

SOLITARY CONFINEMENT, HUMAN DIGNITY,  
AND THE EIGHTH AMENDMENT

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*The harms of solitary confinement have been well-documented for centuries, yet the practice persists. Despite recent efforts to reform the use of solitary confinement in certain states and localities, over 120,000 people remain confined in solitary conditions in American prisons and jails. In part, America's addiction to solitary confinement remains incurable because the doctrine governing whether a particular punishment practice is constitutional—that is, the doctrine interpreting the Eighth Amendment's Cruel and Unusual Punishments Clause—fails to adequately recognize the harm caused by solitary confinement. To be sure, modern Eighth Amendment doctrine recognizes specific deprivations attendant to solitary (e.g., deprivations of human interaction, environmental stimulation, sleep, and outdoor exercise). But by requiring an atomization of the harm of solitary into these singular deprivations, current Eighth Amendment doctrine fails to capture the breadth, depth, and significance of the harm caused to people experiencing these deprivations in combination. In other words, modern Eighth Amendment doctrine's focus on singular deprivations overlooks the harm to personhood that solitary confinement inflicts.*

*This Article proffers human dignity as a novel conceptual vehicle for capturing and articulating solitary confinement's harm to personhood. Starting from the Supreme Court's edict that "the basic concept underlying the Eighth Amendment is nothing less than the dignity of man," this Article employs a construct of dignity-as-integrity—or wholeness—of personhood. Using dignity-as-integrity as a conceptual vehicle to encompass the physical, psychological, and social harms of*

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*solitary confinement, this Article offers a doctrinally and theoretically coherent construct for understanding solitary confinement's multiple deprivations and the harm those deprivations inflict on personhood. By utilizing the dignity-as-integrity construct, this Article not only provides a more coherent frame for understanding the harms of solitary confinement, it also illuminates how conceptions of dignity shape Eighth Amendment doctrine. For if the touchstone of the Eighth Amendment is truly "nothing less than the dignity of man," an understanding of dignity that encompasses integrity of personhood is critical to providing meaningful parameters on the State's power to punish.*

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## INTRODUCTION

*“[T]hose who try to formulate substantial principles of justice should reserve a prominent place for human dignity. If this is not done, the distinctively moral aspects of justice will be absent; and the claims of justice will be at best legalistic and at worst arbitrary.”*<sup>1</sup>

Although the words “human dignity” appear nowhere in the Constitution, dignity has emerged as a significant constitutional value animating the Supreme Court’s individual rights jurisprudence. Dignity has functioned as the underpinning of Fourteenth Amendment privacy rights in marriage, contraception, and sexual relationships; the Fifth Amendment right against self-incrimination; the Fourth Amendment’s protection against unreasonable searches and seizures; the First Amendment right to freedom of expression; and the Fourteenth Amendment’s guarantee of equal protection.<sup>2</sup> So too has human dignity played a critical role in the Court’s Eighth Amendment jurisprudence, where it serves as the touchstone of the proscription against cruel and unusual punishment.<sup>3</sup>

<sup>1</sup> Michael S. Pritchard, *Human Dignity and Justice*, 82 *Ethics* 299, 300–01 (1972).

<sup>2</sup> See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 567, 578–79 (2003) (overturning Texas’s anti-sodomy statute on the grounds that “adults may choose” to engage in same-sex relationships and still “retain their dignity as free persons”); *Miranda v. Arizona*, 384 U.S. 436, 460 (1966) (“[T]he constitutional foundation underlying the privilege [against self-incrimination] is the respect a government—state or federal—must accord to the dignity and integrity of its citizens.”); *Hudson v. Michigan*, 547 U.S. 586, 594 (2006) (describing the purpose of the knock-and-announce rule as, among other things, to protect “dignity that can be destroyed by a sudden entrance”); *Cohen v. California*, 403 U.S. 15, 24 (1971) (“The constitutional right of free expression is . . . designed and intended to remove governmental restraints from the arena of public discussion . . . in the belief that no other approach would comport with the premise of individual dignity . . . upon which our political system rests.”); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 129, 142 (1994) (holding the exclusion of a juror based on gender is unconstitutional because it “denigrates the dignity of the excluded juror”); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (holding that a minority set-aside program implicates the right “to be treated with equal dignity and respect”); *Goldberg v. Kelly*, 397 U.S. 254, 264–65 (1970) (“From its founding the Nation’s basic commitment has been to foster the dignity and well-being of all persons within its borders.”); see also Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 *U. Pa. L. Rev.* 169, 181 (2011) (cataloguing Supreme Court opinions that have used the term “dignity” and proposing a typology of dignity based on those uses); Maxine D. Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 *Neb. L. Rev.* 740, 757–59 (2006) (asserting that human dignity is a constitutional value in Supreme Court jurisprudence that gives meaning to existing rights).

<sup>3</sup> See *infra* Part II.

Over sixty years ago, in *Trop v. Dulles*, the Court articulated the contemporary Eighth Amendment standard, holding that “[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man.”<sup>4</sup> In the intervening years, the Court has repeatedly endorsed *Trop*, reaffirming the duty of the government to respect the dignity of all people, including those incarcerated in the nation’s prisons.<sup>5</sup> In evaluating Eighth Amendment conditions of confinement claims, the Court has held that while people who are incarcerated “may be deprived of rights that are fundamental to liberty” as part of a lawful sentence, “the law and the Constitution demand recognition of certain other rights” because “[p]risoners retain the essence of human dignity inherent in all persons.”<sup>6</sup>

Of course, this begs the question of what human dignity *is*. The Court has struggled with that question for decades across its constitutional jurisprudence.<sup>7</sup> It is in good company: philosophers, religious scholars, and nations (among others) have debated dignity’s meaning for centuries. The difficulty in articulating a precise definition of human dignity has caused some scholars to question whether it exists at all, dismissing appeals to dignity as “either vague restatements of other, more precise, notions or mere slogans that add nothing to an understanding of the topic.”<sup>8</sup> But while critiques about the definitional vagueness of human dignity are not without merit, the fact that dignity resists easy definition does not belie its existence or the potentially critical role it plays in individual rights jurisprudence.

This is especially true in the context of the Eighth Amendment, where dignity has been central to the Court’s reasoning. Indeed, the Court’s Eighth Amendment jurisprudence in the wake of *Trop* demonstrates that when the Court has held a challenged punishment unconstitutional, it has—explicitly or implicitly—examined the relationship between the

<sup>4</sup> 356 U.S. 86, 100 (1958) (plurality opinion).

<sup>5</sup> See, e.g., *Moore v. Texas*, 137 S. Ct. 1039, 1048 (2017); *Kennedy v. Louisiana*, 554 U.S. 407, 419–20 (2008).

<sup>6</sup> *Brown v. Plata*, 563 U.S. 493, 510 (2011).

<sup>7</sup> See, e.g., *supra* note 2.

<sup>8</sup> Ruth Macklin, *Dignity Is a Useless Concept*, 327 *Brit. Med. J.* 1419, 1419 (2003); see also Steven Pinker, *The Stupidity of Dignity*, *New Republic* (May 28, 2008), <https://newrepublic.com/article/64674/the-stupidity-dignity> (arguing that dignity’s subjective nature makes it a near-useless concept); Mirko Bagaric & James Allan, *The Vacuous Concept of Dignity*, 5 *J. Hum. Rts.* 257, 260, 265–67 (2006) (critiquing dignity as a concept that is too vague to serve as a solid foundation for human rights); Michael Rosen, *Dignity: The Case Against*, in *Understanding Human Dignity* 143, 144 (Christopher McCrudden ed., 2013) (referring to dignity as a “Potemkin village of vain pretensions”).

Eighth Amendment and human dignity and been unable to reconcile the challenged state practice with the individual's dignitary interest.<sup>9</sup> Yet a review of the Court's post-*Trop* Eighth Amendment decisions shows how difficult it is to find coherent and consistent descriptions of human dignity against which a challenged punishment can be measured.<sup>10</sup>

In recent years, a number of scholars have sought to bring greater clarity to judicial conceptions of dignity.<sup>11</sup> Their work has been instrumental in highlighting the important role dignity plays in some of the most significant individual rights decisions of the last fifty years, including some involving the Eighth Amendment.

Yet no previous research has examined the concept of dignity in one context where it is both urgently necessary and conceptually appropriate: solitary confinement. Today, over 122,000 incarcerated people suffer solitary confinement in American prisons and jails. This Article therefore examines the meaning of human dignity—theoretically, normatively, and prescriptively—in the context of claims asserting that solitary confinement violates the Eighth Amendment's prohibition against cruel and unusual punishment. My hope is that doing so will provide an additional way of conceptualizing both the harm of solitary and the meaning of dignity in the context of the Eighth Amendment.

I have chosen to explore dignity through the lens of Eighth Amendment challenges to solitary confinement for three intersecting reasons. The first is the prevalence of its use in American corrections. Although critics roundly denounced solitary confinement after it was first introduced over two centuries ago, the United States, unlike other countries, has never

<sup>9</sup> See *infra* Section II.A.

<sup>10</sup> See *infra* Section II.A.

<sup>11</sup> See, e.g., Henry, *supra* note 2; Jeremy Waldron, Dignity, Rank, and Rights: The 2009 Tanner Lectures at UC Berkeley (N.Y. Univ. Sch. of L., Pub. L. & Legal Theory Rsch. Paper Series, Working Paper No. 09-50, 2009); Erin Daly, Dignity Rights: Courts, Constitutions, and the Worth of the Human Person (2013); Jonathan Simon, The Second Coming of Dignity, *in* The New Criminal Justice Thinking 275 (Sharon Dolovich & Alexandra Natapoff eds., 2017); Noah B. Lindell, The Dignity Canon, 27 Cornell J.L. & Pub. Pol'y 415 (2017); Adeno Addis, Justice Kennedy on Dignity, 60 Hous. L. Rev. 519 (2023) [hereinafter Addis, Kennedy on Dignity]; Josh Bowers, Probable Cause, Constitutional Reasonableness, and the Unrecognized Point of a "Pointless Indignity," 66 Stan. L. Rev. 987 (2014); Goodman, *supra* note 2; Rex D. Glensy, The Right to Dignity, 43 Colum. Hum. Rts. L. Rev. 65 (2011); Hugo Adam Bedau, The Eighth Amendment, Human Dignity, and the Death Penalty, *in* The Constitution of Rights: Human Dignity and American Values 145 (Michael J. Meyer & William A. Parent eds., 1992).

been able to meaningfully reduce its use of the practice.<sup>12</sup> Following condemnations from commentators and courts, the use of solitary declined significantly from the end of the nineteenth century through the 1970s.<sup>13</sup> But in the 1980s and 1990s, correlated with the belief that “nothing works” to curb recidivism,<sup>14</sup> many states and the Federal Bureau of Prisons built an unprecedented number of supermax prisons.<sup>15</sup> As a result, since the 1990s, the United States has dramatically expanded its use of solitary confinement.<sup>16</sup> By the end of the 1990s, “there were approximately 20,000 prisoners confined to supermax-type units in the United States,”<sup>17</sup> and by 2016, that number climbed to “approximately 80,000 inmates . . . held in some form of isolation in state and federal prisons on any given day.”<sup>18</sup> Today, over 122,000 people are in solitary

<sup>12</sup> See David M. Shapiro, *Solitary Confinement in the Young Republic*, 133 Harv. L. Rev. 542, 572 (2019) (discussing the history of solitary confinement in American corrections); Ashley T. Rubin & Keramet Reiter, *Continuity in the Face of Penal Innovation: Revisiting the History of American Solitary Confinement*, 43 Law & Soc. Inquiry 1604, 1611–25 (2018) (same); see also *infra* note 18 (discussing the efforts by other countries to reduce the use of solitary confinement and mitigate its harmful effects).

<sup>13</sup> Terry Allen Kupers, *Solitary: The Inside Story of Supermax Isolation and How We Can Abolish It* 21 (2017); Keramet Ann Reiter, *The Most Restrictive Alternative: A Litigation History of Solitary Confinement in U.S. Prisons, 1960–2006*, 57 Stud. L. Pol. & Soc’y 71, 78–81 (2012).

<sup>14</sup> See Robert Martinson, *What Works?—Questions and Answers About Prison Reform*, 35 Pub. Int. 22, 25, 48 (1974) (“With few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism.” (emphasis omitted)).

<sup>15</sup> See Jonathan Simon, *Mass Incarceration on Trial: A Remarkable Court Decision and the Future of Prisons in America* 47 (2014) (“Forty-four out of fifty states, the federal government, and of course the military (for its war on terror) now operate supermax prisons.”); see also Ryan T. Sakoda & Jessica T. Simes, *Solitary Confinement and the U.S. Prison Boom*, 32 Crim. Just. Pol’y Rev. 66, 66–68 (2021) (detailing the sharp increase in prison expansion in the United States and the increased use of long-term solitary confinement, particularly of racial and ethnic minorities, that came with it); Daniel P. Mears, *Urb. Inst. Just. Pol’y Ctr., Evaluating the Effectiveness of Supermax Prisons* 4 (2006) (finding that as of 2004, forty-four states and the federal government operated supermax prisons); John J. Gibbons & Nicholas de B. Katzenbach, *Confronting Confinement: A Report of the Commission on Safety and Abuse in America’s Prisons*, 22 Wash. U. J.L. & Pol’y 385, 405 (2006) (finding that “[b]etween 1995 and 2000, the growth rate in the number of people housed in segregation far outpaced the growth rate of the prison population overall: forty percent compared to twenty-eight percent”).

<sup>16</sup> Keramet Reiter, *The Rise of Supermax Imprisonment in the United States*, in *Solitary Confinement: Effects, Practices, and Pathways Toward Reform* 77, 77–81 (Jules Lobel & Peter Scharff Smith eds., 2020).

<sup>17</sup> Craig Haney, *Mental Health Issues in Long-Term Solitary and “Supermax” Confinement*, 49 Crime & Delinq. 124, 125 (2003) [hereinafter Haney, *Mental Health*].

<sup>18</sup> Nat’l Comm’n on Corr. Health Care, *Position Statement: Solitary Confinement (Isolation)* 1 (2016); Arthur Liman Pub. Int. Program at Yale L. Sch. & Ass’n of State Corr. Adm’rs,

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Time-In-Cell: The ASCA-Liman 2014 National Survey of Administrative Segregation in Prison 3 (2015) (approximating that “between 80,000 and 100,000 people were in isolation in prisons as of the fall of 2014”).

During this same time, our peer countries adopted laws, policies, and guidelines to reduce their use of solitary and mitigate its harmful effects. See, e.g., Gesetz über den Vollzug der Freiheitsstrafe und der freiheitsentziehenden Maßnahmen der Besserung und Sicherung (Strafvollzugsgesetz—StVollzG) [Act on the Execution of Prison Sentences and Measures of Reform and Prevention Involving Deprivation of Liberty (Prison Act)], Mar. 16, 1976, BGBl at 581, 2088, last amended by Gesetz [G], Oct. 5, 2021, BGBl I at 4607, § 89 (Ger.), [https://www.gesetze-im-internet.de/englisch\\_stvollzg/index.html](https://www.gesetze-im-internet.de/englisch_stvollzg/index.html) [https://perma.cc/7K5K-6M99] (limiting the use of solitary confinement to situations where it is “indispensable” and typically not longer than three months per year); The Prison Rules 1999, SI 1999/728, r. 55(1)(e) (Eng.), <http://www.legislation.gov.uk/uksi/1999/728/article/55/made> [https://perma.cc/Q7DL-D7VV]; Sharon Shalev & Kimmet Edgar, Deep Custody: Segregation Units and Close Supervision Centres in England and Wales 148 (2015) (providing demographic data and information on how England and Wales use solitary confinement units); Barrison & Manitus, Recent Stats Show Marked Drop in Use of Solitary Confinement Across Canada (Aug. 8, 2017), <http://criminallawoshawa.com/recent-stats-show-marked-drop-in-use-of-solitary-confinement-across-canada/> [https://perma.cc/P4WL-B2HB] (illustrating the decreasing use of solitary confinement in Canada); Irish Penal Reform Tr., Data Released on Solitary Confinement in Irish Prisons (Oct. 24, 2016), <https://www.iprt.ie/latest-news/data-released-on-solitary-confinement-in-irish-prisons/> [https://perma.cc/KGB5-ABEP] (noting that in 2016, fifty-one people in Irish prisons were held in solitary confinement). Compare Directorate of Prison Administration, Living in Detention: Handbook for New Inmates 41, 42, 44–45 (7th ed.), [https://www.justice.gouv.fr/sites/default/files/migrations/portail/art\\_pix/RFC\\_Guide\\_Je\\_suis\\_en\\_detention\\_V7\\_FINAL\\_EUK.pdf](https://www.justice.gouv.fr/sites/default/files/migrations/portail/art_pix/RFC_Guide_Je_suis_en_detention_V7_FINAL_EUK.pdf) [https://perma.cc/FYY4-WBLK] (providing limits on when and how long an incarcerated person may be held in solitary confinement), with Code Pénal [C. Pén] [Penal Code] art. R57-7-62 (Fr.) (repealed 2022) (detailing the rights of a person held in solitary confinement).

To be sure, the use of penal isolation is in decline in some U.S. jurisdictions. Valerie Kieba, Sal Rodriguez & Mirilla Zhu, Solitary Confinement in the United States: The Facts, Solitary Watch (June 2023), <https://solitarywatch.org/facts/faq/> [https://perma.cc/M927-MQUP]. But this is not uniformly true, especially considering that data regarding its prevalence is self-reported and changes in the terminology used to describe solitary confinement can mask the reality that, while the label may change, the underlying conditions remain the same. Joshua Manson, How Many People Are in Solitary Confinement Today?: Conflicting Definitions, Disputed Data, and Nonexistent Oversight Mean We Still Lack Reliable Information on the Scope of This Torturous Practice, Solitary Watch (Jan. 4, 2019), <https://solitarywatch.org/2019/01/04/how-many-people-are-in-solitary-today/> [https://perma.cc/3Y6M-WVP9].

confinement in American prisons and jails.<sup>19</sup> Some have been held in isolation cells for over four decades.<sup>20</sup>

But what, precisely, is the nature of the harm caused by solitary confinement? That question forms the basis of my second reason for exploring dignity through the lens of Eighth Amendment challenges to solitary: such an examination provides a unified framework for understanding the harm caused by long-term isolation. Mental health professionals, physicians, sociologists, and incarcerated people have described in considerable detail the constellation of symptoms and pathologies that accompany prolonged isolation, many of which are severe, painful, disabling, and permanent.<sup>21</sup> Yet despite the fact that hundreds of studies across nations and over decades have virtually all reached similar conclusions as to the physical and psychological injuries caused by long-term isolation,<sup>22</sup> most courts have held that solitary

<sup>19</sup> Solitary Watch & Unlock the Box Campaign, *Calculating Torture: Analysis of Federal, State, and Local Data Showing More Than 122,000 People in Solitary Confinement in U.S. Prisons and Jails 3* (2023), <https://solitarywatch.org/wp-content/uploads/2023/05/Calculating-Torture-Report-May-2023-R2.pdf> [<https://perma.cc/DLJ7-U8Z2>]. The 2021 Correctional Leaders Association-Liman Survey puts the estimate of people in solitary confinement in prisons between 41,000 and 48,000, but that study does not include jails. Corr. Leaders Ass'n & Arthur Liman Ctr. for Pub. Int. L. at Yale L. Sch., *Time-In-Cell: A 2021 Snapshot of Restrictive Housing Based on a Nationwide Survey of U.S. Prison Systems*, at xi, 4 (2022), [https://law.yale.edu/sites/default/files/area/center/liman/document/time\\_in\\_cell\\_2021.pdf](https://law.yale.edu/sites/default/files/area/center/liman/document/time_in_cell_2021.pdf) [<https://perma.cc/8D9C-UUQR>].

<sup>20</sup> See, e.g., Albert Woodfox Freed After 43 Years in Solitary Confinement, *Amnesty Int'l UK* (Oct. 6, 2020, 6:12 AM), <https://www.amnesty.org.uk/albert-woodfox-free-louisiana-usa-after-43-years-solitary-confinement-us> [<https://perma.cc/CU4A-N9WE>]; Tim Franks, *Forty Years in Solitary Confinement and Counting*, *BBC* (Apr. 4, 2012), <https://www.bbc.com/news/magazine-17564805> [<https://perma.cc/25KW-LPGL>]; Brian Mann, *How the US Decided to Lock 80,000 People in Solitary Confinement*, *N. Country Pub. Radio* (Aug. 17, 2015), <https://www.northcountrypublicradio.org/news/story/29254/20150818/how-the-us-decided-to-lock-80-000-people-in-solitary-confinement> [<https://perma.cc/NQK4-78KV>] (“Some inmates have been confined in solitary for twenty, thirty, even forty years at a time.”); Shane Bauer, *Solitary in Iran Nearly Broke Me. Then I Went Inside America’s Prisons.*, *Mother Jones* (Dec. 2012), <https://www.motherjones.com/politics/2012/10/solitary-confinement-shane-bauer/> [<https://perma.cc/2VNX-QBLZ>] (documenting that eighty-nine people in Pelican Bay State Prison’s Security Housing Unit have been housed in solitary confinement for over twenty years and one has been in solitary confinement for forty-two years).

<sup>21</sup> See *infra* Parts I, II; see also Craig Haney, Brie Williams & Cyrus Ahalt, *Consensus Statement from the Santa Cruz Summit on Solitary Confinement and Health*, 115 *Nw. U. L. Rev.* 335, 345–49 (2020) (recommending reform based on the evidence of negative physical and psychological effects of isolation).

<sup>22</sup> See generally Craig Haney, *The Psychological Effects of Solitary Confinement: A Systematic Critique*, 47 *Crime & Just.* 365 (2018) [hereinafter Haney, *Psychological Effects*] (summarizing studies on the psychological effects of solitary confinement). One study that



confinement does not constitute cruel and unusual punishment.<sup>23</sup> One of the main reasons for this is the difficulty of articulating the harm caused by solitary confinement in a constitutionally cognizable way.

My thesis is that human dignity is the thread that unites and provides a framework for understanding the various harms that solitary inflicts. As such, it provides both a doctrinally and theoretically coherent construct for understanding the deprivations inherent in solitary confinement and the additional and distinct harm that such confinement causes to dignity interests.

This point leads to my third reason for exploring dignity through the lens of Eighth Amendment challenges to solitary confinement: just as an examination of dignity helps us to better understand the harm caused by solitary confinement, it is also true that understanding the harm of solitary confinement will, I hope, shed additional light on the concept of dignity as it is used in Eighth Amendment jurisprudence and—at a time when fundamental rights are undergoing a sweeping reexamination<sup>24</sup>—constitutional law more generally.

This Article proceeds in three parts. Part I provides an overview of the practice of solitary confinement in American corrections. Part II examines

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purported to find minimal or no negative effects—the *One Year Longitudinal Study of the Psychological Effects of Administrative Segregation* study conducted by Maureen O’Keefe and others, in the Colorado Department of Corrections—has been roundly discredited. *Id.* at 384–86.

<sup>23</sup> An important exception exists where the plaintiffs are juveniles or have a preexisting serious mental illness. See, e.g., *Jones’El v. Berge*, 164 F. Supp.2d 1096, 1123–24 (W.D. Wis. 2001) (observing conditions of isolation at a particular facility “pose[d] a grave risk of harm to seriously mentally ill inmates” and concluding that they should “not be housed” there because of that risk); *Ruiz v. Johnson*, 37 F. Supp. 2d 855, 915 (S.D. Tex. 1999) (concluding that “[a]s to mentally ill inmates in [solitary confinement], the severe and psychologically harmful deprivations” in the Texas prison system are “by our evolving and maturing . . . standards of humanity and decency, found to be cruel and unusual punishment”), *rev’d and remanded sub nom. Ruiz v. United States*, 243 F.3d 941 (5th Cir. 2001); *Madrid v. Gomez*, 889 F. Supp. 1146, 1266–67 (N.D. Cal. 1995) (finding “a substantial or excessive risk of harm with respect to inmates who were mentally ill or otherwise particularly vulnerable to conditions of extreme isolation and reduced environmental stimulation” presented by solitary confinement); *Clark v. Coupe*, 55 F.4th 167, 177, 181 (3d Cir. 2022) (reaffirming the exception for people with mental illness); *Williams v. Sec’y Pa. Dep’t of Corr.*, 117 F.4th 503, 508–09, 524 (3d Cir. 2024); *Finley v. Huss*, 102 F.4th 789, 805 (6th Cir. 2024).

<sup>24</sup> See, e.g., *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2246, 2248 (2022) (holding that the Constitution does not confer a right to abortion); *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2165, 2175–76 (2023) (limiting the use of race-conscious college admissions programs); *Shinn v. Ramirez*, 142 S. Ct. 1718, 1734 (2022) (holding that a federal habeas court may not consider evidence beyond a state court record based on ineffective assistance of state post-conviction counsel).

the evolution of the Supreme Court's Eighth Amendment conditions of confinement jurisprudence, illustrating how the Court's rejection of a totality-of-the-circumstances approach to analyzing prison conditions has resulted in the failure to recognize the multiple, discrete, and overlapping harms that solitary confinement causes, especially including personhood harms. Drawing on the Court's invocation of dignity as the touchstone of the Eighth Amendment, Part III first considers the philosophical and legal formulations of dignity that might be brought to bear in analyzing conditions of confinement claims and asserts that dignity-as-integrity (wholeness) constitutes a basic human need deserving of Eighth Amendment protection. Part III then analyzes the ways that solitary confinement operates to erode the integrity of various dimensions of personhood, and thus constitutes an impermissible violation of the Eighth Amendment's dignity guarantee.

#### I. SOLITARY CONFINEMENT—WHAT IT IS AND WHAT IT DOES

*As he went through Cold-Bath Fields he saw  
A solitary cell;  
And the Devil was pleased, for it gave him a hint  
For improving his prisons in Hell.*<sup>25</sup>

The United Nations Standard Minimum Rules for the Treatment of Prisoners (“Nelson Mandela Rules”) define “solitary confinement” as “the confinement of prisoners for 22 hours or more a day without meaningful human contact. Prolonged solitary confinement . . . refer[s] to solitary confinement for a time period in excess of 15 consecutive days.”<sup>26</sup> But that rather bare definition fails to capture the experience of it. While there is some variation among prisons, the conditions in solitary confinement (also referred to as administrative segregation, special housing units (“SHUs”), disciplinary segregation, control units, penal isolation, and restrictive housing, among other euphemisms) typically share a common set of features.<sup>27</sup>

<sup>25</sup> Samuel Taylor Coleridge, *The Devil's Thoughts*, in 1 *The Complete Poetical Works of Samuel Taylor Coleridge* 319, 322 (Ernest Hartley Coleridge ed., 1912).

<sup>26</sup> G.A. Res. 70/175, at r. 44, United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) (Dec. 17, 2015).

<sup>27</sup> Kiebala et al., *supra* note 18 (cataloguing the various terms prison systems employ to refer to solitary confinement).

People housed in solitary confinement spend nearly all day every day alone in their cells, which are about the size of a Chevrolet Suburban.<sup>28</sup> Cells used for solitary confinement are purpose-built, “designed to minimize human contact and environmental stimulation.”<sup>29</sup> “Cell doors are typically solid metal with metal strips along the bottom that help prevent communication with prisoners in other cells. Some cells have a small narrow window; others do not have access to any natural light.”<sup>30</sup> The cells are sparsely furnished, typically containing a cement slab bed, a toilet-and-sink fixture, a cement or metal shelf that can be used as a desk, and a cement or metal seat.<sup>31</sup>

<sup>28</sup> The description of solitary confinement conditions is informed by my work on the litigation that the University of Denver Sturm College of Law’s Civil Rights Clinic has conducted with and on behalf of people held in federal and state supermax prisons. See, e.g., Plaintiff’s Response to Motion for Summary Judgment at 10–11, *Silverstein v. Fed. Bureau of Prisons*, No. 07-cv-02471 (D. Colo. Mar. 2, 2011) (on file with author) (including accompanying exhibits); Appellants’ Opening Brief at 4, *Rezaq v. Nalley*, 677 F.3d 1001 (10th Cir. 2012) (No. 11-1069); Plaintiff’s Amended Complaint at 10–11, *Sardakowski v. Clements*, No. 12-cv-01326 (D. Colo. Nov. 19, 2012) (on file with author). The description of solitary confinement conditions also relies on first-person accounts such as those published in Solitary Watch’s “Voices from Solitary” series. See, e.g., Ray Luc Levasseur, *Voices from Solitary: “A Prison Where the Building Becomes the Shackles,”* Solitary Watch (Nov. 27, 2013), <https://solitarywatch.org/2013/11/27/voices-solitary-adx-prison-building-becomes-shackles/> [<https://perma.cc/3WMR-BQ7U>]; Jean Casella & James Ridgeway, *Voices from Solitary: Katfish on Life in “The Bucket,”* Solitary Watch (Sept. 5, 2010), <https://solitarywatch.org/2010/09/05/voices-from-solitary-katfish-on-life-in-the-bucket/> [<https://perma.cc/E6Z4-C6UW>]. I have described these conditions elsewhere as well. See, e.g., Laura Rovner, *Am. Const. Soc’y for L. & Pol’y*, Issue Brief: Dignity and the Eighth Amendment: A New Approach to Challenging Solitary Confinement 2 (2015) [hereinafter Rovner, *Dignity and the Eighth Amendment*], [https://www.acslaw.org/wp-content/uploads/2015/11/Dignity\\_and\\_the\\_Eighth\\_Amendment\\_3.pdf](https://www.acslaw.org/wp-content/uploads/2015/11/Dignity_and_the_Eighth_Amendment_3.pdf) [<https://perma.cc/MQ77-HUDV>]; Laura Rovner, *On Litigating Constitutional Challenges to the Federal Supermax: Improving Conditions and Shining a Light*, 95 *Denv. L. Rev.* 457, 459 (2018) [hereinafter Rovner, *On Litigating Constitutional Challenges*]; Laura Rovner, *What Happens to People in Solitary Confinement*, TED (Dec. 2018), [https://www.ted.com/talks/laura\\_rovner\\_what\\_happens\\_to\\_people\\_in\\_solitary\\_confinement?language=en](https://www.ted.com/talks/laura_rovner_what_happens_to_people_in_solitary_confinement?language=en) [<https://perma.cc/S3WW-X3CT>].

<sup>29</sup> Am. Pub. Health Ass’n, *Policy Statement: Solitary Confinement as a Public Health Issue* (Nov. 5, 2013), <https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2014/07/14/13/30/solitary-confinement-as-a-public-health-issue> [<https://perma.cc/A9WU-LYTF>].

<sup>30</sup> Rovner, *Dignity and the Eighth Amendment*, *supra* note 28, at 2.

<sup>31</sup> See Levasseur, *supra* note 28; Casella & Ridgeway, *supra* note 28. For further description of solitary confinement conditions, see, e.g., Rovner, *On Litigating Constitutional Challenges*, *supra* note 28, at 459 (describing conditions in the U.S. Penitentiary Administrative Maximum (ADX), the Federal Bureau of Prisons’s supermax prison); Liman Ctr., Yale L. Sch., *Daily Life in Solitary Confinement, Seeing Solitary*, <https://seeingsolitary.limancenter.yale.edu/what-is-solitary/> [<https://perma.cc/93YR-23KU>] (last visited Feb. 15, 2025) (surveying firsthand

As I have described elsewhere,

For whatever period of time a prisoner is held in solitary confinement, virtually every aspect of his life occurs in his eighty square foot cell. A prisoner in segregation eats all of his meals there, within arm's reach of his toilet. He is usually denied many services and programs provided to [the rest of the prison population], such as educational classes, job training, [addiction] treatment, work, or other kinds of rehabilitative or religious programming. To the extent that a person in solitary receives any programming, it is typically provided in-cell through written materials or via a television screen, though some people in solitary are prohibited from having televisions, radios, art supplies, and even reading materials.

For the one hour per day (on average) that prisoners in solitary are permitted to leave their cells, they are taken to a small, kennel-like cage to exercise, and even the time there is spent alone. Access to family visits and phone calls is limited; any visits that do occur take place through thick glass and over phones. And prisoners in solitary confinement typically are not permitted any human touch, except when the correctional officers shackle them to escort them from location to location.<sup>32</sup>

In short, solitary confinement deprives people “of almost all meaningful perceptual, social, and occupational stimulation, including natural light, most or all personal property, and almost all human interaction . . . except that which ‘occurs through bars or . . . slots in solid metal doors.’”<sup>33</sup> Dr. Craig Haney, one of the world’s foremost experts on solitary confinement, sums up the experience: “The long-term absence of meaningful human contact and social interaction, the enforced idleness and inactivity, and the oppressive security and surveillance procedures, and the accompanying hardware and other paraphernalia that are brought

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accounts of daily life in solitary confinement); Robert King, Dolores Canales, Jack Morris & Armondo Sosa, *Sharing Experiences of Solitary Confinement—Prisoners and Staff*, in *Solitary Confinement: Effects, Practices, and Pathways Toward Reform*, supra note 16, at 242, 243–56 (sharing personal accounts of solitary confinement from both incarcerated people and staff).

<sup>32</sup> Rovner, *Dignity and the Eighth Amendment*, supra note 28, at 2 (footnote omitted).

<sup>33</sup> Brief of Medical & Other Scientific & Health-Related Professionals as Amici Curiae in Support of Respondents & Affirmance at 3, *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017) (Nos. 15-1358, 15-1359 & 15-1363) (quoting Am. Pub. Health Ass’n, supra note 29).

or built into these units combine to create harsh, dehumanizing, and deprived conditions of confinement.”<sup>34</sup>

Unsurprisingly, these conditions exact a toll. “The wealth of medical and other scientific and health-related research examining the consequences of prolonged use of solitary confinement overwhelmingly concludes that it inflicts profound psychological”<sup>35</sup>—and sometimes physical—harm.<sup>36</sup> Studies across nations and over decades conclude again and again that “[t]he restriction of environmental stimulation and social isolation associated with confinement in solitary are strikingly toxic” to people.<sup>37</sup>

In the psychological and psychiatric literature on the effects of solitary confinement, much of which has been presented in amicus briefs to the Supreme Court<sup>38</sup> and the federal circuit courts of appeals,<sup>39</sup> mental health experts have explained that “[t]he well-established psychological harms

<sup>34</sup> Expert Report of Professor Craig Haney, Ph.D., J.D. ¶ 32, *Johnson v. Wetzel*, 209 F. Supp. 3d 766 (M.D. Pa. 2016) (No. 16-cv-00863).

<sup>35</sup> Brief of Medical & Other Scientific & Health-Related Professionals, *supra* note 33, at 6.

<sup>36</sup> See generally Justin D. Strong et al., *The Body in Isolation: The Physical Health Impacts of Incarceration in Solitary Confinement*, PLOS One, Oct. 9, 2020 (finding solitary confinement to be associated with physical as well as mental health problems).

<sup>37</sup> Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 Wash. U. J.L. & Pol’y 325, 354 (2006) [hereinafter Grassian, *Psychiatric Effects*]; see also Bruce A. Arrigo & Jennifer Leslie Bullock, *The Psychological Effects of Solitary Confinement on Prisoners in Supermax Units: Reviewing What We Know and Recommending What Should Change*, 52 Int’l J. Offender Therapy & Compar. Criminology 622, 627–32 (2008) (summarizing select research on the psychological effects of both long- and short-term solitary confinement); Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. Rev. L. & Soc. Change 477, 496–529 (1997) (summarizing the empirical literature on solitary confinement); Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 Crime & Just. 441, 456–87 (2006) (examining the historical development of the use of solitary confinement in countries including the United States, Denmark, Holland, Norway, Sweden, and Belgium, beginning in the mid-nineteenth century). See generally Craig Haney, *The Social Psychology of Isolation: Why Solitary Confinement Is Psychologically Harmful*, 2009 Prison Serv. J. 12 [hereinafter Haney, *Social Psychology*] (providing a theoretical framework within which the harmful effects of solitary confinement can be understood).

<sup>38</sup> See, e.g., Brief of Medical & Other Scientific & Health-Related Professionals, *supra* note 33; Brief of Amici Curiae Professors & Practitioners of Psychiatry, Psychology, & Medicine in Support of Petitioner, *Hamner v. Burls*, 141 S. Ct. 611 (2020) (mem.) (No. 19-1291).

<sup>39</sup> See, e.g., Brief of Amici Curiae Professors & Practitioners of Psychiatry, Psychology, & Medicine in Support of Plaintiff-Appellant & Reversal, *Porter v. Pa. Dep’t of Corr.*, 974 F.3d 431 (3d Cir. 2020) (No. 18-3505); Proposed Brief of Amici Curiae Professors & Practitioners of Psychiatry, Psychology, & Medicine in Support of Plaintiff-Appellant’s Petition for Rehearing En Banc, *Hope v. Harris*, 861 F. App’x 571 (5th Cir. 2021) (No. 20-40379).

inflicted by solitary confinement are a direct result of its inherent characteristics: ‘isolation’ from other people, lack of meaningful perceptual stimulation, and extreme ‘idleness’ resulting from the denial of any productive activities.”<sup>40</sup> As Dr. Terry Kupers has observed, “[h]uman beings require at least some social interaction and productive activities to establish and sustain a sense of identity and to maintain a grasp on reality.”<sup>41</sup>

Deprived of social interaction and environmental stimulation, “an inordinately high percentage of [people] in solitary confinement exhibit a set of psychopathologies which many medical professionals describe as unique and not present in any other syndrome.”<sup>42</sup> Dr. Craig Haney has catalogued these harms: anxiety, panic, withdrawal, hypersensitivity, ruminations, cognitive dysfunction, hallucinations, loss of control, irritability, aggression, rage, paranoia, depression, a sense of impending emotional breakdown, self-mutilation, and suicidal ideation and behavior.<sup>43</sup> As Dr. Kenneth Appelbaum, the former Director of Correctional Mental Health Policy and Research for the University of Massachusetts Center for Health Policy and Research, stated, “[n]early every scientific inquiry into the effects of solitary confinement over the past 150 years has concluded that subjecting an individual to more than 10 days of involuntary segregation results in a distinct set of emotional,

<sup>40</sup> Brief of Medical & Other Scientific & Health-Related Professionals, *supra* note 33, at 10 (citing Terry A. Kupers, *Isolated Confinement: Effective Method for Behavior Change or Punishment for Punishment’s Sake?*, in *The Routledge Handbook of International Crime and Justice Studies* 213, 217–18 (Bruce Arrigo & Heather Bersot eds., 2013)).

<sup>41</sup> Kupers, *supra* note 40, at 217.

<sup>42</sup> See Brief of Medical & Other Scientific & Health-Related Professionals, *supra* note 33, at 6.

<sup>43</sup> Haney, *Mental Health*, *supra* note 17, at 130–31 (collecting dozens of studies); see also Elizabeth Bennion, *Banning the Bing: Why Extreme Solitary Confinement Is Cruel and Far Too Usual Punishment*, 90 *Ind. L.J.* 741, 757 (2015) (enumerating those psychiatric symptoms that are “[s]trikingly consistent” among people held in solitary confinement (quoting Grassian, *Psychiatric Effects*, *supra* note 37, at 335)); Stuart Grassian, *Psychopathological Effects of Solitary Confinement*, 140 *Am. J. Psychiatry* 1450, 1452–53 (1983) [hereinafter Grassian, *Psychopathological Effects*] (describing the psychiatric symptoms displayed by fourteen people exposed to varying periods of increased social isolation and sensory restriction in solitary confinement); Fatos Kaba et al., *Solitary Confinement and Risk of Self-Harm Among Jail Inmates*, 104 *Am. J. Pub. Health* 442, 445 (2014) (finding that punishment by solitary confinement increased the likelihood of self-harm by almost 700% among incarcerated people when controlling for length of sentence). They also may suffer “serious sleep disturbances, profound lethargy, dizziness, and deterioration of cardiac, musculoskeletal, gastrointestinal, and genitourinary function.” Brief of Medical & Other Scientific & Health-Related Professionals, *supra* note 33, at 7.

cognitive, social, and physical pathologies.”<sup>44</sup> Being confined in conditions where social interaction and environmental stimulation are absent “can be as clinically distressing as physical torture.”<sup>45</sup>

The studies documenting the harmful effects of solitary are too numerous to recite here. To take just one recent example, a 2020 study of people housed in solitary confinement in Washington State, using both quantitative and qualitative data, found

a wide range and high prevalence of symptoms of psychiatric distress in this population, including BPRS [Brief Psychiatric Rating Scale] symptoms associated with anxiety and depression among as many as half of our participants, administrative indicators of SMI [serious mental illness] among at least one fifth of our participants, and condition-specific symptoms, such as feelings of extreme social isolation, in well more than half of our participants. Moreover, these symptoms persisted in the second year for participants in and out of solitary confinement.<sup>46</sup>

<sup>44</sup> Kenneth L. Appelbaum, American Psychiatry Should Join the Call to Abolish Solitary Confinement, 43 J. Am. Acad. Psychiatry & L. 406, 410 (2015) (alteration in original) (quoting David H. Cloud, Ernest Drucker, Angela Browne & Jim Parsons, Public Health and Solitary Confinement in the United States, 105 Am. J. Pub. Health 18, 21 (2015)).

<sup>45</sup> Jeffrey L. Metzner & Jamie Fellner, Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for Medical Ethics, 38 J. Am. Acad. Psychiatry & L. 104, 104 (2010).

<sup>46</sup> Keramet Reiter et al., Psychological Distress in Solitary Confinement: Symptoms, Severity, and Prevalence in the United States, 2017–2018, 110 Am. J. Pub. Health S56, S60–61 (2020).

One explanation for this may be “that solitary confinement can fundamentally alter the structure of the human brain in profound and permanent ways.” Brief of Medical & Other Scientific & Health-Related Professionals, *supra* note 33, at 24. Dr. Huda Akil, a neuroscientist whose research examines the effects of emotions and stress on brain structure and function, “reports that each key characteristic of solitary confinement—lack of physical activity, meaningful interaction with others and the natural world, and visual stimulation—‘is by itself sufficient to change the brain . . . dramatically, depending on whether it lasts briefly or is extended’” for days. *Id.* at 25 (emphasis omitted) (quoting Kate Allen, Researchers Study Effects of Prolonged Isolation Among Prisoners, *Toronto Star* (Feb. 14, 2014), [https://www.thestar.com/news/world/2014/02/14/researchers\\_study\\_effects\\_of\\_prolonged\\_isolation\\_among\\_prisoners.html](https://www.thestar.com/news/world/2014/02/14/researchers_study_effects_of_prolonged_isolation_among_prisoners.html)); see also ACLU, Briefing Paper: The Dangerous Overuse of Solitary Confinement in the United States 6 (2014), [https://www.aclu.org/sites/default/files/assets/stop\\_solitary\\_briefing\\_paper\\_updated\\_august\\_2014.pdf](https://www.aclu.org/sites/default/files/assets/stop_solitary_briefing_paper_updated_august_2014.pdf) [<https://perma.cc/MAL9-9JJQ>] (describing Dr. Akil’s finding that extreme psychological stress, such as from solitary confinement, can cause the brain to shrink, and noting that this aligns with “decades” of experimental studies on mammals which showed the neurological harms of isolation and sensory deprivation).

As some of the world's leading mental health experts on solitary confinement explained in their amicus brief to the Supreme Court, "[t]he 'lasting mental health implications' of pathologies developed in prolonged isolation include the inability to initiate or control behavior or interact with other people, loss of one's sense of self and control over emotions, and withdrawal into a fantasy world."<sup>47</sup> These mental health repercussions can persist long after a person leaves solitary confinement (and even after their release from prison).<sup>48</sup> That is "[b]ecause prolonged solitary confinement transforms inmates' personalities, [causing them to] subsequently grapple with an altered self-image on a daily basis, as well as overwhelming feelings of inadequacy, 'invalidating stigmas, relived abuse, uncontrollable paranoia or anxiety, self-imposed seclusion, [and] difficulties with sexual intimacy.'"<sup>49</sup> For some, the effects can be permanent: "Those who are not blessed with special personal resiliency and significant social and professional support needed to recover from such atypical and traumatic experiences may never return to the free world and resume normal, healthy, productive social lives."<sup>50</sup>

<sup>47</sup> Brief of Medical & Other Scientific & Health-Related Professionals, *supra* note 33, at 18 (quoting Haney, *Mental Health*, *supra* note 17, at 138–41).

<sup>48</sup> See generally Brian O. Hagan et al., *History of Solitary Confinement Is Associated with Post-Traumatic Stress Disorder Symptoms Among Individuals Recently Released from Prison*, 95 J. Urb. Health 141 (2018) (finding that those subject to solitary confinement were more likely to report PTSD symptoms, and their symptoms continued following their release from prison). "One Canadian study found that over 50% of formerly isolated prisoners experienced at least some of these long-term psychological impairments." Brief of Medical & Other Scientific & Health-Related Professionals, *supra* note 33, at 18 (citing Joane Martel & Elizabeth Fry Soc'y of Edmonton, *Solitude & Cold Storage: Women's Journeys of Endurance in Segregation* 85–86 (1999)).

<sup>49</sup> Brief of Medical & Other Scientific & Health-Related Professionals, *supra* note 33, at 18 (third alteration in original) (quoting Martel & Elizabeth Fry Soc'y of Edmonton, *supra* note 48, at 87). Less clinical but no less powerful is C.F. Villa's firsthand description of his fifteen years in isolation at Pelican Bay: "The truth is we've been undone, unwound. The inside of our plastic skulls raked and routed. A composition of cracks and fissures where nothing will ever be the same again." C.F. Villa, *Living in the SHU, in Hell Is a Very Small Place: Voices from Solitary Confinement* 35, 37 (Jean Casella, James Ridgeway & Sarah Shourd eds., 2016).

<sup>50</sup> Brief of Medical & Other Scientific & Health-Related Professionals, *supra* note 33, at 18 (quoting Haney, *Mental Health*, *supra* note 17, at 141); see also Sharon Shalev, *A Sourcebook on Solitary Confinement* 22–23 (2008) (discussing the lasting effects of solitary confinement); Grassian, *Psychiatric Effects*, *supra* note 37, at 353–54 (identifying those effects of solitary confinement that "may persist for decades").



## II. THE PROBLEM WITH THE EIGHTH AMENDMENT

*A. The Eighth Amendment Conditions Framework*

What safeguards does the Constitution offer? The primary source of constitutional protection for people in prison is the Eighth Amendment, which prohibits the infliction of “cruel and unusual punishments.”<sup>51</sup> During the nineteenth century, there was little in the way of Eighth Amendment jurisprudence.<sup>52</sup> In 1910, however, the Supreme Court decided *Weems v. United States*, where for the first time it struck down a sentence as violative of the Eighth Amendment: fifteen years in prison as well as *cadena temporal* (“hard labor”) for falsifying an official document.<sup>53</sup> The Court found problematic both the length of the sentence and its conditions: “It is cruel in its excess of imprisonment and that which accompanies and follows imprisonment. It is unusual in its character. Its punishments come under the condemnation of the bill of rights, both on account of their degree and kind.”<sup>54</sup>

Following *Weems*, the Supreme Court did not address a substantive Eighth Amendment claim for almost fifty years until its 1958 decision in *Trop v. Dulles*.<sup>55</sup> In *Trop*, the Court held that the Eighth Amendment prohibited the revocation of the citizenship of a soldier who received a dishonorable discharge after conviction for military desertion.<sup>56</sup> Even though the punishment did not involve “physical mistreatment” or “primitive torture,”<sup>57</sup> such “[d]enationalization” could be seen as “a worse

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<sup>51</sup> U.S. Const. amend. VIII.

<sup>52</sup> Professor Alex Reinert attributes this absence to the fact that the Court had held that the Amendment did not apply to state legislation and that the challenges to particular punishments were not “substantial.” See Alexander A. Reinert, Eighth Amendment Gaps: Can Conditions of Confinement Litigation Benefit from Proportionality Theory?, 36 Fordham Urb. L.J. 53, 57 (2009).

<sup>53</sup> 217 U.S. 349, 382 (1910). The defendant was sentenced to “bear a chain night and day. He is condemned to painful as well as hard labor.” *Id.* at 366.

<sup>54</sup> *Id.* at 377.

<sup>55</sup> 356 U.S. 86 (1958). Professor Margo Schlanger has examined the barriers to conditions of confinement litigation post-*Weems*. See Margo Schlanger, The Constitutional Law of Incarceration, Reconfigured, 103 Cornell L. Rev. 357, 368 (2018).

<sup>56</sup> *Trop*, 356 U.S. at 101 (plurality opinion).

<sup>57</sup> *Id.*

punishment . . . because it involved ‘the total destruction of the individual’s status in organized society.’”<sup>58</sup>

In analyzing the claim, the Court articulated the framing of the Eighth Amendment that has become the touchstone of its jurisprudence ever since: “The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards.”<sup>59</sup> This language appears in many of the Supreme Court’s Eighth Amendment decisions, especially those where the Court draws a line at punishments that degrade or deny personhood.

The Court’s recognition that the driving force behind the Eighth Amendment was to protect and preserve human dignity from severe government encroachments informed its analysis in *Estelle v. Gamble*,<sup>60</sup> its first true conditions of confinement case.<sup>61</sup> In *Estelle*, the Court held that the Eighth Amendment protects incarcerated people from harm caused by the “deliberate indifference” of prison officials to medical needs.<sup>62</sup> Employing that standard, the Court found that the State’s failure to provide medical care to the incarcerated plaintiff violated his rights under the Eighth Amendment. The Court grounded its holding in its prior Eighth Amendment decisions, reaffirming the idea that the Court “ha[s] held repugnant to the Eighth Amendment punishments which are incompatible with ‘the evolving standards of decency that mark the progress of a maturing society.’”<sup>63</sup>

Following *Estelle*, the Court decided a series of cases that collectively defined the parameters of modern Eighth Amendment conditions

<sup>58</sup> John F. Stinneford, *Incapacitation Through Maiming: Chemical Castration, the Eighth Amendment, and the Denial of Human Dignity*, 3 U. St. Thomas L.J. 559, 589 (2006) (quoting *Trop*, 356 U.S. at 101).

<sup>59</sup> *Trop*, 356 U.S. at 100.

<sup>60</sup> 429 U.S. 97 (1976).

<sup>61</sup> *Weems* concerned both the length of the petitioner’s sentence and the conditions under which he was sentenced to serve it. See Schlanger, *supra* note 55, at 365–66.

Until the 1960s, the Supreme Court—and the federal courts in general—had followed the “hands-off” approach to prison and jail conditions. *Id.* at 368. In 1962, in *Robinson v. California*, the Supreme Court incorporated the Eighth Amendment against the states via the Fourteenth Amendment. 370 U.S. 660, 666–67 (1962). Two years later, in *Cooper v. Pate*, the Court held that constitutional challenges to conditions of confinement with respect to religious liberty were not categorically prohibited. 378 U.S. 546, 546 (1964) (*per curiam*); see also Schlanger, *supra* note 55, at 368–69 (chronicling this history).

<sup>62</sup> *Estelle*, 429 U.S. at 104.

<sup>63</sup> *Id.* at 102 (quoting *Trop*, 356 U.S. at 101).

jurisprudence. Through its opinions in *Hutto v. Finney*,<sup>64</sup> *Rhodes v. Chapman*,<sup>65</sup> *Helling v. McKinney*,<sup>66</sup> *Farmer v. Brennan*,<sup>67</sup> and *Hope v. Pelzer*,<sup>68</sup> the Court arrived at the test that now governs Eighth Amendment challenges to prison conditions.<sup>69</sup>

Currently, to prevail on an Eighth Amendment conditions of confinement claim, a plaintiff must satisfy a two-pronged test with objective and subjective components. The objective prong requires them to demonstrate the challenged condition is sufficiently serious because it either deprives them of a basic human need<sup>70</sup> (sometimes referred to as “the minimal civilized measure of life’s necessities”<sup>71</sup>) or puts them at “unreasonable risk of serious damage to [their] future health.”<sup>72</sup> The subjective prong requires a showing that prison officials acted with “deliberate indifference” in imposing or maintaining the condition despite knowing about the harm or risk of harm.<sup>73</sup>

In *Rhodes*, the Court considered whether housing two people in a cell designed for only one person (and the overcrowding that ensued in the rest of the prison) violated the Eighth Amendment.<sup>74</sup> In reciting the test for the objective prong, the *Rhodes* Court observed that conditions of confinement, “alone or in combination, may deprive inmates of the minimal civilized measure of life’s necessities.”<sup>75</sup> Justice Brennan expounded on this point in his concurrence, explaining that “[i]t is important to recognize that various deficiencies in prison conditions

<sup>64</sup> 437 U.S. 678, 685 (1978) (addressing the Eighth Amendment’s substantive reach in conditions of confinement litigation in finding that “[c]onfinement in a prison or in an isolation cell is a form of punishment subject to scrutiny under Eighth Amendment standards”).

<sup>65</sup> 452 U.S. 337, 344–45 (1981) (considering “for the first time” the “principles relevant to assessing claims that conditions of confinement violate the Eighth Amendment”).

<sup>66</sup> 509 U.S. 25, 35 (1993) (holding that a prison condition that exposes a person to an unreasonable risk of damage to their future health is actionable under the Eighth Amendment).

<sup>67</sup> 511 U.S. 825, 847 (1994) (holding that a prison official may be liable under the Eighth Amendment based on deliberate indifference to the safety of an incarcerated person if the official knows of, and responds unreasonably to, a substantial risk of serious harm).

<sup>68</sup> 536 U.S. 730, 737–38 (2002) (finding it permissible to infer the existence of deliberate indifference by prison officials where the risk of harm to an incarcerated person is obvious).

<sup>69</sup> Excessive force claims brought under the Eighth Amendment are analyzed under a different standard. See *Whitley v. Albers*, 475 U.S. 312, 320–21 (1986) (citations omitted).

<sup>70</sup> *Rhodes*, 452 U.S. at 347.

<sup>71</sup> *Id.*

<sup>72</sup> *Helling v. McKinney*, 509 U.S. 25, 35 (1993).

<sup>73</sup> *Farmer v. Brennan*, 511 U.S. 825, 837–40 (1994). This Article’s focus is on the objective prong of the Eighth Amendment analysis.

<sup>74</sup> 452 U.S. at 339.

<sup>75</sup> *Id.* at 347.

‘must be considered together.’ . . . The individual conditions ‘exist in combination; each affects the other; and taken together they [may] have a cumulative impact on the inmates.’”<sup>76</sup> Thus, he reiterated, “a court considering an Eighth Amendment challenge to conditions of confinement must examine the totality of the circumstances. Even if no single condition of confinement would be unconstitutional in itself, ‘exposure to the cumulative effect of prison conditions may subject inmates to cruel and unusual punishment.’”<sup>77</sup>

Ten years later, however, in *Wilson v. Seiter*, Justice Scalia writing for the Court explained that its statement in *Rhodes* was “a far cry from saying that all prison conditions are a seamless web for Eighth Amendment purposes.”<sup>78</sup> Rather, he wrote, “[s]ome conditions of confinement may establish an Eighth Amendment violation ‘in combination’ when each would not do so alone, but only when they have a mutually enforcing effect that produces the deprivation of *a single, identifiable human need* such as food, warmth, or exercise.”<sup>79</sup>

The Court therefore rejected the plaintiff’s claims that “overcrowding, excessive noise, insufficient locker storage space, inadequate heating and cooling, improper ventilation, unclean and inadequate restrooms, unsanitary dining facilities and food preparation, and housing with mentally and physically ill inmates” violated the Eighth Amendment; rather, the Court concluded that “[n]othing so amorphous as ‘overall conditions’ can rise to the level of cruel and unusual punishment when no specific deprivation of a single human need exists.”<sup>80</sup>

<sup>76</sup> Id. at 362 (Brennan, J., concurring in the judgment) (second alteration in original) (quoting *Holt v. Sarver*, 309 F. Supp. 362, 373 (E.D. Ark. 1970), *aff’d*, 442 F.2d 304 (8th Cir. 1971)).

<sup>77</sup> Id. at 362–63 (footnote omitted) (quoting *Laaman v. Helgemoe*, 437 F. Supp. 269, 322–23 (D.N.H. 1977)).

<sup>78</sup> 501 U.S. 294, 304–05 (1991).

<sup>79</sup> Id. at 304 (emphasis altered).

<sup>80</sup> Id. at 296, 305.

To date, the Supreme Court has identified food, clothing, shelter, medical care,<sup>81</sup> and reasonable safety<sup>82</sup> as basic human needs, as well as warmth and exercise.<sup>83</sup> Additionally, the Court has held that a prison condition that “pose[s] an unreasonable risk of serious damage to [a person’s] future health” may satisfy the objective prong, even if the damage has not yet occurred.<sup>84</sup> All of these, as James Robertson points out, “are corporal concerns, to the exclusion of the social and civic components of an environment responsive to the needs of personhood.”<sup>85</sup>

<sup>81</sup> *Id.* at 303. In Eighth Amendment cases challenging inadequate medical care, most courts analyzing the objective prong assess whether the incarcerated person has a “serious medical need[.]” *Estelle v. Gamble*, 429 U.S. 97, 104 (1976); see also *Smith v. Carpenter*, 316 F.3d 178, 183 (2d Cir. 2003) (“In order to establish an Eighth Amendment claim arising out of inadequate medical care, a prisoner must prove ‘deliberate indifference to [their] serious medical needs.’” (quoting *Chance v. Armstrong*, 143 F.3d 698, 702 (2d Cir. 1998))); *DePaola v. Clarke*, 884 F.3d 481, 486 (4th Cir. 2018) (“When a prison official demonstrates ‘deliberate indifference’ to an inmate’s serious medical needs, a constitutional violation occurs under the Eighth Amendment.” (citing *Estelle*, 429 U.S. at 101–06)).

<sup>82</sup> *Helling v. McKinney*, 509 U.S. 25, 32 (1993) (citing *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 199–200 (1989)); see also *Farmer v. Brennan*, 511 U.S. 825, 832–33 (1994) (holding that prison officials’ failure to protect incarcerated people from violence at the hands of other incarcerated people may violate the Eighth Amendment).

<sup>83</sup> *Wilson*, 501 U.S. at 304. Some lower courts have also found that sanitation and personal hygiene, as well as sleep, are basic human needs. See, e.g., *Robertson v. Bass*, No. 24-30395, 2025 WL 416994, at \*3–4 (5th Cir. Feb. 6, 2025) (per curiam); *Palmer v. Johnson*, 193 F.3d 346, 352 (5th Cir. 1999); *Carver v. Bunch*, 946 F.2d 451, 452 (6th Cir. 1991); *Hoptowit v. Ray*, 682 F.2d 1237, 1246 (9th Cir. 1982); *Harper v. Showers*, 174 F.3d 716, 720 (5th Cir. 1999); *Merritt v. Hawk*, 153 F. Supp. 2d 1216, 1228 (D. Colo. 2001). One commentator has noted that “[s]trikingly similar provisions appear in a California statute setting a standard of care for pet shops.” Samuel H. Pillsbury, Note, *Creatures, Persons, and Prisoners: Evaluating Prison Conditions Under the Eighth Amendment*, 55 S. Cal. L. Rev. 1099, 1112 (1982).

<sup>84</sup> *Helling*, 509 U.S. at 35. According to the Court, “unreasonable risk[s] of serious damage” include exposure to tobacco smoke, risk of infectious disease, unsafe drinking water, exposed wiring, deficient firefighting measures, and assault. *Id.* at 34–35.

<sup>85</sup> James E. Robertson, *Houses of the Dead: Warehouse Prisons, Paradigm Change, and the Supreme Court*, 34 Hous. L. Rev. 1003, 1045 (1997). Professor Sharon Dolovich has argued persuasively that the Eighth Amendment demands more, writing that

to read prison officials’ constitutional obligations as solely about keeping people alive is to strip the Eighth Amendment of much of its moral force. . . . If the Constitution “does not mandate comfortable prisons,” it nonetheless prohibits treatment at odds with basic decency and with the humanity and dignity of the people we punish. It therefore obliges state officials to engage with people inside, not as some lower form of life that merely needs to keep drawing breath for the state’s burden to be discharged, but as fellow human beings whose suffering and despair demand a moral response regardless of whether some measure of criminal punishment may be warranted.

Sharon Dolovich, *Evading the Eighth Amendment: Prison Conditions and the Courts*, in *The Eighth Amendment and Its Future in a New Age of Punishment* 133, 140 (Meghan J. Ryan & William W. Berry III eds., 2020) (footnotes omitted).

Although the *Wilson* Court made clear that the list of basic life necessities is non-exhaustive, it remains unclear how a need may make the list because the Court has not set forth a rule for determining what constitutes a basic human need. Nevertheless, the existing list shows that “basic human needs” are not limited to those literally required to sustain life: certainly, any number of non-incarcerated people do not get regular exercise and yet continue living. Rather, the list seems to include items that the Court has deemed the “minimal civilized measure of life’s necessities”<sup>86</sup>—a standard that is “contextual and responsive to ‘contemporary standards of decency.’”<sup>87</sup>

*B. What Eighth Amendment Law Misses  
About Solitary Confinement*

*1. The “Deprivation of a Single Human Need” Approach Fails to Account for Solitary’s Multiple Deprivations and Reinforcing Effects*

What, then, of solitary confinement? While the Supreme Court has not yet been squarely confronted with an Eighth Amendment challenge to the practice, most lower courts asked to consider the question have held that its use does not violate the Eighth Amendment for people who are not juveniles, are not pregnant, or do not have a serious mental illness.<sup>88</sup> At times over the last 125 years, the Supreme Court has expressed concern with the use of solitary, most notably in its 1890 decision in *In re Medley*.<sup>89</sup> In that case, the Court was confronted with a challenge to a Colorado statute requiring solitary confinement of death-sentenced prisoners prior to their executions.<sup>90</sup> The Court described this mandatory isolation—which could last no more than a month—as imposing “an additional punishment of the most important and painful character” that was designed “to mark [the prisoners] as examples of the just punishment

<sup>86</sup> *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981).

<sup>87</sup> *Hudson v. McMillian*, 503 U.S. 1, 8 (1992) (quoting *Estelle v. Gamble*, 429 U.S. 97, 103 (1976)). Additionally, the Court has recognized that duration is relevant to the inquiry of whether a given prison condition can be said to deprive a person of a basic human need. *Hutto v. Finney*, 437 U.S. 678, 686–87 (1978). So too is the severity of the deprivation. *Hudson*, 503 U.S. at 8–9.

<sup>88</sup> See *infra* notes 94–100 and accompanying text; Margo Schlanger, *Incrementalist vs. Maximalist Reform: Solitary Confinement Case Studies*, 115 Nw. U. L. Rev. 273, 274–75, 286–87 (2020).

<sup>89</sup> 134 U.S. 160 (1890).

<sup>90</sup> *Id.* at 162–64.

of the worst crimes of the human race.”<sup>91</sup> The Court thus concluded that the statute violated the Constitution on *ex post facto* grounds “as applied to crimes committed before it came into force,”<sup>92</sup> but did not hold that solitary confinement violates the Eighth Amendment. Since then, especially in the last decade, some of the Justices have expressed concern about the use of long-term solitary confinement, though the Court has not granted certiorari on a case challenging the practice on Eighth Amendment grounds.<sup>93</sup>

The federal district and circuit courts, however, have seen extensive litigation involving solitary confinement, much of it brought pursuant to the Eighth Amendment. In these cases, plaintiffs claim that being held for years—sometimes decades—in solitary confinement constitutes cruel and unusual punishment. Most federal courts that have considered the issue have held that it does not, except in situations where the person is a juvenile or has a preexisting mental illness.<sup>94</sup> Those exceptions are grounded in the idea that youth and mental illness make people more vulnerable to the harmful effects of isolation. For example, in *Madrid v. Gomez*, the U.S. District Court for the Northern District of California likened the placement of persons with mental illness in solitary confinement to “putting an asthmatic in a place with little air to breathe.”<sup>95</sup> For that reason, the court ruled that confining people with mental illness in supermax conditions could “not be squared with evolving standards of humanity or decency” because the risk of exacerbating their mental illness

<sup>91</sup> *Id.* at 170–71.

<sup>92</sup> *Id.* at 172–73.

<sup>93</sup> See, e.g., *Apodaca v. Raemisch*, 139 S. Ct. 5, 10 (2018) (Sotomayor, J., respecting the denial of certiorari) (“Courts and corrections officials must accordingly remain alert to the clear constitutional problems raised by keeping prisoners . . . in ‘near-total isolation’ from the living world . . . in what comes perilously close to a penal tomb.” (citation omitted)); *Davis v. Ayala*, 576 U.S. 257, 288 (2015) (Kennedy, J., concurring) (“[S]olitary confinement . . . will bring you to the edge of madness, perhaps to madness itself.” (internal quotation marks omitted)); *Glossip v. Gross*, 576 U.S. 863, 926 (2015) (Breyer, J., dissenting) (observing that “it is well documented that . . . prolonged solitary confinement produces numerous deleterious harms”).

<sup>94</sup> See, e.g., *Madrid v. Gomez*, 889 F. Supp. 1146, 1266 (N.D. Cal. 1995) (ruling that putting people with mental illness in solitary confinement violates the Eighth Amendment); *V.W. ex rel. Williams v. Conway*, 236 F. Supp. 3d 554, 582–83, 588–89 (N.D.N.Y. 2017) (granting a preliminary injunction prohibiting solitary confinement for juveniles). But see *Hughes v. Judd*, 108 F. Supp. 3d 1167, 1181–85 (M.D. Fla. 2015) (rejecting the claim that the Eighth Amendment standard governing juveniles is more demanding than that for adults).

<sup>95</sup> 889 F. Supp. at 1265.

was so grave—so “shocking and indecent—[that it] simply has no place in civilized society.”<sup>96</sup>

Yet the *Madrid* court also ruled that confining people *without* mental illness in identical conditions did *not* violate the Eighth Amendment. The court explained that

while the conditions in the SHU may press the outer bounds of what most humans can psychologically tolerate, the record does not satisfactorily demonstrate that there is a sufficiently high risk to all inmates of incurring a serious mental illness from exposure to conditions in the SHU to find that the conditions constitute a *per se* deprivation of a basic necessity of life.<sup>97</sup>

*Madrid* was decided in 1995, but in the decades that have followed, other courts have largely adopted its distinction between people with mental illnesses and those without when considering Eighth Amendment challenges to long-term solitary confinement.<sup>98</sup> The result is that with some recent, notable exceptions,<sup>99</sup> most of the federal courts have held that where an incarcerated plaintiff does not have a preexisting mental illness, long-term or indefinite solitary confinement does not violate the Eighth Amendment.<sup>100</sup>

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<sup>96</sup> *Id.* at 1266.

<sup>97</sup> *Id.* at 1267.

<sup>98</sup> See, e.g., *Jones v. El v. Berge*, 164 F. Supp. 2d 1096, 1124 (W.D. Wis. 2001) (finding that placing seriously mentally ill prisoners in the Wisconsin supermax violates the Eighth Amendment); Order at 23, *Austin v. Wilkinson*, No. 01-cv-00071 (N.D. Ohio Nov. 21, 2001) (noting that the defendants offered little opposition to a preliminary injunction prohibiting the placement of seriously mentally ill prisoners at the Ohio supermax); *Ruiz v. Johnson*, 37 F. Supp. 2d 855, 915 (S.D. Tex. 1999) (finding that prison conditions can pose too great a threat to the psychological health of mentally ill inmates, violating the Eighth Amendment).

<sup>99</sup> See *Johnson v. Wetzel*, 209 F. Supp. 3d 766, 777–78, 782 (M.D. Pa. 2016) (granting plaintiff’s preliminary injunction and finding plaintiff likely to succeed on an Eighth Amendment claim based on thirty-six years of solitary); *Peoples v. Annucci*, 180 F. Supp. 3d 294, 296, 308 (S.D.N.Y. 2016) (approving a class-action settlement of Eighth Amendment claims for prolonged solitary confinement); *Shoatz v. Wetzel*, No. 13-cv-00657, 2016 WL 595337, at \*7–9 (W.D. Pa. Feb. 2, 2016) (denying defendants’ motion for summary judgment where the plaintiff endured twenty-two years of solitary); *Ashker v. Brown*, No. 09-cv-05796, 2013 WL 1435148, at \*4–6 (N.D. Cal. Apr. 9, 2013) (denying a motion to dismiss where the plaintiffs were held in solitary for at least eleven years); *Wilkerson v. Stalder*, 639 F. Supp. 2d 654, 658–59, 686 (M.D. La. 2007) (denying in part defendants’ motion for partial summary judgment where plaintiffs were held in solitary confinement for approximately twenty-eight to thirty-five years).

<sup>100</sup> See, e.g., *Silverstein v. Fed. Bureau of Prisons*, 559 F. App’x. 739, 762–63 (10th Cir. 2014); *Isby v. Brown*, 856 F.3d 508, 522–24 (7th Cir. 2017); *Littler v. Ind. Dep’t of Corr.*



Some of these claims fail on the subjective prong—that is, courts find prison officials have not acted with deliberate indifference to the harm or risk of harm to a person by keeping them in solitary confinement for years or even decades.<sup>101</sup> But in other cases, courts have found that the plaintiff failed to establish that being subjected to long-term isolation deprived them of a “basic human need” or put them at “substantial risk of serious harm.”

This was true in *Madrid*. In his 139-page opinion, Chief Judge Thelton Henderson described the isolating conditions in the Pelican Bay SHU in painful detail: “[T]he SHU interior is designed to reduce visual stimulation. . . . The cellblocks are marked throughout by a dull sameness in design and color. The cells are windowless; the walls are white concrete. When inside the cell, all one can see through the perforated metal door is another white wall.”<sup>102</sup> He noted that in the small exercise pen, “the walls are 20 feet high, they preclude any view of the outside world. . . . [G]iven their cell-like design and physical attachment to the pod itself, the pens are more suggestive of satellite cells than areas for exercise or recreation.”<sup>103</sup>

Chief Judge Henderson also found that “[o]pportunities for social interaction with other prisoners or vocational staff are essentially precluded.”<sup>104</sup> As for interaction with correctional staff, it “is kept to an absolute minimum. . . . In addition, the contact that correctional staff do have with inmates often occurs in a routinized setting while inmates are in handcuffs and waist and ankle chains, such as during an escort from the cell to another point in the prison.”<sup>105</sup>

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Comm’r, No. 11-cv-00218, 2011 WL 2729523, at \*4 (N.D. Ind. July 12, 2011); *Mora-Contreras v. Peters*, 851 F. App’x 73, 73–74 (9th Cir. 2021); *Hill v. Pugh*, 75 F. App’x 715, 719–20 (10th Cir. 2003); *Bono v. Saxbe*, 620 F.2d 609, 615 (7th Cir. 1980); *LaVergne v. Stutes*, 82 F.4th 433, 437 (5th Cir. 2023).

<sup>101</sup> One reason for this is that courts defer to penological justifications proffered by prison officials—despite that, “legitimate penological interest” is not part of the Eighth Amendment’s deliberate indifference test. See Brittany Glidden, *Necessary Suffering?: Weighing Government and Prisoner Interests in Determining What Is Cruel and Unusual*, 49 *Am. Crim. L. Rev.* 1815, 1855 (2012).

<sup>102</sup> *Madrid*, 889 F. Supp. at 1228 (citation omitted).

<sup>103</sup> *Id.* at 1228–29. Jonathan Simon has described Chief Judge Henderson’s work on the *Madrid* case as “based on one of the most thorough judicial investigations ever undertaken of a prison regime,” and the written opinion as “among the most significant modern narratives of prison conditions, comparable in its critical gaze to the much earlier observations of prison by Alexis de Tocqueville, Charles Dickens, and John Howard.” Simon, *supra* note 15, at 48.

<sup>104</sup> *Madrid*, 889 F. Supp. at 1229.

<sup>105</sup> *Id.*

In analyzing the plaintiffs' claim that these conditions violated the Eighth Amendment, the court began with *Wilson*, repeating its maxim that "[c]ourts may not find Eighth Amendment violations based on the 'totality of conditions' at a prison."<sup>106</sup> Chief Judge Henderson therefore observed that

while courts may consider conditions in combination "when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need . . . [,] [n]othing so amorphous as 'overall conditions' can rise to the level of cruel and unusual punishment when no specific deprivation of a single human need exists."<sup>107</sup>

The court recognized that in addition to those things necessary "to physically sustain life, such as shelter, food, and medical care, . . . conditions that inflict serious mental pain or injury also implicate the Eighth Amendment."<sup>108</sup> But cabined by *Wilson*'s requirement that only conditions that deprive a person of a "single, identifiable human need" are actionable, the court assessed whether "the conditions of extreme social isolation and reduced environmental stimulation . . . inflict psychological trauma" and "deprive inmates of sanity itself."<sup>109</sup> Having thus defined the human need (or risk of harm) as sanity, the court drew a dividing line between those for whom the conditions in the SHU were unconstitutional (people diagnosed with a mental illness), and those for whom those same conditions were not (people not diagnosed with a mental illness).

Aside from the fact that a "deprivation of sanity" standard fails to account for the other types of psychological harm that solitary inflicts,<sup>110</sup>

<sup>106</sup> Id. at 1246 (quoting *Hoptowit v. Ray*, 682 F.2d 1237, 1246 (1982)).

<sup>107</sup> Id. (alterations in original) (quoting *Wilson v. Seiter*, 501 U.S. 294, 304 (1991)).

<sup>108</sup> Id. at 1260.

<sup>109</sup> Id. at 1246, 1261.

<sup>110</sup> The court went on to state,

[P]laintiffs can not prevail on the instant claim simply by pointing to the generalized "psychological pain"—i.e. the loneliness, frustration, depression or extreme boredom—that inmates may experience by virtue of their confinement in the SHU. . . . The Eighth Amendment simply does not guarantee that inmates will not suffer some psychological effects from incarceration or segregation. However, if the particular conditions of segregation being challenged are such that they inflict a serious mental illness, greatly exacerbate mental illness, or deprive inmates of their sanity, then defendants have deprived inmates of a basic necessity of human existence—indeed, they have crossed into the realm of psychological torture.

the way the *Madrid* court and other courts have interpreted *Wilson*'s "deprivation of a single identifiable human need" requirement is problematic for two additional, interrelated reasons.

First, a review of other cases challenging long-term solitary confinement under the Eighth Amendment shows that in pleading the objective element of their claims, plaintiffs have asserted that solitary confinement deprives them of several human needs, including human interaction, environmental stimulation, exercise, and sleep.<sup>111</sup> But even

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Id. at 1263–64 (citations omitted). This construction appears to be consistent with the Supreme Court's requirement that only "extreme deprivations" will suffice to support the objective prong. *Hudson v. McMillian*, 503 U.S. 1, 9 (1992).

<sup>111</sup> See, e.g., *Ashker v. Governor of Cal.*, No. 09-cv-05796, 2014 U.S. Dist. LEXIS 75347, at \*18–19 (N.D. Cal. June 2, 2014); see also *Silverstein v. Fed. Bureau of Prisons*, 559 F. App'x 739, 744–45 (10th Cir. 2014) (plaintiff alleged that long-term solitary confinement deprived him of social contact, environmental stimulation, and sleep, as a result of which he suffered—and would continue to suffer—serious harm in the form of, inter alia, depression, anxiety, and cognitive impairment); *Johnson v. Wetzel*, 209 F. Supp. 3d 766, 776–78 (M.D. Pa. 2016) (plaintiff alleged long-term solitary confinement "denie[d] him social interaction, environmental stimuli, sleep, and exercise" to a degree that caused serious and ongoing psychological harm in violation of the Eighth Amendment); *Madrid*, 889 F. Supp. at 1261 (plaintiffs alleged that "extreme social isolation and reduced environmental stimulation" in Pelican Bay's Security Housing Unit caused psychological harm); *Ruiz v. Johnson*, 37 F. Supp. 2d 855, 908 (S.D. Tex. 1999) (plaintiffs alleged that solitary confinement denied them life necessities including property, interpersonal contact, mental stimulus, and rehabilitative programs). People challenging long-term solitary confinement also assert that these deprivations cause them serious physical and psychological harm and put them at substantial risk of serious future harm if the isolation continues.

Some courts have recognized social interaction as a basic human need. In 2009, a court sentencing Mr. Corozzo, a "captain and killer for the mafia," rejected federal prosecutors' request to deny Mr. Corozzo visits from his family because "human beings require the company of other humans to stay healthy." *United States v. Corozzo*, 256 F.R.D. 398, 399, 401 (E.D.N.Y. 2009). The court noted that "[s]ubstantial research demonstrates the psychological harms of solitary confinement and segregation." Id. at 401–02. Similarly, in 2007, a Louisiana district court found in *Wilkerson v. Stalder* that "social interaction and environmental stimulation" are basic human needs. 639 F. Supp. 2d 654, 678–79 (M.D. La. 2007). It rejected defendants' argument that the list of basic human needs "such as 'food, sleep, clothing, shelter [and] medical attention'" was exhaustive and that the prison had therefore not deprived plaintiffs of a basic human need. Id. at 661, 678 (citation omitted).

The way some courts conduct the inquiry is so literal as to defy common sense, requiring a total deprivation of the life necessity before the court deems it actionable. For example, the U.S. Court of Appeals for the Tenth Circuit concluded that Tommy Silverstein, who was held in solitary confinement for over thirty years, the last thirteen of which were in ADX, the federal supermax, was "not totally isolated" because he

1) ha[d] daily contact with three shifts of [Federal Bureau of Prisons] guards and daily interaction with other staff, even if the time of contact is minimal; 2) [could] communicate with other inmates (albeit by yelling from cell to cell or during adjacent

assuming the Supreme Court would agree that some or all of these should be added to the list of basic life necessities, the “deprivation of a single human need” approach forces a fracturing of the experience of solitary that fails to account for its multiple deprivations and their reinforcing effects. By way of example, in many solitary confinement units and supermax prisons, conditions such as constant light and noise make it impossible for people to sleep more than a few hours at a time. On its own, chronic sleep deprivation is painful and debilitating: the short-term consequences include increased stress responsivity, emotional distress, mood disorders and other mental health problems, as well as deficits in cognition, memory, and performance.<sup>112</sup> But when sleep deprivation is combined with a denial of social interaction, environmental stimulation, and exercise—each of which is harmful in its own right—the harm of each of these deprivations reinforces the others and is compounded.

Yet this compounded harm—precisely *because* it is compounded—escapes Eighth Amendment scrutiny in an analysis focused only on whether solitary confinement has produced “a deprivation of a single, identifiable human need.” As Professor Sharon Dolovich has explained in critiquing *Wilson*’s approach,

After *Wilson*, a plaintiff’s inability to state with precision the reinforcing effect of a particular condition on the deprivation of a “single, identifiable human need” renders those conditions constitutionally irrelevant. They drop out entirely, to be treated by the court as if they did not exist. But if specific conditions can be erased for constitutional purposes, they cannot be erased as a matter of lived experience.<sup>113</sup>

*Wilson*’s cramped construction of the objective prong, which precludes consideration of a prisoner’s “overall conditions,” forces an artificial fragmenting of the multiple deprivations that comprise solitary

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recreation); [and] 3) receive[d] a minimum of two fifteen-minute telephone calls and up to five social visits per month, even if his family [could] not travel to Colorado. *Silverstein*, 559 F. App’x at 755.

<sup>112</sup> See, e.g., Goran Medic, Micheline Wille & Michiel EH Hemels, Short- and Long-Term Health Consequences of Sleep Disruption, 9 *Nature & Sci. Sleep* 151, 154 (2017). Long-term consequences of sleep loss include increased risk of hypertension, diabetes, obesity, depression, heart attack, and stroke. Comm. on Sleep Med. & Rsch., Bd. on Health Scis. Pol’y & Inst. of Med. of the Nat’l Acads., *Sleep Disorders and Sleep Deprivation: An Unmet Public Health Problem* 55, 56 (Harvey R. Colten & Bruce M. Altevogt eds., 2006).

<sup>113</sup> Dolovich, *supra* note 85, at 154 (footnote omitted).

confinement and their effects, masking the reality that the harm that isolation causes is greater than the sum of its parts.<sup>114</sup>

## *2. The Court's Current Eighth Amendment Jurisprudence Fails to Recognize Personhood Harms*

There is a related and deeper problem with the federal courts' approach to the Eighth Amendment objective prong analysis: the failure to account for this aggregate harm caused by the various deprivations inherent in solitary confinement. I do not believe it is an overstatement to describe this as a destruction of personhood.

This is a difficult harm to articulate in a constitutionally cognizable way, particularly against the backdrop of the Supreme Court's current list of basic human needs, a list that one commentator has referred to as "a schema grounded in body-suffering."<sup>115</sup> But personhood is more than the physical body; it necessarily includes psychological and social

<sup>114</sup> Professor Dolovich makes a similar point in discussing Justice Brennan's concurrence in *Rhodes*, where he endorses the totality-of-the-circumstances approach to the objective prong that the Court subsequently disclaimed in *Wilson*. Noting that even "[i]f it is possible to individually itemize the basic requirements for sustaining life and even for ensuring a humane and decent existence, any determination as to whether a carceral experience is bearable, much less humane, can only be made holistically." *Id.* at 144. This is because, Dolovich explains,

[c]onditions that may be scarcely endurable in isolation . . . may well become wholly unendurable when lived all at once. . . . In his *Rhodes* opinion, Justice Brennan gave shape to this understanding, explaining that courts should determine constitutionality by asking whether "exposure to the cumulative effects of prison conditions" amounts "to cruel and unusual punishment."

*Id.* (emphasis omitted) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 362–63 (1981) (Brennan, J., concurring in the judgment)).

<sup>115</sup> Robertson, *supra* note 85, at 1063. "In its adoption of the 'single, identifiable human need' test, the Court embraced a measure of pain well-suited to an earlier, pre-incarceration period when the prevailing mode of punishment had clearly defined points of contact with the offender's physical person." *Id.* at 1049; see also Jules Lobel & Huda Akil, *Law & Neuroscience: The Case of Solitary Confinement*, 147 *Daedalus* 61, 67 (2018) (describing U.S. courts' treatment of mental harm and pain as "a second-class citizen").

This is further illustrated by *Madrid* itself:

Defendants are thus entitled to design and operate the SHU consistent with the penal philosophy of their choosing, absent constitutional violations. . . . [T]hey may emphasize idleness, deterrence, and deprivation over rehabilitation. This is not a matter for judicial review or concern unless the evidence demonstrates that conditions are so extreme as to violate basic concepts of humanity and deprive inmates of a minimal level of life's basic necessities.

889 F. Supp. at 1262 (citation omitted).

dimensions as well.<sup>116</sup> Professor Adeno Addis captures this notion powerfully when he explains:

At the most basic level, a person is a physical (embodied) and psychological being. Like other animals, humans are “centered” within the cast of their bodies. But a person is of course much more than that. She is also a social being with commitments, relationships, and life plans, each of which makes her the person she is.<sup>117</sup>

Indeed, one way of understanding personhood harm is that it is the notion of being reduced to one’s body, which occurs when corporal concerns are addressed “to the exclusion of the social and civic components of an environment responsive to the needs of personhood.”<sup>118</sup>

What is missing in an environment that does not account for personhood needs? As I argue below, what is absent is agency, the ability to exercise moral decision-making, to set and pursue goals, to build and sustain relationships, and to exercise judgment. Such an environment stifles the desire and capacity to learn, think, and develop one’s identity, as well as the fundamental need to hope and plan. It also deprives people of a basic level of autonomy and self-determination—in essence, the very elements that define the human experience and enable people to fully express their humanity.<sup>119</sup>

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<sup>116</sup> See generally Adeno Addis, *The Role of Human Dignity in a World of Plural Values and Ethical Commitments*, 31 *Neth. Q. Hum. Rts.* 403 (2013) (arguing that how we conceive of ourselves and each other—and therefore how we define human dignity—is necessarily politically and socially constructed and informed by individual values, societal values, and our identities and relationships within our various communities).

<sup>117</sup> Addis, *Kennedy on Dignity*, *supra* note 11, at 536 (footnote omitted).

<sup>118</sup> Robertson, *supra* note 85, at 1045 (citation omitted). Justice Brennan gives voice to this type of personhood harm in his concurrence in *Furman v. Georgia*, making the point that “[m]ore than the presence of [physical] pain” is involved in extremely severe punishment: “The true significance of these punishments is that they treat members of the human race as nonhumans, as objects to be toyed with and discarded . . . [and] may reflect the attitude that the person punished is not entitled to recognition as a fellow human being.” 408 U.S. 238, 272–73 (1972) (Brennan, J., concurring).

<sup>119</sup> See Robert Johnson, *Reflections on the Death Penalty: Human Rights, Human Dignity, and Dehumanization in the Death House*, 13 *Seattle J. for Soc. Just.* 583, 586 (2014). Of course, at least some of these qualities are not exclusive to humans. See, e.g., Roger S. Fouts, *Apes, Darwinian Continuity, and the Law*, 10 *Animal L. Rev.* 99, 113 (2004) (“A worldview which presumes that only humans have rational thought, or a rational soul, is one that prevents us from discovering new insights about humans. This view maintains that we are rational thinkers and that is the end of it. In order to do this it focuses on the differences and ignores the similarities we share with our fellow animals.”).

For that reason, respect for personhood is inextricably intertwined with human dignity. Viewing solitary confinement through a dignity lens captures a fuller, more expansive understanding of the harms that exist beyond the “schema . . . [of] body-suffering.”<sup>120</sup> And relatedly, viewing dignity through the lens of solitary confinement can help contribute to an understanding of what human dignity means in the context of the Eighth Amendment.

### III. THE ROLE OF DIGNITY: RETURN TO DIGNITY-BASED JURISPRUDENCE BETTER CAPTURES/RECOGNIZES THE EXPERIENCE OF SOLITARY

*“You do not have to love humanity in order to believe in human dignity.”*<sup>121</sup>

#### *A. What Is Human Dignity?*

*“Humanity talks to itself about itself, it judges itself, it invents the questions and answers, it alone worries about human dignity. There is no appeal beyond itself. But the discussion must go on because there are certain questions that must be answered, and can only be answered by reference to the idea of human dignity.”*<sup>122</sup>

At the outset, I acknowledge that seeking to bring clarity to the personhood harms of solitary confinement via a human dignity lens risks trading one inchoate construct for another. Indeed, a common critique of dignity is the difficulty in defining it, making its use as a basis for constitutional interpretation somewhat shaky.<sup>123</sup> Part of that difficulty arises because we ask dignity to do different work—some of it quite foundational—in a broad range of philosophical, moral, religious, political, and legal contexts<sup>124</sup> where dignity’s “importance, meaning, and function are commonly presupposed but rarely articulated.”<sup>125</sup> The lack of a one-size-fits-all definition has caused some scholars to discard dignity entirely. Some reject it as duplicative of other concepts (typically

<sup>120</sup> See Robertson, *supra* note 85, at 1063.

<sup>121</sup> George Kateb, *Human Dignity*, at xiii (2011).

<sup>122</sup> *Id.* at 27.

<sup>123</sup> See *supra* note 8 and accompanying text.

<sup>124</sup> See, e.g., Remy Debes, *Dignity*, *Stanford Encyclopedia of Phil.* (Feb. 18, 2023), <https://plato.stanford.edu/entries/dignity/> [<https://perma.cc/3EX7-ASE9>].

<sup>125</sup> Henry, *supra* note 2, at 172.

autonomy).<sup>126</sup> Others find proffered definitions of dignity problematic when they are so broad as to be “nothing more than a short-hand expression for people’s moral intuitions and feelings,”<sup>127</sup> or so narrow that they fail to encompass the myriad ways in which we use the term.<sup>128</sup>

While I acknowledge that dignity resists easy definition, I agree with Andrea Sangiovanni that this difficulty is neither unique to dignity nor fatal to its utility: “All evocative and powerful values have a variety of meanings and uses to which they can be put.”<sup>129</sup> Sangiovanni sees this fluidity as opportunity: “[T]he fact that dignity is such a historically contested term, and that it therefore carries many latent, incompatible, and open-ended possibilities within it, is no objection at all. It is an invitation to further reflection and an invitation to see in what guise it can best do battle.”<sup>130</sup> Philosopher Mary Neal makes a similar point:

[T]he fact that dignity is used in a variety of different ways in ethical and legal discourses, and is used to mean a range of different things, does not signify that anything is “amiss” with the concept in general, as some commentators have claimed; rather, we should *expect* there to be a range of different meanings of “dignity” corresponding to the range of different legal language-games in which the term is used.<sup>131</sup>

Indeed, some scholars take the position that this multiplicity of uses is a vehicle for gaining a deeper understanding of what dignity is. One of these scholars is David Luban, who has developed what he calls a “human rights pragmatist” approach to understanding human dignity, which “insists that the meaning of the phrase ‘human dignity’ is not defined by

<sup>126</sup> See Macklin, *supra* note 8, at 1419–20; Pinker, *supra* note 8.

<sup>127</sup> Helga Kuhse, Is There a Tension Between Autonomy and Dignity?, in 2 *Bioethics and Biolaw: Four Ethical Principles* 61, 72 (Peter Kemp, Jacob Dahl Rendtorff & Niels Mattsson Johansen eds., 2000); see also John Harris, *Cloning and Human Dignity*, 7 *Cambridge Q. Healthcare Ethics* 163, 163 (1998) (“Appeals to human dignity are . . . universally attractive; they are also comprehensively vague.”). “Someone . . . could receive the impression that human dignity is, seemingly, the whole law in a nutshell, and that it is possible to apply to it the saying of the Rabbis: ‘Study it from every aspect, for everything is in it.’” Daly, *supra* note 11, at 102 (quoting Ariel L. Bendor & Michael Sachs, *The Constitutional Status of Human Dignity in Germany and Israel*, 44 *Isr. L. Rev.* 25, 46 (2011)).

<sup>128</sup> See Henry, *supra* note 2, at 184–86.

<sup>129</sup> Andrea Sangiovanni, *Humanity Without Dignity: Moral Equality, Respect, and Human Rights* 14 (2017). That said, Sangiovanni is not a fan of dignity as a theory of moral equality capable of serving as a foundation for human rights. *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> Mary Neal, “Not Gods But Animals”: Human Dignity and Vulnerable Subjecthood, 33 *Liverpool L. Rev.* 177, 180 (2012).



a philosophical theory, but rather determined by its use in human rights practice.”<sup>132</sup> The pragmatist’s approach “reverses the order of explanation, defining ‘human dignity’ by its inferential commitments rather than the other way around.”<sup>133</sup> By examining the various ways in which dignity is used in the human rights context, Luban asserts, we find “not a unitary conception of human dignity, but a network of human dignities bearing family resemblances to each other.”<sup>134</sup>

Professor Leslie Meltzer Henry articulates a similar perspective when she observes that “[d]ignity is not a fixed category, but rather a series of meanings that share a Wittgensteinian family resemblance.”<sup>135</sup> In her article discussing the use of dignity in constitutional interpretation, Henry explains that “Wittgenstein’s understanding of language importantly demonstrates that standard approaches to conceptualizing dignity, which search only for its ‘necessary and sufficient’ features, risk distorting or circumscribing the word’s meaning.”<sup>136</sup> Like Luban, she urges a use-driven, backward-looking approach: “Rather than seeking exact definitions with clear and rigid boundaries,” we should instead conceptualize dignity “by exploring the ‘overlapping and criss-crossing’ meaning[] [it has] in practice.”<sup>137</sup> This “context-driven view of dignity” is not static, “but rather is responsive to evolving attitudes, structures, and beliefs.”<sup>138</sup> As such, it is a particularly useful way of conceptualizing dignity in the context of the Eighth Amendment, given the Supreme Court’s edict that the controlling standard for cruel and unusual

<sup>132</sup> David Luban, Human Rights Pragmatism and Human Dignity, in *Philosophical Foundations of Human Rights* 263, 275 (Rowan Cruft, S. Matthew Liao & Massimo Renzo eds., 2015). He continues: “This suggests that the best way of understanding what the [Universal Declaration of Human Rights] and other human rights instruments mean by ‘human dignity’ is simply by looking at the content of the documents. In effect, the instruments themselves catalogue the material inferences and incompatibilities that define human dignity.” *Id.* at 276.

<sup>133</sup> *Id.* at 275.

<sup>134</sup> *Id.* at 277 (emphasis omitted).

<sup>135</sup> Henry, *supra* note 2, at 188.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* Doron Shultziner makes a similar point, explaining,

As Wittgenstein notes in *Philosophical Investigations*, in order to understand the meaning of a word or a concept “one cannot guess how a word functions. One has to look at its use and learn from that.” Furthermore, some of the linguistic functions of dignity seem to imply different, even contradictory, meanings.

Doron Shultziner, A Jewish Conception of Human Dignity, *J. Religious Ethics* 663, 665 (2006) (citations omitted).

<sup>138</sup> Henry, *supra* note 2, at 189.

punishment claims is drawn “from the evolving standards of decency that mark the progress of a maturing society”<sup>139</sup> and its pronouncement that those “[e]volving standards of decency must embrace and express respect for the dignity of the person, and the punishment of criminals must conform to that rule.”<sup>140</sup>

### 1. *Philosophical Constructions of Dignity*

What, then, are these “overlapping and criss-crossing” meanings of human dignity that should inform our understanding of it in the Eighth Amendment context? Philosophical understandings of dignity have often informed legal interpretations, and therefore provide a useful starting point for exploring human dignity in American jurisprudence.<sup>141</sup>

Immanuel Kant is widely recognized as playing an instrumental role in shaping our historical and modern conceptions of dignity; indeed, “many writers who attempt to explain the source and nature of ‘human dignity’ do so along largely Kantian lines, explicitly or at least perceptibly.”<sup>142</sup> In Kant’s *Groundwork for the Metaphysics of Morals*, he explains that all persons have equal and innate worth, or dignity, because they have the capacity for rational autonomy.<sup>143</sup> For that reason, “they can never be used

<sup>139</sup> *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

<sup>140</sup> *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008) (citing *Trop*, 356 U.S. at 100).

<sup>141</sup> Benjamin Krolkowski traces this history, noting that

[h]uman dignity originated separately as both a religious and philosophical concept. The religious underpinnings of human dignity derive from the Judeo-Christian belief that all human beings are created in the image of God. Each individual therefore contains a fragment of the so-called “divine spark,” imbuing him or her with a dignity that cannot be denied or in any way disparaged by others.

Benjamin F. Krolkowski, *Brown v. Plata: The Struggle to Harmonize Human Dignity with the Constitution*, 33 Pace L. Rev. 1255, 1257 (2013) (footnote omitted).

<sup>142</sup> Neal, *supra* note 131, at 181. Some credit Cicero as having introduced the term. See generally Hubert Cancik, ‘Dignity of Man’ and ‘Persona’ in Stoic Anthropology: Some Remarks on Cicero, *De Officiis I* 105–107, in *The Concept of Human Dignity in Human Rights Discourse* 19 (David Kretzmer & Eckart Klein eds., 2002) (detailing the ancient Roman conceptualization of dignity as the interaction between nature and reason along with the contributions of later philosophers).

<sup>143</sup> See generally Immanuel Kant, *Groundwork for the Metaphysics of Morals* (Allen W. Wood ed. & trans., Yale Univ. Press 2002) (1785). For a similar discussion of Kant, see Bharat Malkani, Dignity and the Death Penalty in the United States Supreme Court, 44 *Hastings Const. L.Q.* 145, 170 (2017). Indeed, dignity comes from the Latin *dignitas*, which could be translated as “worth,” “intrinsic worth,” or “worthiness.” Luis Aníbal Avilés Pagán, Human Dignity, Privacy and Personality Rights in the Constitutional Jurisprudence of Germany, the United States and the Commonwealth of Puerto Rico, 67 *Revista Jurídica U. P.R.* 343, 345 n.4 (1998). That said, I take issue with the idea that the capacity for rational thought is the

as a means to an end—that is, they must be treated with respect for their rationality and ability to act autonomously.”<sup>144</sup> For Kant, human dignity embodied the idea that every human being is valuable, “regardless of [his] usefulness to anyone or for anything. The value of the human being lies in itself, not in his utility to achieve something. Human beings are not mere means to achieve ends but ends in themselves.”<sup>145</sup>

Kant maintained that the capacity for rational will and agency were humanity’s distinguishing feature and were therefore the source/locus of human dignity. As philosopher Martha Nussbaum has observed:

Kant’s conception of the person lies in a long tradition that goes straight back to the Greek and Roman Stoics, in which personhood is identified with reason (including, prominently, the capacity for moral judgment), and in which reason, so construed, is taken to be a feature of human beings that sets them sharply apart from nonhuman animals and from their own animality.<sup>146</sup>

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locus of human worth because of its implications for the rights of people with certain cognitive disabilities. For that reason, I tend to agree with J.M. Bernstein: “Nothing has done more harm to the discourse of human dignity than the assumption that there is some magical property, say the possession of the power of reason, whose simple possession by an individual suddenly gives her the standing of having intrinsic and inviolable worth.” J.M. Bernstein, *Torture and Dignity: An Essay on Moral Injury* 264 (2015).

<sup>144</sup> Malkani, *supra* note 143, at 170.

<sup>145</sup> Neal, *supra* note 131, at 182 (quoting Bernhard Rütsche, *The Role of Human Dignity in the Swiss Legal System. Arguing for a Dualistic Notion of Human Dignity*, 21 *Journal International de Bioéthique* [J. Int’l de Bioéthique] 83, 87 (2010) (Fr.)). Interestingly, Amanda Ploch has observed that the centrality of autonomy in Kant’s formulation of dignity caused him to reject rehabilitation as a valid goal of punishment:

Immanuel Kant, one of the most influential minds in developing and fleshing out the concept of dignity, rejected rehabilitative punishment, because having rehabilitation in prisons would be treating the prisoner as a means to an end, with the end being helping society or the prisoner. Kant instead supported the retributive theory of justice—punishing people in return for the crimes they have committed.

Amanda Ploch, *Why Dignity Matters: Dignity and the Right (Or Not) to Rehabilitation from International and National Perspectives*, 44 *N.Y.U. J. Int’l L. & Pol.* 887, 892–93 (2012) (footnote omitted).

<sup>146</sup> Martha C. Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* 130 (2006). Erin Daly also gives voice to the exceptionalism of human animals when it comes to dignity, explaining,

As philosopher George Kateb has argued, human dignity connotes the fact that human beings are different from, and more special than, any other creatures in the universe: “the human species,” he writes, “is indeed something special, [in] that it possesses valuable, commendable uniqueness or distinctiveness that is unlike the uniqueness of any other species. It has higher dignity than all other species, or a qualitatively different dignity from all of them. The higher dignity is theoretically founded on humanity’s

For Kant, dignity is not something a person must—or even can—earn; rather, it is a quality that inheres in people simply by virtue of being born human. A person’s dignity is not contingent on *how* they exercise their rationality and autonomy; rather, it is based on their *capacity* for rationality and autonomy. As Professor Michael Rosen has observed, “[w]hat has intrinsic, absolute value, for Kant, is not our lives but our personhood—‘humanity in our persons’—and . . . our personhood and our lives are not the same thing.”<sup>147</sup>

A number of scholars have endorsed the Kantian notion of dignity as an inherent quality of human beings,<sup>148</sup> though the formulations I find most persuasive do not view the basis of human dignity as grounded solely in the human capacities of autonomy and rationality. Nussbaum, in her writings about human dignity, asserts that “human beings have a worth that is indeed inalienable, because of their capacities for various forms of activity and striving,” as well as “sentience, imagination,

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partial discontinuity with nature. Humanity is not only natural, whereas all other species are only natural.” Uniquely among species, we are part nature, and part more-than-nature, having the capacity of agency, the ability to create and control our world to a degree that far exceeds that of any other creature on earth (or elsewhere, as far as we know).

Daly, *supra* note 11, at 13 (footnote omitted).

<sup>147</sup> Michael Rosen, *Dignity: Its History and Meaning* 152 (2012) (emphasis omitted).

<sup>148</sup> See, e.g., Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 Eur. J. Int’l L. 655, 659–60 (2008); Daly, *supra* note 11, at 127; Amy Gilbert, *Bibliographic Review, Critical Texts on Justice and the Basis of Human Dignity*, *Hedgehog Rev.*, Fall 2007, at 81, 82; Thomas E. Hill, Jr., *Kantian Perspectives on the Rational Basis of Human Dignity*, in *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* 215, 215–16 (Marcus Düwell, Jens Braarvig, Roger Brownsword & Dietmar Mieth eds., 2014) (arguing that human dignity is an innate status that people do not earn and cannot forfeit); Giovanni Bognetti, *The Concept of Human Dignity in European and US Constitutionalism*, in *European and US Constitutionalism* 85, 89 (Georg Nolte ed., 2005). That said, there is some debate in the literature as to whether a person can be deprived of their dignity by being subjected to undignified treatment, or whether dignity is so integral to human beings that while people may suffer assaults on their dignity, they can never be deprived of it. Ronald Dworkin, *Justice for Hedgehogs* 19 (2011) (describing “Kant’s principle” as “[a] person can achieve the dignity and self-respect that are indispensable to a successful life only if he shows respect for humanity itself in all its forms”); Jeremy Waldron, *Dignity, Rank, and Rights* 17 (Meir Dan-Cohen ed., 2012) (observing that “[o]n the one hand, we are told that human rights ‘derive from the inherent dignity of the human person[,]’ [while o]n the other hand, it is said that people have a right to be protected against ‘degrading treatment’ and ‘outrages on personal dignity’” (quoting Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 3320, 75 U.N.T.S. 135, 138)).

emotions, and the capacity for reasoning and choice.”<sup>149</sup> Like Kant, Nussbaum also holds that a central feature of dignity is the need for each person to be treated as an end.<sup>150</sup> But Nussbaum goes beyond the Kantian emphasis on rationality alone, arguing that “[t]here is dignity not only in rationality but in human need itself and in the varied forms of striving that emerge from human need”—including needs that are physical, psychological, and social.<sup>151</sup>

Borrowing from Amartya Sen’s concept of substantial freedoms or capabilities,<sup>152</sup> Nussbaum has identified ten “[c]entral [h]uman [c]apabilities,” by asking and answering the question, “[w]hat activities characteristically performed by human beings are so central that they seem definitive of a life that is truly human?”<sup>153</sup> Her list includes (1) life; (2) bodily health; (3) bodily integrity; (4) senses, imagination, and

<sup>149</sup> Martha Nussbaum, Human Dignity and Political Entitlements, *in* Human Dignity and Bioethics: Essays Commissioned by the President’s Council on Bioethics 351, 357, 359 (2008).

<sup>150</sup> See Nussbaum, *supra* note 146, at 70.

<sup>151</sup> Nussbaum, *supra* note 149, at 363. In his preface to *Understanding Human Dignity*, Archbishop Vincent Nichols also eloquently captures this view:

Human dignity in its fullest sense emerges from social relationships. . . . This social dimension of human dignity, which arises from our nature as social beings, helps to explain why we lose something extremely important if we try to reduce the value of human dignity to simply protecting personal autonomy.

Vincent Nichols, Preface, *in* *Understanding Human Dignity*, *supra* note 8, at xix, xxii–xxiii.

<sup>152</sup> See generally Amartya Sen, *Development as Freedom* (1999) (introducing the concept of “capabilities,” which refers to what individuals are able to do and be, and asserting that development should be understood as a process of expanding people’s capabilities and substantive freedoms).

<sup>153</sup> Martha C. Nussbaum, *Sex & Social Justice* 39, 41–42 (1999) (footnote omitted).

thought;<sup>154</sup> (5) emotions;<sup>155</sup> (6) practical reason; (7) affiliation;<sup>156</sup> (8) other species; (9) play; and (10) control over one's environment.<sup>157</sup>

Nussbaum asserts that these capabilities are fundamental entitlements of citizens, all necessary for a decent and dignified human life.<sup>158</sup> No one is excluded: "[T]he capabilities approach holds that the basis of a claim is a person's existence as a human being— . . . the very birth of a person into the human community."<sup>159</sup> In this way, she shares Kant's view that dignity inheres in human beings simply by virtue of being human and thus

<sup>154</sup> Included in "[s]enses, imagination, [and] thought" are [b]eing able to use the senses; being able to imagine, to think, and to reason—and to do these things in a "truly human" way . . . ; being able to use imagination and thought in connection with experiencing and producing expressive works and events of one's own choice . . . ; [and] being able to use one's mind in ways protected by guarantees of freedom of expression.

Id. at 41.

<sup>155</sup> By "[e]motions," Nussbaum means [b]eing able to have attachments to things and persons outside ourselves; . . . to love those who love and care for us; . . . to grieve at their absence; in general, being able to love, to grieve, to experience longing, gratitude, and justified anger; not having one's emotional developing blighted by fear or anxiety.

Id.

<sup>156</sup> This includes "[b]eing able to live for and in relation to others, to recognize and show concern for other human beings, to engage in various forms of social interaction; . . . [and] being able to be treated as a dignified being whose worth is equal to that of others." Id.

<sup>157</sup> Id. at 41–42. Like Kant, Nussbaum's capabilities approach to dignity also grounds dignity in certain cognitive capacities, rendering her approach incompatible with a disability justice perspective. She posits that:

Some types of mental deprivation are so acute that it seems sensible to say that the life there is simply not a human life at all, but a different form of life. Only sentiment leads us to call the person in a persistent vegetative condition, or an anencephalic child, human . . . because all possibility of conscious awareness and communication with others is absent.

Nussbaum, *supra* note 146, at 187 (footnote omitted).

As Adeno Addis observes about the Kantian formulation of dignity in a critique equally applicable to Nussbaum, "[t]he problem with Kantian dignity so conceived is that it has difficulty explaining why we should worry about the dignity of people with severe cognitive disabilities." Addis, *Kennedy on Dignity*, *supra* note 11, at 574.

<sup>158</sup> See Nussbaum, *supra* note 146, at 166.

<sup>159</sup> Id. at 285. This has echoes of Kant's *Critique of Practical Reason*: "The moral law is *holy* (inviolable [*unverletzlich*]). A human being is indeed unholy enough but the *humanity* in his person must be holy to him." Rosen, *supra* note 147, at 81 (alteration in original) (quoting Immanuel Kant, *Critique of Practical Reason* 72 (Mary Gregor ed. & trans., Cambridge Univ. Press rev. ed. 2015) (1788)).

having various *capacities*, regardless of how people do or do not exercise them.<sup>160</sup>

The underpinnings of Nussbaum's list of human capabilities are the human needs from which they derive—as she explains, “[t]here is dignity not only in rationality but in human need itself and in the varied forms of striving that emerge from human need.”<sup>161</sup> Dignity is integrally related to Nussbaum's capabilities approach because

[d]ignity is not defined prior to and independently of the capabilities, but in a way intertwined with them and their definition. . . . The guiding notion therefore is not that of dignity itself, as if that could be separated from capabilities to live a life, but, rather, that of a life with, or worthy of, human dignity, where that life is constituted, at least in part, by having the capabilities on the list.<sup>162</sup>

In this sense, the capabilities and dignity are two sides of a coin: a dignified life is one where a person is able to exercise their capabilities. And conversely, because the capabilities are based on fundamental human needs, Nussbaum maintains that depriving a person of the ability to exercise those capabilities is a deprivation of their personhood.

Other scholars have similarly approached their analysis of human dignity by articulating the basic elements of personhood. Adeno Addis conceives of an individual's personhood as having three dimensions—physical, psychological, and social—and maintains that a person is whole only when all three dimensions are free from effacement.<sup>163</sup> This notion of wholeness—or, as he refers to it, “integrity”<sup>164</sup>—is central to Addis's understanding of human dignity: “When the integrity of the person is at

<sup>160</sup> See Immanuel Kant, *The Metaphysics of Morals* 210 (Mary Gregor ed. & trans., Cambridge Univ. Press 1996) (1797) (“I cannot withdraw at least the respect that belongs to him in his quality as a human being, even though by his deeds he makes himself unworthy of it.”).

<sup>161</sup> Nussbaum, *supra* note 149, at 363. Philosopher Mary Neal makes a similar point in highlighting the interconnectedness of dignity and vulnerability. See Neal, *supra* note 131, at 185. Borrowing from Anna Grear, she observes that “vulnerability can be . . . conceptualised as both a source and expression of radical interrelationality,” and that “we can conceive of vulnerability as a quintessential embodied openness to each other and to the world.” *Id.* at 187 (quoting Anna Grear, *Redirecting Human Rights: Facing the Challenge of Corporate Legal Humanity* 132–33 (2010)).

<sup>162</sup> Nussbaum, *supra* note 146, at 162.

<sup>163</sup> See Adeno Addis, *Dignity, Integrity, and the Concept of a Person*, 13 *Vienna J. on Int'l Const. L.* 323, 330–31 (2019) [hereinafter Addis, *Dignity, Integrity*].

<sup>164</sup> *Id.* at 323.

stake existence is at stake in some manner and dignity is about protecting that integrity (personhood) in all of its dimensions.”<sup>165</sup> To the extent that a person’s physical, psychological, or social integrity is subject to violative depredation, their personhood—their dignity—is at risk of effacement.<sup>166</sup>

The notion of dignity-as-integrity is rooted in the Aristotelian idea that humans are unable to express dignity unless they are whole, integrated selves.<sup>167</sup> Unlike Nussbaum, however, Addis does not posit that dignity demands everything necessary for human flourishing; rather, he sees the protection of a person’s “whole and integrated self”<sup>168</sup> as the “baseline . . . from which a [person] can flourish.”<sup>169</sup> Thus, for Addis, dignity’s entitlement extends only to those things that are “essential for personhood or the human status.”<sup>170</sup> This view is consistent with his belief that “[d]ignity as integrity is modest in its aspirations and yet more basic and more profound in its concern about what, as a threshold matter, it means to be a person.”<sup>171</sup>

Addis’s three dimensions of personhood—physical, psychological, and social—form a “concept of a person” that must be inviolable if dignity is

<sup>165</sup> Id. at 332 (citing Kateb, *supra* note 121, at 10). This use of “integration” is also employed by Gabriele Taylor, who explains that “the notion of integrity may . . . be approached . . . by thinking of the person possessing integrity as being the person who ‘keeps his inmost self intact’, whose life is ‘of a piece’, whose self is whole and integrated.” Gabriele Taylor, *Integrity*, 55 *Aristotelian Soc’y* 143, 143 (Supp. 1981).

<sup>166</sup> See Addis, *Dignity, Integrity*, *supra* note 163, at 332.

<sup>167</sup> See Nussbaum, *supra* note 146, at 159–60. Aristotle’s ethics are built on the idea that humans achieve their highest potential—and therefore express their full dignity—when they live in accordance with their rational nature. Virtue, as a state of the soul, requires a balance of rational and non-rational parts of the soul, the alignment of emotions and desires with rational judgment, and practical wisdom to guide action in harmony with reason. This integrated state enables a person to live a life of flourishing (*eudaimonia*), which Aristotle considers the highest expression of human nature and dignity. See generally Aristotle, *Nicomachean Ethics*, bks. II–IV (C.C.W. Taylor trans., Oxford Univ. Press 2006) (c. 384 B.C.E.) (introducing the doctrine of the mean and the idea that virtue lies between excess and deficiency in Book II; discussing voluntary action and choice in Book III, which are both crucial for virtue such that we are responsible for our actions when they are voluntary and arise from deliberation; and examining specific virtues in Book IV in addition to the idea that these virtues involve appropriate expressions of oneself in social contexts, suggesting that a well-ordered character (integrated self) is necessary to interact with others in ways that reflect dignity and moral integrity).

<sup>168</sup> Addis, *Dignity, Integrity*, *supra* note 163, at 332.

<sup>169</sup> Addis, *Kennedy on Dignity*, *supra* note 11, at 538.

<sup>170</sup> Id. at 538 n.58.

<sup>171</sup> Id. at 526.



to be preserved.<sup>172</sup> He describes physical (or bodily) integrity as that which

should not be passed beyond, in, and through the violation of it . . . [,] not just . . . the body's immunity from direct attack but also immunity from any attempt by another to act towards the target in a way that is highly insensitive "to the most basic needs and rhythms of a human life."<sup>173</sup>

Because "[t]he self is its body, and being a body is what makes the self vulnerable to assault and the violative depredations of the other,"<sup>174</sup> the notion of integrity of the person necessarily includes freedom from physical vulnerability, or physical integrity.<sup>175</sup>

Depredations of psychological integrity<sup>176</sup>—or indignity—occur when a person "is diminished or debased in such a way that one or another aspects of what makes the person who she is are either extinguished or seriously curtailed."<sup>177</sup> Jan Christoph Bublitx and Reinhard Merkel conceive of this indignity as a certain kind of nonconsensual and severe interference with the mind, such as when the State "invas[es] the inner sphere of persons, . . . access[es] their thoughts, modulat[es] their emotions or manipulat[es] their personal preferences."<sup>178</sup> They view the starting point of psychological integrity as "a clear normative conception of mental self-determination"<sup>179</sup> and assert that interventions that substantially interfere with psychological integrity include "those that reduce or impair cognitive capacities (e.g. memory, concentration, willpower), alter preferences, beliefs and behavioral dispositions (e.g.

<sup>172</sup> Id. at 604.

<sup>173</sup> Id. at 551 (internal quotation marks omitted) (footnotes omitted).

<sup>174</sup> Id. at 550 (emphasis omitted) (quoting Bernstein, *supra* note 143, at 13).

<sup>175</sup> See id. at 551.

<sup>176</sup> The European Union has introduced a right to respect for "mental integrity" in Article 3 of the Charter of Fundamental Rights. Charter of Fundamental Rights of the European Union art. 3(1), 2012 O.J. (C 326) 396. Also, the European Court of Human Rights includes mental integrity under the scope of Article 8 (privacy). Id. art. 8, at 397; *Botta v. Italy*, 66 Eur. Ct. H.R. ¶ 32 (1998) ("Private life . . . includes a person's physical and psychological integrity; the guarantee afforded by Article 8 of the Convention is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings." (citation omitted)).

<sup>177</sup> Addis, Kennedy on Dignity, *supra* note 11, at 537.

<sup>178</sup> Jan Christoph Bublitx & Reinhard Merkel, Crimes Against Minds: On Mental Manipulations, Harms and a Human Right to Mental Self-Determination, 8 *Crim. L. & Phil.* 51, 61 (2014).

<sup>179</sup> Id.

implanting false or erasing true memories, creating addictions), [and] elicit inappropriate emotions (e.g. artificially induced appetite) or clinically identifiable mental injuries.”<sup>180</sup>

The concept of social integrity is premised on the idea that a person’s identity is not formed in a vacuum; rather, people are who they are—at least in part—because of their “relationships, commitments, and life plans.”<sup>181</sup> As such, Addis defines social integrity as “the integrity or wholeness of the social dimension of the person—whom to love, whom and how to worship, etc., the life projects that make the embodied self a human being.”<sup>182</sup> For that reason, Addis postulates, these commitments “express dignity as integrity.”<sup>183</sup> It is precisely because these relationships, commitments, desires, and projects are, in significant part, the stuff of meaning in people’s lives, that being forced to abandon them can cause a shattering of self-understanding—a loss of social integrity.<sup>184</sup> Social integrity is central to the notion of human dignity because it is central to humanity itself: “Across cultures and systems, there is a consensus that to be human is largely to have connections, relationships, and commitments.”<sup>185</sup> And it is those relationships and commitments that “make us not only the specific humans we are but humans in a general sense as well.”<sup>186</sup>

The social dimension of personhood also encompasses the notion of a person’s situated self—the idea that, as J.M. Bernstein explains, “the self is a normative construction that is so constituted through its relations to others. Selves are relational beings who are inescapably dependent on others for their standing or status as a human self—as a person.”<sup>187</sup> Because “[r]ecognition (being treated as human) by social others is the primary mechanism through which ‘one attains humanity,’”<sup>188</sup> the denial of that recognition can erode the integrity of a person as a social being.<sup>189</sup>

<sup>180</sup> *Id.* at 68.

<sup>181</sup> Addis, *Kennedy on Dignity*, *supra* note 11, at 537–38, 601.

<sup>182</sup> *Id.* at 528 n.22.

<sup>183</sup> *Id.* at 585.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 584.

<sup>186</sup> *Id.* at 601.

<sup>187</sup> Bernstein, *supra* note 143, at 13 (emphases omitted).

<sup>188</sup> Addis, *Dignity, Integrity*, *supra* note 163, at 357 (citation omitted).

<sup>189</sup> Like Addis and Nussbaum, Robert Johnson also has asserted that a person’s dignity can only be understood with reference to their connections with other people. Johnson first sets out a formulation of human dignity that bears similarities to Kant’s conception, observing that “[h]uman beings are endowed with the capacity for a conscious awareness of self that marks

For Addis, Nussbaum, and other dignity scholars, human dignity is not only an articulation of what it means to be a person. It also functions as a moral directive, an obligation to protect against “debasement of personhood in its various dimensions.”<sup>190</sup> “On this account,” Addis explains, “dignity is nothing less than what we think it means to be human and what the moral, ethical, and legal obligations are that must exist to sustain humanness.”<sup>191</sup> For Addis, dignity is inseparable from the command to respect it. So too for Nussbaum, who views the relationship between dignity and respect as so intertwined that they should be considered together.<sup>192</sup> Rather than “thinking of the two concepts as totally independent, so that we would first offer an independent account of dignity and then argue that dignity deserves respect (as independently defined),” Nussbaum sees the concepts as “closely related, forming a concept-family to be jointly elucidated” because “[c]entral to both concepts is the idea of being an end and not merely a means.”<sup>193</sup> Returning to the Kantian notion that “what is intrinsically good must be treated in a way that respects the fact of its intrinsic goodness—its dignity,” Michael Rosen reasons that what it means to respect the dignity of another is to “adopt an attitude of respect toward it and act in ways that are expressive of that attitude.”<sup>194</sup> In this way, dignity carries with it an ethical imperative of respect (which Rosen also refers to as “an ethics of honor” or “an ethics

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the individual as distinct and separate from others.” Johnson, *supra* note 119, at 584. However, Johnson emphasizes that human beings can only exercise their capacity for self in a social setting. That is, “[s]elf-determination is necessarily achieved in the world of other human beings through a process of self-defining social interactions.” *Id.* at 585.

<sup>190</sup> Addis, Kennedy on Dignity, *supra* note 11, at 527. Philosopher Avishai Margalit can be read to espouse a similar view that dignity carries with it a moral command when he asserts that “a decent society is one whose institutions do not violate the dignity of the people in its orbit.” Avishai Margalit, *The Decent Society* 51 (Naomi Goldblum trans., 1996). David Luban goes even further, arguing that “human dignity should best be understood as a kind of conceptual shorthand referring to relations among people, rather than as a metaphysical property of individuals.” David Luban, *Legal Ethics and Human Dignity* 6 (2007).

<sup>191</sup> Addis, Kennedy on Dignity, *supra* note 11, at 540–41.

<sup>192</sup> Although he rejects dignity in lieu of respect, Andrea Sangiovanni, like Nussbaum, sees respect as inseparable from the “reactive attitude that governs [it],” arguing that “we respect others as persons when we respect the integrity of their sense of self, that is, when we respect their nature as self-presenting beings.” Sangiovanni, *supra* note 129, at 112.

<sup>193</sup> Nussbaum, *supra* note 149, at 354.

<sup>194</sup> Rosen, *supra* note 147, at 143 (emphasis omitted). Nussbaum distinguishes this form of respect from the “reverential attitude” meaning employed by the Stoics, arguing that respect in the context of dignity “requires more: it requires creating the conditions in which capacities can develop and unfold themselves.” Nussbaum, *supra* note 149, at 359.

of reverence”), imposing “a duty to act in ways that are both respectful and worthy of respect.”<sup>195</sup>

If dignity carries with it a corresponding duty of respect, then this has significant implications for the relationship between the individual and the State. Christopher McCrudden views that obligation—which he describes as “requir[ing] that the state should be seen to exist for the sake of the individual human being, and not vice versa”—as related to the Kantian principle that individuals must be treated as ends rather than means.<sup>196</sup> Other dignity scholars have offered similar characterizations, observing that “protecting dignity requires the State to ‘treat its members with respect for their intrinsic worth as human beings,’”<sup>197</sup> and that “dignity is both an inherent quality that all humans have by virtue of being human, and is a guiding principle for ethical behavior on the part of the community and the institution.”<sup>198</sup> Several commentators draw on the idea of dignity captured by the German word *Menschenwürde*, in which dignity “is possessed equally by all human beings” by virtue of being human and which incorporates a state duty of respect by “provid[ing] ‘a metaphysical justification for human rights and duties.’”<sup>199</sup>

What are these rights and duties? Addis argues that

<sup>195</sup> Rosen, *supra* note 147, at 143–44; see also Neal, *supra* note 131, at 197 (“Finally, the use of dignity as an ethical principle, or ethical imperative, must be considered. In this type of use, ‘dignity’ is a claim or instruction about how we ought to treat other human beings. Just as dignity requires us to aim for an equilibrium between the material and transcendent aspects of our own nature, we are also required to have regard to these different aspects in our treatment of other people, and to treat them in ways which heed both their material and transcendent needs, without fetishizing or ignoring one or the other.”). Christopher McCrudden, too, articulates a formulation of dignity that is inseparable from a moral imperative: “The power of the concept of human dignity is unquestionable. It appears to present a simple command to all of us: that we (individually and collectively) should value the human person, simply because he or she is human.” Christopher McCrudden, *In Pursuit of Human Dignity: An Introduction to Current Debates*, in *Understanding Human Dignity*, *supra* note 8, at 1, 1.

That said, the notion of “respect” has its vagueness critics too, especially in the context of respecting dignity. Peggy Cooper Davis has wryly observed that “[t]he concept of respect for human dignity has, I think, been best understood in the process of contemplating its lack.” Peggy Cooper Davis, *Responsive Constitutionalism and the Idea of Dignity*, 11 U. Pa. J. Const. L. 1373, 1374 (2009).

<sup>196</sup> McCrudden, *supra* note 148, at 679.

<sup>197</sup> Lindell, *supra* note 11, at 422 (quoting *Furman v. Georgia*, 408 U.S. 238, 270 (1972) (Brennan, J., concurring)).

<sup>198</sup> Malkani, *supra* note 143, at 166. See also Margalit, *supra* note 190, at 39–40 (discussing the inherent nature of human rights and the institutional actions defining a decent society).

<sup>199</sup> Neal, *supra* note 131, at 178; *id.* (quoting David J. Mattson & Susan G. Clark, *Human Dignity in Concept and Practice*, 44 *Pol’y Scis.* 303, 305 (2011)).

[t]he world that dignity as integrity imagines is one of absolute and minimalist claims a person can make in the defense of his or her integrity as a person—bodily, social, and psychic security. These are minimums required for a concept of a person, for dealing with urgent problems of cruelty and indignity as universal concerns, not sufficient conditions for a fully just society.<sup>200</sup>

This conception of dignity is more consistent with the protections enshrined in the Bill of Rights which are, in the main, negative rather than positive rights.<sup>201</sup> For that and other reasons, I do not argue here that there is a constitutional right to dignity.<sup>202</sup> Rather, as I explain below, my position aligns more closely with those who claim that dignity is a constitutional value that informs individual rights jurisprudence in

<sup>200</sup> Addis, Kennedy on Dignity, *supra* note 11, at 604.

<sup>201</sup> See generally Robert H. Bork, The Impossibility of Finding Welfare Rights in the Constitution, 1979 Wash. U. L.Q. 695 (arguing that there is no affirmative right to welfare based on the Constitution). That said, there are good arguments that the Supreme Court's Eighth Amendment conditions jurisprudence is an exception, given the Court's recognition that when the State chooses to punish a person by imprisoning them, it obligates itself to provide for the things that incarcerated people are no longer able to provide themselves. Professor Sharon Dolovich refers to this as the State's "carceral burden." Sharon Dolovich, Cruelty, Prison Conditions, and the Eighth Amendment, 84 N.Y.U. L. Rev. 881, 891 (2009) (emphasis omitted); see also David P. Currie, Positive and Negative Constitutional Rights, 53 U. Chi. L. Rev. 864, 864–66 (1986) (discussing Judge Posner's conclusion that the Constitution is one of negative rather than affirmative rights); Frank I. Michelman, Foreword: On Protecting the Poor Through the Fourteenth Amendment, 83 Harv. L. Rev. 7, 11–12 (1969) (discussing the tension between "claim[ing] a legal right to have certain wants satisfied out of the public treasury" and the government's duty to treat all people equally); Arthur Selwyn Miller, Toward a Concept of Constitutional Duty, 1968 Sup. Ct. Rev. 199, 199–200 (describing a shift toward the acknowledgment of affirmative rights in Supreme Court jurisprudence); Albert M. Bendich, Privacy, Poverty, and the Constitution, 54 Calif. L. Rev. 407, 419–20 (1966) (comparing affirmative constitutional rights in the criminal defense context with other situations). Michael Rosen recognizes this as well when he observes that in dignity jurisprudence, "the focus is not on what individual agents may do so much as on the limits that must be placed on the actions of the state and its representatives." Rosen, *supra* note 147, at 112.

<sup>202</sup> Others disagree. See Glensy, *supra* note 11, at 70–71; Daly, *supra* note 11, at 11–12. In recent years, Justice Thomas has been among the Court's most vocal critics of the idea that the Constitution might guarantee a right to dignity, writing in his dissent in *Obergefell v. Hodges* that "the Constitution contains no 'dignity' Clause." 576 U.S. 644, 735 (2015) (Thomas, J., dissenting). Other conservative Justices have also eschewed dignity, though not always consistently. Erin Daly explains the contradiction: "[E]veryone likes dignity because dignity means what each of us wants. This is why both wings of the U.S. Supreme Court can agree that the Eighth Amendment is founded on the principle of human dignity, though they disagree as to what that means in a given case." Daly, *supra* note 11, at 102.

general, and has a normative role to play in judicial interpretation of Eighth Amendment conditions of confinement claims in particular.

## 2. Legal Constructions of Dignity

*“It is because law is coercive and its currency is life and death, freedom and incarceration, that its pervasive commitment to dignity is so momentous. Law is the exercise of power.”*<sup>203</sup>

Unlike the constitutions of most modern nations, the U.S. Constitution makes no mention of dignity.<sup>204</sup> Despite this lack of an express reference to dignity in the text, the Supreme Court has long employed the concept in interpreting and justifying constitutional rights, even though it “does not operate as an applicable legal rule at all.”<sup>205</sup> According to Leslie Meltzer Henry, who conducted comprehensive research into the use of dignity in Supreme Court jurisprudence, the Court’s earliest uses of dignity were in the context of institutions, where the Court imbued a number of inanimate objects with dignity—including states (often in support of finding them immune from suit), courts, the physical space of a courtroom, various forms of evidence, public records, patents, and the American flag, to name a few.<sup>206</sup>

Beginning in the 1940s, however, the concept of dignity also began to appear in the Court’s individual rights decisions. “This change can in part

<sup>203</sup> Waldron, *supra* note 11, at 59–60 (footnote omitted).

<sup>204</sup> This is especially true of constitutions drafted after World War II and the Universal Declaration of Human Rights. Some constitutions, such as Germany’s, have dignity as their cornerstone. See Grundgesetz [GG] [Basic Law], translation at [http://www.gesetze-im-interne.t.de/englisch\\_gg/index.html](http://www.gesetze-im-interne.t.de/englisch_gg/index.html) [<https://perma.cc/XLZ8-ZF4S>].

<sup>205</sup> Gerald L. Neuman, Discourses of Dignity, *in* Understanding Human Dignity, *supra* note 8, at 637, 640.

<sup>206</sup> See Henry, *supra* note 2, at 195–98. The Supreme Court’s first use of dignity was in *Chisholm v. Georgia*, where the Court was required to decide whether the state diversity clause of Article III, which permitted suits between a state and a citizen of another state, permitted only suits by states against citizens or also permitted suits by citizens against states. 2 U.S. (2 Dall.) 419, 455 (1793) (Wilson, J.) (“A State; useful and valuable as the contrivance is, is the inferior contrivance of man; and from his native dignity derives all its acquired importance.” (emphases omitted)); Daly, *supra* note 11, at 98. In discussing the Court’s various uses of dignity, Erin Daly highlights the majority and dissenting opinions in *Deck v. Missouri*, where the Justices argued about “whether shackling a prisoner during the penalty phase of a trial offends the dignity, not of the prisoner, but of the court.” *Id.* at 80 (citing *Deck v. Missouri*, 544 U.S. 622 (2005)). Summing up her critique of the role of dignity in American jurisprudence compared to its use internationally, Daly notes, “And yet, uniquely in the world, the U.S. Supreme Court has always been much more comfortable attaching dignity to inanimate things, such as states and courts and contracts, than to human beings.” *Id.* at 71.

be explained by the global response to the Holocaust and other World War II era atrocities, resulting in the signing of great international agreements such as the United Nations Charter, and the Universal Declaration of Human Rights.”<sup>207</sup> Justice Robert Jackson’s concurring opinion in *Skinner v. Oklahoma*, which invalidated forced sterilization for certain “habitual criminals” in 1942, was an early mention of dignity in the individual rights context.<sup>208</sup>

Three years later in *Screws v. United States*, Justice Frank Murphy also drew on dignity in dissenting from the Court’s decision to vacate the convictions of three white police officers for willfully depriving Robert Hall, a Black man, of his rights under the Due Process Clause when they killed him by “unjustifiably beat[ing] and crush[ing] [his] body . . . , thereby depriving him of trial by jury and of life itself.”<sup>209</sup> Justice Murphy took issue with the plurality’s conclusion that the statute under which the officers were prosecuted did not give fair warning to state officials that they could be held criminally liable for their brutal killing of Mr. Hall. After noting that the officers deprived him of “the right to life itself,” Justice Murphy observed that the “right was his . . . because he was a human being. As such, he was entitled to all the respect and fair treatment that befits the dignity of man.”<sup>210</sup> In both of these early uses of dignity in individual rights cases, the Justices treated dignity as an inherent quality that the litigants possessed simply by virtue of being human.

That formulation of dignity as inherent and intertwined with personhood continued to appear in the Court’s individual rights decisions in the 1950s and 1960s, when the Court dramatically expanded its use of dignity in constitutional interpretation. Many scholars attribute the increased role of dignity to Justice Brennan, who described the Constitution as “a sublime oration on the dignity of man,” and “a sparkling vision of the supremacy of the human dignity of every individual.”<sup>211</sup> Justice Brennan—and, later, Justice Kennedy—repeatedly relied on dignity as a substantive value or principle animating existing

<sup>207</sup> Krolikowski, *supra* note 141, at 1259 (footnote omitted).

<sup>208</sup> 316 U.S. 535, 535 (1942); *id.* at 546 (Jackson, J., concurring).

<sup>209</sup> 325 U.S. 91, 136 (1945) (Murphy, J., dissenting).

<sup>210</sup> *Id.* at 134–35.

<sup>211</sup> William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. Tex. L. Rev. 433, 438–39 (1986); see also Bernard Schwartz, *How Justice Brennan Changed America*, in *Reason and Passion: Justice Brennan’s Enduring Influence* 31, 41 (E. Joshua Rosenkranz & Bernard Schwartz eds., 1997) (suggesting that dignity was core to Justice Brennan’s jurisprudence).

rights.<sup>212</sup> In the individual rights sphere, the Court has employed dignity to anchor its decisions involving (the now more tenuous) rights to privacy; equal protection; economic assistance from the government; end-of-life decision-making; freedom from unreasonable searches and seizures and self-incrimination; marriage and procreation; freedom of expression (and the competing right of an individual to protect their public image); and, as relevant here, protection against cruel and unusual punishment.<sup>213</sup> As of 2011, according to Professor Henry, the Court had invoked dignity in construing nine of the twenty-seven amendments to the Constitution.<sup>214</sup>

Some scholars have characterized dignity's role as an "increasingly vital and vibrant constitutional precept"<sup>215</sup>—so much so that the Court has "changed the content of U.S. constitutional law to name dignity as a distinct and core value."<sup>216</sup> Ronald Dworkin has asserted that "the

<sup>212</sup> See, e.g., Henry, *supra* note 2, at 232 tbl.2 (showing thirty-four references to dignity in opinions by the Roberts Court between 2005 and 2011); Luís Roberto Barroso, *Here, There, and Everywhere: Human Dignity in Contemporary Law and in the Transnational Discourse*, 35 B.C. Int'l & Compar. L. Rev. 331, 354–55 (2012) ("As a fundamental value and a constitutional principle, human dignity serves both as a moral justification for and a normative foundation of fundamental rights."); Lindell, *supra* note 11, at 420; Daly, *supra* note 11, at 78–79; Goodman, *supra* note 2, at 747.

<sup>213</sup> See Goodman, *supra* note 2, at 757; see also Aharon Barak, *Human Dignity: The Constitutional Value and the Constitutional Right* 185–208 (Daniel Kayros trans., 2015) (recognizing that while constitutional values inform constitutional rights, the scope of human dignity as a constitutional value is more expansive than the degree to which it is constitutionally protected); *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008) (restricting the imposition of capital punishment to a narrow range of cases based on "[e]volving standards of decency" that "express respect for the dignity of the person"); *Roper v. Simmons*, 543 U.S. 551, 560 (2005) (setting aside the death sentence of a juvenile under the age of eighteen and noting that "the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons"); *Hope v. Pelzer*, 536 U.S. 730, 738 (2002) (finding that handcuffing a prisoner to a hitching post in the sun for seven hours violated the "basic concept underlying the Eighth Amendment[, which] is nothing less than the dignity of man" (alteration in original) (quoting *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion))); *Ford v. Wainwright*, 477 U.S. 399, 409–10 (1986) (plurality opinion) (prohibiting the execution of mentally ill persons and explaining that the Eighth Amendment "protect[s] the dignity of society itself from the barbarity of exacting mindless vengeance"); *Gregg v. Georgia*, 428 U.S. 153, 158, 173, 207 (1976) (plurality opinion) (upholding the death penalty of an individual convicted of murder but noting that the Eighth Amendment requires penalties to be in accord with "the dignity of man" (quoting *Trop*, 356 U.S. at 100)).

<sup>214</sup> Henry, *supra* note 2, at 172–73.

<sup>215</sup> Goodman, *supra* note 2, at 747 (quoting Jordan J. Paust, *Human Dignity as a Constitutional Right: A Jurisprudentially Based Inquiry into Criteria and Content*, 27 How. L.J. 145, 148 (1984)).

<sup>216</sup> Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 Stan. L. Rev. 1921, 1941 (2003); see also Neuman,



principles of human dignity . . . are embodied in the Constitution and are now common ground in America.”<sup>217</sup> And philosopher and dignity scholar William Parent has called dignity “the fundamental value underlying the U.S. Constitution”<sup>218</sup>—a characterization of significant

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supra note 205, at 640 (observing that in the United States, “human dignity remains in the background as a value justifying the set of human rights, but does not operate as an applicable legal rule”).

<sup>217</sup> Ronald Dworkin, *Three Questions for America*, N.Y. Rev. Books, Sept. 21, 2006, at 5, <https://www.nybooks.com/articles/2006/09/21/three-questions-for-america>; see also Dworkin, supra note 148, at 191–218, 255–75 (interpreting the concepts of dignity and morality). Indeed, Dworkin (and Justice Stevens) grounds the very foundation of rights in dignity:

The institution of rights against the Government is not a gift of God, or an ancient ritual, or a national sport. It is a complex and troublesome practice that makes the Government’s job of securing the general benefit more difficult and more expensive, and it would be a frivolous and wrongful practice unless it served some point. Anyone who professes to take rights seriously, and who praises our Government for respecting them, must have some sense of what that point is. He must accept, at the minimum, one or both of two important ideas. The first is the vague but powerful idea of human dignity. This idea, associated with Kant, but defended by philosophers of different schools, supposes that there are ways of treating a man that are inconsistent with recognizing him as a full member of the human community, and holds that such treatment is profoundly unjust.

Delaware v. Van Arsdall, 475 U.S. 673, 697 n.9 (1986) (Stevens, J., dissenting) (quoting Ronald Dworkin, *Taking Rights Seriously* 198–99 (1977)).

That said, viewing Dworkin as a fan of dignity in constitutional interpretation would be a mistake, given his claim that dignity’s elasticity has made it “debased by flabby overuse.” Dworkin, supra note 148, at 13.

<sup>218</sup> William A. Parent, *Constitutional Values and Human Dignity*, in *The Constitution of Rights: Human Dignity and American Values*, supra note 11, at 47, 47. Parent’s view of dignity is not only that dignity encompasses equality, but also, like Nussbaum, that it includes an anti-degradation element: “It furnishes each one of us, whether strong or weak, politically powerful or disenfranchised, competent or retarded, and whatever our race, religion, sex, or sexual orientation, with an indefeasible moral standing to protest (or to have protested on our behalf) all insidious attempts to degrade our persons.” *Id.* at 62.

That said, some commentators have noted that the Court’s reliance on dignity as a constitutional value is inconsistent and contingent—especially in situations where there is a competing state interest or strong public opinion. Professor Maxine Goodman explains, “human dignity is a well-developed and robust core value but only in certain types of cases, typically those where public opinion favors advancing human dignity interests above competing state interests.” Goodman, supra note 2, at 748. Other scholars, such as James Whitman, claim it is the *absence* of dignity as a controlling value in American constitutional interpretation that has led to “an American propensity to treat criminals without respect for their dignity precisely because of their criminality.” Malkani, supra note 143, at 151 (citing James Q. Whitman, *Harsh Justice: Criminal Punishment and the Widening Divide Between America and Europe* (2003)).

import considering Justice Breyer's description of values as "the constitutional analogue of statutory purposes."<sup>219</sup>

That said, the Court's meaning and use of dignity are far from uniform; just as philosophers and theologians ascribe different meanings to dignity in different contexts, so too has the Court in constitutional interpretation.<sup>220</sup> Yet there are some themes that run through the Justices' uses of human dignity in individual rights cases. As with philosophical interpretations of dignity, one of those themes is inherent worth grounded in personhood—the notion that every person has dignity because dignity is necessarily intertwined with humanity itself.

Justice Brennan, who invoked dignity in thirty-nine opinions during his tenure on the Court,<sup>221</sup> gave his most fulsome explication of dignity-as-personhood in his concurrence in *Furman v. Georgia*, in which the Court held that the imposition of the death penalty on three people in Georgia and Texas violated the Eighth Amendment's prohibition against cruel and unusual punishment.<sup>222</sup> Justice Brennan's concurrence, which Jonathan Simon has called "the most developed account in our constitutional tradition of the meaning of dignity for punishment,"<sup>223</sup> begins with *Trop*'s mandate that to be constitutional, a punishment must not be so severe as to be degrading to the dignity of human beings: "The State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings. A punishment is 'cruel and unusual,' therefore, if it does not comport with human dignity."<sup>224</sup> While noting that pain—including "severe mental pain"—may be a factor in the judgment of whether a punishment is so severe as to be degrading to human dignity, Justice Brennan observed that the "true significance" of "barbaric punishments condemned by history" (including the rack, the thumbscrew, the iron boot, and the stretching of limbs) is that they "treat members of the human race as nonhumans, as objects to be toyed with and discarded. They are

<sup>219</sup> Stephen Breyer, *Making Our Democracy Work: A Judge's View* 162 (2010).

<sup>220</sup> Leslie Meltzer Henry has catalogued these uses and created a "typology of dignity" in which she identifies five conceptions of dignity used by the Court: "institutional status as dignity, equality as dignity, liberty as dignity, personal integrity as dignity, and collective virtue as dignity." Henry, *supra* note 2, at 169 (emphasis omitted). The Court's overarching purpose in invoking all of these conceptions, she argues, is to "give weight to substantive interests that are implicated in specific contexts." *Id.* at 189–90.

<sup>221</sup> *Id.* at 171.

<sup>222</sup> 408 U.S. 238, 239–40 (1972) (per curiam).

<sup>223</sup> Simon, *supra* note 15, at 138.

<sup>224</sup> *Furman*, 408 U.S. at 270 (Brennan, J., concurring).

thus inconsistent with the fundamental premise of the Clause that even the vilest criminal remains a human being possessed of common human dignity.”<sup>225</sup>

Justice Brennan’s interpretation of the Eighth Amendment in *Furman* draws heavily on human dignity, concluding that a punishment is cruel and unusual if it “reflect[s] the attitude that the person punished is not entitled to recognition as a fellow human being” or “involves a denial by society of the individual’s existence as a member of the human community.”<sup>226</sup> Thus, while acknowledging that criminal conduct can lead to the forfeiture of certain rights (the most obvious of which is the deprivation of liberty attendant to incarceration), Justice Brennan’s formulation of dignity does not distinguish between those who have been convicted of a crime and those who have not; the idea that they could have different degrees of dignity is directly contrary to the idea of dignity as an inalienable characteristic inherent in all human beings.<sup>227</sup>

The inherent and fundamental nature of human dignity appears regularly in the Court’s Eighth Amendment cases, including *Trop v.*

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<sup>225</sup> Id. at 271–73.

<sup>226</sup> Id. 273–74. John Stinneford argues that the word “cruel” in the Eighth Amendment implies a particular relationship between the punisher and the punished, “an attitude that the suffering of the person punished is either unimportant, or is something to be positively enjoyed.” Stinneford, *supra* note 58, at 565–66. Thus, “a cruel punishment is one that treats the offender as though he or she were not a human person with a claim to our concern as fellow persons, but as a mere animal or thing lacking in basic human dignity.” Id. at 566. For that reason, he argues, the Framers’ use of the word “cruel” “clarifies that human dignity must be the primary focus of our analysis of the ‘cruel and unusual punishments’ clause.” Id.

<sup>227</sup> Professor Stinneford points out that the idea that even people convicted of the most heinous crimes still retain inherent human dignity is a “departure from the traditional notion that criminals may forfeit their place in the human community through the commission of serious crime,” noting that St. Thomas Aquinas “justified capital punishment on the ground that those guilty of serious sin have discarded their dignity and become like beasts.” Id. at 587.

*Dulles*,<sup>228</sup> *Ford v. Wainwright*,<sup>229</sup> *Gregg v. Georgia*,<sup>230</sup> *Hall v. Florida*,<sup>231</sup> *Roper v. Simmons*,<sup>232</sup> *Hope v. Pelzer*,<sup>233</sup> and *Brown v. Plata*.<sup>234</sup>

In addition to the dignity-as-inherent-worth theme that runs through the Supreme Court's punishment jurisprudence, the theme of dignity-as-integrity also appears, and the Court has restricted some state practices that erode the physical, psychological, or social integrity of those subjected to them.<sup>235</sup>

<sup>228</sup> 356 U.S. 86, 100 (1958) ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.").

<sup>229</sup> 477 U.S. 399, 401, 406, 409–10 (1986) (plurality opinion) (concluding that the execution of mentally incapacitated individuals is unconstitutional due to the Eighth Amendment's protection of fundamental human dignity).

<sup>230</sup> 428 U.S. 153, 158, 173, 207 (1976) (plurality opinion) (upholding the death penalty of a person convicted of murder, but noting that the Eighth Amendment requires penalties to be in accord with "the dignity of man" (quoting *Trop*, 356 U.S. at 100)).

<sup>231</sup> 572 U.S. 701, 708 (2014) (noting that the execution of a person with an intellectual disability "contravenes the Eighth Amendment, for to impose the harshest of punishments on an intellectually disabled person violates his or her inherent dignity as a human being").

<sup>232</sup> 543 U.S. 551, 560 (2005) ("By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons.").

<sup>233</sup> 536 U.S. 730, 738 (2002) (holding that the use of a hitching post violated the "basic concept underlying the Eighth Amendment[, which] is nothing less than the dignity of man" (alteration in original) (quoting *Trop*, 356 U.S. at 100)).

<sup>234</sup> 563 U.S. 493, 510 (2011) ("Prisoners retain the essence of human dignity inherent in all persons. Respect for that dignity animates the Eighth Amendment prohibition against cruel and unusual punishment.").

<sup>235</sup> One of the most significant examples of this, though not in the criminal punishment context, is *Miranda v. Arizona*, 384 U.S. 436 (1966). In prohibiting coerced confessions, the Court held that incommunicado and otherwise repressive interrogations create an "atmosphere [that] carries its own badge of intimidation. To be sure, this is not physical intimidation, but it is equally destructive of human dignity." *Id.* at 444–45, 457. The policies underlying the Fifth Amendment privilege against self-incrimination "point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens." *Id.* at 460.

Interestingly, this same belief that the inherent dignity of a person precludes the State from inflicting punishments that intrude into identity and personhood also gave rise to critiques of rehabilitation as a valid goal of punishment. In the 1970s,

many influential legal theorists began openly to criticize rehabilitation, not on the grounds that it was insufficiently punitive (most were liberals not particularly interested in more punishment) but on the grounds that, by treating the prisoner as an object to be "fixed," rehabilitative penology denied prisoners their "dignity," understood largely as "autonomy."

Simon, *supra* note 15, at 37.

There is a Kantian underpinning to this critique: Kant himself rejected rehabilitation as a goal of punishment because seeking to rehabilitate a person in prison "would be treating the prisoner as a means to an end, with the end being helping society or the prisoner" himself.

*i. Physical/Bodily Integrity.* As noted above, *Skinner* is one such example, where the Court found unconstitutional an Oklahoma statute that permitted the State to sterilize a person if he was found to be a “habitual criminal.”<sup>236</sup> Although the Court struck the statute on equal protection grounds and therefore did not reach the question of whether it constituted cruel and unusual punishment,<sup>237</sup> Justice Robert Jackson’s critique of the statute sounds in dignity-as-integrity: “There are limits to the extent to which a legislatively represented majority may conduct biological experiments at the expense of the dignity and personality and natural powers of a minority—even those who have been guilty of what the majority defines as crimes.”<sup>238</sup>

Many (though not all) of the needs that comprise the physical or bodily dimension of personhood are reflected in the Supreme Court’s current list of basic life necessities in its conditions of confinement jurisprudence. Medical care is one. In *Brown v. Plata*, where the Court upheld a release order as necessary to correct the Eighth Amendment violations of inadequate medical care caused by overcrowding in the California prison system, Justice Kennedy framed the incursions to the bodily dimension of integrity as a deprivation of dignity: “Just as a prisoner may starve if not fed, he or she may suffer or die if not provided adequate medical care. A prison that deprives prisoners of basic sustenance, including adequate

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Ploch, *supra* note 145, at 892–93 (citing Kant, *supra* note 160, at 105); see also Edgardo Rotman, Do Criminal Offenders Have a Constitutional Right to Rehabilitation?, 77 J. Crim. L. & Criminology 1023, 1026–27 (1986) (“The humanistic model of rehabilitation affirms the concept of prison inmates as possessors of rights.”). Instead, Kant endorsed a retributive theory of punishment, which to his mind respected their autonomy and thus, their dignity. Ploch, *supra* note 145, at 892–93, 896.

<sup>236</sup> 316 U.S. 535, 536–38 (1942).

<sup>237</sup> *Id.* at 538.

<sup>238</sup> *Id.* at 546 (Jackson, J., concurring). That said, Justice Jackson’s issue with sterilizing the prisoner-plaintiffs in *Skinner* was with the vagueness of the characteristics the State of Oklahoma sought to eliminate and the lack of certainty about their transmissibility, which he compared unfavorably with the Court’s sanctioning of the sterilization of Carrie Buck, a woman with an intellectual disability, whom he found to have “definite and observable characteristics, where the condition had persisted through three generations and afforded grounds for the belief that it was transmissible and would continue to manifest itself in generations to come.” *Id.* (citing *Buck v. Bell*, 274 U.S. 200 (1927)). That said, Justice Jackson’s treatment of dignity in his concurrence is notable in that it adopts the Kantian perspective that dignity is afforded to everyone “as an incident of being born human,” and recognizes that the State may engage in certain conduct that detracts from a person’s dignity, and that “the Constitution may protect against such degradation.” Daly, *supra* note 11, at 82.

medical care, is incompatible with the concept of human dignity and has no place in civilized society.”<sup>239</sup>

In this passage, the Court expressly links bodily integrity to dignity, recognizing that “[b]ecause ‘bodily autonomy and bodily integrity [are] immediate ingredients in the human being’ their violations become ‘a denial of the victim’s status as human’ and hence a denial of his or her dignity.”<sup>240</sup>

*ii. Psychological Integrity.* While violations of the bodily dimension of personhood<sup>241</sup> are perhaps the most obvious forms of punishment that constitute impermissible intrusions into a person’s wholeness, some members of the Court have recognized that effacements of the psychological and social dimensions of personhood can be equally if not more destructive. As is true with attempts to understand dignity more generally, psychological integrity is most readily understood in its breach, that is, the infliction of severe mental pain and suffering or “disruption of the senses and personality.”<sup>242</sup> In prison, assaults on psychological integrity are ubiquitous; prison *itself* is an assault on psychological integrity. But further degradations of psychological integrity can be caused by sleep deprivation, constant noise, sensory deprivation, sexual and/or cultural humiliation, etc. As with physical integrity, the federal courts have recognized that punishments that erode psychological

<sup>239</sup> 563 U.S. at 510–11, 545.

<sup>240</sup> Addis, Dignity, Integrity, *supra* note 163, at 335 (alteration in original) (emphasis omitted) (footnote omitted).

<sup>241</sup> Another example of this, though in the Fourth Amendment context, is the Court’s decision in *Winston v. Lee*, where the Court found unconstitutional forcing a person to undergo surgery to remove a bullet that could implicate the person in a crime. 470 U.S. 753, 755 (1985). The Court found that the surgery, which would go beneath the skin and require general anesthesia, was a substantial intrusion that was not outweighed by state interests in obtaining the evidence. *Id.* at 765–66. The Court described “the extent of intrusion upon the individual’s dignitary interests in personal privacy and bodily integrity” as one factor in finding the search to be unreasonable. *Id.* at 761. The Court cited its decision in *Schmerber v. California* for the notion that “[t]he overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State.” *Id.* at 760 (alteration in original) (quoting *Schmerber v. California*, 384 U.S. 757, 767 (1966)).

<sup>242</sup> Hernán Reyes, *The Worst Scars Are in the Mind: Psychological Torture*, 89 Int’l Rev. Red Cross 591, 599 (2007); see also Gretchen Borchelt & Christian Pross, *Physicians for Hum. Rts., Break Them Down: Systematic Use of Psychological Torture by US Forces* 117 (2005), <https://phr.org/wp-content/uploads/2005/05/break-them-down.pdf> [<https://perma.cc/8RZH-BDFV>] (describing an Inter-American Court of Human Rights opinion holding that solitary confinement violates the psychological integrity of detainees under the American Convention on Human Rights).

integrity can violate the Eighth Amendment—at least when the harm (or risk of harm) is severe.<sup>243</sup>

This can be true even for state incursions into psychological integrity that many might deem beneficial. For example, in *Washington v. Harper*, where the Court upheld a prison policy authorizing treatment of the plaintiff with antipsychotic drugs against his will and without a judicial hearing,<sup>244</sup> Justice Stevens penned a dissent that condemned the majority's decision on dignity-as-integrity grounds.<sup>245</sup> He began by observing that involuntary treatment with psychiatric medication intrudes on both the “physical and intellectual” liberty of the plaintiff, noting that “[e]very violation of a person’s bodily integrity is an invasion of his or her liberty.”<sup>246</sup> But he also condemned the treatment as degrading because its purpose was “to alter the will and the mind of the subject”<sup>247</sup>—his psychological integrity—a result he deemed inconsistent with “the right to be treated with dignity.”<sup>248</sup>

In addition to the Supreme Court, some federal appellate courts have articulated similar integrity-based concerns in the involuntary medication context, particularly when the medication affects an incarcerated person’s thought processes. As the U.S. Court of Appeals for the Fourth Circuit explained, where the use of mind-altering medication is concerned, “the threat to individual rights goes beyond a threat of physical intrusion and threatens an intrusion into the mind.”<sup>249</sup> In reversing the district court’s order permitting forced psychiatric medication, the court cited the Supreme Court’s decision in *Stanley v. Georgia*,<sup>250</sup> which stated that “[t]he makers of our Constitution . . . recognized the significance of man’s spiritual nature, of his feelings and of his intellect. . . . They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations.”<sup>251</sup> Critical to the court’s decision in *United States v.*

<sup>243</sup> For example, courts have ruled that the failure to provide mental health treatment violates the Eighth Amendment. See, e.g., *Braggs v. Dunn*, 257 F. Supp. 3d 1171, 1267 (M.D. Ala. 2017); *Jensen v. Shinn*, 609 F. Supp. 3d 789, 912–13 (D. Ariz. 2022).

<sup>244</sup> 494 U.S. 210, 213, 236 (1990).

<sup>245</sup> *Id.* at 237 (Stevens, J., concurring in part and dissenting in part).

<sup>246</sup> *Id.*

<sup>247</sup> *Id.* at 237–38.

<sup>248</sup> *Id.* at 258 (quoting *Meachum v. Fano*, 427 U.S. 215, 233 (1976) (Stevens, J., dissenting)).

<sup>249</sup> *United States v. Charters*, 829 F.2d 479, 492 (4th Cir. 1987) (citing *Bee v. Greaves*, 744 F.2d 1387, 1394 (10th Cir. 1984)), *vacated on reh’g en banc*, 863 F.2d 302 (4th Cir. 1988).

<sup>250</sup> *Id.* at 483–84, 492 (citing *Stanley v. Georgia*, 394 U.S. 557, 564 (1969)).

<sup>251</sup> *Stanley*, 394 U.S. at 564 (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

*Charters* was its observation that “[t]he impact of antipsychotic medication upon the mind may be sufficient to undermine the foundations of personality.”<sup>252</sup> The court’s holding evinces a dignity-as-integrity-based view—specifically, that there are some forms of punishment where the threat to an individual’s identity and personhood is too grave to permit the State to proceed.

Similarly, in *Beard v. Banks*, the Court was faced with a First Amendment challenge to a prison ban on newspapers, magazines, and photographs in the prison’s segregation unit.<sup>253</sup> While the plurality upheld the regulation under the deferential *Turner* standard,<sup>254</sup> Justice Stevens’s dissent found it to be an impermissible intrusion into psychological and social integrity, explaining that the prison’s rule “[came] perilously close to a state-sponsored effort at mind control,” which he deemed impermissible because “[t]he State may not ‘invad[e] the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.’”<sup>255</sup>

Justice Stevens’s dissent sounds in a view of dignity-as-integrity and the idea that the restrictions imposed by the ban impermissibly intruded on the plaintiffs’ psychological integrity, thus violating aspects of their personhood. Regarding the part of the rule prohibiting reading material, Justice Stevens concluded that it “prevents prisoners from ‘receiv[ing] suitable access to social, political, esthetic, moral, and other ideas,’ which are central to the development and preservation of individual identity”<sup>256</sup>—an incursion into psychological integrity. His concern with the prohibition of personal photos was his belief that it amounted to an intrusion of the State into the plaintiffs’ identity and personhood, noting that it “interferes with the capacity to remember loved ones, which is undoubtedly a core part of a person’s ‘sphere of intellect and spirit.’”<sup>257</sup> For Justice Stevens, these invasions into the minds and personalities of the people impacted by the ban were violations of their integrity—

<sup>252</sup> *Id.* at 492 (citing *In re Guardianship of Roe*, 421 N.E.2d 40, 53 (Mass. 1981)).

<sup>253</sup> 548 U.S. 521, 524–25 (2006) (plurality opinion).

<sup>254</sup> *Id.* at 531–33; see also *Turner v. Safley*, 482 U.S. 78, 89 (1987) (“[W]hen a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.”).

<sup>255</sup> *Beard*, 548 U.S. at 552 (Stevens, J., dissenting) (third alteration in original) (quoting *Wooley v. Maynard*, 430 U.S. 705, 715 (1977)).

<sup>256</sup> *Id.* (alteration in original) (quoting *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969)).

<sup>257</sup> *Id.*



impermissible depredations of personhood. He therefore concluded that the regulation could not be squared with “the sovereign’s duty to treat prisoners in accordance with ‘the ethical tradition that accords respect to the dignity and intrinsic worth of every individual.’”<sup>258</sup>

*iii. Social Integrity.* As for judicial recognition of dignity-as-social-integrity, the paradigmatic example is, of course, *Trop*, where the Court held that the use of denationalization as punishment for military desertion violates the Eighth Amendment because it constitutes an effacement to the denationalized person’s social integrity—and thus, his dignity.<sup>259</sup> The Court recognized that while denationalization “involved no physical mistreatment, no[r] primitive torture,” it is cruel and unusual punishment because it results in “the total destruction of the individual’s status in organized society” and “strips the citizen of his status in the national and international political community.”<sup>260</sup> In his concurring opinion, Justice Brennan went even further in describing the incursions into the social dimension of personhood caused by denationalization, explaining that it “excommunicates” any person subjected to it and in doing so “makes him, literally, an outcast.”<sup>261</sup> For the Court, denationalization is an impermissible assault on dignity because it strikes at the heart of the social dimension of personhood.

In *Trop*, the Court made a powerful statement about the relationship between social integrity and dignity, and the idea that while the State’s power to punish allows it to deprive people of certain rights, that power is not limitless. The State may not engage in punishments that erode the social (or physical or psychological) integrity of its citizens. Addis explains,

Integrity as wholeness requires that both the embodied (basic) and social (reflective) self are protected from serious curtailment . . . . Indignity occurs when the person is diminished or debased in such a way that one or another aspects of what makes the person who she is are either extinguished or seriously curtailed.<sup>262</sup>

<sup>258</sup> Id. at 553 (quoting *Overton v. Bazzetta*, 539 U.S. 126, 138 (2003) (Stevens, J., concurring)).

<sup>259</sup> 356 U.S. 86, 100–01 (1958).

<sup>260</sup> Id. at 101.

<sup>261</sup> Id. at 111 (Brennan, J., concurring).

<sup>262</sup> Addis, *Kennedy on Dignity*, *supra* note 11, at 537 (emphasis omitted) (footnote omitted).

*B. Dignity Is a Basic Human Need*

Because of the way Eighth Amendment conditions of confinement analysis has evolved post-*Wilson*, the kinds of personhood-based harms discussed above rarely appear in the solitary confinement case law. Yet it is important—and I believe, possible—to conceptualize these harms in a way that is cognizable under the Eighth Amendment.

The value that underlies and informs the Eighth Amendment’s prohibition against cruel and unusual punishments is the Supreme Court’s edict that punishments must comport with “the evolving standards of decency that mark the progress of a maturing society.”<sup>263</sup> Decency, while not a particularly high bar, is not toothless; the State’s commitment to decency—at least in the punishment arena—requires the provision of things that people need just by virtue of being human. As discussed above, the Court has held that those necessities include food, clothing, shelter, medical care, sanitation, reasonable safety, warmth, and exercise. But this list of “human needs” was determined by a particular conception of what is necessary for human life, where “life” and “necessity” are understood in terms of bare survival. As Lisa Guenther has observed, “[b]y focusing on the provision of basic needs such as food, water, and shelter, judges in these cases were able to evade the questions of whether ‘needs’ are sufficient to define (human) life.”<sup>264</sup> Because human life—humanity—consists of more than mere physical existence, the Eighth Amendment’s commitment to decency requires that punishments “must be kept entirely free of any maltreatment that would make an abomination of the humanity residing in the person suffering it.”<sup>265</sup> For that reason, I argue that dignity also deserves a place on the list of basic human needs.

In making this claim, the formulation of dignity I am employing is dignity-as-integrity, where integrity means wholeness in all three dimensions of personhood: physical, psychological, and social.<sup>266</sup> A person is “whole” only when all three dimensions are protected from

<sup>263</sup> *Trop*, 356 U.S. at 101.

<sup>264</sup> Lisa Guenther, *Solitary Confinement: Social Death and Its Afterlives* 133 (2013).

<sup>265</sup> Immanuel Kant, *The Metaphysical Elements of Justice* 102 (John Ladd trans., Bobbs-Merrill Co. 1965) (1797).

<sup>266</sup> See generally Addis, *Dignity, Integrity*, supra note 163 (arguing that integrity consists of physical, psychological, and social dimensions and that dignity is meant to preserve all of them). The Oxford English Dictionary defines “integrity” as “[t]he condition of having no part or element taken away or wanting; undivided or unbroken state.” *Integrity*, Oxford Eng. Dictionary, [https://www.oed.com/dictionary/integrity\\_n?tab=meaning\\_and\\_use](https://www.oed.com/dictionary/integrity_n?tab=meaning_and_use) (last visited Feb. 28, 2024).

serious infringement; conversely, “indignity is the ‘effacement’ of personhood.”<sup>267</sup> This is because “[w]hen the integrity of the person is at stake[,] existence is at stake in some manner and dignity is about protecting that integrity (personhood) in all of its dimensions.”<sup>268</sup> And nowhere is the risk that the state will violate a person’s dignity greater than when the person is dependent on the state in some way—most classically, when they are in the “custodial control of the state.”<sup>269</sup>

This is not to say that any infringement into the three dimensions of personhood would suffice to deprive a person of dignity at the level of a basic human need. To be sure, the entire construct of criminal punishment in general, and prison in particular, is designed to impinge on dignity. Conditions such as overcrowding, identifying incarcerated people by numbers rather than their names, and other routine aspects of prison life “constrain the prisoner’s individuality, limit his autonomy, and eradicate his equality.”<sup>270</sup> But there is a point at which the incursions into the various facets of personhood are so severe that they erode the integrity—the wholeness—of those dimensions, thus depriving the person of dignity. If the Eighth Amendment’s prohibition against cruel and unusual punishment means anything, it must protect against the destruction of what makes us human. As noted dignity scholar Jeremy Waldron has asserted, “[o]ne ought to be able to do one’s time, take one’s licks, while remaining upright and self-possessed.”<sup>271</sup>

*C. An Analysis of Solitary Confinement  
Where Dignity Is a Basic Human Need*

If we take seriously the Supreme Court’s reaffirmation in *Trop* that “[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man,”<sup>272</sup> and we accept both that dignity is inherent and that one formulation of it is integrity (or wholeness), then the use of long-term solitary confinement violates the Eighth Amendment’s dignity

<sup>267</sup> Addis, Dignity, Integrity, supra note 163, at 332; Addis, Kennedy on Dignity, supra note 11, at 539.

<sup>268</sup> Addis, Dignity, Integrity, supra note 163, at 332.

<sup>269</sup> Daly, supra note 11, at 66.

<sup>270</sup> Id. at 68; see also Sangiovanni, supra note 129, at 110 (“Imprisonment, for example, always involves ritualized forms of humiliation—incarceration, stripping of clothes, uniforms, searching of bodies, the unrelenting gaze of staff, restricted social and public spaces, and often various forms of physical abuse.”).

<sup>271</sup> Waldron, supra note 11, at 61.

<sup>272</sup> *Trop v. Dulles*, 356 U.S. 86, 100 (1958).

guarantee. In this Section, I tie these threads together to explain how. To do so, I examine the ways that solitary confinement impacts the various dimensions of personhood, illustrating the threats it presents to integrity in each sphere and ultimately, to the dignity of a person as a whole.

### *1. Solitary Confinement Erodes Physical Integrity*

While most discussions of solitary confinement focus on the mental destruction it causes, penal isolation also erodes the physical integrity of the human body. Physical or bodily integrity requires sustenance to maintain it. That sustenance, as the Court has recognized, includes necessities such as food, shelter, medical care, sanitation, reasonable safety, warmth, and exercise.<sup>273</sup> These and other kinds of sustenance, including sunlight, vitamins, fresh air, and sufficient space to move, are often denied to people in solitary or supermax confinement.<sup>274</sup>

Isolation cells are typically small; they are frequently described as the size of a small bathroom or closet.<sup>275</sup> A person can walk from one side to the other in three or four steps.<sup>276</sup> Some cells are narrow enough that a person can touch both sides by standing in the middle with outstretched arms.<sup>277</sup> “Recreation” is typically offered in either an outdoor cage not much bigger than the person’s cell or in an indoor cell of the same size, usually for not more than an hour a day.<sup>278</sup>

<sup>273</sup> See *supra* Section II.A.

<sup>274</sup> See, e.g., Arthur Longworth, *How to Survive Supermax: Inside the Hell of Solitary Confinement*, *New Republic* (June 18, 2020), <https://newrepublic.com/article/158191/survive-supermax> [<https://perma.cc/X5KC-VF7S>]; German Lopez, *You Could Fit 19 Solitary Confinement Cells in a Typical 1-Bedroom Apartment*, *Vox* (June 11, 2015, 12:20 PM), <https://www.vox.com/2015/6/11/8765977/solitary-confinement-cells-small> [<https://perma.cc/5V79-CRPK>].

<sup>275</sup> Longworth, *supra* note 274.

<sup>276</sup> *Id.*

<sup>277</sup> See *supra* note 28; see also Diana D’Abruzzo, *One Cell, a Lifetime of Pain: Waking to the Truth of Solitary Confinement*, *Arnold Ventures* (May 19, 2021), <https://www.arnoldventures.org/stories/one-cell-a-lifetime-of-pain-waking-to-the-truth-of-solitary-confinement> [<https://perma.cc/L897-UBRW>].

<sup>278</sup> See, e.g., Solitary Watch, *ACLU of La. & Jesuit Soc. Rsch. Inst./Loy. Univ. New Orleans, Louisiana on Lockdown: A Report on the Use of Solitary Confinement in Louisiana State Prisons, with Testimony from the People Who Live It* 54 (2019), <https://solitarywatch.org/wp-content/uploads/2019/06/Louisiana-on-Lockdown-Report-June-2019.pdf> [<https://perma.cc/QCS3-FJ8N>] (finding that 42.1% of survey respondents in solitary reported that they did not spend any time outside their cells, 3.5% spent less than one hour per day outside their cells, and 46.4% reported spending one to two hours per day outside their cells); D’Abruzzo, *supra* note 277 (describing “the yard” for people in solitary confinement as a “larger barred cell outdoors where people can get fresh air and exercise alone”).

These conditions can erode the integrity of the physical body in a variety of ways. First, being confined in a small cell virtually all day every day drastically limits even the basic amount of exercise that typically occurs through daily movement in an unconfined space, which is crucial for treating or avoiding conditions such as hypertension, diabetes, arthritis, and heart disease.<sup>279</sup> Additionally, research demonstrates that “older adults outside of prison who report feeling isolated, a lack of physical exercise, and loneliness experience elevated risk for the earlier onset of dementia, physical deconditioning resulting in a heightened subsequent risk of falls, Vitamin D deficiency, and cardiovascular disease.”<sup>280</sup>

There is every reason to believe people incarcerated in solitary confinement face at least as much risk of these kinds of physical deterioration. Arthur Longworth, who spent years in the Washington state supermax, gives personal voice to the experience:

If you went into [the supermax] strong and healthy, that’s not the way you’re going to stay. You don’t get enough vitamins and calories, fresh air, sunlight, or anything else necessary for health. You grow anemic, jittery, skeletal. Unless you stop moving—in which case you become doughy, pallid, frail.<sup>281</sup>

Robert King Wilkerson, one of the Angola Three who spent twenty-nine years in solitary confinement in the Louisiana State Penitentiary, described some of the physical deterioration he witnessed of men who had been in solitary: “I saw some guys throw a football and break their arms because their bones had gotten so brittle, their muscles so weak.

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<sup>279</sup> Cyrus Ahalt et al., Reducing the Use and Impact of Solitary Confinement in Corrections, 13 Int’l J. Prisoner Health 41, 43 (2017); see also Expert Report of Brie Williams, MD, MS at 26–27, *Silverstein v. Fed. Bureau of Prisons*, No. 07-cv-02471, 2011 WL 4552540 (D. Colo. Sept. 30, 2011) (on file with author) (discussing adverse health effects caused by solitary confinement).

<sup>280</sup> Ahalt et al., *supra* note 279, at 43 (citation omitted). This is compounded by the fact that in some situations, medical care is delayed, compromised, or not provided at all to people in solitary confinement. Medical visits often occur through the cell door, making it difficult or impossible to meaningfully assess a patient or conduct certain tests. Expert Report of Brie Williams, MD, MS, *supra* note 279, at 26–27.

<sup>281</sup> Longworth, *supra* note 274.

Dudes would run the yard and hit a small hole and their ankle would just snap.”<sup>282</sup>

Additionally, the restrictions in many solitary confinement units on the availability and type of food can cause people to lose weight, causing their bodies to literally erode.<sup>283</sup> One man, recounting the loss of nearly forty pounds of his body mass during his first six months in solitary confinement, noted that “I am at a point where I know that I am deteriorating in this cell.”<sup>284</sup>

While the physical effects of solitary confinement are an area ripe for additional research,<sup>285</sup> two studies from the past five years support the anecdotal reports described above. First, a 2019 study of men in California’s supermax prisons found that those held in solitary confinement “experienced an absolute 31% higher hypertension prevalence than those in maximum security units.”<sup>286</sup> And a 2020 study of people held in solitary confinement in Washington state prisons concluded that solitary confinement “exacerbates well-documented physical health ‘symptoms’ of incarceration, from disruptions of daily life and routines, to undiagnosed, untreated, or mis-treated ailments,” as well as weight fluctuations, which are associated with “adverse cardiovascular . . . outcomes,” and musculoskeletal pain, which “increases multimorbidity.”<sup>287</sup>

<sup>282</sup> Solitary Watch et al., *supra* note 278, at 34–36 (quoting Lane Nelson, *The Planted*, *The Angolite*, Jan./Feb. 1995, at 29, [http://www.itsabouttimebpp.com/Political\\_Prisoners/pdf/The\\_Angolite\\_1995.pdf](http://www.itsabouttimebpp.com/Political_Prisoners/pdf/The_Angolite_1995.pdf) [<https://perma.cc/64MX-9NCQ>]).

<sup>283</sup> Strong et al., *supra* note 36, at 9 (noting that study participants “frequently experienced fluctuations in body weight,” sometimes due to food with insufficient caloric content, other times due to self-restriction based on concerns of prison staff tampering with food).

<sup>284</sup> Solitary Watch et al., *supra* note 278, at 36.

<sup>285</sup> Strong et al., *supra* note 36, at 2–3 (“[W]hile many studies have examined the relationship between incarceration and health, and some studies have examined the relationship between solitary confinement and mental health, the existing literature lacks analysis of disparate physical health outcomes across levels and severity of confinement, especially within isolation, and for incarcerated people of color.” (footnote omitted)).

<sup>286</sup> Brie A. Williams et al., *The Cardiovascular Health Burdens of Solitary Confinement*, 34 *J. Gen. Internal Med.* 1977, 1977 (2019).

<sup>287</sup> Strong et al., *supra* note 36, at 14. Even more troubling, the authors of the study found that the health concerns they identified “likely have a grossly disparate impact on communities of color: just as incarceration is a health stratifying institution for prisoners, their families, and communities, so, too, does solitary confinement appear to exacerbate racial health inequities.” *Id.* They conclude, “[i]n sum, people of color face a disproportionate risk of being placed in solitary confinement; such racial disparities, in turn, mean that the physical health symptoms associated with, or possibly caused by, these conditions of confinement are likely to fall disproportionately on certain groups.” *Id.* at 15.

In addition to the harms associated with the extremely limited physical space that people are forced to inhabit, the study also identifies harms that the authors correlate with the extraordinary restrictions, controls, and forced dependence that characterize solitary confinement:

Our participants experienced the deprivations of solitary confinement as exacerbating their health problems, which shaped their health experiences as punitive. Otherwise medically trivial conditions quickly become grave in solitary; “dandruff” can become a bleeding scalp wound, a four-dollar co-payment blurs the difference between subjective palpitations and an unstable arrhythmia, and unused muscles “rot.”<sup>288</sup>

The authors conclude, “[p]hysical suffering reveals itself to be a crucial dimension of experience in solitary confinement.”<sup>289</sup>

Physical deterioration in solitary confinement occurs not just at the level of muscle, bone, and body mass, but also at the level of physiological brain function. Dr. Stuart Grassian documented the adverse effects of solitary confinement on brain function as far back as 1983, and more recently found that “even a few days of solitary confinement” would shift a person’s electroencephalogram (EEG) pattern “toward an abnormal pattern characteristic of stupor and delirium.”<sup>290</sup> Neuroscience research has further demonstrated the devastating impact solitary confinement can inflict on the brain. Dr. Matthew Lieberman’s research in social cognitive neuroscience, with particular focus on the neural bases of social cognition, details how and why the human brain is “wired to connect” and the devastating consequences that occur when it cannot.<sup>291</sup>

Relatedly, Dr. Huda Akil, a neuroscientist specializing in the impact of emotions and stress on brain structure and function, has discovered that the defining features of solitary confinement—denial of physical activity,

<sup>288</sup> Id.

<sup>289</sup> Id.; see also Jaquelyn L. Jahn, Nicolette Bardele, Jessica T. Simes & Bruce Western, Clustering of Health Burdens in Solitary Confinement: A Mixed-Methods Approach, *SSM—Qualitative Rsch. Health*, Jan. 2022, at 1, 6 (describing how solitary confinement exacerbates physical health problems).

<sup>290</sup> Grassian, *Psychiatric Effects*, supra note 37, at 331; see also Grassian, *Psychopathological Effects*, supra note 43, at 1452–53 (observing adverse psychopathological effects caused by solitary confinement).

<sup>291</sup> Matthew D. Lieberman, *Social: Why Our Brains Are Wired to Connect*, at ix–x (2013); Expert Report of Matthew D. Lieberman ¶¶ 8–12, *Ashker v. Governor of Cal.*, No. 09-cv-05796 (N.D. Cal. dismissed Mar. 11, 2024).

meaningful social interaction, and environmental stimulation—can “fundamentally alter the structure of the human brain in profound and permanent ways.”<sup>292</sup> Dr. Akil has shown that under conditions of severe and sustained stress, the hippocampus (the part of the brain responsible for setting the level of emotional reactivity and anxiety) loses its neuroplasticity: “[I]t physically shrinks, the rate of birth of new cells diminishes or ceases . . . and the opportunity for contacts with neighboring cells decreases.”<sup>293</sup> The erosion of this region of the brain causes it to fail in its functioning, resulting in a loss of emotional control and stress regulation, as well as defects in memory, spatial orientation, and other cognitive processes.<sup>294</sup> Indeed, Dr. Akil reports “that *each* key characteristic of solitary confinement—lack of physical activity, meaningful interaction with others and the natural world, and visual stimulation—‘is by itself sufficient to change the brain . . . dramatically, depending on whether it lasts briefly or is extended.’”<sup>295</sup> Even more disturbing, many neurobiological studies “reveal that certain regions of the brain of people who experience extreme psychological stress (like

<sup>292</sup> Brief of Medical & Other Scientific & Health-Related Professionals, *supra* note 33, at 24–25 (citing ACLU, *supra* note 46, at 6).

<sup>293</sup> Lobel & Akil, *supra* note 115, at 69; Dana G. Smith, Neuroscientists Make a Case Against Solitary Confinement, *Sci. Am.* (Nov. 9, 2018), <https://www.scientificamerican.com/article/neuroscientists-make-a-case-against-solitary-confinement/> [<https://perma.cc/FA4G-MG47>] (explaining the negative neurological effects of social isolation). Studies of polar expeditioners who lived in Antarctica for fourteen months in conditions characterized by environmental monotony and prolonged isolation produced similar results. Alexander C. Stahn et al., Brain Changes in Response to Long Antarctic Expeditions, 381 *New Eng. J. Med.* 2273, 2273 (2019).

<sup>294</sup> Lobel & Akil, *supra* note 115, at 69.

<sup>295</sup> Brief of Medical & Other Scientific & Health-Related Professionals, *supra* note 33, at 25 (alteration in original) (quoting Allen, *supra* note 46).



those in solitary confinement) literally diminish in volume because the neural cells become shriveled.”<sup>296</sup> The damage can be irreversible.<sup>297</sup>

Given solitary confinement’s effects on brain function and its potential capacity to alter the physical structure of the brain, holding a person in prolonged isolation is no less an attack on their physical integrity than failing to provide a person with hypertension the medication necessary to control their blood pressure.

All of these impacts of solitary confinement—individually and in concert—erode physical integrity. It is no matter that the harms inflicted are sins of omission rather than commission. The denial of access to the things the body needs to maintain integrity is no less problematic than affirmative assaults on the body.<sup>298</sup> As Addis explains, “it is not only affirmative intrusions that threaten bodily integrity, “it is also about restricting, restraining, or regulating the normal rhythm or functions of life . . . . The embodied self has certain natural functions and restraining or commandeering those functions is clearly a violation of the integrity of the embodied self and hence the dignity of the individual so restrained.”<sup>299</sup> Indeed, it is the omissions that make the deprivations all the more insidious. As Arthur Longworth explains,

[the] passive facade of long-term solitary confinement abets their misconception of what they’re doing. The way they see it, they’re not actually doing anything to you. They’re not breaking your bones on the wheel. They’re not stretching or snapping your tendons and sinews on the rack. They’ve merely situated you within an architecture . . . . What happens to you inside that cell is on *you*, not them.<sup>300</sup>

<sup>296</sup> Id. Given the myriad ethical and logistical barriers to conducting a true controlled study on the effects of solitary confinement in general and on the brain in particular, many of those studying the neurobiological effects of solitary confinement also point to animal studies, given that rats and mice share ninety-nine percent of the same genes as humans and a parallel neuroanatomy. These studies have shown that the brains of mice and rats in solitary confinement show “enormous differences” compared to animals in more typical environments, such as decreases in the anatomical complexity of the brain and the number of blood vessels in the brain. Lobel & Akil, *supra* note 115, at 70 (quoting Michael J. Zigmond & Richard Jay Smeyne, *Use of Animals to Study the Neurobiological Effects of Isolation: Historical and Current Perspectives*, in *Solitary Confinement: Effects, Practices, and Pathways Toward Reform*, *supra* note 16, at 221, 227); Zigmond & Smeyne, *supra*.

<sup>297</sup> Brief of Medical & Other Scientific & Health-Related Professionals, *supra* note 33, at 26.

<sup>298</sup> Dolovich, *supra* note 201, at 915.

<sup>299</sup> Addis, *Kennedy on Dignity*, *supra* note 11, at 567.

<sup>300</sup> Longworth, *supra* note 274.

The limitations inherent in solitary confinement impact multiple bodily systems, including neurological, muscular/skeletal, and cardiovascular systems, in ways that erode physiological integrity and thus the physical dimension of personhood.

## 2. Solitary Confinement Erodes Psychological Integrity

As for the psychological dimension of personhood, at this point it is beyond cavil that solitary confinement inflicts psychological damage and pain.<sup>301</sup> While it may not result in a “depriv[ation] . . . of sanity,”<sup>302</sup> particularly for those who do not begin the experience with a preexisting mental illness, decades of research—not to mention first-person accounts—make clear that solitary confinement is psychologically harmful.<sup>303</sup> Some of those harms—particularly those that have physically measurable corollaries—are described above. But there are other effects of solitary that are just as destructive to psychological integrity though not as easily measurable.

<sup>301</sup> See, e.g., The Istanbul Statement on the Use and Effects of Solitary Confinement, Int'l Psych. Trauma Symp., Istanbul 2 (2007), [https://www.solitaryconfinement.org/\\_files/ugd/Istanbul\\_expert\\_statement\\_on\\_sc.pdf](https://www.solitaryconfinement.org/_files/ugd/Istanbul_expert_statement_on_sc.pdf) [<https://perma.cc/325Y-GHJS>]; Haney et al., *supra* note 21, at 336; Kristin G. Cloyes, David Lovell, David G. Allen & Lorna A. Rhodes, Assessment of Psychosocial Impairment in a Supermaximum Security Unit Sample, 33 *Crim. Just. & Behav.* 760, 773–74 (2006); Grassian, *Psychiatric Effects*, *supra* note 37, at 335–38; Craig Haney, Restricting the Use of Solitary Confinement, 1 *Ann. Rev. Criminology* 285, 298–99 (2018); Haney, *Mental Health*, *supra* note 17, at 132–37; Smith, *supra* note 37, at 476–81; Haney, *Psychological Effects*, *supra* note 22, at 367–74; Mimosa Luigi, Laura Dellazizzo, Charles-Édouard Giguère, Marie-Hélène Goulet & Alexandre Dumais, Shedding Light on “the Hole”: A Systematic Review and Meta-Analysis on Adverse Psychological Effects and Mortality Following Solitary Confinement in Correctional Settings, *Frontiers Psychiatry*, Aug. 2020, at 1, 1–2; Hagan et al., *supra* note 48, at 141–47; H. S. Andersen et al., A Longitudinal Study of Prisoners on Remand: Psychiatric Prevalence, Incidence and Psychopathology in Solitary vs. Non-Solitary Confinement, 102 *Acta Psychiatrica Scandinavica* 19, 19–24 (2000).

<sup>302</sup> *Madrid v. Gomez*, 889 F. Supp. 1146, 1261 (N.D. Cal. 1995).

<sup>303</sup> As Dr. Craig Haney has explained,

Indeed, in part out of recognition of the importance of the human need for social contact, connection, and belongingness, social psychologists and others have written extensively about the harmful effects of its deprivation—what happens when people are subjected to social exclusion and isolation. Years ago, Herbert Kelman argued that denying persons of contact with others was a form of dehumanization.

Expert Report of Craig Haney, Ph.D., J.D. ¶ 41, *Ashker v. Governor of Cal.*, No. 09-cv-05796 (N.D. Cal. dismissed Mar. 11, 2024) (citing Herbert C. Kelman, *Violence Without Moral Restraint: Reflections on the Dehumanization of Victims and Victimizers*, in *Varieties of Psychohistory* 282 (George M. Kren & Leon H. Rappoport eds., 1976)).

These forms of psychological harm have been, and continue to be, discussed extensively in the psychological literature. They include, for example,

stress-related reactions (such as decreased appetite, trembling hands, sweating palms, heart palpitations, and a sense of impending emotional breakdown); sleep disturbances (including nightmares and sleeplessness); heightened levels of anxiety and panic; irritability, aggression, and rage; paranoia, ruminations, and violent fantasies; cognitive dysfunction, hypersensitivity to stimuli, and hallucinations; loss of emotional control, mood swings, lethargy, flattened affect, and depression; increased suicidality and instances of self-harm; and, finally, paradoxical tendencies to further social withdrawal.<sup>304</sup>

Jack Henry Abbott, who endured multiple stints in solitary, describes its impact on psychological integrity in terms that are less clinical but no less powerful:

Time descends in your cell like the lid of a coffin in which you lie and watch it as it slowly closes over you. When you neither move nor think in your cell, you are awash in pure nothingness.

Solitary confinement in prison can alter the ontological makeup of a stone.<sup>305</sup>

Here, Abbott gives voice to the psychological harms of solitary that goes beyond a recounting of symptoms to something more profound: the erosion of psychological integrity. That erosion occurs as a direct result of the conditions that comprise solitary, conditions that, in the aggregate, attack the capacity to maintain an integral sense of self.<sup>306</sup> In describing the experience to Norman Mailer, with whom Abbott corresponded while Mailer was writing *The Executioner's Song* and who later helped Abbott publish *In the Belly of the Beast*, Abbott wrote:

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<sup>304</sup> Haney, Psychological Effects, *supra* note 22, at 372. Indeed, the editor of *The Oxford Handbook of Social Exclusion*, after summarizing the array of psychological threats that social exclusion poses to mental health, concluded that “[t]his dizzying array of responses to social exclusion supports the premise that it strikes at the core of well-being.” C. Nathan DeWall, Looking Back and Forward: Lessons Learned and Moving Ahead, *in* *The Oxford Handbook of Social Exclusion* 301, 302 (C. Nathan DeWall ed., 2013).

<sup>305</sup> Jack Henry Abbott, *In the Belly of the Beast: Letters from Prison* 44–45 (1981).

<sup>306</sup> Sangiovanni, *supra* note 129, at 112.

I have experienced everything possible to experience in a cell in a short time—a day or so if I’m active, a week or two if I’m sluggish.

I must fight, from that point on, the routine, the monotony that will bury me alive if I am not careful. I must do that, and do it without losing my mind.<sup>307</sup>

With so little else to occupy his mind, Abbott turned to the one thing left to him: his memory. “I have my memories. I have the good ones, the bad ones, the ones that are neither of these. So I have *myself*.”<sup>308</sup>

Our memories are our history, our identities; they are integral to who we are, to our self-understanding. But as Abbott discussed in a particularly vivid passage, even memory is vulnerable to maiming by solitary confinement:

Memory is arrested in the hole. I think about each remembered thing, study it in detail, over and over. I unite it with others, under headings for how I feel about it. Finally it changes and begins to tear itself free from facts and joins my imagination. Someone said *being is memory*.<sup>309</sup>

With no new stimuli or experiences, Abbott’s memory turned inward on itself, becoming disfigured in the process: “[T]he further I go into that terrain of time, into my memories, the more they enter my imagination. The imagination—bringing this memory into that, and that into this, every possible permutation and combination—replaces further experience, which would, if not enhance it, at least leave it intact.”<sup>310</sup> Here, Abbott is describing an existential threat to his psychological integrity—the perversion of the memories that are central to his identity.

And there is more. The extraordinary deprivation of experience that is characteristic of solitary confinement threatens not only the aspects of identity that are formed by memories, but also those related to the exercise

<sup>307</sup> Abbott, *supra* note 305, at 46. Eddie Griffin, one of the Marion Control Unit survivors, describes his experience in terms that are strikingly similar:

After a few days, you are totally numb. Feelings become indistinct, emotions unpredictable. The monotony makes thoughts hard to separate and capsule. The eyes grow weary of the scene, and shadows appear around the periphery, causing sudden reflexive action. Essentially, the content of a man’s mind is the only means to defend his sanity.

Eddie Griffin, *Breaking Men’s Minds: Behavior Control and Human Experimentation at the Federal Prison in Marion, Illinois*, 4 J. Prisoners on Prisons 17, 27 (1993).

<sup>308</sup> Abbott, *supra* note 305, at 46.

<sup>309</sup> *Id.*

<sup>310</sup> *Id.* at 47.

of agency and self-autonomy—“the opportunity to engage in behaviors that allow each of us to define who we are.”<sup>311</sup> Solitary or supermax confinement warehouses people—in the words of Robert Johnson, these units are “modern-day houses of the dead . . . not because of brutality but because of inertia.”<sup>312</sup> The forced idleness that is characteristic of solitary confinement means that people in isolation are routinely denied the opportunity to exercise meaningful autonomy or self-efficacy.<sup>313</sup>

Nearly every aspect of life in solitary is controlled by the institution: when and what people can eat, what they can read, whether and when they can exercise, and more. As Dr. Craig Haney explains, because people in solitary “are forced to become highly dependent on the surrounding institution to authorize, organize, and oversee even the most minute and mundane aspects of their daily life,” they “may find themselves struggling to initiate behavior on their own, in part because they have been stripped of the opportunity to organize their lives around meaningful activity and purpose.”<sup>314</sup> In extreme cases, Haney observes, “prisoners may literally stop behaving.”<sup>315</sup>

Relatedly, the extraordinary control over every aspect of people’s day-to-day existence and the inability to exercise decision-making power over even the most mundane things can cause some to “lose the ability to set limits for themselves or to regulate their own behavior through internal mechanisms.”<sup>316</sup> Over time, Haney explains, this can cause them to become uncomfortable with even minor freedoms “because they have lost confidence in their own ability to behave in the absence of constantly enforced restrictions, the tight external structure that surrounds them, and the ubiquitous physical restraints into which they are repeatedly placed.”<sup>317</sup>

<sup>311</sup> Robert Johnson, Ann Marie Rocheleau & Alison B. Martin, *Hard Time: A Fresh Look at Understanding and Reforming the Prison* 208 (4th ed. 2017) (citation omitted).

<sup>312</sup> Robertson, *supra* note 85, at 1005 (quoting Robert Johnson, *Hard Time: Understanding and Reforming the Prison* 7–8 (2d ed. 1996)).

<sup>313</sup> Haney, *Social Psychology*, *supra* note 37, at 18 (citing Albert Bandura, *Self-Efficacy: The Exercise of Control* (1997)).

<sup>314</sup> Expert Report of Craig Haney at 17–18, *Silverstein v. Fed. Bureau of Prisons*, 704 F. Supp. 2d 1077 (D. Colo. 2010) (No. 07-cv-02471) (on file with author).

<sup>315</sup> *Id.* at 18.

<sup>316</sup> *Id.*

<sup>317</sup> *Id.* Kevin Light-Roth, incarcerated in Washington, describes his experience of this: After nine months in the hole, maybe a year, your psychological rhythm shifts to match the tempo of solitary. You lose all desire to get out of your cell. Five days out of the week you are allowed one hour in the concrete dog run that serves as a recreation area,

The multiple and compounding deprivations inherent in solitary confinement present a profound risk to psychological integrity in another, deeper way: the emotional dissociation and fragmenting of self that some people are forced to employ to survive the experience. Solitary survivor Arthur Longworth explains:

You have to dissociate yourself from the experience—to withdraw a part of yourself and keep it at a distance from the world at large. You start by deadening your senses to what’s happening around you. . . . [Y]ou turn your attention away.

You have to protect that part of yourself from your feelings: the helplessness, the anger, the hopelessness that washes over you in an unebbing tide. Those are the feelings that arise inside you in that place. You can’t stop them. But if you stand back—if you don’t allow the separated part of yourself to wander out into the storm of those feelings—you can get through it.<sup>318</sup>

Dr. Craig Haney similarly describes this “standing back” practice of people in long-term isolation—albeit more clinically, calling it a “socially pathological adaptation[]” that is “premised on the absence of meaningful contact with people”—and notes that while such adaptations are “functional and even necessary under these circumstances, they can become especially painful and disabling if taken to extremes, or if and when they are internalized so deeply that they persist long after time in isolation has ended.”<sup>319</sup>

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but you decline that time more often than not, only leaving your cell if you need to make a phone call. At length, you start skipping those, too. . . .

When you shower—three times per week in a four-foot by four-foot cage at the end of the tier—you finish quickly and flag down the guards to take you back. Returning to your prison cell feels like returning to sanctuary.

You can feel yourself slipping toward total dissociation, becoming unmoored from the physical world. And you want it to happen. You will not be able to admit it, least of all to yourself, but you want to let go of reality. You don’t want to deal with the world anymore and you don’t want to get out of solitary.

Kevin Light-Roth, *Recovery from Solitary Is an Illusion*, Substack: Small Bow (Jan. 28, 2025), [https://substack.com/home/post/p-155876550?utm\\_campaign=post&utm\\_medium=web](https://substack.com/home/post/p-155876550?utm_campaign=post&utm_medium=web) [<https://perma.cc/2AN8-4L7X>].

<sup>318</sup> Longworth, *supra* note 274.

<sup>319</sup> Declaration of Craig Haney, Ph.D., J.D. ¶ 28, *Parsons v. Ryan*, 289 F.R.D. 513 (D. Ariz. 2013) (No. 12-cv-00601). Echoing the idea that the psychological impacts of isolation persist even after a person is released from solitary confinement, Arthur Longworth recounts,

there’s a part of you—a part of whatever it is we are as human beings—that doesn’t get to leave [solitary]. It doesn’t recover with your body. It is an empty space that returns

In another “normal” adaptation to the abnormal environment of solitary confinement, some people can become hypervigilant—even paranoid—as a consequence of being isolated from social reality and the attendant reality checks that typical interactions with other people provide. As a result, “they form interpretations and make connections entirely within the only reality that they have access to—their own.”<sup>320</sup> As one long-term inhabitant of solitary confinement describes it, “[p]erception becomes distorted in here, which leads to bizarre behavior. It’s because there is nothing for a person to compare themselves to. There is no barometer for judging what is ‘normal,’ so the thought processes begin to gradually drift in odd directions.”<sup>321</sup>

Given its ability to impact what John Stinneford has called “the interior capacities” of a person—including reason and free will<sup>322</sup>—there is a way in which solitary confinement can be said to operate almost as a kind of psychosurgery, akin to chemical castration. Stinneford has argued persuasively that chemical castration is constitutionally impermissible because it permits “the state to exert control over the inner workings of the offender’s brain,” interfering with brain function “in a manner that turns the brain itself into a kind of prison.”<sup>323</sup> So too with solitary confinement, which, as described above, can profoundly affect the personalities and thought patterns of those subjected to it. As Stinneford concludes in the chemical castration context, with language equally applicable to solitary confinement, “[t]his is more than mere infringement: it is assaultive destruction or maiming.”<sup>324</sup>

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you to supermax when you sleep. You awaken in the night, heart in your throat, certain you’re still in the strangling grasp of the cell. . . . [People] don’t understand that what happened to you in that place still happens every day.

Longworth, *supra* note 274. Brian Nelson, who spent twenty-three years in isolation, much of it in Tamms, the Illinois supermax prison that was closed in 2013, describes a similar reaction after being released:

I can taste it. I can smell it. I can see it every single day. I like being away from people, I am so afraid of people. I used to love hangin’ out, even my Mom—how do I tell my mother I’m afraid of her? The woman I love? . . . What did they do to me? . . . I hate it out here. I’m afraid every fucking day.

Brian Nelson, *Weak as Motherfuckers, in Hell Is a Very Small Place: Voices from Solitary Confinement*, *supra* note 49, at 117, 118.

<sup>320</sup> Declaration of Dr. Craig Haney ¶32, *Silverstein v. Fed. Bureau of Prisons*, 704 F. Supp. 2d 1077 (D. Colo. 2010) (No. 07-cv-02471) (on file with author).

<sup>321</sup> Johnson et al., *supra* note 311, at 328 (citation omitted).

<sup>322</sup> Stinneford, *supra* note 58, at 566.

<sup>323</sup> *Id.* at 567 n.37, 568.

<sup>324</sup> *Id.* at 596.

The erosion of psychological integrity caused by solitary confinement is well-documented, profound, and, in some circumstances, permanent. Inflicting this form of punishment risks taking from a person their psychological wholeness; in this sense, solitary confinement is literally dis-integrating. For that reason, it also constitutes a deprivation of dignity.

### *3. Solitary Confinement Erodes Social Integrity*

In addition to the threats to physical and psychological integrity that solitary confinement inflicts, it also presents a profound threat to a person's social integrity, and correspondingly, their dignity.

The notion of social integrity is grounded in the principle that humans are, at base, social creatures. We do not become who we are in a vacuum—our identities are necessarily shaped by our interactions with others. For that reason, “[a]cross cultures and systems, there is a consensus that to be human is largely to have connections, relationships, and commitments.”<sup>325</sup> Addis, quoting philosopher Bernard Williams, explains that these things are what comprise personhood because they give meaning to our lives: “[P]ersons have ‘a set of desires, concerns . . . call them, projects, which help to constitute a character,’ things that determine the very sort of person one is or will become.”<sup>326</sup>

Prison in general degrades those connections and experiences by virtue of removing people from society: eroding their social ties and, through lack of meaningful work and educational opportunities, removing opportunities for people to demonstrate the competencies and individuation that would otherwise allow them “to publicly affirm that they are not ‘living corpses’ but persons capable of achievement.”<sup>327</sup> But the extraordinary social isolation and forced idleness that characterize supermax confinement constitute an entirely different level of assault on the social integrity of people housed there.

These deprivations have been features of solitary confinement from the beginning—David Rothman has described the practice of prison officials teaching a person sent to Sing Sing in the 1830s to “consider himself dead to all without the prison walls” and to “be literally buried from the

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<sup>325</sup> Addis, Kennedy on Dignity, *supra* note 11, at 584.

<sup>326</sup> *Id.* at 585 (alteration in original) (emphasis omitted) (quoting Bernard Williams, Persons, Character and Morality, in *Moral Luck: Philosophical Papers 1973–1980*, at 1, 5 (1981)).

<sup>327</sup> Robertson, *supra* note 85, at 1055.



world.”<sup>328</sup> While modern-day correctional systems use more euphemistic terminology, today’s supermax confinement is unchanged in the way it forces people to “do time without a way to give time meaning . . . as the phrase ‘doing time’ suggests.”<sup>329</sup> As James Robertson observes, in solitary confinement, “one cannot compensate for the pains of imprisonment by ‘doing time’ in a constructive manner via work, training, or education. Warehoused inmates are required to experience confinement as truly a ‘waste of [their] time.’”<sup>330</sup>

In this way, solitary confinement inflicts an extreme form of “social death”<sup>331</sup> on those subjected to it, putting them in “the condition of having so few meaningful social contacts, and such an acute awareness of that deficit, that an individual loses the ability ‘to function as a social being.’”<sup>332</sup> By forcing people to abandon or deny their commitments and life projects, solitary confinement can disorient—or even destroy—a person’s self-understanding, and thus their integrity.<sup>333</sup> Dr. Craig Haney, in his expert report in the *Ashker v. Governor of California* litigation

<sup>328</sup> David J. Rothman, *The Discovery of the Asylum: Social Order and Disorder in the New Republic* 95 (1971) (citation omitted).

<sup>329</sup> Hans Toch, *Warehouses for People?*, 478 *Annals Am. Acad. Pol. & Soc. Sci.* 58, 63 (1985).

<sup>330</sup> Robertson, *supra* note 85, at 1031 (alteration in original) (citation omitted).

<sup>331</sup> Orlando Patterson coined this term in *Slavery and Social Death: A Comparative Study*, where he defined slavery as “one of the most extreme forms of the relation of domination, approaching the limits of total power from the viewpoint of the master, and of total powerlessness from the viewpoint of the slave.” Orlando Patterson, *Slavery and Social Death: A Comparative Study* 1 (1982). Patterson argued that slaves were rendered noncitizens and condemned to social death, which had external and internal effects on enslaved people. See generally *id.*

<sup>332</sup> *Johnson v. Wetzel*, 209 F. Supp. 3d 766, 774 (M.D. Pa. 2016) (citation omitted).

<sup>333</sup> In making this argument, I am in no way discounting the extraordinary resistance to these assaults on social integrity that many people in solitary engage in on a daily basis. In one particularly powerful example, Siyaves Azeri recounts a conversation with Forough Arghavan, in which she described the experience of solitary confinement—and resistance to it—by women in an Iranian prison:

She spoke of a ‘Prison Code’ prohibiting prisoners from speaking to each other, sharing their belongings and prohibiting them from “any form of collective and communal activity.” It meant that prisoners could not share anything they had. If your friend was cold and you happened to have an extra pullover, you were prohibited from passing that extra to her. If you had an orange, you were not supposed to share it with your comrades. Breaking the code was punished by severe physical torture up to seventy-two hours. Yet, she recalled that prisoners would break the code despite the threat of torture in order not to lose what she calls their sense of human dignity.

Siyaves Azeri, ‘Resurrecting’ the Self: Atomising the Individual via Solitary Confinement, in *Understanding Violence: Contexts and Portrayals* 189, 199 n.26 (Marika Guggisberg & David Weir eds., 2009).

challenging indefinite solitary confinement in California, captures this concept in a particularly haunting way:

The social death that the [supermax] prisoners have undergone has created a sense in many of them of what might be called “ontological insecurity”—profound concerns about whether or not they really “exist” and have “being” in the world. This may seem like an extreme assertion, but realize that these are men whose families and friends—the persons who helped shape their identities and to whom those identities were most closely tied before coming to prison—not only may have not interacted with them for years (or decades) but not even seen them, and not even heard their voices over the same period. If the people “closest” to you throughout your life have not seen you, and have not heard your voice, nor you theirs, do you really exist?<sup>334</sup>

Also insidious is the way that solitary confinement can devastate social integrity by turning what are typically human strengths—our capacity for relationships and connections—into instruments of torment by stripping away the very context that makes these human qualities meaningful. Lisa Guenther elucidates this point powerfully when she writes,

To put it bluntly, solitary confinement would be no big deal if we were not thinking, feeling creatures who rely on our relationships for a meaningful sense of ourselves. But we are, and we do. By exiling the prisoner from a worldly context within which these capacities could be exercised meaningfully, solitary confinement turns the prisoner’s agency and intelligence into a source of suffering rather than strength. As such, the social and sensory isolation of solitary amounts to a living death sentence.<sup>335</sup>

The “living death sentence”—the exile—that solitary confinement imposes also has important implications for the status of the people subjected to it—“not just as . . . relational being[s] but also as [people] who speak[], listen[], and—ideally, at least—[are] heard by others who listen and respond in a meaningful way.”<sup>336</sup> That is because, as Guenther explains, “[t]his is what it means to share a world: not just the cohabitation of planet Earth, but a sharing of meaning with others, and the creation of

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<sup>334</sup> Expert Report of Craig Haney, *supra* note 303, ¶ 130.

<sup>335</sup> Lisa Guenther, *The California SHU and the End of the World, in Hell Is a Very Small Place: Voices from Solitary Confinement*, *supra* note 49, at 211, 213.

<sup>336</sup> *Id.* at 213.

a social context for individual experience in language and in our material culture.”<sup>337</sup>

Gresham Sykes, writing about this in the context of prison more generally, has explained that “[t]he status lost by the prisoner is, in fact, similar to . . . the status of citizenship—that basic acceptance of the individual as a functioning member of the society in which he lives.”<sup>338</sup> For people in long-term solitary confinement, that “loss of citizenship” is even more pronounced. Guenther likens the experience to Hannah Arendt’s account of those deprived of citizenship in *The Origins of Totalitarianism*.<sup>339</sup> Arendt’s view of the world is a shared space where words and actions intersect to form a shared reality. That perspective illuminates the violence inherent in excluding people from this common space, effectively nullifying the impact of their words and actions: “The fundamental deprivation of human rights is manifested first and above all in the deprivation of a place in the world which makes opinions significant and actions effective.”<sup>340</sup> Like those who are stateless, people in solitary confinement—particularly those subject to extreme and draconian communication restrictions<sup>341</sup>—are forcibly removed from

<sup>337</sup> Id.

<sup>338</sup> Gresham M. Sykes, *The Society of Captives: A Study of a Maximum Security Prison* 66–67 (1958).

<sup>339</sup> Guenther, *supra* note 335, at 213.

<sup>340</sup> Id. (quoting Hannah Arendt, *The Origins of Totalitarianism* 296 (1973)).

<sup>341</sup> One of the most extreme examples of these restrictions that can be imposed on people in the Federal Bureau of Prisons (“BOP”) is Special Administrative Measures (“SAMs”). SAMs are person-specific confinement and communication rules, imposed by the United States Attorney General but carried out by the BOP. 28 C.F.R. § 501.3 (2011). The Attorney General may authorize the Director of the BOP to implement SAMs only upon written notification “that there is a substantial risk that a prisoner’s communications or contacts with persons could result in death or serious bodily injury to persons, or substantial damage to property that would entail the risk of death or serious bodily injury to persons.” Id. A person’s SAMs spell out in intricate detail the nature of this isolation, “including, for example, how many pages of paper he can use in a letter or what part of the newspaper he is allowed to have and after what sort of delay.” Rovner, *On Litigating Constitutional Challenges*, *supra* note 28, at 475; see also Laura Rovner & Jeanne Theoharis, *Preferring Order to Justice*, 61 *Am. U. L. Rev.* 1331, 1359–61 (2012) (describing Syed Fahad Hashmi’s SAMs, which were in place for two-and-a-half years during his pretrial detention and included restrictions like one hour of exercise per day in an indoor solitary cage, one letter a week to a single immediate family member, and the ability to read only limited portions of newspapers and even then, only thirty days after publication). Of course, there are any number of formal and informal ways that prison systems—both state and federal—restrict the communications of people in solitary confinement.

meaningful participation in human community, condemned to a social death where they exist physically but cannot truly participate in civic life.

Further, the social death that takes place in solitary confinement does not just deprive people of the activities, work, and life commitments that constitute social integrity, or “the right to exist in a community of others as a person of meaningful words and deeds.”<sup>342</sup> There is also a signaling dimension to solitary or supermax confinement that further erodes social integrity because of how it presents those sent there—both to the world and to the individuals themselves. This is not only because at least part of a person’s conception of self is linked to how they spend their time, but also because of the labels that accompany people put in penal isolation. Prison staff, government attorneys, the media, and even courts often refer to people sent to solitary confinement—particularly supermax confinement—as the “worst of the worst.”<sup>343</sup> That designation “defines the inhabitants of supermax as fundamentally ‘other’ and dehumanizes, degrades, and demonizes them as essentially different from the rest of humanity, even from other prisoners, an already dehumanized group in the eyes of the larger society.”<sup>344</sup> And this, in turn, makes it easier to continue to confine people in conditions that deny their humanity.<sup>345</sup>

<sup>342</sup> Guenther, *supra* note 335, at 213.

<sup>343</sup> Johnson et al., *supra* note 311, at 316. Robert Johnson has observed that for people labeled this way, the term can become a “self-fulfilling prophecy, in which ordinary prisoners become the ‘worst of the worst’ because they come to see themselves the way we have labeled them.” *Id.* at 315–16.

<sup>344</sup> *Id.* at 316 (citing Craig Haney, *A Culture of Harm: Taming the Dynamics of Cruelty in Supermax Prisons*, 35 *Crim. Just. & Behavior* 956, 963 (2008)). Judge Richard Posner cautioned against this in the context of prison more generally in his 1995 partial dissent in *Johnson v. Phelan*:

There are different ways to look upon the inmates of prisons and jails in the United States in 1995. One way is to look upon them as members of a different species, indeed as a type of vermin, devoid of human dignity and entitled to no respect; and then no issue concerning the degrading or brutalizing treatment of prisoners would arise. . . . We must not exaggerate the distance between “us,” the lawful ones, the respectable ones, and the prison and jail population; for such exaggeration will make it too easy for us to deny that population the rudiments of humane consideration.

69 F.3d 144, 151–52 (7th Cir. 1995) (Posner, C.J., concurring in part and dissenting in part).

<sup>345</sup> As Samuel Pillsbury has explained,

The more we can designate a person as fundamentally different from ourselves, the fewer moral doubts we have about condemning and hurting that person. We assign the offender the mythic role of Monster, a move which justifies harsh treatment and insulates us from moral concerns about the suffering we inflict.

Samuel H. Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 *Cornell L. Rev.* 655, 692 (1989) (footnote omitted).

In all of these ways, solitary confinement diminishes or debases a person's social integrity. The forcing of people to abandon or deny their life commitments, the denial of "a sustaining social environment in which one is recognized as a member and participant,"<sup>346</sup> and the stigma that attaches to those in solitary confinement all operate to erode the social integrity—and therefore the dignity—of those subjected to it.

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In the aggregate, the conditions comprising solitary confinement deprive people of more than just human interaction, or environmental stimulation, or sleep, or outdoor exercise. To be sure, all of those are serious deprivations, and in some situations—particularly involving people deemed especially vulnerable—courts have found them to be Eighth Amendment violations. But viewing each of these deprivations in isolation fails to capture the breadth, depth, and significance of the harm they cause in combination. Even more importantly, atomizing the deprivations in this way results in overlooking the more difficult-to-capture—but equally serious—harms that solitary inflicts.

Dignity-as-integrity is a conceptual vehicle that allows us to capture and articulate these harms. Conceptually, dignity-as-integrity is about the idea of a person—it is "nothing less than what we think it means to be human."<sup>347</sup> It attaches to personhood in its entirety—its physical, psychological, and social dimensions. As the above discussion illustrates, examining solitary confinement through a dignity lens lays bare the myriad ways that it impinges on the various aspects of personhood, denying people's humanity and therefore, their dignity.

In addition to the work it does as a conceptual frame, dignity-as-integrity also serves as a moral, ethical, and constitutional command. As an existential value, dignity is "invoked to defend the threshold conditions (privileges and immunities) that are necessary for a person to exist as an integral whole."<sup>348</sup> As the above analysis demonstrates, solitary confinement denies people those threshold conditions, eroding their wholeness—their integrity—in the physical, psychological, and social dimensions. Dignity, with its corresponding ethical command of respect, demands a corrective response—the elimination of the practice in its

<sup>346</sup> Sangiovanni, *supra* note 129, at 84.

<sup>347</sup> Addis, *Kennedy on Dignity*, *supra* note 11, at 540–41.

<sup>348</sup> *Id.* at 526.

entirety—as this punishment is inconsistent with the State’s obligation to secure the integrity, or wholeness, of the person.

#### CONCLUSION

*“If to be in the world is to be with others, then when you take from a person everything that links him to the human world, you refuse him human status. . . . [T]o be without others is to lose the world.”*<sup>349</sup>

Conceptualizing dignity-as-integrity as a basic human need within the meaning of the Eighth Amendment provides a framework that captures a more fulsome picture of the myriad personhood harms that solitary confinement inflicts. And looking through the other end of the telescope at the ways in which solitary confinement erodes integrity provides a vehicle for more deeply understanding the relationship between integrity and dignity, and its implications for the Eighth Amendment more generally. If the touchstone of the Eighth Amendment’s prohibition against cruel and unusual punishment is truly “nothing less than the dignity of man,”<sup>350</sup> an understanding of dignity that encompasses integrity of personhood in all its dimensions is critical to ensuring that the State’s power to punish is “exercised within the limits of civilized standards.”<sup>351</sup>

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<sup>349</sup> Jill Stauffer, *We Have Invented a New Form of Death*, Interview with Colin Dayan, *The Believer* (Feb. 1, 2013), <https://www.thebeliever.net/we-have-invented-a-new-form-of-death-interview-with-colin-dayan/>.

<sup>350</sup> *Trop v. Dulles*, 356 U.S. 86, 100 (1958).

<sup>351</sup> *Id.*