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Severing Solitary: Reforming Inmate Isolation in Consideration of Prison Realities and the Eighth and Fourteenth Amendments

Harrison R. Kusnierz

Introduction

Despite its controversial history and implementation, solitary confinement remains a critical part of prison life for many of the 1.2 million individuals incarcerated in U.S. federal and state prisons.[1] Indeed, of the 143,698 inmates in custody by the Federal Bureau of Prisons (BOP) in November 2023, nearly 11,000 are housed in Special Housing Units (SHUs), a form of restricted and segregated housing.[2] Although the term "solitary confinement" is frequently used in public discourse,[3] the actual practice of isolating an inmate in a single cell for twenty-two to twenty-four hours per day, separate from the general prison population, is far more nuanced than it seems on its face.[4] Inmate isolation can generally be sorted into two categories, depending on the reason for the placement, including (1) disciplinary segregation, and (2) administrative segregation.[5] While the former refers to the situation where an inmate is temporarily removed from the general population as punishment for misconduct while in prison, the latter is applied based on the perceived risk that the prisoner poses to themself or others and more often involves many years, even decades, of grueling isolation.[6] To be sure, inmates can and often do spend

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[1] E. Ann Carson, *Prisoners in 2021 — Statistical Tables*, BUREAU OF JUSTICE STATISTICS, Dec. 2022, https://bjs.ojp.gov/library/publications/prisoners-2021-statistical-tables.

[2] Federal Bureau of Prisons, *Statistics: Restricted Housing*, WWW.BOP.GOV, www.bop.gov/about/statistics/statistics_inmate_shu.jsp (last visited Nov. 10, 2023).

[3] Elizabeth Findell, *Texas Inmates Wage Hunger Strikes to Protest Solitary Confinement*, WALL ST. J., Feb. 10, 2023, https://www.wsj.com/articles/texas-inmates-wage-hunger-strikes-to-protest-solitary-confinement-e7646b4e.

[4] Oregon Justice Resource Center, *Solitary Confinement*, WWW.OJRC.INFO, https://ojrc.info/solitary-confinement#:~:text=It%20is%20sometimes%20called%20"DSU,known%20as%20"the%20hole" (last visited November 17, 2023); This brief piece provides a useful overview of the various terms used to refer to "Solitary Confinement," including "Ad Seg" and "the hole."

[5] Elli Marcus, *Toward a Standard of Meaningful Review: Examine the Actual Protections Afforded to Prisoners in Long-Term Solitary Confinement*, 163 UNIV. OF PA. L. REV. 1159, 1160 (March 2015).

[6] *Id*. at 1161.

extended periods of time in disciplinary segregation, as well.[7] It is not uncommon for prisoners to endure years in disciplinary segregation for minor offenses such as refusing to trim their hair when such an act would conflict with their religious beliefs.[8]

While courts have recognized these distinctions when assessing the constitutionality of solitary confinement, this paper explores solitary confinement in greater depth by examining the harrowing personal experiences of various inmates in isolation in prison facilities, with a focus on the duration of solitary confinement. I apply medical studies, the realities of prison life, and precedent from the Supreme Court and various circuit courts on the Eighth and Fourteenth Amendments in advocating for a *per se* ban against administrative segregation in its entirety and disciplinary segregation beyond a maximum period of fifteen-days within a ninety-day period. Regarding disciplinary isolation within a fifteen-day period, and building on the Court's holding in *Hewitt v. Helms*, I propose heightened procedural safeguards for inmates through the establishment of a federal quasi-judicial body to oversee the solitary confinement assignment process, akin to the National Labor Relations Board's role in safeguarding employees' rights to organize.[9]

Characterizing "Solitary Confinement"

Solitary confinement has been utilized in corrections since the nation's founding, when the Walnut Street Jail in Philadelphia began holding inmates in single cells in 1773.[10] Despite

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[7] Joseph Darius Jaafari, *His hair is sacred. But to get out of solitary confinement, his jailers say he must cut it off*, P.A. POST, Feb. 25, 2020, https://whyy.org/articles/his-hair-is-sacred-but-to-get-out-of-solitary-confinement-his-jailers-say-he-must-cut-it-off/.

[8] *Id.*

[9] *Hewitt v. Helms*, 459 U.S. 460 (1983) (holding that inmates retain only a narrow range of protected "liberty interests" for Due Process Clause purposes and administrative segregation alone does not qualify as a liberty interest).

[10] Terry Allen Kupers, *Solitary: The Inside Story of Supermax Isolation and How We Can Abolish It*, 19 (2017).

this, however, there does not appear to be a long-standing tradition of inmate isolation throughout American history.[11] Notably, in the 1890 case of *In re Medley*, the Supreme Court addressed a Colorado state statute that placed inmates in solitary confinement until the time of their execution.[12] The Court struck down the statute, emphasizing that when isolated, a "considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane[,]" while "others … committed suicide."[13] Although the Court did not wholly strike down the practice as violative of the Eighth Amendment's prohibition on cruel and unusual punishment,[14] it is remarkable the Supreme Court grappled with the inhumanity and mental anguish of inmate isolation as early as the nineteenth-century and in the context of a temporary period prior to execution. Indeed, solitary confinement remained disfavored in U.S. corrections through the mid-20th century, with the 1959 Manual of Correctional Standards clearly stating that the practice should only be used as a "last resort" and last no longer than fifteen days, regardless of it being imposed for administrative or disciplinary reasons.[15]

Amidst a tough-on-crime political sentiment and following a major riot at a federal pentrentrionary in Marion, Illinois, by the early 1980's, solitary confinement returned to common use alongside the proliferation of the ADX, or "Supermax" administrative maximum facilities.[16]

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[11] *In re Medley*, 134 U.S. 160, 167 (1890).

[12] *Id.*

[13] *Id*. at 168.

[14] U.S. Const. amend. VIII.

[15] Merin Cherian, *Cruel, Unusual, and Unconstitutional: An Originalist Argument for Ending Long-Term Solitary Confinement*, 56 AM. CRIM. L. REV. 1759, 1773 (2019).

[16] Kupers, *Solitary* at 25.

Over forty states and the BOP maintain Supermax facilities, where prisoners are overwhelmingly held alone for approximately twenty-three hours a day in an often unsanitary cell that lacks natural light.[17] Supermax prisons are certainly not the only facilities that house inmates solitarily. The BOP's three categories of restrictive housing include (1) Special Housing Units, (2) Special Management Units, and (3) its ADX facility in Florence, Colorado.[18] Decisions regarding the placement of inmates are made at the Designation and Sentence Computation Center (DSCC) within the BOP's Grand Prairie Office Complex in Texas.[19] These decisions are based on various factors, including the level of security and staff supervision required by the inmate and provided by the institution.[20] DSCC officials generate a quantitate score that informs their ultimate sentencing decision.[21]

Given the particularly grueling nature of administrative segregation, it worth briefly exploring a day in the life of a typical prisoner housed in long-term solitary confinement. One such inmate, William Blake, has been isolated in administrative segregation at New York's Great Meadow Correctional Facility for approximately three decades.[22] Reflecting on his daily life in solitary confinement, Mr. Blake has contemplated that he "… cannot fathom how dying any death could be harder or more terrible than living through all that" he has "been forced to endure

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[17] *Id.*

[18] Center for Naval Analyses, *Federal Bureau of Prisons: Special Housing Unit Review and* Assessment, WWW.BOP.GOV, www.bop.gov/resources/news/pdfs/CNA-SHUReportFinal_123014_2.pdf (Dec. 2014).

[19] Federal Bureau of Prisons, *Custody & Care: Designations*, WWW.BOP.GOV, www.bop.gov/inmates/custody_and_care/designations.jsp (last visited Nov. 1, 2023).

[20] *Id.*

[21] *Id.*

[22] William Blake, "A Sentence Worse than Death" in *Hell Is a Very Small Place: Voices From Solitary Confinement* (Jean Casella, James Ridgeway, and Sara Shourd eds., The New Press, Kindle Edition, 2016), 25.

for the past quarter century."[23] He spends his days in "twenty-three-hour-a-day lockdown in a cell smaller than some closets" and with his one hour of "'recreation' consisting of placement by oneself in a concrete-enclosed yard or, in some prisons, a cage made of steel bars."[24] During his one hour of daily recreation, there are no televisions, "balls to bounce" or "other inmates" to interact with."[25] His daily meals are handed "through a narrow slot" in his cell door and the only living beings he sees for most his day are "the mice and cockroaches that infest the unit" that he is held in.[26] Amidst constant noise and the horrid stench of excrement being "splash[ed]" all around from inmates isolated in surrounding cells, Mr. Blake frequently laments that the boredom and pain from his isolation "squeeze the sanity from … [his] mind, the spirit from … [his] soul, and the life from … [his] body."[27]

Another inmate in California, C.F. Villa, housed at the Pelican Bay State Prison's Security Housing Unit since 2001, has made similar observations about life in solitary confinement.[28] Mr. Villa was sentenced to life imprisonment for a robbery conviction under California's "three strikes" law, and he was placed in the SHU solely on the basis of alleged gang affiliation after a corrections officer had observed him speaking a prohibited language indigenous to Mexico that is associated with certain criminal gangs.[29] In addition to sharing experiences similar to Mr. Blake, Villa laments being forced to "strip naked" by abusive guards,

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[23] *Id.*

[24] *Id*. at 26.

[25] *Id.*

[26] *Id.*

[27] William Blake, "A Sentence Worse than Death" in *Hell Is a Very Small Place*, 28.

[28] C.F. Villa, "Living in the SHU" in *Hell Is a Very Small Place: Voices From Solitary Confinement* at 34.

[29] *Id.*

who "[o]n a whim, without provocation, reason, or justice" force "SHU inmates … to defecate in a seatless chair in a bucket in restraints."[30] Indeed, Mr. Villa writes, [t]he more derided the inmate, the more pleasured the guard or sergeant watching."[31]

The experiences of Mr. Blake and Mr. Villa almost certainly have significant implications for their health and well-being. In the early 1990's, psychologist Craig Haney assessed the health of 100 unmates in Pelican Bay's SHU and found that ninety-one-percent suffered from anxiety and nervousness and seventy-percent "felt themselves on the verge of an emotional breakdown."[32] Moreover, two-thirds of isolated inmates suffered from various symptoms impacting their mental health.[33] It is also worth noting that there is not a single published medical study on solitary confinement in which an inmate held for longer than ten days did not exhibit negative psychological effects, from hallucinations and emotional breakdowns to hypertension and suicidal thoughts and behaviors.[34] In addition to the medical community, the judiciary has been critical of facilities such as Pelican Bay. In *Madrid v. Gomez*, the U.S. district court found "many, if not most, inmates in the SHU [at Pelican Bay] experience some degree of psychological trauma in reaction to their extreme social isolation and the severely restricted environmental stimulation in the SHU."[35]

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[30] *Id*. at 38.

[31] *Id.*

[32] Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 CRIME AND JUSTICE 441, 480 (2006).

[33] *Id.*

[34] Craig Haney, *Mental Health Issues in Long-Term Solitary and Supermax Confinement*, 49 CRIME AND DELINQUENCY 124, 132 (2003).

[35] *Madrid v. Gomez*, 8 F. Supp. 1146, 1234 (N.D. Cal. 1995).

Long-Term Administrative Segregation: Unreasonable Under the Eighth Amendment

Having established the tragic nature of extended solitary confinement as a preliminary matter, one legal theory under which isolated inmates have challenged the constitutionality of the practice involves the Eighth Amendment.[36] For Eighth Amendment purposes, long-term confinement must be distinguished further from short-term disciplinary solitary confinement. Specifically, in *Hutto v. Finney*, the Court reasoned that although it is "perfectly obvious that every decision to remove a particular inmate from the general prison population for an indeterminate period could not be characterized as cruel and unusual" punishment under the Eighth Amendment, "[i]t is equally plain, however, that the length of confinement cannot be ignored in deciding whether the confinement meets constitutional standards."[37] That is to say, a "filthy, overcrowded cell and a diet of "grue" might be tolerable for a few days and intolerably cruel for weeks or months."[38]

Accordingly, much of my focus in this section and the following section on the Fourteenth Amendment will focus on long-term solitude, which I define as more than fifteen days within a ninety-day period and argue should be deemed unreasonable *per se*. The fifteen-day ceiling that I propose is rooted in extensive research and literature. As noted previously, the 1959 Manual of Correctional Standards states that inmate isolation should last no longer than fifteen days, regardless of it being imposed for administrative or disciplinary reasons.[39] Furthermore, former wardens who advocate for reform have specifically proposed a fifteen-day

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[36] U.S. Const. amend. XIV.

[37] *Hutto v. Finney*, 437 U.S. 678, 686-687 (1978).

[38] *Id.*

[39] Cherian, *Cruel, Unusual, and Unconstitutional*, 1773.

cap.[40] One such warden, Roberta Richman, who retired from the Rhode Island Department of Corrections in 2012, testified to the U.S. House Judiciary Committee that "too many inmates come out of isolation angrier and more dangerous than they were when they went in" and it is "painfully clear" to her "that inmates who are subjected to long-term isolation often suffer irreparable harm."[41] Moreover, a fifteen-day maximum confinement period complies with international standards, with the United Nations Standard Minimum Rules for the Treatment of Prisoners, also known the Nelson Mandela Rules, explicitly prohibiting "solitary confinement for a time period in excess of 15 consecutive days."[42]

While an outright ban on solitary confinement—both administrative and disciplinary—may seem promising, it is important to keep in mind prison realities. While the California legislature passed a prohibition on solitary confinement "for more than 15 consecutive days and no more than 45 days in a 180-day period" in 2022,[43] California Governor Gavin Newsom vetoed the measure under pressure from prison officials, who cited safety concerns.[44] Given the existing apprehension among corrections officers, and the obvious violence that can ensue if prison officials are unable to temporarily isolate an inmate experiencing an immediate crisis that puts themself or others in danger, an absolute ban on solitary confinement is unrealistic. Thus,

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[40] Matt O'Brien, *Former RI prison warden speaks out against solitary confinement*, THE PROV. J., April 8, 2016, https://www.providencejournal.com/story/news/politics/government/2016/04/08/former-ri-prison-warden-speaks-out-against-solitary-confinement/3199949300

[41] *Id.*

[42] G.A. Res. 70/175, ¶ 00, U.N. Doc. A/RES/70/175 (Dec. 17, 2015).

[43] Assem. Bill 2632, 2021-2022 Reg. Sess. (Cal. 2022).

[44] Nigel Duara, *A veto for the 'Mandela' bill that sought to limit solitary confinement in California*, CALMATTERS, Sep. 26, 2022, https://calmatters.org/justice/2022/09/california-solitary-confinement-bill/; While this piece explains Governor Newsom's decision to veto AB-2632, it should be noted that the legislation was re-introduced in June 2023 as Assem. Bill 280, 2023-2024 Reg. Session (Cal. 2023), which has yet to reach the Governor's desk as of November 2023.

advocating for a fifteen-day ban—modeled after existing state law and international norms—seems most promising. And research suggests that, despite initial concerns from prison leaders, reductions in the use of solitary confinement "sho[w] no change or actual improvements" to the operation of the prison facilities, while simultaneously bringing relief to isolated prisoners who are integrated with the general prison population.[45]

With respect to the Eighth Amendment, the prohibition on "cruel and unusual punishment" applies to claims by prisoners challenging conditions of their confinements.[46] The Eighth Amendment imposes a duty on prison officials to provide "humane conditions of confinement and ensure that inmates receive adequate food, clothing, shelter, and medical care."[47] In *Farmer v. Brennan*, the Court articulated a test for an Eighth Amendment conditions of confinement claim involving objective and subjective prongs, with the former requiring the deprivation to be objectively and sufficiently serious such that it denies "life's necessities" and the latter requiring that the prison official was "deliberately indifferent" to that deprivation.[48]

In *Porter v. Clarke*, the Fourth Circuit held that the indefinite solitary confinement of individuals on Virginia's death row violated the Eighth Amendment under deliberate indifference analysis.[49] There, plaintiffs were held on death row in separate cells, each seventy-one square feet, with 5-inch-high windows.[50] The facts in the record reflect similar conditions endured by

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[45] David H. Cloud et al., *"We just needed to open the door": a case study of the quest to end solitary confinement in North Dakota*, 9 HEALTH JUSTICE 28 (2021).

[46] *Porter v. Clarke*, 923 F.3d 348, 355 (4th Cir. 2019).

[47] *Farmer v. Brennan*, 511 U.S. 825, 832 (1994).

[48] *Id*. at 834.

[49] *Porter v. Clarke*, 923 F.3d at 348

[50] *Id*. at 353.

William Blake and C.F. Villa above. Specifically, the court held that "the challenged conditions of confinement on Virginia's death row," where Plaintiffs spent between twenty-three and twenty-four hours a day "alone, in a small …. cell[,]" posed a "substantial risk" of serious psychological harm such that the inmates' Eighth Amendment rights were violated.[51]

Similarly, in *Palakovic v. Wetzel*, the Third Circuit reached a similar holding in a case brought by the parents of Brandon Palakovic, a mentally ill inmate who died by suicide after being placed in solitary confinement.[52] The court reversed the district court's dismissal of the family's Eighth Amendment claim against prison officials because the inmate "was repeatedly subjected to solitary confinement via placement in the prison's Restricted Housing Unit … characterized by extreme deprivations of social interaction and environmental stimulation, abusive staff, and inadequate to non-existent mental health care."[53] Palakovic endured "multiple 30-day stints in solitary confinement" and was isolated for up to twenty-four hours per day with minimal outside visibility and contact.[54] Because the inmate "experienced inhumane conditions of confinement to which the prison officials … were deliberately indifferent," the facts were "more than sufficient to state a plausible claim that Brandon experienced inhumane conditions of confinement."[55]

While both *Porter* and *Palakovic* support abolishing long-term solitary confinement under an Eighth Amendment deliberate indifference analysis, Supreme Court precedent also

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[51] *Id*. at 357.

[52] *Palakovic v. Wetzel*, 854 F.3d 209, 215 (3d Cir. 2017)

[53] *Id*. at 216.

[54] *Id*. at 217.

[55] Id. at 226.

generally supports these holdings. In *Helling v. McKinney*, the Court addressed whether an inmate has a constitutional right to be housed in a smoke-free environment.[56] Interestingly, in ruling in favor of the inmates, the majority held that "[w]e have great difficulty agreeing that prison authorities may not be deliberately indifferent to an inmate's current health problems but may ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year."[57] The Court's concept of protection against future harm is pertinent in the context of solitary confinement and lends support to the rulings above by the Fourth and Third Circuits. While the inmate in *Palakovic* tragically died by suicide while housed in long-term solitary confinement, the *Helling* holding seems to make clear that an inmate need not take their life in order to escape solitary confinement and instead may have a right to stay either within the general prison population or enter a mental hospital under the Eighth Amendment. Indeed, as the Court held in *Hudson v. McMillan*, an inmate need not wait until they suffer a serious injury for their punishment to constitute cruel and unusual punishment.[58] And given the tragic testimony from those in solitary conferment, it seems clear that the practice puts inmates at a substantial risk of serious psychological harm.

It is also important to keep in mind the importance of evolving standards of decency when conducting Eighth Amendment analysis. In *Estelle v. Gamble*, the Court noted that whether an inmate's incarceration amounts to cruel and unusual punishment depends in part on "the evolving standards of decency that mark the progress of a maturing society."[59] Scholars have

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[56] *Helling v. McKinney*, 509 U.S. 25 (1983).

[57] *Id*. at 31.

[58] *Hudson v. McMillian*, 503 U.S. 1 (1992).

[59] *Estelle v. Gamble*, 429 U.S. 97, 102 (1976).

observed that the Court has emphasized factors such as state legislative actions, professional consensus, historical precedents, and international norms when assessing evolving standards of decency.[60] The Court has given particular importance to state legislative actions because these bodies are considered the best reflection of the moral values held by the citizenry at a given time.[61] As discussed above, the California legislature recently passed a bill banning long-term solitary confinement, while other states like New Jersey have implemented reforms into law.[62] Clearly, there is increasing public support for reform in this area. This is especially evident in polling data, which indicates that seventy-eight percent of voters—across party lines—support a prohibition on solitary confinement for inmates with mental health needs.[63] As a result, contemporary standards of decency have evolved to appear to favor restrictions on solitary confinement, aligning with the Eighth Amendment analysis mentioned above.

When distinguishing between long-term and short-term solitary confinement, it is worthwhile to briefly explore some of the circumstances under which circuit courts have permitted isolated segregation. For instance, in *Anderson v. County of Kern*, the Ninth Circuit addressed the use of padded "safety cells" for the temporary confinement of suicidal prisoners.[64] The contested safety cell was "approximately 10 feet by 10 feet" and "covered with a rubberized

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[60] Andrew Leon Hanna, *Solitary Confinement as Per Se Unconstitutional*, 21 U. PA. J. CONST. L 1, 2 (2018-2019).

[61] *Id*. at 3.

[62] ACLU NJ, *Gov. Murphy Signs Isolated Confinement Restriction Act Into Law*, WWW.ACLU-NJ.ORG, www.aclu-nj.org/en/press-releases/gov-murphy-signs-isolated-confinement-restriction-act-law (last visited November 15, 2023).

[63] Lew Blank, *A Bipartisan Majority of Voters Support Strongly Restricting Solitary Confinement, Including Placing a Four-Hour Limit on the Practice*, DATA FOR PROGRESS, Nov. 16, 2022, https://www.dataforprogress.org/blog/2022/11/16/a-bipartisan-majority-o...litary-confinement-including-placing-a-four-hour-limit-on-the-practice.

[64] *Anderson v. Cnty. of Kern*, 45 F.3d 1310, 1312 (9th Cir. 1995).

foam padding."[65] Most of the plaintiffs were, in total, isolated for less than twenty-four hours, respectively.[66] In affirming the district court's ruling against the inmates on their Eighth Amendment claim, the court noted that "the plaintiffs here have not shown … that the sanitary limitations imposed upon them were more than temporary."[67] Evidently, courts seem more inclined to defer to prison officials when the contested confinement is of shorter duration, such as less than a day, as opposed to lasting for months or years on end. Nevertheless, as I will discuss below, inmates placed in short-term solitary confinement must still be provided with significant procedural protections.

Long-Term Administrative Segregation and Due Process

If long-term solitary confinement were to be abolished while short-term disciplinary segregation for periods of less than fifteen days were to continue, inmates should still have the right to seek procedural protection under the Fourteenth Amendment's Due Process Clause.[68] Below, I will illustrate the success of this strategy in decisions from the Fourth, Seventh, Second, Sixth, and Fifth Circuit Courts in cases involving long-term isolation.

As per *Sandin v. Conner*, a liberty interest exists if the government "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life."[69] If a liberty interest exists, the courts must consider the three factors articulated in *Matthew v. Eldridge*,[70] a test that balances (1) the private interest impacted by the government action, (2) the

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[65] *Id*. at 1312-1314.

[66] *Id.*

[67] *Id*. At 1315.

[68] Elli Marcus, *Toward a Standard of Meaningful Review* at 1165.

[69] *Sandin v. Conner*, 515 U.S. 472, 496 (1995).

[70] *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976).

risk of an erroneous deprivation of the interest through the procedures used and probable value of additional safeguards, and (3) the government's interest.[71]

In *Wilkinson v. Austin*, the Court found a liberty interest in avoiding incarceration in a Supermax prison.[72] The Court interpreted "atypical and significant hardship" to include solitary confinement because the placement was long-term and reviewed only once annually by prison officials after a thirty-day review period.[73] Specifically, the justices unanimously took issue with an inmate being placed in a cell where "human contact is prohibited[,] … the light … is on for 24 hours; exercise is for 1 hour per day, but only in a small indoor room[,]" and "placement is indefinite" as opposed to short-term.[74] Although the Supreme Court identified a liberty interest in *Wilkinson*, the government prevailed because prisons may circumvent it by merely providing "notice of the factual basis leading to the consideration" for solitary confinement and a "fair opportunity for rebuttal," which "are among the most important procedural mechanisms for purposes of avoiding erroneous deprivations."[75] As I will argue below, a heightened standard is necessary to avoid much suffering among inmates in solitary confinement. Nevertheless, circuit courts have applied *Wilkinson* in ways that have resulted in favorable outcomes for isolated inmates.

In *Incumaa v. Stirling*, the Fourth Circuit reversed the district court's grant of summary judgement to prison officials in favor of Incumaa, an inmate who was held in solitary

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[71] *Id.*

[72] *Wilkinson v. Austin*, 545 U.S. 209, 223-234 (2005).

[73] *Id.*

[74] *Id.*

[75] *Id*. at 225-226.

confinement for twenty years, on grounds that the inmate's punishment amounted to an "atypical and significant hardship in relation to the general [prison] population" and "implicate[d] a liberty interest in avoiding security detention."[76] Furthermore, the court held there was a "triable dispute" as to whether the prison's "process for determining which inmates are fit for release from" solitary confinement "meets the minimum requirements of due process."[77] Mr. Incumaa was placed in isolation for his role in a decades-earlier prison riot that led to an eleven-hour standoff with police, and he supposedly received regular reviews from prison staff regarding his assignment.[78] The inmate's isolation was especially invasive as he was confined to his cell "24 hours a day on non-recreation and non-shower days" and "permitted to leave his cell for recreation only one hour approximately ten times per month."[79] The court ultimately took issue with the fact that prison officials "merely rubber-stamped … [Incumaa's] incarceration in … [solitary confinement] (figuratively and sometimes literally)," citing in "rote repetition the same justification every 30 days."[80] The policy employed by the prison encouraged "arbitrary decisionmaking" and risked the "possibility that the … staff may single out Appellant for an insufficient reason."[81]

Similarly, in *Isby v. Brown*, the plaintiff had been held in administrative segregation for ten years and claimed, among other things, that the punishment violated his Fourteenth

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[76] *Incumaa v. Stirling*, 791 F.3d 517, 520 (4th Cir. 2015).

[77] *Id.*

[78] *Id*. at 520.

[79] *Id*. at 521.

[80] *Id*. at 534.

[81] *Incumaa*, 791 F.3d at 534.

Amendment rights under Due Process.[82] Isby was locked alone inside his approximately eighty square foot cell for twenty-three hours per day, and he was required to wear a "nylon dog leash" while outside for his daily one-hour of outdoor exercise on an area covered in bird feces.[83] The court held that "[g]iven the length of time Isby has been confined in administrative segregation … a due process liberty is at stake."[84] In applying the *Matthews* factors, the court reasoned that because Isby was an inmate, his private interest was "considerably lessened" and the government interest was "substantial."[85] However, "the validity of the government interest continues only so long as the inmate continued to pose a safety risk or security risk."[86]

The *Isby* Court was extremely critical of the prison's review process for inmates such as Mr. Isby, noting that "there is a genuine dispute of fact as to whether the thirty-day reviews [of prisoners in solitary confinement] take into account any updated circumstances in evaluating the need for continued confinement," with prison officials writing a "repetition of the same boilerplate sentences following each review."[87] Importantly, the Seventh Circuit emphasized the the Supreme Court's holding in *Hewitt v. Helms*, which required prison officials to periodically review whether an inmate in solitary confinement continues to pose a threat.[88] According to the *Isby* Court, *Hewitt* entitled inmates to an "informal and nonadversary periodic review (the frequency of which is committed to the discretion of the prison officials) that keeps

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[82] *Isby v. Brown*, 856 F.3d 508, 512 (7th Cir. 2017) .

[83] *Id*. at 513.

[84] *Id*. at 524.

[85] *Id*. at 526.

[86] *Id.*

[87] *Isby*, 856 F.3d at 526-527.

[88] *Id*. at 524 (citing *Hewitt v. Helms*, 459 U.S. 460 (1983)).

administrative segregation from becoming a pretext for indefinite confinement."[89] Given the existence of a liberty interest and "the long stretches of time during which Isby had no serious discipline problems, as well as the conflicting reasons as to his ongoing segregation," the court held that "Isby's confinement, could cause a reasonable trier of fact to conclude that Isby has been deprived of his liberty interest without due process."[90]

The Second Circuit, in *Proctor v. LeClaire*, ruled in favor of an inmate who had been incarcerated in solitary confinement for twenty-two years on the basis of due process.[91] The inmate raised triable issues of fact on his due process claim.[92] Specifically, New York prisons provided for periodic reviews of inmates in administrative segregation every sixty days until they were deemed fit to return to the general population.[93] The Second Circuit evaluated the record and took issue with prison officials merely holding sham reviews.[94] Notably, the court held that the "state may not use Ad Seg as a charade in the name of prison security to mask indefinite punishment for past transgressions."[95] Clearly, if an inmate has spent years in administrative segregation and has consistently received rubber-stamp reviews of their isolation, the Second, Seventh, and Fourth Circuits will raise concerns.

Likewise, the Sixth Circuit has shown a willingness to rule in favor of inmates held in solitary confinement based on due process concerns regarding inadequate prison review

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[89] *Isby*, 856 F.3d at 525.

[90] *Id*. at 529.

[91] *Proctor v. LeClaire*, 846 F.3d 596 (2nd Cir. 2017).

[92] *Id*. at 612.

[93] *Id*. at 529.

[94] *Id*. at 611-612.

[95] *Id.*

procedures.[96] In *Selby v. Caruso*, an inmate brought a *pro se* suit against Michigan Department of Corrections officials for violating his due process rights after holding him in solitary confinement for approximately thirteen years based on his escape attempt several years prior.[97] Selby testified that he was locked in his cell between twenty-three to twenty-four hours per day with no direct contact with other prisoners and was often denied outdoor time.[98] On a monthly basis, from 1998 to 2011, prison staff composed Administrative Segregation Interview Reports about Selby's confinement.[99] Selby, however, contended that these reports were a "sham" because the outcome of the reviews were overridden by a "hold" placed on him by a prison administrator, and he alleges he was never informed why he was subject to such a hold.[100]

Ultimately, as in the preceding cases above, Selby was considered to have a liberty interest in freedom "from restraint that imposed atypical and significant hardship on him in relation to the ordinary incidents of prison life."[101] While the court conceded that "it is a jury question whether Selby received the process due to him," there is nevertheless "longstanding Supreme Court jurisprudence that prison officials must engage in some sort of periodic review while an inmate is confined in administrative segregation" as per the *Hewitt* Court.[102] While "Selby presented a very serious security risk when he was placed in administrative segregation," over time, that did not excuse "lower-level prison staff" from conducting "perfunctory and

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[96] *Selby v. Caruso*, 734 F.3d 554, 556 (6th Cir. 2013).

[97] *Id*. at 556.

[98] *Id*. at 556-557.

[99] *Id*. at 557.

[100] *Id.*

[101] *Selby*, 734 F.3d. at 529.

[102] *Id*. at 559.

meaningless" reviews of the assignment that were tantamount to a sham.[103] Notably, the Sixth Circuit also found a liberty interest for a similarly situated inmate in *Harris v. Caruso*, where the plaintiff was held in administrative segregation for eight years—less than in Selby.[104]

Sham review procedures were also at issue in *Wilkerson v. Goodwin*, where the Fifth Circuit addressed a due process claim raised by an inmate held in administrative segregation.[105] The inmate alleged that he was held in solitary confinement for thirty-nine years without justification and without adequate due process protections, in violation of his Fourteenth Amendment constitutional rights.[106] The inmate was placed in "extended lockdown" at the notorious Louisiana State Penitentiary at Angola in 1972 after being suspected and later convicted of murdering a corrections officer.[107] While in solitary confinement, the prisoner was forced to remain alone in his cell for twenty-three hours daily and could exercise in a fenced yard three times per week, weather permitting.[108] While the inmate appeared before a review board every ninety days, he alleged that the process was a "sham," with the district court even recognizing that the sentence was effectively "indefinite."[109] In establishing a liberty interest, the court was careful, as I have done throughout this paper, to distinguish between long-term and short-term isolation. For example, the court emphasized that no liberty interest would exist for an

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[103] *Id*. at 559-560.

[104] *Harris v. Caruso*, 465 F. App'x 481, 484 (6th Cir. 2012)

[105] *Wilkerson v. Goodwin*, 774 F.3d 845 (5th Cir. 2014).

[106] *Id*. at 848-849.

[107] *Id.*

[108] *Id*. at 849.

[109] *Id*. at 849-851.

inmate segregated for thirty days for "disruptive behavior."[110] Based on "the duration of the solitary confinement," which was nearly four decades, "the severity of the restrictions, and their effectively indefinite nature," it was clear to the court that the *Wilkerson* inmate endured an "atypical and significant hardship… in relation to the ordinary incidents of prison life" according to "any possible baseline," thus affirming the denial of summary judgement to the prison officials in the case.[111]

Advancing Heightened Procedural Rights for Inmates in Disciplinary Isolation

As the preceding cases demonstrate, inmates in long-term solitary confinement often possess a liberty interest under due process in being segregated from the general prison population. Tragically, for many isolated inmates, prison review procedures can best be characterized as a "sham," potentially extending their time in a single cell for up to twenty-four hours per day unnecessarily. It is important to emphasize that the Court has articulated a low burden for prisons to meet in regularly evaluating inmates held in solitary confinement. As mentioned above, the Supreme Court identified a liberty interest in *Wilkinson*, but the government still prevailed.[112] Alas, providing prisoners with "notice of the factual basis leading to the consideration" for solitary confinement and a "fair opportunity for rebuttal" is a low standard.[113] Accordingly, in addition to this paper's proposal to abolish long-term solitary confinement beyond fifteen-days, I recommend that the U.S. Congress and state legislatures enact reform to secure protections for those inmates remaining in isolation.

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[110] *Wilkerson*, 774 F.3d at 853 (quoting *Sandin*, 515 U.S. at 485-86)).

[111] *Id*. at 855.

[112] *Wilkinson*, 545 U.S. 209 at 225-226.

[113] *Id.*

The Prison Litigation Reform Act (PLRA) offers one potential framework for providing procedural safeguards to inmates held in solitary confinement.[114] Under the PLRA, which was implemented to hinder lawsuits brought by incarcerated individuals in federal court and promote the resolution of disputes outside of court, inmates with a complaint must first attempt to resolve their dispute through the prison's internal grievance procedure.[115] Specifically, a written grievance must be submitted by the inmate to prison officials, and the Warden primarily determines whether to address the grievance.[116] The "appeals process" under the PLRA is entirely internal to the BOP. For example, if an inmate is not satisfied with the Warden's disposition of their grievance, they may appeal to the BOP Regional Director.[117] As a last resort, inmates can finally appeal the Regional Director's decision to the General Counsel of the BOP.[118] Only once that extensive internal grievance process is "exhausted," the inmate may proceed to file their complaint in federal court.[119]

Adopting an official review system for inmates held in short-term solitary confinement modeled after the PLRA may be beneficial; however, the PLRA model has a critical flaw: the lack of neutrality and diversity in perspectives at all review levels, from the Warden to the General Counsel. A system incorporating hearing panels with external officers from outside the BOP or state prison system—including medical professionals, prison reform advocates, and

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[114] 42 U.S.C. § 1997e (1996).

[115] *Rinaldi v. United States*, 904 F.3d 257 (3rd Cir. 2018); *see also* ACLU, *Know Your Rights: The Prison Litigation Reform Act (PLRA)*, WWW.ACLU.ORG, www.aclu.org/sites/default/files/images/asset_upload_file79_25805.pdf (last visited November 18, 2023).

[116] *Rinaldi*, 904 F.3d at 262.

[117] *Id.*

[118] *Id.*

[119] *Id.*

retired wardens—would offer a more balanced and effective review process. While the PLRA's approach to handling prisoner grievances is efficient and provides a basic foundation, other models exist that would potentially better protect the rights of inmates.

In 1935, Congress enacted the National Labor Relations Act, which created the National Labor Relations Board to enforce employees' rights.[120] Today, the wholly independent agency maintains over two-dozen regional offices that handle complaints by employees in the private sector, and the agency comprises a General Counsel, Board, and Division of Judges that hear labor complaints brought before it.[121] The NLRB's regional office structure offers an effective blueprint for establishing a new, independent federal agency dedicated solely to addressing inmate challenges against short-term solitary confinements across the country: the Solitary Confinement Review Board (SCRB). Given the widespread use and dreadful impact of solitary confinement, it seems plausible to establish a network of independent administrative panels within a larger independent federal agency.

In line with the NLRB model above, SCRB panels would consist of neutral and independent experts possessing diverse experiences, including mental health professionals and retired prison administrators. The panels would ensure that decisions to isolate inmates are subjected to due process. And, by guaranteeing inmates timely responses and preventing federal courts from being inundated with claims from inmates, this paper's proposed SCRB model aligns with the public policy objectives of the PLRA. I outline the structure of a proposed Solitary Confinement Review Board below. For the sake of clarity, the forthcoming SCRB framework

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[120] National Labor Relations Board, *About NLRB*, NLRB.GOV, https://www.nlrb.gov/resources/faq/nlrb (last visited Nov. 1, 2023).

[121] *Id.*

focuses exclusively on the federal prison system; however, states are well-suited to implement their own SCRB systems.

The SCRB System

As of November 2023, the Federal Bureau of Prisons operates 122 institutions across its self-delineated Mid-Atlantic, North Central, Northeast, South Central, Southeast, and Western regions.[122] The Solitary Confinement Review Board will have its main office in Washington D.C., housing the independent agency's Director and staff, and will also comprise six field offices, one in each of the BOP's six regions. The Director will be appointed by the President, with the advice and consent of the U.S. Senate. Each SCRB field office will be staffed with a Regional Director and Regional Attorney, both appointed by the Director. They will be equally responsible for overseeing staff that accepts and processes petitions submitted by inmates held in solitary confinement. The proposed federal legislation for the SCRB system should mandate that inmates have the legal right to file petitions with their regional SCRB field office via mail, prison computer systems, or corrections officers directly.

Each of the six SCRB field offices is to establish a Hearing Panel with an odd number of members, ranging from a minimum of three to a maximum of fifteen, and field offices will open applications to members of the general public to serve on these panels. Although the hiring of panelists will ultimately be the joint responsibility of the SCRB Regional Director and Regional Attorney, by law at least one-third of each Hearing Panel must consist of healthcare professionals with advanced degrees in psychology or psychiatry and a minimum of five years of practical

[122] Federal Bureau of Prisons, *Our Locations*, WWW.BOP.GOV, https://www.bop.gov/locations/#:~:text=Federal Bureau of Prisons&text=We have many facilities located,22 residential reentry management offices (last visited Nov. 15, 2023).

experience, and another one-third must comprise individuals who are not and have never been affiliated with the Bureau of Prisons. For the final one-third, applications from current and former wardens and community members with relevant prison operations experience will be encouraged but not required. In order to ensure quality panelists, those who serve will receive reasonable compensation for their time. Given the alarming effects of solitary confinement, petitions must be reviewed by Hearing Panels within ninety-six hours or less from the date of submission by an inmate. Final decisions by the Hearing Panel are to be rendered based on the majority decision of the panelists.

Practically speaking, for example, an inmate held in solitary confinement as a form of punishment at FCI Loretto, a low security federal correctional institution in Loretto, Pennsylvania, would submit a petition to review the conditions of their confinement to the SCRB Field Office for the Northeast Region. Impartial staff members at that field office would then compile health, court, and BOP records for that inmate and contact officials at FCI Loretto to learn more about the circumstances of the petitioner's incarceration. The petition and information gathered by staff would subsequently be presented to the field office's Hearing Panel, which will review the petition and decide whether the inmate should be released to the prison's general population. In making its decision, the Panel may optionally request a Zoom interview with the inmate to directly question and assess their personality. Furthermore, the Panel may order separate health evaluations of the petitioner as part of its assessment process. The petitioner may appeal the Hearing Panel's final decision to the SCRB's Office of the Director in Washington D.C. If they are still not satisfied, the inmate may then proceed to federal court to litigate their assignment or file a renewed petition with the SCRB field office after ninety days. Overall,

compared to the tragic "sham" hearings conducted internally by BOP officials, as described in the cases above, the SCRB system would provide enhanced due process and procedural safeguards for inmates held in solitary confinement because of its emphasis on neutrality and efficiency.

Conclusion

Given solitary confinement's prevalence and devastating impact on inmates' mental and physical health, it is critical that reforms be implemented. Under the Eighth Amendment's cruel and unusual punishment clause, long-term administrative segregation—that is, isolation beyond fifteen days—should be deemed unreasonable *per se* because of its impact on inmates and precedent striking down the practice under deliberate indifference. Under the Eighth Amendment, solitary confinement appears contradictory on its face to evolving standards of decency, based on state legislative activity and increasing public awareness of the burden the practice has on inmates' health. Inmates isolated for extended periods may seek procedural protection in the Fourteenth Amendment's Due Process Clause because there is clearly a liberty interest in long-term solitary confinement. Furthermore, in the event long-term solitary confinement is eliminated in prison systems, inmates must be afforded proper due process for instances of short-term isolation. The establishment of the Solitary Confinement Review Board —an independent, quasi-judicial body, with field offices across the country to hear due process challenges to solitary consignment—presents one solution to the issue of "sham" hearings and prison officials "rubber-stamping" continued orders for inmates to remain isolated. Ultimately,

the U.S. should strive to return to the Supreme Court's late nineteenth-century reasoning in *In re Medley* and avoid forcing inmates to suffer in isolation.[123]

[123] *In re Medley*, 134 U.S. at 160.