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Indefinite Isolation: Rethinking the Relationship Between the Fourteenth Amendment and Prolonged Solitary Confinement

Katherine Farmer

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I. INTRODUCTION

> Solitary confinement. Administrative segregation. Administrative detention. Restrictive housing. Temporary confinement. Protective custody. Appropriate placement. There are many names for solitary confinement . . . No matter the language, *it is all solitary — and it is torture*.[1]

Prison officials first placed Monica Cosby ("Ms. Cosby") in solitary confinement for "insolence" and "unauthorized movement," which under the prison's rules refers to "being someplace in the prison without permission."[2] Despite the fact that Ms. Cosby was "exactly where [she] was supposed to be," in the kitchen where she was assigned to work, she received sixty days in solitary confinement.[3] As a result, correctional officers removed Ms. Cosby from the general prison population and "locked [her] in a cell alone . . . for [twenty-three] hours a day."[4] During that time, Ms. Cosby's "allowed hour out" often did not occur and all of her meals were delivered to her through a slot in a locked cell door.[5] After sixty days, Ms. Cosby returned to the general prison population.[6] Less than a week later, however, prison officials readmitted her to solitary.[7] This treacherous cycle continued for many years, with Ms. Cosby's longest continuous stint in solitary confinement lasting one year.[8]

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[1] Monica Cosby, *Solitary Confinement Is Used to Break People — I Know Because I Endured It*, TRUTHOUT (May 23, 2016), https://truthout.org/articles/solitary-confinement-is-used-to-break-people-i-know-because-i-endured-it (emphasis added).

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] Cosby, *supra* note 1.

[8] *Id.*

Depending on which solitary cell the prison assigned her to, Ms. Cosby might have had a window,[9] though most were "painted or clouded over"—further depriving her of any contact with the outside world.[10] Ms. Cosby's limited human interaction came from her overhearing the distressed screams of other isolated inmates nearby.[11] To this day, after being out of solitary confinement for over eleven years, Ms. Cosby still involuntarily shivers when she hears sounds that remind her of the movements of correctional officers and still "half expect[s] to be taken back."[12]

Unfortunately, Ms. Cosby's story—and the devasting psychological toll it has taken on her—is similar to those of many thousands of other incarcerated individuals held in long-term solitary confinement in prisons across the United States. Yet, despite the severity of their situation, there is no uniform baseline of time in solitary confinement to trigger constitutional protections. An incarcerated individual's right to procedural due process review under the Fourteenth Amendment is limited and uncertain.

The United States Congress defines solitary confinement as:

> [T]he . . . confinement of an inmate in a correctional facility, pursuant to disciplinary, administrative, protective, investigative, medical, or other classification, in a cell or similarly confined holding or living space, alone or with other inmates, for approximately [twenty] hours or more per day, with severely restricted activity, movement, and social interaction.[13]

As highlighted above, human contact in solitary confinement is typically restricted, with "[m]any prisoners [] only allowed one visit per month, if any."[14] While the amount of time an incarcerated

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[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] Restricting the Use of Solitary Confinement Act, H.R. 176, 117th Cong. § 4015(b)(2) (2021-2022).
[14] *The Dangerous Overuse of Solitary Confinement in the United States*, ACLU 3 (2014), https://www.aclu.org/report/dangerous-overuse-solitary-confinement-united-states.

individual spends in solitary confinement may vary, sentences can last for "months, years, or even decades."[15]

This Comment begins in Part II by analyzing the use of solitary confinement in the United States, focusing on its history, current usage estimates, its psychological effects on incarcerated individuals, and growing skepticism towards prolonged isolation. Part III then explores the two constitutional avenues for challenging long-term solitary confinement: the Eighth Amendment and Fourteenth Amendment, with a focus on due process protections arising under the Fourteenth Amendment. Part IV argues for a uniform, one-month durational baseline from which to trigger Fourteenth Amendment due process review. Part V ultimately concludes that such a durational baseline is necessary given: (1) the devastating health implications of long-term solitary confinement; (2) the limited protections against solitary currently afforded to incarcerated individuals; and (3) to remain consistent with our nation's "history and tradition,"[16] as demonstrated by practices at Walnut Street Jail—"the nation's first penitentiary"[17]—in Philadelphia, Pennsylvania during the late 1700s.

II. SOLITARY CONFINEMENT IN THE UNITED STATES

A. *History Of Solitary Confinement in the United States*

The use of solitary confinement in the United States dates back to the late eighteenth century,[18] as the states began to build their first prisons.[19] The Quakers, a pacifist spiritual

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[15] *Id.*
[16] Michael H. v. Gerald D, 491 U.S. 110, 123 (1989) ("This insistence that the asserted liberty interest be rooted in history and tradition is evident.").
[17] Patricia Madej, *The Majority of People in Solitary are Black. Philly Forefathers Designed it that Way*, THE PHILA. INQUIRER (June 9, 2022), https://www.inquirer.com/news/more-perfect-union-solitary-confinement-mental-health-racism-20220609.html.
[18] Patrice Taddonio, *How the U.S. Became the World Leader in Solitary Confinement*, FRONTLINE (Apr. 17, 2017), https://www.pbs.org/wgbh/frontline/article/watch-how-the-u-s-became-the-world-leader-in-solitary-confinement.
[19] Ashley T. Rubin and Keramet Reiter, *Continuity in the Face of Penal Innovation: Revisiting the History of American Solitary Confinement*, 43 ABA J. L. & SOC. INQUIRY 1604, 1612 (2018).

community, introduced the practice "as part of an experiment to improve prison conditions and rehabilitate inmates"—rather than as a punishment.[20] They believed that if an incarcerated individual was placed "in [their] own solitary cell, freed from the evil influences of modern society . . . they would become like a penitent monk, free to come close to God and to their own inner being, and they would naturally heal, heal from the evils of the outside society."[21]

One of the earliest American penal institutions to implement solitary confinement was Walnut Street Jail in Philadelphia, Pennsylvania.[22] Walnut Street Jail sat only a few blocks away from Independence Hall, the gathering place of America's Founding Fathers.[23] Several prison reform principals governed the use of solitary confinement at Walnut Street Jail, including: "(1) the length of solitary confinement must reflect the severity of an inmate's crime; (2) courts and the legislature should determine the duration of solitary confinement for particular offenses; (3) prison operations require external oversight and inspection; and (4) *isolation becomes cruel and immoral when prolonged*."[24]

To better understand the use of solitary confinement at Walnut Street Jail, it is important to comprehend the distinction between using solitary confinement as a disciplinary measure and using it as a criminal punishment.[25] Prison officials at Walnut Street Jail "had the power to impose solitary confinement to *discipline* prisoners, but only for days or weeks."[26] Specifically, prison officials had "no power to impose solitary confinement for more than fifteen days for disciplinary

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[20] Taddonio, *supra* note 18.
[21] *Id.*
[22] David M. Shapiro, *Solitary Confinement in the Young Republic*, 133 HARV. L. REV. 542, 544 (2019). Professor Shapiro, from Northwestern Pritzker School of Law, engages in a detailed examination of historical and archival evidence from Walnut Street Jail before ultimately concluding that "the unchecked use of solitary confinement in today's correctional facilities contravenes norms that prevailed in the Constitution's founding era." *Id.* at 542.
[23] *Id.*
[24] *Id.* at 553–54 (emphasis added).
[25] *Id.* at 557.
[26] *Id.* (emphasis added).

infractions."[27] Holding an incarcerated individual in long-term solitary confinement at Walnut Street Jail was only appropriate when pursuant to a "*criminal punishment by a court* statutorily authorized to do so."[28] Courts reserved their use of solitary confinement for serious criminal offenses, in which it was limited by established sentencing ranges.[29] Additionally, sentencing judges often showed leniency with the average solitary confinement sentence being closer to the statutory approved minimum than maximum.[30]

As a result of these governing reformist principals and statutory limitations, Walnut Street Jail had only sixteen solitary cells for its several hundred inmates.[31] Consequently, from 1795 to 1800, prison officials admitted just twenty-nine incarcerated individuals to solitary confinement out of the prison's general population of 748.[32] Notably, Walnut Street Jail "came to be recognized as a paradigm of solitary confinement in America," with other state correctional institutions looking to it as a model when implementing their own systems.[33]

B. *Current Estimates of Incarcerated Individuals in Solitary Confinement*

Correctional institutions within the United States have greatly increased their reliance on solitary confinement.[34] Over the past two decades, states began building "supermax" prisons, to hold incarcerated individuals "in extreme isolation, often for years or even decades."[35] Relatively rare prior to the 1990s, today forty-four states and the federal government have supermax facilities, housing roughly 25,000 people nationwide.[36] But this figure does not reflect the total number of

[27] *Id.*
[28] Shapiro, *supra* note 22, at 558 (emphasis added).
[29] *Id.*
[30] *Id.*
[31] Rubin & Reiter, *supra* note 19, at 1613.
[32] Shapiro, *supra* note 22, at 567.
[33] *Id.* at 548.
[34] *The Dangerous Overuse of Solitary Confinement in the United States*, ACLU 2 (2014), https://www.aclu.org/report/dangerous-overuse-solitary-confinement-united-states.
[35] *Id.*
[36] *Id.*

incarcerated individuals held in solitary confinement within the United States, which is far greater.[37]

As of May 2023, prisons and jails across the country held at least 122,840 incarcerated individuals in solitary confinement for over twenty-two hours per day—equating to roughly 6 percent of their total population.[38] By contrast, only 3.8 percent of the total prison population at Walnut Street Jail was held in solitary confinement during the five-year period from 1795 to 1800.[39] Although this percentage increase may not initially appear significant, because the US prison population has risen to over 1,200,000,[40] it is extremely consequential. Additionally, approximately 41,000 to 48,000 incarcerated individuals in America are currently held in long-term solitary confinement, lasting fifteen days or more.[41]

Justifications for the increased use of solitary confinement generally rely on the misconception that "putting 'the worst of the worst' in solitary confinement creates a safer general population environment where prisoners will have greater freedom and access to educational and vocational programs."[42] Other proponents of solitary confinement view it as a deterrent, reducing disruptive behaviors throughout the correctional institution.[43] But there is no evidence to show that using solitary confinement significantly reduces the levels of violence in prisons.[44]

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[37] *Id.*
[38] Jean Casella, *New Report Finds More Than 122,000 People in Solitary Confinement in the United States*, SOLITARY WATCH (May 23, 2023), https://solitarywatch.org/2023/05/23/new-report-finds-more-than-122000-people-in-solitary-confinement-in-the-united-states; *see also* Juleyka Lantigua-Williams, *The Link Between Race and Solitary Confinement*, THE ATLANTIC (Dec. 5, 2016), https://www.theatlantic.com/politics/archive/2016/12/race-solitary-confinement/509456 (acknowledging that "[p]eople of color are overrepresented in solitary confinement compared to the general prison population.").
[39] *See* Shapiro, *supra* note 22, at 567.
[40] E. Ann Carson, *Prisons Report Series: Preliminary Data Release*, BUREAU OF JUSTICE STATISTICS (Sept. 2023), https://bjs.ojp.gov/library/publications/prisons-report-series-preliminary-data-release.
[41] *Time-In-Cell: A 2021 Snapshot of Restrictive Housing based on a Nationwide Survey of U.S. Prison Systems*, YALE L. SCH. (Aug. 2022), https://law.yale.edu/centers-workshops/arthur-liman-center-public-interest-law/liman-center-publications/time-cell-2021.
[42] *The Dangerous Overuse of Solitary Confinement in the United States*, *supra* note 34, at 10.
[43] *Id.*
[44] *Id.* at 9.

Conversely, studies have shown "that the levels of violence in American prisons may have more to do with the way prisoners are treated and how prisons are managed and staffed."[45]

C. *Effects Of Long-term Solitary Confinement*

Being placed in solitary confinement can have devastating consequences for the mental health of incarcerated individuals.[46] Solitary confinement causes "permanent changes to people's brains and personalities."[47] These changes occur because the portion of the brain that plays a vital role in memory physically shrinks after an individual is subjected to extended periods of time without human interaction."[48] Additionally, people sentenced to solitary confinement often exhibit:

> a variety of negative physiological and psychological reactions, including hypersensitivity to stimuli; perceptual distortions and hallucinations; increased anxiety and nervousness; revenge fantasies, rage, and irrational anger; fears of persecution; lack of impulse control; severe and chronic depression; appetite loss and weight loss; heart palpitations; withdrawal; blunting of affect and apathy; talking to oneself; headaches; problems sleeping; confusing thought processes; nightmares; dizziness; self-mutilation; and lower levels of brain function.[49]

As a result of these negative psychological implications, incarcerated individuals in solitary confinement "account for approximately half of those who die by suicide," even though they comprise roughly 6 percent of the total prison population.[50] At the International Symposium on Solitary Confinement in November 2020, researchers and formerly incarcerated individuals made clear that "any 'positive' benefits correctional institutions gain by using solitary confinement are outweighed by the severe and often permanent damages caused by prolonged isolation."[51]

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[45] *Id.* at 10.
[46] Tiana Herring, *The Research Is Clear: Solitary Confinement Causes Long-Lasting Harm*, PRISON POL'Y INITIATIVE (Dec. 8, 2020), https://www.prisonpolicy.org/blog/2020/12/08/solitary_symposium.
[47] *Id.*
[48] *Id.*
[49] *The Dangerous Overuse of Solitary Confinement in the United States*, *supra* note 34, at 4.
[50] *See* Herring, *supra* note 46, at 4.
[51] *Id.* See text accompanying notes 42–45 for a discussion of the purported, but refuted, benefits of using solitary confinement in correctional institutions.

Kalief Browder's ("Kalief") story serves as a harrowing account of the psychological consequences of prolonged solitary confinement.[52] When he was just sixteen years old, Kalief was stopped by the police in the Bronx and accused of stealing a backpack.[53] Although his accuser's stories were inconsistent, Kalief was charged with robbery and sent to Rikers Correctional Facility ("Rikers") while he awaited trial.[54] Kalief spent several years at Rikers—including fourteen plus months in solitary confinement—before all charges against him were eventually dropped.[55] After Kalief returned home, his family members described him as "paranoid and withdrawn."[56] Kalief's mother stated that "[m]entally, he was still in Rikers," and his older brother described him as a shell of his former self.[57] Two years after his release from Rikers, and following the severe mental anguish that resulted from it, Kalief tragically took his own life by hanging himself from a window in his childhood home.[58] Those who knew Kalief believed that this "was a method he . . . learned in prison."[59]

D. *Growing Skepticism Towards Solitary Confinement*

As a result of the psychological effects of solitary confinement, there is growing momentum to reduce or eliminate the use of the practice in correctional institutions across the United States.[60] A national survey, conducted in February 2021, found that "five out of six respondents—cutting across Democrats and Republicans—supported limits on the use of solitary

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[52] *Kalief Browder: A Voice to End Solitary Confinement*, STOP SOLITARY FOR KIDS BY CTR. FOR CHILDREN'S L. & POL'Y, https://stopsolitaryforkids.org/kalief-browder-lost-to-solitary-confinement (last visited Feb. 18, 2024); *see also* Jennifer Gonnerman, *Before the Law*, THE NEW YORKER (Sept. 29, 2014), https://www.newyorker.com/magazine/2014/10/06/before-the-law.
[53] *Kalief Browder: A Voice to End Solitary*, *supra* note 52.
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] *Kalief Browder: A Voice to End Solitary*, *supra* note 52.
[60] Terry A. Kupers, *It's Time to End Solitary Confinement Behind Bars*, ALJAZEERA (Aug. 2, 2023), https://www.aljazeera.com/opinions/2023/8/2/its-time-to-end-solitary-confinement-behind-bars#:~:text=In%20a%202021%20national%20survey,the%20use%20of%20solitary%20confinement.

confinement."[61] Discourse questioning solitary has garnered the attention of former President Barak Obama, who stated in January 2016 that: "[t]he United States is a nation of second chances, but the experience of solitary confinement too often undercuts that second chance. Those who do make it out often have trouble holding down jobs, reuniting with family and becoming productive members of society."[62]

This skepticism has paved the way for reform efforts urged by private institutions and within several states.[63] A number of correctional institutions have implemented "research-informed policies and innovations," including "clinical programming, such as group therapy, community meetings, and medication counseling," in place of solitary confinement in order to address violations committed by incarcerated individuals.[64] Others have created "de-escalation rooms," where incarcerated individuals "can read a book or listen to calming music to avoid solitary confinement after displaying troublesome behavior."[65] These programs have generated promising results, including reduced levels of prison misconduct and improvements in mental health outcomes for incarcerated individuals.[66] Additionally, some states—such as Colorado—have banned the use of solitary confinement, except in extreme cases, for "people with serious mental illnesses, juveniles, and pregnant women."[67] Various other states are considering similar reform efforts.[68]

III. CONSTITUTIONAL AVENUES FOR CHALLENGING LONG-TERM SOLITARY CONFINEMENT

[61] *Id.* (citing *Five in Six Voters Favor Sharply Restricting Use of Solitary Confinement*, SCH. OF PUB. POL'Y, UNIV. OF MARYLAND (June 29, 2021), https://publicconsultation.org/criminal-justice/solitary-confinement).
[62] Tanya Somanader, *President Obama: "Why We Must Rethink Solitary Confinement"*, THE WHITE HOUSE PRESIDENT BARAK OBAMA (Jan. 26. 2016), https://obamawhitehouse.archives.gov/blog/2016/01/26/president-obama-why-we-must-rethink-solitary-confinement.
[63] *See* Andreea Matei, *Solitary Confinement in US Prisons*, URBAN INST. 10 (Aug. 2022), https://www.urban.org/sites/default/files/2022-08/Solitary Confinement in the US.pdf.
[64] *Id.*
[65] *Id.* at 11.
[66] *Id.*
[67] *Id.* at 10.
[68] *Id.* at 11.

Incarcerated individuals seeking to challenge the use of prolonged solitary confinement commonly bring claims under the Eighth and Fourteenth Amendment of the United States Constitution.[69] First, Section A explores Eighth Amendment challenges to solitary confinement and broadly discuss the relevant federal circuit split. Next, Section B delves into an extensive analysis of Fourteenth Amendment challenges—including due process requirements for disciplinary hearings, the liberty interest implicated by solitary confinement, and the approaches of various federal circuits.

A. *Eighth Amendment Claims: "Cruel and Unusual Punishment"*

The Eighth Amendment states that "[e]xcessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted*."[70] The Supreme Court has recognized that the amendment's ban on "cruel and unusual punishment" applies to prolonged solitary confinement.[71] To establish that a condition of confinement violates the Eighth Amendment, an incarcerated individual must prove: (1) that the condition was objectively serious, and (2) that prison officials were deliberately indifferent to the harm caused by the condition of confinement.[72]

The Supreme Court has only once, within the past two centuries, addressed the constitutionality of prolonged solitary confinement under the Eighth Amendment.[73] This occurred in *Hutto v. Finney*, where the Court found that "conditions in Arkansas' prisons, including its

[69] *See Settlement Reached to End Permanent Solitary Confinement for People Sentenced to Death in Pennsylvania*, ACLU (Nov. 18, 2019), https://www.aclu.org/press-releases/settlement-reached-end-permanent-solitary-confinement-people-sentenced-death (acknowledging the argument that holding incarcerated individuals "in permanent solitary confinement violates the Eighth and Fourteenth Amendments").
[70] U.S. CONST. amend. VIII. (emphasis added).
[71] *See* Hutto v. Finney, 437 U.S. 678, 685 (1978) ("Confinement in a prison or in an isolation cell is a form of punishment subject to scrutiny under Eighth Amendment standards."); *see also* Farmer v. Brennan, 511 U.S. 825, 826 (1994) ("Prison officials have a duty under the Eighth Amendment to provide humane conditions of confinement.").
[72] *See Brennan*, 511 U.S. at 834.
[73] Alexander A. Reinert, *Solitary Troubles*, 93 NOTRE DAME L. REV. 927, 932 (2018).

punitive isolation cells, constituted cruel and unusual punishment."[74] However, the *Hutto* Court acknowledged that "punitive isolation 'is not necessarily unconstitutional, but it may be, depending on the duration of the confinement and the conditions thereof.'"[75] The Court reasoned that the length of time spent in punitive confinement was "simply one consideration among many" when determining whether a condition is cruel and unusual.[76]

Due to its dearth of solitary caselaw, the Supreme Court has "left a gap in any substantive limitation of how, why, and for how long extreme isolation can be used."[77] As a result, the federal circuits are split as to whether long-term solitary confinement constitutes cruel and unusual punishment in violation of the Eighth Amendment.[78] The Third, Fourth, Seventh, and Eleventh Circuits have held that long-term solitary confinement may constitute cruel and unusual punishment.[79] In contrast, the Fifth, Sixth, Ninth, and Tenth Circuits routinely hold that it does not amount to cruel and unusual punishment.[80]

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[74] *Hutto*, 437 U.S. at 685.
[75] *Id.* at 685–86 (citing Finney v. Hutto, 410 F. Supp. 251, 275 (E.D. Ark 1976)).
[76] *Id.* at 687.
[77] *Reinert*, *supra* note 73.
[78] John Kruzel, *U.S. Supreme Court Turns Away Suit By Texas Inmate Held 27 Years In Solitary Confinement*, REUTERS (Apr. 17, 2023), https://www.reuters.com/world/us/us-supreme-court-turns-away-suit-by-texas-inmate-held-27-years-solitary-2023-04-17 (acknowledging the "split among federal appeals courts over whether solitary confinement could constitute cruel and unusual punishment").
[79] *See* Porter v. Pennsylvania Dep't. of Corr., 974 F.3d 431, 435 (3d Cir. 2020) ("We are also asked to decide whether thirty-three years of solitary confinement may violate the Eighth Amendment. We answer this question in the affirmative."); Porter v. Clarke, 923 F.3d 348, 353 (4th Cir. 2019) ("The district court held that the death row inmates' long-term detention in conditions amounting to solitary confinement created a "substantial risk" of psychological and emotional harm and that State Defendants were 'deliberately indifferent' to that risk . . . [W]e affirm."); Walker v. Shansky, 28 F.3d 666, 673 (7th Cir. 1994) ("[P]rolonged confinement in administrative segregation 'may constitute cruel and unusual punishment in violation of the Eighth Amendment.'"); Sheley v. Dugger, 833 F.2d 1420, 1429 (11th Cir. 1987) ("[Plaintiff's] case is unique because of his long period of segregation. While we have been hesitant in the past to apply the Eighth Amendment to claims of physical and mental deterioration by prisoners in the general prison population, [plaintiff's] twelve-year confinement in [solitary confinement] raises serious constitutional questions.").
[80] *See* Hope v. Harris, 861 F. App'x. 571, 582 (5th Cir. 2021) ("The Eighth Amendment prohibits the infliction of 'cruel and unusual punishments.' But long-term solitary confinement is not per se cruel and unusual."); Harden-Bey v. Rutter, 524 F.3d 789, 795–96 (6th Cir. 2008) ("Because placement in segregation is a routine discomfort that is part of the penalty that criminal offenders pay for their offenses against society, it is insufficient to support an Eighth Amendment claim."); Anderson v. County of Kern, 45 F.3d 1310 (9th Cir. 1995) ("[A]dministrative segregation, even in a single cell for twenty-three hours a day, is within the terms of confinement ordinarily contemplated by a sentence."); Grissom v. Roberts, 902 F.3d 1162, 1174 (10th Cir. 2018) ("[Defendant] states, 'A growing number of courts have concluded denying the basic human needs of social interaction and environmental stimulation can violate

The Supreme Court recently denied a petitioner's January 2022 writ of certiorari to resolve the issue of: "[w]hether decades of solitary confinement can, under some circumstances, violate the Eighth Amendment."[81] Although this Comment contends that long-term solitary confinement is cruel and unusual punishment in violation of the Eighth Amendment, because the Supreme Court has recently declined to address the issue, this Comment instead focuses on an alternative constitutional avenue for challenging the practice: the Fourteenth Amendment.

B. *Fourteenth Amendment Claims: The Due Process Clause*

Because the federal circuits have not uniformly found that long-term solitary confinement violates the cruel and unusual punishment clause of the Eight Amendment, incarcerated individuals often advance the alternative legal theory that being held in long-term solitary confinement, without due process review, violates their Fourteenth Amendment rights.[82]

The Fourteenth Amendment states that "[n]o State shall . . . deprive any person of life, liberty, or property, without *due process of law*."[83] To raise a successful due process challenge, an incarcerated individual must first demonstrate that their "right to life, liberty or property is threatened."[84] The Supreme Court has acknowledged that long-term solitary confinement can

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the Eighth Amendment, especially when the deprivation lasts for years.' But the cited courts are four federal district courts, none from this circuit . . . Indeed, the most recent relevant decision by this court is an unpublished opinion rejecting an Eighth Amendment claim brought by a prisoner who had been in solitary confinement for 30 years under conditions not markedly different from those here.").

[81] *See* Kruzel, *supra* note 78; *see also* Hope v. Harris, 143 S. Ct. 1746 (Mem) (2023).

[82] Andrew Hamm, *A 27-Year Solitary Confinement And A Dispute About Discharging Settlement Payments In Bankruptcy*, SCOTUS BLOG (Mar. 4, 2022), https://www.scotusblog.com/2022/03/a-27-year-solitary-confinement-and-a-dispute-about-discharging-settlement-payments-in-bankruptcy ("First, [plaintiff] argues that his confinement violates the Eighth Amendment's prohibition on cruel and unusual punishments . . . Second, [plaintiff] argues that the twice-yearly hearings in which prison administrators review his case violate the due process clause of the 14th Amendment.").

[83] U.S. CONST. amend. XIV, § 2 (emphasis added).

[84] Jennifer Wedekind, *Fact Sheet: Solitary Confinement and the Law*, SOLITARY WATCH, 2011, https://solitarywatch.org/wp-content/uploads/2011/06/FACT-SHEET-Solitary-Confinement-and-the-Law1.pdf; *see also* Perry v. Spencer, 751 F. App'x. 7, 9 (1st. Cir. 2018) ("To prevail on this claim, [plaintiff] must demonstrate (1) that defendants deprived him of a cognizable liberty interest, (2) without constitutionally sufficient process").

implicate a "liberty interest" under the Fourteenth Amendment.[85] Nevertheless, caselaw is divided on whether duration, conditions of confinement, or an amalgam of both curtails that interest.[86] This section discusses the Fourteenth Amendment's due process requirements for disciplinary hearings, revisits the liberty interest associated with prolonged solitary confinement, and lastly discuss the two approaches of the federal circuits.

1. **Due Process Requirements for Disciplinary Hearings**

The Fourteenth Amendment is implicated both before an incarcerated individual is placed in solitary confinement and when their solitary sentence is extended.[87] The Amendment's due process requirement may be satisfied, within the context of prisons and jails, when there is "a hearing before an impartial decisionmaker during which evidence can be presented and an individual can defend his or her interests."[88]

In *Wolff v. McDonnell*, the Supreme Court addressed whether a correctional institution's disciplinary proceedings, that resulted in an incarcerated individual's stay in solitary confinement, complied with the due process clause of the Fourteenth Amendment."[89] The disciplinary procedures at issue in *Wolff* consisted of the following:

> (1) a preliminary conference with the Chief Corrections Supervisor and the charging party, where the prisoner is informed of the misconduct charge and engages in preliminary discussion on its merits;
> (2) the preparation of a conduct report and a hearing before the Adjustment Committee, the disciplinary body of the prison, where the report is read to the inmate; and
> (3) the opportunity at the hearing to ask questions of the charging party.[90]

[85] *See* Wilkinson v. Austin, 545 U.S. 209, 210 (2005) (finding that "inmates [have] a constitutionally protected liberty interest in avoiding assignment" at a supermax facility with highly restrictive conditions).
[86] Claire Angelique Nolasco & Michael S. Vaughn, *Construing the Legality of Solitary Confinement: Analysis of United States Federal Court Jurisprudence*, 44 AM. J. CRIM. JUST. 812, 835 (2019), https://doi.org/10.1007/s12103-018-9463-5.
[87] Wilkinson v. Austin, 545 U.S. 209, 211 (2005).
[88] *Id.*
[89] Wolff v. McDonnell, 418 U.S. 539, 543 (1974).
[90] *Id.* at 558–59.

In reviewing the sufficiency of these disciplinary procedures to protect against erroneous deprivations of liberty through solitary confinement, the Supreme Court stated that "one cannot automatically apply procedural rules designed for free citizens in an open society . . . to the very different situation presented by a disciplinary proceeding in a state prison."[91] Nonetheless, the *Wolff* Court held that the disputed procedures were "constitutionally deficient" under the "minimum requirements of procedural due process appropriate for the circumstances."[92] The Court reasoned that that prison disciplinary procedures resulting in a loss of good-time credit or the imposition of solitary confinement must accord an incarcerated individual with both (1) "a 'written statement by the factfinders as to the evidence relied on and reasons' for the disciplinary action," and (2) the opportunity "to call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals."[93] After *Wolff*, these two requirements must be met in prison disciplinary hearings pertaining to solitary confinement in order to afford an incarcerated individual with constitutionally sufficient due process.[94]

2. **The Liberty Interest of Incarcerated Individuals in Long-Term Solitary Confinement**

To prevail on a due process claim, an incarcerated individual must demonstrate "(1) that defendants deprived him of a cognizable liberty interest, (2) without constitutionally sufficient process."[95] In *Wolff*, the Supreme Court outlined the two requirements for constitutionally sufficient due process where disciplinary procedures may result in the imposition of solitary

[91] *Id.* at 558, 560.
[92] *Id*.
[93] *Id.* at 564–65 (citing Morrissey v. Brewer, 408 U.S. 471, 489 (1972)).
[94] Horne v. Coughlin, 155 F.3d 26, 30 (2d Cir. 1998) ("[I]n [*Wolff*] the Supreme Court discussed the procedural requisites of prison disciplinary hearings. *Wolff* held . . . that prisoners are entitled to . . . a written statement by the prison factfinders as to the evidence relied upon by them, and the opportunity to call witnesses and present documentary evidence.").
[95] Perry v. Spencer, 751 F. App'x. 7, 9 (1st. Cir. 2018).

confinement.[96] The Court, however, set forth the framework for identifying a cognizable liberty interest in connection with solitary confinement in *Sandin v. Conner*.[97]

In *Sandin*, the Supreme Court evaluated, for the first time, "whether [the] disciplinary confinement of inmates itself implicates constitutional liberty interests."[98] The *Sandin* Court found that whether a liberty interest is implicated turns upon whether the confinement "imposes *atypical and significant hardship* on an inmate in relation to [the] ordinary incidents of prison life."[99] The incarcerated individual in *Sandin* was sentenced to thirty days of disciplinary segregation after he was charged with "'high misconduct' for using physical interference to impair a correctional function."[100] The *Sandin* Court ultimately found that, based on the "significant amounts of 'lockdown time' even for inmates in the general population," the plaintiff's "discipline in segregated confinement did not present the type of atypical, significant deprivation in which a State might conceivably create a liberty interest."[101]

Roughly ten years later, in *Wilkinson v. Austin*, the Supreme Court once again considered whether solitary confinement infringed upon a Fourteenth Amendment liberty interest.[102] The plaintiff in *Wilkinson* was an incarcerated individual at Ohio State Penitentiary ("OSP"), a "maximum-security [facility] with highly restrictive conditions, designed to segregate the most dangerous prisoners from the general prison population."[103] The Court found that at OSP, "almost every aspect of an inmate's life is controlled and monitored," and that "[i]ncarceration there [was] synonymous with extreme isolation."[104] The Court reasoned that "[u]nlike the 30–day placement

[96] *Wolff*, 418 U.S. 564–65.
[97] Sandin v. Conner, 515 U.S. 472, 486 (1995).
[98] *Id.*
[99] *Id.* at 472 (citing *Wolff*, 418 U.S. 539).
[100] *Id.* at 475–76.
[101] *Id.* at 486.
[102] Wilkinson v. Austin, 545 U.S. 209 (2005).
[103] *Id.*
[104] *Id.*

in segregated confinement at issue in *Sandin*, placement at OSP is *indefinite* and, after an initial 30–day review, is reviewed just annually."[105] As a result, the *Wilkinson* Court found that, applying the "atypical and significant hardship" standard set forth in *Sandin*,[106] the lower court "was correct to find [that] inmates possess a liberty interest in avoiding assignment at OSP."[107]

3. **Federal Circuit Split as to What Baseline in Solitary Confinement is Considered "Atypical and Significant"**

In the aftermath of *Sandin*, the federal circuits "have not reached consistent conclusions for identifying the baseline from which to measure what is atypical and significant in any particular prison system."[108] The circuits "diverge on whether duration, confinement conditions, or a combination of both implicate liberty interests requiring due process protections."[109] This section explores the federal circuits' two main approaches: (1) analyzing multiple factors; or (2) analyzing a single factor, namely duration, to determine whether a constitutionally protected liberty interest is present.

i. Multi-Factor Approach

a. *First Circuit*

The First Circuit has examined both the conditions of confinement and duration to determine whether solitary confinement implicates a constitutionally protected liberty interest.[110] In *Perry v. Spencer*, the First Circuit examined the Fourteenth Amendment claim of an incarcerated

[105] *Id.* at 211 (emphasis added).
[106] *Id.* at 210 (citing *Sandin*, 515 U.S. at 483).
[107] *Id.* at 230.
[108] Wilkinson v. Austin, 545 U.S. 209, 223 (2005) (citing *Sandin*, 515 U.S. at 484) ("The *Sandin* standard requires us to determine if assignment to [solitary confinement] 'imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.' In Sandin's wake the Courts of Appeals have not reached consistent conclusions for identifying the baseline from which to measure what is atypical and significant in any particular prison system. This divergence indicates the difficulty of locating the appropriate baseline.").
[109] Nolasco & Vaughn, *supra* note 86.
[110] *See* Perry v. Spencer, 751 F. App'x. 7, 10 (1st Cir. 2018).

individual confined "in non-disciplinary segregation for over 600 days."[111] Within its due process analysis, the *Perry* Court favorably discussed *LaChance v. Commissioner of Correction*—a case in which the Massachusetts Supreme Judicial Court "concluded that [a] ten-month period of confinement was sufficient to satisfy the standard and implicate a protected liberty interest subject to due process protections," and in which it further held that "the interest attaches after ninety days."[112] The *Perry* Court, however, ultimately rejected the due process claim because "[w]hile the restrictive conditions . . . were substantially similar to those described in *Wilkinson*, other circumstances were arguably distinguishable and, . . . courts had found comparable periods [in solitary confinement] insufficient."[113]

b. *Third Circuit*

In *Shoats v. Horn*, the Third Circuit established a two-factor inquiry to determine whether an incarcerated individual's solitary confinement sentence should be considered atypical and significant.[114] The *Shoats* factors include: "(1) the duration of the challenged conditions; and (2) whether the conditions overall imposed a significant hardship in relation to the ordinary incidents of prison life."[115] In *Williams v. Secretary Pennsylvania Department of Corrections*, the Third Circuit applied these factors to find that isolating two plaintiffs on death row for six and eighth years respectively would be considered atypical and significant under *Sandin*.[116]

c. *Fourth Circuit*

In *Smith v. Collins*, the Fourth Circuit held that a plaintiff, who was held in solitary confinement for four years and three months, "demonstrated a genuine issue of material fact with

[111] *Id.* at 8.
[112] *Id.* at 10 (citing LaChance v. Comm'r of Corr., 463 Mass. 767, 776–77 (2012)).
[113] *Id.*
[114] Williams v. Secretary Pennsylvania Dep't. of Corr., 848 F.3d 549, 560 (3d Cir. 2017) (citing Shoats v. Horn, 213 F.3d 140, 144 (3d Cir. 2000)).
[115] *Id.*
[116] *Id.* at 561–62.

regard to the atypicality and harshness of his confinement. . . and thus as to the existence of a liberty interest in avoiding such confinement."[117] The *Smith* Court reasoned that the incarcerated individual's conditions of confinement were extreme[118] and that the duration exceeded "the length of various periods that other courts have found insufficient to trigger a liberty interest, which 'range[ ] up to two and one-half years.'"[119]

d. *Fifth Circuit*

The Fifth Circuit has held that there is no threshold duration of time in solitary confinement to impose an "atypical and significant" hardship on an incarcerated individual, so as to support the finding of a protected liberty interest under the Fourteenth Amendment.[120] Instead, the Fifth Circuit has instructed lower courts to "apply a nuanced analysis looking at the length and conditions of confinement on a case-by-case basis to determine whether they give rise to a liberty interest."[121] In *Bailey v. Fisher*, the Fifth Circuit indicated that a period of five years in extreme isolation may be sufficient to implicate such a protected liberty interest.[122]

e. *Seventh Circuit*

The Seventh Circuit "'take[s] into consideration all of the circumstances of a prisoner's confinement in order to ascertain whether' he has been deprived of liberty within the meaning of the due process clause."[123] In *Kervin v. Barnes*, the Circuit noted that it was an error to suggest an

[117] Smith v. Collins, 964 F.3d 266, 275 (4th Cir. 2020).
[118] *Id.* at 276 ("The first Wilkinson factor weighs strongly in [plaintiff's] favor. The severity of the conditions alleged by [plaintiff] . . . are substantially similar to those that contributed to the finding of a protected liberty interest in the Supreme Court's decision in *Wilkinson*.")
[119] *Id.* at 279.
[120] Carmouche v. Hooper, 77 F.4th 362, 367 (5th Cir. 2023).
[121] *Id.*
[122] Bailey v. Fisher, 647 F. App'x. 472, 477 (5th Cir. 2016) ("If [plaintiff] remains in segregation today, he has been isolated for over five years, with only a few months of relief in the interim. The duration of [plaintiff's] confinement is a necessary component in the *Sandin* analysis.").
[123] Kervin v. La Clair Barnes, 787 F.3d 833, 836 (7th Cir. 2015) (citing Marion v. Columbia Correctional Institution, 559 F.3d 693, 699 (7th Cir. 2009)).

incarcerated individual "must spend at least six months in segregation before he can complain about having been deprived of liberty without due process of law [because a] considerably shorter period of segregation may, depending on the conditions of confinement and on any additional punishments, establish a violation."[124]

f. *Eighth Circuit*

The Eight Circuit has recognized that "[p]risoners have a liberty interest in freedom from conditions of confinement that impose 'atypical and significant hardship' relative to 'ordinary incidents of prison life'" and acknowledged that "[t]he *duration* and *degree* of restrictions bear on whether a change in conditions imposes such a hardship."[125] The Eighth Circuit, however, is more inclined to find an "atypical and significant deprivation" of a liberty interest where an incarcerated individual is held in solitary confinement for several years.[126]

g. *Ninth Circuit*

In determining whether an incarcerated individual is entitled to due process protections under the Fourteenth Amendment, the Ninth Circuit considers:

> 1) whether the challenged condition 'mirrored those conditions imposed upon inmates in administrative segregation and protective custody,' and thus comported with the prison's discretionary authority;
> 2) the duration of the condition, and the degree of restraint imposed; and
> 3) whether the state's action will invariably affect the duration of the prisoner's sentence.[127]

[124] *Id.* at 836–87 (citing Palmer v. Richards, 364 F.3d 60, 65–67 (2d Cir. 2004) (77 days); Mitchell v. Horn, 318 F.3d 523, 527, 532–33 (3d Cir. 2003) (90 days); and Gaines v. Stenseng, 292 F.3d 1222, 1225–26 (10th Cir. 2002) (75 days)).
[125] Hamner v. Burls, 937 F.3d 1171, 1180 (8th Cir. 2019) (citing *Sandin*, 515 U.S. at 484) (emphasis added).
[126] *See* Williams v. Norris, 277 F. App'x. 647, 649 (8th Cir. 2008) ("[Plaintiff]—who is serving a life sentence without the possibility of parole . . .—has continuously spent almost nine years in ad seg confinement . . . plus more than three years in ad seg . . . and we agree with the district court that this constitutes an atypical and significant hardship.").
[127] Brown v. Oregon Dep't. of Corr., 751 F.3d 983, 987 (9th Cir. 2014).

Applying this framework, the Ninth Circuit found a cognizable liberty interest where a correctional institution detained an inmate in solitary confinement for over two years as a sanction for misconduct.[128]

h. *Tenth Circuit*

The Tenth Circuit considers four factors, of which no single one is dispositive, when determining whether an incarcerated individual's conditions of confinement create a protected liberty interest under the Fourteenth Amendment.[129] These factors include: "(1) [w]hether the segregation furthers a legitimate penological interest such as safety, (2) whether the conditions in the placement are extreme, (3) whether the punishment impacts the inmate's duration of incarceration, and (4) whether the placement was indeterminate."[130] Utilizing these factors, the Tenth Circuit has found that 339 days in solitary confinement does not create a protected liberty interest to give rise to a procedural due process claim.[131]

ii. Single Factor or Durational Approach

a. *Second Circuit*

The Second Circuit has found that holding an incarcerated individual in solitary confinement for longer than 305 days, considered alone, is "sufficiently atypical to require procedural due process protection under *Sandin*."[132] Notwithstanding, the Second Circuit has determined that "[w]hen confinement is of an intermediate duration—between 101 and 305 days—

[128] *Id.* at 998 (citing *Sandin*, 515 U.S. at 484) ("[P]laintiff's twenty-seven month confinement in the IMU without meaningful review 'impose[d] atypical and significant hardship on [him] in relation to the ordinary incidents of prison life.'").
[129] Marshall v. Ormand, 5 72 F. App'x. 659, 661 (10th Cir. 2014).
[130] *Id.*
[131] Hill v. Fleming, 173 F. App'x. 664, 672 (10th Cir. 2006); *see also Marshall*, 572 F. App'x. at 662 (holding that an inmate's placement in maximum security for over 400 days did not create a protected liberty interest).
[132] Iqbal v. Hasty, 490 F.3d 143, 161 (2d Cir. 2007) (citing *Sandin*, 515 U.S. at 484); *rev'd on other grounds by* Ashcroft v. Iqbal, 556 U.S. 662 (2009). *See also* Colon v. Howard, 215 F.3d 227, 231–32 (2d Cir. 2000) (concluding that 305 days in solitary confinement is "atypical and significant").

'development of a detailed record of the conditions of the confinement relative to ordinary prison conditions is required.'"[133]

b. *Sixth Circuit*

In *Harden-Bey v. Rutter*, the Sixth Circuit found that segregating an incarcerated individual from the general prison population for "three years and counting" may affect a cognizable liberty interest.[134] The Circuit noted "cases from [its] sister circuits suggest[ing], the duration of prison discipline bears on whether a cognizable liberty interest exists."[135] Correspondingly, the Sixth Circuit has held that "[s]hort terms of administrative segregation normally 'do[ ] not trigger a liberty interest.'"[136]

c. *Eleventh Circuit*

In *Quintanilla v. Bryson*, the Eleventh Circuit affirmed the lower court's finding that placing an incarcerated individual in solitary confinement for nine months, "establish[ed] the imposition of 'atypical and significant hardship . . . in relation to the ordinary incidents of prison life,' so as to create a liberty interest protected by due process."[137] The Eleventh Circuit did not provide lengthy reasoning, but cited precedent from the Eighth Circuit stating "where an inmate is held in segregation *for a prolonged or indefinite period of time* due process requires that his situation be reviewed periodically in a meaningful way and by relevant standards to determine whether he should be retained in segregation or returned to population."[138]

d. *D.C. Circuit*

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[133] *Id.* at 161 (citing Palmer v. Richards, 364 F.3d 60, 64–65 (2d Cir. 2004)).
[134] Harden-Bey v. Rutter, 524 F.3d 789, 793 (6th Cir. 2008) ("On this bare-bones record, we hold only that the district court erred in dismissing the complaint on the ground that the duration of this prison discipline, three years and counting, does not affect whether [the plaintiff] has a protected liberty interest.").
[135] *Id.*
[136] Hursey v. Anderson, No. 16–1146, 2017 WL 3528206, at *4 (6th Cir. Mar. 31, 2017) (citing Guile v. Ball, 521 F. App'x. 542, 544 (6th Cir. 2013)).
[137] Quintanilla v. Bryson, 730 F. App'x. 738, 743 (11th Cir. 2018) (citing *Sandin*, 515 U.S. at 484).
[138] *Id.* at 744 (citing Kelly v. Brewer, 525 F.2d 394, 400 (8th Cir. 1975)) (emphasis added).

In *Hatch v. District of Columbia*, the D.C. Circuit considered whether disciplinary and administrative segregation for twenty-nine weeks (i.e. seven months) implicated a liberty interest under the Fourteenth Amendment.[139] The *Hatch* Court purported to look "not only to the nature of the deprivation (e.g., loss of privileges, loss of out-of-cell time) but also to its length in evaluating its 'atypicality' and 'significance.'"[140] When remanding the case for further consideration, however, the D.C. Circuit instructed the district court to determine "even if the conditions [plaintiff] faced were *no more restrictive than ordinary conditions of administrative segregation* . . . whether its duration . . . was 'atypical' compared to the length of administrative segregation routinely imposed on similarly situated prisoners."[141]

IV. THE SUPREME COURT SHOULD RECOGNIZE A ONE MONTH BASELINE FROM WHICH TO TRIGGER FOURTEENTH AMENDMENT DUE PROCESS REVIEW

The Circuit Courts' various interpretations of whether solitary confinement imposes an atypical and significant hardship undermine the central promise of the due process clause—fair procedure.[142] Some federal circuits focus exclusively on duration, while others examine a combination of both duration and conditions of confinement to decide if due process protections are required.[143] As a result, "inmates in some areas of the country are subject to longer terms of segregation" without being afforded meaningful disciplinary hearings.[144] To resolve this quandary, the Supreme Court should adopt the single factor approach and recognize a uniform, one-month durational baseline from which to create a liberty interest and trigger Fourteenth Amendment due process review. First, Section A discusses the rationale for creating a one-month

[139] Hatch v. District of Columbia, 184 F.3d 846 (D.C. Cir. 1999) (emphasis added).
[140] *Id.* at 856.
[141] *Id.* at 858.
[142] *See Due Process*, CORNELL L. SCH. (Oct. 2022), https://www.law.cornell.edu/wex/due_process ("The clause also promises that before depriving a citizen of life, liberty or property, the government must follow fair procedures.").
[143] Nolasco & Vaughan, *supra* note 86.
[144] *See id.*

baseline, namely the extreme conditions inherent to solitary confinement and the effects of even a short stint in segregation. Next, the following sections explore the need for the Supreme Court to adopt a durational baseline, including: the devasting health implications of long-term solitary confinement (Section B); the limited rights and protections currently afforded to incarcerated individuals (Section C); and the call to remain consistent with our nations' history and traditions (Section D).

A. *Rationale for Creating a One-Month Baseline*

The Supreme Court should adopt the single-factor approach and hold that one month, or twenty-eight days, in solitary confinement is the appropriate baseline to constitute an "atypical and significant" hardship and trigger Fourteenth Amendment due process review on account of the extreme conditions inherent to segregation and the risks posed by spending even a short amount of time in isolation.

The Court should employ the single factor, rather than the multifactor, approach because conditions of segregation almost always involve extreme isolation—with incarcerated individuals typically "spend[ing] 22.5 to 24 hours a day in an 80-square-foot, concrete, windowless cell."[145] Further, individuals in solitary confinement "can't make phone calls . . . [are] often denied visitors and physical activity . . . [and served] food [that] is even sometimes rotten."[146] Conditions in solitary confinement are so deplorable that prominent legal scholars—including Jules Lobel from the University of Pittsburgh—contend that long-term segregation is *per se* cruel and unusual.[147] Because placement in solitary confinement is synonymous with the imposition of inhumane

[145] Christina Sterbenz, *Four Reasons To Ban Solitary Confinement*, BUS. INSIDER (Feb. 28, 2014), https://www.businessinsider.com/jules-lobel-says-solitary-confinement-is-unconstitutional-2014-2.
[146] *Id.*
[147] Sterbenz, *supra* note 145.

conditions, there is no need for the Supreme Court to consider the conditions of confinement disjunctively.

One-month is an appropriate baseline because, as recognized by the Third Circuit, cognitive disturbances arise after "even a few days in solitary confinement."[148] These serious cognitive disturbances include: "heightened anxiety, irrational anger and irritability, confused thought processes, and being extremely sensitive to external stimuli."[149] Consequently, many European countries have outright banned the use of solitary confinement for durations of one month or shorter.[150] The United States, alarmingly, continues to use "solitary confinement more extensively than any other country, for longer periods, and with fewer guarantees."[151] Because the Supreme Court is currently unwillingly to bar domestic use of the practice,[152] it should at least afford incarcerated individuals with due process review after one month to prevent them from remaining in solitary confinement indefinitely.

Although this one-month baseline is shorter than the durations that some federal circuits have found to implicate a constitutionally protected liberty interest, it is not drastically so.[153] Additionally, because most solitary confinement sentences start at one month,[154] it is a practical baseline from which to determine whether a correctional institution has a legitimate purpose for keeping an incarcerated individual in confinement.

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[148] Williams v. Secretary Pennsylvania Dep't. of Corr., 848 F.3d 549, 562 (3d Cir. 2017).
[149] Stephanie Wykstra, *The Case Against Solitary Confinement*, VOX (Apr. 17, 2019), https://www.vox.com/future-perfect/2019/4/17/18305109/solitary-confinement-prison-criminal-justice-reform.
[150] Katherine Lamb, *Beyond Solitary Confinement: Lessons from European Prison Reform*, BROWN POL. REV. (Nov. 22, 2015), https://brownpoliticalreview.org/2015/11/beyond-solitary-confinement-lessons-from-european-prison-reform ("In Belgium, eight days is the maximum permissible duration, whereas Finland allows [fourteen] days; Poland, England, and Wales allow [twenty-eight].").
[151] Wykstra, *supra* note 149.
[152] *See* Kruzel, *supra* note 78.
[153] *See* Kervin v. La Clair Barnes, 787 F.3d 833, 836–37 (7th Cir. 2015) (citing Palmer v. Richards, 364 F.3d 60, 65–67 (2d Cir. 2004) (77 days); Mitchell v. Horn, 318 F.3d 523, 527, 532–33 (3d Cir. 2003) (90 days); and Gaines v. Stenseng, 292 F.3d 1222, 1225–26 (10th Cir. 2002) (75 days)).
[154] Dan Nolan & Chris Amico, *Solitary by the Numbers*, FRONTLINE (Apr. 18, 2017), http://apps.frontline.org/solitary-by-the-numbers.

B. *Devastating Health Implications of Long-Term Solitary Confinement*

As discussed in Part II, individuals subject to solitary confinement suffer from a variety of physical and mental health problems.[155] They are "more likely to develop anxiety, depression, suicidal thoughts, and psychosis," and are at a heightened risk for developing a range of physical conditions, including "fractures, vision loss, and chronic pain."[156] The adverse effects of solitary confinement worsen the longer an incarcerated individual remains there.[157] Additionally, "[r]esearch indicates that many problems people develop while in solitary confinement often persist upon their return to the general population or their release to the outside world."[158]

Nations across the globe have recognized the dangers posed by solitary confinement and have limited their use of the practice accordingly.[159] Countries in Europe have restricted "the maximum permissible duration for solitary confinement allowed as punishment," with ranges stemming from eight to sixty days.[160] Juan E. Méndez, the United Nations' Special Rapporteu on torture, has further stated that "[i]ndefinite and prolonged solitary confinement in excess of [fifteen] days should also be subject to an absolute prohibition."[161] In addition to these durational limitations, the European Court of Human Rights recently held that "in order to avoid any risk of

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[155] *See* notes 46-59.

[156] Jayne Leonard, *What are the Effects of Solitary Confinement on Health?*, MEDICALNEWSTODAY (Feb. 16, 2023), https://www.medicalnewstoday.com/articles/solitary-confinement-effects#mental-health-effects.

[157] Bruce A. Arrigo & Jennifer Leslie Bullock, *The Psychological Effects of Solitary Confinement on Prisoners in Supermax Units*, UNIV. OF NORTH CAROLINA AT CHARLOTTE, 52 INT'L J. OF OFFENDER THERAPY & COMPAR. CRIMINOLOGY 622, 627 (Dec. 2008) ("The adverse effects of solitary confinement appear to be related primarily to the duration and conditions of internment.").

[158] Tiana Herring, *The Research Is Clear: Solitary Confinement Causes Long-Lasting Harm*, PRISON POL'Y INITIATIVE (Dec. 8, 2020), https://www.prisonpolicy.org/blog/2020/12/08/solitary_symposium.

[159] Katherine Lamb, *Beyond Solitary Confinement: Lessons from European Prison Reform*, BROWN POL. REV. (Nov. 22, 2015), https://brownpoliticalreview.org/2015/11/beyond-solitary-confinement-lessons-from-european-prison-reform.

[160] *Id*. ("In Belgium, eight days is the maximum permissible duration, whereas Finland allows [fourteen] days; Poland, England, and Wales allow [twenty-eight]; France and Estonia allow [forty-five]; and Ireland allows up to [sixty].").

[161] *Solitary Confinement Should Be Banned In Most Cases, UN Expert Says*, UN NEWS, UNITED NATIONS (Oct. 18, 2011), https://news.un.org/en/story/2011/10/392012.

arbitrariness, substantive reasons must be given when a protracted period of solitary confinement is extended."[162]

Given the extreme risks that prolonged solitary confinement poses to the health and safety of incarcerated individuals, and the fact that the United States lags behind its global counterparts in curtailing use of the practice, the Supreme Court should establish a one-month durational baseline—from which time in solitary confinement is deemed "atypical and significant"—to trigger Fourteenth Amendment, due process review.

C. *Limited Rights and Protections Currently Afforded to Incarcerated Individuals*

The constitutional rights of incarcerated individuals in the United States "are more limited in scope than [those] held by individuals in society at large."[163] The Supreme Court has reasoned that "[l]awful imprisonment necessarily makes unavailable many rights and privileges of the ordinary citizen."[164] Concerningly, in addition to their limited constitutional rights, incarcerated individuals have finite means to communicate wrongdoings that occur in prison.[165] This is especially true for incarcerated individuals in solitary confinement, who often have just "one hour [per day] to . . . make a phone call, *if allowed*."[166]

The limited opportunities for incarcerated individuals to seek redress is further compounded by the high degree of judicial deference accorded to prison officials.[167] The Supreme

[162] Ramirez Sanchez v. France, App. No. 59450/00, 45 Eur. H.R. Rep. 49, ¶ 139 (2007).
[163] Shaw v. Murphy, 532 U.S. 223, 229 (2001).
[164] Wolff v. McDonnell, 418 U.S. 539, 555 (1974).
[165] *Solitary Confinement Facts*, AM. FRIENDS SERVICE COMM., https://afsc.org/solitary-confinement-facts#:~:text=Although%20solitary%20confinement%20conditions%20vary,rare%20non%2Dcontact%20family%20visits (last visited Feb. 18, 2024) ("Although solitary confinement conditions vary from state to state and among correctional facilities, systematic policies and conditions include: . . . [s]everely limited contact with other human beings . . . [i]nfrequent phone calls and rare non-contact family visits.").
[166] Kiana Calloway, *I Spent 16 Months in Solitary Confinement and Now I'm Fighting to End It*, ACLU (July 3, 2019), https://www.aclu.org/news/prisoners-rights/i-spent-16-months-solitary-confinement-and-now-im (emphasis added).
[167] Turner v. Safley, 482 U.S. 78, 85 (1987) ("Where a state penal system is involved, federal courts have, as we indicated in Martinez, additional reason to accord deference to the appropriate prison authorities.").

Court has held that "[w]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably relate[s] to legitimate penological interests."[168] This "reasonable relation" or "rational basis" test is the lowest level of judicial scrutiny applied to determine whether a specific law or action violates an individual's right, and it is arguably even more deferential when imposed in the prison setting.[169]

Considering the limited rights and protections currently afforded to incarcerated individuals—in contrast to the high level of deference accorded to prison officials—the Supreme Court should establish a one-month durational baseline from which to prompt Fourteenth Amendment, due process review. Such a baseline would guard against creating a harbor for human rights abuses in prison.

D. *Historical Argument for a One-Month Baseline*

In *Michael H. v. Gerald D.*, Justice Antonin Scalia—one of history's most influential Supreme Court jurists[170]—stated: "[i]n an attempt to limit and guide interpretation of the [due process clause], we have insisted not merely that the interest denominated as a 'liberty' be 'fundamental' . . . but also that it be an interest traditionally protected by our society."[171] Phrased differently, modern Supreme Court jurisprudence only affords due process protections to liberty interests "'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"[172]

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[168] *Id.* at 89.
[169] *Rational Basis Test*, CORNELL L. SCH., https://www.law.cornell.edu/wex/rational_basis_test.
[170] Brian P. Smentkowski & Aaron M. Houck, *Antonin Scalia*, ENCYCLOPEDIA BRITANNICA (Feb. 9, 2024), https://www.britannica.com/biography/Antonin-Scalia ("Scalia was perhaps the most influential Supreme Court justice of his generation.").
[171] Michael H. v. Gerald D, 491 U.S. 110, 122 (1989).
[172] *Id.* (citing Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).

The Court's insistence that "the asserted liberty interest be rooted in history and tradition"[173] provides a strong argument for providing due process protections to incarcerated individuals in solitary confinement. As legal scholar David Shapiro has demonstrated, at Walnut Street Jail—"the birthplace of solitary confinement in America"—the use of prolonged segregation was carefully regulated. [174] Individuals in solitary confinement had a cognizable liberty interest against being sequestered there long-term, as the prison adopted the reformist principal that "isolation becomes cruel and immoral when prolonged".[175] Further, prison officials at Walnut Street Jail "had the power to impose solitary confinement to discipline prisoners, *but only for days or weeks*."[176] Holding an incarcerated individual in long-term solitary confinement was only appropriate when pursuant to a criminal punishment, which was reserved for serious offenses and limited by established sentencing ranges.[177] This historical record clearly establishes that freedom from long-term solitary confinement is a liberty interest "rooted in history and tradition,"[178] and casts doubt upon any argument that "the founding generation would have embraced the contemporary regime of judicial deference in matters of human isolation."[179]

Additionally, this historical argument for due process protections may increase the likelihood that such a durational baseline would be supported by both progressive and conservative leaning judges. Traditionally, "progressives" or members of the Democratic Party have favored policies seeking to restrict the use of solitary confinement in prisons, jails, and detentions

[173] *Id.* at 123.
[174] Shapiro, *supra* note 22, at 545-46.
[175] *Id.* at 554.
[176] *Id.*
[177] *Id.*
[178] *Michael H.*, 491 U.S. 110 at 123.
[179] *Id.*

centers.[180] The current Supreme Court, however, leans more conservative.[181] This new, conservative Court, guided by Antonin Scalia's past opinions, has repeatedly emphasized the role of history and tradition when justifying its conclusions.[182] Because the historical record at Walnut Street Jail clearly demonstrates that those creating prison policy during the founding generation understood that solitary confinement should be limited, conservative judges would also be likely to uphold a durational baseline from which to prompt due process review.

V. CONCLUSION

Holding incarcerated individuals in long-term solitary confinement is a damaging practice that occurs all too often in correctional institutions across the United States. The due process clause of the Fourteenth Amendment offers incarcerated individuals a meaningful avenue to challenge the use of prolonged solitary confinement where it implicates a constitutionality protected liberty interest. In order to clarify when such a liberty interest attaches, the Supreme Court should hold that one month in solitary confinement constitutes an "atypical and significant" hardship which requires Fourteenth Amendment, due process review due to (1) the devastating health effects of long-term solitary confinement, (2) the limited protections currently afforded to incarcerated individuals, and (3) because such a baseline is consistent with our nation's history and traditions, as demonstrated at Walnut Street Jail in Philadelphia, Pennsylvania during the late 1700s.

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[180] Jessica Schulberg, *House Democrats Introduce Bill Aimed At Ending Solitary Confinement, A Form Of Torture*, HUFFPOST (July 27, 2023), https://www.huffpost.com/entry/house-democrats-introduce-bill-to-end-solitary-confinement_n_64c2deebe4b024f8ebc7de57.

[181] Nina Totenberg, *The Supreme Court is the Most Conservative in 90 Years*, NPR (July 5, 2022), https://www.npr.org/2022/07/05/1109444617/the-supreme-court-conservative ("The [C]ourt produced more conservative decisions this term than at any time since 1931.")

[182] Erwin Chemerinsky, *History, Tradition, the Supreme Court, and the First Amendment*, 44 HASTINGS L.J. 901, 919 (1993) ("Even though the Court always has discussed historical practices in justifying its conclusions, the emphasis on tradition as a limit on the scope of rights is new. [There is a] constant use of history to justify conservative results.").