

COMMENT

“I’m On Fire”: A Call to Eradicate Excessive Solitary Confinement Sentences for Nonviolent Offenses

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* J.D. Candidate, Howard University School of Law, Class of 2017; Editor-in-Chief, *Howard Law Journal*, Vol. 60. There are so many people that I should thank for the successful completion of this Comment, but I would first like to start off by thanking God. I have learned so much in this past year serving as Editor-in-Chief, and on those nights when I doubted myself and my abilities, He showed me that I am capable of everything and more. I would next like to thank the smartest person I know, my faculty advisor, Professor Harold McDougall. You challenged me so much on so many points that I felt strongly about while writing this Comment, and that only made my writing that much better. I would also like to thank the beautiful people who supported and encouraged me throughout this writing process. Those close to me know that this Comment was the most difficult thing I have ever written. I have been through so many trials and tribulations during this writing process, but seeing it come to fruition is simply surreal. Thank you to my family for always pushing me, especially my mother. Thank you to my brother for always serving as my role model. Thank you to my father for simply being you. Last but not least, thank you to my Godmother for always being my guiding light, my beacon of hope, and my realm of positivity.

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INTRODUCTION

On March 17, 2014, a music video was posted to the popular website, WorldStarHipHop.com.¹ Within twenty-four hours, the video—commonly referred to as “I’m on Fire”—had been viewed nearly half a million times.² What made this music video so popular was that inmates recorded it in a South Carolina prison using a cell phone.³ Although cell phones are prohibited in prisons and jails among inmates, they are a very popular contraband item.⁴ Shortly after the

1. Paul Bowers, *S.C. Inmates Allegedly Film Hip-Hop Music Video in Prison*, CHARLESTON CITY PAPER (Mar. 18, 2014, 3:53 PM), <http://www.charlestoncitypaper.com/FeedbackFile/archives/2014/03/18/sc-inmates-allegedly-film-hip-hop-music-video-in-prison>.

2. *Id.* Today, the music video has been viewed approximately two million times. It has been viewed 900,000 times on YouTube, and 1.2 million times on its original domain, WorldStarHipHop. See LightworkerTV, *South Carolina Inmates Film 1st Ever Music Video*, YOUTUBE (Mar. 15, 2014), <https://www.youtube.com/watch?v=8wbqiSVLUq8>; see also *South Carolina Inmates Film 1st Ever Music Video In Prison!*, WORLDSTARHIPHOP (Mar. 17, 2014), <http://www.worldstarhiphop.com/videos/video.php?v=wshh9d14sLHAcSMVlotr>.

3. Bowers, *supra* note 1.

4. *Id.*; see Carol McKinley, *Smartphones in Prison: New Contraband Allows Inmates to Make Money*, DAILY BEAST (Oct. 16, 2011), <http://www.thedailybeast.com/articles/2011/10/16/smartphones-in-prison-new-contraband-allows-inmates-to-make-money> (finding that “[s]martphones are the new files in cakes. Today’s inmates covet them more than drugs, and

incident, a spokesperson from the South Carolina Department of Corrections (“SCDC”) issued a statement, stating that once the investigation concluded, the inmates involved would be “appropriately charged.”⁵

As time passed and excitement about the video subsided, many began to question: what happened to these inmates? Were they found? Were they punished? This music video was said to be the first of its kind,⁶ and as such, many wondered what the “appropriate” punishment would be. Alas, Dave Maass, a researcher for the Electronic Frontier Foundation (“EFF”), published the prisoners’ punishments⁷ and the results were shocking. The seven inmates who participated in creating the music video received almost twenty years in solitary confinement combined:⁸ “five of the prisoners were punished with 180 days of ‘disciplinary detention,’ ”⁹ while the others were given 270 and 360 days—all for recording a song on a cell phone.¹⁰ The facility justified these sentences by stating that the inmates posed a “security threat” through their alleged “gang-related”¹¹ words and contraband

America’s prison system is struggling to crack down on the growing smartphone black market”); see also Seth Ferranti, *Cell Phones in Prison*, GORILLA CONVICT (Apr. 24, 2012), <http://www.gorillaconvict.com/2012/04/cell-phones-in-prison/> (noting that cell phones are common contraband items, and have even “become a big and profitable business for guards and correctional officers who are quick to take advantage and make a dollar”). The Department of Justice also conducted an official report on popular contraband items, and listed cell phones as “the most common hard contraband item[] recovered in . . . [Bureau of Prisons] BOP institutions from FY 2012 through FY 2014 . . .” OFFICE OF THE INSPECTOR GENERAL, U.S. DEPARTMENT OF JUSTICE, REVIEW OF THE FEDERAL BUREAU OF PRISONS’ CONTRABAND INTERDICTION EFFORTS, JUNE 2016 (noting that the number of cell phones recovered was “8,728 according to the BOP’s ‘Cell Phones Recovered’ report, 5,734 according to the BOP’s TRUINTEL database”).

5. Bowers, *supra* note 1.

6. LightworkerTV, *supra* note 2.

7. CJ Ciaramella, *These Inmates Got Years in Solitary Confinement for Making a Music Video*, BUZZFEED NEWS (Oct. 21, 2015, 3:52 PM), <http://www.buzzfeed.com/cjciaramella/these-inmates-got-months-in-solitary-confinement-for-making#.ktzeWz9LP>.

8. Monique John, *‘Empire’ Comes to Life: Inmates Slammed With Solitary Confinement After Shooting Music Video*, HELLO BEAUTIFUL (Oct. 22, 2015), <https://hellobeautiful.com/2015/10/22/prisoners-shoot-music-video-in-jail/>.

9. *Id.* Solitary confinement goes by several names: “isolation, SHU (special housing units), administrative segregation, supermax prisons, the hole, MCU (management control units), CMU (communications management units), STGMU (security threat group management units), voluntary or involuntary protective custody, special needs units, or permanent lockdown.” *Solitary Confinement Facts*, AM. FRIENDS SERV. COMM., <https://www.afsc.org/resource/solitary-confinement-facts> (last visited Mar. 27, 2017).

10. John, *supra* note 8.

11. The “I’m On Fire” song lyrics have been transcribed and placed at the end of this Comment in the Appendix to prove that the lyrics do not promote “gang-related” activity. Rap artists oftentimes use metaphors to explain how explosive and almost “mind-blowing” their lyrics are. For example, the lyrics “AR, AK, spit something, go straight to brains” means that the lyrics go straight to a listener’s brain in the same fashion as a bullet would from a gun. In a sense, it suggests that the lyrics are striking. This same sentiment is used when the first lyricist

phone; however, the SCDC's characterization of the inmates' lyrics as gang-related is far from the truth and simply tone-deaf, highlighting their ignorance of hip-hop culture.¹²

The "I'm on Fire" instance is just one example in a sea of many that exemplifies the excessive use of solitary confinement for individuals who commit nonviolent offenses. Though the main argument against cell phone use in prisons and jails is that inmates can use phones to plan an escape or a violent crime,¹³ inmates are placed in solitary more frequently for nonviolent crimes—such as accessing social media—rather than conspiring to commit a criminal act.¹⁴ In South Carolina, for example, using social media while incarcerated "is on the same level of offense as attacking a guard, rioting[,] and taking a hostage."¹⁵ In 2012, "the [SCDC] made 'Creating and/or Assisting With A Social Networking Site' a Level 1 offense"—a category typically assigned to excessively "violent violations of prison conduct policies."¹⁶ As EFF states, "[s]ome inmates ask their families to access their online accounts for them, while many access the Internet themselves through a contraband cell phone (possession of which is . . . [a] Level 1 offense)."¹⁷ In sixteen cases, "inmates were sentenced to

discusses the "twelve inch shotty." He explains that his lyrics run through your body in the same fashion as a shotgun. Those are the only two metaphors that reference weapons. Two other inmates rap as well, and each inmate discusses marijuana in some aspect. However, neither person discusses the act of selling marijuana, as gangs have the perception of doing. Additionally, with marijuana's current legalization in several states, the argument that marijuana use is only associated with gang members is outdated. Thus, it becomes apparent that, instead of focusing on the lyrics, the SCDC officials heard what they wanted to hear and sentenced men to months and even a year in solitary confinement for cleverly expressing themselves through metaphor. See *South Carolina Inmates Film 1st Ever Music Video in Prison!*, *supra* note 2.

12. John, *supra* note 8.

13. One fact that the SCDC has attempted to highlight to support its contention that the "I'm On Fire" inmates' sentences were appropriate is the alarming surge in cell phone use in prisons and jails. See Tod W. Burke & Stephen S. Owen, *Cell Phones as Prison Contraband*, FBI (July 2010), <https://leb.fbi.gov/2010/july/cell-phones-as-prison-contraband>. One prison official has stated, "[c]ell phones are perhaps the worst type of contraband because, in most cases, they provide an easy, continuing connection back to the inmate's life on the street." *Id.* Inmates, on the other hand, argue that they prefer wireless phones to avoid prison monitoring. *Id.* Cell phones are private and are much less expensive than prison payphones. *Id.*

14. Additionally, some argue that correctional facilities prefer the use of payphones because they derive substantial revenue from their use: "a 1995 study found that such income totaled \$96.4 million for thirty-one state correctional agencies." *Id.*

15. Alfred Ng, *South Carolina Inmates Collectively Get Almost 20 Years of Solitary Confinement for Rap Video*, N.Y. DAILY NEWS (Oct. 21, 2015, 11:44 PM), <http://www.nydailynews.com/news/crime/rapper-inmates-solitary-confinement-20-years-article-1.2406526>.

16. Dave Maass, *Hundreds of South Carolina Inmates Sent to Solitary Confinement Over Facebook*, ELEC. FRONTIER FOUND. (Feb. 12, 2015), <https://www.eff.org/deeplinks/2015/02/hundreds-south-carolina-inmates-sent-solitary-confinement-over-facebook>.

17. *Id.*

more than a decade in . . . disciplinary detention, with at least one inmate receiving more than [thirty-seven] years in isolation.”¹⁸ To extend the length of each sentence, the SCDC “issues a separate Level 1 violation for *each day* that an inmate accesses a social network.”¹⁹

It seems that the SCDC is aware of the criticism regarding its excessive sentences, because, in February of 2015, it ruled that sixty days would be the new maximum sentence per offense.²⁰ Still, sixty days in solitary is much too steep a sentence for a nonviolent offense, especially when the rule remains that infractions can be coupled with one another to add up to six months, a year, or more. Even more disappointing, the SCDC’s spokesperson still stands by its decision to excessively punish the “I’m On Fire” music video’s participants, arguing that the inmates’ lyrics were inappropriate.²¹

Since the early 1970s, prisons and jails have increasingly relied on solitary confinement to control individuals within their confines, including children.²² The drastic surge in the use of this punishment is without question. About half a dozen solitary confinement units existed in 1985.²³ Currently, “more than [forty] states have super-maximum security [(“supermax”)] . . . facilities primarily designed to hold inmates in long-term isolation.”²⁴ Today, there are between 80,000 to 100,000 individuals held in solitary confinement.²⁵

18. *Id.* This extensive sentence length is not uncommon. In fact, Maass’ report details a number of other excessive sentences given to inmates for using social networks:

- In October 2013, Tyheem Henry received **13,680 days (37.5 years) in disciplinary detention** and lost 27,360 day (74 years) worth of telephone, visitation, and canteen privileges, and 69 days of good time—***all for 38 posts on Facebook.***
- In June 2014, Walter Brown received **12,600 days (34.5 years) in disciplinary detention** and lost 25,200 days (69 years) in telephone, visitation, and canteen privileges, and 875 days (2.4 years) of good time—***all for 35 posts on Facebook.***
- In May 2014, Jonathan McClain received **9,000 days (24.6 years) in disciplinary detention** and lost 18,000 days (49 years) in telephone, visitation, and canteen privileges, and 30 days of good time—***all for 25 posts on Facebook.***

Id.

19. *Id.* (emphasis added). This policy is quite arbitrary. According to Maass, “[a]n inmate who posts five status updates over five days, would receive five separate Level 1 violations, while an inmate who posted 100 updates in one day would receive only one.” *Id.*

20. Radio Staff, *South Carolina Inmates Get Combined Total of 20 Years in Solitary Confinement for Posting Music Video Online*, RADIO NOW 92.1 (Oct. 23, 2015), <https://radio-nowhouston.com/23024/south-carolina-inmates-get-combined-total-of-20-years-in-solitary-confinement-for-posting-music-video-online/>; see also John, *supra* note 8.

21. John, *supra* note 8.

22. *Solitary Confinement Facts*, *supra* note 9.

23. *Id.*

24. *Id.*

25. *FAQ*, SOLITARY WATCH (2015) [hereinafter *FAQ*, SOLITARY WATCH], <http://solitarywatch.com/facts/faq/> (last visited Apr. 4, 2017). The above stated estimate is an “extrapolation of data obtained from thirty-four states, housing seventy-three percent of all prisoners, which found over 66,000 people in restrictive housing. This figure does not include local jails,

The problem is that solitary confinement has become a “control strategy of first resort” rather than a “last resort measure reserved for the ‘worst of the worst.’”²⁶ Men and women are currently in solitary confinement for extended periods of time because they “have untreated mental illnesses, are children in need of ‘protection,’ are gay or transgender, are Muslim, have unsavory political beliefs, [possess cell phones, use social media in prison,]²⁷ or report rape or abuse by prison officials.”²⁸ Fortunately, the publication of the “I’m on Fire” music video was enough, not only to blow the whistle on South Carolina’s practices, but also to spark widespread conversation about the excessive use of solitary confinement for nonviolent offenses in general.

Some have argued that solitary confinement constitutes cruel and unusual punishment under the Eighth Amendment because (1) the conditions are typically horrid and (2) sentence lengths can be excessively and arbitrarily long.²⁹ In this Comment, however, I additionally argue that solitary confinement is a blatant violation of one’s freedom of association right because long-term isolation inevitably leads to irreparable psychological harm. Oftentimes, when the argument of cruel and unusual punishment is used, courts tend to focus on the conditions of *that* person in *that* prison or *that* cell rather than the excessive use of solitary confinement in general.³⁰ Thus, I posit that arguing freedom of association, in addition to cruel and unusual punishment, is a direct challenge to the excessive use of solitary confinement, especially in the context of nonviolent offenses because isolation is much too steep a punishment for individuals who have not proven themselves to be dangerous and thus, worthy of being separated from others. A person’s right to freely associate with others has

juvenile, military and immigration facilities.” *Id.* In October 2015, the Bureau of Justice Statistics released a report entitled “Use of Restrictive Housing in U.S. Prisons and Jails, 2011–12.” ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, USE OF RESTRICTIVE HOUSING IN U.S. PRISONS & JAILS 2011–12 (2015), <http://www.bjs.gov/index.cfm?ty=PBdetail&iid=5433>. According to the report, nearly twenty percent of prisoners and eighteen percent of inmates in jail have spent time in isolation. *Id.*

26. *FAQ*, SOLITARY WATCH, *supra* note 25.

27. *See, e.g.* Burke & Owen, *supra* note 13.

28. *Id.*; *see also* Jean Casella & James Ridgeway, *Rastafarians Spend a Decade in Solitary for Refusing Haircuts*, SOLITARY WATCH (Feb. 11, 2010), <http://solitarywatch.com/2010/02/11/rastafarians-spend-a-decade-in-solitary-for-refusing-haircuts/> (noting that in Virginia, a group of Rastafarian men were placed in solitary—some for more than a decade—because they refused to cut their hair on religious grounds).

29. *See infra* Part III.

30. *See infra* Part II.A.2.

been recognized as a fundamental right under the United States Constitution.³¹ This being so, I argue that such a right may not be excessively limited for prisoners who do not commit violent offenses, because such a punishment is so severe that it inevitably alters a prisoner's psyche.³² Accordingly, because excessive solitary confinement sentences are detrimental and counterproductive, this punishment should be limited in its use for nonviolent offenses.

To dissect this issue, I have sectioned this paper into five parts. Part I discusses the widespread issue of solitary confinement and the practice's origins. Part II discusses the psychological implications of solitary confinement to show how cruel and unusual the deprivation of one's freedom of association truly is. Part III discusses how the cruel and unusual punishment argument has been used, highlighting its successes, but also critiquing these purported victories. Part IV is critical because it demonstrates how my freedom of association argument against excessive solitary confinement sentences for nonviolent offenses parallels the argument that was made in one of the most important Supreme Court cases of all time: *Brown v. The Board of Education*.³³ In that case, the NAACP's Legal Defense Fund ("LDF") argued that the separation of black and white children in schools should be abolished, not only because the conditions were unequal, but also because segregation was psychologically harmful to black children. Namely, many black children tended to view themselves as lesser than white children, and this negative thinking impaired their learning and growth process. I argue that solitary confinement is akin to this scenario because prisoners become so severely psychologically depleted after an excessively long stay in solitary confinement that most never learn to assimilate back into society, and as a result either become violent, repeat offenders, or "unproductive" members of society. Part V seeks to provide a solution to the issues discussed in this Comment by discussing President Obama's Executive Order, which directly addresses the issue of solitary confinement, in addition to other remedies that can be instituted to create a more reasonable term for a prisoner in solitary confinement.

31. *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984) (stating that "freedom of association receives protection as a fundamental element of personal liberty").

32. *See* John, *supra* note 8.

33. *See generally* *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 493 (1954) (finding that separate educational facilities are inherently unequal based on precedent laid in the lower courts as well as psychological data derived from "The Doll Tests").

I. THROUGH THE LOOKING GLASS: PAST VS. PRESENT

A. From Where Did it Come?

Laura Sullivan, a writer for NPR, has researched the history of solitary confinement, and the timeline is quite troubling. In 1829, “the first experiment in solitary confinement in the United States beg[an] at the Eastern State Penitentiary in Philadelphia.”³⁴ It was “based on a Quaker belief that prisoners isolated in stone cells with only a Bible would use the time to repent, pray[,] and find introspection.”³⁵ Unfortunately, many prisoners lost their minds, committed suicide, or were “no longer able to function in society,” and, as a result, the use of solitary confinement was discontinued for decades.³⁶

In *In re Medley*, Supreme Court Justice Samuel Freeman Miller wrote about the effects of solitary confinement on inmates housed in Philadelphia in 1890, finding that “a considerable number of the prisoners . . . became violently insane[, and] others . . . committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community.”³⁷

Although it seemed that the United States was moving away from the trend of housing inmates in solitary confinement for the reasons stated above, in 1934, “[t]he federal government open[ed] Alcatraz in San Francisco Bay to house the nation’s worst criminals.”³⁸ Each prisoner had his own cell.³⁹ While a majority of the prisoners spent many hours in the yard or completing work assignments, “a few dozen [were] kept in ‘D Block,’ the prison’s solitary-confinement hallway.”⁴⁰ One cell in particular was referred to as “The Hole.”⁴¹ There was “no light, inmates [were] kept naked, and bread and water [was] shoved

34. Laura Sullivan, *Timeline: Solitary Confinement in U.S. Prisons*, NPR (July 26, 2006, 7:52 PM), <http://www.npr.org/templates/story/story.php?storyId=5579901>.

35. *Id.*

36. *Id.*

37. *In re Medley*, 134 U.S. 160, 168 (1890); see also Sullivan, *supra* note 34.

38. Sullivan, *supra* note 34. Alcatraz Island had been used for years before it was converted to a prison to house the nation’s most dangerous criminals. *Alcatraz*, HISTORY (2017), <http://www.history.com/topics/alcatraz>. Beginning in the 1850s, Alcatraz was reserved for military use. *Id.* By 1933, “the Army relinquished Alcatraz to the U.S. Justice Department, which wanted a federal prison that could house a criminal population too difficult or dangerous to be handled by other U.S. penitentiaries.” *Id.* Alcatraz, as it is known to many today, opened on July 1, 1934. *Id.*

39. *Alcatraz*, *supra* note 38.

40. Sullivan, *supra* note 34.

41. *Id.*

through a small hole in the door.”⁴² D Block prisoners could not speak to other prisoners and were seldom allowed to leave their cells.⁴³ Alcatraz was shut down in 1963 and is now a popular tourist attraction rather than a maximum security prison.⁴⁴

In the 1970s, many criminologists began to rethink the idea of mass incarceration altogether because it was ineffective in deterring crime.⁴⁵ Experts issued a statement, noting that “‘no new institutions for adults should be built and existing institutions for juveniles should be closed.’ [This] recommendation was based on their findings that ‘the prison . . . and the jail have achieved . . . a shocking record of failure. There is overwhelming evidence that these institutions create crime rather than prevent it.’”⁴⁶

Despite these findings, in the 1980s, more facilities were built, and these prisons, nicknamed “supermax facilities,” were built specifically to house *all* their prisoners in solitary indefinitely: “the use of solitary grew . . . after white supremacists murdered two prison guards in a federal penitentiary in Marion, Ill[inois].”⁴⁷ Prison administrators placed the facility on “lockdown,” and this one-time remedy was institutionalized: supermax facilities soon became the new norm.⁴⁸

42. *Id.*

43. *Id.*

44. *Alcatraz*, *supra* note 38 (stating that “[t]he federal penitentiary at Alcatraz was shut down in 1963 because its operating expenses were much higher than those of other federal facilities at the time.” Because Alcatraz was located on an island, it was more difficult and expensive for necessities to be shipped to the prison).

45. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 8 (2012) (citing DOUGLAS BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK PEOPLE IN AMERICA FROM THE CIVIL WAR TO WORLD WAR II* (2008); ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863-1877*, at 425 (1988); JOHN HOPE FRANKLIN & ALFRED A. MOSS, *FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS* 82 (Knopf, 8th ed. 2000)) (noting that this conclusion was made based on a survey conducted by the National Advisory Commission on Criminal Justice Standards and Goals).

46. *Id.*

47. The Editors, *Solitary Confinement Is Cruel and Ineffective*, *SCI. AM.* (Aug. 1, 2013), <https://www.scientificamerican.com/article/solitary-confinement-cruel-ineffective-unusual/>.

48. *Id.*; *see also* ALEXANDER, *supra* note 45, at 46, stating,

During the presidential election that year, both the Republican candidate, Richard Nixon, and the independent segregationist candidate, George Wallace, made ‘law and order’ a central theme of their campaigns, and together they collected 57[%] of the vote. Nixon dedicated seventeen speeches solely to the topic of law and order, and one of his television ads explicitly [stated, among other things,] ‘It is time for an honest look at the problem of order in the United States.’

Even worse, this ad was referring to civil rights activists at the time. According to Alexander, “[v]iewing his own campaign ad, Nixon reportedly remarked with glee that the ad ‘hits it right on the nose. It’s all about those damn Negro-Puerto Rican groups out there.’” *Id.* at 47 (citing DORIS MARIE PROVINE, *UNEQUAL UNDER LAW: RACE IN THE WAR ON DRUGS* (2007)).

By 1989, California had built Pelican Bay State Prison (“Pelican Bay”), arguably the United States’ most well-known supermax facility today.⁴⁹ There was no “yard, cafeteria, classrooms or shops”⁵⁰ Instead of engaging in much physical or thought-provoking activity, “[i]nmates spent [twenty-two-and-a-half] hours a day inside an [eight-by-ten-foot] cell. The other [one-and-a-half] hours were spent alone in a small concrete exercise pen.”⁵¹ Though a federal judge found that Pelican Bay’s conditions “‘may well hover on the edge of what is humanly tolerable’ . . . he rule[d] that there is no constitutional basis for the courts to shut down the unit or to alter it substantially,”⁵² and ultimately left that determination to the states.⁵³ Interestingly enough, “[t]here was no legislative discussion of the novel punitive design of Pelican Bay nor that it would be the site of indefinite [Security Housing Unit (“SHU”)] commitments. The original planners [also] did not contemplate that some prisoners would spend decades there.”⁵⁴

In this next section, I will discuss how solitary confinement has evolved today. Part B demonstrates that the number of men and women housed in isolation has ballooned over the past fifteen to twenty years. Historically, we have seen that solitary confinement has been proven inefficient; yet, statistical trends do not note this revelation. Instead, they show that the number of individuals in isolation has continued to skyrocket and the length of the sentences continue to increase as well.

B. Numbers Don’t Lie: The Widespread Issue of Solitary Confinement

Widespread solitary confinement statistics show a shocking trend. The Bureau of Justice Statistics conducted a census of state and fed-

49. Sullivan, *supra* note 34.

50. *Id.*

51. *Id.*; see also *Madrid v. Gomez*, 889 F. Supp. 1146, 1229 (N.D. Cal. 1995).

52. Sullivan, *supra* note 34; see *Madrid*, 889 F. Supp. at 1146. While deciding this case, Judge Henderson toured Pelican Bay’s SHU “to inspect the conditions of isolation which inmates had challenged for cruel and unusual punishment violations.” Joseph B. Allen, *Extending Hope Into “The Hole”: Applying Graham v. Florida to Supermax Prisons*, 20 WM. & MARY BILL RTS. J. 217, 223 (2011). Henderson noted that “some inmates spend the time simply pacing around the edges of the pen; the image created is hauntingly similar to that of caged felines pacing in a zoo.” *Id.* at 1229.

53. Sullivan, *supra* note 34.

54. Keramet Reiter, *A Brief History of Pelican Bay*, PRISONER HUNGER STRIKE SOLIDARITY, <https://prisonerhungerstrikesolidarity.wordpress.com/education/resources/resources/pelican-bay/305-2/> (last visited on Mar. 28, 2017).

eral prisoners between 2000 and 2005, finding that approximately 81,000 men and women are held in some form of solitary confinement.⁵⁵ The census figures “do not include prisoners in solitary confinement in juvenile facilities, immigrant detention centers, or local jails; if they did, the numbers would certainly be higher.”⁵⁶ Today, the total number of individuals held in solitary may linger between 80,000 and 100,000, according to a Yale Law School and the Association of State Correctional Administrators survey.⁵⁷

Though prison officials justify their excessive use of solitary confinement by arguing that it reduces prison violence, placing prisoners in solitary has been found to do quite the opposite.⁵⁸ After Mississippi “reduced the number of prisoners in solitary confinement at its Parchman facility and developed new units for prisoners with mental illness, the number of violent attacks plummeted from a high of [forty-five] in March 2006 to five in January 2008.”⁵⁹ Additionally, “[a] . . . study of Washington[’s] prison population found that [sixty-nine percent] of those who were released directly to the community from solitary . . . landed . . . back in jail within three years, compared with [forty-six percent] of those who had been allowed to readjust to the general prison population before release.”⁶⁰

David Fathi, head of the ACLU’s National Prison Project, found that solitary confinement is “profoundly damaging . . . to physical and mental health,” and also noted that “a United Nations expert on torture has called for solitary confinement over [fifteen] days to be completely abolished.”⁶¹ Research has shown that one’s brain changes

55. *FAQ, SOLITARY WATCH*, *supra* note 25; *see also* ANGELA BROWNE, ALISSA CAMBIER & SUZANNE AGHA, VERA INST. JUSTICE, PRISONS WITHIN PRISONS: THE USE OF SEGREGATION IN THE UNITED STATES 46 (Oct. 2011), <http://www.jstor.org/stable/pdf/10.1525/fsr.2011.24.1.46.pdf> (citing FED. SENTENCING REPORTER, VOL. 24 NO. 1, 46-49 SENTENCING WITHIN SENTENCING (2011)).

56. *FAQ, SOLITARY WATCH*, *supra* note 25; *see also* Casella & Ridgeway, *supra* note 28 (stating that Rikers Island alone has 990 isolation cells).

57. Terrence McCoy, *When Solitary Confinement Becomes Cruel and Unusual*, PORTLAND PRESS HERALD (Jan. 30, 2016), <http://www.pressherald.com/2016/01/30/when-solitary-confinement-becomes-cruel-and-unusual-punishment/> (noting that this survey was released in September 2015).

58. The Editors, *supra* note 47.

59. Additionally, Mississippi “saved more than five million dollars.” *Id.*

60. *Id.* This study was conducted in 2007.

61. Ciaramella, *supra* note 7.

considerably after only seven days of isolation.⁶² More than double this amount is thus more than enough punishment.

So it is clear. A United Nations expert on torture has admitted that solitary confinement has known psychological side effects.⁶³ The question then becomes what exactly are these damaging side effects? Part II of this Comment discusses, in great detail, the psychological effects of solitary confinement by examining numerous studies to prove that solitary confinement is damaging to one's mental health.

II. ISOLATION: WHAT WE KNOW ABOUT THE EFFECTS OF SOLITARY CONFINEMENT

A. Social Experiments, Studies, and Reports

Scientists have conducted studies on the effects of solitary confinement for years. Perhaps the most damning evidence that has been used to combat the use of solitary confinement is a PBS "Frontline" report that exposed solitary confinement, how it functions, and the mental ramifications of its use.⁶⁴ The study found that, for a majority of the twentieth century, the average stay in solitary lasted "just a few days, or several weeks in more extreme cases."⁶⁵ This pales in comparison to the years that many inmates spend in solitary today. Though supporters say the practice keeps correctional facilities safe, these studies prove that solitary confinement is mentally damaging and counterproductive.

1. The Rhesus Monkey and McGill Experiments

In one well-known 1950s study, Harry Harlow, a University of Wisconsin psychologist, "placed rhesus monkeys inside a custom-designed solitary chamber nicknamed 'the pit of despair.'"⁶⁶ After

62. Desire Thompson, *South Carolina Inmates Get Combined Total Of 20 Years in Solitary Confinement For Posting Music Video Online*, NEWSONE, <https://newsone.com/3221072/inmates-get-20-years-solitary-confinement-for-rap-video/> (last visited May 8, 2017).

63. Ciaramella, *supra* note 7.

64. See generally Jason M. Breslow, *What Does Solitary Confinement Do to Your Mind?*, FRONTLINE (Apr. 22, 2014), <http://www.pbs.org/wgbh/pages/frontline/criminal-justice/locked-up-in-america/what-does-solitary-confinement-do-to-your-mind/> (discussing the psychological effects of solitary confinement).

65. *Id.*

66. *Id.* The study came about because, in the 1950s, many psychologists encouraged the notion that paying less attention to infants led to increased independence. Atul Gawande, *Hellhole: The United States Holds Tens of Thousands of Inmates in Long-Term Solitary Confinement. Is this Torture?*, NEW YORKER (Mar. 30, 2009), <http://www.newyorker.com/magazine/2009/03/30/hellhole>. This was Harlow's first time raising monkeys on his own, and so he decided to

about a day or two, most of the monkeys hunched themselves into a small corner of the chamber.⁶⁷ Doctors assumed that this behavior demonstrated their sense of hopelessness.⁶⁸ In addition to observing the monkeys fall into depression, Harlow noticed the monkeys engaging in odd, and sometimes, self-destructive behavior. “Harlow . . . found that monkeys kept in isolation wound up profoundly disturbed, given to staring blankly and rocking in place for long periods, circling their cages repetitively, and mutilating themselves.”⁶⁹ Though the monkeys held in short-term isolation eventually readjusted, “twelve months of isolation almost obliterated the animals socially.”⁷⁰

replicate the childcare methods used in nurseries. *Id.* The monkeys were fed, given play toys, and were even kept warm with blankets. *Id.*

67. Breslow, *supra* note 64. Where Harlow went wrong is that he isolated the animals to protect them from disease and infection. Gawande, *supra* note 66. Though the monkeys grew up healthy and strong, their cognitive abilities failed because they lacked social interaction with other animals. *Id.*

68. Breslow, *supra* note 64; *see also* Gawande, *supra* note 66.

69. *Id.* In another experiment, Harlow “created” a mother for the monkeys to identify with in an attempt to see if this would quell the monkeys’ social anxiety:

[O]ne artificial mother was a doll made of terry cloth; the other was made of wire. He placed a warming device inside the dolls to make them seem more comforting. The babies, Harlow discovered, largely ignored the wire mother. But they became deeply attached to the cloth mother. They caressed it. They slept curled up on it. They ran to it when frightened. They refused replacements: they wanted only “their” mother. If sharp spikes were made to randomly thrust out of the mother’s body when the rhesus babies held it, they waited patiently for the spikes to recede and returned to clutching it. *No matter how tightly they clung to the surrogate mothers, however, the monkeys remained psychologically abnormal.*

Gawande, *supra* note 66.

70. Breslow, *supra* note 64; *see also* Michael Mechanic, *What Extreme Isolation Does to Your Mind*, MOTHER JONES (Oct. 18, 2012, 4:09 AM), <http://www.motherjones.com/politics/2012/10/donald-o-hebb-effects-extreme-isolation> (noting that, after a few days in isolation, the students were played tapes about the supernatural and began to believe that they were true. Additionally, “[t]hey performed poorly on grade-school tasks involving simple arithmetic, word associations, and pattern recognition. They also experienced extreme restlessness, childish emotional responses, and vivid hallucinations.”); 1951: *CIA’s Psychological Torture Is Rooted in Experiments at Dachau*, PROJECT ARTICHOKE & MK-ULTRA, ALLIANCE FOR HUMAN RESEARCH PROTECTION (2017) [hereinafter *CIA’s Psychological Torture*], <http://ahrp.org/1951-cias-psychological-torture-is-rooted-in-experiments-at-dachau-project-artichoke-mk-ultra/> (quoting four students saying, “being in the apparatus was a form of torture.”); *Explore Sensory Stimulation, Leonard Cohen, and More!*, PINTEREST, <https://www.pinterest.com/pin/486670303465119842/> (containing a picture of a male student bound during the McGill Experiments. The student’s eyes, ears, and hands were covered to effectively deprive him of his senses); *MK-ULTRAViolence: Or, How McGill Pioneered Psychological Torture*, MCGILL DAILY (Sept. 6, 2012) [hereinafter *MK-ULTRAViolence*], <http://www.mcgilldaily.com/2012/09/mk-ultraviolence/> (asking readers to “[i]magine being trapped in a small room. Your hands covered in gloves, your sight blocked by translucent glasses, and your head covered by a pillow . . . You are totally deprived of your senses. This is the imagery of torture in foreign wars . . . [but] [i]t occur[red] right here at McGill.”); Carol Schaeffer, “Isolation Devastates the Brain”: *The Neuroscience of Solitary Confinement*, SOLITARY WATCH (May 11, 2016), <http://solitarywatch.com/2016/05/11/isolation-devastates-the-brain-the-neuroscience-of-solitary-confinement/> (stating that students dropped out of the sensory deprivation experiment after not being able to think clearly and after suffering hallucinations); Valtin, *Heart of Darkness: Sensory Deprivation & U.S. Torture—Where From Here?*,

McGill University conducted a similar experiment in 1951 with human subjects. Similar to the monkeys, male graduate students voluntarily stayed in small chambers, containing only a bed.⁷¹ To completely deprive the students of their senses, “[t]hey wore goggles and earphones and [there was] some sort of noise, just white noise, from a loudspeaker[.]”⁷² While in their rooms, “the volunteers also wore gloves and cardboard tubes over their arms to limit their sense of touch. A U-shaped pillow covered their ears and the hum of an air conditioner further obscured outside noise.”⁷³ According to Frontline, “[t]he plan was to observe students for six weeks, but not one lasted more than seven days. Nearly every student lost the ability ‘to think clearly about anything for any length of time,’ while several others began to suffer from hallucinations.”⁷⁴

Recall what David Fathi noted above: considerable changes occur in the brain within seven days in solitary confinement.⁷⁵ Therefore, the fact that these students could last no more than seven days is not surprising. It demonstrates that the human brain is not built to withstand such stark isolation. The male graduate students voluntarily participated in this experiment. Because they had the opportunity to leave, they did. Prisoners, however, do not. They are forced to remain in isolation, and as the studies mentioned below will prove, they suffer mental distress as a result.

2. Prison Studies: The Effects of Solitary Confinement on Inmates

Prisoners fare far worse when it comes to isolation, most notably because they are subjected to it for longer amounts of time than were attempted in the above-referenced experiments. Psychiatrists and psychologists have described the “‘SHU syndrome,’ . . . [affecting] prisoners who spend months in isolation.”⁷⁶ The symptoms of this disorder “resemble those of Post-Traumatic Stress Disorder and might

DAILY KOS (May 10, 2007), <http://www.dailykos.com/story/2007/5/9/333027/> (noting that the person behind the McGill University experiments, Daniel O. Hebb, concluded “that . . . such [sensory deprivation] conditions would have a disorganizing effect on thought’”).

71. *Supra* note 70.

72. Mechanic, *supra* note 70; see also *MK-ULTRAViolence*, *supra* note 70.

73. Mechanic, *supra* note 70; see also *MK-ULTRAViolence*, *supra* note 70.

74. Breslow, *supra* note 64 (emphasis added).

75. Thompson, *supra* note 62. This was also supported by the McGill experiments, wherein psychologists found that the students’ cognitive abilities had been severely impaired after seven days temporarily, but within that time students had forgotten everyday tasks like simple arithmetic. Mechanic, *supra* note 70.

76. Reiter, *supra* note 54.

include hallucinations, depression, anxiety, anger[,] and suicide.”⁷⁷ Psychiatrist and former faculty member of Harvard Medical School, Stuart Grassian, echoed these same sentiments.⁷⁸ Grassian interviewed hundreds of inmates in solitary confinement, and in one study, found that “roughly a third of solitary inmates were ‘actively psychotic and/or acutely suicidal.’”⁷⁹ He ultimately “concluded that solitary can cause a specific psychiatric syndrome, characterized by hallucinations; panic attacks; overt paranoia; diminished impulse control; hypersensitivity to external stimuli; and difficulties with thinking, concentration and memory.”⁸⁰ Some inmates were even found to develop crippling obsessions: “one inmate . . . developed some obsession with his inability to feel like his bladder was fully empty . . . Literally, that man spent hours, . . . 24 hours a day . . . standing in front of the toilet trying to pee . . . He couldn’t do anything else except focus on that feeling.”⁸¹

Again, recall the rhesus monkeys mentioned earlier. After a considerable amount of time in the “chamber of despair,” some resorted to self-mutilation.⁸² Inmates placed in solitary for an excessive amount of time have also been found to engage in this same, self-destructive behavior. In fact, there are studies which demonstrate that solitary confinement can make inmates more dangerous or, at the very least, a greater danger to themselves. Inmates placed in solitary have been found to self-mutilate “at rates that are higher than the general prison population.”⁸³ The self-destruction does not stop

77. *Id.*

78. Breslow, *supra* note 64.

79. *Id.*

80. *Id.*

81. *Id.*

82. Gawande, *supra* note 66.

83. *Id.* Additionally, a group of medical professionals observed inmates placed in solitary confinement in New York City jails and recorded their findings:

Methods. We analyzed data from medical records on 244699 incarcerations in the New York City jail system from January 1, 2010, through January 31, 2013.

Results. In 1303 (0.05%) of these incarcerations, 2182 acts of self-harm were committed, (103 potentially fatal and 7 fatal). Although only 7.3% of admissions included any solitary confinement, 53.3% of acts of self-harm and 45.0% of acts of potentially fatal self-harm occurred within this group. After we controlled for gender, age, race/ethnicity, serious mental illness, and length of stay, we found self-harm to be associated significantly with being in solitary confinement at least once, serious mental illness, being aged 18 years or younger, and being Latino or White, regardless of gender.

Conclusions. These self-harm predictors are consistent with our clinical impressions as jail health service managers. Because of this concern, the New York City jail system has modified its practices to direct inmates with mental illness who violate jail rules to more clinical settings and eliminate solitary confinement for those with serious mental illness.

Fatos Kaba, *Solitary Confinement and Risk of Self-Harm Among Jail Inmates*, NAT’L CTR. FOR BIOTECHNOLOGY INFORMATION, U.S. NATIONAL LIBRARY OF MEDICINE (Mar. 2014), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3953781>. The medical professionals concluded that in-

there. Inmates placed in solitary have been found to account for a large number of suicides in prisons and jails: “[i]n one study of California’s prison system, researchers found that ‘from 1999 to 2004 prisoners in solitary . . . accounted for nearly half of all suicides. A 1995 study of the federal prison system found that [sixty-three percent] of suicides occurred among inmates locked in . . . solitary or in psychiatric seclusion cells.’”⁸⁴ One inmate who participated in the study explained, “[t]he Hole and Segregation cells are depressing enough to drive many men to take their lives After years of living in the cramped confines of a segregation cell with no hope of getting out, it is easy to see why a man would prefer death.”⁸⁵

Finally, psychologist Craig Haney conducted a study of prisoners at Pelican Bay, and found that inmates began “to lose the ability to initiate behavior of any kind—to organize their own lives around activity and purpose.”⁸⁶ The result is “chronic apathy, lethargy, depres-

mates with preexisting mental conditions should be directed to a clinical setting rather than solitary confinement because isolation can exacerbate an inmate’s preexisting condition and cause him to harm himself or others. Still, because the excessive use of solitary confinement leads to mental illness, should these alternatives not be used for all inmates, or at the very least, those who commit nonviolent offenses within the facility?

84. Breslow, *supra* note 64; see also Shira E. Gordon, Note, *Solitary Confinement, Public Safety, and Recidivism*, 47 U. MICH. J. L. REFORM 495, 506 (2014) (stating that “[p]risoners in solitary confinement who exhibit signs of mental illness such as refusing an order, self-mutilation or cutting, or expressing anger at officers likewise receive disciplinary sanctions rather than treatment. Even suicidal behavior is sometimes treated as a behavioral rather than psychological problem”).

85. Breslow, *supra* note 64.

86. *Id.*; see also Dan Winters, *Buried Alive: Stories From Inside Solitary Confinement*, GQ (Mar. 2, 2017), <http://www.gq.com/story/buried-alive-solitary-confinement> (noting that “literature . . . going back decades documents the psychic anguish of isolation—severe depression, rage, panic attacks, PTSD, paranoia, hallucinations, self-mutilation. The suicide rate in solitary is five to ten times higher than . . . the general prison population. . . . Justice Anthony Kennedy told Congress in March . . . 2015, ‘Solitary confinement literally drives men mad.’” In Winters’ article, he provides firsthand accounts from prisoners who were in solitary, and many documented their hallucinations, the psychiatric medication they were forced to take after spending months and even years in solitary, and the little to no help that they received from prison administrators and medical staff:

NELSON: Within the first week, I started talking to myself. I would think I was seeing stuff out of the corner of my eye. I would turn my head real fast, like I saw something in my cell. The hallucinations—it’s not something a lot of us talk about, but all of us had them real bad. You see somebody else in your cell. You hear voices on the stairs or coming through the vent.

TURNER: My obsessive thoughts are primarily about cleanliness and poison. I know that the staff are watching me and listening to me. I know they have prisoner informants and listening devices directed toward me. I can take measures towards these things. But they will try to poison me by some means or another. I doubt that it will be by food. It’ll most likely be from something being put in or onto my sheets, pillowcase, toilet seat, door, etc. So I try to take reasonable cleaning measures to minimize these liabilities or weak spots.

LUTALO: First, the prisoner starts neglecting their personal hygiene. He’ll withdraw. You’ll start seeing a distant look in their eyes: They’re going through the changes. You

sion and despair, [and] in extreme cases, prisoners may literally stop behaving.”⁸⁷ Prisoners told Haney “that the first time they[] [were] given an opportunity to interact with other people, they [couldn’t] do it.”⁸⁸ By that point, they had already developed social atrophy and anxiety.⁸⁹

The case studies and psychological diagnoses shown above demonstrate that excessive solitary confinement sentences lead to severe mental and psychological issues. Citing the disparaging statistics of inmates placed in solitary who can no longer assimilate into society helps to prove a point: taking away a person’s ability to live—to exist amongst others (or at the very least excessively limiting this ability), amounts to cruel and unusual punishment and is undoubtedly a denial of one’s freedom of association right. Even more problematic are the arbitrary ways in which solitary confinement is instituted. Courts do not sentence inmates to solitary; instead, administrators in correctional facilities give prisoners their solitary confinement sentences.⁹⁰ As a result, these administrators have wide discretion over the sentences that they are allowed to give to others.⁹¹

Though some have argued that these excessive punishments constitute cruel and unusual punishment, this argument has been mainly used on a case-by-case basis. Many argue that the conditions at their specific jail or prison is cruel and unusual, and though attacking injustice on a case-by-case basis may be helpful, it is slow to lead to widespread reform. Still, it is important to note how this argument has been used in the courts to demonstrate that there are judges who disagree with excessive solitary confinement sentences, especially in light of the empirical data that some judges cite to argue against its use. Therefore, although this approach may not bring about reform on its

try to talk to the prisoner, encourage him to come outside. Stop talking to a psychologist, because they’re trying to get you on psychotropic drugs. And once they got you on the drugs, you do the smack-mouth [*makes rapid lip-smacking noise*]. Your hands lock up. You do the shuffle. You develop a potbelly. And you’re gone.

Id. It is clear that prisoners Nelson and Lutalo were able to look back on their experiences in isolation and recall their state of mind at the time, while Turner developed paranoia and believed that prison officials were plotting on him. *See id.*

87. Breslow, *supra* note 64; *see also* Winters, *supra* note 86.

88. Breslow, *supra* note 64; *see also* Voices From Solitary, *Voices from Solitary: Survivors Speak*, SOLITARY WATCH (Oct. 21, 2014), <http://solitarywatch.com/2014/10/21/voices-from-solitary-survivors-speak/> (noting that one prisoner recalled his time after solitary, stating that “[e]ven now, six months out of the hole I still remain affected. I withdraw from social interaction/setting[s]. I feel frustrated for no apparent reason”).

89. *Id.*

90. Reiter, *supra* note 54.

91. *Id.*

own—or at the very least not instantly—it is a tool among many others that, when used together, possibly can.

III. CRUEL AND UNUSUAL PUNISHMENT: THE PREVAILING ARGUMENT⁹²

And just, suffering in that cell, I mean mentally . . . it's impossible to put into words, that's why I put in that one part about my anger and a sense of continuously silently screaming

If you could put every emotion of the human spirit of hopelessness, pain, agony, hatred . . . frustration. Why you're locked in this cage, treated like some animal? You think that's making that person better? You think that's making everybody safer? This is still a human being. . . .

Our system of incarceration was created to punish a prisoner and correct him or make him a better person than when he went in there.

*-Todd Ashker, 52,
22 Years in Solitary Confinement⁹³*

A. Background: The Past and Procedure of a Cruel and Unusual Punishment Claim

The rhetoric around cruel and unusual punishment stems from the Eighth Amendment of the United States Constitution.⁹⁴ The text itself states, “Excessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted.*”⁹⁵ The ban essentially bars excessive penalties.⁹⁶

92. Cruel and unusual punishment litigation is not a main focal point of this Comment. My main argument is that the freedom of association argument has been constantly overlooked. I thus spend a brief amount of time discussing the cruel and unusual punishment standard as well as its purported victories to demonstrate that cruel and unusual punishment litigation has largely led to victories on a case by case basis rather than as a whole.

93. Colin Archdeacon & Center for Constitutional Rights, *Effects of Solitary Confinement*, N.Y. TIMES (Aug. 3, 2015, 4:41 PM), <https://www.nytimes.com/video/science/100000003831139/effects-of-solitary-confinement.html>.

94. U.S. CONST. amend. VIII.

95. *Id.* (emphasis added).

96. See, e.g., *Coker v. Georgia*, 433 U.S. 584, 591–92 (1977) (stating that the clause bars barbaric and excessive punishments); Richard S. Frase, *Limiting Excessive Prison Sentences Under Federal and State Constitutions*, 11 U. PA. J. CONST. L. 39, 49 (2008) (proposing that the “Punishments Clause” prohibits excessive punishments); Cedric Richmond, *Toward a More Constitutional Approach to Solitary Confinement: The Case for Reform*, 52 HARV. J. ON LEGIS. 1, 6 (2015) (citing *Hutto v. Finney*, 437 U.S. 678, 687 (1978)); Meghan J. Ryan, *Does the Eighth Amendment Punishments Clause Prohibit Only Punishments That Are Both Cruel and Unusual?*, 87 WASH. U. L. REV. 567, 569 (2010) (citing *Solem v. Helm*, 463 U.S. 277, 284 (1983) (stating that the clause prohibits punishments disproportionate to the crime); Micah Schwartzbach, *The*

For years, many have speculated that solitary confinement is a violation of the Eighth Amendment's ban on cruel and unusual punishment.⁹⁷ After all, isolating a person in a cramped cell for a prolonged period of time does seem cruel and unusual on its face. However, making this claim in a court of law is much more burdensome. To prove such a claim, two requirements must be satisfied: (1) "the deprivation alleged must be, 'objectively, sufficiently serious,' . . . resulting in the denial of 'the minimal civilized measure of life's necessities'; [and (2)] the prison official imposing the deprivation . . . must subjectively act with 'deliberate indifference to inmate health or safety.'"⁹⁸ In *Farmer v. Brennan*, the Court rejected the petitioner's request to use recklessness as a bright line standard for deliberate indifference, stating that recklessness is not self-defining.⁹⁹ It instead held that "official[s] must both be aware of facts" that pose a substantial risk to the health or safety of inmates and actually draw the inference that there is a substantial risk of serious harm.¹⁰⁰ Likewise, in *Estelle v. Gamble*, the Supreme Court held that deliberate indifference to serious medical needs of prisoners constitutes the "unnecessary and wanton infliction of pain."¹⁰¹

Born out of cruel and unusual punishment litigation were specific nuances that courts found cruel and unusual, rather than the practice of prolonged solitary confinement itself. In 1991, the Supreme Court determined that conditions of confinement could constitute an Eighth

Meaning of "Cruel and Unusual Punishment", NOLO (2017), <http://www.nolo.com/legal-encyclopedia/the-meaning-cruel-unusual-punishment.html> (stating that the cruel and unusual punishment clause "prevents the government from imposing a penalty that is either barbaric or far too severe for the crime committed, and it has been applied to prison conditions").

97. See Elizabeth Bennion, *Banning the Bing: Why Extreme Solitary Confinement Is Cruel and Far Too Usual Punishment*, 90 INDIANA L.J. 741, 741 (2015) (stating that "solitary confinement, as commonly practiced in the United States, is cruel and unusual punishment—whether analyzed under current Supreme Court standards or an improved framework"). See also *Cruel Isolation*, N.Y. TIMES (Aug. 1, 2011), <http://www.nytimes.com/2011/08/02/opinion/cruel-isolation-of-prisoners.html> (noting that "[i]n May, the Supreme Court found conditions at the overcrowded prisons so egregious that they violated the Eighth Amendment's ban on cruel and unusual punishment and ordered the state to cut its prison population by more than 30,000 inmates. The case did not address the issue of long-term solitary confinement"). But see *Brown v. Plata*, 563 U.S. 493 (2011) (finding that prison overcrowding of over 30,000 inmates amounted to cruel and unusual punishment, but the Court did not find the same for the prison's solitary confinement conditions).

98. Anthony Giannetti, *The Solitary Confinement of Juveniles in Adult Jails and Prisons: A Cruel and Unusual Punishment?*, 30 BUFF. PUB. INT. L.J. 31, 38 (2012); see also *Farmer v. Brennan*, 511 U.S. 825, 832–35 (1994); *Davenport v. De Robertis*, 844 F.2d 1310, 1314–15 (7th Cir. 1988).

99. *Farmer*, 511 U.S. at 826; see also Richmond, *supra* note 96, at 7.

100. *Farmer*, 511 U.S. at 837; see also Richmond, *supra* note 96, at 7–8.

101. *Estelle v. Gamble*, 429 U.S. 97, 103 (1976).

Amendment violation if the totality of circumstances deprives the prisoner of “a single, identifiable human need such as food, warmth, or exercise.”¹⁰² One can easily see how a prisoner can have access to all three of these things and still lose his sanity, because he is alone in a cell for months or even years at a time.

In *Madrid v. Gomez*, the Northern District of California determined that isolating mentally ill prisoners constituted an Eighth Amendment violation.¹⁰³ The court described isolating the mentally ill as “the mental equivalent of putting an asthmatic in a place with little air to breathe.”¹⁰⁴ Ironically enough, the court did not focus on how the practice of prolonged isolation can cause a prisoner to become mentally ill; the court instead focused on how isolation can exacerbate a preexisting condition.¹⁰⁵

Still, there is one recent Supreme Court concurrence, which shows that, at the very least, the conversation surrounding the excessive use of solitary confinement is not being ignored. In *Davis v. Ayala*, Justice Kennedy provided commentary on his view of solitary confinement.¹⁰⁶ Though the case was about jury selection in the respondent’s murder trial, Justice Kennedy was moved to discuss the excessive use of solitary confinement because of Ayala’s time spent there.¹⁰⁷ Justice Kennedy ultimately concluded that, “[i]n a case that presented the issue, the judiciary may be required, within its proper jurisdiction and authority, to determine whether workable alternative systems for long-term confinement exist, and, if so, whether a correctional system should be required to adopt them.”¹⁰⁸ He ultimately alludes to the idea that, if the right case presented itself, the Supreme Court could finally decide on the issue of excessive solitary confinement sentences.¹⁰⁹

102. *Wilson v. Seiter*, 501 U.S. 294, 304 (1991).

103. *Madrid v. Gomez*, 889 F. Supp. 1146, 1279–80 (N.D. Cal. 1995).

104. *Id.* at 1265.

105. *Id.*

106. *Davis v. Ayala*, 135 S. Ct. 2187, 2208–10 (2015) (Kennedy, J., concurring) (“One hundred and twenty-five years ago, this Court recognized that, even for prisoners sentenced to death, solitary confinement bears ‘a further terror and peculiar mark of infamy.’” (citing *In re Medley*, 134 U.S. 160, 170 (1890))).

107. *Id.* at 2208 (“[S]ince being sentenced to death in 1989, Ayala has served the . . . majority of his more than 25 years . . . in . . . solitary confinement . . . [I]t is likely respondent has been held for all or most of the past 20 years or more in a windowless cell no larger than a . . . parking spot . . .”).

108. *Id.* at 2210.

109. *Id.*

B. *Ashker v. Governor of California*: What California's Resilience Tells Us About the Fight Against Solitary Confinement

Although there has not been a case that has led to the widespread reform of solitary confinement to the degree that I desire in this Comment, there are some battles which demonstrate what true reform looks like. Recently, the argument that solitary confinement amounts to cruel and unusual punishment led to a victory in the state of California. In *Ashker v. Governor of California*, plaintiffs argued that prisoners held in the SHU at Pelican Bay who “spent a decade or more in solitary” had their Eighth Amendment rights violated, and that “the absence of meaningful review for SHU placement violate[d] the prisoners’ rights to due process.”¹¹⁰

Besides the legal action, what was most notable about *Ashker* was the citizen action and grassroots movements that led to the case’s victory. According to the Prisoner Hunger Strike Solidarity Coalition (“PHSS”), in July 2011 “[t]he prisoners in the [SHU]¹¹¹ at Pelican Bay . . . began what became a [] historic hunger strike to protest the cruel,

110. See *Ashker v. Governor of California*, No. C 09-5796 CW, 2014 WL 2465191 *1 (N.D. Cal. Jun. 2, 2014); see also Matt Ford, *The Beginning of the End for Solitary Confinement?: California's Settlement With Prisoners Will Massively Reduce the State's Use of Isolation—and Is the Latest Win for the Movement Against the Practice.*, THE ATLANTIC (Sept. 2, 2015), <https://www.theatlantic.com/politics/archive/2015/09/scaling-back-solitary/403441/> (stating that “Juan Mendez, the United Nations special rapporteur on torture, urged the United States to abolish long-term solitary during the strike; he had previously compared the practice to torture”); Paige St. John, *California Agrees to Move Thousands of Inmates Out of Solitary Confinement*, L.A. TIMES (Sept. 1, 2015), <http://www.latimes.com/local/lanow/la-me-ln-california-will-move-thousands-of-inmates-out-of-solitary-20150901-story.html> (stating that “California has been among a shrinking number of states that keep inmates isolated on the grounds of gang membership rather than behavior, at a time of increasing national criticism over the use of solitary confinement”). Many prisoners tend to join prison gangs for protection rather than true interest. J.D., *Why Prisoners Join Gangs*, ECONOMIST (Nov. 14, 2014), <http://www.economist.com/blogs/economist-explains/2014/11/economist-explains-7> (explaining that as the population of dangerous prisoners increased, so did prison gang membership so individuals could benefit from their protection); *Ashker v. Governor of California*, CTR. FOR CONST. RIGHTS (Feb. 3, 2016) [hereinafter CTR. FOR CONST. RIGHTS], <https://ccrjustice.org/home/what-we-do/our-cases/ashker-v-brown#>; CCR JUSTICE, SUMMARY OF ASHKER V. GOVERNOR OF CALIFORNIA: SETTLEMENT TERMS (2015) [hereinafter CCR JUSTICE], <https://ccrjustice.org/sites/default/files/attach/2015/08/2015-09-01-Ashker-settlement-summary.pdf> (detailing the settlement that the prisoners and the state reached in reforming California’s use of solitary confinement); *Ashker v. Governor of California*, VERA INST. JUST., [hereinafter VERA INST. JUST.], <http://www.safealternativestosegregation.org/resources/view/ashker-v-california> (last visited May 7, 2017) (briefly describing the *Ashker* lawsuit and also providing links to trial documents and the ultimate settlement agreement). But see BORDC/DDF, *California Organizes, Educates, to End Solitary Confinement*, DEFENDING RIGHTS & DISSENT (July 23, 2015), <http://bordc.org/news/california-organizes-educates-to-end-solitary-confinement/> (stating that, since the settlement and hunger strikes, many prisoners are still placed in solitary for excessive lengths of time. It is clear that more remains to be done).

111. As stated earlier, the “SHU” is yet another euphemism used in place of solitary confinement.

inhumane[,] and tortuous conditions of their imprisonment.”¹¹² 30,000 California prisoners participated in this hunger strike, and after sixty days and the death of a prisoner, “California legislators held public hearings.”¹¹³ At the same time, the Center for Constitutional Rights (“CCR”) brought a case against the state of California, and this case was none other than *Ashker v. Governor of California*.¹¹⁴ Feeling the pressure, the state agreed to, among other things:

“Transform California’s use of solitary confinement from a status-based to a behavior-based system”;

“Create a new Restricted Custody General Population Unit (RCGP) as a secure alternative to solitary confinement”; and

“Provide[] significantly more out-of-cell time” for those in solitary confinement for a prolonged period of time.¹¹⁵

Prisoner representatives were even afforded the opportunity to “work with plaintiffs’ counsel and the magistrate judge to monitor implementation of the settlement.”¹¹⁶

The *Ashker* settlement favored inmates tremendously. These inmates risked their lives, and in the process garnered legislative and judicial support to attack California’s widespread use of the SHU. It is important to note that, though the *Ashker* case is a win for California inmates, there are still tens of thousands of inmates at federal, state, and local correctional facilities who are subjected to dehumanizing conditions every day. Even worse, they are most often subjected to these conditions for petty infractions, like talking back to a guard or asking a family member to post a supportive status on Facebook telling their family and friends that they are doing just fine.¹¹⁷

Thus, although the cruel and unusual punishment argument has its utility, it has mainly been used to fight battles rather than the general war. Inmates who have argued Eighth Amendment violations in

112. BORDC/DDF, *supra* note 110.

113. *Id.*; see also CTR. FOR CONST. RIGHTS, *supra* note 110.

114. See *Ashker*, No. C 09-5796 CW, 2014 WL 2465191, at *1.

115. CCR JUSTICE, *supra* note 110.

116. *Id.*

117. See *supra* Part I; see also Michael Martin, ‘Time: The Kalief Browder Story’ Depicts Issues With Solitary Confinement, NPR (Mar. 4, 2017, 6:54 PM), <http://www.npr.org/2017/03/04/518527689/time-the-kalief-browder-story-depicts-issues-with-solitary-confinement> (“In one . . . video[], Kalief is shown being slammed down on the ground for . . . appearing to do nothing more than talking back to a corrections officer. He’s shackled behind his back, and, . . . its scenes like this that really bring to light the type of chaos that happens on Rikers Island.”); *Solitary Confinement Facts*, *supra* note 9 (“Prisoners can be placed in isolation for many reasons, from serious infractions, such as fighting with another inmate, to minor ones, like talking back to a guard or getting caught with a pack of cigarettes.”).

the past have prevailed because of how shocking the circumstances were: the California inmates who settled with the state in *Ashker* were partially afforded this victory because they starved themselves to combat solitary confinement.¹¹⁸ Additionally, the named prisoners in the lawsuit spent ten or more years in the SHU. What about those prisoners who spent nine years in solitary? Five years? Even one? It is my belief that, to change the system as a whole, the cruel and unusual punishment argument must be used on a larger scale. We must move away from arguments that focus on the conditions of the prison and the cell, and focus on the practice in its totality. To do so, the cruel and unusual punishment argument can be used in combination with another constitutional argument. For example, the freedom of association constitutional argument against solitary confinement has been consistently overlooked. Recognized as a fundamental right,¹¹⁹ freedom of association can be used alongside cruel and unusual punishment as well as the multitude of psychological and social experiments to show that associating with others is a fundamental right, and if such right shall be limited, it cannot be done arbitrarily and excessively.

IV. THE FREEDOM OF ASSOCIATION

A. What Is the Freedom of Association?

There are two aspects of the freedom of association: (1) the right to associate with others, and (2) the right to expressive association.¹²⁰ Under the first aspect, the freedom of association is viewed as a “fundamental element of personal liberty.”¹²¹ The right to expressive as-

118. BORDC/DDF, *supra* note 110.

119. *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984) (finding that the freedom of association is a “fundamental element of personal liberty”).

120. STEVEN D. JAMAR, CONSTITUTIONAL LAW: POWER, LIBERTY, EQUALITY 1 (2017).

121. *Roberts*, 468 U.S. at 618; *see also Freedom of Association: Essential Principles*, DEMOCRACY WEB, <http://democracyweb.org/freedom-of-association-principles> (last visited May 7, 2017) (finding that an instrumental right of freedom of association is the right to organize); *The Freedom (Not) to Associate*, EXPLORING CONST. CONFLICTS, <http://law2.umkc.edu/faculty/projects/ftrials/conlaw/association.htm> (last visited May 7, 2017) (stating that the “[f]reedom of association cases . . . bring into conflict two competing views of the world: rights-oriented liberalism that holds that a person’s identity comes from individual choices . . . and communitarianism, that holds that a person’s identity comes from the communities of which an individual is a part . . .”). *But see* Thomas I. Emerson, *Freedom of Association and Freedom of Expression*, 74 YALE L.J. 1, 3–4 (1964) (finding that there are four aspects of freedom of association which go beyond the scope of this Comment):

The first is where a question is presented of the general power of the government to restrict or otherwise regulate the affairs of an organization or its membership. This was the problem involved in *NAACP v. Alabama ex rel. Patterson*. . . . A second type of problem arises when governmental power is used to compel an individual to belong to an organization, pay dues, or otherwise participate in its activities. . . . In a third con-

sociation is viewed as “the right to associate for the purpose of engaging in constitutionally protected activities including the First Amendment freedom of speech, right to assembly, right to petition for the redress of grievances, and the free exercise of religion.”¹²² Although the freedom of association is not expressly enumerated in the Constitution, it is considered necessary to effectuate other constitutional rights.¹²³

1. In the Beginning: Before *Brown*

As Professor Steven Jamar, a Constitutional Law Professor at Howard University School of Law, puts it, “[t]he start of the modern expansion and articulation of the right arises during the rights revolution of the mid-20th century and is one of the many examples of the Supreme Court deciding basic rights cases arising in the context of the Civil Rights Movement, especially after *Brown* . . .”¹²⁴ Though a number of these cases were brought under the Fourteenth Amendment’s Equal Protection Clause, they were also decided under freedom of association principles, though not stated explicitly.¹²⁵

Brown was not the first case of its kind. Indeed, Thurgood Marshall and Charles Hamilton Houston, a former Howard University School of Law student and Dean respectively, initially tried cases in the lower courts to lay the precedent for *Brown*.¹²⁶ These cases argued that black and white students’ education was limited because of racially discriminatory laws that limited, or in some cases, essentially

text, problems of freedom of association arise in connection with the rights of individual members or minority groups vis-a-vis the organization to which they belong. An example is the Labor-Management Reporting and Disclosure Act, which guarantees certain rights of franchise, free expression and due process to members of a labor organization. The fourth area is where the associational rights at stake are not organizational but personal in nature. Professor Herbert Wechsler believes that this was a primary, though overlooked, issue in the *School Segregation Cases*. A more clear-cut illustration is furnished by a state law which punishes association with criminals, or prohibits persons of different races from eating together in restaurants.

122. JAMAR, *supra* note 120.

123. *Id.*

124. *Id.*

125. See, e.g., Richard A. Epstein, *Public Accommodations Under the Civil Rights Act of 1964: Why Freedom of Association Counts as a Human Right*, 66 STANFORD L. REV. 1241, 1255 (2014) (stating that Title II of the Civil Rights Act was created on freedom of association principles). Epstein went on to state “the imposition of anti-miscegenation laws is a violent affront to the ordinary principles of freedom of association, which apply as much (if not more) to marriage as to any other relationship.” *Id.* at 1256.

126. See generally *Mo. ex rel. Gaines v. Canada*, 305 U.S. 337 (1938) (ruling that a law student was entitled to equal protection of the laws in being admitted to a law school at a state university because of the absence of other proper provision for his legal training).

eliminated their association with one another.¹²⁷ One example is *McLaurin v. Oklahoma State Regents*, wherein “the state admitted a black student to its graduate school, but designated a special row for him to sit in the classroom, a special carrel for him to study in the library, and a special table for him to eat at in the cafeteria, all apart from white students.”¹²⁸ The court was convinced that “admitting the black student to the school but preventing social and intellectual interaction with white students would not possibly be equal because interaction with other students was one of the benefits of education.”¹²⁹

2. *Brown*: The Psychological Effects of Denied Association

In December 1953, *Brown v. Board of Education* was argued before the Supreme Court.¹³⁰ The issue in *Brown* was whether segregating “children in public schools solely on the basis of race, even though the physical facilities and other ‘tangible’ factors may be equal, deprive[d] the minority children of equal educational opportunities[.]”¹³¹ The Court reached its conclusion by not only exemplifying the inherent inequality in separate educational facilities, but also by looking at the “effect of segregation itself on public education.”¹³² As the Court put it, “[t]o separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”¹³³ The Court went on to state that “[s]egregation with the sanction of law . . . has a tendency to (retard) the educational and mental development of [black] children and to deprive them of some of the benefits they would receive in a racial(ly) integrated school system.”¹³⁴ The Court thereafter stated that its conclusion was reached largely because of the

127. See generally JAMAR, *supra* note 120, at ch. 19 (highlighting the sociological and psychological ramifications of denied association).

128. JAMAR, *supra* note 120, at 39 (citing *McLaurin v. Oklahoma State Regents*, 339 U.S. 637, 640 (1950) (stating that the black student “was required to sit apart at a designated desk in an anteroom adjoining the classroom; to sit at a designated desk on the mezzanine floor of the library[;] and to sit at a designated table and to eat at a different time from other students in the school cafeteria”)).

129. *Id.*; see also *McLaurin*, 339 U.S. at 641 (finding that separating the black student from whites in all social aspects of his education will handicap him “in his pursuit of effective graduate instruction. Such restrictions impair and inhibit his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession”).

130. JAMAR, *supra* note 120, at 37.

131. *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 493 (1954).

132. *Id.* at 492.

133. *Id.* at 494.

134. *Id.* at 494.

psychological knowledge they possessed at that time that they did not have when deciding *Plessy v. Ferguson*.¹³⁵ The Court thus concluded what we all know to be true today: in the field of public education, the doctrine of “separate but equal” has no place because separate educational facilities are inherently unequal.¹³⁶

What is important to note here is that, although the concept of freedom of association was not clearly articulated in *Brown*, its implications were understood. *Brown v. Board of Education* was brought under the guise of the Equal Protection Clause of the Fourteenth Amendment because the LDF was directly combatting discrimination against members of a protected class: African Americans. Still, the Court decided to look beyond the blatant racism and discrimination to analyze what the effects of the denied association between blacks and whites did to black and white children. The empirical data that the Court relied on in reaching its conclusion was known as “The Doll Test.”¹³⁷

135. *Id.*

136. *Id.* at 495.

137. *Brown at 60: The Doll Test*, LDF, <http://www.naacpldf.org/brown-at-60-the-doll-test> (last visited Apr. 17, 2017); *The Clark Doll Experiment*, ABAGOND (May 29, 2009), <https://abagond.wordpress.com/2009/05/29/the-clark-doll-experiment/> (detailing the experiment, including questions asked and the children’s reactions). The test proved to be more difficult after the black children seemed to realize how they viewed themselves:

In the experiment Clark showed black children between the ages of six and nine two dolls, one white and one black, and then asked these questions in this order:

“Show me the doll that you like best or that you’d like to play with,”

“Show me the doll that is the ‘nice’ doll,”

“Show me the doll that looks ‘bad’,”

“Give me the doll that looks like a white child,”

“Give me the doll that looks like a coloured child,”

“Give me the doll that looks like a Negro child,”

“Give me the doll that looks like you.”

“Negro” and “coloured” were both common words for blacks before the 1960s.

The last question was the worst since by that point most black children had picked the black doll as the bad one. In 1950 44% said the white doll looked like them! In past tests, however, many children would refuse to pick either doll or just start crying and run away.

Id.; *Stereotypes and the Clark Doll Test*, EXPLORABLE, <https://explorable.com/stereotypes> (last visited May 8, 2017) (stating that “[t]he results of Clark’s study were used to prove that school segregation was distorting the minds of young black kids, causing them to internalize stereotypes and racism, to the point of making them hate themselves.” The writers also found that “the experiment helped to persuade the American Supreme Court that “separate but equal” schools for blacks and whites were anything but equal in practice and is therefore illegal . . .”). *But see* The Root Staff, *The Doll Test for Racial Self-Hate: Did It Ever Make Sense?*, THE ROOT (May 17, 2014), <http://www.theroot.com/the-doll-test-for-racial-self-hate-did-it-ever-make-se-1790875716> (stating that, aside from overruling the “separate but equal” doctrine, *Brown*’s other legacy was “[t]he tradition of questioning small children about black and white dolls in order to measure their sentiments about race”). The article goes on to play down the role that the doll test played in the *Brown* litigation by noting that the LDF’s Equal Protection argument was enough to win the case, but the Court mentioned the doll test findings in a footnote); Dixon

3. The Doll Test: Segregation vs. Isolation

In the 1940s, “psychologists Kenneth and Mamie Clark designed and conducted a series of experiments known . . . as ‘the doll tests’ to study the psychological effects of segregation on African American children.”¹³⁸ All four dolls were identical, but differed with regard to their purported race.¹³⁹ “Test subjects” ranged from ages three and seven, and were asked to identify which color doll they preferred.¹⁴⁰ Most of the children preferred the white doll, attributing positive characteristics to it that they did not identify in the black doll.¹⁴¹ Dr. Clark recalled an episode in which he asked a black child “which doll was most like him”, to which “[t]he child responded by smiling and pointing to the brown doll: ‘That’s a nigger. I’m a nigger.’”¹⁴² The Clarks ultimately found that “prejudice, discrimination, and segregation created a feeling of inferiority among African American children and damaged their self-esteem.”¹⁴³

Because of the Doll Test findings, the Supreme Court in *Brown* was persuaded that separate educational facilities are inherently unequal because separating the races led to serious psychological side effects. Segregation and isolation are of course two completely different ideas. Segregation during the Jim Crow era entailed separating two groups of people—blacks and whites—to violate the blacks’ access to social resources.¹⁴⁴ It created a psychological reaction because it was part of a subjective narrative of the power of the white identity group.¹⁴⁵ Isolation, on the other hand, violates a physical, genetically-based need for human contact¹⁴⁶ that when taken away, has proven to lead to visceral results. Thus, I argue that isolation is on par with segregation, if not worse, because it directly interferes with a basic genetic necessity that, when impaired, innately leads to psychological

Fuller 2011, *Doll Test*, YOUTUBE (Feb. 7, 2012), <https://www.youtube.com/watch?v=TkpUyB2xgTM> (demonstrating one of many doll tests that had been conducted following the Clarks’ test).

138. *Brown at 60: The Doll Test*, *supra* note 137; *The Clark Doll Experiment*, *supra* note 137; *Stereotypes and the Clark Doll Test*, *supra* note 137.

139. *Brown at 60: The Doll Test*, *supra* note 137.

140. *Id.*

141. *Id.*; see also *The Clark Doll Experiment*, *supra* note 137; *Stereotypes and the Clark Doll Test*, *supra* note 137; *The Root Staff*, *supra* note 137.

142. *Brown at 60: The Doll Test*, *supra* note 137.

143. *Id.*

144. Email from Harold McDougall, Professor of Law, Howard University School of Law to Author (Nov. 27, 2016) (on file with author).

145. *Id.*

146. *Id.*

deficiencies far worse than the Supreme Court sought to avoid in *Brown*. Therefore, if isolation bears some resemblance to segregation, the next logical question is what data suggests that solitary confinement is psychologically debilitating? In other words, what is our “doll test”?

Our modern day doll test comes in the form of the numerous studies, experiments and reports published about solitary confinement. They come in the form of the rhesus monkeys who went insane after being stuck in a box for twelve months.¹⁴⁷ They come in the form of the young men who could not stay in a room for more than seven days without losing their minds.¹⁴⁸ They come in the form of the thousands of inmates in the federal, state, and local correctional facilities who left the department of corrections [UN]corrected because they were placed in solitary confinement for weeks, months, and years at a time. Because of the enforcement of solitary confinement, prisoners suffer from diminished brain capacity, become socially unconscious, and even become destructive to themselves and others. They avoid social interaction and are almost incapable of working or even “being” among others.

With this ammunition in hand, our litigation will consist of all past approaches: we will argue that solitary confinement violates the Eighth Amendment’s prohibition on cruel and unusual punishment and we will argue that it violates prisoners’ freedom of association right.¹⁴⁹ What will strengthen these arguments is the mounting evidence accumulated from social experiments and studies which demonstrate that no human being (or animal for that matter) can withstand the current administration of solitary confinement. At the same time, there must be citizen action. A prisoner in California gave his life to combat the injustices that existed in California prisons. There is no doubt that countless people of color gave their lives before *Brown* was decided. I am not suggesting that there must be lives lost, but there must be strong support and dedication for prisoners contesting the use of solitary. We must attend the town hall meetings, make our voices heard, stage strikes, and do what is necessary to bring awareness to this practice.

147. Breslow, *supra* note 64; Gawande, *supra* note 66.

148. Breslow, *supra* note 64; *CIA’s Psychological Torture*, *supra* note 70; Mechanic, *supra* note 70; Schaeffer, *supra* note 70; Valtin, *supra* note 70; *Explore Sensory Stimulation*, Leonard Cohen, and More!, *supra* note 70;

149. Recall that the freedom of association “is considered necessary to effectuate other constitutional rights.” See *supra* Part IV.A.

B. Prisoner's Rights: Do Prisoners Have a Right to Sanity?

Undoubtedly, the largest difference between the children in *Brown* and the prisoners discussed in this Comment is that children are innocent. They come into this world with a clean slate and should not be punished for something over which they have no control: the color of their skin. Prisoners, on the other hand, are presumed to have placed themselves in their situation. As the old saying goes, “you do the crime, you do the time.” It is also widely known that prisoners are not afforded the same rights as unincarcerated Americans. Thus, I have decided to briefly discuss the rights that prisoners do have.

Prisoners are not entitled to all constitutional rights; they are however, protected by the Constitution's prohibition on cruel and unusual punishment—which “requires that prisoners be afforded a minimum standard of living”—the Equal Protection Clause of the 14th Amendment,¹⁵⁰ the right to due process,¹⁵¹ the “right to administrative appeals[,]”¹⁵² and a right of access to the parole process.”¹⁵³ There also exists “the Model Sentencing and Corrections Act[, which] provides that a confined person has a protected interest in freedom from discrimination on the basis of race, religion, national origin, or sex.”¹⁵⁴ Finally, “[p]risoners also have limited rights to speech and religion.”¹⁵⁵

150. Ken LaMance, *Rights of Prisoners Lawyers*, LEGAL MATCH, <http://www.legalmatch.com/law-library/article/rights-of-prisoners.html> (last visited May 8, 2017) (stating that “prisoners are protected against unequal treatment on the basis of race and sex, and have some limited rights pertaining to religion and speech”); see also *The Rights of Individuals in Prison*, LAW FIRMS, <http://www.lawfirms.com/resources/criminal-defense/defendants-rights/prisoners-rights.htm> (last visited May 8, 2017) (stating that prisoners have the right to equal protection, but that this right differs when one is in prison).

151. LaMance, *supra* note 150 (noting that “prisoners must be afforded the chance to participate in the appeals process as well as the parole process. Basically, that means that a prisoner has to be given a chance to apply for another day in court”).

152. *Id.*

153. Cornell University Law School, *Prisoners' Rights*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/prisoners_rights (last visited Apr. 19, 2017).

154. *Id.*; see also LaMance, *supra* note 150 (stating that the Act was created to ensure that “convicted criminals received fairly uniform sentences that were based on the crime and not on other aspects of the individual such as race or sex”).

155. *Id.*; see also *Kay v. Bemis*, 500 F.3d 1214, 1218 (10th Cir. 2007) (stating that religious beliefs are protected by the Free Exercise Clause if they are “sincerely held”); see also *Your First Amendment Right to Freedom of Speech and Association*, JAILHOUSE LAWYER'S HANDBOOK (2010), <http://jailouselaw.org/your-first-amendment-right-to-freedom-of-speech-and-association/> (referring to the four prong test delineated in the pivotal case, *Turner v. Safley*, 482 U.S. 78 (1987): (1) “Is the regulation reasonably related to a legitimate, neutral government interest?” *Id.* (2) “Does the regulation leave open another way for you to exercise your constitutional rights?” *Id.* (3) “How does the issue impact other prisoners, prison guards or officials and prison

Courts defer to “prison officials regarding prisoners’ rights,” finding that, “[s]o long as the conditions or degree of a prisoner’s confinement are within the sentence and do not otherwise violate the Constitution, the due process clause does not require judicial oversight.”¹⁵⁶ The rational relationship test is used to examine “whether there is a rational relation to a legitimate state interest.”¹⁵⁷

In applying the rational relationship test, the question remains: should one’s freedom of association be limited to such a severe extent that he literally loses his mind? Does such action bear a rational relationship to talking back or having unsavory political beliefs in jails and prisons? Although the rational relationship test is the lowest level of judicial scrutiny, and is thus almost always satisfied, I still believe that the answer is likely no. One may argue that there is a rational relationship between bad behavior and the punishments that result from them, no matter how severe. Still, at the crux of the rational relationship test is rationality, and it cannot possibly be rational to excessively affect someone else’s psyche, thereby making them ironically irrational in the process.

Often times, prisoners’ rights are restricted and officials are given discretion over the punishments enforced to maintain order within the prison.¹⁵⁸ However, what happens when maintaining order within the prison interferes with one’s behavior once he is released? If the role of the Department of Corrections is to “correct” those who are imprisoned, as we are led to believe, excessive solitary confinement surely is not doing the job. As stated above,¹⁵⁹ excessive solitary con-

resources?” *Id.* (4) “Are there obvious, easy alternatives to the regulation that would not restrict your right to free expression?”).

156. *Id.* But see *Davis v. Ayala*, 135 S. Ct. 2187, 2208–10 (2015) (Kennedy, J., concurring):

[D]espite scholarly discussion and some commentary from other sources, the condition in which prisoners are kept simply has not been a matter of sufficient public inquiry or interest. To be sure, cases on prison procedures and conditions do reach the courts. See, e.g., *Brown v. Plata*, 563 U.S. —, 131 S.Ct. 1910, 179 L.Ed.2d 969 (2011); *Hutto v. Finney*, 437 U.S. 678, 685, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978) (“Confinement in a prison or in an isolation cell is a form of punishment subject to scrutiny under the Eighth Amendment”); *Weems v. United States*, 217 U.S. 349, 365–367, 30 S.Ct. 544, 54 L.Ed. 793 (1910). Sentencing judges, moreover, devote considerable time and thought to their task. There is no accepted mechanism, however, for them to take into account, when sentencing a defendant, whether the time in prison will or should be served in solitary. So in many cases, it is as if a judge had no choice but to say: “In imposing this capital sentence, the court is well aware that during the many years you will serve in prison before your execution, the penal system has a solitary confinement regime that will bring you to the edge of madness, perhaps to madness itself.” Even if the law were to condone or permit this added punishment, so stark an outcome ought not to be the result of society’s simple unawareness or indifference.

157. *Id.*

158. See *Richmond*, *supra* note 96, at 1.

159. See *supra* Part II.

finement sentences affect prisoners so much psychologically that they often times cannot assimilate back into society. Even worse, they come out more violent.¹⁶⁰ The irony of someone being sentenced to solitary confinement for a nonviolent offense, and then coming out of solitary confinement violent is jarring. These violent tendencies have a dangerous impact on everyday citizens once inmates formerly held in solitary confinement are released back into society. So it comes full circle. What price are we willing to pay for those who “deserve it?” Are we truly willing to ruin someone’s life for the rest of his life because he accessed Facebook two to three times every two days? Are we willing to risk civilian safety for the same reason? Of course, bad behavior in correctional facilities is rationally related to the punishment that the inmates must receive, and some administrators argue that solitary confinement is the most effective way to punish inmates. I do not dispute this. In fact, in this Comment, I do not even call for the eradication of solitary confinement in its entirety. What I ask for is its limitation. Spending months at a time in solitary confinement does not bear a rational relationship to having a phone, especially when there is no evidence of an escape plan or a violent plot. Such a punishment is excessive and a blatant abuse of power.

Because of a toxic culture of punishment, mixed with race and class-based malevolence,¹⁶¹ the United States relies on incarceration, and undoubtedly solitary confinement, more heavily than any other country in the world.¹⁶² The excessive use of this practice must be stopped before we can see any true prison reform. In Part V, I will discuss President Obama’s Executive Order and other widespread efforts of reform. This shows promise that our criminal justice system is moving away from the trend of excessive solitary confinement sentences for nonviolent offenses.

160. Barack Obama, *Why We Must Rethink Solitary Confinement*, WASH. POST (Jan. 25, 2016), https://www.washingtonpost.com/opinions/barack-obama-why-we-must-rethink-solitary-confinement/2016/01/25/29a361f2-c384-11e5-8965-0607e0e265ce_story.html?utm_term=.A6f7e58f81b9.

161. See generally ALEXANDER, *supra* note 45; TA-NEHISI COATES, *BETWEEN THE WORLD AND ME* (2015). Alexander and Coates both highlight how race and socio-economic status factor into how one fairs, not only in society, but within the criminal justice system.

162. ALEXANDER, *supra* note 45, at 8–10.

V. LOOKING FORWARD: HOPE, CHANGE

A. The Executive Order

In 2010, 16-year-old Kalief Browder was “accused of stealing a backpack.”¹⁶³ He was sent to the infamous Rikers Island, “where he reportedly endured unspeakable violence at the hands of inmates and guards—and spent nearly two years in solitary confinement.”¹⁶⁴ During his time at Rikers, Kalief was never found guilty of the crime.¹⁶⁵ Instead, he was awaiting trial the entire time.¹⁶⁶ Then finally, in 2013, the charges were dropped and Kalief was released.¹⁶⁷ Though Kalief enrolled in classes at Bronx Community College, “his life was a constant struggle to recover from the trauma of being locked up alone for 23 hours a day. One Saturday, he committed suicide at home. He was just 22 years old.”¹⁶⁸

In 2016, former President Barack Obama “announced a ban on solitary confinement for juvenile offenders in the federal prison system,” stating “the practice is overused and has the potential for devastating psychological consequences.”¹⁶⁹ In an op-ed, he also “outlines a series of executive actions that . . . prohibit federal corrections officials from punishing prisoners who commit ‘low-level infractions’ with solitary confinement.”¹⁷⁰ Under President Obama’s plan, “the longest a prisoner can be punished with solitary confinement for a first offense is [sixty] days, rather than the current maximum of 365 days.”¹⁷¹ As President Obama noted, “solitary confinement gained popularity in the United States in the early 1800s, and the rationale for its use has

163. Obama, *supra* note 160 (wherein former President Obama wrote about his stance on the excessive use of solitary confinement in the Washington Post’s “Opinion” section); see also Juliet Eliperin, *Obama Bans Solitary Confinement for Juveniles in Federal Prisons*, WASH. POST (Jan. 26, 2016), https://www.washingtonpost.com/politics/obama-bans-solitary-confinement-for-juveniles-in-federal-prisons/2016/01/25/056e14b2-c3a2-11e5-9693-933a4d31bcc8_story.html (discussing President Obama’s article and the executive order).

164. Obama, *supra* note 160.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Presidential Memorandum—Limiting the Use of Restrictive Housing by the Federal Government*, THE WHITE HOUSE: PRESIDENT BARACK OBAMA (Mar. 1, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/03/01/presidential-memorandum-limiting-use-restrictive-housing-federal>; *FACT SHEET: Department of Justice Review of Solitary Confinement*, THE WHITE HOUSE: PRESIDENT BARACK OBAMA (Jan. 25, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/01/25/fact-sheet-department-justice-review-solitary-confinement>; Eliperin, *supra* note 163; see also Obama, *supra* note 160.

170. Eliperin, *supra* note 163.

171. *Id.*

varied over time [but] [t]oday, it[] [is] increasingly overused on people such as Kalief [Browder], with heartbreaking results”¹⁷²

As a result, President Obama “directed [former] Attorney General Loretta E. Lynch and the Justice Department to review the overuse of solitary confinement across U.S. prisons.”¹⁷³ The recommendations of the Justice Department included “banning solitary confinement for juveniles and as a response to low-level infractions, expanding treatment for the mentally ill and increasing the amount of time inmates in solitary can spend outside of their cells.”¹⁷⁴

States that have led the way are already seeing positive results:

Colorado cut the number of people in solitary confinement, and assaults against staff are the lowest they’ve been since 2006. New Mexico implemented reforms and has seen a drop in solitary confinement, with more prisoners engaging in promising rehabilitation programs. And since 2012, federal prisons have cut the use of solitary confinement by [twenty-five] percent and significantly reduced assaults on staff.¹⁷⁵

The progress does not stop there:

Illinois and Oregon, in response to lawsuits, have announced they will exclude seriously mentally ill inmates from solitary confinement, and last month New York state reached a five-year, sixty-two million dollar settlement with the New York Civil Liberties Union in which it pledged to significantly cut the number of prisoners in solitary as well as the maximum time they could stay there. California reached a settlement in September, pledging to overhaul the way it treats almost 3,000 inmates who are frequently kept alone for more than twenty-two hours a day in their cells.¹⁷⁶

President Obama’s Executive Order is a clear step in the right direction. When President Obama published his report on solitary confinement in January of 2016, talk of solitary confinement became more widespread politically. Indeed, as previously noted, many states have amended their solitary confinement policies to limit the amount of time that inmates are punished.¹⁷⁷ Unsurprisingly, these states have seen a drop in behavioral issues.¹⁷⁸

172. Obama, *supra* note 160.

173. *Id.*

174. *Id.*

175. *Id.*

176. Eliperin, *supra* note 163.

177. Obama, *supra* note 160; Eliperin, *supra* note 163.

178. Obama, *supra* note 160. Mississippi, mentioned *infra* Part I.B, is just one example.

B. Proposed Legislation

In May 2014, Representative Cedric Richmond introduced the Solitary Confinement Study and Reform Act.¹⁷⁹ This “bill aim[ed] to study and promote reforms to how solitary confinement is done in America and to bring the practice more in line with the U.S. Constitution.”¹⁸⁰

The Act had several provisions that addressed the concerns identified in this Comment. First, the Act set out to establish a commission, which would “implement a comprehensive legal and factual study of the numerous impacts, including mental, physical, and economic, of solitary confinement in the United States.”¹⁸¹ The Commission would hold public hearings, “take . . . testimony, and receive such evidence as it considers advisable to carry out its duties.”¹⁸² The bill also included a compliance mechanism: “[E]ach fiscal year, any money that a state would otherwise receive for prison purposes for that fiscal year under a grant program shall be reduced by fifteen percent for non-compliance.”¹⁸³

Unfortunately, this bill died in a previous Congress.¹⁸⁴ Additionally, with the Republican Party being a majority of the current Congress and Senate, it is unlikely that this bill will pass now. One thing that the Solitary Confinement Study and Reform Act does show is that there are legislators who would like to see an end to the excessive use of solitary confinement as well. In this Comment I have noted a Supreme Court Justice, a former President, and a Congressman who have all spoken out against the excessive use of solitary confinement. Figures of this magnitude lending their voices to this movement demonstrate a glimmer of hope, even change.

CONCLUSION

Before he was twenty-one years old, my brother, Travis Peterkin, had already been arrested three times. The first time, for dropping a candy wrapper on the floor. Littering in New York is punishable by

179. Solitary Confinement Study and Reform Act of 2014, H.R. 4618, 113th Cong. (2014); *see also* Richmond, *supra* note 98, at 13.

180. Richmond, *supra* note 96, at 13.

181. *Id.* at 15.

182. *Id.* at 16.

183. *Id.*

184. Solitary Confinement Study and Reform Act, H.R. 4618, 113th Cong. (2014).

fine,¹⁸⁵ but the police officer who had witnessed my brother's littering took him in overnight. Ironically, when the officer had discovered the wrapper on the floor, my brother was attempting to pick it up. This happened on my sixteenth birthday.

The second time my brother was taken to jail was for walking through a park at night. There was a sign posted, warning against walking through the park at dusk. Still, because this particular park was a shortcut to the closest store—to which my brother was going to grab some groceries for my mother—he figured a two-minute walk through the park wouldn't hurt. Besides, he had never seen anyone get in trouble for this. He was wrong. He was again taken and held overnight.

The last time, my brother walked his bike on the sidewalk. In New York, you can only ride your bike in the street, so my brother walked his bike to the street so he could ride it. Still, police officers took him in.

I discuss these interactions because I would be remiss if I ended this Comment without touching on the ways that the criminal justice system has disproportionately affected black men and women in this country. I have cited Michelle Alexander and Ta-Nehisi Coates to demonstrate that many scholars have already researched and published works explaining how the criminal justice system disproportionately affects black men and women because of the over-policing of black bodies. I am no stranger to this.

My family is from the Brownsville section of Brooklyn, New York. Each time that my brother was arrested, if my family did not have the means or the knowledge of our rights to get my brother out of lock-up, he would have been taken to Riker's Island. The main thing that I keep thinking is what if my brother ended up like Kalief Browder? What if Travis had been sent to Riker's and had been caught talking back or using someone else's contraband cell phone? After watching the "I'm On Fire" fiasco unfold and reading about Kalief Browder, I could not help but think about the countless men and women close to me who were but so close to going to solitary themselves, and how they could have come out forever changed because of a split-second decision that was nonviolent. It is my hope

185. New York Code § 16-118 (2006) (stating that littering is prohibited, and that any violation of this crime is punishable by a fine of between \$50-\$250).

that this Comment can convince more people that the current administration of solitary confinement is excessive and unconstitutional.

Though President Obama spoke out against the excessive use of solitary confinement, the political climate of our country has suddenly shifted. Crime and punishment, as has been expressed by Michelle Alexander, is a Republican ideal.¹⁸⁶ Indeed, it is undoubtedly what won Ronald Reagan and George H.W. Bush their elections.¹⁸⁷ With this being known, it is our job, now more than ever, to shed light on the injustice of the excessive use of solitary confinement for nonviolent offenses.

Solitary confinement was based on the belief that prisoners, when isolated with a Bible, would use the time to repent and pray.¹⁸⁸ Today, tens of thousands of people suffer mental anguish because of this “belief.” There was no actual scientific evidence supporting the argument that isolation truly reforms inmates, but there is real scientific evidence to support the contention that it does not. Thus, we must use this proof to ensure that the practice is, at the very least, not abused. The current use of solitary confinement should be limited, especially for nonviolent offenses.

186. ALEXANDER, *supra* note 43, at 44–47.

187. *Id.* at 47–48.

188. Sullivan, *supra* note 34.

APPENDIX

"I'm On Fire" Lyrics

[Chorus]

I'm on! I'm on fire! I'm on fire! (8 times)

[Verse 1]

I'm a fight dude when I fight through
Been through hell but I made it through
Never been in love but I'll marry the mic
I'm a volcano erupting, true
Imma make that fire long B, imma smoke out this room
Smoking on that blue
Rise out, my swagger cool
Immaculate, extravagant
Use the words then say my name
Gasoline, strike a match, miss some more, I am the flame
Hear me out, I sound bright, satellite, fear the rage
AR, AK, spit something, go straight to brains
(Inaudible), I go hard, bye leather, bring the pain
Lay loose, I must say, it's a hard desert I'm hotter than
Tea kettle, I'm going out, Now I'm on can't turn me out, light switch I'm
flipped up
Finna make a stand like I'm gettin' up
Imma rise up, elevate, go straight to the top, escalate.
Finna blow up, no day late.
And I aint playing like Terminator
My mind made up and stand up
Hotels like [inaudible]
Green light [inaudible]

[Chorus]

I'm on! I'm on fire! I'm on fire! (8 times)

[Verse 2]

I flame with the brain because I'm the torch
Stand too close you might get scorched
Give them the [inaudible] like you did before
My tongue a two-edged sword
Hercules, Conan, I'm a Warrior, He-Man.
Tag-team, I was in the west, now you can call me trash can
Pick it up, take it out, burn it up, that's what I'm about
Concrete, I'm silent, that's real talk, common stock
Put it on, I fire it up, imma blaze call the fire truck
Never mind don't waste time, I don't fight men in my hometown
[inaudible] I'm Bruce Lee, call me Jet Lee, cause I'm unleashed
Cause I'm the one, no two, three

It'll take a crane just to move me
Excuse me, pardon me, let me through, I'm here now
[inaudible]
Illuminated, illuminati, like Pac said, Killuminati
Illuminati run through your body, [inaudible] like a twelve inch shotty
Real lit, real lit
Homie, I'm in the zone now.
Best believe it's on now, it's on now.
[Chorus]
I'm on! I'm on fire! I'm on fire! (8 times)
Mix, mix, mix, mix, mix, mix (Repeatedly)
We bout to mix the game up mix, mix (7 times)
[Verse 3]
I step out my new car, chain gave me whip-lash
Fire up that new reef, hit twice then tap a**
I ball like I'm bowling.
[inaudible]
Drug get so large you think I'm riding with King-Kong.
Every day is new money, my cash flow like tray, tray
I get money, you spend money
My weed green, your sh** black.
Who this? I ball hard.
Take cars in my backyard
Those whips and chains I bought it all with my black card
Switch the game up
N***a switch ya name up
Call the green dot cause that's exactly how I came up
In the south cack em do a show for my people
Scoop Drizzle stop in that '96 regal
All I do is ball, swaggin' every day though
Homie I get money, talkin' bout the pay though
Hit the studio and drop a track and got my fatal
I'm real off in this thing and you know imma mix the game up
Mix, mix, we bout to mix the game up mix, mix (7 times)
[Verse 4]
I'm [inaudible] like Kay Slay
Smash Kim like Ray J
Played around like hill say
Now they all on my pay day
I [inaudible] fast give you whip lash
Step in you smell cash
I sh***ed on the track now you smell it, my black a**
I ball hard [inaudible]

I'm On Fire

Pass the blunt and I burn haze
Hide in the booth
When I produce I mix up the turntable
Mixes like I'm a chef
Mixes [inaudible]
Bruce Lee on the song now I need me a karate belt
[inaudible], hot pursuit, you know what [inaudible]
Now you saying I'm out the scoop
Yea [inaudible] I'm proud too
For the drizzle, drizzle, rain, rain
Drizzle all in my rain, rain
Rain on that range, range
Mixing up the game, game
Mix, mix, we bout to mix the game up, mix, mix (5 times)¹⁸⁹

189. LightworkerTV, *supra* note 2. Note: All lyrics marked “inaudible” are a result of the low-quality video and the prisoners either yelling or speaking over each other when someone is rapping.