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The Constitutionality of Solitary Confinement: Insights from Maslow's Hierarchy of Needs

Lindley A. Bassett

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-NOTES-

THE CONSTITUTIONALITY OF
SOLITARY CONFINEMENT:
INSIGHTS FROM MASLOW'S
HIERARCHY OF NEEDS

Lindley A. Bassett

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† J.D. Candidate, 2016, Case Western Reserve University School of Law; B.S. 2011, Denison University. Many thanks to: Professor Sharona Hoffman of Case Western Reserve University School of Law for challenging me to think broadly about health law and for her assistance throughout the writing and publication processes; Professor Frank Hassebrock of Denison University for cultivating my interest in psychology and providing my first opportunity to conduct human subjects research; the staff and editors of Health Matrix for their cooperation and diligence; and my loving family for their unwavering support and encouragement.

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I. INTRODUCTION

Thomas Silverstein has been called America's "most isolated man," having served 28 years in prison under strict orders for "no human contact."¹ He was originally incarcerated for an armed robbery committed when he was 19 years old, but he is now serving a sentence for life without parole for killing two fellow inmates and a prison guard. In his 2012 case against the Federal Bureau of Prisons,² he described the conditions he faced in solitary confinement at a maximum security prison in Atlanta:

I was confined to a special part of the prison known as the "side pocket." . . . I was deep underground, and there were no windows in the side pocket. The side pocket cells measured approximately six feet by seven feet, almost exactly the size of a standard king mattress. . . . I could lie down, I could sit on my bed, or I could stand. . . . I was permitted to wear underwear, but I was given no other clothing. Shortly after I arrived, the prison staff began construction on the side pocket cell, adding more bars and other security measures to the cell while I was within it. In order not to be burned by sparks and embers while they welded more iron bars across the cell, I had to lie on my bed and cover myself with a sheet. It is hard to describe the horror I experienced during this construction process. As they built new walls around me it felt like I was being buried alive. It was terrifying.³

In *Silverstein v. Federal Bureau of Prisons*, Silverstein alleged that the conditions of solitary confinement he experienced amounted to cruel and unusual punishment, thereby violating his Eighth Amendment⁴ rights under the United States Constitution.⁵ Silverstein's claim is not unusual in this regard, as courts have been asked to examine the potential detriments of solitary confinement for

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1. Declaration of Thomas Silverstein at 12, *Silverstein v. Federal Bureau of Prisons*, 559 Fed. Appx. 739 (10th Cir. 2014) (No. 07-cv-02471-PAB-KMT).
 2. *Silverstein v. Federal Bureau of Prisons*, 559 Fed.Appx. 739 (10th Cir. 2014).
 3. Declaration of Thomas Silverstein, *supra* note 1, at 11-13.
 4. U.S. CONST. amend. VIII. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."
 5. U.S. CONST.

over a century.⁶ However, as noted by the 10th Circuit in *Silverstein*, no court has yet declared the practice to be universally unconstitutional.⁷

Part II will provide background on the legal theories prisoners have employed to challenge the practice of solitary confinement under the Eighth Amendment. Prisoners have argued that the duration of confinement,⁸ degree of isolation,⁹ and/or extent of sensory deprivation¹⁰ are so restrictive and damaging that they violate the U.S. Constitution. The courts, however, define basic human needs or “the minimal civilized measure of life’s necessities”¹¹ as only adequate safety, food, warmth, exercise, basic hygiene, and medical care.¹² Nonetheless, the Supreme Court has noted that the definition of basic human needs “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”¹³

The constitutionality of solitary confinement therefore depends upon society’s interpretation of what constitutes basic human needs. Part III will provide background on the basic human needs framework

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6. See, e.g., *In Re Medley*, 134 U.S. 160, 168 (1890) (“A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others become violently insane; others still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community.”).
 7. *Silverstein v. Federal Bureau of Prisons*, 559 Fed.Appx. at 755-56.
 8. See, e.g., *U.S. v. Bout*, 860 F.Supp.2d 303 (S.D. NY 2012) (holding that indefinite solitary confinement of a prisoner violated his Eighth Amendment rights even though his involvement with a former Liberian dictator made his release a high risk to security).
 9. See, e.g., *Bono v. Saxbe*, 620 F.2d 609, 614 (7th Cir. 1980) (stating that “[i]nactivity lack of companionship and a low level of intellectual stimulation do not constitute cruel and unusual punishment even if they continue for an indefinite period of time.”).
 10. See, e.g., *Madrid v. Gomez*, 889 F. Supp. 1146, 1228-29 (N.D. Cal. 1995) (explaining that “the SHU interior is designed to reduce visual stimulation. . . The cellblocks are marked throughout by a dull sameness in design and color. The cells are windowless; the walls are white concrete. . . The overall effect of the SHU is one of stark sterility and unremitting monotony. Inmates can spend years without ever seeing any aspect of the outside world except for a small patch of sky. One inmate fairly described the SHU as being ‘like a space capsule where one is shot into space and left in isolation.’”).
 11. *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981).
 12. *Estelle v. Gamble*, 429 U.S. 97, 102-04 (1976).
 13. *Hudson v. McMillian*, 503 U.S. 1, 8 (1992) (quoting *Rhodes v. Chapman*, 452 U.S. at 347).

developed by Abraham Maslow in his groundbreaking Hierarchy of Needs.¹⁴ Part IV will argue that Maslow's Hierarchy of Needs suggests solitary confinement in its current form is unconstitutional because it prevents prisoners from belonging. The theoretical assumptions from Maslow's Hierarchy of Needs are substantiated through empirical psychological research on the detrimental effects of isolation.

Part V will propose changes that could be made to the practice of solitary confinement to restore constitutionality under the Eighth Amendment. More specifically, Maslow's theory suggests that if prisoners in prolonged solitary confinement were able to belong, they would not suffer such extreme psychological deterioration. Reforming solitary confinement to allow prisoners to belong would lead to favorable outcomes not only for prisoners' health and quality of life but also for legitimate prison security concerns, economic concerns related to the costs of keeping prisoners in solitary confinement, and ethical concerns that human rights organizations have about the U.S. prison system's practice of keeping prisoners in prolonged isolation.

II. BACKGROUND ON SOLITARY CONFINEMENT

A. History

Solitary confinement can be traced back to Eastern State Penitentiary (otherwise known as Cherry Hill) in Philadelphia.¹⁵ Opened in 1826, Cherry Hill invoked a form of rehabilitation known as the Pennsylvania system.¹⁶ Prisoners spent all their time alone in their cells and wore hoods during exercise periods; prison architects even rearranged sewage piping to prevent communication between inmates.¹⁷ Severe isolation was thought to force the prisoner to reflect upon his crime, thereby making him "the instrument of his own punishment."¹⁸ For a short time, the Pennsylvania system caught on,

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14. Abraham H. Maslow, *A Theory of Human Motivation*, 50 PSYCHOL. REV. 370, 370 (1943).
 15. Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 CRIME & JUST. 441, 455 (2006).
 16. DAVID J. ROTHMAN, THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC 85 (1971).
 17. Thomas L. Hafemeister & Jeff George, *The Ninth Circle of Hell: An Eighth Amendment Analysis of Imposing Prolonged Supermax Solitary Confinement on Inmates With a Mental Illness*, 90 DENV. U. L. REV. 1, 10 (2012).
 18. *Id.* (quoting DAVID J. ROTHMAN, THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC 85 (1971)).

and the system was duplicated in England, France, Germany, Holland, Belgium, Portugal, Norway, Sweden, and Denmark.¹⁹ When prison officials began to see prisoners mentally deteriorating in response to such extreme isolation, the practice was largely discontinued.²⁰ By the 1830s, reports indicated that Cherry Hill prisoners were suffering from “hallucinati[ons]..., ‘dementia,’ and ‘monomania,’”²¹ but prison physicians attributed the inmates’ mental deterioration to the alleged inherent inferiority of inmates of color.²²

With the exception of Pennsylvania, every other state that had implemented the Pennsylvania system between 1830 and 1880 abandoned it within a few years.²³ The use of prolonged solitary confinement was revived at the U.S. Penitentiary in Marion, Illinois. Opened in 1963 to replace Alcatraz,²⁴ Marion went into “prolonged emergency lockdown” following a week of inmate rioting in October 1983 that left two officers dead.²⁵ The lockdown at Marion, in which all prisoners are kept in prolonged solitary confinement, continues to this day.²⁶ In 1994, the first federal prison that was purposefully based on the super-maximum security system at Marion was built in Florence, Colorado.²⁷ California’s infamous Pelican Bay prison soon

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19. Smith, *supra* note 15, at 458.
20. NORMAN JOHNSTON, FORMS OF CONSTRAINT: A HISTORY OF PRISON ARCHITECTURE 138 (2000).
21. Smith, *supra* note 15, at 457.
22. *Id.* at 458 (“One 1846 report concluded that the disproportionately high number of cases of mental illness in Philadelphia’s Cherry Hill Prison were caused by a high proportion of individuals from the ‘mulatto race’ who apparently could not handle the confinement as well as ‘men of pure Saxon blood.’ Another theory put forward by a physician at Cherry Hill posited that “in the late 1830s that ‘the cases of mental disorder occurring in this Penitentiary are, with a few exceptions . . . caused by masturbation, and are mostly among the colored prisoners”).
23. Hafemeister & George, *supra* note 17, at 12.
24. *See From Alcatraz to Marion to Florence - Control Unit Prisons in the United States*, U. MASS. AMHERST, http://people.umass.edu/~kastor/ceml_articles/cu_in_us.html (last visited February 23, 2016) (suggesting that Marion was designed as a less controversial replacement to Alcatraz).
25. LORNA A. RHODES, TOTAL CONFINEMENT: MADNESS AND REASON IN THE MAXIMUM SECURITY PRISON 36 (2004).
26. *Id.* at 28.
27. Gertrude Strassburger, *Judicial Inaction and Cruel and Unusual Punishment: Are Super-Maximum Walls Too High for the Eighth Amendment?*, 11 TEMP. POL. & CIV. RTS. L. REV. 199, 202 (2001).

followed, and a new incarceration paradigm focused on prolonged solitary confinement was born.²⁸

B. Conditions

Although prolonged solitary confinement goes by different names in various prisons,²⁹ the conditions are virtually the same: prisoners spend 23 hours per day alone in a cell.³⁰ The walls of their cells are concrete or steel.³¹ There may or may not be one small window.³² Prisoners' cells (sometimes as small as 6' x 12') serve as bedroom, bathroom, and dining room.³³ If there is not a shower within their cell, prisoners may be shackled and taken to a shower three times per week.³⁴ They have almost no contact with other prisoners or prison guards,³⁵ sometimes only seeing guards when their meals are delivered on a food tray slipped through a small opening in the cell door called a cuff-port.³⁶ The lights may be kept on 24 hours per day, making it hard for those in isolation to know what time of day it is.³⁷

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28. See generally Hafemeister & George, *supra* note 17, at 14.
29. Equivalent terms include: solitary confinement cells, supermax cells, security housing units, supermaximum security cells, segregation units, intensive management units, special control units, and "the hole." See *id.* at 16.
30. *Id.*
31. See Christina Sterbenz, *Heartbreaking Drawings From a Prison Inmate Show What Living in Solitary Confinement is Like*, BUSINESS INSIDER (Feb. 19, 2015), <http://www.businessinsider.com/heart-breaking-drawings-from-a-prison-inmate-show-what-solitary-confinement-is-like-2015-2> (noting some solitary confinement walls are concrete); See also Terrance Slater & Lennox Yearwood Jr., *Opinion: Obama's Action Exposes the Torture of Solitary Confinement*, FUSION (Feb. 4, 2016), <http://fusion.net/story/264338/opinion-obamas-action-exposes-the-torture-of-solitary-confinement/> (noting that some solitary confinement walls are steel).
32. See Scott N. Tachiki, *Indeterminate Sentences in Supermax Prisons Based Upon Alleged Gang Affiliations: A Reexamination of Procedural Protection and a Proposal for Greater Procedural Requirements*, 83 CALIF. L. REV. 1115, 1123 (1995); See also SHARON SHALEV, A SOURCEBOOK ON SOLITARY CONFINEMENT 39 (2008).
33. Peter Michael Kirwan, *Constitutional Laws: Cruel and Unusual Punishment – Solitary Confinement (Jordan v. Fitzharris, 257 F.Supp.674 (N.D.Cal. 1966))*, 29 MONT. L. REV. 242, 242 (1968).
34. Sally Mann Romano, *If the SHU Fits: Cruel and Unusual Punishment at California's Pelican Bay State Prison*, 45 EMORY L.J. 1089, 1102.
35. See *id.* at 1104.
36. Hafemeister & George, *supra* note 17, at 17.
37. *Id.* at 29, n. 163 (quoting David Fathi, *Solitary Confinement in Arizona: Cruel and Unusual*, NAT'L PRISON PROJECT (Mar. 6, 2012, 1:09

Prisoners receive at least four hours per week of exercise time,³⁸ during which they are transported out into an exercise yard alone, in a “man-cage”³⁹ or “dog run”⁴⁰ with no exercise equipment.⁴¹ Inmates are denied access to work and rehabilitative programs,⁴² and they face severe restrictions on reading, craft, and hobby materials.⁴³ At the prison administrators’ discretion, prisoners may receive one supervised, hour-long visit per month with friends and family, but these visits typically prohibit any and all physical contact and occur through a plexiglass wall and intercom.⁴⁴ Every time prisoners leave their cell, they are shackled and escorted by at least two armed guards.⁴⁵ The average duration of a placement in solitary confinement is 531 days or the equivalent of just under a year and a half.⁴⁶

Furthermore, technological innovations have increased the intensity of the isolation that prisoners face in prolonged solitary confinement. Mental health services can now be provided electronically; through the use of telepsychiatry, psychologists can evaluate the physical and mental wellbeing of prisoners without ever actually seeing them in person.⁴⁷ Instead, prisoner and counselor communicate through synchronous audio and video equipment.⁴⁸ Supermax prisons are now purposefully designed with video and audio equipment that allows prison authorities to monitor inmates without

PM), <http://www.aclu.org/blog/prisoners-rights/solitary-confinement-arizona-cruel-and-unusual>).

38. Shalev, *supra* note 32, at n. 2.
39. Hafemeister & George, *supra* note 17, at 18 n. 90.
40. Craig Haney, *Mental Health Issues in Long-Term Solitary and “Supermax” Confinement*, 49 CRIME & DELINQUENCY 124, 126 (2003).
41. Brittany Glidden & Laura Rovner, *Requiring the State to Justify Supermax Confinement for Mentally Ill Prisoners’: A Disability Discrimination Approach*, 90 DENV. U. L. REV. 55, 57 (2012) (discussing prisoners limited ability to exercise).
42. *Id.*
43. Shalev, *supra* note 32, at 53.
44. *Id.* at 26.
45. Hafemeister & George, *supra* note 17, at 17.
46. *Reassessing Solitary Confinement: The Human Rights, Fiscal, and Pub. Safety Consequences: Hearing Before the S. Comm. on Constitution, Civil Rights, and Human Rights of the S. Comm. on the Judiciary*, 112th Cong. 15 (2012) [hereinafter *Reassessing Solitary Confinement Hearing*].
47. *Id.* at 9 (statement of the Hon. Charles E. Samuels, Jr., Director, Federal Bureau of Prisons).
48. Haney, *supra* note 40, at 126.

any meaningful human contact.⁴⁹ As solitary confinement expert Professor Haney⁵⁰ has described,

The technological structure of this environment adds to its impersonality and anonymity. Prisoners interact with their captors over microphones, in chains or through thick windows, peering into the shields that hide the faces of cell extraction teams as they move in coordinated violence. It is axiomatic among those who study human behavior that social connectedness and social support are the prerequisites to long-term social adjustment.⁵¹

Thus, even though negative psychological outcomes were recognized in prisoners held in prolonged solitary confinement as early as 1842,⁵² the practice continues to inflict psychological pain on prisoners to this day and arguably has only become more dangerous as technology has evolved.

C. Prevalence

The United States is believed to have more prisoners in solitary confinement than any other country. Human Rights Watch estimated in 2000 that there were 20,000 U.S. prisoners housed in solitary confinement.⁵³ That number had risen to a widely accepted figure of 80,000 prisoners in solitary confinement by 2012.⁵⁴ Although solitary confinement was born in the United States, it is now used in

49. Nan D. Miller, *International Protection of the Rights of Prisoners: Is Solitary Confinement in the United States a Violation of International Standards?*, 26 CAL. W. INT. L.J. 139, 156 (1995).

50. See *Reassessing Solitary Confinement Hearing*, *supra* note 46, at 20 (stating “Craig Haney is a professor of psychology at the University of California, Santa Cruz, and he is director of their legal studies program. Since the late 1970s, Professor Haney has been one of the leading experts on the psychological effects of prison isolation and solitary confinement. He has conducted systematic, in-depth assessments of hundreds of solitary or supermax prisoners in different states. He has also testified as an expert witness about the psychological impact of solitary confinement in several landmark federal cases He received his Ph.D. in psychology and a J.D. from Stanford University.”).

51. Craig Haney, *Infamous Punishment: The Psychological Consequences of Isolation*, 1993 NAT’L PRISON PROJECT J. ACLU FOUND. 3, 7.

52. Miller, *supra* note 49, at 155.

53. Hafemeister & George, *supra* note 17, at 14.

54. Jean Casella et al., *Hell is a Very Small Place*, FAQ, SOLITARY WATCH (2015), <http://solitarywatch.com/facts/faq/>.

prisons worldwide.⁵⁵ The United States primarily utilizes prolonged solitary confinement as a way to control unruly and disruptive prisoners.⁵⁶ In contrast, other countries sometimes use it for national security⁵⁷ or to fight organized crime.⁵⁸

D. Population

The U.S. is home to only 5% of the world's population, yet it incarcerates approximately 25% of the world's prisoners.⁵⁹ From 1980 to 2010, the U.S. prison population grew at a rate 11 times the general population.⁶⁰ In addition to mandatory minimum sentences and a desire to implement a "tough on crime" agenda, some attribute the drastic increase in the prison population to the deinstitutionalization of the mentally ill.⁶¹ A mentally ill individual in the United States is now three times more likely to be incarcerated than hospitalized, and police are almost twice as likely to arrest someone who appears to have a mental illness than someone who appears mentally healthy.⁶²

The U.S. Department of Justice estimates that 60% of the total prison population currently suffers from mental health problems,⁶³ and the American Psychiatric Association reported in 2000 that up to 5% of prisoners are actively psychotic at any given moment.⁶⁴ Given that solitary confinement is often used to house prisoners whose behavior is

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55. U.N. Secretary-General, *Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Rep. of the Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 23-24 U.N. Doc. A/66/268 (Aug. 5, 2011).
56. CHASE RIVELAND, NAT'L INST. OF CORR., U.S. DEP'T OF JUSTICE, SUPERMAX PRISONS: OVERVIEW AND GENERAL CONSIDERATIONS 3 (1999).
57. SHALEV, *supra* note 32, at 34.
58. *Id.*
59. Fareed Zakaria, *Incarceration Nation*, TIME (Apr. 2, 2012), <http://content.time.com/time/magazine/article/0,9171,2109777,00.html>.
60. ACLU, AT AMERICA'S EXPENSE: THE MASS INCARCERATION OF THE ELDERLY, at i (2012) ("During this time, the general population increased by 36%, while the state and federal prison population increased by over 400%.").
61. Lorna A. Rhodes, *Pathological Effects of the Supermaximum Prison*, 95 AM. J. OF PUB. HEALTH 1692, 1693 (2005).
62. Hafemeister & George, *supra* note 17, at 1.
63. *Id.* at 46.
64. SASHA ABRAMSKY & JAMIE FELLNER, HUMAN RIGHTS WATCH, ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESSES 17 (2003).

troublesome, disruptive, or bizarre, it makes sense that mentally ill prisoners would be disproportionately represented in the solitary confinement population. Human Rights Watch reports that one-fifth to two-thirds of prisoners in solitary confinement had a preexisting mental illness.⁶⁵ The placement of mentally ill individuals in prolonged solitary confinement poses two unique issues. First, mentally ill prisoners are more vulnerable to the negative psychological effects of isolation. Second, mentally ill prisoners placed in solitary confinement may be less able to earn their way back into the general prison population (if the prison uses such an incentive program).⁶⁶

E. Penological Interests

The primary justification for prolonged solitary confinement is incapacitation.⁶⁷ The practice is considered necessary to maintain prison control, protect general population inmates, protect prison staff, and prevent escapes.⁶⁸ Because courts have traditionally viewed prison administration as a matter to be governed by the legislative and executive branches of government,⁶⁹ judges have granted prison officials great deference in determining how to best handle prisoners' often disruptive, violent, and dangerous behaviors.⁷⁰ However, the idea that incapacitating prisoners through prolonged solitary confinement will lead to safer, more orderly prisons has not been proven empirically.⁷¹ Furthermore, incapacitation through solitary confinement can actually lead to greater violence by causing

65. *Id.*

66. *See, e.g.,* Terry A. Kupers et al., *Beyond Supermax Administrative Segregation: Mississippi's Experience Rethinking Prison Classification and Creating Alternative Mental Health Programs*, CRIM. JUST. & BEHAV. 1, 6 (2009) (describing a newly implemented step-down program for inmates with serious mental illness, the prison administrator writes, "prisoners with [severe mental illness can move] from administrative segregation status into congregate activities in program phases, at a pace that would not jeopardize safety in the facility. . . [T]he step-down unit provides, for many prisoners, the portal for leaving administrative segregation. The program fosters movement from the closed tier to the open tier.")

67. Shira E. Gordon, *Solitary Confinement, Public Safety, and Recidivism*, 47 U. MICH. J.L. REFORM 495, 500 (2014).

68. *See, e.g.,* Fred Cohen, *Isolation in Penal Settings: The Isolation-Restrain Paradigm*, 22 WASH. U. J.L. & POL'Y 295, 295-96 (2006).

69. *See* Madrid v. Gomez, 889 F. Supp. 1146, 1262 (N.D. Cal. 1995).

70. *See* Hafemeister & George, *supra* note 17, at 32.

71. Jesenia M. Pizarro et al., *Supermax Prisons: Myths, Realities, and the Politics of Punishment in American Society*, 17 CRIM. JUSTICE POL'Y REV. 1, 13 (2006).

psychological harm to inmates that are almost always released back into the general prison population and/or society at large.⁷²

F. Jurisprudence

The modern standard for an Eighth Amendment challenge to prison conditions involves a two-part test. The objective component asks whether the harm the inmate suffered or was likely to suffer was sufficiently serious to constitute cruel and unusual punishment; the subjective component addresses whether the person(s) responsible for the harm acted with deliberate indifference.⁷³ 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,’”⁷⁴ the standard originally established for violation of the Eighth Amendment under *Gregg v. Georgia*.⁷⁵

In 1981, the Supreme Court decided *Rhodes v. Chapman*. In that case, Ohio inmates challenged the practice of housing two inmates in a single cell (“double celling”).⁷⁶ The Court clarified its ruling in *Estelle* by emphasizing that the Constitution “does not mandate comfortable prisons.”⁷⁷ To constitute an Eighth Amendment violation, a prisoner must be deprived of “the minimal civilized measure of life’s necessities.”⁷⁸ It was not until 1991 that the Supreme Court determined that conditions of confinement can constitute an Eighth Amendment violation if the totality of circumstances deprives the prisoner of “a single, identifiable human need such as food, warmth, or exercise.”⁷⁹

Madrid v. Gomez directly addressed conditions of solitary confinement at Pelican Bay.⁸⁰ While the court refused to hold that solitary confinement constituted cruel and unusual punishment for all prisoners, it did determine that solitary confinement of mentally ill

72. *Id.*

73. *See* *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

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

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

76. *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981) (The Supreme Court cautioned, “conditions that cannot be said to be cruel and unusual under contemporary standards are not unconstitutional. To the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society.”).

77. *Id.* at 349.

78. *Id.* at 347.

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

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

prisoners constitutes an Eighth Amendment violation.⁸¹ The court described solitary confinement of the mentally ill as “the mental equivalent of putting an asthmatic in a place with little air to breathe.”⁸² Thus, *Madrid* set the stage for litigation to determine the minimum level of psychological harm sufficient to trigger an Eighth Amendment claim.

A final case important to the solitary confinement jurisprudence is *Helling v. McKinney*.⁸³ There, an isolated prison inmate challenged the conditions of his confinement on the basis that his exposure to secondhand smoke was likely to result in future harm to his health.⁸⁴ The Court remanded the case for further consideration of whether the possibility of future harm was sufficient to support the objective and subjective components of an Eighth Amendment claim.⁸⁵ Combining the holdings from *Madrid* (psychological harm can trigger an Eighth Amendment violation) and *Helling* (future harm is sufficient to violate the Eighth Amendment) would suggest that future psychological harm resulting from prolonged solitary confinement could violate prisoners’ constitutional rights.

III. BACKGROUND ON MASLOW’S HIERARCHY OF NEEDS

Given the emphasis courts have placed on basic human needs in determining whether prison conditions violate the Eighth Amendment, it is useful to look at human needs theory for insight into what constitutes a basic human need. Widely considered the founder of humanist psychology, Abraham Maslow sought to understand human behavior and motivation.⁸⁶ In 1943, he authored

81. *Id.* at 1279–80.

82. *Id.* at 1265.

83. *Helling v. McKinney*, 509 U.S. 25, 33 (1993) (Justice White wrote, “[w]e have great difficulty agreeing that prison authorities may not be deliberately indifferent to an inmate’s current health problems but may ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year. . . . We would think that a prison inmate . . . could successfully complain about demonstrably unsafe drinking water without waiting for an attack of dysentery. Nor can we hold that prison officials may be deliberately indifferent to an exposure of inmates to a serious, communicable disease on the ground that the complaining inmate shows no serious current symptoms”).

84. *See id.* at 28.

85. *Id.* at 35.

86. *See generally* Algis Valiunas, *Abraham Maslow and the All-American Self*, 33 NEW ATLANTIS: J. TECH. & SOC’Y 93 (2011).

the paper “Theory of Human Motivation,”⁸⁷ that would later be hailed as transformative for the field. Maslow was interested in what kept an individual from reaching his or her potential: “The essential question was not what made Beethoven Beethoven, but why everyone is not a Beethoven.”⁸⁸ Maslow theorized that there were four levels of basic human needs before self-actualization could be achieved.⁸⁹ Maslow considered self-actualization to be the optimal and most fulfilling level of human functioning; self-actualization is marked by an individual's feeling that he or she has meaning in life.⁹⁰

Maslow's arranged his four levels of basic human needs hierarchically, and they are often depicted in pyramidal form: physiological needs, safety needs, love and belonging needs, and esteem needs (from the bottom of the hierarchy to the top).⁹¹ Individuals cannot progress to a higher level of the hierarchy without having satisfied the lower levels first: “Human needs arrange themselves in hierarchies of prepotency. That is to say, the appearance of one need usually rests on the prior satisfaction of another, more pre-potent need. . . [E]very drive is related to the state of satisfaction or dissatisfaction of other drives.”⁹² Maslow's conception of “pre-potency” refers to the idea that unsatisfied needs lower in his Hierarchy are more powerful determinants of an individual's behavior than unsatisfied needs higher in his Hierarchy.⁹³

Maslow felt that most “maladjustment and more severe psychopathology” could be traced to an unsatisfied need to belong.⁹⁴ An individual seeking to belong:

will feel keenly, as never before, the absence of friends, or a sweetheart, or a wife, or children. He will hunger for affectionate relations with people in general, namely, for a place in his group, and he will strive with great intensity to achieve this goal. He will want to attain such a place more than anything else in the world.⁹⁵

87. Maslow *Supra* note 14

88. *Id.* at 100.

89. Maslow, *supra* note 14, at 394.

90. *Id.* at 382.

91. *See id.* at 372-83.

92. *Id.* at 370.

93. *Id.*

94. *Id.* at 381.

95. *Id.*

The need to belong therefore encompasses relationships among friends and family as well as an individual's relation to society at large.⁹⁶

IV. PROLONGED SOLITARY CONFINEMENT VIOLATES THE NEED TO BELONG

Having examined the backgrounds of both solitary confinement and Maslow's Hierarchy of Needs, I apply motivational psychology to the use of isolation in American prisons. Inmates in prolonged solitary confinement are sometimes said to be housed in "a prison within a prison."⁹⁷ As they are purposely prevented from relating with other inmates, prison guards, and their families,⁹⁸ they may feel that not only do they not belong in society, but they are also unfit for the general prison population. Their status as "other" is doubly confirmed:

Because so much of our individual identity is socially constructed and maintained, the virtually complete loss of genuine forms of social contact and the absence of any routine and recurring opportunities to ground one's thoughts and feelings in a recognizable human context leads to an undermining of the sense of self and a disconnection of experience from meaning. Supermax prisoners are literally at risk of losing their grasp on who they are, of how and whether they are connected to a larger social world.⁹⁹

Maslow's theory would suggest that prisoners prevented from belonging will become consumed with trying to satisfy that basic human need. Additionally, prisoners prevented from belonging will experience deterioration in their psychological health. As will be

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96. Roy F. Baumeister & Mark R. Leary, *The Need to Belong: Desire for Interpersonal Attachments as a Fundamental Human Motivation*, 117 PSYCHOL. BULL. 497, 507 (1995) (noting that social contact and meaningful intimate connections with others are both important in satisfying the need to belong).
97. Angela Browne, Alissa Cambier, & Suzanne Agha, *Prisons Within Prisons: The Use of Segregation in the United States*, 24 FED. SENT. REP. 46 (2011).
98. Haney, *supra* note 40, at 127 (Stating "prisoners in these units . . . have no opportunities for normal conversation or social interaction, and are denied the opportunity to ever touch another human being with affection or caring or to receive such affection or caring themselves . . . prisoners experience levels of isolation and behavioral control that are more total and complete and literally dehumanized than has been possible in the past.").
99. *Id.* at 139.

demonstrated, psychological research has proven that prisoners in prolonged solitary confinement both seek to belong and deteriorate mentally. If we accept that Maslow's Hierarchy has therefore been proven scientifically, then the need to belong should be considered one of the basic human needs afforded protection under the Eighth Amendment. This paper will argue that the need to belong: (1) constitutes a basic human need worthy of Eighth Amendment protection, and (2) is violated when prisoners are exposed to prolonged solitary confinement.

A. Prisoners Will Seek to Belong

Prisoners prevented from belonging will become consumed with trying to satisfy that need.¹⁰⁰ Rhodes has argued that rejected inmates may become so desperate for revenge and external feedback that they react by throwing feces, urine, and/or semen at prison guards simply to facilitate some sort of human interaction.¹⁰¹ “[I]nmates are so desperate to gain some sort of attention, no matter how negative, they will use the only tool they have – their own body and its products.”¹⁰² Instead of lessening the social isolation of inmates who act out in this way, prison guards react by increasing isolation. Prison guards will resort to wearing bulky flak jackets and spit shields, thereby increasing the prisoners' social isolation.¹⁰³

In seeking to belong, prisoners will also avoid breaking existing social ties.¹⁰⁴ Some believe that solitary confinement is used to house only “the worst of the worst;”¹⁰⁵ however, this is a fallacy.¹⁰⁶ In fact, solitary confinement is generally used to house the mentally ill, as well as those who pose behavioral, security, or escape risks.¹⁰⁷ Many

100. See Maslow, *supra* note 14, at 375.

101. Hafemeister & George, *supra* note 17, at 37.

102. *Id.*

103. Craig Haney, *A Culture of Harm: Taming the Dynamics of Cruelty in Supermax Prisons*, 35 CRIM. JUST. & BEHAV. 956, 973 (2008).

104. Baumeister & Leary, *supra* note 96, at 497 (“The belongingness hypothesis is that human beings have a pervasive drive to form and maintain at least a minimum quantity of lasting, positive, and significant interpersonal relationships. Satisfying this drive involves two criteria: First, there is a need for frequent, affectively pleasant interactions with a few other people, and, second, these interactions must take place in the context of a temporally stable and enduring framework of affective concern for each other's welfare.”).

105. Haney, *supra* note 103, at 965.

106. See *id.* at 964.

107. See, e.g., Gordon, *supra* note 67, at 503-04. For example, “[i]n a Washington State study, researchers found that mentally ill prisoners

times, those in solitary confinement are there because they have some perceived gang affiliation;¹⁰⁸ separating the gang leader from his or her compatriots is thought to lessen the threat of violence posed by the group.¹⁰⁹ However, Maslow's theory suggests that preventing prisoners from belonging only makes them want to belong more.¹¹⁰ The use of solitary confinement based on alleged gang affiliation therefore could prove counterproductive and even potentially increase violence.

Finally, international human rights documents emphasize the rehabilitation of prisoners. For example, Article 5 of the American Convention on Human Rights states, "punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners."¹¹¹ To the extent that prolonged solitary confinement is justified because it encourages the prisoner to reflect on his behavior, this justification is impractical because the prisoner's whole consciousness will be dominated by his isolation. If the punishment cannot be justified, it is more likely to be a violation of the Eighth Amendment as punishments that fail to serve a legitimate penological interest are considered excessive.¹¹²

B. Prisoners' Psychological Health Will Deteriorate

Maslow thought there would be individual differences in how well individuals could cope with situations that prevent them from

were more than four times more likely than other prisoners to be held in solitary confinement."

108. Haney, *supra* note 40, at 127.

109. See Tachiki *supra* note 32, at 1127 (citing Jim Doyle, *Pelican Bay Inmates' Rights Case Opens*, S.F. CHRON., Sept. 18, 1993, at B3). See also Riveland, *supra* note 56, at 5.

110. See Maslow, *supra* note 14, at 375.

111. Organization of American States, American Convention on Human Rights, art. 5 sec. 6, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

112. See Jacob Zoghlin, *Punishments in Penal Institutions: (Dis)-Proportionality in Isolation*, 21 HUM. RTS. BRIEF 24, 29 (2014) ("Prison administrators are not in a position to weigh the penological interests against the inevitable physical, social, and psychological damages associated with solitary confinement because they do not realize the harm that this treatment causes. Furthermore, because prison administrators are not health experts, they are ill equipped to determine whether a penalty that helps maintain discipline (such as solitary confinement) is proportionate to the violation it punishes. Thus, when prison guards are given such discretion in deciding when to impose solitary confinement, disproportionate punishments constituting constitutional violations consistently result.").

belonging.¹¹³ In line with his Hierarchy of Needs, psychological research has documented individual differences in how prisoners cope with the experience of prolonged solitary confinement.¹¹⁴ Regrettably, the most vulnerable often turn to self-harm behaviors. In fact, “[f]ifty percent of all prison suicides occur in solitary confinement.”¹¹⁵ Psychological research has revealed a significant correlation between segregated prison housing and suicidal ideation,¹¹⁶ with one study finding that prisoners who later committed suicide had spent a median of 63 days in isolation prior to taking their own lives.¹¹⁷ Suicidal behavior by prisoners in solitary confinement is thought to be “a result of sudden frustration from situational stress with no permissible physical outlet... [Thus, s]elf-addressed aggression forms the only activity outlet.”¹¹⁸

Those prevented from belonging also experience negative psychological outcomes that manifest in ways other than through self-harming behaviors.¹¹⁹ In general, researchers have found that distraction helps to regulate emotions; idleness and rumination in response to rejection can lead to a worsening of mood.¹²⁰ Thus, leaving an inmate deprived of the need to belong with nothing to do except reflect on his situation is likely to result in a negative mood. For some prisoners, however, the experience of prolonged solitary confinement results in more than a poor mood. Experts Craig Haney¹²¹ and Dr. Stuart Grassian¹²² have interviewed many inmates

113. *Id.*

114. Jeffrey L. Metzner & Jamie Fellner, *Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for Medical Ethics*, 38 *J. Am. Acad. Psychiatry Law* 104 (2010).

115. *Reassessing Solitary Confinement Hearing*, *supra* note 46, at 2.

116. Ronald L. Bonner, *Stressful Segregation Housing and Psychosocial Vulnerability in Prison Suicide Ideators*, 36 *Suicide and Life-Threatening Behavior* 250, 252 (2006).

117. Bruce B. Way et al., *Inmate Suicide and Time Spent in Special Disciplinary Housing in New York State Prison*, 58 *PSYCHIATRIC SERVICES* 558, 559 (2007).

118. G. Scott & M. Gendreau, *Psychiatric Implications of Sensory Deprivation in a Maximum Security Prison*, 14 *CAN. PSYCHIATRIC ASS'N J.* 337 (1969).

119. For an extensive summary, see Baumeister & Leary, *supra* note 96, at 509.

120. Judith Gere & Geoff MacDonald, *An Update of the Empirical Case for the Need to Belong*, 66 *J. INDIVIDUAL PSYCHOL.* 93, 109 (2010).

121. See *Reassessing Solitary Confinement Hearing*, *supra* note 46, at 20.

122. See *Anticipated Testimony of Stuart Grassian, M.D., Austin v. Wilkinson*, 545 U.S. 209 (2005). Introducing himself, Dr. Grassian

who have been subjected to prolonged solitary confinement.¹²³ Their conversations led them to conclude that such prisoners often fall victim to Secure Housing Unit (SHU) Syndrome.¹²⁴ Symptoms of SHU Syndrome may include: appetite and sleep disturbances, anxiety, panic, rage, loss of control, paranoia, hallucinations, self-mutilation, insomnia, hypersensitivity, ruminations, cognitive dysfunction, irritability, and suicidal ideation and behavior.¹²⁵ Importantly, SHU symptoms may become irreversible beyond 15 days of solitary confinement.¹²⁶

Whereas many SHU Syndrome symptoms are readily observable, isolated prisoners may also experience other less obvious and immediate psychological problems. Inmates prevented from belonging may develop “emotional blunting” whereby prisoners become less attuned to the emotions of others.¹²⁷ They “become less able to be

writes, “I am a Board-certified psychiatrist . . . and subspecialty-certified in Forensic Psychiatry. I have had extensive experience in evaluating inmates housed in special housing units, including at supermax facilities . . . My observations and conclusions have been cited in a number of federal court decisions.”

123. See, e.g., Report or Affidavit of Craig William Haney, Ph.D., J.D., Silverstein v. Federal Bureau of Prisons, 559 Fed. Appx. 739 (10th Cir. 2014) (No. 07-cv-02471-PAB-KMT).
124. See Craig Haney, “*Infamous Punishment*”: *The Psychological Consequences of Isolation*, 8 NAT'L PRISON PROJECT J. 3, 6 (1993).
125. See *id.* at 5. See also Haney, *supra* note 40, at 132 (noting, “There is not a single published study of solitary or supermax-like confinement in which nonvoluntary confinement lasting for longer than 10 days.. failed to result in negative psychological effects.”); *Solitary Confinement: Legal Standards*, DETENTION FOCUS, ASSOCIATION FOR THE PREVENTION OF TORTURE, http://www.apr.ch/detention-focus/en/detention_issues/37/ (last visited Mar. 24, 2016) (paraphrasing REPORT OF THE UN SPECIAL RAPPORTEUR ON TORTURE, A/66/268 (2011)) (“15 days is the limit between ‘solitary confinement’ and ‘prolonged solitary confinement’ because at that point, according to the literature surveyed, some of the harmful psychological effects of isolation can become irreversible.”).
126. *Solitary Confinement: Legal Standards*, *supra* note 125.
127. C. Nathan DeWall & Roy F. Baumeister, *Alone But Feeling No Pain: Effects of Social Exclusion on Physical Pain Tolerance and Pain Threshold, Affective Forecasting, and Interpersonal Empathy*, 91 J. PERS. SOC. PSYCHOL. 1, 6 (2006). (The researchers found that “[s]ocial exclusion produced increases in both pain threshold and pain tolerance in both studies, consistent with the hypothesis that people become less sensitive to physical pain as a result of having their need to belong thwarted. Participants who anticipated a lonely future showed greater tolerance and less sensitivity to physical pain than participants who experienced social acceptance, received no personality feedback, or received feedback forecasting future physical misfortunes. They also

empathetic to the feelings of others and . . . unable to predict the emotional consequences of their own actions, which could lead to antisocial behavior.”¹²⁸ U.N. Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Juan E. Méndez has stated his concern regarding long-term effects of solitary confinement on released prisoners:

Lasting personality changes often leave individuals formerly held in solitary confinement socially impoverished and withdrawn, subtly angry and fearful when forced into social interaction[, which] often prevents individuals from successfully readjusting to life within the broader prison population and severely impairs their capacity to reintegrate into society when released from imprisonment.¹²⁹

Because 93% of prisoners ultimately rejoin society,¹³⁰ it is in society's best interest to rehabilitate prisoners so that they may become productive and safe citizens upon release.¹³¹ Surely rehabilitation cannot include the creation or exacerbation of mental illness. Our judicial system has a duty to society at large to avoid punishments that encourage dangerousness in prisoners that are likely to eventually be released.¹³²

V. SOLITARY CONFINEMENT NEED NOT VIOLATE THE EIGHTH AMENDMENT

Maslow's Theory would suggest that solitary confinement, as it is currently practiced, prevents prisoners from belonging. Changing the punishment so that prisoners are allowed to belong would remedy the Eighth Amendment violation and lead to other favorable outcomes.

A. Proposed Reforms

Some have argued that reform of prolonged solitary confinement is unlikely while the Supreme Court refuses to hold capital

showed significantly less sensitivity to physical pain than they themselves had shown on the baseline measures.”)

128. Gere & MacDonald, *supra* note 120, at 100-01 (citing *id.*)

129. U.N. Secretary-General, *supra* note 55, at ¶ 65. *See also* Gordon, *supra* note 67, at 501-02 (stating that other problems prisoners formerly held in prolonged solitary confinement may experience upon release include light and noise sensitivity, an aversion to human contact, and difficulty controlling their tempers).

130. *See* Haney, *supra* note 103, at 979-80.

131. *See Reassessing Solitary Confinement Hearing*, *supra* note 46, at 11.

132. *See id.*

punishment as *per se* unconstitutional.¹³³ The general idea rests on the assumption that solitary confinement must be a better alternative than the death penalty.¹³⁴ Nonetheless, there are potential changes short of prohibition of solitary confinement or capital punishment that may bring the practice of prolonged solitary confinement into line with constitutional standards. To ensure that prisoners in solitary confinement may satisfy their need to belong, prison authorities must change how the punishment is administered and how prisoners are assigned to solitary confinement. Additionally, prison officials must become educated on the potential detrimental effects of solitary confinement as they relate to the need to belong.

1. Less Severe Isolation

First and foremost, the isolation imposed on prisoners in prolonged solitary confinement must be lessened. As Professor Haney argues, “Better guards, better training, to be sure, but ultimately better conditions as well.”¹³⁵ Given that the need to belong involves not only making new social connections but also maintaining existing relations, proposed reforms must address both components. In an effort to provide prisoners with new social connections, prison administrators must allow for at least daily face to face contact with other human beings, whether they be other inmates, prison guards, or professionals rendering services such as group therapy or counseling.¹³⁶ Some have argued for a direct supervision management style in

133. *See Reassessing Solitary Confinement Hearing, supra* note 46, at 25 (explaining, from an exoneree’s perspective, that inmates from solitary confinement sometimes give up on the appeals process because death by capital punishment is preferable to continued existence in solitary confinement).

134. Alex Kozinski, *Worse than Death*, 125 Yale L.J. F. 230 (2016), <http://www.yalelawjournal.org/forum/worse-than-death>.

135. Haney, *supra* note 103, at 980.

136. Haney, *supra* note 103, at 973 (describing the provision of services to inmates through “programming cages”: “It is hard to imagine a clinician anywhere else in society even attempting a therapeutic interaction with a patient who is standing or sitting inside a thick metal cage – one or another configuration of the so-called ‘programming cages’ that have begun to appear in supermax units across the country. In some supermax units several of these grotesque stand-up cages are arranged in a semicircle – a kind of ‘only in supermax’ parody of an actual ‘group therapy’ session. There are actually some prison clinicians who have arranged to have single steel cages installed inside their offices, so that they can ‘treat’ a caged supermax or administrative segregation ‘patient’ while they sit behind their desks. The sight of these cages is startling and underscores how truly perverse the concept of ‘mental health’ and ‘treatment’ has become in some of these units.”).

solitary confinement units, meaning prison guards must monitor inmates by walking through the halls.¹³⁷ This approach can be contrasted with the style currently used in many supermaximum facilities: inmates are watched from a distant, centrally located, plexiglass-encased pod equipped with security cameras and intercoms.¹³⁸ Using a direct supervision model in solitary confinement would encourage more frequent and meaningful human contact. Prison administrators should also consider allowing isolated prisoners to interact with other isolated prisoners during exercise time, as is done in many other countries.¹³⁹

To facilitate maintenance of existing social connections, prison administrators should consider more liberal policies on entertainment materials, mail privileges, and visits from friends and loved ones. Prison administrators argue that the alleged dangerousness of prisoners justifies additional restrictions on reading and craft materials; regular and open family visits; and educational, recreational, and vocational programming.¹⁴⁰ However, the vast majority of those in solitary confinement are simply mentally ill or disruptive, not dangerous enough to justify such significant deprivations. Even assuming that the prisoners in solitary confinement are sufficiently dangerous to warrant such restrictions, prison officials have not proven that the risk of providing prisoners reading materials and family visits is greater than the risk that solitary confinement will lead to psychological deterioration. It is at least arguable that it is more dangerous to keep prisoners isolated than it is to provide them reading materials and family visits.

2. Procedures to Limit Solitary Confinement

Prison administrators should take measures to limit the use of solitary confinement to only the most extreme and exceptional cases. Not only should solitary confinement be used as a last resort, but prison administrators should also conduct weekly reviews of those in solitary confinement. Periodic reviews were also suggested in The Optional Protocol for the Committee Against Torture.¹⁴¹ Reviews

137. SHALEV, *supra* note 32, at 50.

138. *Id.*

139. *Id.* at 49.

140. *See, e.g., Reassessing Solitary Confinement Hearing, supra* note 46, at 5.

141. G.A. Res. 57/199, U.N. Doc. A/RESS/57/199 (June 22, 2006). Article 4 provides: "Each State Party shall allow visits . . . to any place under its jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence (hereinafter referred to as places of detention). These visits shall be undertaken with a view to

should focus on whether the prisoner is showing any signs of detrimental health effects attributable to his or her isolation. Reviews must also consider whether the use of isolation is serving a legitimate penological interest to ensure it is not disproportionate to the underlying misconduct.

Additionally, all assignments to solitary confinement must be of limited duration. Prisoners should not be subjected to solitary confinement for more than 15 days, as that is the amount of time after which psychological symptoms may become irreversible.¹⁴² Furthermore, a 15 day limitation on solitary confinement would be in accordance with some court cases. For example, in *Berch v. Stahl*, a district court held that the Eighth Amendment prohibited solitary confinement for more than 15 days.¹⁴³ In addition to limiting the duration of solitary confinement, the anticipated total duration and reason for the punishment must be clearly communicated to the prisoner in writing. Such procedural safeguards could improve prison safety as researchers have found that uncertainty regarding the duration of isolation promotes helplessness¹⁴⁴ and is related to hostility and other aggressive behavior.¹⁴⁵

Prisons must implement further procedural safeguards at the time inmates are first assigned to solitary confinement. Prison administrators must be confident that mentally ill individuals are not assigned to solitary confinement. *Madrid v. Gomez* found the use of solitary confinement for mentally ill prisoners to be unconstitutional, so prison officials must make sure to properly interview and screen inmates. Currently, prisoners are screened for mental disorders at intake; however, screening inmates for mental illness at intake is problematic as many present while intoxicated or under the influence

strengthening, if necessary, the protection of these persons against torture and other cruel, inhuman or degrading treatment or punishment. For the purposes of the present Protocol, deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority.”

142. U.N. Secretary-General, *supra* note 55, at ¶ 26.

143. *Berch v. Stahl*, 373 F. Supp. 412, 421 (1974). *See also* *Pugh v. Locke*, 406 F. Supp. 318, 333 (1976).

144. Hans Toch, *Living in Prison: The Ecology of Survival* (1992). Toch developed a “Prison Preference Inventory” and measured inmates’ responses to the following environmental concerns: privacy, safety, structure, support, emotional feedback, social stimulation, activity concern about under stimulation, and freedom.

145. *See* RICHARD HARMON MCCLEERY, *POLICY CHANGE IN PRISON MANAGEMENT: A TEST CASE FOR ADMINISTRATIVE ANALYSIS* 18 (1961).

of drugs.¹⁴⁶ As prisons have a legal duty to provide adequate healthcare to all inmates,¹⁴⁷ prisoners should be assessed for mental illness not only at intake but also periodically, regardless of their assignment to general population or solitary confinement.

Some international commentators have argued that mental health professionals should certify prisoners fit for isolation before they can be lawfully assigned to solitary confinement.¹⁴⁸ Although certifying prisoners fit for solitary confinement could reduce the number of mentally ill individuals housed there, it undermines the potential effect certification would have on the certifier.¹⁴⁹ As the mental health professional has dual obligations to both patient and prison, certification of prisoners for solitary confinement could require health professionals to tacitly approve the torture of their patients.¹⁵⁰ Certification is also tricky because it requires the mental health professional to define which mental illnesses disqualify a prisoner for solitary confinement. Although never specified, it is likely the *Madrid* court had in mind certain Axis I disorders (such as major depressive disorder, generalized anxiety disorder, bipolar disorder, and schizophrenia) when it mandated that mentally ill individuals should not be housed in solitary confinement. However, many mental health professionals feel all prisoners likely meet the diagnostic criteria for Axis II Disorders by virtue of their criminal behavior.¹⁵¹ The question of screening at intake or certifying a prisoner fit for solitary confinement therefore becomes complex: "In a context in which most all individuals are presumed to meet criteria for Axis II anti-social personality disorder (ASPD), or 'criminality' is there more emphasis on treating the 'mad' over the 'bad'?"¹⁵²

3. Educating Prison Administrators

Prison officials are not trained by the Federal Bureau of Prisons about the potential psychological effects of solitary confinement¹⁵³ or

146. Joseph D. Galanek, *The Cultural Construction of Mental Illness in Prison: A Perfect Storm of Pathology*, 37 CULTURE, MED., & PSYCHIATRY 195, 209 (2013).

147. See, e.g., *Estelle v. Gamble*, 429 U.S. 97, 103 (1976).

148. SHALEV, *supra* note 32, at 28.

149. *Id.*

150. *Id.* at 59.

151. Galanek, *supra* note 146, at 212. See also Diagnostic Statistical Manual IV (DSM-IV) (axis II is used for diagnosing personality disorders (including antisocial personality disorder) and intellectual disabilities).

152. Galanek, *supra* note 146, at 198.

153. See *Reassessing Solitary Confinement Hearing*, *supra* note 46, at 8. See also Riveland, *supra* note 56, at 17. Corrections expert Chase Riveland

the psychological effects seen when individuals are prevented from belonging. This lack of education is particularly troubling, as solitary confinement is an environment that naturally lends itself to an intense imbalance of power.¹⁵⁴ Haney describes solitary confinement units as suffering from an 'ecology of cruelty.'¹⁵⁵

[A]t almost every turn, guards are implicitly encouraged to respond and react to prisoners in essentially negative ways—through punishment, opposition, force, and repression. For many guards, at least initially, this approach to institutional control is employed neutrally and even-handedly . . . However, when punishment and suppression continue—largely because of the absence of any available and sanctioned alternative approaches—[guards] become functionally autonomous and often [sentence prisoners to punishments that are] disproportionate in nature [to the prisoners' unruly or dangerous behaviors].¹⁵⁶

Prison personnel must be educated about the potential health effects of prolonged solitary confinement and alternative ways to interact with inmates. Guards should be trained in mental health warning signs as well as de-escalation and communication techniques.¹⁵⁷

Prisoners objecting to the conditions of their confinement under the Eighth Amendment must demonstrate prison administrators' deliberate indifference.¹⁵⁸ Arguably, prison administrators are aware of the potential psychological effects of solitary confinement despite their lack of training; solitary confinement was essentially designed to maintain control through psychological torture. However, even if

describes that prison officials receive training on: "regular counts, feeding, handling of correspondence and property, delivery of medications, providing escort, and performing cell searches..." Riveland also notes that specialized training should be provided to "special operations teams, search and shakedown teams, emergency medical response teams, and cell extraction teams."

154. Haney, *supra* note 103, at 969.

155. *Id.*

156. *Id.* at 958.

157. Kupers et al., *supra* note 66, at 7 (in implementing successful changes at Mississippi's Unit 32, discussed *infra*, "Staff selection and training are critical elements of an effective program. The intensive training is conducted by trained and experienced mental health staff and . . . [c]ompletion of the mental health training is considered an honor and is thus celebrated in a ceremony where officer graduates are given a special uniform patch and awarded the title *correctional mental health manager*").

158. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

prison officials have an implied understanding of the effects solitary confinement may have on prisoners, they should be trained to recognize and report prisoners' mental deterioration. Without demonstrable evidence that prison officials had training and resulting actual knowledge of potential psychological deterioration, prisoners will be in a less advantageous position for bringing Eighth Amendment challenges. There must be a paradigm shift in which prison guards view psychological symptoms in solitary confinement prisoners as a health issue, not the desired outcome of punishment.

B. Favorable Outcomes

Instituting the proposed reforms could result in many improvements for the U.S. prison system. In addition to bringing solitary confinement into line with the current Eighth Amendment jurisprudence, the proposed reforms would preserve the mental health of prisoners (thereby improving prison safety for prisoners and prison guards alike), save money, and improve the country's reputation in international human rights circles.

1. Health & Safety Implications

Assuming that the proposed reforms enable prisoners in solitary confinement to belong, Maslow's theory would predict that their physical and mental deterioration would be mitigated. Furthermore, consequences of solitary confinement that affect behavior after release may be prevented. In fact, there is some evidence that reducing solitary confinement reduces violence. In a report following settlement in the 2010 case *Presley v. Epps* challenging conditions of confinement in Mississippi's Unit 32, prison officials found that loosened restrictions on prisoners resulted in less violence and better inmate behavior.¹⁵⁹ There, prison officials reevaluated their procedures for assigning individuals to solitary confinement and ended up releasing half of those in solitary confinement back into the general prison population.¹⁶⁰ The changes implemented in Unit 32 resulted in

159. Erica Goode, *Prisons Rethink Isolation, Saving Money, Lives and Sanity*, N.Y. TIMES (Mar. 11, 2012), <http://www.nytimes.com/2012/03/11/us/rethinking-solitary-confinement.html>.

160. See *Reassessing Solitary Confinement Hearing*, *supra* note 46, at 30 (statement of Christopher Epps, Commissioner, Mississippi Department of Corrections) ("[N]o one here, I do not believe, wants an inmate living next to them that just got out of maximum security. So what we got to decide is who we are mad with and who we are afraid of. I would take to them that since we changed Unit 32 and we closed it because we do not need it anymore, violence reduced by 50 percent. I would take to them, second, that you got to have accountability in place. When I started, you did one piece of paper called a detention notice, and you just put on there the inmate is interfering with the orderly running of

an almost 70% drop in serious violence (both prisoner-on-staff and prisoner-on-prisoner).¹⁶¹

2. Fiscal Implications

Reforming solitary confinement would also eventually lead to favorable fiscal outcomes. Building and staffing prisons for solitary confinement costs two to three times as much as building and staffing a regular prison. For example, it costs \$61,522 per year to house one prisoner in solitary confinement at Tamms supermax prison in Illinois, compared to \$22,000 per year to house a general population prisoner.¹⁶² The economic burden of running solitary confinement or supermaximum security prisons led Gov. Pat Quinn to close Tamms.¹⁶³ Instituting the proposed reforms to limit solitary confinement to exceptional circumstances and the shortest possible durations would drastically reduce the overall number of prisoners in solitary confinement. The empty cells could be converted to general population areas, thereby reducing the greater prison system problems related to overcrowding.

3. Ethical Implications

In addition to bringing the practice of solitary confinement into line with the Eighth Amendment, implementing the proposed reforms would bring solitary confinement closer to the guidelines established in international human rights documents. Article 1 of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment defines torture as:

[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person, information or a confession, punishing him for an act he or a third person committed or is suspected of having committed or intimidating or coercing him or a third person . . . when such pain or suffering is inflicted by or at the instigation of or with the

the institution, and they went to solitary confinement. That is too easy. You have got to have a check and balance . . . we got to make sure that we realize that 95 percent of all the individuals who are incarcerated in Mississippi is coming back to our neighborhood whether we like it or not.”).

161. Kupers et al., *supra* note 66, at 7.

162. *Reassessing Solitary Confinement Hearing*, *supra* note 46, at 3.

163. Goode, *supra* note 159.

consent or acquiescence of a public official or other person acting in an official capacity.¹⁶⁴

Prolonged solitary confinement constitutes torture because prison officials use it to inflict severe mental pain and suffering for the purpose of punishment. Solitary confinement also runs counter to international human rights documents that emphasize the rehabilitation of prisoners. For example, Article 5 of the American Convention on Human Rights states, “punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners.”¹⁶⁵ It is inherently incompatible to use solitary confinement for punishment if rehabilitation is the ultimate goal; solitary confinement creates or exacerbates more problems than it supposedly solves. Finally, reforming solitary confinement could also have beneficial effects for health care workers and prison administrators who feel conflicted about performing their professional work duties in a cruel, inhuman, and degrading environment.¹⁶⁶

VI. CONCLUSION

Solitary confinement has been used as punishment in U.S. prisons for decades, despite centuries old research documenting its negative psychological consequences. Although the practice has expanded across the country since the 1980s, there is very limited evidence that it is cost effective or achieves a legitimate penological purpose. In a Congressional hearing on solitary confinement held on June 19, 2012, Chairman Dick Durbin from Illinois exclaimed, “Politicians get elected and reelected by being tougher and tougher sometimes, and maybe it is time for us to step back and say let us be smart, let us be thoughtful. When it is all over, let us write a record that we can be proud to tell our children about in terms of who we are and what we have done.”¹⁶⁷ A smart and thoughtful analysis of solitary

164. G.A. Res. 39/46, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. I, U.N. Doc. A/RES/39/46 (Dec. 10, 1984).

165. O.A.S. American Convention on Human Rights, *supra* Note 111.

166. Haney, *supra* note 103, at 980. Haney writes, “Correctional officers get no acknowledgement or consideration for the toll this exposure exacts on them, or appreciation for the ways in which the experience is likely to change them – on the job and off. Yet persons charged with the responsibility of implementing the procedures and enforcing the rules of a regime that deprives people of most of the things that make them human are at grave risk of losing a little humanity themselves.”

167. *Reassessing Solitary Confinement Hearing*, *supra* note 46, at 34.

confinement demonstrates that it produces negative psychological consequences for prisoners that will ultimately rejoin society.

Prolonged solitary confinement poses significant ethical and legal problems. Abraham Maslow's Hierarchy of Needs suggests that prisoners in solitary confinement are prevented from belonging, a basic human need. Courts have held that prisoners must be afforded basic human needs but recognized that our understanding of what constitutes basic human needs inevitably must change as society advances. Although Maslow's Hierarchy of Needs has not changed over time, psychological research can now corroborate the claim that prisoners in prolonged solitary confinement are prevented from belonging.

The time for change has come. Implementing reforms that help to satisfy prisoners' needs to belong will result in favorable outcomes in prisoner health and prison safety, cost savings, and compliance with ethical requirements under international human rights documents. Several states have recently begun reforming their use of solitary confinement,¹⁶⁸ so the stage may be set for legal scholars to reinvigorate the debate surrounding solitary confinement. Additionally, solitary confinement sparked some debate when the Supreme Court heard *Davis v. Ayala* last term. Justice Kennedy illuminated the danger society creates for itself by inflicting prolonged solitary confinement upon prisoners that will almost certainly be released.¹⁶⁹ He wrote separately to register his concern that triple murder convict Ayala had spent much of his preceding 25 years in solitary confinement.¹⁷⁰ While Kennedy lamented that “[y]ears on end of near-total isolation exact a terrible price,” Justice Thomas responded that Ayala's conditions in solitary confinement were undeniably better than those of his three victims.¹⁷¹ Thus, it appears a Supreme Court showdown discussing the merits of prolonged

168. See, e.g., AMERICAN CIVIL LIBERTIES UNION, STATE REFORMS TO LIMIT THE USE OF SOLITARY CONFINEMENT (detailing successful state reforms occurring in the following states: Texas, New Mexico, Michigan, Colorado, Mississippi, Maine, and Illinois).

169. See *Davis v. Ayala*, 135 S. Ct. 2187, 2210 (2015) (Kennedy, J., concurring).

170. See *id.* at 2208.

171. *Davis v. Ayala*, 135 S. Ct. 2187, 2210 (2015) (Thomas, J., concurring) (Justice Thomas stated, “I write separately only to point out, in response to the separate opinion of Justice Kennedy, that the accommodations in which Ayala is housed are a far sight more spacious than those in which his victims . . . now rest. And, given that his victims were all 31 years of age or under, Ayala will soon have had as much or more time to enjoy those accommodations as his victims had time to enjoy this Earth.”).

solitary confinement may be imminent. If Kennedy and others who criticize the use of prolonged solitary confinement are to prevail, all stakeholders must unite to reform the United States prisons' administrative systems. Such reform would benefit not only the prisoners but also all of us who will live among them after their release.

