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Morality in a Box

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Introduction

The criminal justice systems is a set of laws constructed to prevent harm to society by punishing those who have done harm to others and threatens with punishment those who would commit future harm.¹ One of the ways our system punishes harmful conduct is by taking a persons liberty by imprisoning them. It must be emphasized that imprisonment is the most basic violation of an individual's freedom, and a violation of this right must be justified.

Incarceration is currently a popular form of punishment in the United States of America; in fact more than two million people are currently incarcerated in prisons (which holds felons convicted of a state or federal crime) and Jails (those awaiting trial or sentencing).² The United States incarcerates more of its population and a greater percentage of its population than any other nation.³ The United States also has a greater number of incarcerated citizens than any other country, accounting for over 20% of the world prison population.⁴ The United States imprisons more individuals than China, which has general population four times greater than the United States, and even more than Russia.⁵ With so many individuals imprisoned in the United States and at such a high rate (relative to the practice of the rest of the world) the American prisons have had to devise a system that allows them to control, supervise and manage these incarcerated individuals.

America did not always incarcerate such a large percentage of its own population

¹ 1 Subst. Crim. L. § 1.5 (2d ed.)

² <http://www.prisonstudies.org/country/united-states-america>

³ <http://www.idcr.org.uk/wp-content/uploads/2010/09/WPPL-9-22.pdf>

⁴ <http://www.idcr.org.uk/wp-content/uploads/2010/09/WPPL-9-22.pdf> (The current prison population is around 10.1 million people, and the United states incarcerates 2.23 million people.

⁵http://www.nytimes.com/2008/04/23/world/americas/23iht23prison.12253738.html?pagewanted=all&_r=0

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let alone the global population. The American penal system underwent a change in its culture and policy goals beginning in the early 1970s, rejecting the rehabilitative approach to incarceration that was so popular through out the 1960s, and adopted a punishment focused approach to appear tough on crime. This approach does not view prisoners as individuals who made a mistake and needs rehabilitation, rather it views prisoners as an individual who committed a crime and must be punished.⁶ With a renewed focus on getting individuals in prison, as opposed to what they would do out of prison, there was a goal of incarcerating more individuals and for longer terms. Consistent with this approach America saw an unprecedented growth in its inmate population. The population of prisoners incarcerated in American jails and prisons increased from a total of 557,000 in 1981 to over 2.2 million in 2010.⁷

Solitary Confinement

There is no uniform definition of solitary confinement internationally or even in the US, generally solitary confinement is the practice of physically isolating a prisoner in a cell (cells usually have reduced or nonexistent natural lighting) for 22-24 hours per day, with extremely limited human contact or interaction with the outside world (in most jurisdictions prisoners are allowed outside for an hour a day for solitary exercise or recreation). Traditionally solitary confinement cuts off a prisoner's connection to the world outside of the cell in three ways: 1) severe limitations on entertainment the prisoner

⁶ Leena Kurki and Norval Morris, "The Purposes, Practices, and Problems of Supermax Prisons," *Crime & Justice* 28 (2001) 390; Jesenia M. Pizarro, Vanja M. K. Stenius and Travis C. Pratt, "Supermax Prisons: Myths, Realities, and the Politics of Punishment in American Society," *Criminal Justice Policy Review* 17 (2006) 5,8,9.

⁷ Todd D. Minton & William J. Sabol. U.S. Dep't Of Justice, Bureau Of Justice Statistics, Jail Inmates At Midyear 2008-Statistical Tables (Mar. 2009), available at:<http://bjs.ojp.usdoj.gov/content/pub/pdf/jim08st.pdf>; William J. Sabol Et Al., U.S. Dep't Of Justice, Bureau Of Justice Statistics, Prisoners In 2008 (Dec.2009), available at <http://bjs.ojp.usdoj.gov/content/pdf/p08.pdf>; see also <http://www.idcr.org.uk/wp-content/uploads/2010/09/WPPL-9-22.pdf>

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may have while in solitary confinement such as radios, televisions or reading materials; 2) severe limitations on the contact the prisoner may have with fellow inmates such as participation in group activities, meals, religious services and therapy sessions; 3) and there are also severe limitations, restrictions, or prohibitions on visitation and communication with the outside world.⁸

The length of time an individual spends in solitary confinement can range from days, to months, to years, to decades and in rare cases in perpetuity. In short the practice extremely isolates a prisoner from every form of human contact. The use of solitary confinement is generally for either disciplinary or administrative purposes; segregation is a form of punishment for breaking prison rules. Disciplinary segregation is not administered by a sentence from a judge; it is solely in the discretion of prison administration. Disciplinary segregation is not permanent and has a theoretical end so the prisoner can reenter general population after he has learned his lesson. Administratively segregated prisoners are placed in isolation either because they are dangerous or especially vulnerable and need as such, to be protected from the general prison population or particular inmates. Minors in adult prisons traditionally are placed in administrative segregation. Unlike disciplinary segregation, administrative segregation is indeterminate because it is a result of externalities not within the control of the prisoner. In 1980 the United States federal system began to institutionalize Supermax prisons.⁹ Supermax prisons are entire prisons or large units of prisons that house prisoners in isolated cells (sometimes with a cellmate) for 22-23 hours a day, these inmates are considered too dangerous to exist amongst the general prison population. The inmates in

⁸ http://solitaryconfinement.org/uploads/Istanbul_expert_statement_on_sc.pdf

⁹ <http://www.motherjones.com/politics/2009/03/solitary-confinement-brief-natural-history>.

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supermax prisons typically include gang members, mob bosses, escape risks, terrorists and generally dangerous inmates that pose a threat to general prison population and guards.¹⁰ Supermax prisons began with the federal prisons and it is now widely practiced in the majority of states.¹¹

Solitary confinement although popular now, is not a new practice. In 1790 Quaker Reformers developed the penal strategy of subjecting inmates to long-term solitary confinement, under the belief that it would better rehabilitate prisoners. The premise of the theory was that if prisons could maximize control over prisoners by isolating them from the negative influence of other criminals, the prisoner in solitary confinement would have time for true self-reflection.¹² The prisoner would then pray and atone for his misdeeds, and then correct his behavior in the future.¹³ Philadelphia's Walnut street jail was the first prison to establish this practice and was a model for penitentiaries across the country. The practice of isolating prisoners from all human contact came to be known as the Pennsylvania system.¹⁴ Under the Pennsylvania system, prisoners would be taken to their cells with black hoods covering their heads and would be kept in the same cell throughout their sentence and prevented from engaging in contact with other prisoners and guards. Due to overcrowding, the Pennsylvania legislator erected two new large-scale facilities, which included more cells for solitary confinement.¹⁵ The Pennsylvania system promised more than simply a better way to rehabilitate prisoners. The reformers

¹⁰ Craig Haney, A Culture of Harm: Taming the Dynamics of Cruelty in Supermax Prisons, 35 *Crim. Just. & Behav.* 956, 968 (2008)

¹¹ *Id.*

¹² Holly Boyer, Note: Home Sweet Hell: An Analysis of the Eighth Amendment's 'Cruel and Unusual' Clause As Applied to Supermax Prisons, 32 *Sw. U. L. Rev.* 317, 326 (2003).

¹³ *Id.* at 325

¹⁴ Melvin Gutterman, Prison Objectives and Human Dignity: Reaching a Mutual Accommodation, 1992 *B. Y. U. L. Rev.* 857, 862 (1992).

¹⁵ *Id.* at 863

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also believed that solitary confinement would save the state a lot of money because there would be less need for guards to supervise prisoners in a cell all day. And it was also deemed beneficial to security because prisoners would not be able to hatch escape plans with each other.¹⁶ The Pennsylvania system was adopted by other states, most notably New York's Auburn state prison, Auburn State experimented with extreme isolation of prisoners from 1821 to 1823.¹⁷

Although in theory institutionalizing the practice of solitary confinement would save the state money, simplify prison security and, most importantly, better rehabilitate prisoners, in practice it did not come close to achieving any of these goals. The system premised on the theory that it would assist the prisoners to discover a new outlook on the world and be "fixed" was criticized for its cruelty and admonished for its inhumanity.¹⁸

In his reflection of his visit to Pennsylvania's Eastern state penitentiary in 1842, which was a prison designated for solitary confinement, Charles Dickens observed: "(T)he dull repose and quiet that prevails is awful. . . . Over the head and face of every prisoner who comes into this melancholy house, a black hood is drawn; and in this dark shroud, an emblem of the curtain dropped between him and the living world, he is led to the cell from which he never again comes forth, until his whole term of imprisonment has expired. . . . He is a man is a man buried alive; to be dug out in the slow round years; and in the meantime dead to everything but torturing anxieties and horrible despair."¹⁹

Dickens was not alone, after their inspection of the New York Auburn state prison, Alex de Tocqueville and Gustave de Beaumont observed that: "This trial, from which so happy

¹⁶ *Id.*

¹⁷ Harry Elmer Barnes, "The Historical Origin of the Prison System in America," *Journal of the American Institute of Criminal Law & Criminology* 12 (1921): 53.

¹⁸ *Id.*

¹⁹ Charles Dickens, *American Notes* 121-22 (1961).

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a result had been anticipated, was fatal to the greater part of the convicts: in order to reform them, they had been submitted to complete isolation; but this absolute solitude, if nothing interrupt it, is beyond the strength of man; it destroys the criminal without intermission and without pity; it does not reform, it kills. The unfortunates, upon whom this experiment was made, fell into a state of depression, so manifest, that their keepers were struck with it; their lives seemed in danger, if they remained longer in this situation.”²⁰

Both Beaumont and Tocqueville also challenged the idea that extreme isolation could aid rehabilitative efforts, noting, “this system, fatal to the health of the criminals, was likewise inefficient in producing their reform.” The governor of New York subsequently pardoned 26 of those subjected to the experiment, 14 of whom “returned after a short time after into the prison, in consequence of new offences.”²¹

Many other states that experimented with the practice of solitary confinement quickly abandoned the practice.²² In 1890 the United States Supreme Court in *In Re Medley* looked at the history of solitary confinement and found that the practice had profound negative effects on inmates mental health. The court observed that: “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; others still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental

²⁰ Gustave de Beaumont and Alexis de Tocqueville, *On the Penitentiary System in the United States and Its Application in France*, trans. Francis Lieber (Philadelphia: Carey, Lea & Blanchard, 1833) 5-6.

²¹ *Id.*

²² See Barnes, *supra* note 17, at 56

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activity to be of any subsequent service to the community.”²³ By the 20th century Solitary confinement had largely been abandoned by most prisons in America.²⁴

Alcatraz was the first U.S. prison designated to hold the worst of the worst prisoners. Those who refused to follow the rules of other federal prisons, escape risks, and notorious criminals such as Mafia Boss Al Capone were sent to Alcatraz.²⁵ In 1963 Alcatraz closed, primarily because the prison’s costs were double the amount of any other prison.²⁶ After Alcatraz closed in 1963, that same year the Marion Federal Penitentiary was erected in Illinois to become the new and only federal maximum-security prison.²⁷ It housed up to 500 inmates with varying levels of security and accepted around fifty prisoners that were transferred from Alcatraz. Consistent with the punishment model of America in the 1970s that stressed a “tough on crime” approach, Marion constructed segregation units within its walls for the worst of the worst prisoners.²⁸

The American penal system changed on October 22, 1983 when in the Marion, Illinois prison, two separate inmates murdered two guards in separate incidents.²⁹ Immediately, the warden ordered a permanent lock down confining all inmates to their cells for 24 hours a day.³⁰ For the next several years all prisoners housed in Marion were

²³ *In re Medley*, 134 U.S. 160, 168 (1890).

²⁴ Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis Of Supermax and Solitary Confinement*, 23 N.Y.U. Rev. L. & Soc. Change 477, 485-88 (1997)

²⁵ <http://www.bop.gov/about/history/alcatraz.jsp>

²⁶ *Id.*

²⁷ http://people.umass.edu/~kastor/ceml_articles/cu_in_us.html

²⁸ David A. Ward & Allen F. Breed, *The United States Penitentiary Marion, Illinois: Consultants’ Report Submitted to Committee on the Judiciary*, H.R. Doc. No. H522-3, 98th Cong., 2d Sess. 1984.

²⁹ *A History of Hard Time*, Legal Aff., JANUARY/FEBRUARY 2003, at 39, 42

³⁰ *Id.*

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placed on permanent lockdown for 23 hours a day and remained under lockdown until 2006.³¹ This type of prison came to be known as the “supermax” prison.

The National Institute of Corrections, an agency of the United States government, defines a supermax prison as:

“[a] freestanding facility, or a distinct unit within a facility that provides for the management and secure control of inmates who have been officially designated as exhibiting violent or serious and disruptive behavior while incarcerated.³² It typically involves up to 23-hour-per-day, single-cell confinement for an indefinite period of time.³³ Such inmates have been determined to be a threat to safety and security in traditional high-security facilities and their behavior can be controlled only by separation, restricted movement, and limited direct access to staff and other inmates.”³⁴

In 1983 the Marion federal penitentiary was the only prison in the United States to meet the National Institute of Corrections definition of the supermax and was the federal governments only maximum-security prison. After the incidents at Marion the Director of the Federal Bureau of Prisons, Norman Carlson, advocated for the use of a new type of prison, designed to isolate uncontrollable inmates.³⁵ Carlson explained that supermax prisons are necessary because “there is no way to control a very small subset of the inmate population who show absolutely no concern for human life. These two characters

³¹http://www.slate.com/blogs/crime/2013/10/23/marion_prison_lockdown_thomas_silverstein_how_a_1983_murder_created_america.html

³²Nat'l Inst. of Corrections, U.S. Dep't of Justice, Supermax Housing: A Survey of Current Practice 4 (1997), <http://www.nicic.org/pubs/1997/013722.pdf>.

³³ http://www.urban.org/UploadedPDF/411326_supermax_prisons.pdf

³⁴Nat'l Inst. of Corrections, U.S. Dep't of Justice, Supermax Housing: A Survey of Current Practice 4 (1997), <http://www.nicic.org/pubs/1997/013722.pdf>.

³⁵ *Id.*

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(who killed the two guards) had multiple life sentences. Another sentence is no deterrent.”³⁶ Put another way, supermax prisons in its infancy were intended to house dangerous inmates that could not be controlled and were unreceptive to punishment. The only option prisons had for such inmates where to keep them away from everyone else. But the essence of this practice was the fact that the inmates sent to supermax prisons were beyond rehabilitation, there was no hope their behavior would improve so they were sent to solitary confinement to at least keep the other inmates and guards safe.

In 2006 The Marion Prison would be downgraded to a medium security prison, leaving only one federal supermax prison in America.³⁷ As of 2014, the only Federal Supermax prison is located in Florence Colorado. The federal supermax prison in Colorado is unlike any other prison. It’s unique design; technology and particular brand of inmate set it apart. On one occasion the prison allowed reporters to take a tour but prohibited reporters from taking pictures or video.³⁸ It was described by one journalist as a “clean version of what he imagined hell to be like.”³⁹ But given the limited public access the and the careful screening of all communications the inmates have with outside world, the exact conditions and treatment in this prison will remain a mystery. What is known is that prisoners are held in a small cell for 23-24 hours a day, by themselves, with the light constantly on and surrounded by walls that are solid metal so they cannot see

³⁶ <http://www.sfgate.com/news/article/The-Last-Worst-Place-The-isolation-at-2970596.php#page-2>

³⁷ http://www.slate.com/blogs/crime/2013/10/23/marion_prison_lockdown_thomas_silverstein_how_a_1983_murder_created_america.html

³⁸ Dan Eggen, New Home Is ‘Alcatraz of the Rockies’: Moussaoui to Join Many High-Profile Inmates at Federal Prison in Colorado, Wash. Post, May 5, 2006; Jim Hughes, The Feds Plan to Make the Supermax Facility in Florence the Nation’s Premier Prison for Terrorists ‘Alcatraz of the Rockies,’ Denver Post, Aug. 3, 2003

³⁹ 60 Minutes: Supermax: A Clean Version of Hell (CBS television broadcast Oct. 14, 2007), available at http://www.cbsnews.com/stories/2007/10/11/60minutes/main3357727.shtml?source=RSSattr=60Minutes_3357727.

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what is going on outside or communicate with fellow inmates.⁴⁰ For the most notorious criminals Florence had a supermax within the supermax called “ultramax”. Officially called Range 13 it held two prisoners, Thomas Silverstine who killed a prison guard in Marion, and 1993 World Trade Center Bomber Ramzi Yousef, a man the Warden decided to put in Range 13 after “seeing his eyes.”⁴¹ Currently all prisoners have been removed from this section.⁴²

While the federal system has had some restraint in constructing supermax prisons, the state prisons found this type of supermax prison very attractive. In 1983 the Marion prison was the only supermax prison, now over 44 states have constructed their own state supermax prisons, or have segregated housing units adjacent to lower security prisons.⁴³ These prisons liberally use these supermax prisons and segregated housing units for administrative and disciplinary purposes but fail to give the prisoners any clear standard for placement in segregated housing units (SHU).⁴⁴ The use of SHU’s and supermax prisons have been severely criticized by human rights organizations.⁴⁵

By 1991 the Human Rights Watch reported that 36 states had constructed or repurposed facilities emulating Marion’s supermax facility.⁴⁶ Today at least 44 states have supermax facilities, which house approximately 25,000 inmates.⁴⁷ With the popularity of the supermax facilities, many states expanded the number of extreme

⁴⁰ Robert Perkinson, *Shackled Justice: Florence Federal Penitentiary and the New Politics of Punishment*, Soc. Just. 117 (1994); Francis X. Clines, *A Futuristic Prison Awaits the Hard-Core 400*, N.Y. Times, Oct. 17, 1994, at A2.

⁴¹ <http://www.cbsnews.com/news/supermax-a-clean-version-of-hell/2/>

⁴² *Id.*

⁴³ Daniel P. Mears & William D. Bales, *Supermax Incarceration and Recidivism*, 47 *Criminology* 1131, 1135 (2009)

⁴⁴ *Id.* at 1135

⁴⁵ http://www.nyclu.org/files/publications/nyclu_boxedin_FINAL.pdf at 7

⁴⁶ U.S. Department of Justice, National Institute of Corrections, *Supermax Housing: A Survey of Current Practice* (Washington: U.S. Department of Justice, 1997)

⁴⁷ Daniel P. Mears, *Evaluating the Effectiveness of Supermax Prisons*, Urban Institute Justice Policy Center, Mar. 2006: 4.

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isolation or solitary confinement units within lower security facilities. Because prison housing varies from state to state determining the exact number of prisoners in solitary confinement is difficult.⁴⁸ As of 2005 the US Department of justice estimated that nearly 80,000 inmates are housed in solitary confinement in prisons or jails or Supermax facilities.⁴⁹ To put these numbers in perspective, the number of prisoners held in solitary confinement increased 40% between 1995-2000 and the prison population grew by 28% in that same period. Thus, the American prison system has reached the point where solitary confinement is now a regular part of the daily life of many inmates.⁵⁰

In addition to putting more prisoners in solitary confinement, prisons have also increased the period of time that an inmate will stay in solitary confinement. In New York, The NYCLU estimated that the average cumulative sentence in a disciplinary solitary confinement setting is three years, and found that many prisoners serve out the term of their sentence in solitary.⁵¹ In the infamous Pelican Bay Security Housing Unit located in California prisoners are held for an average of seven and a half years, and of the 1,126 prisoners in Pelican Bay's Solitary confinement units more than half of those inmates stayed there for at least 5 years.⁵² Additionally, 89 inmates have been in solitary confinement for over 20 years, and one inmate has reportedly been in solitary for 44 years.⁵³

Most of the supermax cells are purposefully solid to prevent inmates from

⁴⁸ Roy D. King, "The Rise and Rise of Supermax," *Punishment and Society* 1 (1999) 173.

⁴⁹ Shane Bauer, *Solitary in Iran Nearly Broke Me. Then I Went Inside America's Prisons*, Mother Jones (Nov./Dec. 2012), <http://www.motherjones.com/politics/2012/10/solitary-confinement-shane-bauer>.

⁵⁰ John J. Gibbons & Nicholas de B. Katzenbach, *Confronting Confinement: A Report of the Commission on Safety and Abuse in America's Prisons* 14-15 (2006)

⁵¹ The Correctional Association, *Lockdown New York: Disciplinary Confinement in New York State Prisons* 21-22 (2003), available at http://www.correctionalassociation.org/wp-content/uploads/2012/05/lockdown-new-york_report.pdf.

⁵² See Bauer, *supra* note 49

⁵³ *Id.*

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communicating through the walls, prisoners do not even have contact with guards, because the doors open and close by remote control.⁵⁴ In supermax the hour of free time takes place in a caged in wall or cement hallways, prisons call this hour of free time a dog run.⁵⁵ Prison officials justify this treatment on the fact that these prisoners are presumably worst of the worst inmates and deserve the punishment given to them. Acknowledging the severity and inhumanity of this kind of treatment, an administrator of a supermax prison in Texas stated, “ It’s sad to say but there are some people who deserve to be treated like animals.”⁵⁶

The increase in the use of solitary confinement is hard to understand given the harsh criticism of the scholars⁵⁷ and the 1890 opinion in *Medley* by United States Supreme Court citing the harmful effects of solitary confinement.⁵⁸ Recent research has shown that not only were the 19th century observations of the harmful effects of solitary confinement on prisoners correct but the negative effects are actually worse.⁵⁹ Since the increase in the use of solitary confinement in last decade, there has been a plethora of research conducted to support the negative physiological impact solitary confinement has on prisoners.

The Isolation Experience

The ACLU collected first hand accounts of inmates experience in solitary confinement. One inmate said of his experience in solitary confinement “the entire time I

⁵⁴ See Haney, *supra* note 10 at 956, 968

⁵⁵ *Id.*

⁵⁶ Kevin Johnson, Serving Super hard Time: New Prisons Isolate Worst Inmates, USA Today, Aug. 4, 1997, at A1.

⁵⁷ See notes *Supra* 40-56

⁵⁸ See *In Re Medley*, *supra* note 23, at 167

⁵⁹ David Lovell, Patterns of Disturbed Behavior in a Supermax Population, 35 *Crim. Just. & Behav.* 985, 991 Figure 1 (2008); See also David Fathi, The Dangerous Overuse of Solitary Confinement in the United States, in *Prison Law 2012*, at 175, 178 (PLI Litig. & Practice, Course Handbook Ser. No. 234, 2012).

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was in the supermax I was in a 7 by 14 reinforced concrete cell, 23 sometimes 24 hours a day. On the days I was allowed out for an hour I was allowed to be escorted in handcuffs to a 40' long by 8' wide chain link enclosure where I would have the cuffs removed and be allowed to pace or do in place calisthenics for an hour before I was brought back inside for a ten minute shower, one of three I would receive each week. The lights in the cell were always on, just dimmed at night. The sound of slamming metal doors and jingling keys could be heard 24 hours a day. Each day I would read part of my book, but I had to limit how much I read, since I was only allowed three books from the library each week. If I was lucky three books would last me five days.”⁶⁰ Another inmate who spent two years in isolation at Pelican Bay State Prison described his experience: “sometimes I feel overwhelmed. I get trepidations, nervous, agitated, I go off the deep end. . . . Here I feel like I’m in a Kennel, closed off from life itself. I feel like I live in a coffin, like a tomb.”⁶¹ An inmate in a New York state prison who was in the Solitary confinement unit for disciplinary reasons described his experience in the following manner, “It gets real lonely in here, especially if you don’t have family to communicate with or send you books. I’m grateful to have that, but after you be in this cell for so long it hard to keep your mind outside of these four walls, all you have is memories.”⁶² One inmate said of his experience “Nobody likes to be alone. Its not human nature. We’re social. When you take that away from a person it’s standing still, with nothing. Nothing forward, backward, sideways. You just have you.”⁶³ An inmate with more than twenty years of experience in

⁶⁰ An Act to Ensure Humane Treatment For Special Management Prisoner: Hearing on LD 1611 Before the Joint Committee on Criminal Justice and Public Safety, 124th Legis., 2nd Reg. Sess.(Maine, Feb.17, 2010) (statement of former prisoner Michael Cole).

⁶¹ Terry Kupers, M.D., *Prison Madness: The Mental Health Crisis Behind Bars And What We Must Do About It*, 56-57 (1999)

⁶² See NYCLU, *supra* note 45, at iii

⁶³ *Id.* at 27

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and out of solitary confinement described the isolation experience: “You could be in outer space.”⁶⁴ He explained he felt like he was required to, “To just sit quietly like in a space capsule in a cell with very little human contact or cordial conversation.”⁶⁵ Of all the things he wanted while in solitary, his desires were modest: “ I want to interact with others, see others. I want to go to the yard or shower. I want the liberty of walking down the company gallery so that I can feel human.”⁶⁶ Another inmate describing the effect isolation had on himself and fellow prisoners and the lengths they took to deal with the idleness of the experience, said “ I would have a hard time counting the times I have seen another inmate cut themselves to the point that the entire floor of their cell was coated in blood, and they were removed for medical treatment after losing consciousness. Suicide attempts were not uncommon. The mentally unstable were punished for their actions rather than treated for their illness . . . When I was finally released from the Supermax into general population after almost two years, it was overwhelming. There mere sensations of human contact was harsh on my nerves. I would break into cold sweats and shake. I was overly stimulated and anxious all the time. It was very difficult to concentrate on one thing. Even to this day, I have a very difficult time focusing on one thing for very long and I am very easily distracted. The effects of the Supermax reach beyond the confines of its walls and fences.”⁶⁷

Others who were subject to prolonged isolation as prisoner of war or a hostage had accounts similar to that of the prisoners, and spoke to the effect of the idleness on the mind and how it lasts beyond the term of confinement. Senator John McCain was held as

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ See Joint Committee on Criminal Justice and Public Safety, *supra* note 60

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prisoner of war for five years, during which he was regularly beaten and tortured by his captors, sometimes he was beaten to point of broken limbs. He also spent more than two years in extreme isolation in a 15 wide by 15-foot tall cell. Senator McCain described solitary confinement in following manner: “it's an awful thing, solitary. It crushes your spirit and weakens your resistance more effectively than any other form of mistreatment. Having no one else to seek counsel from, you begin to doubt your judgment and your courage. But you eventually adjust to solitary, as you can to almost any hardship, by devising various methods to keep your mind off your troubles and greedily grasping any opportunity for human contact.”⁶⁸ McCain described the initial experience of isolation, “The first few weeks are the hardest. The onset of despair is immediate, and it is a formidable foe. You have to fight it with any means necessary, all the while trying to bridle the methods you devise to combat loneliness and prevent them from robbing your senses”.⁶⁹ “I had to carefully guard against my fantasies becoming so consuming that they took me permanently to a place in my mind from which I might fail to return.”⁷⁰ McCain explained how he dealt with the daily struggle, “On several occasions I became terribly annoyed when a guard entered my cell. . . . And disrupted some flight of fantasy where the imagined comforts where so attractive that I could not easily bear to be deprived of them. Sadly, I knew a few men in prison who had grown so content in their imaginary worlds that they preferred solitary confinement. . . . eventually, they stopped communicating with the rest of us.”⁷¹ McCain described his post-solitary experience, “There is little doubt that solitary confinement causes some mental deterioration in even

⁶⁸ John McCain, *Faith of My Fathers* 206 (Random House, 1999).

⁶⁹ *Id.*

⁷⁰ *Id.* at 207

⁷¹ *Id.* at 207

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the most resilient personalities. When mine was finally ended, in 1970, I was overwhelmed by the compulsion to talk non-stop, face to face with my obliging cellmate. I talked ceaselessly for four days.”⁷²

Senator McCain’s experience is important not only to give another voice of experience but also to show that solitary confinement conquers even the strongest of minds, and that perpetual self reflection with no other communication is not just dangerous to criminals who may have more negative things to reflect on. McCain was a highly trained fighter pilot, he knew to some extent what happens to prisoners of war and the army trains their men to withstand the torture inflicted on them to be able to withhold valuable information. With all his training McCain still said no mind could handle solitary confinement.⁷³ Conversely, many prisoners enter prison with mental or cognitive disabilities and a large majority (or all) is generally untrained to handle long or short periods of solitary confinement without losing their mind and at the very least mentally unfit to handle prolonged isolation without losing their mind.⁷⁴ Moreover, teens that are put in solitary confinement for protection from the adult inmates are certainly not mentally equipped in any respect to handle solitary confinement.⁷⁵ Human beings are social by nature, therefore it is no surprise that the strongest of minds and weakest of minds have the same experience in solitary confinement, because it is an inherently anti-social experience. Humans clearly are not meant to be put in boxes by themselves with nothing but their thoughts a bed and a toilet.⁷⁶

⁷² *Id.* at 217

⁷³ *Id.*

⁷⁴ Fred Cohen, Penal Isolation: Beyond the Seriously Mental Ill, 35 *Crim. Just. & Behav.* 1017, 1031 (2008); *See also* Kupers, *supra* note 61, at 56

⁷⁵ Elizabeth Calvin, National Juvenile Defender Center, *Legal Strategies to Reduce the Unnecessary Detention of Children* 56-58 (2004), available at http://www.njdc.info/pdf/detention_guide.pdf.

⁷⁶ http://www.newyorker.com/reporting/2009/03/30/090330fa_fact_gawande

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Terry Anderson a journalist and the chief middle east correspondent for the associated press at the time of his capture, details in his memoir the seven years he spent as a hostage of Hezbollah in Lebanon.⁷⁷ In particular he recounts the affect that long periods of isolation had on his mind. Anderson simply missed interacting with people, and was filled with feelings hopelessness and depression. As time passed and he spent more time in isolation he felt himself disintegrating, as if his brain were grinding down.⁷⁸ A month into confinement Anderson wrote: “The mind is a blank. Jesus, I always thought I was smart. Where are all the things I learned, the books I read, the poems I memorized? There’s nothing there, just a formless, gray-black misery. My mind’s gone dead. God, help me.”⁷⁹ All there was to do in life was to lay in bed and stare at the walls and ceiling. He would sleep twelve hours a day yet still be tired all the time and doze off uncontrollably. Anderson explained that he was desperate for any activity of almost any kind, because the idleness of laying on a bed staring at the ceiling was destroying his mind.⁸⁰ After prolonged isolation, Anderson a man who wrote for a living lacked the concentration to even read the bible he had in his cell, which, aside for staring at the ceiling, was the only other stimulation he had in the cell.⁸¹ Eventually he become irrationally possessive about his space, and would go into a rage if a guard would even step on his bed, reacting this way was at great risk to his own life, as this guard was holding him hostage by gunpoint ready to kill at moments notice.⁸² With nothing left to

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

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do but reflect on his life, Anderson would constantly ruminate, reflecting back on all the missteps he had made in life, his regrets, and his transgressions against god and family.⁸³

Anderson explained that his only salvation was when he would be put with other hostages for unpredictable periods of time. He noticed that shortly after experiencing the company of other human beings that, his thinking, concentration, ability to control emotions and hallucinations all improved, and would continue to improve during this period.⁸⁴ Anderson explained the difference between being alone in a cell as opposed to having the company of anyone: “I would rather have had the worst companion than no companion at all.”⁸⁵ He was eventually moved back to solitary confinement and spent this time in a six by six foot tall cell. After a few weeks he began to feel he was losing his mind again “I find myself trembling sometimes for no reason,” he wrote. “I’m afraid I’m beginning to lose my mind, to lose control completely.”⁸⁶ Eventually he did lose control completely, after several years of imprisonment he went up to the brick wall of his cell and began to bang his head against it repeatedly, the guards were able to stop him but after his head was crushed and bloody.⁸⁷

Anderson unlike McCain was not trained to deal with being a hostage or prisoner of solitary confinement, but unlike a prisoner, he is a scholar, a well read and highly educated individual, presumably containing more mental fortitude to deal with his own thoughts and occasional self reflection or assessment. At the very least he came into solitary confinement possessing a stronger state of mind psychologically than the average

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

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inmate possessed. Nevertheless, Anderson while better educated than the average prisoner still has one thing in common with all prisoners and people in isolation, he is a human being, a creature that is social by nature. Therefore even-though Anderson was held at gunpoint under threat of death for seven years as a hostage, most traumatic in his memory is the long periods of isolation. His mind craving for a companion and any mental activity, any person would have satisfied his need, it did not matter who the person was. During those seven years Anderson only constantly desired activity and human company. Anderson explained how he saw his mind getting weaker the longer the isolation continued and could not explain why his brain was not working normally. As time went on, the “fantasies” which Senator McCain was careful to make sure did not take over his mind, became so consuming in Anderson’s mind that the fantasies took him permanently to a place in his mind from which he was likely unable to escape. This explains his behavior towards the guards despite greatly risking his life, and how at one point he just smashed his head against a brick wall. After long periods of endless nothingness, Anderson’s fantasies become so consuming he was in a prison he could not escape, his mind, and he found himself inexplicably smashing his head against a brick wall and screaming at his armed captors. The Anderson story shows the overwhelming effect that prolonged isolation can have on even the strongest of minds and supports Senator McCain’s supposition that even the most resilient of personalities cannot survive the experience of solitary confinement without at least some mental deterioration.⁸⁸

The first hand accounts describing the experience of solitary confinement given by several inmates, Senator McCain as a prisoner of war, and Terry Anderson’s as a hostage, are all very similar in their description of the harmful effects that long periods of

⁸⁸ See McCain, *supra* note 68, at 217

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isolation had on their mental health. They all had trouble dealing with having nothing to do, no one to talk to, no where to go but the four corners of a cell, only accompanied by their own thoughts, every single day for a seemingly indeterminate amount of time. This was part of the struggle in trying to resist succumbing to the delusion of the mind caused by a long period of isolation.

The three accounts are also similar to the extent that they all at one point were either in the general population of their respective imprisonment prior to solitary confinement. Similarly upon being placed in solitary confinement, all of them constantly craved that simple human interaction of talking to others, having somewhere to move around other than their cell, and just the daily mental activity most human beings are accustomed to on a normal day. This similarity is more important than the differences in the context of the solitude. All of them had the same experience, because in the end, solitude just becomes solitude, whether you're under threat of death, constantly tortured as a prisoner of war, or just serving part of your criminal sentence, the context of the isolation becomes irrelevant, isolation is isolation. The three accounts existed in a normal social situation and then suffered greatly when they were put in a social existence antithetical to the nature of human beings. The experiences are not surprising; rather it is surprising that the practice of solitary confinement is used so widely despite all the information available and research done citing the negative psychological effects of solitary confinement.

Psychological Data

These first hand accounts provide a good personal account and give proper emotional context to the miserable experience that is this existence. But there is also a

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significant amount of empirical psychological data conducted since popularization of the practice of solitary confinement, along with scientific data into how the mind operates that show the harmful and inescapable psychological effects solitary confinement has on the mental health of prisoners. In short if they do not have any mental health issues prior to entering solitary confinement they soon will, and if they do have mental health issues then those problems will get much worse upon entering solitary confinement.

Furthermore, the research also suggests that the new mental health issues inmates suffer from after solitary confinement will continue to exist and make any integration back into the general population in prison or outside of prison very difficult, and for some impossible.

Psychiatrist Terry Kupers summed up his own research and the research of Psychiatrist Stuart Grassian, that looked into the effects that solitary confinement has on the mental health of prisoners: “Every prisoner placed in an environment as stressful as a supermax unit, whether especially prone to mental breakdown or seemingly very sane, eventually begins to lose touch with reality and exhibit some signs and symptoms of psychiatric decompensation, even if the symptoms do not qualify for a diagnosis of psychosis. . . Even inmates who do not become frankly psychotic report a number of psychosis-like symptoms, including massive free-floating anxiety, hyper-responsiveness to external stimuli, perceptual distortions and hallucinations, a feeling of unreality, difficulty with concentration and memory, acute confusional states, the emergence of primitive aggressive fantasies, persecutory ideation, motor excitement, violent destructive

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or self-mutilatory outbursts, and rapid subsidence of symptoms upon termination of isolation.”⁸⁹

Professor Craig Haney identified five social pathologies that are caused by solitary confinement and that provide explanations for its physiological effects on prisoners. First, in solitary confinement a prisoner is in a cell 22-24 hours a day and becomes totally dependent on the prison for all aspects of their lives (food, clothes , showers) . As a result of this forced dependency, many prisoners become incapable of the ability to control their own behavior or run their own lives.⁹⁰ Second, because prisoners have no meaningful communication with anyone outside of their cells, their activities are very limited, they become unable to arrange their life around anything meaningful because they lacks such an opportunity do so being confined to the four corners of their room and to limited permitted to the communicate only with that spaces occupants which means he has no one but himself to talk to in solitary.⁹¹ With no purpose and nothing to look forward to and nothing being the predominant theme of their daily existence while in isolation, prisoners in this setting commonly experience “chronic apathy, lethargy, depression, and despair.”⁹² Third, because prisoners lose their ability to socially construct their identity through normal interpersonal contact with others, the prisoners experience undermines the prisoner’s sense of self, which creates a feeling of unreality.⁹³ Furthermore these prisoners risk losing their understanding of their identity and connection to the larger social community, which they are excluded from.⁹⁴ Fourth, the

⁸⁹ See Kupers, *supra* note 61, at 56-57

⁹⁰ Craig Haney, *Mental Health Issues in Long-Term Solitary and “Supermax” Confinement*, 49 *Crime & Delinquency* 124, 138-139 (2003)

⁹¹*Id.* at 138

⁹² *Id.*

⁹³ *Id.* at 139

⁹⁴ *Id.*

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prolonged periods of isolation can lead to some inmates becoming generally confused and even terrified of social interaction or contact.⁹⁵ Fifth, the sensory deprivations of being in room with a twenty four hour light, a steel door that limits one's sight outside of the room, combined with complete bar on communication with fellow inmates or visitation, is problematic. The complete control that the prison official is required to exert over the isolated prisoner, who suffers from prolonged absence of any real opportunity for happiness or joy, will lead to uncontrollable and sudden outburst of rage, these adaptations can be dysfunctional and problematic.⁹⁶

In a greater context, Haney observed that in every published study of solitary confinement, where prisoners were held in confinement against their will for ten days without the ability to terminate the isolation, the prisoners experience negative psychological effects.⁹⁷ Although effects range in severity, participants suffered clinically significant symptoms, including hypertension, uncontrollable anger, hallucinations, emotional breakdown, chronic depression and suicidal thoughts and behavior.⁹⁸

Doctor Stuart Grassian, an expert on the psychological effects of isolation, found that isolation diminishes a person's ability to respond to the setting the person is in, and that the harmful results commonly found by individuals in isolation are not limited to mentally ill prisoners, but affect the mentally stable and most intelligent prisoners as well.⁹⁹ Furthermore, these long periods of isolation will inhibit the prisoners from rejoining social communities because they will have trouble dealing with simple social

⁹⁵ *Id.* at 140

⁹⁶ *Id.*

⁹⁷ *Id.* at 132

⁹⁸ *Id.*

⁹⁹ Stuart Grassian, Psychopathological Effects of Solitary Confinement, *Am. J. Psychiatry* 1450, 1450-54 (1983)

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interactions that were common prior to their prolonged isolation experience.¹⁰⁰ In his study Doctor Grassian recorded the symptoms common in prisoners placed in isolation, including hyper-responsivity to external stimuli, perceptual distortions, panic attacks, hallucinations, difficulty with memory, thinking and concentration, delusions, intrusive obsessive thoughts, impulse control problems, and paranoia.¹⁰¹ Dr. Grassian explains that some of the symptoms described above are found in virtually no other psychiatric illness. But among the cluster of symptoms, the most unique are “the striking and dramatically extensive perceptual disturbances experienced by the isolated person. Indeed, these disturbances are almost pathognomonic of the syndrome, meaning they are symptoms virtually found nowhere else.”¹⁰² Dr. Grassian continues, “Thus, the fact that all of these quite unusual symptoms ran together in the same syndrome was itself a clear confirmation of the distinct nature of this syndrome.”¹⁰³ The grouping of these uncommon symptoms form a discreet syndrome, Segregated Housing Unit Syndrome or SHU Syndrome¹⁰⁴ (a syndrome is a “constellation of symptoms occurring together and with a characteristic course over time suggestive a discreet illness.”¹⁰⁵). Although unique, these symptoms are similar to those individuals exhibiting delirium syndrome, which is known to result from conditions including, restricted environmental stimulation, sensory deprivation which are similar to the conditions experienced by those in isolation.¹⁰⁶

This syndrome, although not officially recognized, has been cited by courts as a

¹⁰⁰ *Id.* at 1452

¹⁰¹ *Id.*

¹⁰² Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 Wash. U. J.L. & Pol'y 325 (2006)

¹⁰³ *Id.* at 338

¹⁰⁴ *Id.* at 337-338; *see also* See Kupers, *supra* note 61, at 56

¹⁰⁵ *Id.* at 337

¹⁰⁶ *Id.* at 338

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source to explain the psychiatric problems caused by isolation.¹⁰⁷ To put the effects of solitary confinement into perspective, the suicide rate among those in solitary confinement is particularly alarming. Inmates in solitary confinement make up approximately 6% to 8% of the prison population, yet almost half the total prison suicides are by those in Isolation.¹⁰⁸ Solitary confinement may cause psychological issues that never existed prior to confinement, and it exacerbates problems of those already suffering from mental illness.¹⁰⁹ Because those with mental illness have difficulty conforming to prison rules and inmates who do not follow the rules get sent to solitary confinement, a large number of mentally ill prisoners are put in solitary confinement.¹¹⁰

Federal studies have demonstrated that an otherwise healthy and mentally stable individual, will have adverse psychological effects appear even after short, defined periods in extreme isolation. Despite the large number of mentally ill prisoners (and soon to be mentally ill prisoners) in solitary confinement, prisoners receive psychiatric care infrequently, every 90 days.¹¹¹ Instead of addressing prisoner's mental illness, the prison officials consider the acts in violation of prison rules as disciplinary problems rather than

¹⁰⁷ *Jones "El v. Berge*, 164 F. Supp. 2d 1096, 1101-02 (W.D. Wis. 2001) "Confinement in a super maximum security prison such as Supermax is known to cause severe psychiatric morbidity, disability, suffering and mortality. Prisoners in segregated housing units who have no history of serious mental illness and who are not prone to psychiatric decompensation (breakdown) often develop a constellation of symptoms known as "[Segregated Housing Unit] Syndrome." Although SHU Syndrome is not an officially recognized diagnostic category, it is made up of official diagnoses such as paranoid delusional disorder, dissociative disorder, schizophrenia and panic disorder. The extremely isolating conditions in super maximum confinement cause SHU Syndrome in relatively healthy prisoners who have histories of serious mental illness, as well as prisoners who have never suffered a breakdown in the past but are prone to break down when the stress and trauma become exceptionally severe. Many prisoners are not capable of maintaining their sanity in such an extreme and stressful environment; a high number attempt suicide"

¹⁰⁸ Terry A. Kupers, What To Do With the Survivors? Coping With the Long-Term Effects of Isolated Confinement, 35 *Crim. Just. & Behav.* 1005, 1009 (2008).

¹⁰⁹ *Id.* at 1008

¹¹⁰ David Lovell et al., Recidivism of Supermax Prisoners in Washington State, 53 *Crime & Delinquency* 634, 624 (2007)

¹¹¹ See Kupers, *supra* note 108, at 1010

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as a symptom of mental illness.¹¹² Treatment for mental illness is a means to exercise control over the environment rather than to provide therapy to the person.¹¹³ In *Madrid v. Gomez* a district court judge gave an appropriate analogy to putting mentally ill prisoners in solitary confinement, asserting that it is “the mental equivalent of putting an asthmatic in a place with little air.”¹¹⁴ Thus, not only do prisons send mentally ill prisoners to solitary confinement but they also cause the mental illness of prisoners sent to solitary confinement. Because prisons have shown either an inability or overall apathy to address the needs of patients with mental illness, prisons are making prisoners’ mental illness worse and causing mental illness to others.¹¹⁵

One of the ironies of solitary confinement is that while an individual may crave social interaction during isolation, overtime the the inmate grows to fear social interaction as a result of being socially withdrawn from society for a long period of time. This arises from the fact that part of long term isolation is controlling the entire existence of inmate, the longer the isolation period lasts the greater the prisoner relies on the prison to control his behavior rather than control himself. Thus after the prisoner leaves isolation he is unable to manage his conduct because for such a long time he was accustomed to the prison controlling his conduct. Additionally isolation may lead to

¹¹² *Id.*

¹¹³ See Linda M. Finke, The Use of Seclusion Is Not Evidence-Based Practice, 14 J. Child & Adolescent Psychiatric Nursing 186, 189 (2001)

¹¹⁴ *Madrid v. Gomez*, 889 F. Supp. 1146, 1265 (N.D. Cal. 1995) In holding that there mentally ill prisoners be removed from the segregated housing units in California’s Pelican Bay prison the court explained, “Regardless of whether there is an “exact syndrome” associated with incarceration in solitary confinement or security housing units, the Court is well satisfied that a severe reduction in environmental stimulation and social isolation can have serious psychiatric consequences for some people, and that these consequences are typically manifested in the symptoms identified above.” *Id.* at 1231-32 Turning to the case at bar, it is clear that confinement in the Pelican Bay SHU severely deprives inmates of normal human contact and substantially reduces their level of environmental stimulation, as detailed above. It is also clear that there are a significant number of inmates in the Pelican Bay SHU that are suffering from serious mental illness. *Madrid v. Gomez*, 889 F. Supp. 1146, 1232 (N.D. Cal. 1995)

¹¹⁵ See Finke, *supra* note 113, at 189

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clinical depression and long-term impulse control disorder. Which makes entering the general population of prison or the general population of society extremely hard, as the prisoner is ill equipped to participate in even the most basic social interactions.¹¹⁶

Therefore one of the biggest problems with solitary confinement is that the majority of prisoners eventually get released from prison,¹¹⁷ and at least two thirds of inmates who get released from prison are rearrested within three years of their release.¹¹⁸ Inmates in the general population face an uphill battle to stay out of prison, but it is even for worse for those in isolation. With little social interaction during solitary confinement they come out of prison with psychological issues or psychological problems.¹¹⁹ Recent research indicates that releasing inmates that were in isolation prior to release may increase the likelihood of recidivism,¹²⁰ and threatens the safety of the community.¹²¹ The inmates pose a threat to the community and have a high likelihood of recidivism because they lack the basic social skills and self-control they had before their imprisonment.

Another negative externality connected to the use of supermax prisons or Secured Housing Units is that they are very expensive. Typically a supermax facility cost two or three times more than an ordinary facility. Because prisoners are kept in single cells which have expensive high tech security, and inmates in solitary confinement depend on

¹¹⁶ Bruce A. Arrigo & Jennifer Leslie Bullock, *The Psychological Effects of Solitary Confinement on Prisoners in Supermax Units: Reviewing What We Know and Recommending What Should Change*, 52 *Int'l J. Offender Therapy & Comp. Criminology* 622, 626-27 (2008). Anxiety FN 70

¹¹⁷ See Kupers, *supra* note 108, at 1005. Citing that 93% of inmates are eventually released from prison. ; *see also* E. Ann Carson & William J. Sabol, U.S. Bureau of Justice Statistics, *Prisoners in 2011* (2012). Explaining that every year approximately 700,000 inmates are released. In 2011 there were 688,384 state and federal inmates released from prison

¹¹⁸ Patrick A. Langan & David J. Levin, U.S. Bureau of Justice Statistics, *Recidivism of Prisoners Released in 1994* 1 (2002), available at <http://bjs.gov/content/pub/pdf/rpr94.pdf>

¹¹⁹ See Lovell, *supra* note 110, at 634

¹²⁰ See Haney, *supra* note 10, at 956, 980

¹²¹ See Lovell, *supra* note 59, at 985

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prison officials for their every need, requiring higher officer-to-prisoner ratios.¹²² Finally, solitary confinement may not deter prison violence to the extent desired by prison official or even at all. If a prisoner was not prone to violence before isolation, there is a high probability he will be after. Several reports show that solitary confinement actually increases violence between prisoners and with guards.¹²³ Given the negative effects solitary confinement has on ones mental health, it is hard to understand the usefulness of a disciplinary tool that limits an inmate's ability to control their behavior upon release. As a result of its weak disciplinary function and the fact that internationally, long-term isolation is considered a form of torture, Several International organizations have called for the United to states to end the practice.¹²⁴

Current Jurisprudence

In *Wilkinson v. Austin*, the United States Supreme Court found that solitary confinement has harmful effects on prisoners and considered the punishment atypical and a significant hardship imposed upon prisoners placed in isolation.¹²⁵ Based on this finding of hardship, the Court held that prisoners do have a liberty interest under the due process clause of the 14th amendment in avoiding assignment to isolation.¹²⁶ However, the court left open whether the practice constitutes cruel and unusual punishment.¹²⁷

The Eight Amendment of the United States constitution requires that: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual

¹²² See Mears & Bales, *supra* note 43, at 1135

¹²³ *Id.* at 1135; *See also* Chad Briggs et al., The Effect of Super maximum Security Prisons on Aggregate Levels of Institutional Violence, 41 *Criminology* 1341 (2003); *See also* Haney, *supra* note 10, at 980; *Further see* Madrid v. Gomez, 889 F. Supp. 1146, 1263 n.206 (N.D. Cal. 1995).

¹²⁴ <http://solitaryconfinement.org/uploads/SpecRapTortureAug2011.pdf>; *See also* <http://www.hrw.org/news/2012/06/18/us-look-critically-widespread-use-solitary-confinement>

¹²⁵ *Wilkinson v. Austin*, 545 U.S. 209,214-215 (2005)

¹²⁶ *Id.* at 223

¹²⁷ *Id.* at 229-230

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punishments inflicted.”¹²⁸ The Court gave more teeth to the constitutional prohibition against cruel and unusual punishment in 1976 by prohibiting more than simply physical brutal punishments. The Court held in *Estelle v. Gamble* that punishments are offensive to the Eighth Amendment when they are “incompatible with ‘the evolving standards of decency that mark the progress of a maturing society’ or ‘involve the unnecessary and wanton infliction of pain.’”¹²⁹ The court found that the Eighth Amendment also prohibits punishments that are grossly disproportionate to the severity of the crime and that the Eighth Amendment imposes substantive restrictions on what can be made criminal and punished.¹³⁰

The court must first consider whether there is “objective indicia that reflect the public attitude toward a given sanction.”¹³¹ However, a punishment must not merely be harsh to violate the Eighth Amendment, because some level of restriction is part of the punishment for violating the laws of society. The prohibition on prison conditions is that they must not “deprive inmates of the minimal civilized measures of life’s necessities.”¹³² A claim must not be about general prison conditions, rather a claim must be based on actions that either alone or in combination “produce the deprivation of a single identifiable human need.”¹³³

A harsh prison condition which deprives an identifiable human need must be necessary and serve a penological purpose.¹³⁴ The Court first asks whether the regulation “bears a rational relationship to the legitimate governmental interest put forward to justify

¹²⁸ U.S. Const. amend. VIII

¹²⁹ *Estelle v. Gamble*, 429 U.S. 97, 102 (1976)

¹³⁰ *Id.* at 103

¹³¹ *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)

¹³² *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981).

¹³³ *Wilson v. Seiter*, 501 U.S. 294, 304-05 (1991)

¹³⁴ *Rhodes*, 452 U.S. at 347; *Sheley v. Dugger*, 833 F.2d 1420, 1428 (11th Cir. 1987).

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it.”¹³⁵ Then the court asks whether the regulation “involves the wanton and unnecessary infliction of pain” or is “grossly disproportionate to the severity of the crime warranting imprisonment.”¹³⁶ The law will find that the regulation violated the Eighth Amendment if it fails the second part of this inquiry even if it satisfies the rational relationship inquiry. The Court in *Trop* noted that the Eighth Amendment standard changes with society, stating that the “words of the Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”¹³⁷ Recognizing that the objective aspect to the eighth amendment analysis is not limited to current prisoners being harmed, the Supreme Court said that prisons must not “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.”¹³⁸

There is also the subjective part of the Court’s analysis, which requires a prisoner to show that “A prison official’s ‘deliberate indifference’ to a substantial risk of serious harm to an inmate violates the Eighth Amendment,” by “requiring a showing that the official was subjectively aware of the risk.”¹³⁹ Accordingly, for a prisoner to succeed on a claim in this context, the prisoner must show that the official knew that the prisoner had a serious need and choose to ignore that serious need. Therefore a successful Eighth Amendment claim, must objectively show that an inmate was harmed by the prison conditions and that the prison official either knew or should have known that the inmate was being harmed by these conditions.

¹³⁵ *Turner v. Safley*, 482 U.S. 89 (1987)

¹³⁶ *Rhodes*, 452 U.S. at 347

¹³⁷ *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

¹³⁸ *Helling v. McKinney*, 509 U.S. 25, 33 (1993)

¹³⁹ *Farmer v. Brennan*, 511 U.S. 825, 829, (1994)

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In *Hutto v. Finney* the Supreme Court held, that “Confinement in a prison or in an isolation cell is a form of punishment subject to scrutiny under Eighth Amendment standards.”¹⁴⁰ Looking back to Eighth Amendment jurisprudence the Court in *Hutto* reasoned that the Eighth Amendment “proscribe[s] more than physically barbarous punishments,”¹⁴¹ and “prohibits penalties that are grossly disproportionate to the offense,”¹⁴² “as well as those that transgress today's broad and idealistic concepts of dignity, civilized standards, humanity, and decency.”¹⁴³ The court in *Hutto* set the contours for a standard holding that the length and conditions of each confinement will determine its constitutionality under the Eighth Amendment's prohibition against cruel and unusual punishment.¹⁴⁴

While the Supreme Court held that solitary confinement is subject to scrutiny under the Eighth Amendment, its construction of the Eighth Amendment makes it nearly impossible for a prisoner to succeed on such a claim. Since a punishment which causes harm to a basic human necessity is only a violation of the eighth amendment to the extent that the prison official carrying out the punishment knew the harmful affects the punishment would cause to the inmate, the prisoners' success depends on the ability to bring evidence of the prison officials subjective intent. The Supreme Court has not ruled in any case that solitary confinement violates the Eighth Amendment.

Natural Law and solitary confinement

Many choose to take morality considerations out of legal analysis, it is common to

¹⁴⁰ *Hutto v. Finney*, 437 U.S. 678, 685 (1978)

¹⁴¹ *Id.* at 685 quoting *Estelle v. Gamble*, 429 U.S. 97, 102, 97 S.Ct. 285, 290, 50 L.Ed.2d 251.

¹⁴² *Id.* quoting, *Weems v. United States*, 217 U.S. 349, 367, 30 S.Ct. 544, 549, 54 L.Ed. 793

¹⁴³ *Id.* quoting *Estelle v. Gamble*, *supra*, at 102, 97 S.Ct., at 290, quoting *Jackson v. Bishop*, 404 F.2d 571, 579 (CA8 1968)

¹⁴⁴ *Id.* at 684

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hear what is legal is not always moral and what is moral is not always legal. However natural law views morality and law as interconnected, in fact the common thread of natural law theories is the belief that reason is the essence of law and the establishment of justice its primary function.¹⁴⁵ Natural law analysis entails of practical viewpoints and distinguishes between the practically reasonable and unreasonable. It identifies the conditions and principles of practical right-mindedness, of good and proper order among persons.¹⁴⁶ Natural law emphasizes the relationship between law and morality, “The ultimate justification of a law is the extent to which it fosters both individual good and the common good.”¹⁴⁷ John Finnis, one of the premier natural law theorists argues, “Morality is the product of the deep structure of practical thinking or moral thought.”¹⁴⁸ Under Finnis’s framework, to conduct a moral analysis we must first identifies the objective goods at stake and then applies the principals of practical reasonableness to determine which acts are reasonable, in order to determine general moral standards.¹⁴⁹ In the following section Finnis’s moral analysis will be applied to the practice of solitary confinement in the United States prisons.

When doing a Finnis moral analysis the first question to ask is whether this solitary confinement promotes the good, which requires a determination of the goods implicated by the use of solitary confinement. Finnis sets out seven basic and fundamental human goods. These goods are life, knowledge, play, aesthetic experience, friendship, religion and practical reason. These goods are “intrinsic goods”, meaning that

¹⁴⁵ Michael P. Ambrosio, A moral Appraisal of Legal Education: A Plea for a Return to Forgotten Truths, 22 Seton Hall. L. Rev. 1177,1190 (1992)

¹⁴⁶ John M. Finnis, Natural Law And Natural Rights 18, 23 (2d Ed. 2011).

¹⁴⁷ See Ambrosio, supra note 145, at 1192

¹⁴⁸ See Finnis, supra note 146, at 3

¹⁴⁹ See Finnis, supra note 146, at 23

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they are an end in and of themselves and not just as a tool to obtain other goods.¹⁵⁰ These goods are not simply subjective goods, rather they are objective universal goods that are essential to human knowledge and are the basis in determining practically reasonable.

Seven Basic Goods

Life is the first basic good, Finnis explains that “ The term life signifies every aspect of the vitality of life which puts a human being in good shape for self determination. Thus it includes bodily health and freedom from pain that betokens organic malfunctioning or injury.”¹⁵¹ A person is sent to prison when they commit a social harm, the deprivation of liberty is justified because this person disobeyed the laws and norms of society. However, the deprivation of liberty is not unlimited, prisoners have rights even in prison just limited rights. The question in this analysis is whether or not solitary confinement promotes the good of life and if not is there any moral justification. As shown by the first hand experiences of individuals subjected to long-term isolation and the extensive psychological studies discusses in earlier, solitary confinement harms the mind and the body. Prisoners in isolation lose the ability to function normally, the lack of social interaction causes inmates to go insane and hallucinate. It may cause mental illness or make an existing mental illness worse; it can even cause inmates to commit suicide. Many inmates leave solitary confinement disturbed, because human beings are social by nature and solitary confinement is inherently anti-social, thus many inmates find it impossible to handle the most benign social settings. The practice essentially takes away one’s purpose in life and relegates their existence to four walls, while these inmates may technically be alive, they are made to feel as if they are dead

¹⁵⁰ *Id.* at 83

¹⁵¹ *Id.* at 86

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apart from the world. The majority of prisoners get released from prison at some point, and ex-convicts face an uphill battle integrating back into society, particularly it is hard to find employment as business are hesitant to give former prisoners a job. But inmates that where put in solitary confinement face the additional hurdle of having problems managing the most basic of social interactions. Therefore in addition to worrying about finding employment, inmates that were put in solitary confinement must also consider whether they can even handle the social interactions that occur in the workplace. The basic good of life is greatly at stake when Solitary confinement is employed, because it tortures inmates during the isolation and comprises their ability to function outside of isolation upon release.

Comprising the good of life cannot be morally justified because solitary confinement is used as a disciplinary measure. The purpose of discipline is to deter that action, the purpose of prison in part is to rehabilitate, and disciplinary measures should consider both of these purposes. However solitary confinement causes inmates to lose control over their behavior since they grow accustomed to the guards controlling their every move. Thus inmates leave solitary confinement with a decreased ability to appreciate the deterrence purposes of the punishment and fail avoid this form of discipline in the future. Thus as a disciplinary measure, the practice of solitary confinement is not morally justified in comprising the basic human good of life.

Knowledge is an intrinsic good to be sought as an end in and of itself not as a tool to acquire goods. “Knowledge is something good to have and being well informed and clear headed is a good way to be.”¹⁵² Finnis explains that knowledge is the pursuit of the truth, this desire for truth is not innate, rather the value of truth “becomes obvious only to

¹⁵² See Finnis, *supra* note 146, at 63

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one who has experienced the urge to question, who has grasped the connection between question and answer, who understands that knowledge is constituted by correct answers to particular questions, and who is aware of the possibility of further questions and of other questioners who likewise could enjoy the advantage of attaining correct answers.”¹⁵³ Solitary confinement is one of the greatest violations of this basic human good. Long periods of isolation have a poisonous effect on the thought process of an inmate because isolation divorces the inmate from reality and reason. Many inmates have fantasies and lose the ability to distinguish between real life and the fantasy created in their mind. Prisoners in isolation have no communications with the outside world or with fellow inmates and have limited access to books and televisions. As result the prisoner’s world morphs into four walls, a toilet, a bed, a sink, a floor a ceiling and whatever the prisoner may create in his fantasy. Thus, the practice of solitary confinement directly hinders the prisoner’s ability to pursue knowledge and the truth.

Play involves “engaging in performances which have no point beyond the performance itself, enjoyed for its owns sake. The performance may be solitary or social, intellectual or physical, strenuous or relaxed, highly structured ort relatively informal, conventional or ad hoc in its pattern . . . An element of play can enter into any human activity.”¹⁵⁴ There is no play in solitary confinement, or perhaps solitary confinement has one aspect of play, that is “engaging in performance which have no point beyond the performance itself, enjoyed for its own sake.”¹⁵⁵ However in solitary confinement the performance of any activity is enjoyable only to the extent that it prevents a person from becoming a prisoner to the fantasies of their mind. Regulated to a state of perpetual

¹⁵³ *Id.* at 65

¹⁵⁴ *Id.* at 87

¹⁵⁵ *Id.*

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nothingness there is no opportunity to play or enjoy hobbies or recreate. Inmates are given an hour outside, in a hallway and get to pace back and fourth, as they are given little to read or watch, and they cannot move out and about beyond their cell. Inmates are not just deprived of all opportunities for play but because of the way solitary confinement affects ones mind, the ability to even enjoy play is deprived. Although inmates have limited liberty, they are still able to enjoy some form of play. Solitary confinement deprives prisoners of the opportunity and ability to play in prison and affects the ability of inmates to engage in play after prison.

The difference between the good of play and the good of aesthetic experience is that aesthetic experience, as Finnis so eloquently puts it, “Aesthetic experience, unlike play, need not involve an action of one’s own; what is sought after and valued for its own sake may simply be the beautiful form ‘outside one’, and the ‘inner’ experience of appreciation of its beauty. But often enough the valued experience is found in the creation and/or active appreciation of some *work* of significant and satisfying form.”¹⁵⁶ Solitary confinement deprives an individual of this good because to have “aesthetic experience” one must to be able to experience in a general sense. Most inmates have limited entertainment and contact with the outside world and the hour outside of the cell that some of the lucky inmates experience is in outdoor caged hallway. Solitary confinement has no beauty and even if it did it destroys the mind to extent that a person would lack the ability to appreciate beauty. The inner experience a person in solitary confinement has is toxic and inhibits all appreciation.

Finnis’s fifth good is sociability (friendship) as he puts it “there is the value of sociability which in its weakest form is realized by a minimum of peace and harmony

¹⁵⁶ *Id.* at 87-88

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amongst persons, and which ranges through the forms of human community to its strongest form in the flowering of a full friendship.”¹⁵⁷ Finnis explains how friendship works in terms of the self “some of the collaboration between one person and another is no more than instrumental to the realization by each of his or own individual purposes. But friendship involves acting for the sake of one’s friend’s purposes, one’s friend’s well being. To be in a relationship of friendship with at least one other person is a fundamental form of good, is it not?”¹⁵⁸

Friendship is a beautiful thing, but there is an antecedent requirement to friendship; interaction with other people. The Problem with solitary confinement is that inmates cannot even enjoy the simple good of friendship, the happiness that comes from having someone care for another despite lacking an obligation to care. Solitary confinement takes away all sociability. Furthermore, there are some prisons that would place two inmates in a cell but isolated from the general prison population, however many inmates found that being confined in a small room all day made them both insane.¹⁵⁹ And inmates admitted that despite liking their solitary confinement cellmate they would find themselves constantly fighting with that person because the harsh conditions elicit such a result. Friendship makes even the worst of situations somewhat tolerable. Solitary confinement deprives inmates of this good completely, and because their social skills are diminished while in prison, solitary confinement affects ones ability to maintain friendships when they are released from prison.

The good of practical reasonableness is present in every aspect of our lives or at least it should be, as Finnis puts it “there is the basic good of being able to bring one’s

¹⁵⁷ *Id.* at 88

¹⁵⁸ *Id.*

¹⁵⁹ See NYCLU, *Supra* note 45, at 27

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own intelligence to bear effectively (in practical reasoning that issues in action) on problems of choosing one's actions and lifestyle and shaping one's own character."¹⁶⁰

“Negatively, this involved that one had a measure of effective freedom; positively, it involves that one seeks to bring an intelligent and reasonable order into one's own actions and habits and practical attitudes.”¹⁶¹ Basically practical reasonableness is how we choose which good to pursue. However in solitary confinement an inmate is limited in the goods he can pursue, more concerning is the fact that many inmates in solitary confinement go insane to a certain degree, and insanity inhibits the ability to bring order to one's lifestyle and reasonably choose among goods. One cannot make a decision based on practical reasonableness if that person lost the ability to reason. Solitary confinement limits an inmate's ability to engage in practical reasonableness because the brain functions at a lower level when in isolation and thus cannot effectively use his intelligence to choose and shape his life decisions.

The final value on the list of seven goods is religion. However to Finnis religion is not worshipping a deity, it is not being a Muslim, a Catholic or a Jew. Rather religion asks the ultimate questions, “For, as there is the order of means to ends and the pursuit of life, truth, play, and aesthetic experience in some individually selected order of priorities and pattern of specialization, and the order can be brought into human relations through collaboration, community, friendship, and the order that is to be brought into one's character and activity through inner integrity and outer authenticity, so, finally there arise such questions as: (a) how are all these orders, which have their immediate origin in human initiative and pass away in death, related to the lasting order of the whole cosmos

¹⁶⁰ See Finnis, *supra* note 146, at 88

¹⁶¹ *Id.*

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and to the origin, if any, of that order?”¹⁶² It is the ultimate test of how the order of life how human beings get past determinism and make order of their life. Finnis explains the question religion asks “More important for us than the ubiquity of expressions of religious concerns, in all human cultures is the question: does not one’s own sense of responsibility in choosing what one is to be and do, amount to a concern that is not reducible to the concern to live play procreate, relate to others, and be intelligent?”¹⁶³ Finnis illustrates the obligation of man “ that he is ‘responsible’- obliged to act with freedom and authenticity, and to will the liberty of other persons equally with his own – in choosing what he is to be and all this, prior to any choice of his, ‘man’ is to be free.”¹⁶⁴

When Finnis speaks of religion he speaks of a system that instills a sense of order and the reasons not bearing relevant, the basic premise is to be a good person and do good things. Religion is greatly at stake in solitary confinement because an inmate cannot instill any sense of order since his sense of the world is warped. He may be living in a fantasy, hallucinating, or just shutdown his mind. He is deprived of all opportunity to be a good person, or do good things because he lives in nothing. Inmates have described the experience of solitary confinement, as feeling isolated to the extent that they feel as if they do not exist in the world.¹⁶⁵ It would be hard for anyone to form some sort of hierarchical system of wrongs and rights when they believe they live in a state of non – existence.

One must engage in all of the seven basic goods to flourish as human beings and live a worthwhile valuable life. These goods are self evident, understood by all, and each

¹⁶² *Id.* at 89

¹⁶³ *Id.* at 90

¹⁶⁴ *Id.*

¹⁶⁵ See NYCLU, *Supra* note 45, at 27

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is equal to each other, there is no hierarchy of goods to pursue. Therefore each person through the process of practical reasonableness must decide which goods to pursue and to focus on. Practical reasonableness is “ a set of basic methodological requirements of practical reasonableness (itself one of the basic forms of human flourishing) which distinguish sound from unsound practical thinking and which, when all brought to bear, provide the criteria for distinguishing between acts that (always or in particular circumstances) are reasonable-all-things-considered (and not merely relative-to-a-particular purpose) and acts that are unreasonable-all-things-considered, i.e. between ways of acting morally right or morally wrong — thus enabling one to formulate a set of general moral standards.”¹⁶⁶ Put another way, Practical reasonableness is moral thought, and morality is the explanation for why certain things are not to be done and are immoral.¹⁶⁷

Finnis explains that the good of practical reasonableness, “is participated in precisely by shaping one’s participation in the other basic goods, by guiding one’s commitments, one’s selections of projects, and what one does in carrying them out.”¹⁶⁸ One can only respond properly if the desire for reasonableness is stronger than all other desires that it may overwhelm them.¹⁶⁹ There are nine requirements of what a person must do, think and be if that person’s decisions are to be considered practicably reasonable.¹⁷⁰ In order to determine whether practical reasonableness permits the use of solitary confinement as a punishment for prisoners, one must apply each of the nine principals of practical reasonableness.

¹⁶⁶ See Finnis, *supra* note 146, at 23

¹⁶⁷ *Id.* at 103

¹⁶⁸ *Id.* at 100

¹⁶⁹ *Id.* at 101

¹⁷⁰ *Id.* at 102

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The first principle is that one must have a coherent plan of life. Such a plan is one that “contains a harmonious set of purposes and orientations, not as blueprints but as effective commitments.”¹⁷¹ However it must be emphasized that a life plan does not necessarily require a specific reaction for each action, as life is too unpredictable for that and would belittle the importance of a coherent life plan. Rather a coherent life plan is more of a “way of life” than a set of instructions. As Finnis explained a coherent life plan requires “both direction and control of impulses, and undertaking of specific projects; but they also require the redirection of inclinations, the reformations of habits, the abandonment of old and adoption of new projects, as circumstances require, and, overall, the harmonization of all one’s deep commitments—for which there is no recipe or blueprint, since basic aspects of human good are not like the definite objectives of particular projects, but are participated in.”¹⁷²

There is no federal law that controls how solitary confinement is administered in every state, although there are those who argue that it is a form of torture, there is no law prohibiting, restricting, limiting or instructing how to use solitary confinement.¹⁷³ The prison system that uses solitary confinement does not represent a coherent plan. Prisoners do not know which infractions will put them in solitary confinement, nor do they know the length of time they will stay in solitary confinement for different infractions. In fact, in some prisons solitary confinement is used to deal with overcrowding, gang rivalries, or as an easy way to manage prisoners. It is arbitrarily imposed. For example some prisoners were put in solitary confinement for a positive drug test and while others testing positive for drugs did not get sent to solitary confinement. Although solitary confinement may

¹⁷¹ *Id.* at 103

¹⁷² *Id.* at 104

¹⁷³ See NYCLU, *Supra* note 45, at 17-20

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have some disciplinary function, it does not serve that purpose if an inmate does not know what actions will send them there. Furthermore, the initial use of solitary confinement in supermax prisons emphasize that solitary confinement is not a disciplinary tool. Norman Carlson said that the supermax prisons were necessary because the inmates sent there did not value human life and were impervious to punishment because these inmates already had a life sentence. The purpose of solitary confinement was to keep these inmates away from the general population and guards; it was not intended to be a deterrent against infractions. Rather it was a last resort, and did not consider how to go about reintegrating a prisoner released isolation because the inmates sent to solitary confinement did get released. An effective life plan considers the consequences of one's actions, and use of solitary confinement as a deterrent against infractions by ordinary prisoners fails to consider the big picture. Solitary confinement creates mental illness in prisoners, negatively effects inmate's social skills and causes inmates to develop such a dependence on the guards that some become unable to control their own behavior because it was a task typically assigned to the guards while they were in solitary confinement. Thus the deterrent is ineffective because the prisoners leave solitary confinement with a decreased ability to control their behavior, preventing them from following the rule the violated in the first instance. Such a practice is also problematic because it does not go towards rehabilitating the prisoner, prisoners come out worse, and the lack of social interaction makes it difficult to integrate back into the prison population and society in general. Solitary confinement is a short-term solution that creates long-term problems and would not be coherent with the goal of rehabilitating prisoners.

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The next principle is that there must be no arbitrary preference amongst values, meaning that one cannot arbitrarily choose one good over another.¹⁷⁴ Goods can be subordinated but one cannot ignore the fact that a basic good is a good in and of itself.¹⁷⁵ Life, or human dignity cannot be sacrificed for the interest of appearing tough on criminals, these prisoners are people and we have certain basic standards of human dignity we cannot ignore. Moreover the overall sense of justice is not achieved by solitary confinement, it does not rehabilitate and it is a form of punishment many consider to be torture. Solitary confinement makes the insane worse and the sane insane and those sending prisoners to solitary confinement make those decisions based on arbitrary reasoning rather than some rulebook or guide.

There also must be no arbitrary preferences amongst persons. Finnis explains “fundamental impartiality amongst the human subjects who are partakers of those basic goods.”¹⁷⁶ Obviously, as Finnis admits, there is space for self-preference but it cannot be made through “selfishness special pleading, double standard, hypocrisy, and indifference to the goods of others whom one could easily help, and all the other manifold forms of egoistic group biases.”¹⁷⁷ Basically this is the golden rule, “do to others as you want done to you.”¹⁷⁸ In every respect solitary confinement violates this principle, the prison guards who arbitrarily send inmates to solitary confinement would not want to be sent there themselves. And they would likely be angry if that decision was based on race or criminal history. Nobody would want to go through solitary confinement, it is an internationally condemned practice and the mere witnessing of inmates locked up in that

¹⁷⁴ See Finnis, *supra* note 146, at 105

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 107

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 108

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way has caused guards to quit.¹⁷⁹ It is rare that solitary confinement serves its proper disciplinary function, many times a guard may just be settling a score, there could not be a greater violation of this principal than this action, but when a system has a flexible or non-existent rulebook with no oversight, those are the kinds of results. Anybody who has experienced solitary confinement would not subject another to that experience.

Another requirement is that one must be detached from the missions that person assumes in order to be open to all of the goods and not be pigeonholed to one good or thought. However one must not abandon commitments at the drop of a hat. As Finnis explains “ there is no good reason to take up an attitude to any of one’s particular objectives, such that if one’s project failed and one’s objective eluded one , one would consider one’s life drained of meaning . . . There are also evil consequences of succumbing to the temptation to give one particular project the overriding and unconditional significance which only a basic value and a general commitment can claim – these consequences relate to those that result due to fanaticism.”¹⁸⁰ Thus there is a balance between commitment and detachment, “It is simply the requirement that having made one’s general commitments one must not abandon them lightly (for to do so would mean, in the extreme case, that one would fail to ever really participate in any of the values). And this requirement of fidelity also has a positive aspect. One should be looking creatively for new and better ways of carrying out one’s commitments, rather than restricting one’s horizon and one’s effort to the projects, methods, and routines which with one is familiar.”¹⁸¹ This is the precise problem of solitary confinement. In the 1970s there was this idea that the justice system must appear tough on crime to best

¹⁷⁹ See NYCLU, *Supra* note 45, at 43

¹⁸⁰ See Finnis, *supra* note 146, at 110

¹⁸¹ *Id.*

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manage the justice system and as a result this terrible method of treatment became the norm. The overcrowding lead to too many disciplinary problems for the prisons to handle and solitary confinement became the normal punishment. It has gotten to the point where prisons do not know what else to do because this method is so engrained in their institutional discipline.

One of the most important principles is efficiency within reason; this is the requirement that “one bring about good in the world (in one’s own life and the lives of others) by actions that are efficient for their (reasonable) purpose(s). One must not waste one’s opportunities by using inefficient methods. One’s actions should be judged by their effectiveness, by their fitness for their purpose, by their utility, their consequences.”¹⁸² Efficiency cannot be the sole factor but it is relevant to the morals analysis of solitary confinement as the inefficiency is incredibly alarming. It makes prisoners more violent, it leaves the prisoners ill equipped to adapt to society upon their release, it is incredibly costly, and it is a form of a punishment a that a country should not engage because it is essentially a form of torture.

One must also respect every basic value in every act, consequentialism is incorrect, a person must not do any harmful act to the human good unless that act has good consequences that outweigh the harm. Reason requires every basic value be respected in every action.¹⁸³ Solitary confinement lacks the positive results to justify the basic goods it ignores and harm it causes to inmates.

The common good is the requirement of “favoring and fostering the common

¹⁸² *Id.* at 111

¹⁸³ *Id.* at 119-120

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good of one's communities."¹⁸⁴ However this does not mean the "greatest good for the greatest number."¹⁸⁵ Rather "there is a common good for human beings, inasmuch life, knowledge, play, aesthetic experience, friendship, religion and freedom in practical reasonableness are good for any and every person."¹⁸⁶ The common goods can be understood as "an ensemble of conditions of collaboration which enhance the well-being (or at least the opportunity of flourishing) of all members of a community is, indeed, often called the common the common good."¹⁸⁷ This common good can be achieved by an evaluation of the harms associated with the punishment of solitary confinement, considering the alternatives to this discipline, and determining that if it is required for discipline, what can be done to limit its use and make the punishment more efficient and less harmful to prisoners.

One should also follow and act in line with his conscience,¹⁸⁸ which should be sympathetic to leaving someone alone in a box twenty-four hours a day and making them go insane. One's conscience, especially one that values the seven basic goods, would not deem Solitary confinement as a punishment that is morally justifiable.

Morality

Finnis takes the seven universal goods and nine principles of practical reasonableness and applies them to issues of justice and law. The product of these nine requirements is morality. Applying these principles of practical reasonableness leads to the conclusion that solitary confinement is immoral.¹⁸⁹ "Not every principal has a direct

¹⁸⁴ *Id.* at 120

¹⁸⁵ *Id.* at 125

¹⁸⁶ *Id.* at 155

¹⁸⁷ *Id.* at 165

¹⁸⁸ *Id.* at 125

¹⁸⁹ *Id.* at 126

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role in every moral judgment, but some moral judgments do sum up the bearing of each and all of nine questions in hand, and every moral judgment sums up the bearing of one or more of the requirements.”¹⁹⁰ Each principle has a place in one’s rational actions and thought; a bad judgment is caused by arbitrary or misplaced self-importance rather than pursuit of the good.¹⁹¹ Moral responsibility requires sacrifice. Morality commands that there must be oversight in the use of solitary confinement in all prisons and that the practice must be significantly reduced and limited to the type of inmates imprisoned in federal supermax prisons.

Justice

Finnis explains that Justice concerns the requirements of practical reasonableness in one’s relationships with others and requires that one “foster and favor the common good of one’s communities.”¹⁹² It does not concern all relationships a person has with another rather just those relationships that are necessary for avoiding a wrong to a person that is considered a social harm.¹⁹³ To that end justice deals with the duty people have to each other and the balance or equality between them.¹⁹⁴

There are two forms of justice, are called distributive justice and commutative justice. Distributive justice does not simply seek equality in distribution to achieve justice, rather distributive justice requires the “effective collaboration of persons, and co-ordination of resources and enterprises (including always, in the notion of collaboration and co-ordination, patterns of mutual restraint and non-interference). Such an ensemble of conditions of collaboration which enhance the well being (or at least the opportunity of

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 134

¹⁹² *Id.* at 164

¹⁹³ *Id.* at 162

¹⁹⁴ *Id.*

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flourishing) of all members of a community is, indeed, often called the common good.”¹⁹⁵

Distributive justice does not simply achieve justice by distributing resources and opportunities equally among citizens; rather a distribution is just when done in accordance with or in furtherance of the common good.¹⁹⁶ Commutative justice concerns relations and dealings between person, and deals with the duties owed to persons determined and unascertained, to governing officials and governing officials subjects.¹⁹⁷ Authority of law depends on justice or its ability to guarantee justice.¹⁹⁸ Certain types of punishment are required to avoid injustice and maintain the common good, and thus the need for “incentives to abide by the law when appeals to the reasonableness of sustaining the common good fail to move.”¹⁹⁹ Therefore some punishment that inhibits liberties and makes certain actions undesirable because of their consequences rather than just the actions failure to promote the common good are necessary. Justice is require to avoid the advantage given to someone who chooses actions for his own interest and self preference that is against the common good everyone is trying to promote.²⁰⁰ However Finnis warns against inadequate or non-existent punishment for those who commit these social harms “failure to attempt to resist by force the depredations of invaders, pirates and recalcitrant will normally be a failure in justice.”²⁰¹

While Justice and the requirement for punishment is necessitated by certain bad apples of society, this justice is already achieved by depriving these individuals of their liberty for prolonged periods of time. The goal of justice is the common good of all

¹⁹⁵ *Id.* at 165

¹⁹⁶ *Id.* at 166

¹⁹⁷ *Id.* at 184

¹⁹⁸ *Id.* at 260

¹⁹⁹ *Id.* at 262

²⁰⁰ *Id.* at 263

²⁰¹ *Id.* at 260

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members of the community rather than simple equality.²⁰² The common good involves the seven values and nine principles mentioned earlier which together enhance the well being of all members of the community. “The objective of justice is not equality but the common good, the flourishing of all members of the community, and there is no reason to suppose that this flourishing of all is enhanced by treating everyone identically when distributing roles, opportunities and resources.”²⁰³

This goal is governed by the five principles of distributive justice in order of importance, need, function, capacity, merit and who created risk of harm.²⁰⁴ This even applies to those in prison; we cannot simply ignore the negative consequences of solitary confinement merely because it is being practiced on inmates.

Need means determining whether people are taking more than their reasonable portion at the expense of others or society in general. Need is the “fundamental component of the common good.”²⁰⁵ With respect to solitary confinement the inmates suffer greatly and their extra suffering in solitary confinement is of no real benefit to society. Rather it furthers the political agenda of some parties and helps with elections by appearing tough on crime. But the results are that as a community we have grown to ignore basic human dignity with this practice and make society unsafe by making dangerous criminals unstable and sometimes insane. The benefit is to no one, aside for prison officials who are just accustomed to the easy punishment of solitary confinement rather than actually having to draw up new rules to punish criminals while in prison that is in accordance with the interest of the best possible way to rehabilitate a criminal. There

²⁰² *Id.* at 173

²⁰³ *Id.* at 174

²⁰⁴ *Id.*

²⁰⁵ *Id.*

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is no need for solitary confinement and while prison protects society from the dangers imposed by these individuals, solitary confinement seeks to punish in way that does not protect society and hurts the inmates in a way that cannot really be fixed.

The second element of distributive justice is function, which involves the roles and responsibilities of the community.²⁰⁶ In this case we are using an overly harsh punishment that harms prisoners and degrades human dignity in ways our society does not approve. With respect to distribution, inmates similarly situated get solitary confinement on an unequal basis and sometimes for merely being associated with a gang. The distribution here is one not done on an equal basis.

The third element is capacity, which is “relative not only to roles in communal enterprises but also to opportunities for individual advancement.”²⁰⁷ This requirement relates to benefits one receives based on their ability to do something. Here one receives the punishment of solitary confinement for things they have done, will do, or may do. However this element is not so relevant with respect to punishment. Rather it relates to chances individuals have for advancement. However it cannot be ignored that inmates that have spent time in solitary confinement have a problems advancing once they get out of prison because they lost their inability to interact socially after being alone for several months. An inmate’s capacity to do anything that would be rewarded in the workplace is thus severely limited and to this end solitary confinement limits one’s capacity.

The fourth element is distributions based on merit.²⁰⁸ With respect to sharing in the benefit one can justify a greater share by contributing in a greater way and with much effort. Similarly with punishment a greater punishment should have some correlation to

²⁰⁶ *Id.* at 175

²⁰⁷ *Id.*

²⁰⁸ *Id.*

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the harm committed. Yet with solitary confinement on a quantitative scale, the punishment is not given out based on degree of the infraction committed in prison, rather the punishment is given out on an inconsistent basis with lesser infractions eliciting the punishment and greater infractions avoiding the punishment. Prior to the 1980s there was only one supermax prison and that prison was meant to hold the prisoners that were a danger to the guards/inmates and showed their conduct could not be deterred by punishment. It evolved to hold the worst and most notorious criminals such as the escapees, the serial murders, the terrorist etc. but inmates put in solitary confinement did not leave. Currently there is one federal supermax prison holding the worlds most dangerous. However, subjecting inmates of lesser stature who committed lesser harms to the same punishment that is given to the dangerous criminals that are unable to be controlled is not fair distribution based on merit.

The final element is a determination of who created the risk of harm. “In distribution of the costs and losses of communal enterprise fairness will often turn on whether some of the parties have created or at least foreseen and accepted avoidable risks while others have neither created them nor had the opportunity of foreseeing or of avoiding or insuring against them.”²⁰⁹ Solitary confinement punishes prisoners who are already being punished for wrongs they have done to a greater punishment that is typically reserved for greater wrongs committed by members of society. The results are disastrous. Rather than providing prisoners with an environment that will better help them adapt to society when they are released, solitary confinement creates an environment that impairs the prisoners ability to exist in even the most benign of social settings. It makes dangerous prisoners more dangerous and harmless prisoners harmful.

²⁰⁹ *Id.*

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In the end society bears the brunt of this burden because the use of this punishment is so engrained institutionally, that prisons do not know of any other way to deal with inmates who violate the prison rules. Society is left with this costly prison because solitary confinement is far more expensive than regular cells, since prisoners have their own cell and requires increased security. And prisoners are released far more dangerous than when they entered solitary confinement.

Based on these five elements of distributive justice it is clear that the punishment received by inmates is not just. Since the act is not just, it fails to promote the common good.

Conclusion

Natural law is the theorizing of not just merely facts, nor is it the simple theory that morality has some relation to law. Rather Natural law seeks to analyze and comprehend the requirements of practical reasonableness in order to provide a rational objective basis for the actions of lawmakers, community and individuals.²¹⁰ There are the objective principles proffered by Finnis that one cannot ignore if they want to promote the good and live a purposeful life. One cannot just pretend that law is divorced from morality, because the day the law does not set out to be moral it loses legitimacy. The use of solitary confinement is a perfect example, should we simply just say that these are inmates and there is nothing extant on the law to prohibit the use of this punishment. Should we say that if inmates wanted to avoid solitary confinement they should have not violated the law, because the law is the end? No, and natural law helps with this analysis. Natural law theory provides a concrete basis to evaluate the actions and gets to the basic question of whether this act promotes the good. Here the act does not. Solitary

²¹⁰ *Id.* at 290

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confinement is a terrible punishment that no person would ever want to experience, however if the analysis is simply that the black letter of the law do not prohibit this action we would not be able to get to a place that allows the law to realize the harms of this action. Fortunately it seems clear that society as a whole does not subscribe to divorcing law from morality and there have been significant efforts by several organizations and people to end this practice. Finnis's interpretation of the basic values and principles of practical reasonableness and goals of justice help one make evaluations of how laws affect the community, government and individuals. This way of thought was tremendously helpful in analyzing the morality of solitary confinement and will be helpful to me in the everyday practice of law.