A Pendulum Swinging:
Evaluating Judicial Treatment of Solitary Confinement in U.S. Federal Courts Since 1958

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Table of Contents

Notes on Terminology

In order to understand the legal history of solitary confinement and its evolution over time, it is necessary to explain the meaning and significance of important terms and concepts used in this thesis.

The State vs. Federal Court System:

The judiciary in the United States is divided into two primary legal systems: the federal court system and the state court system. State courts typically handle violations of state laws, while federal courts hear violations of federal law. Generally, "state courts are the final arbitrators of state law and constitutions. However, their interpretations of federal law or the U.S constitution may be appealed to federal courts, which make the final decisions."[1] Federal courts typically deal with cases that deal with the constitutionality of a law, treaties of the U.S., cases involving foreign ambassadors, disputes between different states, habeas corpus issues, and a few others. The federal court system comprises 94 district courts, 13 circuit courts, and one Supreme Court.[2] Arguments in favor or against solitary confinement have been brought to both state and federal courts as early as 1890.

Why Federal Courts?

Most people seeking to challenge the constitutionality of solitary confinement do so in state courts because most of the violations occur within a particular state; however, this thesis will focus primarily on federal court cases. This decision was made for two reasons. The first is that the federal courts are the final authority on interpreting violations of constitutional amendments, including the constitutionality of solitary confinement, and thus set standards that every other court, institution, and person must follow. Secondarily, because federal courts are

[1] "Comparing Federal & State Courts." United States Courts. (n.d.). https://www.uscourts.gov/about-federal-courts/court-role-and-structure/comparing-federal-state-courts.
[2] Ibid.

hearing cases first heard in state courts, facts about the states and their use of the practice can be deduced.

Precedent:

A precedent is a decision or ruling in a previous case used to decide subsequent cases involving similar or identical issues or facts. Typically, a precedent established by higher courts (federal courts) must be followed in other future cases. Decisions by courts on a similar level are considered "persuasive authority" because courts may choose to follow future rulings but are not obligated to do so. Most federal and state court cases evaluating the constitutionality of solitary confinement were based on some precedent or previous interpretation.[3]

The Eighth Amendment:

The Eighth Amendment (1791) is the most common basis on which the use of solitary confinement has been challenged. This Amendment "protects against imposing excessive bail, excessive fines, or cruel and unusual punishments."[4] Its principles were based on the British Magna Carta of 1215, and its language was taken almost word-for-word from the 1689 English Bill of Rights.[5] Beyond stating that individuals are protected from "cruel and unusual punishment," the U.S. Constitution does not give any further guidance or specify the specific violations. As a result, its meaning has been largely left up to the courts to decide. This thesis will focus on the Eighth Amendment's "cruel and unusual clause" but may also include references to other amendments.

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[3] "Precedent." Legal Information Institute. Legal Information Institute, n.d. https://www.law.cornell.edu/wex/precedent#:~:text=Precedent%20refers%20to%20a%20court,facts%2C%20or%20similar%20legal%20issues.

[4] "Overview of Eighth Amendment, Cruel and Unusual Punishment." Constitution Annotated: Analysis and Interpretation of the U.S. Constitution, https://constitution.congress.gov/browse/essay/amdt8-1/ALDE_00000258/

[5] "Cruel & Unusual Punishment - Conversation Starter 2 - Trop v. Dulles." American Bar Association, https://www.americanbar.org/groups/public_education/programs/constitution_day/conversation-starters/cruel-and-unusual-punishment/cruel-and-unusual-punishment-conversation-starter-2-trop-v-dulles/

The Fourteenth Amendment:

The "due process clause" of the Fourteenth Amendment (1868), enacted after the Civil War, is a fundamental principle that establishes fair or equal treatment in the legal system. It generally encompasses various rules or policies dictating how individuals should be treated and their rights or privileges at various stages of a criminal or civil case; this includes the discovery or use of evidence and procedures or rights that arrested individuals have during the interrogation and trial stage.[6] In the context of solitary confinement, an individual can argue that their Fourteenth Amendment rights have been violated in situations where they are arbitrarily placed in isolation (deprived of their liberty without just cause).[7] This thesis will not focus too heavily on the Fourteenth Amendment, but will make references to it at certain points.

[6] "Due Process." Legal Information Institute. Legal Information Institute. https://www.law.cornell.edu/wex/due_process.
[7] "Fourteenth Amendment: Equal Protection and Other Rights." Constitution Annotated: Analysis and Interpretation of the U.S. Constitution, https://constitution.congress.gov/browse/amendment-14/.

Introduction

> "I believe that very few men are capable of estimating the immense amount of torture and agony which this dreadful punishment, prolonged for years, inflicts upon the sufferers."
> - Charles Dickens on Solitary Confinement, 1842.

Solitary confinement is a profoundly deleterious yet commonly practiced method of imprisonment, used in jails, prisons, juvenile facilities, and other related institutions across the United States since the 1800s. The practice involves isolating an individual from other inmates for 22-24 hours per day in cells, where they cannot hear or speak to other inmates. These individuals are rarely permitted to receive visits from outsiders or allowed to spend more than one hour a day outdoors or outside of their cells.[8] The exact purpose of solitary confinement varies, but it has traditionally been used in the U.S. as a punitive tool, as a mechanism for behavioral modification, and as a means of maintaining order or protecting inmates from hurting themselves.[9] Importantly, inmates are often placed into solitary confinement due to an infraction committed during their incarceration rather than because of their initial crime. For example, an inmate may be placed in solitary confinement if they are caught with contraband or if they have injured another inmate. Moreover, the practice can be used on any inmate who commits an offense in prison, including, in certain state prisons, youths and children as young as 12 or 13 years old.[10]

The use of solitary confinement, particularly in jails and prisons, has been at the forefront of significant controversy and criticism since it became an institutionalized practice in the nineteenth century. This is because solitary confinement's detrimental psychological and

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[8] Hannah Pullen-Blasnik, Jessica Simes, Bruce Western, "The Population Prevalence of Solitary Confinement," Science Advances 7, no. 48 (2021), https://www.science.org/doi/10.1126/sciadv.abj1928.
[9] Ibid.
[10] Andrew L. Hanna, *Solitary Confinement in America*, 21 U. Pa. J. Const. L. Online (2019), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1032&context=jcl_online

physical effects have been demonstrated repeatedly. For example, in many of the earliest prisons to experiment with solitary confinement in the Eighteenth and Ninteenth century, visitors noted the rapid mental and physical deterioration of inmates subject to such confinement as well as their high rates of suicide.[11] In the 1990s, studies emerged providing concrete evidence of its neurological and psychological effects. These studies found that solitary continent resulted in insomnia, anxiety, depression, paranoia, distortion of time and perception, Post Traumatic Stress Disorder (PTSD), increased risk of suicide, and shortened life span.[12] As a result of the harmful conditions of solitary confinement and its psychological effects on inmates, many psychologists, academics, and others have argued for the dissolution of the practice.[13]

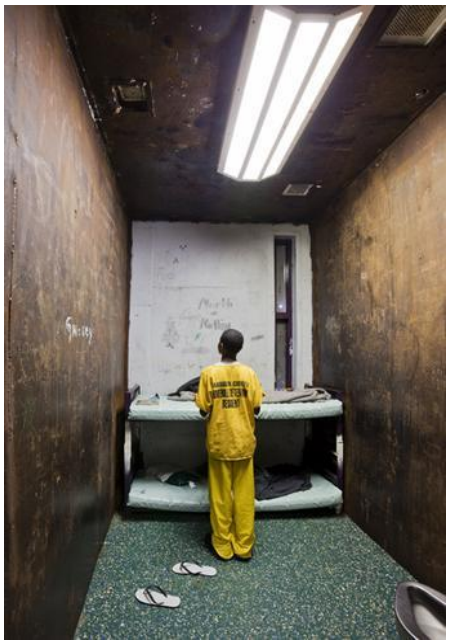

Figure 1. A Photograph of a Child in a Solitary Confinement Unit at Harrison County Juvenile Detention Center in Biloxi, Mississippi (2010), taken by Richard Ross.[14]

[11] Lisa Guenther, *Solitary confinement: Social death and its afterlives*. Minneapolis: University of Minnesota Press, 2013.
[12] Federica Coppola, "The brain in solitude: an (other) eighth amendment challenge to solitary confinement." *Journal of Law and the Biosciences,* 6 no. 1, (2019): 184–225, https://doi.org/10.1093/jlb/lsz014; Stuart Grassin, M.D., "Psychiatric Effects of Solitary Confinement Grassian Declaration," https://www.prisonlegalnews.org/media/publications/psychiatric_effects_of_solitary_confinement_grassian_declaration_1993.pdf
[13] Ibid.
[14] Jean Casella and James Ridgeway, "Richard Ross Photographs Children in Solitary Confinement," Solitary Watch (2010), https://solitarywatch.org/2010/05/21/children-in-lockdown-richard-ross-photographs-juvenile-detention/.

Despite the clearly established adverse psychological effects of solitary confinement on its subjects, there currently exists no federal law or Constitutional amendment explicitly preventing its use in jails, prisons, or other facilities and institutions.[15] While the Eighth Amendment technically protects incarcerated individuals from "cruel and unusual punishment" (among other provisions), the Constitution does not give any further guidance, nor does it explicitly mention solitary confinement.[16] The Fourteenth Amendment also theoretically protects states and other institutions from depriving individuals of life, liberty, or property without due process of law, but it also does not mention solitary confinement.[17] As a result, the legality and permissibility of solitary confinement have effectively been left to the courts to decide on a case-by-case basis. Further, with certain recent exceptions, judicial treatment of this practice has historically been made by evaluating the severity of the punishment or conditions of the environment in relation to the crime committed rather than by looking at the impact of the punishment on its subject.[18]

The fact that the federal courts have yet to outlaw the use of solitary confinement has left many reform advocates frustrated. In particular, academic and others examining federal court rulings argue that the judicial branch has failed to consider evolving standards of decency or the morality of the practice and that the law is changing too slowly or late. For example, legal scholars in the Journal of Law and Biosciences asserted that "throughout history, courts have manifested a narrow interpretation and application of the conditions standard in relation to

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[15] David Polizzi and Bruce Arrigo, "Cruel but Not Unusual: Solitary Confinement, the 8th Amendment, and Agamben's State of Exception," *New Criminal Law Review*: *An International and Interdisciplinary Journal*, Vol. 21, No. 4, (Fall 2018): 615-639, https://www.jstor.org/stable/26530576.
[16] "Overview of Eighth Amendment, Cruel and Unusual Punishment." Constitution Annotated: Analysis and Interpretation of the U.S. Constitution, https://constitution.congress.gov/browse/essay/amdt8-1/ALDE_00000258/
[17] "Fourteenth Amendment: Equal Protection and Other Rights." Constitution Annotated: Analysis and Interpretation of the U.S. Constitution, https://constitution.congress.gov/browse/amendment-14/.
[18] "Fact Sheet: Solitary Confinement and the Law," Solitary Watch, https://solitarywatch.org/wp-content/uploads/2011/06/FACT-SHEET-Solitary-Confinement-and-the-Law1.pdf

solitary confinement."[19] Additionally, David Fathi, the Director of the American Civil Liberties Union's (ACLU) National Prison Project, has argued that the federal courts "continue to apply an old standard that is out of step with a growing understanding of the harms of prolonged social isolation."[20]

This thesis will evaluate these claims of judicial failure and offer a different perspective on the federal courts' treatment of solitary confinement by examining the different ways the courts have interpreted its constitutionality since the late 1950s and the evolution of legal protections under and interpretations of the Eighth and Fourteenth Amendments. Since the adoption of the Eighth Amendment in 1791, the initial language used in the Constitution has stayed the same. Yet, over more than two hundred years, the Eighth and Fourteenth Amendments have been interpreted in considerably different ways. For example, during certain periods, the courts expanded the definition of "cruel and unusual punishment," more clearly defining actions that prisons could not subject inmates to, including the use and duration of solitary confinement. The existence of these options provides clear evidence challenging the belief that the federal courts were typically unwilling to address the rights of inmates and the use of solitary confinement. However, at other times, the federal courts held a more conservative view of the Amendments, interpreting or reinterpreting constitutional language in a manner that narrowed prior holdings and the protections previously established or revising the conditions required to a finding of constitutionality to make it harder to prove that a violation had occurred.

Thus, it is not that the courts were entirely unresponsive to evolving standards of decency, but rather that they were not consistent— sometimes expanding constitutional

[19] Federica Coppola, "The brain in solitude: an (other) eighth amendment challenge to solitary confinement." *Journal of Law and the Biosciences,* 6 no. 1, (2019): 184–225, https://doi.org/10.1093/jlb/lsz014
[20] David Fathi, "Prisoner's Rights: Solitary Confinement," The American Civil Liberties Union, https://www.aclu.org/issues/prisoners-rights/solitary-confinement.

protections and at other times narrowing them. This thesis identifies, enumerates, and tries to explain the significant divergences in these rulings or interpretations.

Through an analysis of all relevant Supreme Court rulings and several other federal court cases between 1958 to the present day, it can be argued that the courts' willingness to expand protections and address the issue of solitary confinement has differed, indeed seesawed, depending upon the historical time period of which they were a part. Specifically, the periods from 1958–1980 and 1992 to the present reflected judicial analyses focusing more on the protection of prisoners and their rights as established by the Constitution. In contrast, 1981-1990 reflected a more conservative era, in which the federal courts held a more limited interpretation of the Eighth and Fourteenth Amendment protections, including the legality of solitary confinement. Further, these rulings reflected and typically aligned with the then prevailing sentiments towards crime in the general public and the then existing domestic political climate as evidenced by the language and rationale of, and the political lenses utilized by, the Justices and judges adjudicating these cases.

Chapter One:
A Brief History of Solitary Confinement in the United States

The history of solitary confinement and the justification and methodology of its use over time provide valuable insight into the judicial findings with respect to its legality and constitutional limits on its practice. The origins of solitary confinement as a punitive measure can be located in Seventeenth-century colonial America. It was during this period that the Quakers sought to create a penal system that was more humane and less publicly punitive than the penal customs of English colonial rule: a system that emphasized public humiliation, torture, and execution.[21] After enacting the Great Law of Pennsylvania in 1682, a law restricting the use of the death penalty in all cases except for murder, the Quakers began to rely on and emphasize the value of reformative justice through solitude and self-contemplation. This is because these advocates believed that the experience of solitary confinement could act as a deterrent to crime, as the time spent alone could be profitably used to reflect alone on God and one's own behavior.[22]

The first penitentiary in Philadelphia, Walnut Street Jail (1787), was one of the first institutions to implement solitary confinement as a common practice. The approach to segregating inmates and prohibiting contact among them was born out of Quaker's beliefs on punishment and redemption.[23] Within fifty years, the use of solitary confinement expanded to several other penitentiaries across the Northeast area, including New York's Auburn Prison (1821) and Pennsylvania's Eastern State Prison (1829). Analogous to Walnut Street Jail, inmates lived, worked, and slept in isolated cells, with various methods in place to prevent them from

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[21] Lisa Guenther, *Solitary Confinement: Social deaths and its afterlives.* Minneapolis: University of Minnesota Press, 2013.
[22] Ibid.
[23] Jean Casella, James Ridgeway, *Hell is a Very Small Place: Voices From Solitary Confinement.* New York: The New Press, 2016;

speaking or having physical contact with one another.[24] By 1880, solitary confinement had become a standard practice in penitentiaries or juvenile centers across the United States, including California, Connecticut, Illinois, Indiana, Kentucky, Louisiana, and many other states.[25]

Figure 2. Solitary Confinement Units in Pennsylvania's Eastern State Penitentiary (1829).[26]

These early experiments in solitary confinement quickly proved detrimental to inmates. In many institutions across the country, inmates suffered significant psychological effects as a result of prolonged solitary confinement, including "insanity" and "mental exhaustion."[27] In Auburn Penitentiary, for example, numerous prisoners tried to harm themselves or commit suicide after spending a few months in isolation. This would lead Auburn officials to place individuals in solitary cells but have them work together during the day.[28] Similar events also occurred in many of the other early experiments with solitary confinement. As a result, every

[24] Ibid.
[25] Jean Casella, James Ridgeway, *Hell is a Very Small Place: Voices From Solitary Confinement.* New York: The New Press, 2016; "Historical Corrections Statistics in the United States, 1850- 1984." Accessed November 11, 2022. https://bjs.ojp.gov/content/pub/pdf/hcsus5084.pdf.
[26] "Timeline." Eastern State Penitentiary Historic Site. Accessed April 7, 2023. https://www.easternstate.org/research/history-eastern-state/timeline.
[27] Lisa Guenther, *Solitary confinement: Social death and its afterlives*. Minneapolis: University of Minnesota Press, 2013.
[28] Ibid.

state that had experimented with solitary confinement between 1830 and 1880 abandoned its use by the turn of the century.[29]

For the remainder of the nineteenth century, solitary confinement was relatively obsolete. This persisted into the early twentieth century, during which only a few jails or detention centers relied on solitary isolation. One notorious exception was Alcatraz Prison in California (1934), which kept a number of its inmates in a solitary location nicknamed "the hole." The hole was a bare concrete room with no light and only a small hole in the floor; inmates could be kept in these isolation cells anywhere from a few days to years. Examples such as Alcatraz were nevertheless uncommon and only used by a handful of other jails and institutions.[30] However, this began to change in the late 1950s with a second wave of solitary confinement.

Between the late mid to late 1950s and 1970s, solitary confinement once again became a standard technique used in jails, prisons, and other institutions. Its growth can be attributed to several factors, including growing crime and incarceration rates. Further, administrators and guards increasingly advocated using this technique to deal with violence and overcrowding.[31] Notably, the new wave or form of solitary confinement differed from its former purpose or character; the practice now emphasized behavioral modification or to "break down the antisocial personalities of inmates and to rebuild them in harmony with social norms" as opposed to its initial goal of religious redemption in the nineteenth century.[32] To further achieve this goal,

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[29] Scott Christianson, *With Liberty for Some: 500 Years of Imprisonment in America*. Boston, MA: Northeastern University Press, 1998.
[30] Lisa Guenther, *Solitary confinement: Social death and its afterlives*. Minneapolis: University of Minnesota Press, 2013.
[31] David Polizzi and Bruce Arrigo, "Cruel but Not Unusual: Solitary Confinement, the 8th Amendment, and Agamben's State of Exception," *New Criminal Law Review*: *An International and Interdisciplinary Journal*, Vol. 21, No. 4, (Fall 2018): 615-639, https://www.jstor.org/stable/26530576.
[32] Lisa Guenther, *Solitary confinement: Social death and its afterlives*. Minneapolis: University of Minnesota Press, 2013.

inmates were also commonly subjected to sensory deprivation, sensory overload, intensive group confinement, and aversion therapy.[33]

In the 1980s, the United States experienced its third and final wave of solitary confinement. The practice took on a new character, being increasingly employed as a punitive measure to achieve justice and accountability rather than its previous goal of promoting behavioral rehabilitation.[34] Rates of solitary confinement also rose significantly compared to the previous decade, particularly as crime rates and the number of criminal prosecutions grew at the start of the 1980s. As the number of incarcerated individuals rose, the United States would create Supermax Prisons or large maximum security prisons designed with the primary purpose of isolating individuals from one another to maintain greater order. Supermax prisons are distinct from most other correctional facilities in that inmates live in isolation for the duration of their sentence —and not because of misbehavior in prison but because of their original crime.[35]

By the early 2000s, almost every prison or penitentiary in the United States had a solitary confinement unit, and the number of incarcerated individuals in solitary confinement continued to grow.[36] In fact, today, the United States leads the world in the number of incarcerated individuals in solitary confinement, with more than 48,000 inmates placed in some form of prolonged isolated imprisonment. Of these 48,000 individuals, roughly 6,000 of them have been held in solitary confinement for over a year.[37] The following section will examine the legal

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[33] Ibid.
[34] Andrew L. Hanna, *Solitary Confinement in America*, 21 U. Pa. J. Const. L. Online (2019), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1032&context=jcl_online
[35] Ibid; Patrice Taddonio, "Watch: How the U.S. Became the World Leader in Solitary Confinement." PBS. Public Broadcasting Service. https://www.pbs.org/wgbh/frontline/article/watch-how-the-u-s-became-the-world-leader-in-solitary-confinement.
[36] Ibid.
[37] Angela Hattery and Earl Smith, "We talked to 100 people about their experiences in solitary confinement. This is what we learned." The Conversation, PhysOrg, https://phys.org/news/2022-10-people-solitary-confinement.html#:~:text=Every%20day%2C%20up%20to%2048%2C000,and%20prisons%20across%20the%20U.S.

history of solitary confinement, focusing on how the federal courts have understood and interpreted the Eighth Amendment over time.

Chapter Two:
Identifying Oscillations in the Rulings of the Federal Courts

Following the resurgence of solitary confinement in the 1950s, several federal court cases sought to interpret the legality of isolation in jails, prisons, and other institutions. Notably, these courts had few precedents to consider as there had only been a handful of cases concerning the use or legality of solitary confinement or cases interpreting the Eighth and Fourteenth Amendments prior to this period. In *In re Medley* (1890), the U.S. Supreme Court ruled that solitary confinement for prisoners on death row was an "additional and unnecessary punishment" and thus unconstitutional.[38] However, only one year later, in *McElvaine v. Brush* (1891), the U.S. Supreme Court stated that it was not its role to interfere with the state's decision to use solitary confinement for death row inmates, despite at the same time, observing in dicta that its use was inhumane.[39] The Court took the position that "the first 10 articles of amendment were not intended to limit the powers of the states in respect of their own people, but to operate on the federal government only."[40] Subsequently, in *Weems v. United States* (1910), another Eighth Amendment case, the U.S. Supreme Court established that the punishment should be proportional to the crime but acknowledged that "the words of the Eighth Amendment are not precise."[41]

During the next several decades, and as federal courts heard additional cases and arguments, analyses and varying interpretations of what constitutes acceptable or unacceptable treatment of prisoners in both federal and state prisons followed. Crucially, at certain moments, the federal courts appeared willing to, and in fact did, in specific circumstances and based upon

[38] "In re Medley, Petitioner, 134 U.S. 160 (1890)," Justia Law. https://supreme.justia.com/cases/federal/us/134/160/.
[39] "McElvaine v. Brush, 142 U.S. 155 (1891)," Justia Law, https://supreme.justia.com/cases/federal/us/142/155/
[40] Ibid.
[41] "Weems v. United States, 217 U.S. 349 (1910)," Justia Law, https://supreme.justia.com/cases/federal/us/217/349/.

constitutional analysis, condemn the use of solitary confinement or other actions or treatments that prison guards had subjected inmates to. Thus, while many argue that the persistence of solitary confinement can be attributed largely to the federal courts' failure to take action or address the severity of the practice, this section will demonstrate that this claim is not entirely warranted.

It does seem to be the case that the willingness of the federal courts to expand the protections of the Eighth and Fourteenth Amendments has not always followed a straightforward or linear trajectory – with notable setbacks during specific periods, hindering progress in the treatment of prisoners more broadly. By examining federal court cases – including the decisions made, the rationale for their rulings, the language used, and the precedent created– it becomes clear that these protections have oscillated, largely depending on the historical period in which they were issued. This thesis has identified three distinct historical periods during which opinions rendered fluctuated: 1958 to 1980, 1981 to 1990, and 1992 to the present.

I. 1958-1980: Modest Reforms

An analysis of federal court cases between 1958 and 1980 suggests that during this period, the U.S. Supreme Court (and, to a lesser extent, lower federal courts) held a more progressive or evolving view of the Eighth and Fourteenth Amendments. In all relevant U.S. Supreme Court cases, the decisions expanded the protection of incarcerated individuals by more clearly defining and expanding what constituted "cruel and unusual punishment" and what actions, punishment, or treatment violated the due process clause of the Fourteenth Amendment. This included setting important standards regarding using solitary confinement for prolonged periods, conditions of prisons that were deemed unconstitutional, and specific actions or punishments that could not be used against inmates. Additionally, federal courts appeared more

willing to address the severity of the practice and tended to rule in favor of inmates subjected to solitary confinement. The following section will examine four U.S. Supreme Court cases during this first historical period: *Trop v. Dulles 356 U.S. 86* (1958), *Brooks v. Florida 389 U.S. 413* (1967), *Estelle v. Gamble 429 U.S. 97* (1976), and *Hutto v. Finney 437 U.S. 678* (1978).

The progressive interpretation by the federal courts of the Eighth Amendment during this period is evidenced by *Trop v. Dulles 356 U.S. 86* (1958), a U.S. Supreme Court case that addressed the constitutionality of non-physical forms of "cruel and unusual punishment." In 1944, a United States soldier named Albert Trop was convicted of desertion and sentenced to several years of hard labor. Following his time in prison, Trop was told that his citizenship had been revoked as an additional punishment, resulting in his decision to sue the United States government.[42] Trop's case was eventually brought to the Supreme Court in 1958 under the claim that revoking his citizenship constituted a "cruel and unusual punishment." In a 5-4 decision, the court ruled in favor of Trop, asserting that denaturalization was unconstitutional because the punishment was disproportionate to the crime. Speaking for the Court, Justice Warren contended that:

> The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. Fines, imprisonment and even execution may be imposed depending upon the enormity of the crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect.[43]

In doing so, the Supreme Court sought to determine the limitations of the government's power in punishing individuals and addressed the meaning of the term "cruel and unusual punishment." Specifically, the Court would clarify that the "power of the state to punish individuals must be exercised within the limits of civilized standards" and that the Eighth

[42] "Trop v. Dulles, 356 U.S. 86 (1958)," Justia Law, https://supreme.justia.com/cases/federal/us/356/86/
[43] Ibid.

Amendment's meaning of "cruel and unusual" must change over time and "draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[44]

Moreover, while the case did not directly concern solitary confinement, it was one of the Court's earliest and most important attempts to set standards regarding how individuals should be punished and how the Eighth Amendment should be interpreted. As a result of this case, as well as *Weems v. United States* (1910), there were now two ways to state that an Eighth Amendment violation had occurred: (1) if the punishment was disproportionate to the crime committed (established in *Weems v. United States,* 1910) and (2) if it was not in accordance with society's contemporary standards of decency (established in *Trop v. Dulles,* 1958).[45] The addition of the second criterion highlighted a clear effort by the Court to expand Eighth Amendment protections and its attentiveness to evolving moral standards.

Brooks v. Florida 389 U.S. 413 (1967), another U.S. Supreme Court case during the first oscillation, concerned the admissibility of a prisoner's confession after prolonged solitary confinement. On May 27, 1965, Bennie Brooks was convicted of participating in a riot in Florida State Prison at Raiford. As punishment, Brooks and two other prisoners were subsequently placed in their own isolation cells (7-foot by 7-foot windowless rooms) for thirty-five days.[46] In his cell, Brooks was prevented from having any contact with any other inmate, given only 12 ounces of soup and eight ounces of water per day, and regularly subjected to physical abuse from the correctional officers. Investigating officers would also repeatedly question Brooks about his role in the riot. On the fifteenth day of this interrogation, Brooks confessed to being a participant and gave his statement into a tape recorder.[47]

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[44] "Trop v. Dulles, 356 U.S. 86 (1958)," Justia Law, https://supreme.justia.com/cases/federal/us/356/86/
[45] "Weems v. United States, 217 U.S. 349 (1910)," Justia Law, https://supreme.justia.com/cases/federal/us/217/349/; "Trop v. Dulles, 356 U.S. 86 (1958)," Justia Law, https://supreme.justia.com/cases/federal/us/356/86/
[46] "Brooks v. Florida - 389 U.S. 413, 88 S. Ct. 541 (1967)", Law School Case Brief, Lexisnexis, https://www.lexisnexis.com/community/casebrief/p/casebrief-brooks-v-florida
[47] "Brooks v. Florida, 389 U.S. 413 (1967)", Law Justia, https://supreme.justia.com/cases/federal/us/389/413/

At his trial in a Florida state court, the recording was used as evidence to convict Brooks for his role in the prison riot. Brooks contested the use of the tape recorder, arguing that his confession was coerced and should be inadmissible because it violated his "due process" and "other constitutional rights."[48] Despite his assertion, the Florida state court found that Brook's confession was voluntary and extended his sentence as punishment for his role. The ruling was appealed to Florida's District Court of Appeals, which affirmed the initial ruling made by the Florida state court and dismissed Brook's claim of a constitutional violation. The case was brought to the Supreme Court in 1967.[49]

Figure 3. Florida State Prison, Railford.[50]

The U.S. Supreme Court reversed the judgment of Florida's District Court of Appeals and rescinded the extended conviction of these prisoners in a 9-0 *per curiam* opinion (unanimous decision). In its ruling, the Supreme Court held that the prisoner's confession was not a voluntary expression of guilt and was unconstitutional because "the petition was held for two weeks under barbaric conditions in a 'sweatbox' punishment cell' and completely under the control and domination of his jailers."[51] Further, the court held that the lower courts and state "cannot escape

[48] Ibid.
[49] "Brooks v. Florida - 389 U.S. 413, 88 S. Ct. 541 (1967)", Law School Case Brief, Lexisnexis, https://www.lexisnexis.com/community/casebrief/p/casebrief-brooks-v-florida
[50] "Raiford State Prison," Florida Memory: State Library and Archives of Florida, https://www.floridamemory.com/items/show/137110
[51] "Brooks v. Florida, 389 U.S. 413 (1967)", Justia Law, https://supreme.justia.com/cases/federal/us/389/413/

the responsibility of making its own examination of the record."[52] The ruling established in *Brooks v. Florida 389 U.S. 413* (1967) reflected a crucial expansion of inmate protections and an important divergence from state and lower court decisions. The decision emphasized the importance of holding correctional officers and the state accountable for their actions and was based on an awareness that solitary confinement could be inhumane and an unjust coercive tool. More broadly, it set an important standard regarding the treatment of inmates in prisons based upon an evolving view of the scope of Constitutional protections.

In *Estelle v. Gamble* 429 U.S. (1976), the U.S. Supreme Court further expanded the scope of inmate protections by clarifying the meaning of the "cruel and unusual" under the Eighth Amendment. In 1973, J.W. Gamble, an inmate at the Huntington Unit in the Texas Prison System, was gravely injured while working in a textile mill. Despite Gamble's assertion that he was in significant pain and unable to work, he was refused medical care by the staff at the prison and instead sent back to work.[53] After refusing to work due to his injuries, the correctional officers at the prison placed Gamble in solitary confinement for a two-month period. While in solitary, Gamble received medical attention (on seventeen separate occasions) but contended that he was given inadequate and limited treatment.[54] In 1974, Gamble filed a civil suit against the correctional officers, in which he argued that the Texas prison "subjected him to cruel and unusual punishment in violation of the Eighth Amendment, made applicable to the states by the Fourteenth."[55] The case was initially tried in a U.S District Court but was dismissed for "failure to state a claim upon which relief could be granted."[56] The Court of Appeals for the Fifth Circuit

[52] Ibid.
[53] "Estelle v. Gamble 429 U.S. 97 (1976)," Law School Case Brief, Lexisnexis, https://www.lexisnexis.com/community/casebrief/p/casebrief-brooks-v-florida
[54] "Estelle v. Gamble 429 U.S. 97 (1976)," Justia Law, https://supreme.justia.com/cases/federal/us/429/97/
[55] Ibid.
[56] "Estelle v. Gamble 429 U.S. 97 (1976)," Justia Law, https://supreme.justia.com/cases/federal/us/429/97/

reversed the decision, holding that "Gamble was essentially placed in solitary confinement due to substandard medical care."[57]

In 1976, the case was heard by the U.S. Supreme Court. While the Court found that Gamble's Eighth Amendment claims were insufficient as he had been treated by medical staff on multiple occasions, it did conclude that the meaning or definition of "cruel and unusual punishment" had to be expanded. The opinion by the majority of the Court held that "deliberate indifference to the serious medical needs of prisoners constituted the unnecessary and wanton infliction of pain prescribed by the Eighth Amendment."[58] By mandating that "deliberate indifference" be a criteria when evaluating"cruel and unusual" punishments, the Supreme Court effectively broadened the scope and meaning of the Amendments protections. Further, *Estelle v. Gamble* 429 U.S. (1976) reflected the Court's acknowledgment that inmates had a constitutional right to various medical treatments and that correctional officers had a responsibility to ensure that the health and safety of the inmates was reasonably protected.

One of the most noteworthy cases during this historical period was *Hutto v. Finney* 437 U.S. 678 (1978), a landmark U.S Supreme Court case that concerned the constitutionality of prolonged solitary confinement in an Arkansas state correctional facility. In 1970, several inmates sued the Arkansas Department of Corrections, alleging that its treatment towards inmates and the conditions of the prison were unconstitutional.[59] The Arkansas prison system was well known for its rampant mistreatment and abuse towards inmates; individuals in the prisons were often crammed into small cells, held in solitary confinement for significant periods of time without justification, and subjected to consistent physical and verbal abuse from the

[57] Ibid.
[58] "Estelle v. Gamble 429 U.S. 97 (1976)," Justia Law, https://supreme.justia.com/cases/federal/us/429/97/
[59] "Hutto v. Finney, 437 U.S. 678 (1978)", Justia Law, https://supreme.justia.com/cases/federal/us/437/678/

correctional staff. In fact, one federal judge famously equated a sentence to the Arkansas prison with a "banishment from civilized society to a dark and evil world."[60]

The case was initially tried in the U.S. District Court for the Eastern District of Arkansas in 1970. The Court found the entire Arkansas correctional system to be unconstitutional and ordered them to make a series of remedial changes, including setting limitations on the number of individuals who could be housed in the same cell and a limit on the number of days an inmate could spend in solitary confinement to 30 days. The Arkansas Department of Corrections challenged the thirty day limit on solitary confinement and appealed the case to a higher federal court. In 1978, the suit was brought to the U.S Supreme Court.[61]

In a majority opinion, the Court upheld the decision by the U.S. District Court. Specifically, it ruled that the detention of an inmate in a solitary confinement cell for longer than thirty days combined with the substandard conditions of the prison was a form of "cruel and unusual punishment" and thus unconstitutional.[62] In Court documents, Associate Justice John Paul Stephens acknowledged that "A filthy, overcrowded cell and a diet of 'gruel' might be tolerated for a few days and be intolerably cruel for weeks or months."[63] In doing so, Justice Stephens expressed his belief that solitary confinement for periods longer than thirty days could be constitutionally suspect. Further, the decision reflected one of the most clear efforts made by the Court to condemn the practice and hold correctional facilities and officers accountable for their behavior.

The Court's rulings made during the first historical period reflected an expansion of inmate protections; while some cases created additional criteria for establishing an Eighth

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[60] "Holt v. Sarver, 300 F. Supp. 825 (E.D. Ark. 1969)", Casetext, https://casetext.com/case/holt-v-sarver-3
[61] "Hutto v. Finney - 437 U.S. 678, 98 S. Ct. 2565 (1978)", Law School Case Brief, https://www.lexisnexis.com/community/casebrief/p/casebrief-hutto-v-finney
[62] Ibid.
[63] "Hutto v. Finney, 437 U.S. 678 (1978"), Justia Law, https://supreme.justia.com/cases/federal/us/437/678/

Amendment violation, others set important limitations on the use of solitary confinement. For example, *Trop v. Dulles* (1958) held that the meaning of "cruel and unusual" had to evolve to continuously reflect society's standards of decency, while *Estelle v. Gamble* (1976) found that being "deliberately indifferent" to the safety and wellbeing of prisoners could constitute a form of "cruel and unusual" punishment. Additionally, *Brooks v. Florida* (1967) challenged the admissibility of a prisoner's confession after prolonged solitary confinement under the due process clause, and *Hutto v. Finney* (1978) established the principle that prolonged time spent in solitary confinement was unconstitutional.

II. 1981 - 1990: Conservative Retrenchment

Beginning in the early 1980s, however, there was a noticeable shift in the federal court rulings concerning the rights of prisoners and the legality of solitary confinement. The decisions and language used appeared to walk back Eighth and Fourteenth Amendment protections and made it harder to prove that a violation had occurred. Moreover, the courts more commonly ruled against prisoners or chose to provide further autonomy and sovereignty to state courts and jails, prisons, and other facilities. The following sections will examine the relevant U.S. Supreme Court cases and one additional federal court case. These include Rhodes v. Chapman 452 U.S. 337 (1981), Gibson v. Lynch, 652 F.2d (1981), Hawkins v. Hall 644 F.2d 914 (1981), and Whitley v. Albers, 475 U.S. 312 (1986).

The U.S. Supreme Court's harsher approach to the rights of prisoners subjected to solitary confinement under the relevant amendments is reflected in *Rhodes v. Chapman 452 U.S. 337* (1981). *Rhodes v. Chapman* addressed the conditions of prison cells in an Ohio Maximum Security prison and examined whether housing multiple prisoners in one cell, also known as

'double celling,' was constitutional. The case was brought to the Supreme Court after an inmate named Kelly Chapman and several prisoners filed a suit against the prison; they argued that the conditions constituted a violation of the Eighth Amendment's protection from "cruel and unusual punishment" because it resulted in overcrowding and worsened conditions.[64]

The Supreme Court held that double-celling did not constitute a form of cruel and unusual punishment under the Eighth Amendment because the conditions failed and did not meet the criteria necessary to establish that a violation occurred. Specifically, the Court held that the "conditions could not be said to be cruel and unusual under contemporary standards," one of the criteria established for evaluating Eighth Amendment violations in *Trop v. Dulles 356 U.S. 86* (1958)."[65] More notably, the Supreme Court reasoned that "even if such conditions are restrictive and even harsh, they are part of the penalty that criminals pay for their offenses against society."[66] This particularly striking quote reflected the belief that punishment, even if inhumane, was justified because the criminal deserves it; this decision and language coincided with the growing belief that prisons should serve a punitive purpose as opposed to a reformative one, reflecting the narrowing of prisoners rights or protections during this period. Moreover, in contrast to prior periods, the Court actively sought to reduce the number and kinds of treatments or circumstances that qualified as violating the rights of inmates.

In *Gibson v. Lynch 652 F.2d 348* (1981), the United States Court of Appeals for the Third Circuit further reviewed the legality of solitary confinement and the meaning of "cruel and unusual punishment." The plaintiff, Frazier M. Gibson, Jr., had been a prisoner in the New Jersey prison system. During his stay at Trenton State Prison, Gibson was held in an isolation cell with

[64] "Rhodes v. Chapman 452 U.S. 337 (1981)", Law School Case Brief, Lexisnexis, https://www.lexisnexis.com/community/casebrief/p/casebrief-rhodes-v-chapman
[65] "Rhodes v. Chapman, 452 U.S. 337 (1981"), Justia Law, https://supreme.justia.com/cases/federal/us/452/337/
[66] Ibid.

no radio, TV, yard recreation, or contact with visitors for three months. Gibson claimed that he was given inadequate food, limited access to laundry service or clean clothing, and shower time.[67] He would later file a civil suit against the correctional facility, alleging that his time spent in the solitary confinement cell and the other abuses he suffered while at the prison violated his Eighth and Fourteenth Amendment rights. The case was heard by the U.S. Court of Appeals for the Third District in 1981.[68]

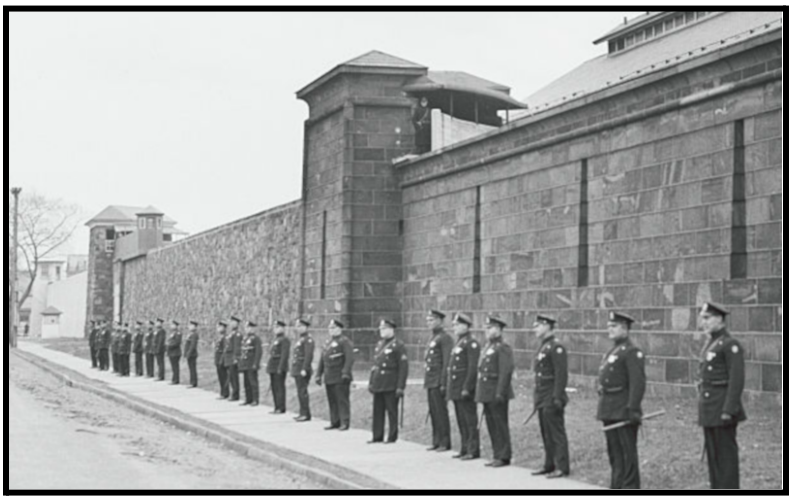

Figure 4. Trenton State Prison.[69]

The Federal Court of Appeals rejected Gibson's claim that his Constitutional rights had been violated by the correctional facility. Specifically the Court held that because the inmate's nutritional needs were met, he could not sufficiently state an Eighth Amendment claim. This decision essentially established that prolonged solitary confinement was acceptable as long as the defendant was given basic necessities, such as food and water.[70] Interestingly, the Court of Appeals cited *Hutto v. Finney* (1978), a case that previously established thirty days of solitary confinement as unconstitutional. However, the Court argued that "the length of time in isolation

[67] "Gibson v. Lynch 652 F.2d 348 (1981)", Casetext, https://casetext.com/case/gibson-v-lynch/case-summaries
[68] Ibid.
[69] Kate Gallison, "The Time I Went to Trenton State Prison." (2018), https://kategallison.wordpress.com/2018/09/22/the-time-i-went-to-trenton-state-prison/.
[70] "Gibson v. Lynch 652 F.2d 348 (1981)", Casetext, https://casetext.com/case/gibson-v-lynch/case-summaries

was simply one consideration among many" and was therefore not sufficient to make prolonged isolation unconstitutional, thereby justifying going against precedent.[71]

The decision in *Gibson v. Lynch, 652 F.2d* (1981) marked an essential divergence from evolving standards on the legality of solitary confinement and the Eighth Amendment protections established in the previous decade. The Court of Appeals held that the practice of solitary confinement and the duration of time spent in it did not classify as "cruel or unusual punishment," despite rulings made by the Supreme Court only a few years earlier.[72] The fact that the federal courts were willing to find loopholes in precedent exemplifies a shift in thinking – taking a narrower view of both prisons' rights generally and limits implicit in the Eighth Amendment. Further, as with the previous case, the Justices in *Rhodes v. Chapman 452 U.S. 337* (1981) seemed more willing to rule in favor of the state or prison system than the inmates.

Hawkins v. Hall 644 F.2d 914 (1981), another U.S. Court of Appeals case, further eroded precedents restricting solitary confinement under the Eighth Amendment. The case began after an inmate named Charles Hawkins Jr. sued the Massachusetts Correctional Institute for his treatment at the institution. Hawkins claimed that three days after a prison riot, he was "beaten by several correction officers, dragged across the prison yard, attacked again in the detention area that same day, and later was viciously assaulted and abused by correction officers."[73] Hawkins was later placed in the observation room: an eight by ten foot solitary cell used to detain violent inmates for prolonged periods of time. The case was first tried in the U.S. District Court for the District of Massachusetts, which found that "the prison acted properly in placing Hawkins in the cell."[74] The case was later appealed to the U.S. Court of Appeals, First Circuit,

[71] "Gibson v. Lynch 652 F.2d 348 (1981)", Casetext: Smarter Legal Research, https://casetext.com/case/gibson-v-lynch/case-summaries
[72] Ibid.
[73] "Hawkins v. Hall 537 A.2d 571 (1988)", Casetext: Smarter Legal Research, https://casetext.com/case/hawkins-v-hall-2
[74] Ibid.

which sought to determine whether it should uphold the previous decision made by the District Court and whether Hawkin's time in solitary confinement violated his Eighth Amendment right.[75]

Despite solid evidence, the Court of Appeals for the First Circuit ultimately dismissed Hawkin's claim, arguing that his time in solitary confinement was not a violation of the Eighth Amendment because it was (1) not "grossly disproportionate to the offense" and (2) "not so barbarous that it offends society's evolving sense of decency."[76] Further, the Court held that "solitary confinement is not per se impermissible" and that "It may be a necessary tool of prison discipline, both to punish infractions and to control and perhaps protect inmates whose presence within the general population would create unmanageable risks."[77] Following *Hawkins v. Hall* (1981), many arguments justified the use of solitary confinement for the benefit of the correctional institution.

In *Whitley v. Albers, 475 U.S. 312* (1986), the U.S. Supreme Court sought to further clarify behavior that did not qualify as "cruel and unusual punishment" under the Eighth Amendment. The case began in 1983 after a correctional officer shot an inmate named Gerald Albers in the left knee during a prison riot. Albers filed a class action suit against petitioner prison officials in a federal district court "alleging, inter alia, that they had deprived him of his rights from "cruel and unusual punishment" under the Eighth and Fourteenth Amendments."[78] The case was initially tried in the U.S. District Court in Oregon, which held that "the prison guard's use of deadly force had been justified under the circumstances and could not be found to

[75] "Hawkins v. Hall 537 A.2d 571 (1988)," Casetext: Smarter Legal Research, https://casetext.com/case/hawkins-v-hall-2
[76] Ibid.
[77] "Hawkins v. Hall 537 A.2d 571 (1988)", Casetext: Smarter Legal Research, https://casetext.com/case/hawkins-v-hall-2
[78] "Whitley v. Albers, 475 U.S. 312 (1986)", Justia Law, https://supreme.justia.com/cases/federal/us/475/312/

be not reasonably necessary."[79] Albers ultimately appealed this decision to the United States Court of Appeals for the Ninth Circuit, which reversed the District Court's decision. The Court of Appeals also called for the trial to be remanded (returned to the lower case for further evaluation) in order to determine whether the prison officials had "deliberately shot the inmate when he knew it was unnecessary and if the officer had acted with deliberate indifference to the inmate's rights."[80] If so, the plaintiff could argue that his Eighth Amendment rights had been violated.

However, in 1986, the Court of Appeals's ruling was overturned by the U.S. Supreme Court. The Court ruled that the District Court had been correct in its initial ruling and that the correctional officers had not violated the constitutional rights of the inmates by shooting them. The rationale for its decision was predicated upon the belief that the punishment (the prison guard's use of deadly force) was "made in a good faith effort to restore prison security" and necessary to restore order.[81] Since the guards' actions were justified under the circumstances, the Court concluded that the punishment was proportional to the crime and, therefore, not in violation of the Eighth Amendment. Moreover, the Court clarified that:

> After incarceration, only the "unnecessary and wanton infliction of pain" constitutes cruel and unusual punishment forbidden by the Eighth Amendment. To be cruel and unusual punishment, conduct that does not purport to be punishment at all must involve more than ordinary lack of due care for the prisoner's interests or safety. "Unnecessary and wanton infliction of pain" may be constitutional, if the infliction of pain is done in a good-faith effort to restore discipline, rather than done maliciously to cause harm.[82]

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[79] Ibid; "Whitley v. Albers, 475 U.S. 312 (1986)", Lexisnexis, https://www.lexisnexis.com/community/casebrief/p/casebrief-whitley-v-albers
[80] Ibid.
[81] "Whitley v. Albers - 475 U.S. 312, 106 S. Ct. 1078 (1986)", Law School Brief, https://www.lexisnexis.com/community/casebrief/p/casebrief-whitley-v-albers
[82] Ibid; "Whitley v. Albers, 475 U.S. 312 (1986)", Lexisnexis, https://www.lexisnexis.com/community/casebrief/p/casebrief-whitley-v-albers

The decision effectively set a much more stringent standard or limited criteria for evaluating Eighth Amendment violations and actions that could be deemed "cruel and unusual."[83] That is, whereas previous precedent established that prison officials could be held accountable if there was a "deliberate indifference" to the safety of inmates, this case stood for the principle that a prison guard must cause "unnecessary and wanton infliction of plain" to be considered unconstitutional (this stringent criterion would be overturned in future cases). The subjective nature of the phrase subsequently posed an added challenge for prisoners, as it made it harder to identify and prove that their rights have been infringed upon.[84] Thus, the case of *Whitley v. Albers, 475 U.S. 312* (1986) demonstrated another instance in which the Supreme Court actively sought to limit the rights of prisoners and protections against correctional officers and the larger institution. Moreover, as with the other cases during the 1980s, it reflected the belief that punishment, even if extreme, can be justified for the greater good of the prison or society.

III. 1992 - Present Day: Return to Reform

In more recent years, particularly the period from 1992 to the present, the federal courts once again seemed to shift course, with their rulings signifying a notable divergence from the decisions made during the 1980s. This period represents the most significant effort made by the federal courts thus far to expand Eighth and Fourteenth Amendments protections and redefine the legality or acceptability of solitary confinement, especially for those with pre-existing mental illnesses. In a majority of federal court rulings, particularly those decided by the U.S. Supreme Court, new conceptions of what constituted "cruel and unusual punishment" were added; for the

[83] Ibid.
[84] Whitley v. Albers, 475 U.S. 312 (1986), Lexisnexis, https://www.lexisnexis.com/community/casebrief/p/casebrief-whitley-v-albers

first time, the federal courts began to take into account the adverse psychological effects of solitary confinement in addition to the physical conditions of a cell when determining the constitutionality of the practice. Further, the federal courts re-evaluated decisions made in the previous decade and generally ruled in favor of the prisoners. This section will examine four cases: Hudson *v. McMillian, 503 U.S. 1* (1992), *Madrid v. Gomez 889 F. Supp. 1146* (1995), *Farmer v. Brennan, 511 U.S. 825* (1994), and *Palakovic v. Wetzel, No. 16-2726 3d Cir.* (2017).

The U.S. Supreme Court's progressive interpretation of the Eighth Amendment and "cruel and unusual punishment" was evidenced by the ruling made in *Hudson v. McMillian, 503 U.S. 1* (1992). *Hudson v. McMillian* sought to determine whether excessive force against an inmate could be considered unconstitutional, even if it did not result in serious physical injury.[85] The case began after Keith Hudson, a former Louisiana inmate, sued two correctional officers after he received a beating that resulted in minor bruising and facial swelling. Hudson argued that the prison staff had violated his right to be protected from "cruel and unusual punishment' under the Eighth Amendment.[86] The case was heard in state court as well as the U.S. Court of Appeals before reaching the U.S. Supreme Court. The Court of Appeals for the Fifth Circuit had previously held that "the use of excessive force is not a violation of the amendment unless it caused 'significant injury' and that Hudson "could not prevail because his injuries were minor."[87]

In 1992, the Supreme Court overruled the Fifth Circuit Court of Appeal's decision, ruling that the abuse Hudson received from the prison guards constituted a clear form of "cruel and unusual punishment" and was, therefore, unconstitutional. In a majority opinion, Justice Sandra O'Connor wrote:

[85] "Hudson v. McMillian, 503 U.S. 1 (1992)," Justia Law, https://supreme.justia.com/cases/federal/us/503/1/
[86] Ibid.
[87] "Hudson v. McMillian, 503 U.S. 1 (1992)," Justia Law, https://supreme.justia.com/cases/federal/us/503/1/

> When prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency are always violated. This is true whether or not significant injury is evident. [...] To deny the difference between punching a prisoner in the face and serving him unappetizing food is to ignore the concepts of dignity, civilized standards, humanity, and decency that animate the Eighth Amendment.[88]

This quote reflected the Supreme Court's view that punishment could be considered "cruel and unusual" even if it did not result in significant physical injury. That is, any punishment that is used sadistically or ignores "the dignity" and "decency" of prisoners could be considered a violation of the inmate's rights. Further, it demonstrated the belief of the Justices in the majority that attempts to justify forms of violence by claiming that they were not physical was a "loophole" that needed to be addressed. Justice Blackman further argued that "the unnecessary pain prohibited by the Eighth Amendment could include psychological as well as physical pain."[89] This was the first time that a member of the Supreme Court acknowledged psychological abuse could be as detrimental as physical violence, setting an important precedent for future cases. More generally, the ruling established in *Hudson v. McMillian, 503 U.S. 1* (1992) reflected a much clearer understanding concerning the meaning of "cruel and unusual punishment," an evolution of what constitutes violations to it, and an acknowledgment regarding the need to expand prisoner's protections.[90]

The U.S. Supreme Court further demonstrated its inclination to reinterpret Eighth Amendment protections in *Farmer v. Brennan, 511 U.S. 825* (1994), a case that attempted to answer whether "deliberate indifference" to the medical needs of prisoners required both a subjective and objective awareness of harm to be considered unconstitutional. The suit was filed on behalf of Dee Farmer, a transexual woman who was transferred to a prison in Indiana and

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[88] Ibid.
[89] "Hudson v. McMillian, 503 U.S. 1 (1992)," Justia Law, https://supreme.justia.com/cases/federal/us/503/1/
[90] Ibid.

placed in a male section of the prison because of her biological sex. After being transferred to Indiana's U.S. Penitentiary Terre Haute, Farmer alleged that she was beaten and sexually assaulted by another inmate.[91]

Farmer filed a suit against several federal correctional officers in the U.S district court for the Western District of Wisconsin, arguing that they acted with "deliberate indifference" to her safety in violation of the Eighth Amendment because they knew the institution housed violent inmates and that her circumstances placed her at an increased risk for abuse.[92] The District Court denied Farmer's claim on the basis that "a failure to prevent inmate assaults violated the Eighth Amendment only if prison officials were reckless in a criminal sense, such as having actual knowledge of a potential danger."[93] They argued that because the inmate never explicitly told the guards she was transexual, the correctional guards had not acted improperly. The ruling was later reaffirmed by the Court of Appeals for the Seventh Circuit.

In 1994, the U.S. Supreme Court vacated the judgment made by the lower court and sent the case back to the court for further review. The opinion held that the District Court's decision to deny Farmer's claim because she had not informed the correctional officers of her gender was a limited view and incorrect. The Supreme Court established the rule that the plaintiff could use any form of evidence to show that the correctional officers had knowledge of the dangers and that the lower court must re-examine the case with this standard in mind.[94] The Court further held that a prison official can be liable for acting with "deliberate indifference to inmate health or safety if the official knew that the inmates faced a substantial risk of serious harm and

[91] "Farmer v. Brennan, 511 U.S. 825 (1994)", Oyez, https://www.oyez.org/cases/1993/92-7247; Justia Law, https://supreme.justia.com/cases/federal/us/511/825/
[92] Ibid.
[93] "Farmer v. Brennan, 511 U.S. 825 (1994)", Oyez, https://www.oyez.org/cases/1993/92-7247; Justia Law, https://supreme.justia.com/cases/federal/us/511/825/
[94] Ibid.

disregarded that risk by failing to take reasonable measures to abate it."[95] The decision made in *Farmer v. Brennan, 511 U.S. 825* (1994) reflected an effort by the federal court to more clearly explain the meaning of "subjective recklessness" and defined actions that would constitute a violation of the Eighth Amendment.

In *Madrid v. Gomez 889 F. Supp. 1146* (1995), the United States District Court for the Northern District of California further clarified the constitutionality of solitary confinement for inmates with pre-existing psychological conditions. The case was brought to the District Court by prisoners in California's Pelican Bay State Prison after they sued the prison for a variety of Eighth Amendment violations, including the use of excessive force, inadequate treatment for physical and mental health care, and inhumane conditions in the prison's Secure Housing Unit (SHU), the name of the solitary confinement unit of the prison.[96] The SHU, in particular, "gained a well-deserved reputation as a place which, by design, imposes conditions far harsher than those anywhere else in the California prison system."[97] Around 1,000-1,500 convicts were confined in these windowless housing units at the time for 22 ½ hours per day. *Madrid v. Gomez 889 F. Supp. 1146* (1995) addressed whether the SHU and other prison conditions were unconstitutional and a form of "cruel and unusual punishment."[98]

[95] "Farmer v. Brennan, 511 U.S. 825 (1994)", Oyez, https://www.oyez.org/cases/1993/92-7247
[96] "Madrid v. Gomez, 889 F. Supp. 1146 (N.D. Cal. 1995)" Justia Law, https://law.justia.com/cases/federal/district-courts/FSupp/889/1146/1904317/
[97] "In re Bean, 251 B.R. 196 (E.D.N.Y. 2000)," Casetext: Smarter Legal Research, https://casetext.com/case/in-re-bean-24
[98] "Madrid v. Gomez, 889 F. Supp. 1146 (N.D. Cal. 1995)", Justia Law, https://law.justia.com/cases/federal/district-courts/FSupp/889/1146/1904317/

Figure 5. A Solitary Confinement Cell at California's Pelican Bay State Prison.[99]

In 1995, the U.S. District Court for the Northern District of California found that many prison conditions violated the inmates' constitutional rights. Specifically, Judge Thelton E. Henderson held that (1) there was unnecessary and wanton infliction of pain and use of excessive force at the prison, and (2) prison officials did not provide inmates with constitutionally adequate medical and mental health care.[100] Additionally, the District Court determined that while the use of solitary confinement was not in itself a violation of the Eighth Amendment, and that the Court did not have the power to ban the practice outright, it nevertheless concluded that the practice could be unconstitutional for prisoners with pre-existing mental health conditions. The District Court transcript stated:

> It is clear that confinement in the Pelican Bay SHU severely deprives inmates of normal human contact and substantially reduces their level of environmental stimulation, as detailed above. It is also clear that there are a significant number of inmates in the Pelican Bay SHU that are suffering from serious mental illness. Reduction in environmental stimulation and social isolation can have serious psychiatric consequences for some

[99] Jean Casella and James Ridgeway, "Case Closed on Supermax Abuses at Pelican Bay," Solitary Watch, https://solitarywatch.org/2011/02/15/case-closed-on-supermax-abuses/
[100] "Madrid v. Gomez, 889 F. Supp. 1146 (N.D. Cal. 1995)", Civil rights Litigation Clearinghouse, https://clearinghouse.net/case/588/

people, and these consequences are typically manifested in the symptoms identified above.[101]

In this decision, the District Court acknowledged that solitary confinement could exacerbate the mental state of inmates, particularly for those who already had mental health conditions. In determining the constitutionality of Pelican Bay's solitary confinement unit, the Judges referenced emerging scientific and statistical evidence. The decision made reference to the "ample and growing body of evidence that a ["variety of psychiatric disturbances"] may occur among persons in solitary or segregated confinement persons, who are, by definition, subject to a significant degree of social isolation and reduced environmental stimulation."[102] Further, one Judge argued that solitary confinement was "the mental equivalent of putting an asthmatic in a place with little air to breathe."[103] This was one of the first cases in which a federal court directly acknowledged the psychological impacts of solitary confinement and that its effects were significant enough to warrant a violation of their Eighth Amendment protections. Further, *Madrid v. Gomez 889 F. Supp. 1146* (1995) signified an apparent effort on the part of the District Court to re-evaluate the acceptability of solitary confinement for inmates with mental health issues and to take into account evolving standards of decency.

The use of prolonged solitary confinement for an inmate with pre-existing mental health issues was also addressed by the United States Court of Appeals for the Third Circuit in *Palakovic v. Wetzel, No. 16-2726 3d Cir.* (2017). In 2012, a twenty-three-year-old inmate named Brandon Palakovic committed suicide while serving a 16-48 month sentence for burglary in Pennslyvania's State Correctional Institution – Cresson. Despite being "identified as a suicide

[101] "Madrid v. Gomez, 889 F. Supp. 1146 (N.D. Cal. 1995)," Justia Law, https://law.justia.com/cases/federal/district-courts/FSupp/889/1146/1904317/
[102] Ibid.
[103] The Future of Supermax Confinement. The Prison Journal, 81(3), 376–388. https://doi.org/10.1177/0032885501081003005

behavior risk," Palakovic was repeatedly placed in a windowless solitary confinement cell for periods of longer than thirty days. He did not receive counseling or evaluation, except for a handful of mental health interviews conducted through the cell door slot.[104] Following his death, the parents of Palakovic sued the correctional facility, alleging that the prison officials and medical personnel violated the Eighth Amendment rights of Palakovic by being "deliberately indifferent to both inhumane conditions that he experienced while in solitary confinement and to Palakovic's serious medical needs for mental healthcare."[105] The case was initially tried and dismissed by a Pennsylvania District Court; in 2017, the case was re-heard and tried by the United States Court of Appeals.[106]

The U.S. Court of Appeals for the Third Circuit reversed the decision made by the Pennsylvania District Court, holding that "It was a legal error to dismiss the first complaint's inhumane conditions of confinement and inadequate mental health care claims as deficient under the vulnerability-to-suicide framework."[107] In addition to ruling that the claim had been wrongfully dismissed, the Court of Appeals also sought to determine whether the Eighth Amendment rights of Brandon Palakovic had been violated. The Court found that the Palakovics had sufficiently stated their claim that the conditions were inhumane and a violation of the Eighth Amendment because it met the deliberate indifference test established in *Estelle v. Gamble* 429 U.S. 97 (1976). It held that the correctional officers were in violation of the Eighth Amendment because they were aware that the prison conditions posed a "substantial risk" to the inmate but disregarded it.[108]

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[104] "Palakovic v. Wetzel, 854 F.3d 209 (3d Cir. 2017)," Harvard Law Review, 131 Harv. L. Rev. 1481, https://harvardlawreview.org/2018/03/palakovic-v-wetzel/
[105] "Palakovic v. Wetzel, No. 16-2726 (3d Cir. 2017)," Justia Law, https://law.justia.com/cases/federal/appellate-courts/ca3/16-2726/16-2726-2017-04-14.html
[106] Ibid.
[107] "Palakovic v. Wetzel, 854 F.3d 209 (3d Cir. 2017"), Harvard Law Review, 131 Harv. L. Rev. 1481, https://harvardlawreview.org/2018/03/palakovic-v-wetzel/
[108] Ibid.

The rationale for the Court's decision was based largely on scientific evidence demonstrating the harmful psychological effects of solitary confinement. In particular, the Court cited the "growing consensus regarding the harmful effects of solitary confinement" as an important evaluating factor in its decision that the conditions of the prison posed a significant risk to the inmate. The Court's consideration of these factors once again suggests that it was in tune with society's evolving standards of decency.[109] Generally speaking, *Palakovic v. Wetzel, No. 16-2726 3d Cir.* (2017) is a clear instance of the federal courts' shifting sentiment towards the legality of solitary confinement, as well as a concerted effort to hold prison officials accountable for these violations. Further, it fits into a much broader pattern seen during the third historical period in which the federal courts sought to re-evaluate the criteria necessary to establish an Eighth Amendment violation and restrict the use of solitary confinement.

To date, no federal court has found the entire solitary confinement practice unconstitutional.[110] To a certain extent, this demonstrates a fundamental limitation, perhaps self-imposed by the Courts. However, to state that the federal courts have been entirely unresponsive to society's evolving standards of decency or the expansion of inmate protections is not wholly accurate. As the previous section demonstrated, the federal courts, and in particular the U.S. Supreme Court, have, over time, redefined or reinterpreted constitutional amendments to expand upon inmate protections and determined certain aspects of solitary confinement as unconstitutional. For example, creating limitations on the number of days a prisoner can spend in solitary confinement, the use of solitary confinement for inmates with pre-existing mental health conditions, and excessive force or violence against inmates.

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[109] "Palakovic v. Wetzel, No. 16-2726 (3d Cir. 2017)," Justia Law, https://law.justia.com/cases/federal/appellate-courts/ca3/16-2726/16-2726-2017-04-14.html

[110] Andrew L. Hanna, *Solitary Confinement in America*, 21 U. Pa. J. Const. L. Online (2019), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1032&context=jcl_online

The fact that more progress has not been made may be attributed to the inconsistent rulings of the federal courts. Specifically, it is possible that the efforts made by the federal courts to expand Eighth Amendment protections and challenges to the constitutionality of solitary confinement between 1958 and 1980 could have had a greater impact and "longer legs" were it not for the notable setbacks during 1981 to 1990. For example, the decision made in *Hawkins v Hall* (1981) that Eighth Amendment violations must be "(1) "grossly disproportionate to the offense" and (2) "so barbarous that it offends society's evolving sense of decency" made it harder for inmates to prove that their rights were violated and set precedents or standards that courts would rely on for many years – that is, focusing their analysis almost exclusively on the physical conditions of the cells in determining constitutionality.[111]

Acknowledging that the legality of solitary confinement was subject to various setbacks is not intended to excuse the absence of more significant progress or to defend the somewhat limited actions of the federal courts. Rather, identifying these setbacks and oscillations demonstrates the potential for future improvement and proves that the Eighth and Fourteenth Amendments are not stringent but both malleable and shaped by prevailing sentiments and developments. The terms “cruel and unusual punishment” and “due process” began as vague and undefined concepts and changed over time to reflect the new or then-current social, political, and scientific developments. The malleable nature of the amendments demonstrates the potential for greater change in the future and that the courts could continue to interpret the Constitutional rights of prisoners under the Eighth and Fourteenth Amendments more progressively and evolve in favor of abolishing solitary confinement, especially as new evidence and public backlash

[111] “Hawkins v. Hall 537 A.2d 571 (1988)”, Casetext: Smarter Legal Research, https://casetext.com/case/hawkins-v-hall-2

grows. The following section will attempt to provide an explanation as to why the federal courts' decisions changed in the 1980s and once more in the 1990s.

Chapter Three:
Explaining the Federal Courts' Inconsistent Rulings

The fluctuations of the rulings at all federal levels over the course of these periods cannot be explained by one specific reason or concretely discerned. However, this chapter offers a theory as to why the courts changed course after 1980 and again in 1992. By analyzing the relevant federal court cases during these periods in conjunction with their historical contexts and other factors, the chapter aims to demonstrate that the Courts' changing interpretations of the law reflected the prevailing values and principles of their respective times. That is, the Courts' contraction or expansion of Eighth and Fourteenth Amendment protections — as it related to prisoners' rights and the legality of solitary confinement — was, in many ways, a response to the then current social, political, and scientific developments.

During the 1980s, the federal courts' decisions to step down prisoners' protections and allow for the greater use of solitary confinement coincided with the harsher sentiments toward crime held both by the general public and their political representatives during the Reagan Presidency (1980-1989). The second shift, beginning in 1992, also seemed to reflect social, political, and scientific factors, as well as a growing public response to what was popularly understood as increasing violations of prisoners' rights and emerging scientific evidence condemning the practice.

The notion that the federal courts, and in particular, the U.S. Supreme Court, were themselves responding to various developments during these eras is particularly noteworthy given the fact that numerous U.S. Supreme Court rulings seemed inconsistent with the purported political affiliations of the majority of sitting justices. This suggests that public opinion, social

and scientific developments, as well as events taking place in the day had a greater influence on judicial outcomes than expected.

1981 - 1990: Conservative Retrenchment

The period of 1981 to 1990 marked a significant departure from the preceding twenty-plus years. The federal courts shifted their focus from somewhat modest efforts to increase inmate protections and limit the practice of solitary confinement to raising the conditions necessary to establish a violation of an inmate's constitutional rights and justifying the use of extreme punitive measures. For example, *Whitley v. Albers, 475 U.S. 312* (1986) determined that punishment can only be "cruel and unusual" if it involves "the unnecessary and wanton infliction of pain."[112] The change in the U.S. Supreme Court's treatment of these issues seemed to correspond to larger social and political factors during the Reagan era (1981-1989). This includes the President's harsher stance on crime, the rise in criminal prosecutions, and the new punitive goal of prisons.

The 1980s in the United States were largely characterized by a much harsher stance on crime and a surge in criminal prosecutions. The shifting sentiments towards crime corresponded to a rise in violent crime and increased social and economic inequality across the country.[113] One critical development and contributing factor was the crack cocaine epidemic, which both began and reached its zenith in the 1980s. The epidemic referred to the substantial surge of crack cocaine that spread into numerous cities across the United States and which had detrimental effects on the American population.[114] The increased availability and use of crack cocaine

[112] "Whitley v. Albers, 475 U.S. 312 (1986)," Lexisnexis, https://www.lexisnexis.com/community/casebrief/p/casebrief-whitley-v-albers
[113] Andrew L. Hanna, *Solitary Confinement in America*, 21 U. Pa. J. Const. L. Online (2019), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1032&context=jcl_online;
[114] David Farber, *Crack: Rock Cocaine, Street Capitalism, and the Decade of Greed.* Cambridge, United Kingdom: Cambridge University Press, 2019.

contributed to an increase in drug-related crimes, including gang-related violence and theft. At the same time, guns and other weapons became more widely available, further contributing to the rise in violent crime rates during this period.[115]

These new developments were well-known and regularly reported in the media; for example, in 1980, the New York Times published an article titled, *1980 Called the Worst Year of Crime in City History*. The report states that:

> There were more reported murders, robberies, burglaries and thefts of automobiles and other items than in any previous year since the department began compiling such statistics 49 years ago." The 1980 homicide total, 1,814, was 4.7 percent higher than the 1979 record of 1,733 murders.[116]

The growth in criminal prosecutions can also be attributed to government behavior; specifically, the Reagan administration placed "an increased focus on 'tough on crime' policies, including longer sentences, increased police presence in communities, and a greater emphasis on punitive measures."[117] For example, President Ronald Reagan significantly expanded the 'war on drugs,' an extensive global campaign to reduce the illicit drug trade in the United States. Moreover, President Reagan actively encouraged the mass incarceration of nonviolent offenders, which primarily involved arresting and jailing individuals for drug-related offenses.[118] In 1986, Congress passed the Anti-Drug Abuse Act of 1986, which "allocated $1.7 billion to the War on Drugs and established a series of "mandatory minimum" prison sentences for various drug offenses."[119] In many ways, these new government actions were a response to the increasing

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[115] Ibid.
[116] Leonard Buder, "1980 Called the Worst Year of Crime in History." New York Times, https://www.nytimes.com/1981/02/25/nyregion/1980-called-worst-year-of-crime-in-city-history.html
[117] George L. Kelling and Catherine M. Coles, *Fixing broken windows: Restoring order and reducing crime in our communities.* New York: Simon and Schuster, 1996.
[118] Doug Rossinow, "Reaganism and the Rise of the Carceral State," Oxford University Press's Academic Insights for the Thinking World, https://blog.oup.com/2015/12/reagan-era-imprisonment/.
[119] Tony Platt, "U.S. Criminal Justice in the Reagan Era: An Assessment." Crime and Social Justice, no. 29 (1987): 58–69. http://www.jstor.org/stable/29766345.

public concern; that is, there was growing fear among the general public that crime was "out of control" and that existing methods were ineffective at mitigating the problem. However, it can also be argued that the Reagan Administration actively attempted to elicit fear about crime from the public to garner political support.[120]

Figure 6. The then-first lady Nancy Reagan giving an Anti-Drug speech to students.[121]

The new government initiatives and the subsequent rise in criminal prosecutions and arrests greatly expanded the prison system during the 1980s. In fact, during the course of Reagan's presidency, the total prison population in the U.S. rose from 329,000 to 627,000.[122] As prisons became increasingly crowded and eventually overcrowded, the pressure to establish and maintain order in prisons grew as well. For example, many prisons implemented harsher disciplinary measures, including implementing enhanced security systems, and relied more heavily on solitary confinement. In fact, the 1980s saw the creation of the supermax prison: a separate control unit within a jail or other institution designed to create a "more effective way to manage penal institutions and to ensure prison safety."[123]

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[120] Doug Rossinow, "Reaganism and the Rise of the Carceral State," Oxford University Press's Academic Insights for the Thinking World, https://blog.oup.com/2015/12/reagan-era-imprisonment/.
[121] "Her Causes: Just Say No" Ronald Reagan Presidential Foundation and Library, https://www.reaganfoundation.org/ronald-reagan/nancy-reagan/her-causes/
[122]Dan Carmichael, "U.S. prison population exploded in 1980s" UPI, https://www.upi.com/Archives/1991/05/16/US-prison-population-exploded-in-1980s/4744674366400/#:~:text=But%20during%20the%201980s%2C%20the,at%20the%20end%20of%201990.
[123] Andrew L. Hanna, *Solitary Confinement in America*, 21 U. Pa. J. Const. L. Online (2019), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1032&context=jcl_online

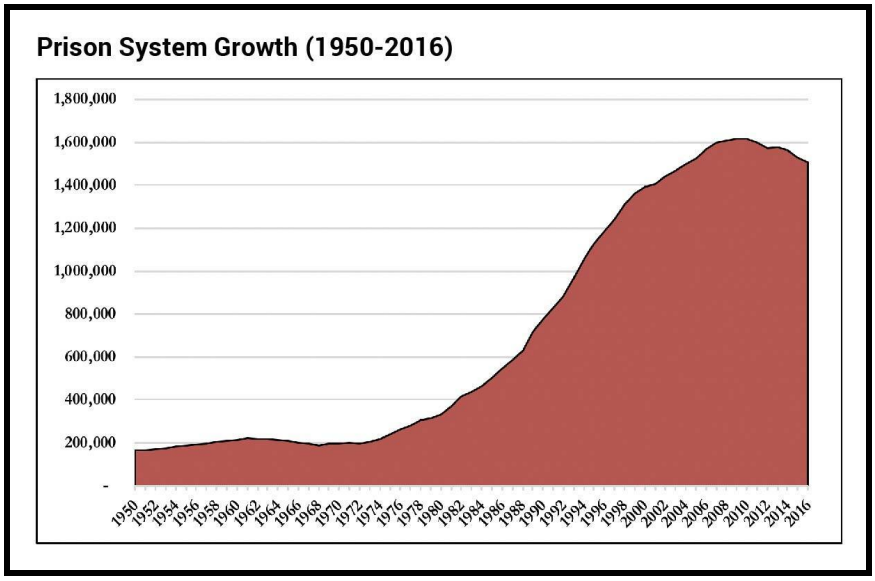

Figure 7: The number of incarcerated individuals in the American prison system from 1950 to 2016.[124]

During this period, federal courts' rulings seemed to align with the increasing concern about crime, including efforts to establish greater order in the prison system and prioritize punishment instead of rehabilitation. This is reflected most clearly in the rationale for their decisions and the language used. In the case of *Rhodes v. Chapman 452 U.S. 337* (1981), for example, the U.S. Supreme Court found that double-celling (housing multiple individuals in a cell) in a prison that was already 38% over capacity was not unconstitutional.[125] The decision was predicated upon the belief that inmates were not entitled to comfortable prisons under the Constitution and that harsh punishments may serve as a necessary or valuable form of punishment. Specifically, Justice Powell wrote that "the Constitution does not mandate comfortable prisons" and that "to the extent such conditions are restrictive and even harsh, they are part of the penalty that criminals pay for their offenses against society."[126] It is evident from the language used that the Supreme Court's decision to hold a more stringent interpretation of the

[124] James Cullen, "The History of Mass Incarceration" Brennan Center for Justice, https://www.brennancenter.org/our-work/analysis-opinion/history-mass-incarceration
[125] "Rhodes v. Chapman, 452 U.S. 337 (1981)", Justia Law, https://supreme.justia.com/cases/federal/us/452/337/
[126] Ibid.

Eighth Amendment was at least in part related to the then prevailing sentiment towards crime and the criminal justice system; that is, the emphasis on justice and the belief that prison was intended to have a punitive rather than rehabilitative purpose.

In *Hawkins v. Hall 644 F.2d 914* (1981) and *Jackson v. Meachum 699 F.2d 578* (1st Cir. 1983), maintaining prison order once again took precedence over the rights or protections of inmates. In *Hawkins v. Hall 644 F.2d 914* (1981), the U.S. Supreme Court justified the use of prolonged solitary confinement because it served the interest of the prison system. The majority of the Justices concluded that "solitary confinement is not per se impermissible" and that "It may be a necessary tool of prison discipline, both to punish infractions and to control and perhaps protect inmates whose presence within the general population would create unmanageable risks."[127] Similarly, in *Jackson v. Meachum* (1983), the U.S. District Court for the First Circuit supported the use of solitary confinement for an inmate with pre-existing mental health conditions because “he showed himself to be a danger to others and was an escape risk."[128] While the District Court heard testimony that "continued confinement under the above conditions would produce, as it had produced, an imminent risk of suicide," the Court nevertheless held that to "make the Eighth Amendment a guarantor of a prison inmate's prior mental health would go measurably beyond what today would generally be deemed 'cruel and unusual."[129]

In *Whitley v. Albers 475 U.S. 312* (1986), the belief that greater order was needed in the prison system was the prominent factor in deciding whether a police officer shooting an inmate during a riot was unconstitutional. In its ruling, the U.S. Supreme Court concluded that “not every governmental action affecting the interests or well-being of a prisoner is subject to Eighth

[127] “Hawkins v. Hall 644 F.2d 914 (1st Cir. 1981)”, Casetext: Smarter Legal Research, https://casetext.com/case/hawkins-v-hall-2
[128] “Jackson v. Meachum, 699 F.2d 578 (1983), Casetext: Smarter Legal Research, https://casetext.com/case/jackson-v-meachum
[129] Ibid.

Amendment scrutiny" because it may be necessary to restore order.[130] Specifically, the Court held that:

> Where a prison security measure is undertaken to resolve a disturbance, such as occurred in this case, that poses significant risks to the safety of inmates and prison staff, the question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on whether force was applied in a good faith effort to maintain or restore discipline.[131]

As evidenced by these four cases, the lower federal and U.S. Supreme Court rulings share many of the sentiments expressed by politicians and the general public. Specifically, these cases reflected the beliefs of judges and justices that prisons should be used for punitive purposes instead of rehabilitative ones and that greater order and restraint were needed in the criminal justice system. Thus, the hesitance to expand Eighth Amendment protections and the judicial acceptance of solitary confinement in jails, prisons, and other institutions may have been a function of the period. Further, it suggests that the courts were responsive to what they believed were evolving standards or prevailing opinions on punishment, including solitary confinement.

The 1992 - the present: Return to Reform

The period from 1992 to the present, or the third historical period, reflected a far more progressive approach to the legality of solitary confinement than the prior one. The lower federal and U.S. Supreme Courts appeared more willing to address the inhumane nature of solitary confinement, including considering its psychological effects and expanding inmate protections under the Eighth and Fourteenth Amendments. For example, in *Madrid v. Gomez 889 F. Supp. 1146* (1995), the District Court ruled that "a reduction in environmental stimulation and social isolation can have serious psychiatric consequences for some people."[132]

[130] "Whitley v. Albers, 475 U.S. 312 (1986)", Law Justia, https://supreme.justia.com/cases/federal/us/475/312/
[131] Ibid.
[132] "Madrid v. Gomez, 889 F. Supp. 1146 (N.D. Cal. 1995)", Justia Law, https://law.justia.com/cases/federal/district-courts/FSupp/889/1146/1904317/

These decisions appeared to coincide with notable social, political, and scientific developments in that era. One important change was the perception of crime, which became less hostile and more nuanced. For example, there was also a growing emphasis on identifying the underlying issues resulting in criminal behavior and finding a remedy. The increase in youth programs, community policing, and drug and treatment programs exemplifies this.[133] Moreover, the 1990s saw a decrease in violent crime rates. In the mid-1990s, rates of violent crime "plummeted across America (suburbs, exurbs, and rural areas), across all demographic groups (poor, black and white, young and old)."[134] While criminal prosecutions continued to rise, they mainly comprised drug-related offenses.[135]

Figure 8: The Reported Violent Crime Rates in the United States from 1990 to 2021 (per 100,000 of the population).[136]

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[133] Alfred Blumstein and Joel Wallman, "The Decade of Decline: The 1990s and Crime in the United States" Cambridge University Press (2000).
[134] Vanessa Barker, *Review of Explaining the Great American Crime Decline: A Review of Blumstein and Wallman, Goldberger and Rosenfeld, and Zimring*, Law & Social Inquiry 35, no. 2 (2010): 489–516., http://www.jstor.org/stable/40783025.
[135] Ibid.
[136] "Reported violent crime rate in the United States from 1990 to 2021." Statistica, https://www.statista.com/statistics/191219/reported-violent-crime-rate-in-the-usa-since-1990/

Another important development that likely shaped public perception towards crime and solitary confinement was the emerging and growing number of psychological studies and reports that documented the harmful effects of solitary confinement. Specifically, during the late 1980s and 1990s, an increasing number of psychologists, human rights organizations, and individuals began to look into and study the effects of prolonged isolation. For example, in 1993, a well-known psychologist Stuart Grassin wrote a report for a class action suit against Pelican Bay State Prison titled "Psychiatric Effects of Solitary Confinement." He contended that prolonged solitary confinement resulted in a "range of mental health problems, including hallucinations, paranoia, and self-mutilation."[137] Further, he wrote that many individuals would "likely suffer permanent harm as a result of such confinement."[138]

The harmful effects of solitary confinement were also investigated and reported on by non-for-profit organizations. For example, in the same year, "Human Rights Watch" published a 299 page report exposing the rampant abuse inmates faced in prisons across the United States and in other countries across the globe. The authors of the report visited several prisons in the U.S. in order to speak with inmates about their experiences and report on the conditions of these facilities. In one section of the report, the authors stated that "some of the inmates Human Rights Watch interviewed in [the solitary confinement unit of Florida State Prison at Stark] had not been outdoors for several years."[139] The report also found that the solitary confinement units at this prison and others "were extremely harsh" "filthy" and "dangerous."

In the late 1990s and 2000, additional studies emerged studying the correlation between solitary confinement and various mental health problems. In a 1997, psychologists Craig Hanley

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[137] Stuart Grassin, M.D., "Psychiatric Effects of Solitary Confinement." https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1362&context=law_journal_law_policy
[138] Ibid.
[139] *The Human Rights Watch Global Report on Prisons*. Human Rights Watch. Printed in the United States of America, 1993. https://www.hrw.org/legacy/reports/pdfs/g/general/general2.936/general2936full.pdf

and Mona Lynch reported that solitary confinement resulted in "deteriorating eyesight and joints, self-harm, and suicide."[140] In 2003, Hanley wrote an additional article in which he discussed emerging evidence that solitary confinement also caused "appetite and sleep disturbances, anxiety, panic, rage, loss of control, para-noia, and hallucinations.[141] In 2008, psychiatrist Terry Kupers found that of all successful suicides in corrections, approximately half occur among the 6% to 8% of the prison population that is consigned to segregation at any given time."[142] Throughout the 1990s and 2000s, these findings and others were supported by countless additional psychologists.

Figure 9. A Solitary confinement cell at Rikers Island Correctional facility in New York City.[143]

During the 1990s, the Court appeared to make decisions in accordance with the emerging scientific evidence and increasing condemnation by psychologists, NGOs, and the general

[140] Haney, Craig, and Mona Lynch. 1997. "Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement." Review of Law and Social Change 23 (4): 477–570.
[141] Craig Haney, Mental Health Issues in Long-Term Solitary and "Supermax" Confinement. 2003. Crime & Delinquency, 49(1), 124–156. https://doi.org/10.1177/0011128702239239.
[142] Terry A. Kupers, *What To Do With the Survivors? Coping With the Long-Term Effects of Isolated Confinement.* Criminal Justice and Behavior, 35(8), 1005–1016. https://doi.org/10.1177/0093854808318591
[143] Naina Bhardwaj, "A Prisoner was covered in filth and barking like a dog after 600 days in solitary confinement in a Virginia jail." Business Insider, https://www.businessinsider.com/virginia-man-spent-over-600-days-in-solitary-confinement-2021-3

public. This period clearly saw the judicial focus shifting from an emphasis on how punishment benefits society to how it impacts its subjects. This is evidenced by several federal court cases during this period, including *Madrid v. Gomez N.D. Cal.* (1995) and *Palakovic v. Wetzel, No. 16-2726 3d Cir.* (2017). In *Madrid v. Gomez,* for example, the psychological impact of solitary confinement was an essential consideration in the judges' decision that solitary confinement could be unconstitutional for inmates with pre-existing mental health issues. In determining whether an Eighth Amendment violation had taken place, the Court held that it is "appropriate to consider expert opinion, including 'scientific and statistical inquiry' that will be used to determine the seriousness of the harm caused by solitary confinement."[144] The Court further explained that:

> More recent studies have documented the potential adverse mental health effects of solitary or segregated confinement. As the Seventh Circuit noted in Davenport v. DeRobertis, 844 F.2d 1310, 1316 (7th Cir.1988), "there is plenty of medical and psychological literature concerning the ill effects of solitary confinement (of which segregation is a variant)."

In *Palakovic v. Wetzel, No. 16-2726 3d Cir.* (2017), emerging scientific and psychological evidence was also a major influence in the U.S. District Court's ruling. In deciding whether the prison officials and medical personnel violated the Eighth Amendment rights of Brandon Palakovic, an inmate who committed suicide after prolonged time in solitary confinement, the Court argued that the psychological impact of the practice made it a "substantial risk of serious harm." This led to the conclusion that the prison officials and medical personnel had acted in a manner that was "cruel and unusual punishment."[145] In evaluating the circumstances of Palakovic's conditions, the Court stated that:

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[144] "Madrid v. Gomez, 889 F. Supp. 1146 (N.D. Cal. 1995)," Justia Law, https://law.justia.com/cases/federal/district-courts/FSupp/889/1146/1904317/

[145] "Palakovic v. Wetzel, No. 16-2726 (3d Cir. 2017)", Justia Law, https://law.justia.com/cases/federal/appellate-courts/ca3/16-2726/16-2726-2017-04-14.html

> We must first acknowledge the robust body of legal and scientific authority recognizing the devastating mental health consequences caused by long-term isolation in solitary confinement. [...]. We observed a growing consensus that conditions like those to which Brandon [Palakovic] repeatedly was subjected can cause severe and traumatic physiological damage, including anxiety, panic, paranoia, depression, post-traumatic stress disorder, psychosis, and even a disintegration of the basic sense of self identity.[146]

Thus, the Court acknowledged that these findings and the many studies "documenting high rates of suicide and self-mutilation amongst inmates who have been subjected to solitary confinement" established the sufficiency of the Palakovics' claim. The fact that these opinions not only took into account the psychological evidence but conveyed the belief that solitary confinement was harmful is a clear example of the federal courts responding to evolving evidence and standards of decency during the third oscillation. The decision made in *Palakovic v. Wetzel* is arguably the most progressive decision thus far, suggesting that the federal courts' interpretation of the Eighth Amendment has continued to develop and improve.

Broadly speaking, the cases discussed above demonstrated a notable divergence from prior federal court cases concerning solitary confinement. For example, in contrast to a majority of the earlier cases, which determined violations of the Eighth Amendment rights of inmates by looking at the physical conditions of the cell or physical abuse suffered during their stay, these cases took into account the psychological effects of the practice. This suggests that the Courts were becoming more attentive to emerging scientific evidence and shifting options held by the public. Additionally, in contrast to the earlier periods, the language and rationales of the Courts' holdings did not convey the same belief that prisoners deserved to be punished or that maintaining order took precedence over the rights of inmates. Thus, shifts in the lower federal

[146] "Palakovic v. Wetzel, No. 16-2726 (3d Cir. 2017)", Justia Law: 31
https://law.justia.com/cases/federal/appellate-courts/ca3/16-2726/16-2726-2017-04-14.html

and Supreme Court rulings at the start of the early 1990s may also correspond to significant societal, political, and scientific developments.

The claim that the federal courts' decisions were influenced by the period is further supported by examining the purported political affiliations of the Supreme Court Justices during these two historical periods (1980-1990 and 1992-the present). Since all nine Supreme Court Justices appear to have had some political affiliations (and at the very least were nominated by American presidents who were clearly politically aligned), often voting predictably or in accordance with them, it would be reasonable to assume that the era with the most liberal court rulings would have the most liberal Justices and that the era with the most conservative rulings would have the most conservative Justices. However, upon further review, it becomes clear that this was not always the case, at least insofar as issues around solitary confinement were adjudicated.

The period that produced the most liberal interpretation of the Eighth and Fourteenth Amendments with respect to inmates' rights and solitary confinement (1992-the present) had more so called conservative Justices than the preceding period (1980-1990). During many of the cases that expanded inmate protections, the Court was composed primarily of Republican nominated Justices.[147] In *Hudson v. McMillian* (1992) and *Farmer v. Brennan*, 511 U.S. 825 (1994), two United States Supreme Court cases that expanded inmate protections, a majority of the Justices identified as conservative or were affiliated with the Republican party. For example, in both periods, seven out of the nine Justices identified as being affiliated with the Republican party. They were William H. Rehnquist (1972–2005), John Paul Stevens (1975-2010), Sandra Day O'Connor (1981 - 2006), Antonin Scalia (1986 - 2016), Anthony M. Kennedy (1988 -

[147] "Justices 1789 to Present," Supreme Court of the United States, https://www.supremecourt.gov/about/members_text.aspx

2018), David Souter (1990-2009) and Clarence Thomas (1991–). Moreover, Justices Rehnquist, O'Connor, and Kennedy were all appointed by Ronald Reagan, the former Republican President.[148]

In contrast, the second oscillation or the period from 1980-1990 had a relatively balanced Supreme Court with regard to political affiliation, despite the fact that it held a much more conservative interpretation of the Eighth and Fourteenth Amendment. For example, in *Rhodes v. Chapman 452 U.S. 337* (1981), there were five Republican affiliated and four Democratic affiliated Justices.[149] The five Republican affiliated Justices were Potter Stewart (1958 - 1981), Warren Earl Burger (1969–86), John Paul Stevens (1975-2010), William H. Rehnquist (1972 - 1986), and Sandra Day O'Connor (1981 - 2006). The four Democratic affiliated Justices were William J. Brennan Jr (1956 - 1990), Byron R. White (1962–1993), Thurgood Marshall (1967-1991), and Lewis F. Powell Jr (1972 - 1987). The composition of the Supreme Court in *Whitley v. Albers, 475 U.S. 312* (1986), a case that increased the bar for behavior to qualify as "cruel and unusual punishment" under the Eighth Amendment, was also composed of five affiliated Republicans and four affiliated Democrats.[150]

The belief that Justices were responding to these developments as opposed to their purported political affiliation or that of the president who nominated them is further supported by examining former Associate Justice Anthony Kennedy's opinions towards solitary confinement. Despite the fact that he was affiliated with the Republican party and nominated to the Supreme Court by Ronald Reagan, Kennedy condemned the use of solitary confinement and mass incarceration on several occasions.[151] In 2015, he wrote a five page concurrence scrutinizing the

[148] Ibid.
[149] "Justices 1789 to Present," Supreme Court of the United States, https://www.supremecourt.gov/about/members_text.aspx
[150] Ibid.
[151] "Justices 1789 to Present," Supreme Court of the United States, https://www.supremecourt.gov/about/members_text.aspx

use of solitary confinement in U.S prisons. In it, he argued that “long-standing knowledge of the dangerousness of solitary confinement was too often and too easily ignored” and that "Research still confirms what this Court suggested over a century ago: Years on end of near-total isolation exacts a terrible price.”[152] In condemning the practice, he cited the documented psychological effects of the practice, including increased risk of suicide, withdrawls, and self-mutilation.[153] Thus, despite the fact that he was nominated by a candidate who both supported and directly encouraged the use of solitary confinement, Kennedy’s opinions were shaped by emerging scientific evidence and the acknowledgement that the practice had detrimental effects.

The fact that the political affiliation of the Supreme Court Justices did not necessarily correspond with their rulings interpreting the legality of solitary confinement is both surprising and notable. The anomaly in the third oscillation can be explained by arguing that the Justices were ruling in accordance with the then prevailing climate of the decade and took a more nuanced view than one might have expected. In other words, the fact that conservative Justices supported more liberal rulings suggests that their decisions were heavily influenced or shaped by the period’s social factors, including the emerging scientific implications showcasing the adverse effects of solitary confinement.

[152] “Justice Kennedy Condemns Solitary Confinement”, Equal Justice Initiative, https://eji.org/news/justice-kennedy-condemns-solitary-confinement/
[153] Adam Liptak, “Will the Supreme Court Scrutinize Solitary Confinement? One Justice Offers a Map,” New York Times, https://www.nytimes.com/2018/05/14/us/politics/supreme-court-solitary-confinement-exercise.html

Conclusion

Solitary confinement began as a well-intentioned effort to create a more humane alternative to the then-predominant form of punishment in colonial New England: public humiliation and execution. However, soon after its implementation, the adverse effects of the practice became known, with inmates showing signs of mental distress and physical deterioration; for some time after, state after state dismantled the practice, until the mid-twentieth century as crime increased and the desire to mete out "more effective" punishment became strong.[154] By the 1970s and the following decades, the number of Americans subjected to this practice grew materially. In fact, there are more than 48,000 individuals in some form of solitary confinement today.[155] The rationale of solitary confinement, which began with a goal of religious redemption, also shifted to one of punishment and retribution.

While many academics and other individuals attribute the widespread and continuous use of solitary confinement to the federal courts' failures to consider evolving standards of decency and take greater action, this thesis has demonstrated that these claims are not entirely warranted. In examining federal court cases since 1958, it becomes clear that the court' interpretations of the Eighth Amendment as it relates to solitary confinement and prisoners' rights have expanded considerably. Expansions of these rights were most apparent from 1958-1980 and 1992- the present, while the contraction and narrowing of constitutional limits were most notable in the 1980s.

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[154] Lisa Guenther, *Solitary confinement: Social death and its afterlives*. Minneapolis: University of Minnesota Press, 2013.

[155] Angela Hattery and Earl Smith, "We talked to 100 people about their experiences in solitary confinement. This is what we learned." The Conversation, PhysOrg, https://phys.org/news/2022-10-people-solitary-confinement.html#:~:text=Every%20day%2C%20up%20to%2048%2C000,and%20prisons%20across%20the%20U.S.

The shifting perspective of the federal courts – both when expanding Eighth Amendment protections and when contracting them – seems to reflect broader views of the American populace and have clearly been informed by various social, political, and scientific developments during the specific period of which they were a part. Evolving standards of decency and morality, fears involving the increase of crimes in American cities, interest in the reasons behind criminal behavior, and scientific findings, among other things, all played a part in the changing judicial dynamics around the findings in solitary confinement cases. This further challenges the critique that the federal courts were not receptive to the public or evolving standards of decency.

The very fact that the Supreme and other federal courts acknowledged the Constitutional issues presented by the practice of solitary confinement (and other practices in the U.S. penal system), setting limits on and conditions to its use, raises important questions regarding the future judicial treatment of solitary confinement. While other branches of government have sought to limit its use, they have done so with greater limitations, largely because of issues of federalism. For example, in 2016, President Barack Obama banned the use of solitary confinement for juvenile offenders who committed minor infractions in federal prisons; however, this does not ban its use on juvenile offenders in state prisons, which continues to use it against juveniles at alarming rates.[156] Further, while twenty-three states have enacted some form of legislation that prohibit or set direct limitations on its use, in the absence of a universal determination on its constitutionality or clearer limits on the circumstances under which it can be used, states have no obligation to ban or limit the practice legislatively. States that have not

[156] Laura Wagner, "Obama Bans Solitary Confinement For Juveniles In Federal Prisons," The Two Way, https://www.npr.org/sections/thetwo-way/2016/01/25/463891388/obama-announces-reforms-to-solitary-confinement-in-federal-prisons.

enacted legislation are also some of the greatest proponents of the practice; for example, Mississippi, Alabama, and Georgia.[157]

The arguments that limited use of solitary confinement to protect inmates from harming themselves or others, and as a deterrent to maintain greater stability in institutions, may have merit. However, great specificity of the circumstances under which the practice can be used (and a consideration of alternatives that may also address this issue) is critical, not only because of the deleterious impact of solitary confinement on its subjects, but also because there is evidence that it has been used to target certain demographics of the population. For example, one study found that black inmates in the New York prison system were "2.52 times more likely to be placed in solitary than their white counterparts."[158] Further, solitary confinement is regularly employed in cases where prisoners commit exceedingly minor infractions, such as using "language, delaying work while on assignment, losing state property, or possessing a significant amount of tobacco."[159] Thus, a clearer analysis of the constitutionality of the practice by the highest court of the land could play a significant role in regulating and limiting it on all levels.

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[157] Anne Teigen, "States that Limit or Prohibit Juvenile Shackling and Solitary Confinement," National Conference of State Legislatures, https://www.ncsl.org/civil-and-criminal-justice/states-that-limit-or-prohibit-juvenile-shackling-and-solitary-confinement#:~:text=23%20states%20and%20the%20District,code%2C%20policy%20or%20court%20rules.

[158] Erika Eichelberger, "How Racist is Solitary Confinement," The Intercept, https://theintercept.com/2015/07/16/rikers-study-black-inmates-250-percent-likely-enter-solitary/

[159] "Minor Infractions Lead to Torture in NC Prisons," Disability Rights, https://disabilityrightsnc.org/news/drnc-newsfeed/minor-infractions-lead-to-torture-in-nc-prisons/

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