

**SERIES ON SOLITARY CONFINEMENT & THE EIGHTH AMENDMENT:
ARTICLE II OF III**

**THE PRESENT CONSTITUTIONAL STATUS
OF SOLITARY CONFINEMENT**

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Prisoners are among the most vulnerable people in our society—and the most forgotten and mistreated among them are those living in solitary confinement. Today, nearly 100,000 Americans, including youth and people with serious mental illness, spend 23 hours a day alone in cells smaller than parking spaces with almost no human engagement. Some live like this for days, others for decades. Over a century ago, the Supreme Court recognized that solitary confinement had been all-but-eliminated because it was “found to be too severe,” but the practice has made a resurgence in the last three decades. And somehow—despite an overwhelming societal and medical consensus today that the harms of solitary confinement are, still, too severe—the practice remains uninhibited by the Constitution in almost all forms, applied to almost all individuals, in almost all jurisdictions in America.

Now, however, the tide may be turning. Federal district courts have in recent years shown an increased willingness to question solitary confinement’s permissibility under the Eighth Amendment’s ban on cruel and unusual punishment, starting with particularly harsh forms of confinement against particularly vulnerable groups of people. Moreover, this occurs in the midst of a trend of expansions of Eighth Amendment rights and a growing recognition by state legislatures, professional organizations, and international bodies that solitary confinement is unacceptably harmful by today’s “evolving standards of decency.” And with the retirement of frequent solitary confinement critic Justice Kennedy, the center of gravity for judicial action is set to shift even further to the lower courts.

At this potentially pivotal moment, this three-part Article series seeks to provide the first comprehensive overview of the practice of solitary confinement in America and of the Eighth Amendment litigation it has spurred. And building on this context, the series introduces and details two arguments, under two separate Eighth Amendment doctrines, contending that solitary confinement is per se unconstitutional.

Too often, discussion in the legal academy and among practitioners and policymakers concentrates simply on the adjudication of guilt or innocence. Too easily ignored is the question of what comes next. Prisoners are shut away—out of sight, out of mind. It seems fair to suggest that, in decades past, the public may have assumed lawyers and judges were engaged in a careful assessment of correctional policies, while most lawyers and judges assumed these matters were for the policymakers and correctional experts.

– *Davis v. Ayala* (Kennedy, J., concurring)¹

* J.D. Candidate, Harvard Law School, 2019. I am grateful to Alex Whiting, Andrew Crespo, Dehlia Umunna, Kristin Hucek, Kyle Smiddie, Martha Minow, Michael J. Klarman, Nancy Gertner, and Ryan Wilson for their feedback. And I am particularly appreciative of the careful edits made by Emily Daenzer and the editors of the *University of Pennsylvania Journal of Constitutional Law Online*. This piece is dedicated to Brandon Palakovic, described by his parents Renee and Darian as a “funny, vibrant, handsome, intelligent, and loving” young man. Brandon committed suicide in his solitary confinement cell on July 16, 2012, at only 23 years of age.

¹ 135 S. Ct. 2187, 2209–10 (2015) (Kennedy, J., concurring).

With a factual backdrop established in Article I of this series, we can now turn to the present constitutional status of solitary confinement. This Article seeks to offer a deep dive into Eighth Amendment solitary confinement litigation—demonstrating that district courts have been increasingly receptive to Eighth Amendment challenges, leading to preliminary injunctions and settlement agreements banning the harshest solitary practices. It will start with a brief overview of the two primary Eighth Amendment analyses that can be used to challenge the constitutionality of solitary (these will be the subjects of Article III’s arguments for a *per se* holding). It will then discuss how, despite solitary confinement’s persistent status as constitutional according to the courts, there has been recent momentum in a number of district courts pushing against the practice’s constitutionality. Finally, it will consider how difficult it is for plaintiffs to win in court and how settlements and non-complete *per se* holdings (i.e., *per se* holdings banning solitary confinement of individuals with serious mental illness, but allowing it for all other prisoners) have led to major enforcement issues pointing to the need for a complete *per se* holding.

I. THE EIGHTH AMENDMENT ANALYSIS

The Eighth Amendment prohibits “cruel and unusual punishments.”² The Supreme Court has announced and reiterated the Amendment’s aspirational value: “nothing less than the dignity of man.”³ The Court has made clear over the years that this clause prohibiting cruel and unusual punishment applies not just to the sentencing of convicted individuals but to the *conditions* that these individuals face while incarcerated. Put simply, “[c]onfinement in a prison or in an isolation cell is a form of punishment subject to scrutiny under Eighth Amendment standards”⁴ because, as the Court reminded us in 2011, “[p]risoners retain the essence of human dignity inherent in all persons.”⁵ Specifically, prison officials have the obligation to “provide humane conditions of confinement.”⁶

Article III of this series will contend that two doctrines of Eighth Amendment jurisprudence can and should lead to the conclusion that solitary confinement is *per se* unconstitutional in all forms and against all individuals. It will offer an argument under the “evolving standards of

² U.S. CONST. amend. VIII.

³ *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion); *see also* *Brown v. Plata*, 563 U.S. 493, 510 (2011) (“Respect for that dignity animates the Eighth Amendment prohibition against cruel and unusual punishment.”).

⁴ *Hutto v. Finney*, 437 U.S. 678, 685 (1978).

⁵ *Brown*, 563 U.S. at 510.

⁶ *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (“The Constitution ‘does not mandate comfortable prisons,’ but neither does it permit inhumane ones”) (citing *Rhodes v. Chapman*, 452 U.S. 337, 349 (1981)) (internal citations omitted).

decency” doctrine and under the “deliberate indifference” doctrine. Accordingly, this Part seeks to provide the legal backdrop for these arguments, and for the discussion of the current constitutional status of solitary confinement in the remainder of this Article.

A. *The “Evolving Standards of Decency” Doctrine and the “Deliberate Indifference” Doctrine*

For over half a century, the Supreme Court has established that the Eighth Amendment derives its meaning from “the evolving standards of decency that mark the progress of a maturing society.”⁷ In the 1958 case of *Trop v. Dulles*,⁸ the Court, determining that using denationalization as a form of punishment violates the Eighth Amendment, stated:

This Court has had little occasion to give precise content to the Eighth Amendment, and, in an enlightened democracy such as ours, this is not surprising. But when the Court was confronted with a punishment of 12 years in irons at hard and painful labor imposed for the crime of falsifying public records, it did not hesitate to declare that the penalty was cruel in its excessiveness and unusual in its character. The Court recognized in that case that the words of the Amendment are not precise, and that their scope is not static. *The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.*⁹

With these words six decades ago, the Court established that the Eighth Amendment standard changes based on the values and progress of the day. Since then, the Court has created various doctrines to determine whether a practice violates this “evolving standards of decency” principle.

One such doctrine that is relevant to solitary confinement—and the first that will be presented as an argument in Article III—is referred to, fittingly, as the “evolving standards of decency” doctrine. The Court established under this doctrine that several factors should be considered in deciding whether a type of punishment violates society’s evolving standards of decency.¹⁰ These include the actions of state legislatures, the opinions of relevant professional organizations, international norms, the history of the type of practice’s use, and others.¹¹

A second relevant doctrine is the “deliberate indifference” doctrine. The

⁷ *Trop*, 356 U.S. at 101.

⁸ 356 U.S. 86.

⁹ *Id.* at 100–101 (internal citations omitted) (emphasis added).

¹⁰ See, e.g., Samuel B. Lutz, *The Eighth Amendment Reconsidered: A Framework for Analyzing the Excessiveness Prohibition*, 80 N.Y.U. L. REV. 1862, 1867–68 (2005) (“As its name implies, the evolving standards of decency doctrine requires courts to analyze prevailing community standards in order to determine whether a particular punishment conforms with established or developing social norms.”).

¹¹ See *infra* Andrew Leon Hanna, *Solitary Confinement as Per Se Unconstitutional (Article III)*, 21 U. PA. J. CONST. L. ONLINE (forthcoming 2019).

Court devised this doctrine to determine whether the specific conditions a prisoner is subjected to during confinement violate the Eighth Amendment.¹² The two prongs of the deliberate indifference test—which, when satisfied, means a correctional institution has violated the Eighth Amendment—are: a) the institution must have maintained conditions that inflicted harm that is “sufficiently serious” or exposed inmates to a “substantial risk of serious harm” (an objective test); and b) the institution’s official(s) must have acted with “‘deliberate indifference’ to inmate health or safety” (a subjective test).¹³ The requisite knowledge level to meet the second, more difficult prong for plaintiffs is recklessness—“somewhere between negligence and purpose or knowledge: namely, recklessness of the subjective type used in criminal law.”¹⁴

B. Applicability of Doctrines to Solitary Confinement

Both of these doctrines can be applied to solitary confinement, providing two independent routes to a potential holding that the practice is per se unconstitutional. As noted, the primary distinction between the doctrines is that the “evolving standards of decency” doctrine is applied to general types of punishment, while the “deliberative indifference doctrine” is applied to specific prison conditions. Either is applicable to solitary; it can be challenged as an unconstitutional type of punishment or as an unconstitutional prison condition. Though most courts today delve into the detailed “deliberate indifference” analysis, there has not been any indication that solitary as a type of punishment cannot be held unconstitutional against the “evolving standards of decency” doctrine. The doctrine has been used significantly in determining the constitutionality of “modes of punishment” in the sentencing sphere—particularly death penalty and life-without-parole sentences—leaving untapped potential in applying it to “modes of punishment” in the conditions of confinement sphere, like solitary confinement.¹⁵ This has occasionally led commentators to briefly note the doctrine’s potential applicability and effectiveness in conditions of confinement cases, especially in the context of solitary confinement.¹⁶ It is

¹² See *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (establishing the deliberate indifference doctrine to determine when poor provision of medical care in prison rises to an Eighth Amendment violation).

¹³ *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

¹⁴ *Brice v. Virginia Beach Corr. Ctr.*, 58 F.3d 101, 105 (4th Cir. 1995) (citing *Farmer*, 511 U.S. at 835).

¹⁵ See Alexander A. Reinert, *Solitary Troubles*, 93 NOTRE DAME L. REV. 927, 959–62 (2018) (noting that placement of prisoners in solitary confinement can be considered a mode of punishment subject to the evolving standards of decency doctrine, and briefly considering whether there is a consensus against the practice).

¹⁶ See, e.g., *id.* at 962 (“[O]ne could argue that solitary confinement is simply inconsistent with evolving standards of decency. After all, if legislatures have abandoned use of solitary confinement as punishment for criminal violations because of the severity of the punishment, one could argue that prison officials are even less empowered to use solitary confinement as punishment.”); *Civil Rights*

past time for this argument to be made in full force, compelling courts to directly confront the fact that solitary confinement is starkly out of step with today's standards of decency.

Article III of this series will argue that an analysis under either doctrine can and should lead to a decision of per se unconstitutionality. It will contend that applying the “evolving standards of decency” doctrine to solitary confinement indicates that the practice as a general matter is incompatible with society's evolving standards of decency and is thus a violation of the Eighth Amendment. Article III will also provide an alternative argument under the more detailed “deliberate indifference” doctrine, particularly because courts commonly apply this test to solitary confinement challenges. It will contend that when the “deliberate indifference” doctrine is applied to any set of specific conditions involving the use of solitary confinement, it will meet the “deliberate indifference” test, meaning it violates the Eighth Amendment in all instances. Both analyses therefore lead to the same conclusion: solitary confinement always contravenes the Eighth Amendment.

II. CONSTITUTIONAL IN ALMOST ALL FORMS, AGAINST ALMOST ALL PRISONERS, IN ALMOST ALL PLACES

The practice of solitary confinement remains unrestrained by the Constitution in just about all forms, imposed on just about all groups of prisoners, in just about all jurisdictions in America. Relatively few courts have weighed in on the Eighth Amendment constitutionality of solitary confinement. And although several cases decry the imposition of solitary confinement as a general matter, as well as in particular manners and when imposed on particularly vulnerable groups, no published opinion yet goes so far as to assert that solitary confinement is per se unconstitutional.¹⁷ Overall,

— *Eighth Amendment — Third Circuit Holds Parents of Mentally Ill Young Man Held in Solitary Confinement Stated Claims of Cruel and Unusual Punishment* — Palakovic v. Wetzel, 131 HARV. L. REV. 1481, 1487–88 (2018) [hereinafter *Civil Rights — Eighth Amendment*] (applying the evolving standards of decency doctrine to argue that solitary confinement of individuals with serious mental illness is per se unconstitutional).

¹⁷ See Kenneth M. Cole III, *The Constitutional Status of Solitary Confinement*, 57 CORNELL L. REV. 476, 476–77 (1972) (contending that the “mantle of precedent” created by “administrative control of inmates considered to be a threat” and state laws or regulations allowing solitary confinement as a permissible “method of enforcing prison rules and discipline” has prevented courts from frequently reconsidering the constitutionality of the practice). Some cases have found long-term solitary confinement to be unconstitutional, as applied, when including certain additional harmful elements—see, for example, cases striking down solitary confinement that involved forced nudity. See, e.g., *Wright v. McMann*, 387 F.2d 519 (2d Cir. 1967); *Knuckles v. Prasse*, 302 F. Supp. 1036 (E.D. Pa. 1969). Others have found that the practice is per se unconstitutional when it involves particularly vulnerable groups—for example, the handful of cases striking down solitary confinement of individuals with serious mental illness, as will be discussed in greater detail. See, e.g., *Ruiz v. Johnson*, 37 F. Supp. 2d 855, 915 (S.D. Tex. 1999), *rev'd on other grounds and remanded sub*

“the Constitution has played almost no role in substantively limiting [solitary confinement’s] use.”¹⁸

Still, the momentum may be shifting. District courts, especially as of late, have shown significant concern with the practice of solitary confinement—issuing preliminary injunctions to ban certain types of solitary (especially confinement of juveniles and individuals with serious mental illness), allowing solitary cases to proceed such that significantly restrictive settlement agreements are signed by local and state governments, and at times even ultimately holding that the practice is unconstitutional in certain forms. This Part will discuss four especially harsh types of segregation—long-term segregation, segregation of those with serious mental illness, segregation of youth, and segregation of individuals on death row—and how courts have treated their permissibility under the Eighth Amendment. These are four types of solitary confinement that might be considered as possessing “plus factors” that elevate the harshness even beyond the baseline. As will be noted, there has been some movement by courts in each area, and—although these practices are especially prone to inflict serious and inhumane harm to inmates—the underlying rationales driving the movements against these practices apply to the core practice of solitary confinement itself, in any duration and with regard to any class of prisoners.

A. *Constitutional Status of Long-Term Confinement*

Long-term isolation of the general inmate population has faced some constitutional scrutiny over the years, most famously in concurrences and dissents by Supreme Court Justices.¹⁹ The American Bar Association (the “ABA”) Standards for Criminal Justice regarding the Treatment of Prisoners defines “long-term” segregation as confinement exceeding or expected to exceed thirty days.²⁰ The length of time is constitutionally meaningful according to the Supreme Court, as it has stated that, in determining whether an Eighth Amendment violation has occurred, length “cannot be ignored.”²¹

Two cases in the 1960s held that long-term solitary confinement can be an Eighth Amendment violation, but stopped short of a *per se* holding as it relates to long-term confinement. These cases, which took place before the “deliberate indifference” doctrine’s development and emphasized concepts related to the “evolving standards of decency” doctrine, focused on the

nom. Ruiz v. United States, 243 F.3d 941 (5th Cir. 2001); Madrid v. Gomez, 889 F. Supp. 1146, 1280 (N.D. Cal. 1995).

¹⁸ Reinert, *supra* note 15, at 957.

¹⁹ See, e.g., Ruiz v. Texas, 137 S. Ct. 1246, 1247 (2017) (Breyer, J., dissenting); Davis v. Ayala, 135 S. Ct. 2187, 2208–10 (2015) (Kennedy, J., concurring).

²⁰ STANDARDS FOR CRIMINAL JUSTICE: TREATMENT OF PRISONERS 23-1.0(o) (AM. BAR ASS’N 2011).

²¹ Hutto v. Finney, 437 U.S. 678, 686 (1978).

combination of long-term confinement and other degrading elements, seeming to limit their language to the particular circumstances at hand. In *Wright v. McMann*,²² the Second Circuit held that solitary confinement “for a substantial period of time” is unconstitutional when it involves nudity and a lack of hygiene items like soap and toilet paper because the practice violates “civilized standards of humane decency.”²³ And in *Knuckles v. Prasse*,²⁴ the District Court for the Eastern District of Pennsylvania held that a five-month span of solitary confinement, because it included two-and-a-half days of nudity, was unconstitutional.²⁵ Ultimately, no court has found long-term solitary confinement to be facially unconstitutional.

Still, cases of long-term confinement have increasingly been settled by state and local governments, with commitments to reform.²⁶ Another recent positive development is that members of the Supreme Court, especially Justice Breyer and recently retired Justice Kennedy, have indicated serious concern with long-term confinement because of its significant psychological harms. In 2015, Justice Kennedy detailed the evidence of the harms of long-term solitary confinement. He noted that “[y]ears on end of near-total isolation exact a terrible price” and lamented the lack of awareness about the plight of inmates in solitary confinement because “so stark an outcome [as the mental harm inflicted by solitary confinement] ought not to be the result of society’s simple unawareness or indifference.”²⁷ Moreover, he seemed to show a direct interest in hearing a case related to long-term confinement: “[i]n a case that presented the issue, the judiciary may be required, within its proper jurisdiction and authority, to determine whether workable alternative systems for long-term confinement exist, and, if so, whether a correctional system should be required to adopt them.”²⁸ Most recently, in a 2017 dissent, Justice Breyer noted “long-standing ‘serious objections’ to extended solitary confinement” and stated that “extended solitary confinement alone raises serious constitutional questions.”²⁹ Despite this momentum at the Court, as will be discussed in Article III of this series, the likelihood of the Roberts Court changing the constitutional status of solitary confinement after Justice Kennedy’s retirement is slim, creating an urgent call for lower courts to take the lead.

As is the case for each of the four subsets of solitary confinement discussed in this Part, these concerns with long-term solitary confinement, though

²² 387 F.2d 519 (2d Cir. 1967).

²³ *Id.* at 526.

²⁴ 302 F. Supp. 1036 (E.D. Pa. 1969).

²⁵ *Id.* at 1061–62.

²⁶ *See, e.g.,* *Ashker v. Brown*, No. 09-cv-5796, 2018 WL 1536739 (N.D. Cal. 2018).

²⁷ *Davis v. Ayala*, 135 S. Ct. 2187, 2209–10 (2015) (Kennedy, J., concurring).

²⁸ *Id.* at 2210.

²⁹ *Ruiz v. Texas*, 137 S. Ct. 1246, 1247 (2017) (Breyer, J., dissenting).

more exaggerated than when it comes to solitary confinement in shorter periods, apply to the practice of solitary confinement as a general matter. Even short stints in solitary have been demonstrated to cause serious psychological harm—with every recorded study of the practice lasting longer than 10 days resulting in “negative psychological effects.”³⁰ And the Court recognized in 1890 that “after even a short confinement,” prisoners were severely harmed.³¹

B. Constitutional Status of Confinement of Mentally Ill Individuals

Courts have also increasingly noted the particular harm placed on mentally ill individuals in solitary confinement. As one federal district court recognized in 2014, “[a]vailable evidence suggests that contemporary values are moving away from placement of seriously mentally ill prisoners in segregated housing.”³² In the most notable case on the subject—*Madrid v. Gomez*,³³ which followed prisoner hunger strikes at Pelican Bay State Prison—the Northern District of California went into detail about the harms of segregating individuals with serious mental illness:

[S]ubjecting individuals to conditions that are ‘very likely’ to . . . seriously exacerbate an existing mental illness [cannot] be squared with evolving standards of humanity or decency Indeed, it is inconceivable that any representative portion of our society would put its imprimatur on a plan to subject the mentally ill . . . to [the prison’s solitary confinement units], knowing that severe psychological consequences will most probably befall those inmates. . . .

[D]ry words on paper [cannot] adequately capture the senseless suffering and sometimes wretched misery that defendants’ unconstitutional practices leave in their wake. The anguish of descending into serious mental illness, the pain of physical abuse, or the torment of having serious medical needs that simply go unmet is profoundly difficult, if not impossible, to fully fathom, no matter how long or detailed the trial record may be.³⁴

Similarly, courts have recognized the harms and dignity concerns with placing people in solitary confinement *because* of their mental illness. The District Court of Puerto Rico put it straightforwardly: “The punishment of persons because they are mentally disturbed is unconscionable and barbaric.”³⁵

This increasing judicial awareness of the harms of solitary on individuals with mental illness has led to at least three cases holding that segregating those with serious mental illness violates the Eighth Amendment, in addition

³⁰ *Williams v. Sec’y Pa. Dep’t of Corr.*, 848 F.3d 549, 566–67 (3d Cir. 2017).

³¹ *In re Medley*, 134 U.S. 160, 168 (1890).

³² *Coleman v. Brown*, 28 F. Supp. 3d 1068, 1105–06, n.50 (E.D. Cal. 2014).

³³ 889 F. Supp. 1146 (N.D. Cal. 1995).

³⁴ *Id.* at 1266, 1280.

³⁵ *Feliciano v. Barcelo*, 497 F. Supp. 14, 35 (D.P.R. 1979).

to several preliminary injunctions³⁶ and other preliminary decisions in favor of plaintiffs leading to settlement agreements.³⁷ In *Madrid*, the district court stated that segregating people with serious mental illness is “the mental equivalent of putting an asthmatic in a place with little air to breathe,” and held that it violated the Eighth Amendment in all cases.³⁸

In *Ruiz v. Johnson*,³⁹ a second per se holding case related to mental illness, the District Court for the Southern District of Texas did the same, finding it to be “deplorable and outrageous that [Texas] prisons appear to have become a repository for a great number of its mentally ill citizens.”⁴⁰ Like the *Madrid* court, the *Ruiz* court found the practice of segregating individuals with mental illness to flout the evolving standards of decency doctrine:

The United States Constitution cannot abide such a perverse and unconscionable system of punishment. As to mentally ill inmates . . . the severe and psychologically harmful deprivations of its administrative segregation units are, by our evolving and maturing society’s standards of humanity and decency, found to be cruel and unusual punishment.⁴¹

While the court decried the impact of solitary confinement on all individuals, as did the court in *Madrid*, it cabined its holding only to those with serious mental illness, purportedly out of deference to prisons’ need to segregate some prisoners in some cases.⁴²

In addition to the traditional Eighth Amendment claim regarding

³⁶ See, e.g., *Braggs v. Dunn*, 257 F. Supp. 3d 1171, 1201, 1267 (M.D. Ala. 2017) (finding that the Alabama Department of Corrections operated a constitutionally inadequate mental healthcare system, one component of which was inadequate screening and intake); *Jones’El v. Berge*, 164 F. Supp. 2d 1096, 1125–26 (W.D. Wis. 2001) (ordering a prison to remove inmates with serious mental illness from its “supermax” facility and to monitor the mental health status of inmates in “supermax”); *Coleman v. Wilson*, 912 F. Supp. 1282, 1320 (E.D. Cal. 1995) (adopting the magistrate judge’s conclusion that “inmates are denied access to necessary mental health care while they are housed in [solitary confinement]”).

³⁷ See, e.g., Summary of Settlement Agreement, Cmty. Legal Aid Soc’y, Inc. v. Coup, No. 15-688 (D. Del. 2016), <http://www.declasi.org/wp-content/uploads/2016/09/2016-09-06-CLASI-v-Coupe-Summary-Sheet.pdf>; Settlement Agreement, Disability Law Ctr. v. Mass. Dep’t of Corr., No. 07-10463 (D. Mass. 2007), <https://www.clearinghouse.net/chDocs/public/PC-MA-0026-0004.pdf>; see also *Justice Department Closes Investigation After Pennsylvania Department of Corrections Takes Significant Steps to Reform Its Use of Solitary Confinement*, U.S. DEP’T OF JUSTICE (Apr. 14, 2016), <https://www.justice.gov/opa/pr/justice-department-closes-investigation-after-pennsylvania-department-corrections-takes> (describing the DOJ’s decision to close its investigation into the Pennsylvania Department of Corrections (PDOC) “following significant improvements made by PDOC to its policies and practices that are intended to protect prisoners with serious mental illness and intellectual disabilities from the harmful effects of solitary confinement”).

³⁸ *Madrid*, 889 F. Supp. at 1265.

³⁹ *Ruiz v. Johnson*, 37 F. Supp. 2d 855 (S.D. Tex. 1999), *rev’d on other grounds and remanded sub nom. Ruiz v. United States*, 243 F.3d 941 (5th Cir. 2001).

⁴⁰ *Id.* at 915.

⁴¹ *Id.* (“Persons who, with psychiatric care, could fit well into society, are instead locked away, to become wards of the state’s penal system. Then, in a tragically ironic twist, they may be confined in conditions that nurture, rather than abate, their psychoses.”).

⁴² *Id.*

inhumane conditions of confinement, plaintiffs with serious mental illness have another Eighth Amendment claim that could lead to a per se holding: the inadequate mental health care claim. The argument under this claim is that there is inherently inadequate mental health care of people with serious mental illness when they are placed in solitary confinement, regardless of the specific context at play. A recent Third Circuit opinion surrounding Brandon Palakovic's case, *Palakovic v. Wetzel*,⁴³ helped to develop the theory behind per se satisfaction of the deliberate indifference doctrine for this type of Eighth Amendment claim.⁴⁴

C. Constitutional Status of Confinement of Youth

There have been recent chippings away at the constitutionality of placing youth in solitary as well.⁴⁵ In 2017 alone, a district court case in New York held that the plaintiffs stated a claim that punitive solitary confinement of juveniles is cruel and unusual under the Eighth Amendment,⁴⁶ and two preliminary injunctions in Tennessee and Wisconsin banned the practice in state prisons.⁴⁷ This is in addition to settlements with states before opinions are issued.⁴⁸ In the New York case, *V.W. v. Conway*,⁴⁹ the court reiterated what the Supreme Court has recognized time and time again—that youth, due to their continued development in adolescence, are particularly “susceptible to influence and to psychological damage.”⁵⁰ It analogized juveniles being placed in solitary to mentally ill individuals in the same position, stating they “suffer from similar, pre-existing mental conditions.”⁵¹

The placement of juveniles in solitary confinement has made perhaps the biggest splash in the media, particularly due to the story of Kalief Browder. As detailed in *The New Yorker* in 2014, Kalief was a young man held in the notoriously brutal conditions of the Riker's Island juvenile facility in New

⁴³ 854 F.3d 209 at 226, 228–229 (3d Cir. 2017).

⁴⁴ For an explanation of how this opinion may help advance this argument, see generally *Civil Rights — Eighth Amendment*, *supra* note 16. The court did so by highlighting that solitary confinement was the “key component” that brought the care to the recklessness standard. *Id.* at 1485; see *Palakovic*, 854 F.3d at 229. And, as noted, “[A] defendant's only safe harbor — arguing lack of knowledge of a person's serious mental illness — is increasingly impeded by the growing judicial view that adequate mental health care requires adequate screening for mental illness.” *Civil Rights — Eighth Amendment*, *supra* note 16, at 1487 (citing *Woodward v. Corr. Med. Servs.*, 368 F.3d 917, 927 (7th Cir. 2004); *Gibson v. County of Washoe*, 290 F.3d 1175, 1189 (9th Cir. 2002)).

⁴⁵ See *e.g.*, *V.W. ex rel. Williams v. Conway*, 236 F. Supp. 3d 554, 583–85 (N.D.N.Y. 2017).

⁴⁶ *Id.*

⁴⁷ *Doe v. Hommrich*, No. 3-16-0799, 2017 WL 1091864 (M.D. Tenn. Mar. 22, 2017); *J.J. v. Litscher*, No. 17-cv-47 (W.D. Wis. July 11, 2017); see also *A.T. v. Harder*, 298 F. Supp. 3d 391 (N.D.N.Y. 2018).

⁴⁸ See, *e.g.*, *G.F. v. Contra Costa Cty.*, No. 13-cv-03667, 2015 WL 7571789 (N.D. Cal. Nov. 25, 2015).

⁴⁹ 236 F. Supp. 3d 554 (N.D.N.Y. 2017).

⁵⁰ *Id.* at 583 (quoting *Miller v. Alabama*, 567 U.S. 460, 476 (2012)).

⁵¹ *Id.* at 584.

York.⁵² His crime: *maybe* stealing a backpack.⁵³ Kalief was held in solitary confinement for multiple years before he was even tried for the alleged crime, and he eventually committed suicide.⁵⁴ President Barack Obama cited Kalief's story in an op-ed in *The Washington Post* announcing that his Administration would end the practice of placing youths in solitary confinement.⁵⁵ It was a symbolic decision that built on the growing national consciousness about the harms of solitary confinement, especially of youth, but the change in policy affected only a few juveniles segregated in federal prisons.

D. Constitutional Status of Confinement of Individuals on Death Row

Finally, another group of prisoners subjected to solitary confinement that has attracted attention by courts, especially the Supreme Court, is prisoners on death row awaiting their execution. Among the most formidable critics of the practice was Justice Stevens. In the 1995 case of *Lackey v. Texas*,⁵⁶ he argued against solitary confinement for those awaiting the death penalty, agreeing with English jurists that “execution after inordinate delay would have infringed the prohibition against cruel and unusual punishments to be found in section 10 of the Bill of Rights 1689.”⁵⁷

As with long-term confinement, Justices Kennedy and Breyer have notably amplified concerns with the issue of prolonged confinement before execution. Though their aforementioned statements condemning solitary confinement were broad in scope, they came specifically in the context of individuals awaiting execution. Justice Kennedy's famous 2015 concurrence in *Davis* was written in relation to a federal habeas case in which the convicted murderer had been held in solitary confinement for “the great majority of his more than 25 years in custody” awaiting execution penalty.⁵⁸ And Justice Breyer's criticisms of long-term solitary confinement two years later came in a statement respecting the denial of certiorari in a case regarding an

⁵² Jennifer Gonnerman, *Before the Law*, NEW YORKER (Oct. 6, 2014), <https://www.newyorker.com/magazine/2014/10/06/before-the-law>.

⁵³ *Id.*

⁵⁴ Michael Schwirtz & Michael Winerip, *Kalief Browder, Held at Rikers Island for 3 Years Without Trial, Commits Suicide*, N.Y. TIMES (June 8, 2015), <https://www.nytimes.com/2015/06/09/nyregion/kalief-browder-held-at-rikers-island-for-3-years-without-trial-commits-suicide.html>.

⁵⁵ Juliet Eilperin, *Obama Bans Solitary Confinement for Juveniles in Federal Prisons*, WASH. POST (Jan. 26, 2016), https://www.washingtonpost.com/politics/obama-bans-solitary-confinement-for-juveniles-in-federal-prisons/2016/01/25/056e14b2-c3a2-11e5-9693-933a4d31bcc8_story.html?utm_term=.7c08c76c6550.

⁵⁶ 514 U.S. 1045 (1995) (mem.).

⁵⁷ *Id.* at 1046–47.

⁵⁸ *Davis v. Ayala*, 135 S. Ct. 2187, 2208 (2015) (Kennedy, J., concurring).

individual placed in solitary confinement on death row.⁵⁹ Having written nearly 20 years prior that “[i]t is difficult to deny the suffering inherent in a prolonged wait for execution,”⁶⁰ he stated that the “‘human toll’ that accompanies extended solitary confinement is exacerbated by the fact that execution is in the offing.”⁶¹ He asked openly: “[w]hat legitimate purpose does it serve to hold any human being in solitary confinement for 40 years awaiting execution?”⁶² And he twice reiterated the need for the Supreme Court to hear the constitutional question of whether solitary confinement, at least in the case of death row inmates, is allowable.⁶³ Despite the recent concerns expressed at the highest Court, however, there has been relatively little in the way of progress on this particular use of solitary confinement in the federal courts as a general matter.

III. NEARLY IMPOSSIBLE TO WIN WITHOUT A PER SE HOLDING, AND ENFORCEMENT CHALLENGES

A. *Long Odds of Victory*

Because there is no per se holding against solitary confinement in almost any form in almost every jurisdiction across the nation, prisoners and/or their families are left with nearly impossible odds in court. Without a broader holding that the practice violates the “evolving standards of decency” doctrine, plaintiffs are left to argue the case-by-case application of the two-pronged deliberate indifference doctrine. This creates a state of affairs in which it is nearly impossible for plaintiffs who suffer or suffered from solitary confinement to win. They are “virtually pre-ordained to fail.”⁶⁴

In analyzing the deliberate indifference doctrine, Justice White noted this lack of opportunity for solitary confinement litigants back in 1991 in *Wilson v. Seiter*.⁶⁵ In that case, Justice White predicted that the subjective intent prong “likely will prove impossible to apply in many cases” because prison conditions are the result of “cumulative actions and inactions.”⁶⁶ In other words, the imposition of inhumane prison conditions on inmates is not something that can generally be traced back to individual prison officials.

⁵⁹ Ruiz v. Texas, 137 S. Ct. 1246, 1246 (2017) (Breyer, J., dissenting).

⁶⁰ Knight v. Florida, 528 U.S. 990, 994 (1999) (Breyer, J., dissenting).

⁶¹ Ruiz, 137 S. Ct. at 1247.

⁶² Smith v. Ryan, 137 S. Ct. 1283, 1283 (2017) (Breyer, J., statement respecting the denial of certiorari).

⁶³ *Id.* at 1283–84.

⁶⁴ See John Fitzpatrick, Dir., Harvard Prison Legal Assistance Project, Remarks at Harvard Law School (Mar. 2, 2018) (arguing that “[p]risoners are hated across the political spectrum,” which diminishes prisoners’ likelihood of success).

⁶⁵ 501 U.S. 294, 306 (1991) (White, J., concurring in judgment).

⁶⁶ *Id.* at 310.

Rather, the punishment practices are the result of multiple decisions across the institution such that one person alone may not be found to have the requisite knowledge (recklessness) to meet the deliberate indifference test's second prong, but the institution itself (or the collective prison officials) could. So, not only does the test make it difficult for plaintiffs to succeed in litigation about inhumane conditions of confinement, it is also not an appropriate test in and of itself. As Justice White put it:

Not only is the majority's intent requirement a departure from precedent, it likely will prove impossible to apply in many cases. Inhumane prison conditions often are the result of cumulative actions and inactions by numerous officials inside and outside a prison, sometimes over a long period of time. In those circumstances, it is far from clear whose intent should be examined, and the majority offers no real guidance on this issue. In truth, intent simply is not very meaningful when considering a challenge to an institution, such as a prison system. . . .

The ultimate result of today's decision, I fear, is that "serious deprivations of basic human needs" will go unredressed due to an unnecessary and meaningless search for "deliberate indifference."⁶⁷

Justice Stevens agreed. In his dissent in *Estelle v. Gamble*,⁶⁸ the foundational case on mental health treatment and the Eighth Amendment in prisons, he argued that the focus of the constitutional inquiry should be on "the character of the punishment rather than the motivation of the individual who inflicted it."⁶⁹ "Both Justices Stevens and White recognized that one of the inherent problems with applying the subjective prong to solitary confinement conditions cases is that the nature of the evil is in the design, rather than the actions of the immediate prison officials."⁷⁰ And commentators have agreed that, as Holly Boyer puts it, it can be "next to impossible" to satisfy the subjective prong.⁷¹

A helpful illustration of just how difficult it is for prisoners held in solitary confinement and their families to succeed in court is the Seventh Circuit case of *Scarver v. Litscher*.⁷² In this case over a decade ago, the court knew from evidence provided in previous litigation that the defendant prison officials actually possessed a well-known article about the harms of segregating those with serious mental illness.⁷³ Even though it recognized this fact and the fact that there is "extensive literature" on the practice's harms, the court held that knowledge of the risk of harm was not sufficient to rise to the recklessness

⁶⁷ *Id.* at 310–11 (internal citation omitted).

⁶⁸ 429 U.S. 97 (1976).

⁶⁹ *Id.* at 116 (Stevens, J., dissenting).

⁷⁰ Holly Boyer, *Home Sweet Hell: An Analysis of the Eighth Amendment's 'Cruel and Unusual Punishment' Clause as Applied to Supermax Prisons*, 32 SW. U. L. REV. 317, 333 (2003).

⁷¹ *Id.*

⁷² 434 F.3d 972 (7th Cir. 2006).

⁷³ *Id.* at 976.

standard of the deliberate indifference doctrine's second prong.⁷⁴

B. Enforcement Challenges Even When Successful

Even in the rare cases of success in attaining a per se holding for at least a type of solitary confinement, enforcement becomes a major issue. The story of Pelican Bay State Prison, the subject of *Madrid's* per se holding that placing individuals with serious mental illness is an Eighth Amendment violation, is illuminating. There, the court determined that segregating individuals with serious mental illness rose to a facial violation of the Eighth Amendment, but that segregating individuals without a serious mental illness did not.⁷⁵ Despite recognizing the harms of segregation to all individuals, it drew a line between those with serious mental illness and those without it, leaving intact the core practice of solitary confinement: "Conditions in the [solitary confinement units] may well hover on the edge of what is humanly tolerable for those with normal resilience, particularly when endured for extended periods of time. They do not, however, violate exacting Eighth Amendment standards, except for the specific population subgroups identified in this opinion."⁷⁶ Partly because of this line leaving the practice's foundation intact, accountability issues have plagued the enforcement of the court opinion;⁷⁷ traditional solitary practices still exist, so a lack of an accurate diagnosis might allow individuals with serious mental illness to fall through the cracks. Individuals on the borders of a diagnosis can continue to be placed in solitary, and those who develop serious mental illnesses while in segregation may not be moved.

One of many other illustrative examples of this point about challenging enforcement is the settlement between a disability rights organization and the Commonwealth of Massachusetts.⁷⁸ In 2012, in response to litigation regarding the use of solitary confinement in its prisons, Massachusetts reached a settlement agreeing to all-but end the practice of placing individuals with serious mental illness in solitary confinement.⁷⁹ The settlement agreement's most severe restrictions were limited to individuals with serious mental illness and, even then, the agreement did allow for short-term stints in solitary confinement in emergency situations.⁸⁰ Enforcement faltered: in 2016, Prisoners' Legal Services, a non-profit advocacy group,

⁷⁴ *Id.* at 975–77.

⁷⁵ *Madrid v. Gomez*, 889 F. Supp. 1146, 1280 (N.D. Cal. 1995).

⁷⁶ *Id.*

⁷⁷ See Jules Lobel, Prof., University of Pittsburgh Law School, Remarks at Harvard Law School (Mar. 2, 2018).

⁷⁸ Settlement Agreement, *Disability Law Ctr. v. Mass. Dep't of Corr.*, No. 07-10463 (D. Mass. 2007), <https://www.clearinghouse.net/chDocs/public/PC-MA-0026-0004.pdf>.

⁷⁹ *Id.* at 6.

⁸⁰ *Id.*

sent a report to Massachusetts Governor Charlie Baker showing that the state was unlawfully placing men with serious mental illness in solitary confinement.⁸¹ Even with a strong settlement agreement, the fact that the practice of solitary confinement was still permitted for many prisoners, and for seriously mentally ill prisoners for short durations in certain cases, kept the practice intact generally and likely made it easier for serious enforcement to falter.

The story of Pelican Bay and the Massachusetts settlement teach us something quite clear: as long as solitary confinement still exists at all, and as long as there is no bright-line per se holding that the practice is unconstitutional, it will likely continue in some form. The system itself would need to be dismantled, either by the judiciary or legislature, for there to be confidence in the enforceability of a rule banning solitary for any length of time or for any sub-group.

⁸¹ Maria Cramer & Jenna Russell, *Advocates: Mass. Unlawfully Isolates Mentally Ill Inmates*, BOS. GLOBE (Dec. 31, 2016), <https://www.bostonglobe.com/metro/2016/12/31/massachusetts-unlawfully-sending-mentally-ill-inmates-solitary-confinement-prisoner-advocates-charge/cYiQVaNab70z1llVCnC4EP/story.html>.