

THINKING OUTSIDE THE SIX-BY-EIGHT FOOT BOX:
HOW STATES ARE RESPONDING TO THE STAGNANT
FEDERAL LAW OF SOLITARY CONFINEMENT

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INTRODUCTION

On February 19, 2016, Albert Woodfox stepped outside without shackles for the first time in 43 years.¹ Mr. Woodfox, a wrongly convicted man, served the longest solitary confinement term in United States history.² For over four decades, Mr. Woodfox sat in a six-by-nine-foot cell for 23 hours a day, and during the hour outside of his cell, prison officials kept Mr. Woodfox in shackles.³ In his memoir, *Solitary*, Mr. Woodfox recounts the torturous conditions he endured while in solitary confinement, describing the isolation as “barbaric”⁴ and “punishment without ending.”⁵ During his time in solitary confinement, Mr. Woodfox endured claustrophobic attacks, intense anxiety, trouble sleeping, depression, and many other mental health and physical ailments correlated to his isolation.⁶ In an interview with Craig Haney, a leading psychologist on the mental and physical effects of solitary confinement, Mr. Woodfox stated: “There is a part of me ... that is gone, that has been taken—my soul. I had to sacrifice that part in order to survive.”⁷

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¹ See *Albert Woodfox Freed After 43 Years in Solitary Confinement*, AMNESTY INT’L (Apr. 1, 2025, at 5:28 AM), <https://www.amnesty.org.uk/albert-woodfox-free-louisiana-usa-after-43-years-solitary-confinement-us>.

² *Id.*

³ *Id.*

⁴ ALBERT WOODFOX, *SOLITARY*, 354 (2019).

⁵ *Albert Woodfox Freed After 43 Years in Solitary Confinement*, *supra* note 1.

⁶ WOODFOX, *supra* note 4, at 355-56.

⁷ *Id.* at 356.

Mr. Woodfox is not the only prisoner who suffered intense psychological and physical pain as a result of solitary confinement: For over 122,000 prisoners in the United States, unbearable isolation is a harrowing reality of their daily lives.⁸ Solitary confinement is a type of punishment that prisons, jails, and detention centers administer to isolate prisoners from other inmates, the outside world, and even prison guards.⁹ Despite a plethora of research linking isolation with detrimental psychological and physical outcomes that trigger Eighth Amendment concerns, federal laws regarding solitary confinement have largely remained stagnant.¹⁰ This Article asserts that solitary confinement without limitation violates the Eighth Amendment's prohibition against cruel and unusual punishment.¹¹ As a result, solitary confinement within the United States' criminal system should be limited to a maximum of fifteen days, and isolated prisoners should receive heightened mental health programming.

To compose a solution that reconciles solitary confinement practices with Eighth Amendment standards, this Article analyzes the historical roots of solitary confinement in the United States, explores the current federal law regarding this punishment, and traces the evolution of various states' laws. Although the Supreme Court has not deemed solitary confinement unconstitutional,¹² the evolving legal landscape in various states reveals the desperate need for reevaluation of solitary confinement policies. Despite federal silence on the issue, states have taken a variety of approaches in upholding the Eighth Amendment's standard of decency for prisoners placed in solitary confinement with varying degrees of success. These policies, however, lack uniformity nationwide.

The Background describes the overarching Eighth Amendment standards and the few cases in which the Court specifically addresses solitary confinement. The Background then discusses how states vary in their approach to implementing solitary confinement. A series of state case studies illustrates the limitations on solitary confinement that courts, legislatures, and various departments of corrections have

⁸ See JEAN CASELLA ET AL., SOLITARY WATCH & UNLOCK THE BOX, CALCULATING TORTURE 4 (2023).

⁹ See *id.* at 3.

¹⁰ See *id.*; U.S. CONST. amend. VIII.

¹¹ See U.S. CONST. amend. VIII.

¹² See *Hutto v. Finney*, 437 U.S. 678, 685-86 (1978).

implemented. Next, the Analysis section addresses the constitutional concerns surrounding the implementation of solitary confinement without limitation. Then, the Analysis considers the successes and failures of the state case studies. The Analysis also reveals the need for collaboration among courts, legislatures, and departments of corrections for meaningful change to occur in solitary confinement policies throughout the United States. Finally, the last section of the Analysis highlights the economic benefits of limiting solitary confinement.

BACKGROUND

The devastating effects of isolation on the human psyche and physical body have been tacitly observed for centuries,¹³ but modern science and psychology show a correlation between solitary confinement and extreme declines in mental and physical health.¹⁴ As psychologists further discover the harmful effects of isolation, concerns about the constitutionality of solitary confinement under the Eighth Amendment arise.¹⁵ Regardless of these concerns, solitary confinement practices remain largely unaddressed at the federal level.¹⁶ Despite multiple attempts, the House of Representatives and the Senate failed to pass comprehensive legislation related to solitary confinement.¹⁷ Federal courts, including the Supreme Court, seem hesitant to address solitary confinement and the bounds of its use.¹⁸ Additionally, no federal

¹³ See *In re Medley*, 134 U.S. 160, 167-68 (1890) (analyzing case studies about prisoners in solitary confinement who became “violently insane”).

¹⁴ See Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psych. Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. REV. L. & SOC. CHANGE 477, 529-30 (1997).

¹⁵ See *id.* at 541.

¹⁶ See Hernandez D. Stroud, *Reforming Solitary Confinement Without the High Court*, BRENNAN CTR. FOR JUSTICE (Feb. 21, 2024), <https://www.brennancenter.org/our-work/analysis-opinion/reforming-solitary-confinement-without-high-court>.

¹⁷ See End Solitary Confinement Act, S. 3409, 118th Cong. (as referred to S. Comm. on the Judiciary, Dec. 5, 2023), <https://www.congress.gov/bill/118th-congress/senate-bill/3409>; End Solitary Confinement Act, H.R. 4682, 119th Cong. (as referred to H. Comm. on the Judiciary, July 23, 2025), <https://www.congress.gov/bill/119th-congress/house-bill/4682>.

¹⁸ See, e.g., *Johnson v. Prentice*, 144 S. Ct. 11 (2023) (Jackson, J., dissenting from denial of certiorari); *Apodaca v. Raemisch*, 586 U.S. 931 (2018) (statement of Sotomayor, J., respecting the denial of certiorari); *Hope v. Harris*, 861 F. App'x 571 (5th Cir. 2021), *cert. denied*, 143 S. Ct. 1746 (2023).

court has found the practice of solitary confinement itself to be unconstitutional.¹⁹

Despite federal inaction, many states have taken independent steps to regulate solitary confinement.²⁰ State courts, legislatures, and correctional departments have all imposed limitations on solitary confinement.²¹ As a result, most states offer more protection to inmates in solitary confinement than the bare-bones protection provided at the federal level.²² The following section defines solitary confinement and then compares the past and present approaches to solitary confinement at the federal and state levels.

I. DEFINING SOLITARY CONFINEMENT: 22+ HOURS OF ISOLATION

Solitary Watch, an organization that advocates against the extended use of isolation, defines solitary confinement as isolation for more than twenty-two hours per day.²³ Isolation is “[s]egregation from the mainstream prisoner population” where prisoners are “given only extremely limited or no direct and normal social contact with other persons.”²⁴ Prisoners are almost exclusively limited to the confines of their cells, which are usually six by eight feet.²⁵ Solitary confinement sometimes also involves the deprivation of sensory inputs known as “reduced environmental stimulation.”²⁶ This approach puts prisoners in monotonous, repetitive environments that work to dull the senses and deprive the prisoners of all stimulation.²⁷ Proponents of solitary confinement justify the practice by citing safety concerns, but recent

¹⁹ Andrew Leon Hanna, *The Present Constitutional Status of Solitary Confinement*, 21 U. PA. J. CONST. L. ONLINE 1, 7 (2019).

²⁰ See *infra* Figure 1.

²¹ See *infra* Figure 1.

²² See *infra* Figure 1.

²³ See CASELLA ET AL., *supra* note 8, at 3.

²⁴ Craig Haney, *Restricting the Use of Solitary Confinement*, 1 ANNU. REV. CRIMINOL. 285, 286 (2018).

²⁵ See Matthew Azzano, *Inside the Underground Economy of Solitary Confinement*, MARSHALL PROJECT (Feb. 18, 2022, at 6:00 AM), <https://www.themarshallproject.org/2022/02/18/inside-the-underground-economy-of-solitary-confinement>.

²⁶ Haney, *supra* note 24, at 289.

²⁷ *Id.*

studies indicate that many prisoners placed in solitary confinement do not pose serious safety risks.²⁸

The two types of solitary confinement primarily addressed throughout this paper are administrative segregation and disciplinary segregation.²⁹ Administrative segregation applies to prisoners who pose a threat to the safety and security of the prison.³⁰ In most prison systems, administrative segregation is a subjective decision made by prison officials without an opportunity for further review or appeal.³¹ Prisoners remain in administrative segregation until officials no longer deem them a threat, often leading to prolonged and indefinite isolation.³² Although some states have placed limitations on administrative segregation, no state has prohibited the practice.³³

Disciplinary segregation is used for rule violations within the prison.³⁴ Each state's department of corrections differs in which rule violations result in disciplinary segregation—some states restrict their use to only the most severe offenses, while others impose segregation for even minor offenses.³⁵ Such sanctions are usually given a definite time sentence, but not every state requires this clarity.³⁶ Some states have prohibited the use of disciplinary segregation altogether and have implemented alternative sanctions for rule violations instead.³⁷

Vast scientific literature documents the relationship between solitary confinement and many extreme adverse psychological and physical effects.³⁸ Psychological effects include: anxiety, depression, panic, withdrawal, aggression, rage, paranoia, hypersensitivity, ruminations, hallucinations, cognitive dysfunction, loss of emotional control,

²⁸ See ANDREEA MATEI, URBAN INST., SOLITARY CONFINEMENT IN US PRISONS 10 (2022), <https://www.urban.org/research/publication/solitary-confinement-us-prisons> (“... many of the people who are placed [in solitary confinement] do not represent the greatest threat to prison safety . . . and solitary confinement has actually been associated with collateral consequences for public safety, since people who have spent time in solitary are more likely to recidivate following release.”).

²⁹ See *id.* at 4.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ See *infra* Figure 1.

³⁴ MATEI, *supra* note 28, at 4.

³⁵ See *id.*; *infra* Figure 1.

³⁶ See MATEI, *supra* note 28, at 4; *infra* Figure 1.

³⁷ See *infra* Figure 1.

³⁸ Haney & Lynch, *supra* note 14, at 529-30.

nightmares, self-harm, and suicidal tendencies.³⁹ Physical effects include: fluctuations in appetite, trembling, heart palpitations, lethargy, headaches, loss of depth perception, and weakening of the immune system.⁴⁰

Additionally, the effects correlated with solitary confinement usually extend well beyond the individual's time in isolation and may continue to worsen even after the individual integrates back into the outside world.⁴¹ The mental and physical effects of solitary confinement can destroy social identity and can "destroy [one's] ability to function normally in free society."⁴² One researcher described solitary confinement as a "social death" due to the grief and loneliness that follow prisoners far outside the confines of the cell.⁴³ Even more than a metaphorical social death, a study conducted in North Carolina revealed a shocking statistic—individuals held in solitary confinement were 24% more likely to die within one year of being released than those who were not held in isolation.⁴⁴ Additionally, individuals held in solitary confinement were 127% more likely than other incarcerated people to die of a drug overdose within just two weeks of release.⁴⁵

In 2015, the United Nations (the "U.N.") published the Nelson Mandela Rules (the "Mandela Rules"), which propose a universal set of standards for the treatment of prisoners.⁴⁶ The U.N. asserted that prolonged solitary confinement is a form of torture that violates prisoners' dignity.⁴⁷ The Mandela Rules propose that placement in solitary confinement should be limited to a maximum of fifteen days.⁴⁸

³⁹ *Id.* at 530.

⁴⁰ *Id.* at 523-24, 530.

⁴¹ Judith Resnik et al., *Punishment in Prison: Constituting the "Normal" and the "Atypical" in Solitary and Other Forms of Confinement*, 115 Nw. U. L. REV. 45, 90-91 (2020).

⁴² Haney, *supra* note 24, at 296.

⁴³ Craig Haney, *Solitary Confinement, Loneliness, and Psych. Harm*, in SOLITARY CONFINEMENT: EFFECTS, PRACTICES, AND PATHWAYS TOWARDS REFORM 129, 140 (Jules Lobel & Peter Scharff Smith eds. 2019).

⁴⁴ Resnik et al., *supra* note 41, at 91.

⁴⁵ *Id.*

⁴⁶ See G.A. Res. 70/175, annex, The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), at 7 (Dec. 17, 2015).

⁴⁷ See *United States: Prolonged Solitary Confinement Amounts to Psychological Torture*, Says U.N. Expert, U.N. HUMAN RTS. (Feb. 28, 2020), <https://www.ohchr.org/en/press-releases/2020/02/united-states-prolonged-solitary-confinement-amounts-psychological-torture>.

⁴⁸ G.A. Res. 70/175, *supra* note 46, at 16-17.

The Mandela Rules also prohibit placing prisoners with mental and physical disabilities in solitary confinement.⁴⁹

II. THE STAGNANT FEDERAL LAW

Although the Supreme Court has addressed the Eighth Amendment extensively,⁵⁰ the Court offers little guidance on how to implement solitary confinement in congruence with constitutional principles.⁵¹ Further, the Supreme Court has not recently addressed solitary confinement, despite vast data showing a correlation between solitary confinement and adverse psychological and physical effects.⁵² Although the U.N. declared prolonged solitary confinement a form of torture in 2015,⁵³ the Supreme Court has not squarely addressed the issue since 1980.⁵⁴ In 2015, Justice Kennedy wrote a concurring opinion to urge reconsideration of solitary confinement practices under the Eighth Amendment because “research still confirms what this Court suggested over a century ago: Years on end of near-total isolation exact a terrible price.”⁵⁵ Several Justices subsequently echoed Justice Kennedy’s concerns about solitary confinement in opinions accompanying denials of certiorari.⁵⁶ The Justices’ detailed responses to the denied petitions reveal at least some judicial desire to reevaluate solitary confinement

⁴⁹ *Id.* at 17.

⁵⁰ *See generally* *Whitley v. Albers*, 475 U.S. 312 (1986) (defining cruel and unusual punishment as the unnecessary and wanton infliction of pain upon prisoners); *Atkins v. Virginia*, 536 U.S. 304 (2002) (establishing the evolving standard of decency).

⁵¹ *See generally* *In re Medley*, 134 U.S. 160 (1890) (addressing solitary confinement for the first time); *Hutto v. Finney*, 437 U.S. 678 (1978) (noting that solitary confinement is not unconstitutional *per se*, but some extreme conditions may violate the Eighth Amendment).

⁵² *See* Haney, *supra* note 24, at 289.

⁵³ The United States does not have to abide by every United Nations proposal, but the U.N. does act as a persuasive authority in the United States. *See* Dan Sicorsky, *The Nelson Mandela Rules: Honoring a Prisoner Turned World Leader*, U.S. DEP’T OF STATE (July 18, 2017), <https://2017-2021.state.gov/the-nelson-mandela-rules-honoring-a-prisoner-turned-world-leader/>.

⁵⁴ *See* *Hughes v. Rowe*, 449 U.S. 5, 11 (1980) (stating that “[s]egregation of a prisoner without a prior hearing may violate due process if postponement is not justified by apprehended emergency conditions” but segregation itself is not unconstitutional); *see also* *Davis v. Ayala*, 586 U.S. 257, 289 (2015) (Kennedy, J., concurring) (expressing concerns about solitary confinement, although it is not the main issue of the case).

⁵⁵ *Davis*, 586 U.S. at 289 (Kennedy, J., concurring).

⁵⁶ *See* *Johnson v. Prentice*, 144 S. Ct. 11, 12 (2023) (Jackson, J., dissenting from denial of certiorari); *Apodaca v. Raemisch*, 586 U.S. 931, 934-35 (2018) (statement of Sotomayor, J., respecting the denial of certiorari) (stating the conditions of the petitioner’s solitary confinement to be “deeply troubling”).

specifically based on research data and current Eighth Amendment standards,⁵⁷ yet the Court has not meaningfully reevaluated the practice.

A. *Solitary Confinement Addressed by the Supreme Court*

In 1890, the Court explicitly addressed solitary confinement for the first time in *In re Medley*.⁵⁸ The petitioner, James Medley, was imprisoned and sentenced to death in Colorado for murdering his wife.⁵⁹ While waiting for his execution, Medley was kept in total isolation without knowing when his death would be scheduled.⁶⁰ The Court found that the “immense mental anxiety” of being completely isolated without knowledge of an execution date amounted to “a great increase of the offender’s punishment.”⁶¹ This great increase in punishment violated Medley’s constitutional rights.⁶² The Court also acknowledged that solitary confinement practices often led to prisoners becoming violently insane, mentally incompetent, and suicidal.⁶³ Despite acknowledging the harm associated with solitary confinement, the Court did not rule the practice itself unconstitutional.⁶⁴ Rather, the Court implied that conditions of solitary confinement that result in insanity and extreme mental distress violate constitutional rights.⁶⁵

In 1978, the Court again acknowledged that solitary confinement is not a *per se* violation of the Eighth Amendment, but the conditions of isolation may violate constitutional standards.⁶⁶ *Hutto v. Finney* involved an Arkansas prison that placed prisoners in solitary confinement cells indefinitely, left them in total darkness, and fed them less than 1,000 calories a day.⁶⁷ This specific implementation of solitary confinement

⁵⁷ See *Johnson*, 144 S. Ct. at 12; *Apodaca*, 586 U.S. at 934-35.

⁵⁸ *In re Medley*, 134 U.S. 160, 161-62 (1890).

⁵⁹ Jodi Lessner, *A Cruel and Unusual Burden: The Case for the Unconstitutionality of Solitary Confinement*, COLUM. UNDERGRAD. L. REV. (Nov. 19, 2017), <https://www.culawreview.org/journal/a-cruel-and-unusual-burden-the-case-for-the-unconstitutionality-of-solitary-confinement>.

⁶⁰ *Medley*, 134 U.S. at 161-62.

⁶¹ *Id.* at 172.

⁶² *Id.* at 172-73.

⁶³ *Id.* at 168.

⁶⁴ Lessner, *supra* note 59.

⁶⁵ See *In re Medley*, 134 U.S. 160, 168, 171 (1890).

⁶⁶ See *Hutto v. Finney*, 437 U.S. 678, 685-86 (1978) (“[P]unitive isolation ‘is not necessarily unconstitutional, but it may be, depending on the duration of confinement and the conditions thereof.’”).

⁶⁷ *Id.* at 682-83.

violated constitutional protections because the conditions “transgress[ed] today’s ‘broad and idealistic concepts of dignity, civilized standards, humanity, and decency;’”⁶⁸ however, the indefinite sentences of solitary confinement imposed upon prisoners by itself were not inherently unconstitutional.⁶⁹ Like *Medley*, the Court in *Hutto* acknowledged that some implementations of isolation are cruel and unusual but declined to draw a bright-line rule to explain when solitary confinement becomes unconstitutional.⁷⁰ Since *Hutto*, the Court’s official view on solitary confinement and the Eighth Amendment has largely remained stagnant.⁷¹

B. *The Eighth Amendment Standard*

Absent a clearly defined rule, general Eighth Amendment principles must be considered to determine whether a specific instance of solitary confinement is constitutional. The Eighth Amendment governs prison practices by stating that no cruel and unusual punishments may be inflicted.⁷² The Eighth Amendment broadly defines cruel and unusual punishment as an “unnecessary and wanton infliction of pain” upon prisoners.⁷³

To determine if prison conditions violate the Eighth Amendment, the Court uses a two-prong test.⁷⁴ The first prong objectively analyzes contemporary standards of decency to determine if a prisoner experienced a deprivation of necessities or a serious risk of harm.⁷⁵ The second prong is a subjective analysis of a prison official’s culpability.⁷⁶ In cases regarding prison conditions,⁷⁷ culpability is generally established by proving that an official acted with deliberate indifference or that

⁶⁸ *Id.* at 685 (quoting *Estelle v. Gamble*, 429 U.S. 97, 102 (1976)).

⁶⁹ *Id.* at 685-86.

⁷⁰ *See id.* at 686-87; *In re Medley*, 134 U.S. at 173.

⁷¹ *See Hughes v. Rowe*, 449 U.S. 5, 11-13 (1980) (commenting not on the constitutionality of prisoner segregation overall, just segregation prior to a hearing); *see also Johnson v. Prentice*, 144 S. Ct. 11 (2023) (Jackson, J., dissenting from denial of certiorari).

⁷² *See* U.S. CONST. amend. VIII.

⁷³ *Whitley v. Albers*, 475 U.S. 312, 320 (1986).

⁷⁴ *See Richard D. Nobleman, Wilson v. Seiter: Prison Conditions and the Eighth Amendment Standard*, 24 PAC. L. J. 275, 290-91 (1992).

⁷⁵ *See id.*

⁷⁶ *See id.* at 292.

⁷⁷ This standard applies only to sentenced prisoners, because pretrial detainees are governed by the Fourteenth Amendment, not the Eighth Amendment. *See Kingsley v. Hendrickson*, 576 U.S. 389, 403-04 (2015).

an official unnecessarily and wantonly inflicted harm upon a prisoner.⁷⁸ In general, ambiguity exists regarding what constitutes cruel and unusual punishment, and even more so when addressing solitary confinement practices.⁷⁹

1. Prong One: The Evolving Standard of Decency

Under the Eighth Amendment, prison officials have a duty to provide humane conditions and reasonable safety for prisoners.⁸⁰ Prison deprives individuals of the ability to care for themselves independently, requiring prison officials to take reasonable measures to provide necessities and to prevent prisoners from suffering substantial risks of harm.⁸¹ Some of the necessities that prisoners may not be deprived of include adequate food, clothing, shelter, and medical care.⁸² Substantial risks of harm include serious physical and psychological harm caused by prison conditions.⁸³

The definitions of necessities and risks of harm have changed throughout the decades because these definitions are based upon an evolving standard of decency.⁸⁴ The standard of decency regarding the treatment of prisoners has evolved since the Constitution's ratification and will continue to evolve.⁸⁵ For example, the growing social conversations and continued research regarding mental health have expanded Eighth Amendment protections.⁸⁶ In 1986, the Supreme Court prohibited the execution of prisoners found to be insane, and in 2002, the Court banned the execution of prisoners found to be mentally incompetent.⁸⁷

⁷⁸ *See id.*

⁷⁹ Lessner, *supra* note 59.

⁸⁰ *See Helling v. McKinney*, 509 U.S. 25, 33 (1993).

⁸¹ *See Wilson v. Seiter*, 501 U.S. 294, 303 (1991); *Hudson v. Palmer*, 468 U.S. 517, 526-27 (1984).

⁸² *See Wilson*, 501 U.S. at 303; *see also Hudson*, 468 U.S. at 526.

⁸³ *See Sharon Dolovich, Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 915 (2009).

⁸⁴ *See Mary Sigler, The Political Morality of the Eighth Amendment*, 8 OHIO ST. J. CRIM. L. 403, 407-08 (2011).

⁸⁵ *See id.*

⁸⁶ *See Jared Lockhart, Evolving Standards of Decency: A View of 8th Amendment Jurisprudence and the Death Penalty*, 34 BYU PRELAW REV. 33, 44 (2020).

⁸⁷ *Ford v. Wainwright*, 477 U.S. 399, 409-10 (1986); *Atkins v. Virginia*, 536 U.S. 304, 310 (2002).

Since then, some federal circuit courts have further strengthened protections for prisoners with severe mental disorders.⁸⁸

The evolving standard of decency is gauged by reviewing societal attitudes and current trends regarding acceptable punishment practices.⁸⁹ In *Atkins v. Virginia*, the Court granted certiorari to review the evolving standard of decency regarding sentencing mentally incompetent prisoners to death.⁹⁰ The Court acknowledged that 30 states passing legislation on the issue indicated an evolution in the standard of decency.⁹¹ The Court noted the consistency of these state legislative changes—each had the purpose of protecting mentally incompetent prisoners—and stated that these legislative trends provided the “clearest and most reliable objective evidence of contemporary values.”⁹² The Court also addressed factors like public outcry, trends across other countries, and expert opinions, which all contributed to the determination that the standard of decency had evolved.⁹³ When these factors indicate that the standard of decency is evolving on a certain punishment or prison condition, the Court should re-evaluate the practice.⁹⁴

2. Prong Two: Deliberate Indifference

The second prong of the Eighth Amendment analysis determines the subjective state of mind of the prison official(s).⁹⁵ To violate a prisoner’s Eighth Amendment rights, an officer or official must act with a sufficiently culpable state of mind: deliberate indifference or unnecessary and wanton infliction of harm.⁹⁶ This paper will examine solitary confinement under the deliberate indifference standard.⁹⁷

⁸⁸ See, e.g., *Finley v. Huss*, 723 F. App’x 294, 298-99 (6th Cir. 2018) (holding that leaving a prisoner in solitary confinement despite multiple suicide attempts and a diagnosis of mental illness was enough to establish an Eighth Amendment claim).

⁸⁹ See Sigler, *supra* note 84, at 405-06.

⁹⁰ *Atkins v. Virginia*, 536 U.S. 304, 310 (2002).

⁹¹ Compare *id.* at 314-16 with *Penry v. Lynaugh*, 492 U.S. 302, 334 (1989) (finding 14 states enacting similar laws does not show a national consensus).

⁹² *Atkins*, 536 U.S. at 312 (quoting *Penry*, 492 U.S. at 331).

⁹³ See *id.* at 311-12; Sigler, *supra* note 84 at 404-05.

⁹⁴ See *Atkins*, 536 U.S. at 311-12; see also *Trop v. Dulles*, 356 U.S. 86, 102-03 (1958).

⁹⁵ See *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

⁹⁶ See *Whitley v. Albers*, 475 U.S. 312, 319 (1986).

⁹⁷ Prolonged isolation exposes prisoners to excessive risks, even if the prison official does not unnecessarily and wantonly inflict harm upon the prisoner—this is deliberate indifference. See *id.*

Deliberate indifference is a standard similar to criminal recklessness, which is more than negligence but less than intentional harm.⁹⁸ For an official to have a sufficiently culpable state of mind under deliberate indifference, he must demonstrate “more than an ordinary lack of due care for the prisoner’s interests or safety.”⁹⁹ This subjective test requires the prison official to know about an excessive risk through actual knowledge or inference, and then willingly disregard the hazard by depriving the prisoner of necessities or exposing the prisoner to substantial risks of harm.¹⁰⁰

III. EVOLVING STATE LAWS

Despite inactivity at the federal level, many states have adopted limitations on solitary confinement.¹⁰¹ States have cultivated these approaches through a variety of different avenues: state courts, state legislatures, and departments of corrections.¹⁰² States take widely different approaches to implementing limitations with varying levels of effectiveness.¹⁰³ The table below illustrates a broad overview of the limitations, if any, that each state imposes upon its solitary confinement policies and shows which avenue the state primarily used to implement those limitations.

The table divides states’ solitary confinement policies into three categories: no limitation, some limitation, and strong limitation. A state designated as having no limitation does not have any policies regulating solitary confinement. A state is defined as having some limitation on solitary confinement if it provides restrictions for at least one type of vulnerable population. Although states differ in how they define vulnerable populations, the most common examples include juveniles, those with severe mental health disorders, and pregnant women. A state is deemed to have strong limitations if it prohibits multiple types of vulnerable populations from being put in segregation units, limits periods of solitary confinement to fifteen days or fewer, or prohibits disciplinary segregation.

⁹⁸ See *Farmer*, 511 U.S. at 836.

⁹⁹ *Whitley*, 475 U.S. at 319.

¹⁰⁰ *Farmer*, 511 U.S. at 837, 842.

¹⁰¹ See *infra* Figure 1.

¹⁰² See *infra* Figure 1.

¹⁰³ See *infra* Figure 1.

The table also reveals how each state primarily created and imposed its limitations. More than half the states have taken a primarily legislative approach.¹⁰⁴ Seven states have made changes directly through their department of corrections.¹⁰⁵ Six other states primarily imposed limitations through the court system.¹⁰⁶ Ten states do not have any limitations on solitary confinement practices.¹⁰⁷

Figure 1

State	Strength of Limitation & Enforcing Entity	Type of Limitation
Alabama	No limitation	No limitation ¹⁰⁸
Alaska	Some limitation through the department of corrections	Juveniles may not be put in disciplinary segregation ¹⁰⁹
Arizona	Strong limitation through legislature	Limits solitary confinement to 15 consecutive days ¹¹⁰
Arkansas	Some limitation through legislature	Limits solitary confinement of juveniles to 24 hours ¹¹¹
California	Some limitation through courts	Prohibits solitary confinement for prisoners with mental illness and requires determinate sentences ¹¹²
Colorado	Some limitation through legislature	Prohibits solitary confinement for juveniles and other vulnerable populations ¹¹³

¹⁰⁴ See *infra* Figure 1.

¹⁰⁵ See *infra* Figure 1 (including Washington, which has not yet implemented its plan created by the department of corrections).

¹⁰⁶ See Figure 1. Massachusetts is counted in both the legislature and court categories because it has taken a mostly even mixture of both approaches. New York is counted in the legislature, courts, and department of corrections categories because it has taken a collaborative approach. This collaboration will be discussed in Background III.D.

¹⁰⁷ See Figure 1. Washington is considered to have no limitation because at the time of this Article, the potential limitations have not yet passed.

¹⁰⁸ See Liman Ctr., *Solitary Confinement in Alabama*, SEEING SOLITARY (2021), <https://seeing solitary.limancenter.yale.edu/jurisdictions/alabama/>.

¹⁰⁹ Alaska Delinq. R. 13.

¹¹⁰ S.B. 1617 31-602(3), 54th Leg., 2d Reg. Sess. (Ariz. 2020).

¹¹¹ ARK. CODE ANN. § 12-29-118(b) (2023).

¹¹² Madrid v. Gomez, 889 F. Supp. 1146, 1217, 1264 (N.D. Cal. 1995); Ashker v. Governor of California, 81 F.4th 863, 889-90 (9th Cir. 2023).

¹¹³ H.B. 21-1211, 2021 Leg., Reg. Sess. (Colo. 2021).

Connecticut	Strong limitation through legislature	Limits solitary confinement to 15 consecutive days ¹¹⁴
Delaware	Some limitation through courts	Special requirements and limitations for prisoners with mental illness ¹¹⁵
Florida	No limitation	No limitation ¹¹⁶
Georgia	Some limitation through courts	Requires 4 hours outside of cell each day; limits solitary confinement to 24 months ¹¹⁷
Hawaii	Some limitation through the department of youth corrections	Prohibits solitary confinement for juveniles ¹¹⁸
Idaho	No limitation	No limitation ¹¹⁹
Illinois	Some limitation through legislature	Limits solitary confinement for juveniles to 7 days ¹²⁰
Indiana	Some limitation through legislature	Limits disciplinary solitary to 30 days ¹²¹
Iowa	Strong limitation through legislature	Limits solitary confinement to 10 days ¹²²
Kansas	No limitation	No limitation ¹²³
Kentucky	Strong limitation through legislature	Prohibits disciplinary solitary confinement ¹²⁴

¹¹⁴ S.B. 459, 2022 Leg., Reg. Sess. (Conn. 2022).

¹¹⁵ CLASI v. Coupe, 2016 WL 1055741, at *4 (D. Del. Mar. 16, 2016).

¹¹⁶ See Jack Denton, *Solitary Confinement Out of Control in Florida Prisons*, SOLITARY WATCH (Mar. 29, 2016), <https://solitarywatch.org/2016/03/29/solitary-confinement-out-of-control-in-florida-prisons/>.

¹¹⁷ *Georgia Prisoners Reach Settlement to Reform One of the “Harshest and Most Draconian” Solitary Confinement Units in the Nation*, S. CTR. FOR HUM. RTS. (Jan. 10, 2019), <https://www.schr.org/georgia-prisoners-reach-settlement-to-reform-one-of-the-harshest-and-most-draconian-solitary-confinement-units-in-the-nation/>.

¹¹⁸ See NATALIE J. KRANER ET AL., LOWENSTEIN CTR. FOR PUBLIC INTEREST, 51 – JURISDICTION SURVEY OF JUVENILE SOLITARY CONFINEMENT RULES IN JUVENILE JUSTICE SYSTEMS 24 (2016).

¹¹⁹ See Liman Ctr., *Solitary Confinement in Idaho*, SEEING SOLITARY (2021), <https://seeing solitary.limancenter.yale.edu/jurisdictions/idaho/>.

¹²⁰ See 730 ILL. COMP. STAT. ANN. 215/10(b-6) (2024).

¹²¹ 210 IND. ADMIN. CODE 3-1-14(b)(2)(B) (2014).

¹²² IOWA CODE ANN. § 356.14 (2023).

¹²³ See *Kansas Juvenile Justice Services*, JUV. JUST. GEOGRAPHY, POL’Y, PRAC., & STATS., <http://www.jjgps.org/juvenile-justice-services/kansas> (last visited Dec. 16, 2024).

¹²⁴ S.B. 84, 2021 Leg., Reg. Sess. (Ky. 2021).

Louisiana	Some limitation through legislature	Prohibits solitary confinement of juveniles for disciplinary reasons; limits juveniles to 8 hours in solitary if there for safety reasons ¹²⁵
Maine	Some limitation through the department of corrections	Prohibits solitary confinement of juveniles; adults receive mental health examinations after 24-hours ¹²⁶
Maryland	Some limitation through legislature	Limits solitary confinement for juveniles and requires yearly solitary reports ¹²⁷
Massachusetts	Some limitation through courts and legislature	Solitary confinement violates the Eighth Amendment if done for “too long” ¹²⁸
Michigan	Some limitation through legislature	Limits solitary confinement of juveniles to 72 hours ¹²⁹
Minnesota	Some limitation through legislature	Prohibits disciplinary solitary confinement for juveniles ¹³⁰
Mississippi	Strong limitation through legislature	Prohibits use of solitary confinement for various populations; limits time in solitary to 15 days ¹³¹
Missouri	No limitation	No limitation ¹³²
Montana	Some limitation through legislature	Limits solitary confinement to the most severe crimes; prisoners’ status must be reviewed every 30 days ¹³³

¹²⁵ H.B. 746, 2022 Leg., Reg. Sess. (La. 2022).

¹²⁶ See Gary Gately, *Growing Number of States Moving Away from Juvenile Solitary Confinement*, JUV. JUST. INFO. EXCH. (Mar. 21, 2014), <https://jjie.org/2014/03/21/growing-number-of-states-moving-away-from-juvenile-solitary-confinement/>; see also ME. REV. STAT. ANN. tit. 34-A, § 3032(3).

¹²⁷ H.B. 1001, 2019 Leg., Jud. Sess. (Md. 2019).

¹²⁸ *Foster v. Comm’r of Corr.*, 146 N.E.3d 372, 401 (Mass. 2020).

¹²⁹ See STATE OF MICHIGAN DEP’T OF HEALTH & HUM. SERVS., SECLUSION, JUVENILE JUSTICE RESIDENTIAL MANUAL 3 (2020).

¹³⁰ S.F. 2909, 93d Leg., Reg. Sess. (Minn. 2023).

¹³¹ H.B. 1122, 2024 Leg., Reg. Sess. (Miss. 2024).

¹³² See S.B. 471, 101st Gen. Assemb., 1st Reg. Sess. (Mo. 2024) (requiring annual data report of those in solitary but imposing no limitations).

¹³³ H.B. 763, 2019 Leg., Reg. Sess. (Mont. 2019).

Nebraska	Some limitation through legislature	Limits vulnerable populations being placed in solitary confinement ¹³⁴
Nevada	Strong limitation through legislature	Prohibits disciplinary solitary confinement; limits administrative segregation to 15 days ¹³⁵
New Hampshire	Some limitation through legislature	Prohibits solitary confinement of juveniles ¹³⁶
New Jersey	Strong limitation through legislature	Limits solitary confinement to 20 consecutive days; offers some protection for vulnerable populations ¹³⁷
New Mexico	Some limitation through legislature	Prohibits use of solitary confinement for juveniles and vulnerable populations ¹³⁸
New York	Strong limitation through court, legislature, and the department of corrections	Prohibits use of solitary confinement for various populations; limits time in isolation to 15 days ¹³⁹
North Carolina	Some limitation through legislature	Solitary confinement prohibited for inmates with serious mental illness ¹⁴⁰
North Dakota	Strong limitation through the department of corrections	Solitary confinement population reduced by 75% since 2018 ¹⁴¹
Ohio	Some limitation through courts	Ruling that trial courts cannot sentence solitary confinement ¹⁴²
Oklahoma	Some limitation through legislature	Prohibits solitary confinement of juveniles ¹⁴³

¹³⁴ See NEB. REV. STAT. § 83-4,114 (2012).

¹³⁵ S.B. 307, 82d Leg., Reg. Sess. (Nev. 2023).

¹³⁶ See *New Hampshire Juvenile Justice Services*, JUV. JUST. GEOGRAPHY, POL'Y, PRAC., & STATS., <http://www.jjgps.org/juvenile-justice-services/new-hampshire> (last visited Dec. 16, 2024).

¹³⁷ A. 314, 218th Leg., Reg. Sess. (N.J. 2019).

¹³⁸ S.B. 399, 56th Leg., 1st Sess. (N.M. 2023).

¹³⁹ *Peoples v. Annucci*, 180 F. Supp. 3d 294, 297 (S.D.N.Y. 2016); S.B. 2836, 2021 Leg., Reg. Sess. (N.Y. 2021).

¹⁴⁰ H.B. 781, 2019 Leg., Gen. Assemb., Reg. Sess. (N.C. 2019).

¹⁴¹ Leeann K. Bertsch, *Reflections on North Dakota's Sustained Solitary Confinement Reform*, in *SOLITARY CONFINEMENT: EFFECTS, PRACTICES, AND PATHWAYS TOWARD REFORM* 325, 331 (Jules Lobel & Peter Scharff Smith eds., 2019).

¹⁴² *State v. Ford*, 221 N.E.3d 69, 90 (Ohio Ct. App. 2023).

¹⁴³ OKLA. STAT. tit. 10A, § 2-7-603 (2023).

Oregon	Some limitation through the department of corrections	Agreement with Disability Rights Oregon to provide mental health care in solitary confinement ¹⁴⁴
Pennsylvania	Strong limitation through legislature	Prohibits solitary confinement for vulnerable populations and limits it to 15 consecutive days ¹⁴⁵
Rhode Island	Some limitation through courts	Created a classification system and limits disciplinary segregation to 30 days ¹⁴⁶
South Carolina	No limitation	No limitation ¹⁴⁷
South Dakota	No limitation	No limitation ¹⁴⁸
Tennessee	Some limitation through legislature	Prohibits solitary confinement for pregnant individuals and those who have given birth within 8 weeks ¹⁴⁹
Texas	Some limitation through legislature	Juveniles may be put in solitary confinement for only 4 hours unless infraction is grievous ¹⁵⁰
Utah	No limitation	No limitation ¹⁵¹
Vermont	Some limitation through legislature	Limits time that prisoners with “serious functional impairment” may be put in solitary confinement ¹⁵²
Virginia	Some limitation through legislature	Mandates at least 4 hours of outside-of-cell time per day ¹⁵³

¹⁴⁴ See Memorandum of Understanding Between the Oregon Dep’t of Corr. and Disability Rts. Oregon (Jan. 8, 2016) (on file with parties).

¹⁴⁵ 61 PA. CONS. STAT. §§ 5102 (c)(2), 5103 (a)-(c) (2023).

¹⁴⁶ *Morris v. Travisano*, 310 F. Supp. 857, 868-71 (D.R.I. 1970); *Paiva v. R.I. Dep’t of Corr.*, 498 F. Supp. 3d 277, 287 (D.R.I. 2020).

¹⁴⁷ See Liman Ctr., *Solitary Confinement in South Carolina*, SEEING SOLITARY (2021), <https://seeing solitary.limancenter.yale.edu/jurisdictions/south-carolina/>.

¹⁴⁸ See Liman Ctr., *Solitary Confinement in South Dakota*, SEEING SOLITARY (2021), <https://seeing solitary.limancenter.yale.edu/jurisdictions/south-dakota/>.

¹⁴⁹ TENN. CODE ANN. § 41-21-402 (2023).

¹⁵⁰ S.B. 1357, 2013 Leg., Reg. Sess. (2013).

¹⁵¹ See UTAH DEP’T OF CORR., INMATE ORIENTATION HANDBOOK 12 (2022).

¹⁵² VT. STAT. ANN. tit. 28, § 701(a) (2020).

¹⁵³ VA. CODE ANN. § 53.1-39.2 (2023).

Washington	Potential limitation through the department of corrections	Department of corrections announced plan in 2023 to reduce solitary confinement by 90% over the next 5 years in response to failed legislation ¹⁵⁴
West Virginia	Some limitation through legislature	Prohibits solitary confinement of juveniles ¹⁵⁵
Wisconsin	Strong limitation through legislature	Limits disciplinary segregation to 10 days ¹⁵⁶
Wyoming	No limitation	No limitation ¹⁵⁷

The remainder of the Background presents a series of case studies to show how states work to limit solitary confinement. These sections dive into how courts, legislatures, and state correctional departments have worked, or not worked, to limit the dangers of solitary confinement.

A. *Limitation through the Courts: Rhode Island*

Rhode Island is one of the few states that used an almost exclusively court-based approach to limit solitary confinement.¹⁵⁸ The complex series of cases known as *Morris v. Travisono* began in 1969 when the plaintiff, Joseph Morris, brought forth a class action against the director of the Rhode Island Department of Corrections (“RIDOC”).¹⁵⁹ The class consisted of inmates segregated “arbitrarily and discriminatorily” from the general population unit.¹⁶⁰ The class brought a constitutional claim under 42 U.S.C. § 1983.¹⁶¹ The complaint alleged that the deteriorating conditions of segregation were “destructive of the human person” and, thus, violated the Eighth Amendment.¹⁶²

¹⁵⁴ See WASHINGTON STATE DEP’T OF CORR., SOLITARY CONFINEMENT TRANSFORMATION PROJECT 2-3 (2023).

¹⁵⁵ W. VA. CODE ANN. § 49-4-721 (2020).

¹⁵⁶ WIS. STAT. § 302.40 (2023).

¹⁵⁷ See The Liman Ctr., *Solitary Confinement in Wyoming*, SEEING SOLITARY (2021), <https://seeingsolitary.limancenter.yale.edu/jurisdictions/wyoming/>.

¹⁵⁸ *Supra* Figure 1.

¹⁵⁹ *Morris v. Travisono*, 310 F. Supp. 857, 857-58 (D.R.I. 1970).

¹⁶⁰ *Id.* at 857.

¹⁶¹ *Id.*

¹⁶² See *id.* at 862.

In 1972, the parties and the presiding judge formulated a consent decree, known as the *Morris* Rules.¹⁶³ This consent decree regulated the conditions of solitary confinement in Rhode Island prisons.¹⁶⁴ Most notably, the *Morris* Rules created an A-D classification system of discipline to guide the placement of prisoners and to provide greater protection for inmates.¹⁶⁵ Class A is the general population unit, and Class D is the strictest solitary confinement unit with little to no privileges.¹⁶⁶ Class B takes away some privileges, such as TV, and limits time in the yard.¹⁶⁷ Class C functions similarly to solitary confinement, like Class D, except inmates are allowed an hour of outside cell time per day.¹⁶⁸ The consent decree required that all inmates sentenced to more than one year of imprisonment receive psychological evaluations and individualized rehabilitation recommendations before being placed in a classification.¹⁶⁹

The goal of these requirements was to urge the “development and administration of an integrated and realistic program of treatment for the individual” and to prohibit the arbitrary use of solitary confinement.¹⁷⁰ Regardless of the consent decree, Rhode Island prisons often chose not to implement these rules.¹⁷¹ As a result, the litigation series continued throughout the 1970s, and in 1980, the court upheld the *Morris* Rules as a guideline that RIDOC *must* enforce.¹⁷² The judge also acknowledged being “troubled by the constitutionality of relegating a person to segregated confinement for over seven years” because of the “severe psychological injury” that isolation causes.¹⁷³ Despite this acknowledgment, the judge was “not prepared to hold such extended segregated confinement unconstitutional *per se*” because solitary confinement “can be a useful and necessary mechanism in maintaining peace and order.”¹⁷⁴

¹⁶³ See *Morris v. Travisono*, 499 F. Supp. 149, 152 (D.R.I. 1980).

¹⁶⁴ See *Morris*, 310 F. Supp. at 863-64.

¹⁶⁵ See *id.* at 868-71.

¹⁶⁶ See *id.* at 867-68, 870.

¹⁶⁷ See *id.* at 868-70.

¹⁶⁸ See *Morris*, 499 F. Supp. at 165-66.

¹⁶⁹ *Morris v. Travisono*, 310 F. Supp. 857, 866 (D.R.I. 1970).

¹⁷⁰ See *id.* at 865.

¹⁷¹ See *Morris v. Travisono*, 499 F. Supp. 149, 157-58 (D.R.I. 1980).

¹⁷² See *id.* at 152.

¹⁷³ *Id.* at 160.

¹⁷⁴ *Id.*

In 1995, RIDOC began changing the *Morris* Rules without consulting the court.¹⁷⁵ Most notably, RIDOC eliminated a thirty-day limitation on disciplinary segregation and removed the requirement that a three-person panel approve the placement that had been introduced in the early 1990s.¹⁷⁶ The *Morris* class action continued, and in 2019, Richard Paiva became the action's class representative.¹⁷⁷

In 2020, the *Paiva* class brought suit against RIDOC, claiming that the unilateral changes made to the *Morris* Rules violated the consent decree issued in 1972 and requesting that the rules be reinstated.¹⁷⁸ The class also sought damages for its class representative, who had been held in disciplinary segregation for more than thirty days and whose appeal was heard by one prison official, rather than a three-person panel.¹⁷⁹ The court ruled that RIDOC did not have the authority to change the *Morris* Rules without court approval and reinforced that the original rules remain "unaltered in full force and effect."¹⁸⁰ The court declined to grant damages, however, because the original consent decree contained ambiguity as to whether RIDOC could alter the *Morris* Rules without permission.¹⁸¹

The litigation series continued after the 2020 *Paiva* case, but in 2023, RIDOC fully reinstated the rule limiting disciplinary segregation to thirty days.¹⁸² RIDOC also provided more guidelines regarding the step-down units of disciplinary confinement, including mandating mental health screenings¹⁸³ and affording inmates the opportunity to appear at a hearing to dispute their segregation status.¹⁸⁴ Although the court and RIDOC have struggled to work together, the recent

¹⁷⁵ See *Paiva v. R.I. Dep't of Corr.*, 498 F. Supp. 3d 277, 283 (D.R.I. 2020).

¹⁷⁶ *Id.* The latter requirement was not included in the original *Morris* Rules but was introduced after subsequent litigation in the early 1990s.

¹⁷⁷ See *id.* at 279 n.1, 280.

¹⁷⁸ See *id.* at 283.

¹⁷⁹ *Id.* at 279.

¹⁸⁰ *Id.* at 287.

¹⁸¹ See *Paiva v. R.I. Dep't of Corr.*, 498 F. Supp. 3d 277, 287 (D.R.I. 2020).

¹⁸² Uprise RI Staff, *Major Overhaul in Rhode Island's Solitary Confinement Policy*, UPRISE RHODE ISLAND (July 21, 2023, at 2:32 PM), <https://upriseri.com/major-overhaul-in-rhode-islands-solitary-confinement-policy>.

¹⁸³ See *id.*

¹⁸⁴ See Douglas Ankney, *U.S. District Court Says Rhode Island Department of Corrections Violated "Morris Rules"*, PRISON LEGAL NEWS (Aug. 1, 2020), <https://www.prisonlegalnews.org/news/2020/aug/1/us-district-court-says-rhode-island-department-corrections-violated-morris-rules/>.

upholding and implementation of the *Morris* Rules serve as a positive step towards limiting disciplinary confinement in Rhode Island.

B. *Limitation Through the Legislature: Nebraska*

Nebraska is the only state that has passed a bill expressly prohibiting solitary confinement—except that the legislation did not eradicate the practice of isolation, it merely changed the definition of solitary confinement.¹⁸⁵ Nebraska’s legislative approach resulted in loopholes, permitting prisons to maintain the practice of solitary confinement under a different name: “restrictive housing.”¹⁸⁶ Nebraska Statute 83-4,114(3) provides that “no person shall be placed in solitary confinement.”¹⁸⁷ At first glance, this bold legislative proclamation seems to result in the strongest limitation on solitary confinement by any state;¹⁸⁸ however, Statute 83-173.03 allows for restrictive housing.¹⁸⁹ Statute 83-170(12) defines restrictive housing as “confinement that provide[s] limited contact with other offenders, strictly controlled movement out-of-cell, and out-of-cell time of less than twenty-four hours per week.”¹⁹⁰ The bill does not require that officials grant prisoners in restrictive housing a minimum outside cell time.¹⁹¹ The Nebraska legislature defines solitary confinement as “confinement of an inmate in an individual cell having solid, soundproof doors and which deprives the inmate of all visual and auditory contact with other persons.”¹⁹² Essentially, under these definitions, Nebraska bans the practice of sensory deprivation, but does not ban or limit the isolation of prisoners.¹⁹³

Nebraska’s Restrictive Housing Unit (“RHU”)¹⁹⁴ functions as an isolation unit.¹⁹⁵ Reporting on the RHUs reveals that in 2023, 1,303 prisoners were placed in restrictive housing, and the average stay was

¹⁸⁵ Compare NEB. REV. STAT. § 83-4,114(3) (2012) with NEB. REV. STAT. § 83-173.03(3) (2020).

¹⁸⁶ See NEB. REV. STAT. § 83-173.03 (2020).

¹⁸⁷ NEB. REV. STAT. § 83-4,114(3) (2012).

¹⁸⁸ *Supra* Figure 1.

¹⁸⁹ See NEB. REV. STAT. § 83-173.03 (2020).

¹⁹⁰ NEB. REV. STAT. § 83-170(12) (2024).

¹⁹¹ See NEB. REV. STAT. § 83-173.03 (2020).

¹⁹² NEB. REV. STAT. § 83-170(13) (2024).

¹⁹³ See *id.*; NEB. REV. STAT. § 83-173.03 (2020).

¹⁹⁴ See NEB. REV. STAT. § 83-173.03(3) (2020) (prohibiting mentally vulnerable populations from being placed in the RHU).

¹⁹⁵ See Jason Witmer, *Stopping Solitary is Part of the Puzzle*, ACLU NEB. (June 14, 2024), <https://www.aclunebraska.org/en/news/stopping-solitary-part-puzzle>.

about a month.¹⁹⁶ As a result of the lack of limitations on the RHUs, some prisoners have remained there for over a year.¹⁹⁷ Public outcry in 2023 led to the introduction of Bill 557, which would limit the time spent in RHUs to fifteen days.¹⁹⁸ Bill 557 would also change the definition of solitary confinement as provided in 83-170(13) to twenty-two hours per day in a cell with no human contact and reduced or no natural light.¹⁹⁹ This new definition would force the Nebraska Department of Corrections to restructure the RHUs in a way that does not merely imitate solitary confinement under a different name.²⁰⁰ Bill 557 has been indefinitely postponed since April 2024, and there have been no subsequent developments at the time of writing this Article.²⁰¹

C. *Limitation Through the Department of Corrections: North Dakota*

Since 2016, the North Dakota Department of Corrections (“NDDOC”) has drastically reduced the use of solitary confinement in its prisons.²⁰² By 2020, the use of solitary confinement decreased by 74% in two of North Dakota’s largest prisons.²⁰³ Overall, prisons across the state reduced their use of solitary confinement by 67%.²⁰⁴ NDDOC’s Director, Leann Bertsch, implemented these changes.²⁰⁵ Bertsch was inspired to reduce solitary confinement rates in her state when she witnessed the approach to rehabilitative corrections taken by Norway, which boasts some of the lowest incarceration and recidivism rates in the world.²⁰⁶ Bertsch noticed how Norway successfully balanced a sense of normalcy and security in its prison systems, and she realized the

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ L.B. 557, 108th Leg., 1st Reg. Sess. (Neb. 2023); *Legislature Debating Bill that Limits Solitary Confinement in Nebraska’s Prisons*, KETV ABC (OMAHA) (Jan. 27, 2023), <https://www.ketv.com/article/lincoln-legislature-debating-bill-that-limits-solitary-confinement-in-nebraskas-prisons/42692934>.

¹⁹⁹ See *Legislature Debating Bill that Limits Solitary Confinement in Nebraska’s Prisons*, *supra* note 198; see also L.B. 557, 108th Leg., 1st Reg. Sess. (2023).

²⁰⁰ See L.B. 557, 108th Leg., 1st Reg. Sess. (2023); see also NEB. STAT. § 83-170(12)-(13) (2024).

²⁰¹ L.B. 557, 108th Leg., 1st Reg. Sess. (Neb. 2023).

²⁰² See Bertsch, *supra* note 141, at 331.

²⁰³ David H. Cloud, *One State’s Push to End Solitary Confinement*, PUBLIC HEALTH POST (Feb. 17, 2022), <https://publichealthpost.org/health-equity/solitary-confinement>.

²⁰⁴ Bertsch, *supra* note 141.

²⁰⁵ See *id.* at 325, 327.

²⁰⁶ *Id.* at 326.

practice of solitary confinement in North Dakota did not adequately address either of these principles.²⁰⁷ Bertsch noted that placement in solitary confinement directly opposes a sense of normalcy and that the security interests solitary confinement purports to uphold are minimal, if any.²⁰⁸

In 2015, NDDOC implemented a restrictive housing reform project led by Bertsch.²⁰⁹ The project had three goals: reduce the number of prisoners in solitary confinement, improve relations between prison staff and prisoners, and better assist prisoners in transitioning from restrictive housing to the general prison population and, ultimately, back to society.²¹⁰ The department summed up these goals in three words: Separate, Assess, Equip.²¹¹

First, NDDOC worked to distinguish between dangerous conduct that should result in solitary confinement and non-dangerous conduct that should result in other behavioral sanctions.²¹² Originally, almost any behavioral infraction resulted in solitary confinement.²¹³ Under the new approach, prisoners can be put in solitary confinement only if they commit one of the “top 10” most harmful types of misconduct while in prison: assault, threatening another person, sexual assault, possession of a weapon, attempted murder, murder, escape, arson, taking hostages, or trafficking contraband.²¹⁴

Second, NDDOC implemented different types of screening and assessments for prisoners put in solitary confinement.²¹⁵ Implementing these assessments resulted in lower numbers of prisoners placed in solitary confinement and reduced the time that prisoners spend there.²¹⁶ Under NDDOC’s new system, if a prison captain places a prisoner in solitary confinement, the unit manager and the chief of security must

²⁰⁷ *See id.* at 326-27.

²⁰⁸ *See id.* at 326, 332.

²⁰⁹ *Id.* at 326.

²¹⁰ Bertsch, *supra* note 141, at 327-28.

²¹¹ *Id.* at 328.

²¹² *See id.*

²¹³ *See id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *See* Cheryl Corley, *North Dakota Prison Officials Think Outside the Box to Revamp Solitary Confinement*, NPR (July 31, 2018, at 5:01 AM), <https://www.npr.org/2018/07/31/630602624/north-dakota-prison-officials-think-outside-the-box-to-revamp-solitary-confinement>.

review the decision within twenty-four hours.²¹⁷ The unit manager and the chief of security will either uphold the decision or order the prisoner to be returned to their original unit.²¹⁸ If the decision is upheld, a mental health professional will conduct a mental health screening as soon as possible.²¹⁹ If mental health issues are present, the prisoner will receive treatment according to their needs.²²⁰ A prisoner may be referred to crisis services, receive a follow-up mental health exam, or, if the issue is severe, the prisoner may be moved to a unit for special assistance.²²¹ If the prisoner remains in solitary confinement, they must receive weekly status checks.²²²

The final steps in NDDOC's plan aim to strengthen relations between prisoners and the prison staff and to ease the transition from solitary confinement to other units or to the outside world.²²³ Whereas most solitary confinement units exist in isolated silence, the final phase of NDDOC's plan encourages one conversation per shift between prison staff and prisoners.²²⁴ Bertsch notes that as conversations became more consistent, the prison culture shifted, and disruptive behaviors decreased.²²⁵ Then, officers began receiving training on how to teach cognitive and behavioral skills to prisoners through these conversations.²²⁶

The third phase also requires that prisoners in solitary confinement have three hours of out-of-cell time per day, whereas before 2015, prisoners were granted only one hour.²²⁷ In addition to these three hours, a group recreational activity must be planned each weekend to promote socialization among segregated prisoners.²²⁸ The final part of this phase requires each prisoner in solitary confinement to complete an individualized success plan.²²⁹ The success plan is created through

²¹⁷ Bertsch, *supra* note 141, at 328.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *See id.*

²²¹ *See id.*

²²² *See id.* at 329.

²²³ *See* Bertsch, *supra* note 141, at 327, 329.

²²⁴ *See id.* at 329.

²²⁵ *Id.*

²²⁶ *See id.*

²²⁷ *Id.* at 330.

²²⁸ *See id.*

²²⁹ *See* Bertsch, *supra* note 141, at 330.

therapy, and it focuses on transitioning the prisoner to a step-down unit where they can work on implementing positive life changes, correcting behavioral issues, and strengthening social skills.²³⁰

NDDOC's implementation of this plan drastically reduced the use of solitary confinement in North Dakota's prisons.²³¹ Since 2015, NDDOC has generally kept under thirty prisoners in solitary confinement.²³² Additionally, the average time a prisoner remains in solitary confinement is now between thirty and sixty days, which is significantly shorter than previously.²³³ As the reforms stabilized over the years, the unit also reported fewer instances of fighting and misconduct.²³⁴ Despite these leaps towards reducing solitary confinement and its negative effects, North Dakota has not outlawed the practice.²³⁵

D. *Limitation Through Collaboration: New York*

New York has taken a collaborative approach to limiting solitary confinement, inspired by a 2016 settlement agreement.²³⁶ Although case law helped develop New York's stance on solitary confinement, the recent Humane Alternatives to Long-Term Solitary Confinement (HALT) Act has been instrumental in guiding the New York Department of Corrections and altering New York's solitary confinement practices.²³⁷ This section discusses the primary case that motivated the state's current solitary confinement legislation and correctional policies.

1. *Peoples v. Annucci*

New York's fight against solitary confinement began in 2011 when a group of prisoners held in segregation facilities brought a class action against the Commissioner of the New York State Department

²³⁰ See *id.*

²³¹ See *id.* at 331.

²³² *Id.*

²³³ See *id.*

²³⁴ See *id.* at 332.

²³⁵ See David H. Cloud, *One State's Push to End Solitary Confinement*, PUBLIC HEALTH POST (Feb. 17, 2022), <https://publichealthpost.org/health-equity/solitary-confinement>.

²³⁶ See *Peoples v. Annucci*, 180 F. Supp. 3d 294, 297 (S.D.N.Y. 2016).

²³⁷ COMM'N CORR., 2023 ANNUAL REPORT: HUMANE ALTERNATIVES TO LONG-TERM SOLITARY CONFINEMENT (HALT) ACT 1 (2023).

of Corrections and Community Supervision.²³⁸ The 2016 settlement agreement in *Peoples v. Annucci* led the state to cap the amount of time prisoners spent in solitary confinement, redetermine which offenses could result in segregation, and create alternative programs for those with mental disabilities.²³⁹ Despite the settlement agreement, prisons unevenly enforced the guidelines, prompting the New York Civil Liberties Union (“NYCLU”) to intervene.²⁴⁰ The NYCLU discovered that although the number of prisoners placed in segregated units decreased by 2,400, a newly created unit essentially functioned as solitary confinement.²⁴¹

The New York Department of Corrections referred to the new unit as “keeplock,” and housed about 3,100 prisoners in the unit.²⁴² Keeplock holds prisoners in their cells without putting them in specifically segregated units.²⁴³ Most of the time, prisoners sanctioned to keeplock are kept in the general population facility, but they are locked in their cells for up to twenty-three hours a day.²⁴⁴ Prisoners in keeplock have additional restrictions not imposed on other prisoners.²⁴⁵ The keeplock unit was designed after the *Annucci* settlement to be less restrictive than solitary confinement, but this form of imprisonment became a mirror image of isolation.²⁴⁶ To address the failed enforcement of the settlement agreement, the NYCLU appealed to the legislative branch by endorsing the HALT Act.²⁴⁷

2. The HALT Act

In March of 2021, New York legislators signed the HALT Act into law.²⁴⁸ This legislation imposed strict solitary confinement regulations, including limiting the time an individual spends in isolation to fifteen

²³⁸ See *Annucci*, 180 F. Supp. 3d at 296; Resnik et al., *supra* note 41, at 104.

²³⁹ See *Annucci*, 180 F. Supp. 3d at 301-02; Resnik et al., *supra* note 41, at 103.

²⁴⁰ See Resnik et al., *supra* note 41, at 103-04.

²⁴¹ *Id.* at 104.

²⁴² *Id.*

²⁴³ N.Y. C.L. UNION (NYCLU), TRAPPED INSIDE: THE PAST, PRESENT, FUTURE OF SOLITARY CONFINEMENT IN NEW YORK 8 (2019).

²⁴⁴ See *id.*

²⁴⁵ See *id.*

²⁴⁶ Resnik et al., *supra* note 41, at 104; see also NYCLU, *supra* note 243, at 8.

²⁴⁷ See Resnik et al., *supra* note 41, at 104; see also NYCLU, *supra* note 243, at 10.

²⁴⁸ See COMM’N CORR., *supra* note 237, at 1.

consecutive days, or twenty total days within a sixty-day period.²⁴⁹ The HALT Act additionally prohibits the isolation of pregnant individuals, prisoners with physical or mental disabilities, and those who are under the age of 21 or above the age of 55.²⁵⁰ The HALT Act also requires that prison officials grant prisoners at least four hours of activity outside of the cell per day, which means this type of isolation no longer falls within the recognized definition of solitary confinement.²⁵¹

In addition, the HALT Act aims to hold prison facilities accountable by requiring them to report isolation practices to the New York Commission of Correction and the public.²⁵² Each month, correctional authorities are required to digitally publish the total number of people in isolation units.²⁵³ New York correctional facilities must also compile this data to make semi-annual and annual reports regarding these numbers available to the public.²⁵⁴ Then, each correctional facility must use this compiled data to submit a yearly report to the Commission.²⁵⁵ The Commission reviews these reports and reinforces guidelines to urge compliance with the HALT Act.²⁵⁶

The HALT Act also creates a new unit for prisoners who reach the maximum time in solitary confinement: the residential rehabilitation unit (RRU).²⁵⁷ RRUs are “separate housing unit[s] used for therapy, treatment, and rehabilitative programming” for prisoners who reach the fifteen-day maximum in isolation but are not fit for the general population unit.²⁵⁸ RRUs grant prisoners at least six hours of out-of-cell time per day.²⁵⁹ The unit offers programs rooted in “promoting personal development, addressing underlying causes of problematic behavior . . . and helping prepare for discharge from the unit and to the community.”²⁶⁰ The RRUs’ officers review each prisoner’s status

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*; see also CASELLA ET AL., *supra* note 8, at 3 (stating solitary confinement is 22+ hours a day of isolation).

²⁵² See COMM’N CORR., *supra* note 237, at 2.

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 4.

²⁵⁷ *Id.* at 3.

²⁵⁸ COMM’N CORR., *supra* note 237, at 3.

²⁵⁹ N.Y. CORRS. & CMTY. SUPERVISION, RESIDENTIAL REHABILITATION UNIT PROGRAM MANUAL 1 (2023).

²⁶⁰ *Id.*

in the unit every week for the first two months, and once a month thereafter, to customize the individual's treatment plan.²⁶¹ These individualized plans allow prison officials to determine if continued RRU placement is appropriate or if the prisoner should be returned to the general population.²⁶² If a prisoner is not discharged from the RRU after 60 days, the RRU staff must provide a specific reason for continued placement and a detailed treatment plan.²⁶³ The maximum time a prisoner may be put in the RRU is one year, unless the prisoner commits a disciplinary infraction while in the unit, which may result in prolonged placement.²⁶⁴ Ultimately, New York's approach to solitary confinement through the *Annucci* settlement, the HALT Act, and the Commission of Correction radically changed the state's isolation policies.

To summarize the Background, *Hutto v. Finney*, from 1978, marks the last time the Supreme Court specifically ruled on the constitutionality of solitary confinement conditions, even though Eighth Amendment caselaw indicates that solitary confinement without limitation should be reevaluated.²⁶⁵ The Eighth Amendment requires prisoners to be free from cruel and unusual punishment.²⁶⁶ When evaluating prison conditions, courts analyze two prongs: the evolving standard of decency and the culpability of prison officials.²⁶⁷ First, courts examine the evolving standard of decency to determine the basic necessities of prisoners and identify serious risks of harm.²⁶⁸ The definitions of those necessities and risks have changed since the creation of the Eighth Amendment, so courts look to legislative trends and public outcry to determine how the standard of decency evolves.²⁶⁹ Second, courts determine if prison officials possessed the requisite culpability for an Eighth Amendment violation.²⁷⁰ For the solitary confinement analysis

²⁶¹ See *id.* at 3-4.

²⁶² *Id.* at 4.

²⁶³ *Id.*

²⁶⁴ See *id.* at 6-7.

²⁶⁵ See *Hutto v. Finney*, 437 U.S. 678, 686-88 (1978); discussion *supra* Section II.A.

²⁶⁶ See U.S. CONST. amend. VIII.

²⁶⁷ See discussion *supra* Section II.B.1.

²⁶⁸ See discussion *supra* Section II.B.1.

²⁶⁹ See discussion *supra* Section II.B.1.

²⁷⁰ See discussion *supra* Section II.B.1.

in this Article, the requisite state of mind is deliberate indifference to the interests and safety of prisoners.²⁷¹

Furthermore, despite federal inaction, many states address solitary confinement through their court systems, legislatures, departments of corrections, or a mix of these entities.²⁷² Rhode Island is the only state to take a completely court-based approach to limiting solitary confinement, but it struggles with the implementation of caselaw into prison systems.²⁷³ Nebraska, on the other hand, takes a wholly legislative approach in creating Restricting Housing Units; however, these units fail to adequately protect prisoners placed in isolation.²⁷⁴ North Dakota relies on its Department of Corrections to implement limitations on solitary confinement, resulting in drastic decreases in the use of isolation.²⁷⁵ Despite the approach taken by NDDOC, North Dakota's state courts or legislature have not passed laws limiting the practice.²⁷⁶ Finally, New York relies on a collaboration between court settlements, the HALT Act, and the changes implemented by the Department of Corrections to limit solitary confinement.²⁷⁷

ANALYSIS

This section discusses two approaches to limiting solitary confinement: through the Supreme Court and through continued state action. Eighth Amendment case law, and the extensive data collected on the effects correlated with isolation, support a finding that solitary confinement of more than fifteen days violates a prisoner's right to be free from cruel and unusual punishment.²⁷⁸ Until the Supreme Court makes this specific finding, however, the states will need to decide what limitations to impose on solitary confinement. Although many states have recognized the harmful impact of unconstrained solitary confinement,²⁷⁹ implementing policies to limit the practice

²⁷¹ See discussion *supra* Section II.B.2.

²⁷² *Supra* Figure 1.

²⁷³ See discussion *supra* Section III.A.

²⁷⁴ See discussion *supra* Section III.B.

²⁷⁵ See discussion *supra* Section III.C.

²⁷⁶ See discussion *supra* Section III.C.

²⁷⁷ See discussion *supra* Section III.D.

²⁷⁸ See Haney, *supra* note 24, at 295-97; Wilson v. Seiter, 501 U.S. 294, 301-02 (1991); Atkins v. Virginia, 536 U.S. 304, 312 (2002).

²⁷⁹ See *supra* Figure 1.

has been difficult without a joint effort from the courts, legislatures, and departments of corrections. Other states neglect to address the issue altogether,²⁸⁰ which underscores why the Supreme Court needs to find that unrestrained solitary confinement violates the Eighth Amendment. The following section discusses how solitary confinement without constraints violates the Eighth Amendment and suggests that the Supreme Court enforce clearer guidelines to regulate segregation units. The next section discusses the need for state entities, like the court system, legislatures, and departments of corrections, to work together in the face of federal silence to uniformly create and enforce limitations on solitary confinement practices.

I. THE UNCONSTITUTIONALITY OF SOLITARY CONFINEMENT

Solitary confinement exceeding fifteen days is cruel and unusual punishment under the Eighth Amendment and should be ruled unconstitutional because such isolation deprives individuals of the basic necessity of human interaction and puts isolated prisoners at a high risk of mental and physical harm. Prison officials directly observe the behavior of prisoners in isolation,²⁸¹ which creates a subjective awareness of the harm correlated with solitary confinement. Even more, a plethora of easily accessible scientific data reveals a correlation between solitary confinement and decreased mental and physical health.²⁸² When a prison official places an individual in solitary confinement for more than fifteen days and disregards the risk shown by science and experience, an Eighth Amendment violation occurs under the deliberate indifference standard.

A. *Solitary Confinement Deprives Prisoners of a Basic Necessity*

As modern science has evolved, the correlation between isolation and declining mental and physical health has been widely recognized among scientists and scholars.²⁸³ A phenomenon known as “social death” occurs when prisoners in long-term isolation lose their sense of

²⁸⁰ See *supra* Figure 1.

²⁸¹ See Haney & Lynch, *supra* note 14, at 513-14.

²⁸² See Haney, *supra* note 24, at 290-91; see generally Haney & Lynch, *supra* note 14 (providing case studies on the mental and physical effects of isolation).

²⁸³ See Haney & Lynch, *supra* note 14.

identity.²⁸⁴ Social death causes prisoners to lose the ability to adequately communicate with others and degrades the faculties necessary to adapt to social settings, even after release.²⁸⁵ The social death caused by unfettered solitary confinement indicates the necessity of human interaction.²⁸⁶ Without human interaction, segregated prisoners often struggle with intense declines in mental health.²⁸⁷ Therefore, interaction with other people should be considered a basic necessity in prisons.

Even more, adequate mental health care should be viewed as a basic necessity for prisoners placed in isolation. In 1976, the Supreme Court acknowledged that withholding medical care from prisoners with severe medical conditions deprived prisoners of a necessity.²⁸⁸ As research on mental health has expanded, and the understanding of the correlation between mental and physical health has been more widely recognized, the Court should begin to view mental health in the same light as physical health.²⁸⁹

Although the Supreme Court acknowledges that prisoners are not guaranteed freedom from mental health decline, the strong correlation between severe, persistent mental health issues and solitary confinement indicates that adequate mental health care in these units is necessary to protect prisoners.²⁹⁰ Declines in a prisoner's mental health while in isolation units often result in serious physical symptoms such as heart palpitations, tremors, decreases in immune health, vision problems, and weight fluctuations.²⁹¹ Sometimes this decline in mental health can be a matter of life or death.²⁹² Segregated prisoners have a higher likelihood of premature death due to medical complications than those in the general prison population.²⁹³ Prisoners placed in solitary confinement are also more likely than those in the general prison population to attempt or

²⁸⁴ Haney, *supra* note 43, at 140.

²⁸⁵ *See id.*

²⁸⁶ *See id.*

²⁸⁷ *See id.*

²⁸⁸ *See* Estelle v. Gamble, 429 U.S. 97, 107-08 (1976).

²⁸⁹ *See* Haney, *supra* note 24, at 290.

²⁹⁰ *See* Rhodes v. Chapman, 452 U.S. 337, 349 (1981) ("The Constitution does not mandate comfortable prisons...[where] persons convicted of serious crimes [are] free of discomfort.").

²⁹¹ Haney, *supra* note 24, at 290-91.

²⁹² *See id.*

²⁹³ *See* Resnik et al., *supra* note 41, at 90-91.

commit suicide.²⁹⁴ For example, before the enactment of the HALT Act, a study of New York prisons revealed that 40% of isolated prisoners committed acts of self-harm while in segregation.²⁹⁵ To combat these severe mental and physical health issues, adequate mental health care is needed in segregation units. Ultimately, the seriousness of mental issues stemming from isolation indicates that human interaction and access to mental health care should be among the basic necessities guaranteed to inmates in segregation units.

B. *Placing Prisoners in Solitary Confinement for More Than Fifteen Days Poses a Serious Risk of Harm*

The legal approach to solitary confinement must catch up with the evolving standard of decency because the intense mental and physical effects correlated with solitary confinement pose a serious risk of harm to isolated prisoners. The negative effects associated with solitary confinement have been observed by courts since the 1800s, and recent scientific data further support these observations.²⁹⁶ The Supreme Court warned of the potential unconstitutionality of allowing prisoners to endure intense insanity in solitary confinement in 1890,²⁹⁷ even though the standard of decency was much lower than it is now. The standard for decent imprisonment practices has clearly evolved over the past 140 years,²⁹⁸ yet the legal view of solitary confinement has largely remained stagnant at the federal level.

The forty states that have imposed limitations on solitary confinement amid federal inaction show the evolving standard of decency.²⁹⁹ Thirty of these states have imposed limitations through their legislatures.³⁰⁰ As stated in *Atkins*, trends in state legislation indicate

²⁹⁴ *Study Links Solitary Confinement to Increased Risk of Death After Release*, VERA INST. JUST. (Dec. 4, 2019), <https://www.vera.org/news/study-links-solitary-confinement-to-increased-risk-of-death-after-release>.

²⁹⁵ Resnik et al., *supra* note 41, at 90.

²⁹⁶ See generally Haney & Lynch, *supra* note 14 (summarizing empirical and autobiographical data to show a correlation between adverse mental and physical effects and solitary confinement).

²⁹⁷ See *In re Medley*, 134 U.S. 160, 168, 173 (1890).

²⁹⁸ See generally *supra* Figure 1 (showing recent state trends towards limiting solitary confinement practices).

²⁹⁹ See generally *supra* Figure 1 (showing the forty states that have imposed limitations on solitary confinement).

³⁰⁰ See generally *supra* Figure 1 (showing the thirty states that have imposed limitations on solitary confinement).

that the standard of decency is evolving, and in that case, legislative changes in thirty states were enough for the Court to re-evaluate the standard.³⁰¹ So too here: thirty states changing solitary confinement practices through their legislatures, and forty states placing limitations on the practice overall, is sufficient to show that the standard of decency has evolved.

The legislative trends across states are not the only indication that the standard of decency regarding solitary confinement practices is evolving. There has also been an increase in public outcry across the nation regarding the unfettered use of solitary confinement.³⁰² Additionally, experts and researchers have expressed concern about the practice of solitary confinement without limitation.³⁰³ These factors indicate that the standard of decency regarding solitary confinement practices should be re-evaluated by the Supreme Court—and soon.³⁰⁴

C. *The Deliberate Indifference of Prison Officials*

When the Court does take up this issue, it should find that when placing prisoners in solitary confinement, prison officials are deliberately indifferent to the deprivation and risk of harm that may occur. Placing prisoners in solitary confinement without any limitation or for prolonged periods demonstrates “more than an ordinary lack of due care for the prisoner[s’] interests or safety.”³⁰⁵ Finding deliberate indifference in this setting is straightforward because prison officials reasonably have sufficient awareness of the large amounts of scientific and social research, in addition to having personal observations and experiences working in segregation units and seeing the harm that isolation causes.

Despite the surplus of research correlating solitary confinement with serious declines in mental and physical health,³⁰⁶ some prison

³⁰¹ See *Atkins v. Virginia*, 536 U.S. 304, 310 (2002); *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989).

³⁰² See Abby Steckel, *Voters Oppose Extreme Isolation in U.S. Prisons*, DATA FOR PROGRESS (Aug. 12, 2021), <https://www.dataforprogress.org/blog/2021/8/12/voters-oppose-extreme-isolation-in-us-prisons> (“Although likely voters appear divided over whether solitary confinement should ever be used, they unambiguously support proposals to prohibit solitary in most situations . . . when presented with a specific proposal to end extreme isolation, a clear majority expressed support.”).

³⁰³ See Haney & Lynch, *supra* note 14, at 497-500.

³⁰⁴ See *supra* Figure 1.

³⁰⁵ See *Whitley v. Albers*, 475 U.S. 312, 319 (1986).

³⁰⁶ See Haney & Lynch, *supra* note 14; Resnik et al., *supra* note 41.

officials keep prisoners in solitary confinement for long stints or indefinitely. Even if a prison official could plausibly argue they are unaware of this research, it would be difficult to believe they do not see firsthand the harm correlated with isolation.³⁰⁷ Deliberately ignoring this harm satisfies the standard for an Eighth Amendment claim.³⁰⁸

Furthermore, prison officials' personal experiences in segregation units underscore their awareness of this harm.³⁰⁹ Prison officials working in segregation units have higher rates of mental illness, household violence, and poor health than those in the general population unit.³¹⁰ In the face of widespread research and prison officials' firsthand experience with solitary confinement, they demonstrate deliberate indifference to prisoners' needs and safety by continuing to administer solitary confinement without limitation.

D. *Proposed Guidelines to Adhere to the Eighth Amendment*

If the Supreme Court does not rule solitary confinement unconstitutional *per se*, then it should provide limitations on the practice to uphold prisoners' Eighth Amendment rights. First, the Supreme Court should implement a fifteen-day limit on solitary confinement to account for the correlation between mental health decline and being isolated for more than fifteen days. After a maximum isolation period of fifteen days, mental health programming should be provided to prisoners as they transition from solitary confinement to the general population unit. This programming will allow prisoners to better adjust to a different unit and will address any underlying mental illnesses.³¹¹ Prisoners with pre-existing mental health disorders should receive mental health programming throughout the isolation period, given the correlation between isolation and exacerbated mental decline.

Further, solitary confinement should be reserved for the most extreme cases, such as instances of violence that pose safety risks and result in the need for administrative segregation. Many states allow for indefinite disciplinary segregation based on non-violent and seemingly

³⁰⁷ See *Finley v. Huss*, 723 F. App'x 294, 298 (6th Cir. 2018) (indicating that a jury could find deliberate indifference when officers do not take a suicidal prisoner out of solitary confinement).

³⁰⁸ See *id.*

³⁰⁹ See KAYLA JAMES & ELENA VANKO, VERA. INST. JUST., THE IMPACTS OF SOLITARY CONFINEMENT 3-4 (2021).

³¹⁰ See *id.*

³¹¹ See N.Y. CORRS. & CMTY. SUPERVISION, *supra* note 259, at 1.

“small” rule violations—this practice should be narrowed to only the most egregious rule violations.³¹² For example, North Dakota provides a useful model by limiting isolation to when a prisoner violates one of the ten rules that most directly affect the safety of the prison.³¹³ By implementing solitary confinement only in response to these ten violations, North Dakota has drastically reduced its use of isolation.³¹⁴

These limitations should not disregard the legitimate safety needs of prisons. At times, it may be necessary to place prisoners in solitary confinement to uphold the safety of the prison staff, other prisoners, and the prisoner himself. Despite these safety concerns, the decision to place a prisoner in solitary confinement should not be made without review.³¹⁵ In these instances, a panel of mental health experts and prison officials should review the situation and make decisions to uphold the constitutional rights of the prisoner and the safety needs of the prison. If the panel deems it necessary to place the prisoner in solitary confinement, mental health treatment should be provided to the prisoner to address the harmful effects associated with isolation.

Lessons from states trying to place limitations on solitary confinement serve as a reminder that these guidelines must be clearly explained and properly enforced to be effective. For example, the clearly communicated guidelines implemented in North Dakota led to radical decreases in the use of solitary confinement.³¹⁶ By contrast, conflicting guidelines and miscommunications in Rhode Island have made limiting the use of solitary confinement difficult.³¹⁷ A ruling from the Supreme Court would help states create uniform, enforceable guidelines. Even if the Court found extended solitary confinement sentences to be unconstitutional and created guidelines to stay within the bounds of the Eighth Amendment, the states would still have to collaborate within themselves to properly comply with the ruling.

³¹² See Bertsch, *supra* note 141, at 327-28.

³¹³ See *id.* at 328.

³¹⁴ See *id.* at 329.

³¹⁵ See *id.*

³¹⁶ See *id.*

³¹⁷ See generally *Morris v. Travisono*, 310 F. Supp. 857 (D.R.I. 1970) (forming the basis for the consent decree that imposed guidelines for solitary confinement); *Paiva v. R.I. Dep't of Corr.*, 498 F. Supp. 3d 277, 287 (D.R.I. 2020) (showing lack of adherence to the guidelines 50 years after *Travisono*).

II. STATE ACTION: THE NEED FOR COLLABORATION

If the federal law remains stagnant and the Supreme Court does not place limitations on solitary confinement, states will continue to address solitary confinement on their own. As illustrated by the case studies above, states have struggled to adequately and uniformly address solitary confinement without federal guidance. The states that have the most limitations on solitary confinement typically have achieved these limitations through a collaboration between their court system,³¹⁸ the legislature,³¹⁹ and their department of corrections.³²⁰ Without the assistance of each of these entities, the regulation of solitary confinement at the state level is often inconsistent and inadequate, which further reveals the need for federal action.

A. *State Courts*

Without the Supreme Court ruling solitary confinement unconstitutional, state courts struggle to enforce guidelines on the practice. The absence of clear guidelines and the general lack of enforcement by courts often allows departments of corrections to find loopholes in court rulings and continue implementing solitary confinement practices with little to no limitation. State courts sometimes address these loopholes, but court action is a slow process, and the cycle of inconsistent implementation of guidelines that enable solitary confinement often repeats.³²¹ A ruling by the Supreme Court may not eradicate all loopholes and enforcement issues, but it would allow the states to have more uniformity in how they address solitary confinement practices. This uniformity would likely offer more protection to prisoners in solitary confinement than the states can offer now.

The courts in Rhode Island illustrate the repetitive cycle of inadequate enforcement power.³²² The issue of solitary confinement

³¹⁸ New York serves as an example of effective limitations put in place by collaboration between state entities. *See, e.g.,* Peoples v. Annucci, 180 F. Supp. 3d 294, 297, 308 (S.D.N.Y. 2016).

³¹⁹ *See, e.g.,* S.B. 2836, 2021-22 Leg., Reg. Sess. (N.Y. 2021).

³²⁰ *See, e.g.,* COMM’N CORR., *supra* note 237, at 1, 4.

³²¹ *See, e.g.,* discussion *supra* Section III.A.

³²² *See generally* Morris v. Travisono, 310 F. Supp. 857 (D.R.I. 1970) (forming the basis for the consent decree that imposed guidelines for solitary confinement): *see also* Paiva v. R.I. Dep’t of Corr., 498 F. Supp. 3d 277, 287 (D.R.I. 2020) (showing lack of adherence to the guidelines 50 years after *Travisono*).

became prevalent in Rhode Island in the 1970s through the *Morris* litigation.³²³ More than fifty years later, the rules established in 1972 remain poorly implemented, and the issue is still hotly debated.³²⁴ The courts, on their own, have struggled to enforce the *Morris* rules because RIDOC has found various loopholes in the original settlement agreement.³²⁵ In some instances, RIDOC has simply not abided by the *Morris* agreement because the courts are not directly overseeing their actions.³²⁶ A prisoner may, of course, bring a claim to the courts regarding a violation of the *Morris* Rules. This process is lengthy and costly, however, as evidenced by more than fifty years of this issue being litigated in Rhode Island courts.³²⁷ As the Rhode Island courts try to clarify the *Morris* Rules, RIDOC continues to work around the settlement agreements, resulting in a repetitive cycle of litigation.³²⁸

B. State Legislatures

State legislatures struggle to address issues like solitary confinement on their own because, many times, the legislature only facially addresses solitary confinement by putting the definition under a different term.³²⁹ For example, Nebraska's legislature bans solitary confinement but allows restrictive housing.³³⁰ Nebraska defines restrictive housing as having less than twenty-four hours of out-of-cell time per week, but does

³²³ See generally *Morris*, 310 F. Supp. 857 (underpinning 50 years of litigation regarding conditions on solitary confinement in Rhode Island).

³²⁴ See generally Uprise RI Staff, *supra* note 182 (stating that “The changes are not without their critics,” and “It is crucial that [the policies] are implemented effectively and that their impact is closely monitored.”).

³²⁵ See *Paiva*, 498 F. Supp. at 281-84, 287 (explaining the lack of compliance with the *Morris* Rules since its creation).

³²⁶ For example, in 1991, RIDOC attempted to “disinherit the obligations which [the] *Morris* Rules impose by . . . claiming that the court created the *Morris* Rules by a sort of immaculate conception.” See *Paiva*, 498 F. Supp. at 282. The court rejected RIDOC’s argument and reinforced that the *Morris* Rules could not be modified without application to a federal judge. See *id.* at 282-83.

³²⁷ See *Paiva*, 498 F. Supp. at 281-83 (explaining the long procedural history of the *Morris-Paiva* class).

³²⁸ See Yael Sarig, *Advocates Demand Accountability, Solitary Confinement Reform After Seven Deaths in R.I. Prisons this Year*, BROWN DAILY HERALD (Oct. 9, 2023), <https://www.browndailyherald.com/article/2023/10/advocates-demand-accountability-solitary-confinement-reform-after-seven-deaths-in-ri-prisons-this-year>.

³²⁹ See NEB. REV. STAT. § 83-4,114(3)-(4) (2012); NEB. REV. STAT. § 83.173.03 (2019).

³³⁰ Compare NEB. REV. STAT. § 83-4,114(3) (2012) with NEB. REV. STAT. § 83.173.03 (2019).

not require a minimum out-of-cell time.³³¹ The definition of solitary confinement that the Nebraska legislature presents does not define the punishment in terms of time, but rather, addresses complete isolation and sensory deprivation.³³² As a result, prisons throughout the state can choose to still implement solitary confinement under the recognized definition—being in a cell for at least twenty-two hours a day.³³³ The Nebraska bill addresses solitary confinement on its face, but does not provide deeper protections for inmates, resulting in minimal changes in prisons.³³⁴ Although Nebraska has introduced legislation to fill some of these loopholes and to add more protections to prisoners, the indefinite postponement of Bill 557 demonstrates the difficulty the legislature faces in addressing solitary confinement policies on its own.³³⁵

Additionally, legislatures across the country struggle to enforce enacted policies because they do not have direct, daily control of the prisons like correctional departments do. In Nebraska, the legislature prohibits putting vulnerable populations, including those with serious mental illness, in solitary confinement.³³⁶ Despite this prohibition, in June 2024, about 450 prisoners in restrictive housing were found to have a serious mental illness.³³⁷ The Nebraska Department of Corrections attempted to justify these placements because the vulnerable prisoners in restrictive housing were being treated with medication or therapy.³³⁸ But putting mentally ill prisoners in restrictive housing—even if they are receiving treatment—compromises the legislature’s goal of protecting vulnerable populations.³³⁹ To protect vulnerable populations from restrictive housing, the legislature must work to clarify its policies and have better mechanisms to enforce them. As Nebraska exemplifies, enforcement of legislation limiting solitary confinement may be

³³¹ See NEB. REV. STAT. § 83-170(12) (2024).

³³² See *id.* at (13).

³³³ See CASELLA ET AL., *supra* note 8, at 3.

³³⁴ See NEB. REV. STAT. § 83-4,114(3) (2012); see generally Linman Ctr., *Solitary Confinement in Nebraska*, SEEING SOLITARY (2021), <https://seeing solitary.linmancenter.yale.edu/jurisdictions/nebraska/>.

³³⁵ See L.B. 557, 108th Leg., 1st Reg. Sess. (Neb. 2023); *Legislature Debating Bill that Limits Solitary Confinement in Nebraska’s Prisons*, *supra* note 198.

³³⁶ See NEB. REV. STAT. § 83-173.03(3)-(4) (2019).

³³⁷ Witmer, *supra* note 195.

³³⁸ *Id.*

³³⁹ See discussion *supra* Section I (explaining that solitary confinement can cause or exacerbate mental illnesses).

difficult and costly to adequately administer without assistance from the departments of corrections and the courts.

C. *State Departments of Corrections*

A state's department of corrections can implement new prison policies most effectively and efficiently. Unlike the courts or the legislature, a department of corrections can directly analyze its prison system, identify its needs, and implement policies to combat the issues. Even though a department of corrections has the most hands-on approach out of the three entities, change within the department still poses problems because it is a self-regulating system. This system can lead to uneven application of policies without accountability. Even if the policy is well-implemented, each department of corrections is under the command of its director. Frequent changes in directors lead to shifting policies, making this entity an insufficient source of long-term solutions to solitary confinement.

As illustrated by North Dakota's approach to reducing solitary confinement, the movement led by a state's department of corrections can be incredibly effective.³⁴⁰ As a result of Leann Bertsch's dedication to lowering solitary confinement and making prison conditions more humane, North Dakota has radically decreased their use of solitary confinement.³⁴¹ Despite this success, there are few to no checks on what the next director may do because the entity is largely self-regulating. If the new director disagrees with Bertsch's mission, he may overturn her policies. If a new director wanted to increase the use of solitary confinement, he could do so. Although state departments of corrections may seem best equipped to make quick and effective changes addressing solitary confinement, frequent leadership turnover renders this approach unsustainable.

D. *A Collaborative Effort*

Collaboration among the courts, the legislature, and a state's department of corrections would allow solitary confinement policies to be adequately implemented. Courts and legislatures provide oversight to departments of corrections, which is the primary enforcement power

³⁴⁰ See Bertsch, *supra* note 141, at 331.

³⁴¹ See *id.*

in prisons.³⁴² Courts and legislatures, on their own, cannot enforce solitary confinement policies, but without the oversight of these entities, departments of corrections lack sustainability. To make meaningful changes in the landscape of solitary confinement practices, each of these entities must work together.

New York created a series of enforceable guidelines by relying on its courts, its legislature, and its Commission of Corrections.³⁴³ When prisons began ignoring the *Annucci* settlement guidelines, the legislature stepped in to pass the HALT Act.³⁴⁴ The legislature implemented provisions to hold the Commission of Corrections accountable in its use of isolation.³⁴⁵ These entities act as a checks and balances system for one another. As a result, New York has some of the strictest policies on limiting solitary confinement, to the point where prisoners are getting four hours of out-of-cell time per day.³⁴⁶ New York still practices isolation, but allowing this amount of time outside of the cell indicates that solitary confinement has been largely eradicated in the state.³⁴⁷ Even with these checks and balances that have led to significant progress in limiting solitary confinement, New York has struggled with enforcement. A ruling from the Supreme Court with clear guidelines on the practice of solitary confinement would help close the remaining gaps in New York prisons.

E. *Economic Benefits of Clear and Enforceable Guidelines*

Implementing guidelines to limit the use of solitary confinement at the state and federal levels would not only better uphold the Eighth Amendment rights of prisoners but would also economically benefit prison systems. Although the cost of solitary confinement varies depending on the state or the individual prison system, as a whole, the cost of building maximum-security prisons and keeping prisoners in solitary confinement far exceeds the cost of placing prisoners in general population units.³⁴⁸ For example, the construction of a prison built to house the majority of prisoners in solitary confinement costs two

³⁴² See, e.g., discussion *supra* Section III.D.

³⁴³ See discussion *supra* Section III.D.

³⁴⁴ See Resnik et al., *supra* note 41, at 104.

³⁴⁵ See *id.*

³⁴⁶ See N.Y. Corr. Law § 137(6)(k)(ii) (2023).

³⁴⁷ See COMM'N CORR., *supra* note 237, at 58.

³⁴⁸ See JAMES & VANKO, *supra* note 309, at 5-6.

to three times more than the construction cost of a typical prison.³⁴⁹ Additionally, the national average cost of keeping a prisoner in solitary confinement is about \$75,000 per year, which is about three times the national average of keeping a prisoner in a general population unit.³⁵⁰ One Colorado study revealed that it costs about \$216 per day to keep a prisoner in solitary confinement, but only \$86 per day to keep a prisoner in the general population unit.³⁵¹

Limiting the use of solitary confinement to fifteen days would drastically reduce the cost of running these units. New York illustrates this reduction, as a fiscal analysis of the HALT Act reveals that implementing limitations on solitary confinement saves state prison systems approximately \$132 million per year.³⁵² Even more, the HALT Act is projected to save New York municipalities \$1.3 billion over the first ten years of its enactment.³⁵³

Part of these savings is because New York implemented mental health programming.³⁵⁴ Although providing mental health care to prisoners placed in solitary confinement incurs additional expenses at the outset, the benefit of mental health programming exceeds the cost of its implementation.³⁵⁵ For example, limiting solitary confinement and providing mental health programming to prisoners in isolation encourages rehabilitation and helps reduce recidivism.³⁵⁶ Taking these steps to lower reincarceration rates in turn provides sustainable, long-term economic benefits to prison systems.³⁵⁷ For instance, the HALT Act's implementation of mental health programming is estimated to save the state \$21.81 million annually because of the reduction of

³⁴⁹ SAL RODRIGUEZ, SOLITARY WATCH, FACT SHEET: THE HIGH COST OF SOLITARY CONFINEMENT 2 (2011), <https://solitarywatch.org/wp-content/uploads/2011/06/fact-sheet-the-high-cost-of-solitary-confinement.pdf>.

³⁵⁰ See Valerie Kiebal, Sal Rodriguez, & Mirilla Zhu, *Solitary Confinement in the United States: The Facts*, SOLITARY WATCH, <https://solitarywatch.org/facts/faq/> (last updated June 2023).

³⁵¹ See JAMES & VANKO, *supra* note 309, at 6.

³⁵² P'SHIP FOR PUB. GOOD, SAVE MONEY, SAVE LIVES: AN ANALYSIS OF THE FISCAL IMPACT OF THE HALT SOLITARY CONFINEMENT ACT 3 (2020).

³⁵³ *Id.* at 7.

³⁵⁴ See P'SHIP FOR PUB. GOOD, *supra* note 352, at 12.

³⁵⁵ See *id.* at 18.

³⁵⁶ See Heather Stringer, *Improving Mental Health for Inmates*, AM. PSYCH. ASS'N (Mar. 2019), <https://www.apa.org/monitor/2019/03/mental-health-inmates>.

³⁵⁷ See *id.*

recidivism rates.³⁵⁸ Ultimately, restrictions on solitary confinement not only uphold the right to be free from cruel and unusual punishment but also create a more economically sustainable prison system.

CONCLUSION

Solitary confinement exceeding fifteen days violates a prisoner's right to be free from cruel and unusual punishment. The extreme mental and physical effects correlated with solitary confinement indicate a need for change at the federal level and among the states. In 1890, the Supreme Court recognized the intense mental effects correlated with solitary confinement, but it has since remained largely silent on the issue. Amid the Court's silence, the standard of decency has evolved as forty states have implemented some kind of limitation on solitary confinement practices. In light of the evolving standard of decency governing isolation practices, solitary confinement needs to be reassessed under Eighth Amendment standards.

To remedy the constitutional violations caused by solitary confinement, the Supreme Court should implement clear guidelines to keep the practice within the bounds of the Eighth Amendment. Solitary confinement for more than fifteen days violates the Eighth Amendment because prison officials are deliberately indifferent to the deprivation of necessities, like social interaction and mental health care, and subject prisoners to substantial risks of harm by placing them in solitary confinement for excessive amounts of time. Solitary confinement should be reserved for the most extreme cases, such as prisoners who pose risks to themselves or others. Additionally, mental health care should be more accessible to prisoners placed in solitary confinement.

Regardless of whether the Supreme Court places limitations on solitary confinement or remains silent, state courts, legislatures, and correctional departments must work together to properly enforce limitations on the practice. As revealed by the case studies above, each state entity works as a checks and balances system to hold one another accountable. Without this system of collaboration, the limitations placed on solitary confinement are often inadequately enforced.

³⁵⁸ See P'SHIP FOR PUB. GOOD, *supra* note 352, at 3-4 (combining prison and jail reincarceration rates).

Ultimately, the unlimited use of solitary confinement in U.S. prisons poses grave constitutional violations for segregated prisoners. Prisoners placed in solitary confinement without a fifteen-day limit are often subject to extreme mental distress and accompanying physical symptoms. Under the current framework of the Eighth Amendment, unlimited solitary confinement violates prisoners' rights to be free from cruel and unusual punishment. Limiting the use of solitary confinement would also result in long-term economic benefits. Therefore, state entities and the federal court system should work together to place limitations on solitary confinement practices and to uphold the constitutional rights of all prisoners.