some interesting questions when it comes to the contemporary practice and law associated with solitary confinement. These principles simultaneously resemble and diverge from some of the law surrounding the practice of solitary confinement. For example, Aquinas's principles, with a modified form of retributivism, might permit solitary confinement but in very rare situations. Alternatively, Plato and Locke both have their own spin on utilitarian ideology. Plato's unique form of utilitarianism can be seen to embrace the punishment of solitary confinement because it is a way of deterring and rehabilitating an individual. Locke's modified utilitarianism also focuses on deterrence; however, Locke would reject the implementation of solitary confinement. These figures each provide an evaluative metric in evaluating solitary confinement. The principles that have been illustrated in Part III discuss the premises and issues raised in Part II, which will be discovered and applied in this Part.

A. <u>*Plato*</u>

Plato's theory of punishment resembles utilitarian thinking with his emphasis on reimbursing the victim for the harm they suffered, the creation of general deterrence, and

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[219] Locke, *supra* note 212.
[220] Tuckness, *supra* note 150, at 728.

reformation of the wrongdoer.[221] Plato is of the belief that, ". . . it is permissible to impose the action (whatever it may be) that is the most effective means of achieving reform."[222] According to Plato, the most effective strategy is to reform an individual who committed a crime is restitution.[223] Plato further believes that any effective way to reform an individual who committed a crime includes non-painful means.[224] These "non-painful means" treat the criminal's injustice by honoring, granting pleasure, and proving moral education for the individual's act.[225] This will not deter other people from committing unjust acts; however, it might be the best way of reforming a particular individual.[226] Plato's theory of punishment's focal point rests on reforming the criminal from making future crimes.[227] Reforming an individual in the eyes of Plato is done through restitution or deterrence.[228] This strategy of providing non-painful means of punishment through restitution plays a vital role in criminal punishment in the United States' courts.[229] The United States Supreme Court can be seen adopting this punishment tactic of restitution in Justice Kennedy's *Paroline v. United States*[230] opinion, where the majority awarded restitution for the victim in a child pornography suit.[231] The Court awarded restitution because the Justices understand that restitution for the victim is effective to reform the defendant in confronting their wrongful acts, and the harm which their actions have caused the victim.[232] This sort of thinking is arguable but it is not sufficient to support all Eighth Amendment challenges on the issue of solitary

[221] Adams, *supra* note 152, at 1.
[222] *Id*. at 4.
[223] *Id*.
[224] *Id*. at 5.
[225] *Id*. at 4-5.
[226] *Id*.
[227] *Id*. at 1.
[228] *Id*. at 4.
[229] Cortney E. Lollar, *What is Criminal Restitution?*, 100 IOWA L. REV. 93, 94 (2014).
[230] Paroline v. United States, 572, U.S. 434 (2014).
[231] *Id*. at 457.
[232] *Id*. at 458. (Citing Kelly v. Robinson, 479 U.S. 36, 49 (1986).

confinement. This raises the question, does placing the wrongdoer in solitary confinement compensate the wrongdoer for their actions or compensate the victim? Solitary confinement may not monetarily compensate the victim; however, it will provide the victim with peace of mind that the wrongdoer is receiving just deserts. Also, solitary confinement can compensate the wrongdoer by deterring them from committing the same act again, allowing for the reformation of the wrongdoers, which is consistent with Plato's theory.

Next, Plato's theory of punishment can be applied to the usage of solitary confinement as a means of reforming the individual from participating in the same crime again. Plato can be read to have the understanding that confinement is a punishment that is successfully used to reform a criminal.[233] "Plato's theory of incarceration is part of his general justification for punishment, the basic tenets of which can be summed up by two Socratic paradoxes: that 'it is better to be punished justly than to escape punishment' (because 'being punished is being improved') and that 'no one does wrong willingly.'"[234] Plato would agree that punishment is necessary to implement in the criminal justice system because it will provide an opportunity for the individual to be "improved."[235] Solitary confinement through the lens of Plato is a just way to punish an individual. His ideology on confinement as a whole is that it is a reasonable tactic of psychic reform which was implemented in the theory of imprisonment until the eighteenth century when state prisons were introduced.[236]

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[233] Jacob Abolafia, *Plato's Theory of Incarceration*, 50 RAMUS. 68, 69-70 (2021).
[234] *Id*. (citing *Gorgias*. 480a-b, 509e.)
[235] *Id*.
[236] *Id*. at 69.

B. *Thomas Aquinas*

Thomas Aquinas's theory of punishment takes on a unique form of retributivism. Aquinas agrees with some of the beliefs of a typical retributivist, and he also disagrees with some of the beliefs a full retributivist would implement.[237] As previously noted, a retributivist believes an individual should be punished for their crimes because they deserve it.[238] With this in mind, it would appear that Aquinas may agree to some extent with the modern use of solitary confinement. Aquinas believes that "it is fitting that such faults are answered by punishments that inflict something upon the criminal that is contrary to his overindulgent will. Without making the criminal suffer something 'contrary to what he would wish,' it is impossible to achieve the 'restoration of the equality of justice.'"[239] Aquinas believes to reform the individual it is important to inflict a punishment that goes against his will.[240] Therefore, nothing in Aquinas's principles would refute the implementation of solitary confinement as a means of punishing a wrongdoer.

Next, viewing solitary confinement as a means of vengeance, Aquinas would agree with its implementation. A key component that is attributed to Aquinas's punishment is the presence of "evil". In his *Summa Theologiae*, he explains:

> Vengeance consists in the infliction of a penal evil on one who has sinned. . . . If, however, the avenger's intention be directed chiefly to some good, to be obtained by means of punishment of the person who has sinned, then vengeance may be lawful, provided other due circumstances be observed.[241]

Vengeance is an obvious occurring fact found within punishment.[242] However, vengeance is not a characteristic used for punishments implementation. The law on solitary confinement and

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[237] Koritansky, *supra* note 148, at 105.
[238] Greenawalt, *supra* note 1, at 350.
[239] Koritansky, *supra* note 148, at 104.
[240] *Id*.
[241] Aquinas, *supra* note 169, at pt. I of. II, question 108, art. 1.
[242] Arnold D. Margolin, *Elements of Vengeance in Punishment*, The, 24 AM. INST. CRIM. & CRIMINOLOGY 755, 757 (1933).

vengeance may have similarities through the lens of Aquinas because both solitary confinement and vengeance are the byproduct of wrongdoing. Also, with respect to vengeance, Aquinas would seemingly agree solitary confinement is a wise way of reforming an inmate who has "sinned" or committed a crime. Further in *Summa Theologiae*, "As Aquinas argues, 'someone is properly said to be punished when he suffers evil for some act he has committed.'"[243] If an inmate suffers through the harsh conditions and isolation of solitary confinement for the crime that they committed, then they have been properly punished in the eyes of Aquinas.

This raises the question should the Supreme Court and other courts take into consideration the presence of Aquinas's theory when considering solitary confinement and the Eighth Amendment? Justice Clarence Thomas of the United States Supreme Court could be seen taking into account Aquinas's theory due to his "rigid interpretation of the Amendment."[244] Justice Thomas believes that any form of prisoner abuse does not constitute as a violation of the "cruel and unusual punishment" clause.[245] In his dissent in *Hudson v. McMillian*,[246] Justice Thomas explains, "In my view, a use of force that causes only insignificant harm to a prisoner may be immoral, it may be tortious, it may be criminal, and it may even be remediable under other provisions of the Federal Constitution, but it is not 'cruel and unusual punishment.'"[247] While the usage of solitary confinement in the eyes of Justice Thomas may include some 'criminal' aspects, it is not subjected to the "cruel and unusual punishment" standard as he sees it. This is similar to Aquinas's view that punishment includes some form of "evil" or "criminal" act; however, it does not exceed the bounds to which constitutes "cruel and unusual punishment." Justice Thomas

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[243] Koritansky, *supra* note 148, at 106. (Citing *Summa Theologiae*. Q. 108, art. 3).
[244] Graham v. Florida, 560 U.S. 48, 85 (2010).
[245] James Ridgeway and Jean Casella, *Cruel Punishment is Not Unusual for Clarence Thomas*, SOLITARY WATCH, (2010) https://solitarywatch.org/2010/03/12/cruel-punishment-is-the-usual-for-clarence-thomas/
[246] Hudson v. McMillian, 503 U.S. 1 (1992).
[247] *Id*. at 18.

explains in his dissent, in order for a prisoner to establish a "cruel and unusual punishment" claim, that prisoner must have suffered a serious injury.[248] Justice Thomas could be seen adopting a Thomistic view on punishment because there are consistencies in Aquinas and Justice Thomas's view in that they want to see proof that the criminal has suffered from their punishment.[249] Therefore, Aquinas's theory of punishment can help courts decide issues regarding the lawfulness of solitary confinement as a just means of punishment.

C. *John Locke*

Locke's focus on deterrence of future crimes as well as restitution could benefit the Supreme Court and lower courts when considering the practice of solitary confinement.[250] Locke might suggest that deterrence should be a primary question and concern which courts should place at the forefront of solitary confinement issues. Locke believes that the main purpose of the government is to protect the inherent rights of the people, including life, health, liberty, and property.[251] "The State of Nature has a Law of Nature to govern it, which obliges every one: And Reason, which is that Law, teaches all Mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his Life, Health, Liberty, or Possessions."[252] As a libertarian, Locke enforces liberty and would reject the use of unnecessary solitary confinement. However, Locke may take the stance of embracing solitary confinement if it can benefit public safety. Locke further understands punishment as being a proponent to public safety.[253] Locke in his *Two Treatises of Government* explains, when a criminal violates the bounds of public safety

[248] *Id*. at 29.
[249] Koritansky, *supra* note 148, at 105. *Hudson v. McMillian*, 503 U.S. 1, 29 (1992).
[250] Suess, *supra* note 208, at 379.
[251] Suess, *supra* note 208, at 374.
[252] Locke, *supra* note 212, at §2.6.
[253] *Id*. at §2.8.

and peace, he may be used as an example to deter others from taking part in a similar act as well as deter the criminal.[254] Locke could see solitary confinement as a way to protect public safety from individuals who have taken part in prior crimes because it will deter the wrongdoer from committing the same act. General deterrence will protect public safety because the goal is that making an example out of the wrongdoer will allow for the people of society to not participate in the same act. By looking to public safety, Locke can inform the courts how to think about the ways in which solitary confinement can be justified. A primary justification from Locke's theory of punishment helps preserve human life and property, with a focal point on public safety and deterrence.[255]

Furthermore, Locke's theory is concerned with not using excessive force when deterring an individual from committing future crimes.[256] An argument which Locke makes is that each crime should receive a punishment to the degree and severity which provides the offender with an opportunity to feel remorse as well as scare others from taking part in the same or similar act.[257] Based on Locke's *Two Treatises of Government* and his theory of punishment, he believes that everyone has the right to punish another for their crimes until that wrongdoer has been punished to a certain point.[258] Locke in *Two Treatises of Government*, explains:

> Besides the crime which consists in violating the laws, and varying from the right to rule of reason, whereby a man so far becomes degenerate, and declares himself to quit the principles of human nature and to be a noxious creature, there is commonly injury done, and some person or other, some other man, receives damage by his transgression; in which case, he who hath received any damage has (besides the right of punishment common to him, with other men) a particular right to seek reparation from him that hath done it.[259]

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[254] *Id.*
[255] Tuckness, *supra* note 206.
[256] Suess, *supra* note 208, at 380.
[257] *Id.* at 389. (Citing John Locke, Two Treatises of Government at 105 (Ian Shapiro ed., Yale University Press 2003)(1689)).
[258] Suess, *supra* note 208, at 380. citing Daniel M. Farrell, *Punishment Without The State*, Noûs Vol. 22, No. 3, 437, 439 (1988).
[259] Locke *supra* note 212, at §2.10.

The court system does have a right to punish an individual for their crimes with the hopes that the punishment will deter the individual from future criminal acts.[260] However, there is a certain point where punishment becomes excessive.[261] Locke would likely agree that the isolation and conditions an inmate goes through in solitary confinement reaches that threshold of being "punished to a certain point."[262] According to Locke, it may be beneficial to punish a wrongdoer by "focusing punishment on deterrence theory, the decriminalization of victimless crime, greater individualization in punishment by minimizing plea bargaining. . ., and focusing on reintegrating convicted individuals into the community. . . ."[263]

Locke's theory of punishment when applied to the lawfulness of solitary confinement raises questions about the practice of the Supreme Court. Locke's theory offers the question, should deterrence be at the forefront of the Supreme Court's ruling when considering the usage of solitary confinement? The answer to this question is yes, and the Supreme Court already holds deterrence as a pivotal aspect of all forms of sentencing including solitary confinement. The Supreme Court in *Dean v. United States*[264] identifies four key purposes from the United States Criminal Code Sentencing Guidelines that courts take into account when assessing the sentence of an individual: fair punishment, deterrence, protection of the public, and rehabilitation.[265] The Supreme Court's practice of including deterrence in their rationale behind what serves as the best form of punishment for an individual is seen as embracing Locke's theory, whether they intended

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[260] Suess, *supra* note 208, at 380.
[261] *Id.*
[262] *Id.*
[263] *Id.* at 389.
[264] Dean v. United States, 581 U.S. 62 (2017).
[265] *Id.* at 67.

to or not. Therefore, Locke is another authority who offers a theory on punishment which can be applied to solitary confinement and should be taken into account by the courts.

Conclusion

Solitary confinement is a contemporary problem in the United States criminal justice system, which could benefit from being evaluated under the various thoughts of Plato, Thomas Aquinas, and John Locke. The punishment theories of retributivism, utilitarianism, and the MPC are vitally important to Platonic, Thomistic, and Lockean theories of punishment. Plato's unique perspective on utilitarianism can be implemented into the court system because of his focus on deterrence and restitution. Plato's view on incarceration reveals that he might have agreed with solitary confinement as a form of punishment. Thomas Aquinas's retributivist theory is one which can be compared to the perspective of Justice Thomas on the issue of solitary confinement and the Eighth Amendment. Finally, Locke's theory of utilitarianism places deterrence at the forefront of a solitary confinement issue, with a major emphasis on public safety. These three jurisprudential thinker's theories of punishment can be useful to help guide courts when deciding solitary confinement issues.