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THE EIGHTH AMENDMENT AND SOLITARY CONFINEMENT: THE GAP IN PROTECTION FROM PSYCHOLOGICAL CONSEQUENCES

INTRODUCTION

The purposes and conditions of Tamms Correctional Center ("Tamms"), which is located in Tamms, Illinois, a town at the southern-most tip of Illinois, can best be described by two stories. Both stories—one from the perspective of the Department of Corrections, the other from the perspective of the inmates—reveal the disturbing nature of solitary confinement as implemented in super maximum security ("supermax") prisons1 such as Tamms and those like it throughout the United States. These stories were brought to light by a class action lawsuit filed on January 6, 1999, by several Tamms inmates on behalf of "all seriously mentally ill prisoners" at Tamms against the prison warden, the prison psychologist, the Department of Corrections’ Director, and six other prison system employees.2 The purpose of the lawsuit is to challenge the conditions of "extreme social isolation, restricted environmental stimulation, severely restricted movement and harsh punishment for problematic behavior caused by their illnesses . . ."3 The inmates seek monetary damages, an injunction, and a ruling that, among other things, Tamms’ procedures ignore protections against cruel and unusual punishment.4

This Comment examines the judiciary’s refusal to extend Eighth Amendment protection from cruel and unusual punishment to cases alleging the inhumane psychological effects of confinement. Part I presents the two stories of the Tamms facility, that of the inmates, and that of the Department of Corrections.5 Part II reviews the purposes

1. Supermaximum security facilities are facilities fostering “extreme social isolation, reduced environmental stimulus, scant recreational, vocational, or educational opportunity, and extraordinary levels of surveillance and control. Prisoners are locked alone in their cells between twenty-two and twenty-three-and-a-half hours a day. They eat and exercise alone.” HUMAN RIGHTS WATCH, COLD STORAGE: SUPERMAXIMUM SECURITY CONFINEMENT IN INDIANA 1 (1997).

2. See R.B. v. Washington, No. 99C 0056 at ¶ 2 (E.D. Ill. filed Jan. 7, 1999) [hereinafter Complaint]. However, only four inmates are actually named as members of the class action on the complaint. See id.

3. Complaint at ¶ 2.

4. Complaint at ¶ 86.

5. See infra notes 11-49 and accompanying text.
of solitary confinement and documents the alarming psychological effects that may result from extended periods in solitary confinement. This Part includes descriptions of solitary confinement in other U.S. prison systems that have already been subjected to public scrutiny, but failed to reach absolute constitutional violations in the eyes of the courts. Part III outlines the history of the Supreme Court's Eighth Amendment conditions-of-confinement cases and the Court's decision in Farmer v. Brennan, which established the current standard for Eighth Amendment challenges to conditions-of-confinement. Part IV presents cases that have applied the Farmer test, or a test similar, to physical and psychological conditions-of-confinement cases. Part V discusses the possible approaches courts could take to fill the gap of Eighth Amendment protection between the physical and psychological conditions-of-confinement.

I. BACKGROUND ON TAMMS CORRECTIONAL CENTER

Both the inmates' and the Department of Corrections' stories describe the physical interior in a similar manner: a seventy square foot cell, with heat and ventilation, containing a toilet, a sink, a desk, a bed, storage for personal items, and an outside window. However, the stories significantly diverge with respect to the purposes of the facility and the privileges granted to the inmates.

A. The Department of Corrections

The Department of Corrections ("the Department") narrator paints a picture of innovative prison reform designed "to protect the public through incarceration, supervision, programs and services." At this facility, the Department will improve the safety at Illinois correctional facilities by implementing a progressive system that offers more measures to modify the behavior of inmates. Tamms was built to "house
only those committed persons who are classified as maximum security
and who are in disciplinary segregation or administrative detention." During initial classification, a committee reviews the reason
for an inmate’s placement at Tamms and classifies the inmate in one
of these two statuses. Generally, inmates not on restricted move-
ment are allowed to travel from their cell to the yard and shower
unescorted and unrestrained. However, those on restricted move-
ment are handcuffed and escorted by two security staff members and
must submit to a visual search.

The Tamms facility intends to “provide growth promoting opportu-
nities as alternatives to unlawful behavior [and] . . . an array of serv-
ices for human care and optional programs for activity and self-
enhancement.” However, many conditions and privileges are affor-
ded to administrative detention inmates and are not applicable to
disciplinary segregation inmates. Inmates in administrative deten-
tion who exhibit improved behavior have the opportunity to increase
the activities available to them through the Behavioral Level System,
which reviews inmates’ behavior every ninety days. Some of the ac-
tivities include limited educational services, such as an ABE or GED
curriculum, as well as post-secondary correspondence courses.

15. Id. at § 505.30. According to prison officials, Tamms is for high-level gang leaders and
violent prisoners. See Tamms Memorandum, supra note 11, at 1. Warden George Welborn com-
mented that Tamms “was built for the worst of the worst.” Christi Parsons, Locked out from Life, CHI. TRIB., Mar. 25, 1998, at 1. See Jonathan Eig, Deep Hole, CHICAGO, July 1998, at 61, 64. Welborn appears to model his prison’s purpose after California’s Pelican Bay State Prison
discussed herein. See infra notes 117-123 and accompanying text. Admittance into these pris-
os, however, is not based on the severity of the original crime, but instead on violations com-
mitted by the inmates once in prison. See Scott N. Tachiki, Indeterminate Sentences in Supermax
Prisons Based upon Alleged Gang Affiliations: A Reexamination of Procedural Protection and a
assignment of prisoners based on disciplinary violations). Administrative detention “is a nondis-
ciplinary status of confinement which removes a committed person from general population or
restricts the individual’s access to general population.” ILL. ADMIN. CODE tit. 20, § 504.660(1)
17. See id. at 5.
18. See id. The Orientation Manual does not clearly define how one is placed on restricted
movement or the relationship between administrative detention/disciplinary segregation and re-
stricted movement.
19. Id. at 2. “Counseling services and programs are provided to benefit the inmate in success-
ful community reintegration.” Id. at 3. Education programs are available to eligible administra-
tive detention inmates and all inmates have access to religious materials and counseling. See id.
at 6-7.
20. See id. at 5.
21. See id.
Activities and programs available to all inmates include clinical services, counseling, a law library, health care, religious services, and volunteer services. Each law library is equipped with numerous reference manuals and useful legal information and each inmate working in the library is provided with the appropriate writing materials. Counselors are assigned to all inmates and make rounds to the cell units once a week. All inmates also have the right to access adequate health care including a medical staff, dentists, mental health professionals, and psychiatric services. A psychiatrist, psychologist, and social workers are on staff at Tamms, and community and institutional resources are available for victims of sexual assault and aggressors as well.

B. The Inmates

The second narration, based on letters written by the inmates collectively, tell a different story. Tamms prison is designed to break the spirit of the inmates and to punish inmates who try to assert the few rights owed them. The Department of Corrections rarely informs inmates of the purpose for their transfer to Tamms. The inmates complain that, since the opening of Tamms, there has been an arbitrary movement of particular inmates to justify Tamms' existence. For example, inmates with disciplinary records from more than ten years ago have been placed at Tamms presumably to begin filling the open cells at the seventy-three million-dollar project.

23. See id. at 3.
24. See id. at 4-5.
25. See id. at 7.
26. See id.
27. See id.
28. See generally Parsons, supra note 15, at 1 (criticizing the methodology of such facilities).
29. See, e.g., Inmates Letters, supra note 11 (revealing the frustration of the inmates regarding their lack of understanding for their transfer to Tamms). Tamms has been termed a supermax prison designed to hold over 500 of the state's toughest and most violent inmates. Hard Times Getting Harder, St. J. Reg., Feb. 4, 1998, at 1. However, many inmates have commented on their lack of disciplinary problems in the pre-transfer institutions. See Inmate Letters, supra note 11, at 19-22. "They have us under the same rule as a segregation inmate—yet they call us A-D inmates . . . . They are supposed to tell you why you are at Tamms." Id. at 9. For example, inmate DJ commented that the committee reviews disciplinary incidents that occurred up to 15 years ago. Id. at 20. Inmate WL wrote, "I came here April 1, 1998 and it's now June 7, 1998 and I still haven't been given a conclusory answer as to why I was sent here . . . . In Menard, I had filed grievances . . . ." Id.
30. "There is a natural tendency, once super-maximum security facilities are built, to fill them; standards for selecting prisoners for whom harsh conditions are warranted get diluted in practice." Human Rights Watch, supra note 1, at 11 (assessing conditions at a supermax facility in Indiana). See Inmate Letters, supra note 11. Ironically, the state spent tremendous amounts of money on the facility, but inmates have repeatedly complained about malfunctioning equipment. Id. For instance, as one inmate, SW, describes, "[t]his place isn't doing anything but going down
The facility punishes inmates by withholding many of the privileges they had at pre-transfer facilities.\textsuperscript{31} Personal visits are limited to a two-hour period once a month,\textsuperscript{32} showers are limited to once per week for disciplinary segregation and twice per week for administrative detention,\textsuperscript{33} and inmates are guaranteed only a minimum of one hour per week of exercise in the yard.\textsuperscript{34} The 10'x20' concrete box hardly serves its purpose as an exercise yard. High walls and a partially covered concrete and mesh ceiling provide the only view to the outside.\textsuperscript{35}

Aside from depriving the inmates of certain privileges, the prison officials engage in mental and physical torture tactics that serve to in-
timidate the inmates. Prison officials may respond to what they perceive as disruptive behavior with punishment, such as the cell extraction procedures. Several of the inmates are reluctant to speak out for fear of guard retribution. Another psychologically torturous condition includes the deprivation of human contact. Tamms creates a sensory-deprived atmosphere by prohibiting human contact between the inmates and other humans, except in instances when prison guards shackle and handcuff the inmates for movement outside of the cell. Inmates must also undergo strip searches every time they exit the pod, including twice for law library visits and at least once for non-contact personal visits.

Aside from the abuses, the system in place does not work. Many of the conditions that are designed to decrease violence in the prison system defeat the purpose of protecting the safety of staff, inmates, and the public. Tamms does not provide meaningful alternatives to “unlawful behavior” as suggested in the Orientation Manual rules and regulations. For example, the Department provides only inmates in particular levels of administrative detention with educational material and religious services on video but does not permit the inmates to take the ABE and GED tests. Furthermore, “law library services are inadequate at Tamms . . . [I]t takes a week or two before a prisoner can get assigned to the law library area and it takes about two

36. “The security staff here gets huge canisters of gas and other chemical agents that are made specifically for large crowds and outdoors, but they chose to use it indoors quite frequently here in Tamms.” Id. at 5. “There’ve been two instances in which I’m aware that a large German Shepherd was brought onto the wings for which I was told was supposed to serve as an ‘intimidation factor.’” Id. at 8.

37. Complaint at ¶ 31. A cell extraction is “a procedure in which members of a tactical team, armed with batons and protected with plastic shields, spray burning chemical substances in the inmate’s face and then forcibly ‘extract’ him from his cell.” Id.

38. See Inmate Letters, supra note 11, at 1.

39. See Parsons, supra note 15, at 1; Inmate Letters, supra note 11, at 6-7 (“I will no longer be able to hug my mother, my sister or my son . . . . One of the biggest, most simplest thing I took for granted was human contact.”). See also Tamms Orientation Manual, supra note 11, at 5 (describing the process for restricted movement outside of the inmate’s cell).

40. See Tamms Orientation Manual, supra note 11, at 5, 13-14; Inmate Letters, supra note 11, at 6-7, 13-14. Many of these strip searches seem to be conducted solely as a method to discourage inmates from using the only available resources that may keep them sane. Inmate Letters, supra note 11, at 6-7, 13-14. “This includes having to lift one’s genitals and spread the buttocks. As there’s never any contact with other prisoners the strip search policy can only be viewed as an attempt to degrade or humiliate the prisoner.” Inmate Letters, supra note 11, at 6-7.

41. See Tamms Orientation Manual, supra note 11, at 6-7.

42. These services are provided for administrative detention inmates at Levels two and three, but not for inmates at Level one or for disciplinary segregation inmates. See Tamms Orientation Manual, supra note 11, at 6, 18, 23-24; Interview with Jean MacLean Snyder, University of Chicago Professor of Law (1998). All books, newspapers, and magazines requested by inmates must be mailed by the publisher. See Inmate Letters, supra note 11, at 13.
weeks for the law librarian to respond to prisoners' requests for cases and forms.) The facility does not give the inmates an opportunity to "increase the activities available to them" through the Behavioral Level System. Instead, inmates develop psychiatric symptoms and aggressive behavior due to the monotony and the hopelessness of a sensory deprived life.

As a result of the monotony and hopelessness, some prisoners have smeared feces all over themselves, others have engaged in self-mutilation or have attempted suicide, while one inmate "removed a screw from his light switch cover and inserted it into his penis just to get out of his cell.

43. Inmate Letters, supra note 11, at 9. Inmates remark that:

There are no Northeastern Reporters, no Federal Reporters, no Federal Supplements, no Supreme Court Reporters, no Shepherds, no form books, no descriptive word indexes for the Illinois Digest, no descriptive word indexes for the Federal Practice Digest, no Illinois Digest Vol. 28, no Federal Practice Digest Vol. 60, no table of cases for the Illinois and Federal Practice digests, no Illinois Digest on Prisoners, no books have pocket parts . . . . [t]hey don't have any of the up-to-date laws and cases in the pocket parts of the books. So we're forced to use what the laws were in 1996 with our suits, which gives the attorney general an unfair advantage, and could end up costing someone their case in the future.

Id. at 9-10. This leaves one to wonder what does the library have?

44. See Tamms Orientation Manual, supra note 11, at 5. Keeping a clean cell is one condition that may allow an inmate to earn increased activities. However, the facility does not provide sufficient means for inmates to do so. See Eig, supra note 15, at 88-89. Inmate DJ observes, "[t]he guards, once a week, carry a bucket of sponges from cell to cell. That's supposed to serve as your broom, mop and toilet cleaner. The result is a lot of people living in dirty cells." Inmate Letters, supra note 11, at 4.

45. See Complaint at ¶ 29-30. Inmate BC descriptively portrays how the conditions at Tamms lead to psychological regression:

The community must understand the physical, emotional and psychological effects this type of incarceration has on prisoners. Physically prisoners' health is at risk. They are fed a low quality food; they are given in some cases two hours per week worth of exercise on a yard that they could barely breathe in fresh oxygen; they receive air and heat in their cells that is designed to cause discomfort in the winter and summer; and the medical treatment is reactionary. Emotionally prisoners are vacillating between the feelings of love and hate. They are made to feel that no one cares about them and their problems; to help facilitate these feelings, they are denied phone calls to their family, friends and community organizations; they are given visits once a month; their privates are visually violated on a regular basis; they are bound in chains whenever they leave their cages; and their grievances are all ways denied. Psychologically they are deteriorating. There is no value placed on their minds; there are no education programs; there is no connection between prisoners and the outside world via t.v., radio and up-to-date newspapers and magazines; prisoners spend hours in their cages fantasizing and day dreaming; sometimes they display drowsiness, inability to sit still, bizarre and aggressive behavior and sensitiveness to listening to other prisoners. Stated briefly, the community that these prisoners belong to will ultimately pay the price for this mistreatment of human minds. This is why our family, friends and community organizations must act.

Inmate Letters, supra note 11, at 15-16.

46. Complaint at ¶ 30. Mutilation is "the depriving a man of the use of any of those limbs which may be useful to him in fight . . . ." BLACK'S LAW DICTIONARY 1039 (7th ed. 1999).
of his cell." Inmate Letters, supra note 11, at 15.

See id. at 15-17. The inmates are not alone in their concern. Psychologists have expressed similar concerns after examining prisoners in solitary confinement. See Dr. Stuart Grassian, Psychiatric Effects of Solitary Confinement 2, 16 (date unknown) (unpublished manuscript, on file with the DePaul Law Review) [hereinafter Grassian, Psychiatric Effects] ("[Effects of solitary confinement] often prevents the inmate from successfully readjusting to the broader social environment of general population in prison and, perhaps more significantly, severely impairs the inmate’s capacity to reintegrate into the broader community upon release from imprisonment."); Craig Haney, Infamous Punishment: The Psychological Consequences of Isolation, NAT’L PRISON Proj. J. 3, 6-7 (Spring 1993) [hereinafter Haney, Infamous Punishment]; Tachiki, supra note 15, at 1128 n.94.

Complaint at ¶ 2. Leslie V. White, Inside the Alcatraz of the 90’s, CAL. LAW, Apr. 1992, at 96. See supra note 48 (discussing the possibility that supermax facilities increase prisoner violence and release more dangerous inmates into society).

See Sally Mann Romano, If the SHU Fits: Cruel and Unusual Punishment at California’s Pelican Bay State Prison, 45 EMORY L.J. 1089, 1093 (1996) (citing Blake McKelvey, American Prisons: A History of Good Intentions 3 (1977)).

See id.


See id.

See People v. Hahn, 83 N.E. 937, 938 (Ill. 1908) (allowing prisoners in solitary confinement to engage in forms of hard labor); Commonwealth v. Richardson, 55 N.E. 988, 989 (Mass. 1900) (recognizing a statutory limit of 30 days as the maximum amount of time a prisoner may spend in solitary confinement); State v. Peters, 4 N.E. 81, 87 (Ohio 1885) (permitting the transfer of mentally disturbed inmates from solitary confinement to an asylum); State v. Palmieri, 46 N.E.2d 318, 321 (Ohio Ct. App. 1938) (excluding solitary confinement from the terms of its prison sentences).
emerged. Then, as violence in prisons increased in the late twentieth century, the purposes of solitary confinement evolved into a purely disciplinary form of punishment. Prison officials view solitary confinement as an effective safety measure that segregates and isolates troublesome prisoners.

Even with the emergence of psychological reports suggesting the harmful effects of solitary confinement, prison officials and the courts continue to support its use to manage prison problems. Some proponents of solitary confinement justify its use by referring to psychological studies suggesting that previous studies overemphasized the damaging effects of solitary confinement. Others base their justifications on particular studies that find positive effects of solitary confinement. One such study indicated that solitary confinement was not more stressful than normal prison life. Furthermore, the study observed an increase in the inmates’ perceptual abilities. Another study found that isolated prisoners described solitary confinement as a more pleasant experience than living in the non-isolated control population. Many of these scientists, however, conducted these studies in the early 1980s, prior to the emergence of studies characterizing the devastating effects of solitary confinement in American prisons.

55. See Haney & Lynch, supra note 52, at 491-94.
57. See Haney & Lynch, supra note 52, at 491.
58. See id. at 491-93.
59. See L.H. Bukstel & P.R. Kilman, Psychological Effects of Imprisonment on Confined Individuals, 88 Psychol. Bull. 469, 470-72 (1980) (concluding that seven separate studies reported no major adverse responses to solitary confinement); D.H. Foster, Political Detention in South Africa: A Sociopsychological Perspective, 18 Int’l. J. Mental Health 21, 24 (1989) (dismissing an analogy between sensory deprivation and political detention as a result of inconsistencies in sensory deprivation studies); Peter Suedfeld et al., Reactions and Attributes of Prisoners in Solitary Confinement, 9 Crim. Just. & Behav. 303 (1982) (reporting no major adverse effects to solitary confinement); Richard H. Walters et al., Effect of Solitary Confinement on Prisoners, 19 Am. J. Psych. 771, 772 (1963) (suggesting that social isolation “does not result in mental deterioration or in increased susceptibility to social influence”).
60. See infra notes 61-63 and accompanying text.
62. See id. at 187.
63. See Walters et al., supra note 59, at 772. The author of the study conceded that the study, which was conducted for only four days and with volunteers as subjects, was not conclusive but only suggestive. Id.
64. See supra notes 59-61.
Since the days of personal observations by Charles Darwin to the current clinical research performed by psychologists such as Dr. Stuart Grassian and Dr. Craig Haney, researchers and observers have seen the horrible injustices of solitary confinement. American psychologists, however, did not begin to document the effects of solitary confinement as implemented in prison systems until the 1980s. Characteristic symptoms displayed by prisoners in solitary confinement include hallucinations, paranoia, and confusional psychosis; however, these symptoms are just the observable and known short-term symptoms. Clinical research is beginning to further delve into the more disturbing long-term effects of solitary confinement. This Part of the Comment addresses challenges to solitary confinement from scientists, while Parts III and IV examine challenges from the legal profession.

A. Concern for the Effects of Solitary Confinement in the Early Years

Prior to experiments performed by Stuart Grassian in the 1980s, the United States did not have a collection of clinical research on the impact of solitary confinement. However, beginning in the early 1830s, sources, such as Charles Darwin and Alexis de Tocqueville, provided information regarding the damaging effects of solitary confinement. Charles Darwin described inmates he saw in solitary confinement as:

dead to everything but torturing anxieties and horrible despair... The first man... answered... with a strange kind of pause... [he] fell into a strange stare as if he had forgotten something...

65. See infra note 75 and accompanying text.
66. Dr. Stuart Grassian has conducted several studies in American prisons and has testified in numerous state and federal courts regarding conditions-of-confinement. See infra notes 96-116 and accompanying text.
67. Dr. Craig Haney has conducted studies similar to Grassian and has written several articles on the psychological implications of solitary confinement. See infra notes 117-136 and accompanying text.
69. See Foster, supra note 59, at 23.
70. See infra notes 103-105 and accompanying text.
71. See infra notes 103-105 and accompanying text.
72. See Grassian, Psychiatric Effects, supra note 48, at 2, 16 (analogizing the long-term effects suffered by POW's to those suffered in solitary confinement); see also Shaun R. Whittaker, Counseling Torture Victims, 16 COUNSELING PSYCHOLOGIST 272, 273-74 (1988) (likening solitary confinement to torture and addressing the long-term effects of such torture).
73. See Grassian, Psychopathological Effects, supra note 68, at 1450.
74. See id. at 1450-51.
another] Why does he stare at his hands and pick the flesh open, . . .
and raise his eyes for an instant to those bare walls.75

In 1833, in a social commentary, Alexis de Tocqueville expressed con-
cern with the long-term effects of solitary confinement on the inmates,
as well as on society, when those inmates are released into the general
population.76 Then, in 1890, the Supreme Court in In re Medley77
agreed with Darwin and de Tocqueville when describing similar ill ef-
effects of solitary confinement.78 As medical literature arose to support
the occurrence of these effects,79 courts retracted from their con-
cerned view.80

During this same period, German concern over a large incidence of
prisoner psychotic disturbances spurred thirty-seven journal articles
characterizing symptoms characteristically seen in prisoners.81 The
German literature described a “hallucinatory, paranoid, confusional
psychosis” with symptoms typically including: (1) vivid visual, audi-
tory, tactile, and olfactory hallucinations; (2) dissociative episodes fol-
lowed by amnesia of that episode; (3) agitation and self-mutilation;
and (4) delusions of guard persecution.82 Even amidst these negative
responses, the United States remained steadfast to the Quaker philos-
ophy that solitary confinement worked to force prisoners to consider
the evil of their bad acts, to repent, and then to reform themselves.83

B. The Middle Years

As German studies and documented observations revealed the dis-
 turbing consequences of solitary confinement, psychologists in the
United States began to research the effects of sensory deprivation in
general. A study performed in the 1950s placed subjects in conditions
that drastically reduced contact with external stimuli.84 Characteristic

75. Id. at 1450.
76. See Haney, Infamous Punishment, supra note 48, at 7.
77. 134 U.S. 160 (1890).
78. Id. at 168 (describing the conditions of Walnut Street Penitentiary in Philadelphia in 1787).
See infra note 159 and accompanying text.
79. See infra notes 96-116, 117-149 and accompanying text.
80. See infra notes 319-334 and accompanying text.
81. See Grasiian, Psychopathological Effects, supra note 68, at 1450-51. Not all of the journal
authors specified which group of prisoners was observed, but in over half of the articles the
authors identified solitary confinement as the group researched. Id.
82. Id. (citing PAUL H. NITSCHIE & KARL WILLIAMS, THE HISTORY OF THE PRISON
PSYCHOSES (1913)).
83. See Romano, supra note 50, at 1093-94.
84. See Stuart Grassian & Nancy Friedman, Effects of Sensory Deprivation in Psychiatric Se-
clusion and Solitary Confinement, 8 INT'L J. L. & PSYCHIATRY 49, 51 (1986) (citing CHARLES A.
BROWNFIELD, ISOLATION: CLINICAL AND EXPERIMENTAL APPROACHES (1965); SENSORY DEPR-
IVATION, A SYMPOSIUM HELD AT HARVARD MEDICAL SCHOOL (PHILIP SOLOMON ET AL. eds,
symptoms developed including perceptual distortions and sensory illusions, vivid fantasies accompanied by hallucinations, derealization experiences, and hyper-reactivity to external stimuli. Subjects that did not tolerate these symptoms well further displayed "cognitive impairment . . . massive free-floating anxiety, extreme motor restlessness, emergence of primitive aggressive fantasies, often accompanied by fearful hallucinations." The more extreme cases included a "catatonic-like stupor with mutism." Seclusion appeared to work counterproductively with the patients.

C. The Current Status

The strongest evidence of the detrimental effects of solitary confinement emerge from studies performed in preparation for lawsuits challenging conditions of solitary confinement as violations of the Eighth Amendment's protection against cruel and unusual punishment. Dr. Stuart Grassian conducted studies in response to prison conditions at various institutions including the Massachusetts Correctional Institute at Walpole and the Pelican Bay State Prison in California, discussed in Part IV of the Comment. Dr. Craig Haney participated in studies for litigation against the Pelican Bay State Prison and provided integral facts and observations made in preparation for the case of Ruiz v.

1961)). The subjects were placed in light-proof, sound-proof rooms with cardboard tubes surrounding the arms and hands to reduce sensation. Id.

Hallucinations represent a 'breakdown' of the functioning of the organism in an incomplete (i.e. wrong or 'broken') state. . . . The sensory-deprived person hallucinates because this is fulfilling an important function for him; it is the mind's attempt to simulate the necessary sensory input data of which it is being deprived. Conceivably one of the main results of hallucinogenic drugs is to effect or at least to hasten this condition of normal input-deprivation.

85. Hallucinations

86. Derealization is "a feeling of altered reality that occurs often in schizophrenia and in some drug reactions." Webster's Ninth New Collegiate Dictionary 342 (1989).

87. See Grassian & Friedman, supra note 84, at 51 (citations omitted).

88. Id.

89. Id. Mutism is "the condition of being mute." Webster's Ninth New Collegiate Dictionary 783 (1989).

90. See Grassian & Friedman, supra note 84, at 50. "Since such isolation tends to promote fantasy, regression, and bodily illusions in normal subjects, it would seem to be contra-indicated for psychotic patients. . . . Sensory deprivation experiments support the growing feeling in modern psychiatry that seclusion is harmful to mental patients." Id. (quoting S. Freedman & M. Greenblatt, Studies in Human Isolation II: Hallucinations and Other Cognitive Findings, 11 U.S. Armed Forces Med. J. 1479, 1492 (1960)).

91. See infra notes 358-452 and accompanying text.
Johnson, also discussed in Part IV. Dr. Grassian has written about the psychological effects of solitary confinement, whereas Dr. Haney has written about the legal implications of the psychological effects of confinement.

1. Study Conducted at Walpole

Dr. Stuart Grassian conducted the first well-recognized American study on the effects of solitary confinement on prisoners at the Massachusetts Correctional Institute at Walpole. The solitary confinement block in this maximum-security facility housed sixty cells approximately 1.8mx2.7m in size, with each cell limited to a toilet, sink, bed, table, stool, and one sixty-watt light bulb providing artificial light. The cells with double doors had one inner barred door and one outer solid steel door with a small Plexiglas window, the only window in the cell. The prison officers prohibited personal belongings inside the inmate’s cell, including radios, television sets, and all reading materials, except a Bible.

Initially, numerous inmates described their experiences in solitary confinement with indifference. As the interviews progressed, however, Dr. Grassian found that the inmates’ earlier statements reflected a denial of the mind-altering conditions and gave way to troubling descriptions of mental torture. Dr. Grassian found “strikingly consistent” symptoms among the inmates he interviewed at Walpole. The symptoms included:

93. See infra notes 337-341 and accompanying text.
94. See, e.g., Grassian, Psychopathological Effects, supra note 68; Grassian & Friedman, supra note 84; Grassian, Psychiatric Effects, supra note 48.
95. See Haney & Lynch, supra note 52; Haney, Infamous Punishment, supra note 48.
96. See Grassian, Psychopathological Effects, supra note 68, at 1451. Grassian’s observations at Walpole resulted from a order mandating psychiatric evaluation of 15 inmate plaintiffs in a class action suit against the Massachusetts Department of Corrections for alleged Eighth Amendment violations relating to solitary confinement conditions. Id. Only 14 inmates were interviewed becaue the 15th was no longer in his cellblock at the time of the interviews. Id. All inmates were male, with a median age of 28 and a median time length in isolation of two months.
97. See id.
98. See id.
99. See id.
100. See id. Some inmate statements included, “[s]olitary doesn’t bother me” and “[s]ome of the guys can’t take it—not me.” Id.
101. Id. at 1452. Some inmates initially concealed their experiences because they feared that guards would discover the inmate’s weakness and torment the inmate. Id. These accounts coincide with one of the German observations, delusions of guard persecution. Id.
102. See Grassian, Psychopathological Effects, supra note 68, at 1452.
1) sensory disturbances: perceptual distortions and loss of perceptual constancy,\textsuperscript{103} in some cases without hallucinations; 2) ideas of reference and paranoid ideation short of overt delusions;\textsuperscript{104} 3) emergence of primitive aggressive fantasies, which remained egodystonic and with reality-testing preserved; 4) disturbances of memory and attention short of overt disorientation and confusional state; and 5) derealization experiences without massive dissociative regression.\textsuperscript{105}

Accounts of sensory exaggeration by eleven of the fourteen inmates included extreme annoyances such as the sound of rushing water through the pipes of the plumbing system, the smell of food, and the presence of a bee in an inmate's cell.\textsuperscript{106} Furthermore, seven inmates described perceptual experiences where the inmate believed that he heard or saw something, but then questioned whether the instance actually occurred.\textsuperscript{107}

For example, one inmate recalled, "I seem to see movements—real fast motions in front of me. Then seems like they're doing things behind your back—can't quite see them. Did someone just hit me? I dwell on it for hours."\textsuperscript{108} In eight instances, the anxiety resulting from solitary confinement caused recurrent physical conditions including rapid heartbeat, perspiration, shortness of breath, panic, trembling, and fear of imminent death.\textsuperscript{109} Statements made by inmates reflecting difficulties with thinking include: "I went to a standstill psychologically once—lapse of memory. I didn't talk for 15 days. . . . I think what I am saying is true—not sure;" "I can't concentrate, can't read. . . . Memory is going;" and "[g]ot to try to concentrate."\textsuperscript{110}

Some of the more disturbing symptoms observed by Dr. Grassian reflected six inmates' "fantasies of revenge, torture, and mutilation of the prison guards."\textsuperscript{111} Similarly disturbing were five reported episodes of a lack of impulse control with random violence, including cases of self-mutilation.\textsuperscript{112} The symptoms can be linked to the conditions of solitary confinement because during a period of relief all of

\textsuperscript{103} Constancy is "a steadfastness of mind under duress." \textit{WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY} 281 (1989).

\textsuperscript{104} Delusions are "a persistent false psychotic belief regarding the self or persons or objects outside the self." \textit{Id.} at 337.

\textsuperscript{105} Grassian, \textit{Psychopathological Effects}, \textit{supra} note 68, at 1453-54.

\textsuperscript{106} \textit{See id.} at 1452.

\textsuperscript{107} \textit{See id.}

\textsuperscript{108} \textit{Id.}

\textsuperscript{109} \textit{See id.} ("My heart pumps real fast. I feel like I don't get enough oxygen. Get frantic.").

\textsuperscript{110} \textit{Id.} at 1453.

\textsuperscript{111} Grassian, \textit{Psychopathological Effects}, \textit{supra} note 68, at 1453 ("[P]icture throwing a guard in lime—eats away at his skin, his flesh—torture him. Try to block it out, but I can't.").

\textsuperscript{112} \textit{See id.}
the prisoners reported a “very . . . rapid diminution” of the symptoms.\textsuperscript{113} Furthermore, more than a majority of these inmates denied ever experiencing such symptoms before the period of solitary confinement.\textsuperscript{114}

These observations are notably consistent with the previously discussed German studies.\textsuperscript{115} Dr. Grassian’s report has more impact, though, because he chose subjects irrespective of their psychiatric status, whereas the majority of the German studies focused on subjects predetermined to suffer from “gross psychotic symptoms.”\textsuperscript{116}

2. \textit{Study Conducted at Pelican Bay}

Drs. Grassian and Haney observed inmates in Security Housing Units ("SHU") at Pelican Bay State Prison in California.\textsuperscript{117} The conditions in the SHU resemble the Walpole cells,\textsuperscript{118} but also include isolating advance technology to further separate the inmates from sensory contact.\textsuperscript{119} Three locked doors separate the inmate from an armed control booth officer, isolating the inmate from other prisoners and from the natural light of the outdoors.\textsuperscript{120} Furthermore, the prison does not permit inmates to take educational or vocational classes or to work.\textsuperscript{121} SHU inmates are isolated for twenty-two and one-half hours a day and shackled in handcuffs and chains when outside of their cells, except when permitted to exercise.\textsuperscript{122} However, many inmates forgo the exercise privilege because security measures require a visual strip...

\textsuperscript{113} See \textit{id}.
\textsuperscript{114} See \textit{id} at 1452-53.
\textsuperscript{115} See \textit{id} at 1451-54.
\textsuperscript{116} Id. at 1453. Some of the German subjects were observed in hospitals or “insane departments” of prisons. \textit{id}.
\textsuperscript{117} See Haney, \textit{Infamous Punishment, supra} note 48, at 6. The description and purpose of Tamms closely resembles the conditions at, and purpose of, Pelican Bay. \textit{id} ("Pelican Bay, a prison that was designated as a place for the ‘worst of the worst’ even before the prisoners ever arrived.").
\textsuperscript{118} See Romano, \textit{supra} note 50, at 1101 ("Each concrete cell contains a concrete stool, concrete bed, concrete writing table, and a toilet and a sink made of heavy stainless steel.").
\textsuperscript{119} See Haney, \textit{Infamous Punishment, supra} note 48, at 3. The advanced technology includes video screens in a central control room that monitor inmates’ every movement and electronic cell doors that prevent human interaction between the prison guard and the inmate. \textit{id}.
\textsuperscript{120} Id. at 4.
\textsuperscript{121} Id.
\textsuperscript{122} See Romano, \textit{supra} note 50, at 1101-02. The inmates may exercise unshackled during the 90 minutes permitted outside their cell each day in a 28’x12’ area. \textit{id} at 1102-03. The exercise space, enclosed by a 20’ wall and a ceiling, is far cry from what the word “exercise space” connotes. See Haney, \textit{Infamous Punishment, supra} note 48, at 3. In \textit{Madrid v. Gomez}, United States District Court Chief Judge Thelton Henderson described inmates in these exercise cells as “hauntingly similar to that of caged felines pacing in a zoo.” 889 F. Supp. 1146, 1229 (N.D. Cal. 1995).
search of the naked inmate in front of the control booth officer and any other person in the area outside of the control booth. Therefore, to some, time spent outside of the cell is considered more degrading and torturous than remaining in the solitary confinement cells at Pelican Bay.

The symptoms Dr. Haney observed represent the destructive impact of solitary confinement. Many of the inmates interviewed by Dr. Haney displayed characteristics similar to those seen by Dr. Grassian at Walpole. Dr. Haney further suggested that many of the psychological consequences are predictable, but determining at what point in time these consequences may emerge is more difficult; as time goes on, however, the damaging effects begin to manifest. Dr. Haney noted that “many prisoners become entirely dependent upon the structure and routines of the institution for the control of their behavior.” As a result, prisoners lose the ability to either set limits for themselves or to initiate any kind of behavior. Social isolation, Dr. Haney recognized, can lead to social withdrawal. Social withdrawal alienates the prisoner from interaction and disorients them when in the presence of others.

As a result, “[s]ome prisoners act out as a way of getting a reaction from their environment” even though they realize that this type of conduct often invariably results in a cell extraction. Other prisoners “create their own sense of reality, one seemingly ‘crazy’ but easier to handle.”

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124. See id. “The destructive consequences can only be understood in terms of the profound importance of social contact and social context in providing an interpretive framework for all human experience. . . . Human identity formation occurs by virtue of social contact with others.”
125. See id. at 6. Haney recorded interviews with prisoners who displayed signs of depression, anxiety, paranoia, suicide, and self-mutilation. One prisoner expressed concerns that guards in his unit were putting poison in his food, while another claimed that he had been slicing on his arms just to see the blood flow. See supra notes 103-105 and accompanying text.
126. See Haney, Infamous Punishment, supra note 48, at 5. The inmates initially conceal many of these psychological consequences because the nature of prison life requires inmates to conceal weaknesses and to preserve “dignity and autonomy.” As a result, early signs of psychological disease will not be apparent to the “untrained or casual observers.”
127. Id.
128. See id. Some do not know how to handle even small amounts of freedom because they do not know how to act without the “totality of behavior restraints.”
129. See id. The prisoners had been prohibited from organizing their own lives for so long that it was difficult to concentrate or organize their thoughts coherently when given periods of freedom.
130. See id. “They move from being starved for social contact to being frightened by it.”
131. Id.
132. Haney, Infamous Punishment, supra note 48, at 5. The cell extraction procedure used at Pelican Bay is similar to that described at Tamms. See supra at n.6. Dr. Haney describes the procedure:
for them to tolerate." In a sense, then, the conditions-of-confinement, which are implemented to deter and punish certain types of conduct, actually increase the likelihood that those types of conduct and resulting punishment will continue. Dr. Haney noted that

the levels of deprivation are so profound, and the resulting frustration so immediate and overwhelming, that for some, this lesson is unlikely ever to be learned. The pattern can only be broken through drastic changes in the nature of the environment, changes that produce more habitable and less painful conditions-of-confinement.

These two cases exemplify the devastating effects of sensory deprived solitary confinement conditions. The earlier studies that suggested solitary confinement does not produce harmful symptoms, were conducted in environments that did not amount to the sensory deprivation seen at Walpole, Pelican Bay, or Tamms. For instance, the Walter's study was conducted using self-selected inmates who volunteered to spend four days in solitary confinement. The length of time spent in these conditions was minimal in comparison to the indeterminate time spent in studies conducted by Drs. Grassian and Haney. The voluntary nature of many of these studies hardly compares to the involuntary and harsh conditions seen at Walpole, Pelican Bay, and Tamms. Furthermore, earlier researchers failed to consider the possibility of long-term effects that may not surface until

The first member of the [five-man cell extraction] team is to enter the cell carrying a large shield, which is used to push the prisoner back into a corner of the cell; the second member [wields] a special cell extraction baton, which is used to strike the inmate on the upper part of his body so that he will raise his arms in self-protection; the inmate is pulled off balance by another whose job is to place leg irons around his ankles; once downed, a fourth member of the team places him in handcuffs; the fifth member stands ready to fire a taser gun or rifle that shoots wooden or rubber bullets at the resistant inmate.

Id.

133. Id. at 5.
134. See id.
135. See id.
136. Id.
137. See id. at 6; Grassian, Psychopathological Effects, supra note 68, at 1451.
138. See Walters et al., supra note 59, at 771.
139. See Grassian & Friedman, supra note 84, at 53.
140. But see Foster, supra note 59, at 24 (stating that involuntary detention by police does not match voluntary participation); Suedfeld et al., supra note 59, at 303 (finding no dramatic differences between convicts in solitary confinement involuntarily and convicts not in solitary confinement).
after the studies were conducted. Therefore, instead of providing contradictory evidence, these earlier reports emphasize the destructive impact of involuntary and indeterminate periods of sensory deprivation similar to that implemented in solitary confinement at Tamms.

Lastly, a Danish study performed during a fifteen month period from November 1991 to February 1993 at the Western Prison in Denmark supports Dr. Grassian and Dr. Haney's results. The study sought to ascertain the effect of solitary confinement on the mental health of inmates. The researchers compared the incidence of hospitalization from solitary confinement to the hospitalization among prisoners who had not been detained in solitary confinement. The conditions at Western Prison did not meet the same level of horror as the American prisons, but the prison did restrict the inmates from previously granted rights. The inmates resided in total segregation from other prisoners in 8m² cells that contained a bed, table, television, and radio. The study concluded that

[the relative risk of admission to the prison hospital for psychiatric morbidity] was higher and increased with time in [solitary confinement] compared to [not in solitary confinement] . . . indicating that individuals detained in [solitary confinement] are forced into an environment that increases their risk of hospitalization for psychiatric reasons.

Therefore, the study revealed that the longer the period of time an inmate remains in solitary confinement, the greater the risk that the inmate will need to seek psychiatric hospitalization.

142. But see Paul Gendreau & James Bonta, Solitary Confinement is Not Cruel and Unusual Punishment: People Sometimes Are!, 26 CANADIAN J. CRIM. 467 (1984) (recognizing that inmates considered solitary confinement cruel and unusual, not because of the sensory deprivation, but because of the psychological reactions to administrative inadequacies).
144. See supra notes 96-99, 117-123 and accompanying text.
145. See supra notes 96-99, 117-123 and accompanying text.
146. See supra notes 96-99, 117-123 and accompanying text.
148. See supra notes 96-99, 117-123 and accompanying text.
149. See id. After analyzing the results of the study, the authors called for an acceptable standard of law that either abolishes solitary confinement or drastically changes the current Danish conditions which would eradicate the effects ascertained in the study. Id. at 105-06.
III. The History of Supreme Court's Eighth Amendment Cases

The Eighth Amendment serves as a substantive safeguard against the infliction of cruel and unusual punishment in our prison systems. Courts look to precedents and to "evolving standards of decency" in their Eighth Amendment analysis. Throughout the twentieth century, the Court has developed a test that adapts to "evolving standards of decency" to analyze the constitutionality of different forms of punishment. The most recent Eighth Amendment law is found in Farmer v. Brennan, a 1994 Supreme Court case which clarified the two-prong test used in Eighth Amendment cases.

A. Providing the Framework for an Eighth Amendment Test

In Medley, a prisoner sentenced to death for the murder of his wife petitioned the Supreme Court for a writ of habeas corpus to relieve him from the imprisonment of solitary confinement while he awaited his execution. The prisoner argued that the 1889 Colorado statute under which he was sentenced was ex post facto because it repealed the previous applicable statute and went into effect after the prisoner committed the crime. The central issue in Medley did not focus on the constitutionality of particular conditions of solitary confinement, but experience demonstrated that there were serious objections to it. A considerable number of the prisoners fell, after even a short confinement, into a semifatuous condition, from which it was next to impossible to arouse them, and others became violently insane;

150. U.S. Const. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").
152. See infra notes 164-256 and accompanying text.
154. 134 U.S. 160 (1890).
155. Id. at 161.
156. Id.
157. The central holding in Medley recognized that the imposition of a sentence in solitary confinement is an additional punishment to imprisonment itself. Id. at 171. Therefore, an act that further imposed conditions of solitary confinement as punishment is ex post facto as to crimes committed before it went into effect. Id.
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others still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community. It became evident some changes must be made in the system . . . .

The Medley Court acknowledged that the Colorado statute instituted solitary confinement in a manner similar to the Walnut-Street Penitentiary. Although the Court did not question the constitutionality of these conditions, it did recognize that solitary confinement was a punishment additional to incarceration itself, and therefore imposed a greater punishment than the repealed statute.

The Supreme Court, in Weems v. United States, began to define the contours of Eighth Amendment protection. In this case, the legislature imposed a fine and at least twelve years of imprisonment of hard and painful labor for the falsification of a public and official document by a public figure. The Court invalidated the penalty because the punishment was disproportionate to the severity of the offense, and therefore was cruel punishment. In effect, the Court expanded Eighth Amendment analysis to include both the method and the length of execution.

In Trop v. Dulles, the Court addressed the constitutionality of the non-physical forms of cruel and unusual punishment. The Court recognized that the power to punish must “be exercised within the limits of civilized standards.” The Trop Court also recognized that the scope of the Eighth Amendment is not static. In determining that the use of denationalization as a punishment for desertion from the United States Army constituted cruel and unusual punishment, the Court interpreted the Eighth Amendment “from the evolving standards of decency that mark the progress of a maturing society.” The Court acknowledged the fact that denationalization is not a physical form of punishment. Surprisingly, the Court found that dena-

158. Id. at 168. The psychological reactions observed by the Court appear strikingly similar to the effects of sensory deprivation observed today in supermax prisons such as Tamms.
159. Id. at 168-69.
160. Medley, 134 U.S. at 171.
162. See id. at 358-59.
163. See id. at 381-82.
165. Id. at 100.
166. Id. at 99 (“The exact scope of the constitutional phrase ‘cruel and unusual’ has not been detailed by this Court.”).
167. See id. at 101.
168. Id.
169. See id. at 101-02.
tionalization is a “form of punishment more primitive than torture . . . [for it] subjects the individual to a fate of ever-increasing fear and distress.” The Court continued by hypothesizing the individual’s possible fears and the consequences of denationalization and then refuted the argument that these consequences do not violate the Eighth Amendment because they are not actual but only possible.

The Court provided the foundation for the Farmer test in Estelle v. Gamble. Estelle was the first Supreme Court case to apply the Eighth Amendment cruel and unusual punishment clause to deprivations not specifically part of a prisoner’s sentence. In Estelle, the plaintiff claimed that he received inadequate medical treatment from prison personnel after sustaining an injury. The Court cited previous Supreme Court and circuit court cases to establish that the government has an obligation to provide medical care for those it incarcerates. Failure to do so “may actually produce physical ‘torture or a lingering death,’” which the Eighth Amendment originally prohibited. The Court stated that “[t]he infliction of such unnecessary suffering is inconsistent with contemporary standards of decency as manifested in modern legislation . . . .” As a result, the Court held that “deliberate indifference to serious medical needs of prisoners constitutes the ‘unnecessary and wanton infliction of pain’ . . . .” However, an inadvertent failure to provide adequate medical care, or negligence on behalf of medical personnel, does not constitute a violation of the Eighth Amendment. The Court determined that the plaintiff did not state a claim for medical indifference because medical personnel saw him on seventeen occasions during a three-month period.

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171. See id. at 102 (“The threat makes the punishment obnoxious.”).
173. See Hudson v. McMillian, 503 U.S. 1, 10 (1992) (“Estelle, we noted, first applied the Cruel and Unusual Punishments Clause to deprivations that were not specifically part of the prisoner’s sentence.”).
174. Estelle, 429 U.S. at 98.
175. See id. at 103 (“These elementary principles establish the government’s obligation to provide medical care for those whom it is punishing by incarceration.”).
176. Id. (citation omitted).
177. In re Kemmler, 136 U.S. 436, 447 (1890) (“Punishments are cruel when they involve torture or a lingering death. . . .”).
178. Estelle, 429 U.S. at 103-04.
179. Id. at 104.
180. See id. at 105-06.
181. See id. at 107.
In *Hutto v. Finney*, the Supreme Court established that conditions-of-confinement may constitute an Eighth Amendment violation. In *Hutto*, the Court upheld the district court's determination that the conditions of solitary confinement in the Arkansas penal system constituted cruel and unusual punishment under the Eighth Amendment. The Court restated the district court finding that solitary confinement "is not necessarily unconstitutional, but it may be depending on the duration of the confinement and conditions thereof. . . . A filthy, overcrowded cell and a diet of 'grue' might be tolerable for a few days and intolerably cruel for weeks or months." In this case, the Court looked at the conditions of isolation as a whole, the inmates' diet, the overcrowding, the violence, the vandalized cells, and the lack of care on the part of the prison personnel to uphold the finding that the isolation cells violated the Eighth Amendment. Furthermore, in this case, some of the inmates had infectious diseases; the Court held that the likely harm that these conditions pose violated the Eighth Amendment, even though the possible infection might not affect all those exposed.

Then, in 1981, the Court in *Rhodes v. Chapman* considered particular conditions-of-confinement that may constitute cruel and unusual punishment. The plaintiff in *Rhodes* claimed that double celling was an Eighth Amendment violation. To determine whether the overcrowding constituted a violation, the Court looked to contemporary values. The Court interpreted *Estelle* as having adopted "objective indicia" derived from history, state legislative action, and sentencing by juries, in assessing "evolving standards of decency." Furthermore, the Court adopted a "totality of conditions" approach announcing that "[c]onditions . . . alone or in combination, may deprive inmates of the minimal civilized measure of life's necessities." The *Rhodes* Court, however, noted that the Constitution does not mandate comfortable prisons, and therefore, provided great deference to the legislature and prison officials in allowing them to determine

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183. See id. at 685. "Confinement in a prison or in an isolation cell is a form of punishment subject to scrutiny under Eighth Amendment standards." Id.
184. Id. at 685-87 (citation omitted).
185. See id. at 687.
186. See id. at 682.
188. See id. at 345.
189. See id. at 339.
190. Id. at 346-47.
191. Id. at 347.
and implement effective measures of prison reform. The Court noted that double ceiling was necessary because of an unanticipated increase in prison population, and found that it did not “lead to deprivations of essential food, medical care,” or sanitation, and it did not increase violence among the inmates. As a result, the Court found that the remaining complaints of limited job and educational opportunities did not inflict unnecessary or wanton pain and did not create conditions grossly disproportionate to the proscribed punishment.

In Whitley v. Albers, the plaintiff claimed that prison officials subjected him to cruel and unusual punishment by shooting him during their attempt to overcome a prison riot. The Court recognized the principle set forth in Estelle and Rhodes establishing that inadvertence or error in good faith fails to rise to an Eighth Amendment violation. Rather, “[a]fter incarceration, only the ‘unnecessary and wanton infliction of pain’ . . . constitutes cruel and unusual punishment . . . .” The Court applied a higher standard for wantonness which included only actions committed “maliciously and sadistically for the very purpose of causing harm.” The subjective standard applied in Whitley is harder to prove than the deliberate indifference standard articulated in Estelle or the lack of a subjective standard in Rhodes because the standard for a prison official’s use of force cannot be established without “balancing competing institutional concerns for the safety of prison staff or other inmates.” On the other hand, “the

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192. See id. at 349.

193. Rhodes, 452 U.S. at 348. However, the Court determined that double ceiling was not per se cruel and unusual punishment. Id.

194. See id. at 348-49.


196. See id. at 314.

197. See id. at 319 (“[I]nadvertence or error in good faith, that fails to characterize the conduct prohibited by the Cruel and Unusual Punishments Clause, whether that conduct occurs in connection with establishing conditions of confinement, supplying medical needs, or restoring official control over a tumultuous cellblock.”).

198. Id. (citations omitted).

199. Id. at 320-21.

200. Id.
State's responsibility to attend to the medical needs of prisoners does not ordinarily clash with other equally important government responsibilities,"²⁰¹ and therefore, in that context, deliberate indifference would constitute wantonness.

Factors indicating actions committed "maliciously and sadistically" include the need for the use of force, the relationship between the need for force and the amount of force used, the extent of the injury inflicted, and any efforts made to diminish the severity of forceful action.²⁰² The Court determined that the prison officials' use of force was necessary because "an officer's safety was in question and . . . an inmate was armed and dangerous."²⁰³ Furthermore, the Court upheld the decision because a warning shot was given and the order was to shoot low, and therefore the action was not wanton.²⁰⁴ As a result, the Court granted prison officials wide latitude in enforcing safety in their institutions.

The Court in Wilson v. Seiter²⁰⁵ clarified the ambiguity regarding the need for a subjective intent in conditions-of-confinement cases. In Wilson, the plaintiff's complaint alleged generally poor prison conditions including overcrowding, excessive noise, inadequate heating and cooling, improper ventilation, unsanitary restrooms and dining facilities, and housing with mentally and physically ill inmates.²⁰⁶ The Court instructed that pains inflicted outside of the punishment established by statute or the sentencing judge constitute cruel and unusual punishment only when some mental element can be attributed to the inflicting officer.²⁰⁷ The Court held that, in cases challenging conditions-of-confinement that are not formally imposed as a sentence, the standard for wantonness is one of deliberate indifference, the same standard applied in cases regarding inadequate medical treatment.²⁰⁸

The Court also addressed the objective portion of the Eighth Amendment test requiring a sufficiently serious deprivation. Similar to the Rhodes requirement, the inmate must be denied the "minimal civilized measure of life's necessities" to meet the objective compo-

²⁰¹ Whitley, 475 U.S. at 320-21.
²⁰² See id. at 321.
²⁰³ Id. at 323 (citations omitted).
²⁰⁴ See id. at 325.
²⁰⁶ See id. at 326.
²⁰⁷ See id. at 300. Punishment is a deliberate act intended to chastise or deter. See Duckworth v. Franzen, 780 F.2d 645, 652 (7th Cir. 1985).
²⁰⁸ See Wilson, 501 U.S. at 303.
ment. However, Justice Scalia narrowly interpreted the *Rhodes* Court’s use of the “totality of conditions” approach:

Some 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 . . . for example, a low cell temperature at night combined with a failure to issue blankets. . . . Nothing 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. . . . [The prisoner must show a deprivation of] an identifiable human need such as food, warmth, or exercise.

In this decision, the Court basically rejected the “totality of conditions” approach, thereby limiting the amount of plausible claims that fall under Eighth Amendment protection.

The Court in *Helling v. McKinney* summarized precedents to support its decision to grant Eighth Amendment protection against sufficiently imminent dangers. The plaintiff in *Helling* alleged that compelled exposure to harmful chemicals in tobacco smoke in the prison environment posed an unreasonable risk to his health, and therefore violated the Eighth Amendment. The Court recognized that “a remedy for unsafe conditions need not await a tragic event.” The Court cited two Court of Appeals decisions granting Eighth Amendment relief to inmates under a threat to personal safety from exposed electrical wiring, deficient firefighting measures, and the intermingling of inmates with serious contagious diseases and to inmates threatened by inmate assaults. The Court noted that “the Eighth Amendment protects against sufficiently imminent dangers as well as current unnecessary and wanton infliction of pain and suffering . . . .” Therefore, the Court held that the plaintiff stated a cause of action under the Eighth Amendment. However, the Court required the plaintiff, on remand, to provide “more than a scientific and statistical inquiry into the seriousness of the potential harm and the

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209. *Id.* at 304.
210. *Id.* at 304-05.
213. *See id.* at 33-34.
214. *See id.* at 31.
215. *Id.* at 33.
216. *See id.* at 33-34 (citing Ramos v. Lamm, 639 F.2d 559 (10th Cir. 1980); Gates v. Collier, 501 F.2d 1291 (5th Cir. 1974)).
217. *Helling*, 509 U.S. at 34.
218. *See id.* at 35.
likelihood that such injury to health will actually be caused by exposure . . . .” The Court instructed the trial court “to assess whether society considers the risk that the prisoner complains of to be so grave that it violates contemporary standards of decency to expose anyone unwillingly to such a risk.” However, the Court did not instruct the lower court on how to make this determination.

B. Farmer v. Brennan

1. Facts

Dee Farmer, a biologically male transsexual inmate was placed in the federal prison system with male inmates. Farmer displayed feminine characteristics, underwent estrogen therapy, received breast implants, and unsuccessfully attempted testicle-removal surgery. Federal prisons place preoperative transsexuals in prison populations with those of similar biological sex. Farmer was segregated in at least one penitentiary for her own safety and at several other penitentiaries for disciplinary reasons.

On one occasion, the Federal Correctional Institute in Oxford, Wisconsin, transferred Farmer to the United States Penitentiary in Terre Haute, Indiana, for disciplinary reasons. At the Terre Haute penitentiary, Farmer was beaten and raped by a male inmate in her cell.

Prior to the rape, Farmer did not express concern for her safety to any prison officials. However, Farmer reported the incident a week later and, without counsel, filed a complaint alleging that the defend-

219. Id. at 36.
220. Id.
221. A transsexual is “one who has ‘[a] rare psychiatric disorder in which a person feels persistently uncomfortable about his or her anatomical sex,’ and who typically seeks medical treatment, including hormonal therapy and surgery, to bring about a permanent sex change.” Farmer v. Brennan, 511 U.S. 825, 829 (1994) (quoting AMERICAN MEDICAL ASSOCIATION, ENCYCLOPEDIA OF MEDICINE 1006 (1989)).
222. See id.
223. See id. Farmer continued her hormonal treatment while in prison by taking smuggled drugs and continued to dress in a feminine manner. Id.
224. Farmer was considered a preoperative transsexual because the testicle-removal surgery was unsuccessful. Id. The basis of the method for separation ignores the fact that the transsexual emotionally and psychologically feels and acts as a member of the opposite sex. Id. The only male characteristic retained by Dee Farmer was hidden, particularly in relation to the many female characteristics that were obvious. See id.
225. See id. at 830.
226. See id. In essence, the transfer removed Farmer from the less dangerous correctional facility to a higher security penitentiary “that houses more troublesome prisoners.” Id.
227. See Farmer, 511 U.S. at 830.
228. See id. at 832.
ant prison officials violated her Eighth Amendment right by their “deliberately indifferent failure to protect petitioner’s safety.” Farmer alleged that the prison officials

either transferred [Farmer] to USP-Terre Haute or placed [her] in its general population despite knowledge that the penitentiary had a violent environment and a history of inmate assaults, and despite knowledge that [Farmer], as a transsexual who “projects feminine characteristics,” would be particularly vulnerable to sexual assault by some USP-Terre Haute inmates.

Farmer sought compensatory and punitive damages. She also requested an injunction to remove her from Terre Haute and place her in a correctional facility with a prohibition from transferring her to any other penitentiary.

The District Court for the Western District of Wisconsin granted summary judgment to prison officials declaring that the prison officials did not have “actual knowledge” of a potential danger because Farmer never expressed to the defendants a concern for her safety. Therefore, they had not been deliberately indifferent to Farmer’s safety. The Seventh Circuit summarily affirmed and the Supreme Court granted certiorari because the circuits had implemented inconsistent objective and subjective tests for “deliberate indifference.”

2. The Opinion

The Supreme Court recognized that the Eighth Amendment imposes a duty on prison officials to provide humane conditions-of-confinement. These conditions include ensuring that inmates receive adequate food, clothing, shelter, and medical care, and that prison of-

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229. The defendants included the Warden of USP-Terre Haute and the Director of the Bureau of Prisons, the Warden of the FCI-Oxford and a case manager there, and the Director of the Bureau of Prisons North Central Region Office and an official in that office. Id. at 830.
230. Id. at 831.
231. Id. at 830-31.
232. See id. at 831.
233. See Farmer, 511 U.S. at 831.
234. See id. at 831-32.
235. Id. at 831. The District Court stated that the Court would find a violation of the Eighth Amendment only if prison officials were “reckless in a criminal sense,” or as defined, possessed “actual knowledge” of a potential danger. Id.
236. See id. at 832. No opinion was written.
237. Id. In McGill v. Duckworth, the Seventh Circuit standard required a “subjective standard of recklessness.” 944 F.2d 344, 348 (7th Cir. 1991). However, in Young v. Quinlan, the Third Circuit found that “a prison official is deliberately indifferent when he knows or should have known of a sufficiently serious danger to an inmate.” 960 F.2d 351, 360-61 (3d Cir. 1992).
238. Farmer, 511 U.S. at 832.
ficials "take reasonable measures to guarantee the safety of the in-
mates." However, not every injury suffered by one inmate caused
by another translates into a constitutional violation. A constitu-
tional violation arises when the injury meets a two-prong test. First,
the injury alleged must be "sufficiently serious," and second, the
prison official must have a "sufficiently culpable state of mind."
The requisite state of mind is one of "deliberate indifference" to the
inmate's health or safety. For a claim based on a failure to prevent
harm, the inmate must show that he is imprisoned under conditions
creating a substantial risk of serious harm. The Court in Farmer
adopted this two-prong test from Wilson v. Seiter but recognized that
the Court had not clearly defined "deliberate indifference."

In analyzing Farmer's claim, the Supreme Court explained the
meaning of "deliberate indifference." The Court adopted and im-
posed a standard similar to the subjective recklessness standard of
criminal law. In order for Farmer, or any other federal inmate, to
assert an Eighth Amendment claim for denying an inmate humane
conditions-of-confinement, the inmate must show that the official was
aware of and disregarded an excessive risk to the inmate's health and
safety. A prison official will be held liable for denying humane con-
ditions-of-confinement under the Eighth Amendment only if the official
knows that an inmate faces an excessive risk and disregards that

239. Id. (citation omitted). In particular, the Court assumed that prison officials have a duty
to protect inmates from the violence of other inmates. Id. at 833. The Court realized that being
subject to violent assaults in prison is not "part of the penalty that criminal offenders pay for
their offenses against society." Id. at 834 (quoting Rhodes, 452 U.S. 337, 347 (1981)). Allowing
beatings or rape does not serve any legitimate penological purpose and does not conform to
"evolving standards of decency." Id. at 833 (citations omitted).
240. See id. at 834.
241. See id.
242. Id. (quoting Wilson, 501 U.S. 294, 298 (1991)). "[The] prison official's act or omission
must result in the denial of 'the minimal civilized measure of life's necessities.'" Id. (quoting
Rhodes, 452 U.S. 337, 345 (1981)).
243. Id. at 834 (quoting Wilson, 501 U.S. 294, 297 (1991)).
244. See Farmer, 511 U.S. at 834 (quoting Wilson, 501 U.S. at 302-03).
245. See id. at 834.
246. Id. at 834-47.
247. Id.
248. See id. at 837-38.
249. See id. at 837. However, a prison official's failure to alleviate a significant risk that was
obvious but not perceived does not fall within this definition of "deliberate indifference." Id. at
838. Therefore, the Court's interpretation is a subjective standard as previously applied in Wil-
son and not the objective standard adopted by some of the federal circuits. See Young v. Quin-
lan, 960 F.2d 351, 360-61 (3d Cir. 1992); Cortes-Quinones v. Jimenez-Nettleship, 842 F.2d 556,
560 (1st Cir. 1988); Morgan v. District of Columbia, 824 F.2d 1049, 1057-58 (D.C. Cir. 1987) (all
applying an objective standard of deliberate indifference).
risk by failing to take reasonable measures to abate it.\textsuperscript{250} In defining the standard, the Court distinguished "inhumane conditions" from "cruel and unusual punishment." The Eighth Amendment protects inmates from the latter and not the former.\textsuperscript{251} Prison conditions are not considered a form of punishment until an inmate can establish that the prison official intended the condition to be a form of punishment.\textsuperscript{252} Therefore, a prison official who fails to notice and alleviate an obvious and significant risk cannot be liable for infliction of "cruel and unusual punishment."\textsuperscript{253} When the Supreme Court applied this standard to Farmer's case, the Court determined that the district court may have placed too much weight on Farmer's failure to notify prison officials of a risk of harm.\textsuperscript{254} The failure to give advance notice of possible harm is not dispositive of deliberate indifference.\textsuperscript{255} Therefore, the Supreme Court remanded the case to the district court.\textsuperscript{256}

The Supreme Court cases discussed in this Part of the Comment addressed a range of inmate complaints including medical indifference, failure-to-protect, excessive use of force, general conditions-of-confinement, and imminent dangers. Part IV demonstrates how courts have applied the Farmer standard to each of the inmate complaints just listed.

**IV. The Farmer Standard Applied to Conditions of Solitary Confinement**

Conditions-of-confinement cases alleging violations of the Eighth Amendment proscription from "cruel and unusual punishment" address prison official's medical indifference, failure-to-protect, and excessive use of force, as well as inhumane conditions-of-confinement, including both physical conditions and psychological effects. However, most of the conditions-of-confinement cases address physical conditions rather than the psychological effects.\textsuperscript{257} As a result, the courts have set some basic standards for physical conditions of solitary confinement, as well as for claims of medical indifference, failure-to-protect, and excessive use of force. The courts require prison officials to provide inmates with adequate food, clothing, shelter, medical care,

\textsuperscript{250} See Farmer, 511 U.S. at 847.
\textsuperscript{251} See id. at 837.
\textsuperscript{252} See id. at 839-40.
\textsuperscript{253} Id. at 838.
\textsuperscript{254} See id. at 849.
\textsuperscript{255} See id. at 849 n.10.
\textsuperscript{256} See Farmer, 511 U.S. at 851.
\textsuperscript{257} See infra notes 263-357 and accompanying text.
and a reasonably safe environment.\textsuperscript{258} These guidelines, however, scarcely protect inmates in solitary confinement from the psychologically "inhumane conditions of confinement."\textsuperscript{259} The following cases address the standards for medical indifference, failure-to-protect,\textsuperscript{260} and excessive use of force claims, then the standards for physical conditions-of-confinement,\textsuperscript{261} and lastly the standards, or lack thereof, for psychological effects of conditions-of-confinement.\textsuperscript{262}

A. Farmer Applied to Claims of Medical Indifference, Failure-to-Protect, and Excessive Use of Force

1. The Objective Prong

The Supreme Court has set particular objective standards for levels of adequate medical care and the safety of inmates. For instance, courts require prison officials to provide inmates minimum levels of medical care, but an inadvertent failure to provide adequate medical care, or negligence on behalf of medical personnel, does not constitute a violation of the Eighth Amendment.\textsuperscript{263} In \textit{Whitley v. Albers}, the Court acknowledged that the Eighth Amendment prohibits "malicious and sadistic infliction of pain" and punishments that are grossly disproportional to the severity of the crime.\textsuperscript{264} However, courts have permitted prison officials' use of mace in situations where inmates pose a threat to prison officials.\textsuperscript{265} Furthermore, courts are required

\begin{footnotes}
\footnotetext{259}{See Bryan B. Walton, \textit{Eighth Amendment and Psychological Implications of Solitary Confinement}, 21 LAW & PSYCHOL. REV. 271 (1997) (assessing the difficulties in meeting Eighth Amendment standards); see also Haney & Lynch, supra note 52, at 541 (discussing psychological implications of solitary confinement, Eighth Amendment law, and possible ways to protect inmates from the harmful effects of solitary confinement).}
\footnotetext{260}{Failure-to-protect claims are made in instances "where prison officials either fail to protect an inmate from a specific threat of violence or allow a stream of violence pervade the institution." Jeffrey M. Lipman, \textit{Eighth Amendment and Deliberate Indifference Standard for Prisoners: Eighth Circuit Outlook}, 31 CREIGHTON L. REV. 435, 442-44 (1998).}
\footnotetext{261}{Physical conditions-of-confinement include tangible components of imprisonment, such as the size of the cell, the cleanliness of the cell, food, clothing, and exercise privileges.}
\footnotetext{262}{Psychological effects result from the physical conditions-of-confinement as well as intangible components that are not readily visible, including the amount of sensory stimulation, the availability of meaningful activity, the amount and quality of permissible privileges, and treatment from prison officials.}
\footnotetext{263}{Estelle v. Gamble, 429 U.S. 97, 103-06 (1976).}
\footnotetext{264}{475 U.S. 312, 320-21 (1986).}
\footnotetext{265}{See Bailey v. Turner, 736 F.2d 963, 969-70 (4th Cir. 1984) (holding that the use of mace is not per se unconstitutional, but courts must look to the reasons for use of gas and the amount used); Soto v. Dickey, 744 F.2d 1260, 1270 (7th Cir. 1984) (using mace reasonably to calm agitated inmates does not constitute cruel and unusual punishment even when the inmate is confined in his cell). But see Williams v. Benjamin, 77 F.3d 756, 770 (4th Cir. 1996) (remanding to}
\end{footnotes}
to insure that prison officials "take reasonable measures to guarantee
the safety of the inmates." Several courts, though, have decided
that sexual abuse by prison guards, which may be the basis for a tort
action, may not constitute "cruel and unusual punishment" until the
episodes are considered "severe or repetitive."

2. The Subjective Prong

Inmates may successfully allege the second prong requiring deliber-
ate indifference by pointing to the official's failure to follow prison
guidelines or to circumstantial evidence regarding the prison condi-
tions. For example, to ascertain a prison official's state of mind in
failure-to-protect cases, courts look at the frequency of violence
among inmates, whether constant threats of violence are present, and
whether there is evidence that inmates live in fear of assaults from
other inmates. Courts may also consider repeated requests by an
inmate to be moved from his cell. However, past instances of vio-
lence, occurring generally or in isolated instances, do not establish
that officers were aware of a risk to a specific inmate. However,
one can prove a failure-to-protect claim "when the official is present
at the time of an assault and fails to intervene or otherwise act to end
the assault," unless the failure to respond was due to a threat to the

267. See Boddie v. Schnieder, 105 F.3d 857, 861 (2d Cir. 1997) (suggesting that four incidents
where a prison official made verbal and physical passes occurring within two and one-half weeks
were not cumulatively extreme); Holton v. Moore, 1997 WL 642530, at *2 (N.D.N.Y. 1997)
(holding that two incidents of a prison official touching an inmate's anus and penis during the
course of a search were not sufficiently serious to state an Eighth Amendment violation). But see
Giron v. Corrections Corp. of Am., 14 F. Supp. 2d 1252, 1255 (D.C.N.M. 1998) (stating that
rape by a prison guard satisfied the "sufficiently serious" first prong of the Eighth Amendment
analysis) (citing Barney v. Pulsipher, 143 F.3d 1299, 1308-09 (10th Cir. 1998)).
268. See Allen v. Sakai, 48 F.3d 1082, 1084 (9th Cir. 1998) (establishing the liability of prison
officials when they knew prison goals were to provide five hours of exercise per week).
269. See infra notes 270-271 and accompanying text.
270. LaMarca v. Turner, 995 F.2d 1526, 1534-38 (11th Cir. 1993); Ramos v. Lamm, 639 F.2d
559, 574 (10th Cir. 1980); Madrid v. Gomez, 889 F. Supp. 1146, 1268 (N.D. Cal. 1995); Fisher v.
Koehler, 692 F. Supp. 1519, 1527-30 (S.D.N.Y. 1988). The presence and frequency of these fac-
tors can be gathered through lay testimony and/or statistics. Madrid, supra, at 1268.
271. See Haley v. Gross, 86 F.3d 630, 642 (7th Cir. 1996) (recognizing that the test for deliber-
ate indifference was met when a prison official spoke to the inmate approximately four to seven
times about problems with the inmate's cellmate, including numerous altercations between the
two cellmates).
272. Giron, 14 F. Supp. 2d at 1256-57. See also Andrews v. Siegel, 929 F.2d 1326, 1330 (8th
Cir. 1991) (holding that a pervasive risk of harm may not ordinarily be shown by pointing to a
single or isolated incidents).
273. Williams v. Mueller, 13 F.3d 1214, 1216 (8th Cir. 1994).
official’s or another’s safety. Similar to failure-to-protect cases, a substantial risk cannot be established in claims of inadequate medical care by pointing to isolated incidents. Furthermore, inadvertent failure or negligence in diagnosis or treatment does not rise to the level of deliberate indifference. However, “a physician may be deliberately indifferent if he or she consciously chooses ‘an easier and less efficacious’ treatment plan.”

The subjective standard increases to an almost unascertainable degree in excessive use of force cases. When inmates claim excessive use of force by prison officials, the inmate must prove that the prison official had “maliciously and sadistically” applied the force. The Court places a higher standard on claims of excessive use of force in order to counterbalance the institutional concerns for the safety of prison staff and other inmates. As a result, prison officials can usually “hide” behind the rationale of protecting prison safety concerns.

B. Farmer Applied to Physical Conditions of Solitary Confinement

1. The Objective Prong

As demonstrated by Farmer v. Brennan, inmates face a difficult burden in establishing both prongs of the Eighth Amendment test. The

274. Williams v. Willits, 853 F.2d 586, 591 (8th Cir. 1988) (finding no Eighth Amendment violation where the prison guard believed that an attempt to break up a fight between two inmates would place himself and others in danger).

275. Madrid, 889 F. Supp. at 1257; Fisher, 692 F. Supp. at 1560. See Todaro v. Ward, 565 F.2d 48, 52 (2d Cir. 1977) (“[W]hile a single instance of medical care denied or delayed, viewed in isolation, may appear to be the product of mere negligence, repeated examples of such treatment bespeak a deliberate indifference by prison authorities.”).


277. Chance v. Armstrong, 143 F.3d 698 (2d Cir. 1998) (suggesting that a doctor choosing an unnecessary course of treatment based on monetary incentives would demonstrate a culpable state of mind).


279. See supra notes 195-204 and accompanying text.

280. See supra notes 195-204 and accompanying text. “In this setting, a deliberate indifference standard does not adequately capture the importance of such competing obligations, or convey the appropriate hesitancy to critique in hindsight decisions necessarily made in haste, under pressure, and frequently without the luxury of a second chance.” Whitley v. Alvers, 475 U.S. 312, 320 (1986).

281. See Luise, supra note 56, at 303. But see Williams v. Benjamin, 77 F.3d 756 (4th Cir. 1996) (rejecting the state’s argument that prison safety justifies atypical punishment and restraint).
courts, however, have set general guidelines for assessing conditions that may constitute a "sufficiently serious" injury. The first guideline requires courts to look to more than just empirical evidence of the seriousness of the potential harm and the likelihood that such injury is caused by solitary confinement conditions. The court must look more generally to "evolving standards of decency." For instance, the "deprivation of a single, identifiable human need," such as the denial of outdoor exercise, meets this objective element. However, courts have limited the application of this standard. For instance, a prison official may deny outdoor exercise to an inmate in solitary confinement if the inmate can engage in some form of exercise in his cell. Another court further limited the standard necessary for clothing by allowing prison officials to place inmates in solitary confinement either naked or with only their underwear.

Even though the first prong, alleging a "sufficiently serious" injury, requires an objective test, the courts have routinely found that particular conditions of solitary confinement do not reach this level of injury. Some conditions that have been constitutionally upheld include seemingly insignificant claims to the average observer, such as the general concept of solitary confinement, limited exercise periods, restricted access to the telephone, limited shower opportunities, and other conditions. Cases decided before Farmer applied a similar objective test for a sufficiently serious injury and may be addressed herein.

285. See Toussaint v. Yockey, 722 F.2d 1490, 1493 (9th Cir. 1984) (suggesting that the denial of outdoor exercise violates the Eighth Amendment where prisoners lived in isolated segregation for over a year); Spain v. Procunier, 600 F.2d 189, 199-200 (9th Cir. 1979) (suggesting that the denial of outdoor exercise violates the Eighth Amendment where prisoners lived in continuous isolated segregation, 24 hours a day, in their cell).
286. See Thomas v. Ramos, 130 F.3d 754, 762 (7th Cir. 1997).
287. See Porth v. Farmer, 934 F.2d 154, 155 (8th Cir. 1991).
289. See Leslie v. Doyle, 125 F.3d 1132, 1134-35 (7th Cir. 1997) (determining that 15 days in disciplinary segregation was not sufficiently serious to rise to an Eighth Amendment violation, even if the inmate had not committed the charged offense); Torres v. Commissioner of Correction, 695 N.E.2d 200, 204 (Mass. 1998) (holding that uncomfortable conditions of disciplinary confinement in a 7'x12' isolated cell do not pose a substantial risk of serious harm when five hours of outdoor exercise are permitted per week).
290. See Wolff v. Deeds, No. 91-16641, 1993 WL 188365, at *2 (9th Cir. June 2, 1993) (restricting exercise to one hour a day indoors for security reasons does not violate the Eighth Amendment); Hayward v. Procunier, 629 F.2d 599, 603 (9th Cir. 1980) (denying exercise for short periods of time based on security concerns does not violate the Eighth Amendment); Douglas v. DeBruyn, 936 F. Supp. 572, 578 (S.D. Ind. 1996) (recognizing no constitutional right to a specific form of recreation).
ties, the courts, though, have also upheld more disturbing conditions. The Ninth Circuit upheld conditions that lacked vocational and educational programs and that fostered idleness. The Supreme Court, in Rhodes v. Chapman, held that overcrowding, in combination with the absence of work and educational opportunities does not impose cruel and unusual punishment. Furthermore, other courts have determined that the presence of unsanitary conditions, such as raw sewage, in an inmate’s cell was not so inhumane as to be declared unconstitutional. One court held that deprivations of toilet paper, towels, sheets, blankets, mattresses, toothpaste, toothbrushes and similar items for several days did not rise to level of a constitutional violation. Therefore, the standard forbidding the deprivation of a single and identifiable basic human need appears to conform to today’s “standards of decency,” but in application, the standard is often too low to challenge.

Before Justice Scalia in Wilson v. Seiter narrowed the use of the “totality of conditions” approach, many courts considered questionable conditions in view of other conditions or in view of the overall condition of the prison. For instance, inadequate lighting in inmates’ cells, combined with other substandard conditions, such as ex-

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291. See Douglas, 936 F. Supp. at 578 (determining that greater access to a telephone is not a basic human need).
292. See Davenport v. DeRobertis, 844 F.2d 1310, 1316 (7th Cir. 1988) (depriving inmates of cultural amenities, such as showering, is not cruel and unusual punishment).
293. See Rhodes v. Chapman, 452 U.S. 337, 347-48 (1981) (holding that double celling in and of itself is not unconstitutional); Toussaint v. Yockey, 722 F.2d 1490, 1492 (9th Cir. 1984) (same); Wolff, 1993 WL 188365, at *1 (determining that double celling inmates due to overcrowded jail conditions alone does not establish a basis for an Eighth Amendment violation).
294. See Hoptowit v. Ray, 682 F.2d 1237, 1254-55 (9th Cir. 1982).
295. See Rhodes, 452 U.S. at 348, 352.
296. See McCord v. Maggio, 910 F.2d 1248, 1249 (5th Cir. 1990) (forcing an inmate to spend 23 hours a day in cell where human waste leaked through broken pipes was rationally related to security measures of prison); Roy v. Jenkins, No. 86-C5738, 1991 WL 202587, at *1, 3 (N.D. Ill. Oct. 3, 1991) (placing an inmate in poorly ventilated cell with raw sewage and human excrement on the floor and mattress is not unconstitutional).
297. Gilland v. Owens, 718 F. Supp. 665, 685 (W.D. Tenn. 1989). The court held, however, that “frequent or long term deprivations of such items would deprive inmates of constitutional rights.” Id.
299. See Ray, 682 F.2d at 1247 (citation omitted) (“[T]he court must consider the effect of each condition in the context of the prison environment, especially when the ill effects of particular conditions are exacerbated by other related conditions.”). Courts are more inclined to find violations of the Eighth Amendment when several substandard conditions exist rather than when one offensive condition exists. See id. Conversely, many courts may balance constitutionally questionable conditions with factors that raise the quality of the prison environment to determine that the overall conditions are not condemned as cruel and unusual punishment. See Sostre v. McGinnis, 442 F.2d 178, 193-94 (2d Cir. 1971) (balancing conditions of isolation from human contact with the inmate’s diet, availability of hygiene products, opportunity for exercise,
cessive noise, fell below the minimum standards of decency for conditions-of-confinement.\textsuperscript{300} Double ceiling, in conjunction with other cell conditions that fostered violence, tension, and psychiatric problems, created a substantially serious risk to an inmate.\textsuperscript{301} Unsanitary conditions-of-confinement, such as plumbing in disrepair, vermin infestation, lack of adequate ventilation, and inadequate cell cleaning supplies, considered in light of "the overall squalor at the penitentiary," undermined the health of inmates and violated the minimum requirements of the Eighth Amendment.\textsuperscript{302}

However, the Supreme Court in deciding \textit{Wilson}, now requires the denial of "a single, identifiable human need such as food, warmth, or exercise" when applying a "totality of conditions" test.\textsuperscript{303} For example, conditions that provide a combination of inadequate food and medical care deny inmates "the minimal civilized measure of life's necessities."\textsuperscript{304} Furthermore, limited exercise periods combined with other conditions, such as confinement in handcuffs and leg shackles, may create a serious enough deprivation to constitute cruel and unusual punishment.\textsuperscript{305} However, the new requirement leaves courts and prison systems uncertain as to whether the pre-\textit{Wilson} conditions just mentioned remain unconstitutional.\textsuperscript{306}

2. \textit{Difficulty of Subjective Prong as Applied to Physical Conditions}

With the adoption of a subjective standard for "deliberate indifference," the Court in \textit{Farmer v. Brennan} significantly limited the number of unconstitutional prison conditions to only those that are recognized and ignored by prison officials.\textsuperscript{307} After the inmate successfully demonstrates a "sufficiently serious" injury incurred in an "inhumane condition of confinement," the inmate must then show participation in therapy, availability of reading materials, and possibility of communication with other inmates).

\textsuperscript{300} See Hoptowit v. Spellman, 753 F.2d 779, 783 (9th Cir. 1985) ("[T]he lighting was so poor that it was inadequate for reading and caused eyestrain and fatigue and hindered attempts to insure that basic sanitation was maintained.").

\textsuperscript{301} Toussaint v. Yockey, 722 F.2d 1490, 1492 (9th Cir. 1984) (distinguishing the particular case from \textit{Rhodes}, where the facility in \textit{Rhodes} was described as a "top-flight, first-class facility").

\textsuperscript{302} Spellman, 753 F.2d at 783-84.


\textsuperscript{305} See Martinez v. Faiman, No. 93C 6225, 1995 WL 383072, at *5 (N.D. Ill. 1995).

\textsuperscript{306} Presumably, these conditions would be upheld as constitutional now, considering that the inmates did not allege a deprivation of food, warmth, exercise, or medical needs.

\textsuperscript{307} \textit{Farmer}, 511 U.S. at 837-38.
that the prison official intentionally disregarded the substantial risk to the inmate's safety. Therefore, inmates have the difficult task of exposing the prison official’s state of mind.

Basically, each case is decided on a case-by-case basis, but several courts have stated general principles by which to evaluate this second prong of the Farmer test. Similar to the standard applied in medical indifference, failure-to-protect, and excessive use of force cases, courts permit subjective knowledge to be proved by evidence of surrounding circumstances. Furthermore, in Gilland v. Owens, the court recognized that the subjective standard does require a showing of bad faith or malicious conduct. The court suggested that plaintiffs can meet the subjective standard by pointing to “[s]ystemic deficiencies in facilities, procedures or staffing.” Another court instructed that a prison official can be found deliberately indifferent only if the official possessed knowledge of an “infirm” condition and the means to cure that condition and then consciously and culpably refused to prevent the perceived harm.

C. The Farmer Standard Applied to Psychological Effects of Solitary Confinement

Although courts have been relatively lenient on prison officials in cases regarding the physical aspects of solitary confinement conditions, the courts have provided some safeguards from the physically “inhumane conditions of confinement.” The psychological realm of solitary confinement, on the other hand, has been left wide open to abuse. Inmates have been left unprotected in an area that may cause longer lasting harm to the inmate and to society than the effects of impermissible physical conditions-of-confinement. Despite the potentially dangerous psychological effects of solitary confinement, inmates face a particularly difficult time alleging a “sufficiently serious” psychological injury as well as demonstrating that a prison official was

308. Id.
309. See Simmons, 154 F.3d at 807-08 (finding that evidence such as paraplegia, wheelchairs, and uneaten trays, provided sufficient and obvious circumstantial evidence to indicate that prison officials knew a risk existed).
311. See id. at 687.
312. Id. (citing Todaro v. Ward, 565 F.2d 48, 52 (2d Cir. 1977)).
313. LaMarca v. Turner, 995 F.2d 1526, 1535-36 (11th Cir. 1993).
314. See supra notes 289-297 and accompanying text.
315. See supra notes 299-305 and accompanying text.
316. See Luise, supra note 56, at 315; Walton, supra note 259, at 276.
317. See supra notes 299-305 and accompanying text.
aware of and disregarded a substantial risk for that psychological injury.\textsuperscript{318}

1. Difficulty in Meeting the Objective Test

Courts, generally, have feared entering into an evaluation of the psychological effects resulting from solitary confinement.\textsuperscript{319} As a result, fewer standards have been established to create limits to inhumane psychological conditions of solitary confinement. Courts require the deprivation of a single and identifiable basic human need to state an Eighth Amendment violation.\textsuperscript{320} However, many courts have not recognized mental health as a basic human need. For example, in \textit{Bono v. Saxbe},\textsuperscript{321} the court upheld conditions of solitary confinement that led to "inactivity, lack of companionship, and a low level of intellectual stimulation" because the inmate had not contended deprivation of "a basic human need."\textsuperscript{322} Some courts hold that psychological complaints do not state an Eighth Amendment claim.\textsuperscript{323} Other courts have justified the presence of psychological effects of solitary confinement as conditions innate to prison life.\textsuperscript{324} The court in \textit{Jackson v. Meachum}\textsuperscript{325} recognized that "[c]onditions such as depression, hopelessness, and frustration may be inevitable consequences of solitary confinement."\textsuperscript{326} Furthermore, not every deficiency or inadequacy rises to the level of cruel and unusual punishment.\textsuperscript{327} The court in \textit{Davenport v. DeRobertis}\textsuperscript{328} conceded that a high probability of psy-


\textsuperscript{319} See Johnson v. Anderson, 370 F. Supp. 1373, 1387 (D. Del. 1974) ("While aware that more subtle forms of punishment, psychological in nature, may also offend the Eighth Amendment's guarantee of civilized treatment, the courts have generally been more tolerant of the nonphysical deprivations associated with solitary confinement.").

\textsuperscript{320} See \textit{supra} note 210 and accompanying text.

\textsuperscript{321} 620 F.2d 609 (7th Cir. 1980).

\textsuperscript{322} \textit{Id.} at 613-14 (holding that psychological harm is not dispositive). Such factors as inadequate medical care, bedding or heating, or inadequate nutritional value of the food "are frequently crucial to a finding of cruel and unusual punishment." \textit{Id}.


\textsuperscript{324} Madrid v. Gomez, 889 F. Supp. 1146, 1262 (N.D. Cal. 1995) ("[T]he very nature of prison confinement may have a deleterious impact on the mental state of prisoners, for reasons that are self evident.").

\textsuperscript{325} 699 F.2d 578 (1st Cir. 1983).

\textsuperscript{326} \textit{Id.} at 584.

\textsuperscript{327} \textit{See Madrid}, 889 F. Supp. at 1260.

\textsuperscript{328} 844 F.2d 1310 (7th Cir. 1988).
chological damage occurs during imprisonment. The court in *Tous-saint v. McCarthy* ruled that "psychological pain" that results from the boredom of solitary confinement is not cruel and unusual punishment.

In these cases, the courts consider the psychological pain experienced by inmates as a portion of the inmates' punishment. Other courts require a physical injury to accompany the psychological claim or an extreme and officially sanctioned psychological harm to exist to allege a "sufficiently serious" injury. Therefore, experiences of terror, psychological harm, and deterioration, which develop in solitary confinement, alone, fail to raise an Eighth Amendment violation.

A few courts have recognized the "sufficiently serious" injuries that may result from psychological aspects of solitary confinement. For instance, several courts in the Ninth Circuit have recognized and declared unconstitutional the psychological harm that results from living in a cell with constant illumination. Furthermore, in *Ruiz v. Johnson*, the court noted that pain and suffering caused by extreme levels of psychological deprivation can support a claim of cruel and unusual punishment. Dr. Haney testified in this case and found a systemic pattern of extreme social isolation and reduced environmental stimulation. He observed "frenzied and frantic state[s] of human despair and desperation," as well as "total deprivation of human

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329. *Id.* at 1313.
330. 801 F.2d 1080 (9th Cir. 1986).
331. *Id.* at 1108.
332. See supra notes 321-331 and accompanying text. But see *Madrid*, 889 F. Supp. at 1263 (recognizing that "a condition or other prison measure that has little or no penological value may offend constitutional values upon a lower showing of injury or harm").
333. See *Doe v. Welborn*, 110 F.3d 520, 524 (7th Cir. 1997) (holding that the fear of assault, unaccompanied by physical injury does not reflect the deprivation of "the minimal civilized measures of life's necessities" (citing *Rhodes v. Chapman*, 452 U.S. 337, 349 (1981)); *Babcock v. White*, 102 F.3d 267, 272 (7th Cir. 1996) (claiming that "it is the reasonably preventable assault itself, rather than any fear of assault, that gives rise to a compensable claim under the Eighth Amendment").
334. Cf. *Welborn*, 110 F.3d at 524-25 (holding that the effects of protective custody do not violate the Eighth Amendment). Protective custody conditions resemble solitary confinement conditions implemented for disciplinary segregation.
335. See *Haney & Lynch*, supra note 52, at 545-47 (citing cases from the 1960s to 1970s that recognized the psychological effects of isolation).
336. See *Keenan v. Hall*, 83 F.3d 1083, 1090-91 (9th Cir. 1996); *Hoptowit v. Mason*, 682 F.2d 1237, 1257-58 (9th Cir. 1982) ("The deprivation of nearly all fresh air and light, particularly when coupled with [lack of control over artificial illumination], creates an extreme hazard to the physical and mental well-being of the prisoner in violation of the Eighth Amendment."); *Perri v. Coughlin*, 1999 WL 395374, at *14 (N.D.N.Y. June 11, 1999).
338. *Id.* at 914.
339. *Id.* at 913.
contact, mental stimulus, personal property and human dignity."\textsuperscript{340} The court went as far as to analogize the cruel and unusual nature of psychological deprivations to that of lashing an inmate's back:

As the pain and suffering caused by a cat-o'-nine-tails lashing an inmate's back are cruel and unusual punishment by today's standards of humanity and decency, the pain and suffering caused by extreme levels of psychological deprivation are equally, if not more, cruel and unusual. The wounds and resulting scars, while less tangible, are no less painful and permanent when they are inflicted on the human psyche.\textsuperscript{341}

More particularly, the court in \textit{Madrid v. Gomez} recognized that "if the particular conditions of segregation . . . are such that they inflict a serious mental illness, greatly exacerbate mental illness, or deprive inmates of their sanity, then \{prison officials\} have deprived inmates of a basic necessity of human existence . . . \{and\} have crossed into the realm of psychological torture."\textsuperscript{342} However, just as the court giveth, the court taketh away. The court in \textit{Madrid} acknowledged the psychological torture present in conditions of solitary confinement but limited the class of persons who may be protected from them.\textsuperscript{343} The court protected inmates who were already mentally ill and those inmates at an unreasonably high risk of suffering a serious mental illness as a result of the conditions in the SHU.\textsuperscript{344} However, according to the court, inmates not characterized as having serious mental disorders were not deprived of a basic necessity of life.\textsuperscript{345}

As seen, courts across the country have had numerous reactions to the psychological conditions imposed on inmates in solitary confinement. As a result, no particular standard has been adopted to guide courts in their analysis of psychological effects of solitary confinement.

2. Difficulty in Meeting the Subjective Portion of the Test for Psychological Conditions-of-Confinement

In order for a prison official to be held accountable for a "sufficiently serious" psychological injury, the prison official must have been deliberately indifferent to the inmate's health or safety.\textsuperscript{346} Consequently, if a prison official is not aware of a substantial risk to the

\textsuperscript{340} Id.
\textsuperscript{341} Id. at 914.
\textsuperscript{343} See id. at 1267 ("\{W\}hile the conditions in [Pelican Bay's solitary confinement] 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.").
\textsuperscript{344} See id.
\textsuperscript{345} See id.
inmate, the official cannot be held accountable. For example, a prison official's failure to recognize "readily apparent" scars inside an inmate's wrists, elbows, and neck as signs of attempted suicide amounts only to negligence.\(^\text{347}\) Even in a case where an inmate expressed to prison officials his thoughts of suicide, the court found that the prison officials had not acted with deliberate indifference.\(^\text{348}\) Deliberate indifference requires that the inmate "had communicated a 'strong likelihood, rather than a mere possibility, that self-inflicted harm w[ould] occur' and 'that custodial official knew or should have known of that strong likelihood.'"\(^\text{349}\) Essentially, the subjective standard requires physical evidence and officer recognition of a psychological harm or injury.

The court in Madrid found that the subjective element was met only in cases where the inmates had pre-existing mental disorders.\(^\text{350}\) To the extent that prison officials were aware of certain inmates with serious mental disorders and of conditions of social isolation that posed a significant risk to the mental health of inmates, the officials acted with deliberate indifference by failing to take action to protect those inmates.\(^\text{351}\) The court imputed to the officials the knowledge that conditions-of-confinement in social isolation are harmful.\(^\text{352}\)

Courts have struggled with the application of this subjective standard in psychological conditions-of-confinement cases.\(^\text{353}\) The Seventh Circuit has even chosen to apply a more stringent deliberate indifference standard in cases where an inmate alleges a psychological risk, requiring a malicious and sadistic intent on behalf of the prison official.\(^\text{354}\) In Babcock v. White, an inmate alleged that prison officials had violated the Eighth Amendment by keeping him in the facility

\(^{347}\) Cf. Freedman v. City of Allentown, 853 F.2d 1111, 1116 (3d Cir. 1988) (holding that mere negligence does not support a civil rights claim requiring deliberate indifference).
\(^{349}\) Id. (citing Colburn v. Upper Darby Township, 946 F.2d 1017 (3d Cir. 1991)).
\(^{351}\) See id.
\(^{352}\) See id.
\(^{353}\) See Haney & Lynch, supra note 52, at 552-54.
\(^{354}\) Babcock v. White, 102 F.3d 267, 270-73 (7th Cir. 1996) (requiring a malicious and sadistic act by officials with respect to the prisoner's fear of physical harm to rise to a sufficiently culpable state of mind); Bullock v. Barham, 23 F. Supp. 2d 883, 884 (N.D.Ill. 1998) (stating that the Eighth Amendment is violated if a prisoner is incarcerated under conditions posing an objective risk of serious harm in conjunction with deliberate indifference on the part of prison officials). In such cases, however, the inmate carries a lighter burden in establishing the objective portion of the test because a malicious and sadistic intent always violates contemporary standards of decency. See Babcock, 102 F.3d at 273 (citing Hudson v. McMillan, 503 U.S. 1, 9 (1992)).
despite his fear of physical harm from other inmates.\textsuperscript{355} Prison officials placed the inmate in administrative detention with members of a gang that had threatened to kill him, even after Babcock had been classified as a "separation"\textsuperscript{356} case. The court found that the prison officials did not act maliciously or sadistically because no actual assault ever occurred.\textsuperscript{357}

\section*{V. Ways to Fill the Gap in Protection from Physical to Psychological Conditions}

The cases discussed in the previous section illustrate a broad gap in protection from cruel and unusual punishment between the physical and psychological conditions of confinement.\textsuperscript{358} Courts are more reluctant to find constitutional violations in the psychological conditions of solitary confinement rather than in the physical conditions.\textsuperscript{359} The physical conditions are visible and more readily apparent to prison officials. Therefore, prison officials' subjective awareness of physical conditions can be measured on a uniform basis.

Psychological conditions, on the other hand, are usually hidden in the minds of the inmates or incapable of diagnosis by lay observers, such as prison guards. Courts have a difficult time measuring the psychological conditions and the subjective standard of guard awareness because courts have recognized fewer universal standards of decency in this area.\textsuperscript{360} Therefore, because prison officials do not have psychological expertise, they are held to a lower standard in recognizing these conditions.\textsuperscript{361} Prisons have psychologists and psychiatrists on staff that are qualified to recognize harmful symptoms. But, facilities either lack a sufficient number of mental health staff\textsuperscript{362} or the staff concentrate their services only on those inmates previously determined to be mentally ill.\textsuperscript{363} Other mental health staff dismiss particu-
lar symptoms as feigned or manipulated conduct; therefore, staff members fail to refer the troubled inmate to a psychiatrist. 364

Prison officials must recognize and ignore particular deprivations of basic human needs in isolation, rather than conditions as a whole, in order to be held deliberately indifferent. 365 Because of the difficulty in assessing psychological harm, courts should look at conditions as a whole, rather than requiring a deprivation of one of a limited number of basic human needs. As seen above, several conditions in combination work together to cause the psychological harm. 366 Therefore, these conditions should be assessed together. Furthermore, courts should use sociological studies to define standards of decency when evaluating psychological conditions-of-confinement. As seen in Part II, psychologists have recently attempted to define particular "minimal civilized measures" of prisoners' mental health needs through studies conducted in isolation cells. 367

A. The Nature of Psychological Conditions Cases Require Courts to Look at the "Totality of Conditions" Approach

The court in Madrid restrained from protecting all inmates because of the limits of legal precedents. 368 However, the court did recognize the seriousness of the potential injury and the prison officials' knowledge of the harmful conditions. 369 The cases discussed in Part IV, however, avoided addressing psychological injuries by either undermining the actual effects of confinement as less than sufficiently serious or by disregarding the sufficiently serious injuries as hidden from the prison officials' awareness. 370 The courts undermine the psychological effects of solitary confinement in all of these cases by abandoning the "totality of conditions" approach. This approach allows the courts to look at prison conditions as a whole without requiring

364. See Human Rights Watch, supra note 1, at 77-78. Even some psychiatrists view the behavior as fake psychotic symptoms "to make an excuse of mental illness. Id. at 79. A behavioral clinician at the Maximum Closed Facility in Indiana expressed his view that "most cases of self-mutilation reflected no more than an inmates desire to be transferred out of the MCT." Id. at 78. This behavior can be considered manipulative; however, the clinician failed to realize that the behavior can also be a symptom of a major psychiatric disorder. Id. Further observations by a trained psychiatrist could have discerned between the two possibilities.
366. See supra notes 96-136 and accompanying text.
367. See Haney & Lynch, supra note 52, at 542. See also supra notes 96-136 and accompanying text.
368. See Haney & Lynch, supra note 52, at 557.
370. See supra notes 257-357.
the deprivation of a single and identifiable basic human need. The "totality of conditions" approach allows the courts to look at all of the conditions at Tamms, and other questionable institutions, including all aspects of sensory deprivation, the lack of meaningful educational and vocational opportunities, and the loss of numerous privileges, together under one analysis. Although none of these conditions alone may be particularly inhumane or cause excessive harm, the combination of the three creates the psychological effects witnessed by Drs. Grassian and Haney.

The psychological studies evaluated the conditions-of-confinement taken as a whole and identified the harmful effects that surface as a result of the combination of all conditions, not just one single and identifiable condition. These studies suggest that all of the conditions at supermax facilities similar to Tamms have a mutually enforcing effect. Looking at each condition separately ignores the true nature of supermax prisons like Tamms. The Department of Corrections designed Tamms with all conditions strategically selected to control the behavior of the inmates. Therefore, the courts should approach the conditions at Tamms by examining the effects of the entire system.

B. Reliance on Psychological Studies May Bridge the Gap

In addition to looking at conditions of solitary confinement as a whole, courts should rely on sociological studies in determining evolving standards of decency. The Eighth Amendment protects inmates from cruel and unusual punishment determined by "evolving standards of decency that mark the progress of a maturing society." Throughout the century, the United States has matured into a society

371. See Hutto v. Finney, 437 U.S. 678, 687 (1978) (finding conditions in isolation cells, as a whole, violate the prohibition against cruel and unusual punishment).
373. See supra notes 96-136 and accompanying text.
374. See supra notes 96-136 and accompanying text. In these studies, the researchers considered the physical aspects of the cell, the amount of permissible exercise, the amount of meaningful activity, the lack of human contact, and among other things, the loss of privileges. See supra notes 96-136 and accompanying text.
375. See supra notes 96-136 and accompanying text.
376. See supra notes 96-136 and accompanying text.
that relies on social science to institute reform.\(^{380}\) Courts increasingly rely on psychological data in numerous areas of the law.\(^{381}\) However, courts generally do not rely on psychological data when assessing the psychological conditions-of-confinement.\(^{382}\) To bridge the gap between physical and psychological conditions-of-confinement, courts need to rely on social science studies to develop standards for both prongs of the Eighth Amendment test, including use in determining "evolving standards of decency." Psychological studies should also provide notice to prison officials of the existence of sufficiently serious psychological conditions in their prison environments.

1. The History of the Court's Use of Social Sciences in Judicial Determinations

Throughout history, judges have adhered to a "common sense" view in their judicial determinations where they have relied more on their own intuition than on the scientific theories of their day.\(^{383}\) Fear of scientific theories may have been justified in earlier centuries when psychology "suffered from an absence of facts" and "consisted of little more than social ideology."\(^{384}\) However, in light of twentieth century advances and the increased accuracy of scientific studies, courts have begun to adapt to the time and consider psychological data and theories.\(^{385}\)

The Court first recognized the benefits of social sciences in the early 1900s.\(^{386}\) In 1908, Justice Louis Brandeis introduced social science data in support of his brief for the petitioner in *Muller v. Oregon.*\(^{387}\) The Brandeis brief utilized social science data to argue that long hours

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\(^{380}\) See generally Paul Rosen, *The Supreme Court and Social Science* (1972) (discussing the need for a reliance on social science to understand the role of law in a rapidly changing democratic society).


\(^{384}\) Id. at 45.

\(^{385}\) See Horowitz & Willging, *supra* note 382, at 345.

\(^{386}\) See Haney, *Social Factfinding,* supra note 381, at 48. Haney suggests, though, that the Court had been relying on social facts before its initial acknowledgment with the Brandeis brief. *Id.*

\(^{387}\) 208 U.S. 412 (1908).
of work are detrimental to women's health. The Court in Muller received the document into evidence, taking notice "of all matters of general knowledge." The emergence of the Court's recognized use of social science data coincided with the period's transition in legal thinking from legal formalism to legal realism. During the early 1900s, psychological scientists, such as Sigmund Freud, John Watson, and Hugo von Munsterberg, suggested that psychology had practical applications in law. Prominent figures in the judicial system, including Justice Oliver Wendell Holmes, Justice Louis Brandies, and Justice Benjamin Cardozo, shared in the support for the incorporation of social sciences in law. The transition to legal realism became most readily apparent during the Depression in the 1930s. As the realists advocated the awareness of social context as opposed to sole reliance on precedent, the courts became increasingly receptive to the use of social science data in judicial decision-making. In essence, the courts were adapting to the "evolving" theories and practices of their time to resolve existing social issues.

In the 1950s, the Court expanded its use of social science data in Brown v. Board of Education. In this decision, the Court placed strong reliance on social science data reflecting the damaging effects of racial desegregation. The Court's reliance on the social sciences in this case particularly demonstrates the process in which courts


389. Muller, 208 U.S. at 421.

390. See Rustad & Koenig, supra note 388, at 100-05.

391. See Horowitz et al., supra note 388, at 6-7.

392. See id.

393. See Rustad & Koenig, supra note 388, at 108. Social and political changes during the Depression sensitized the Court to issues of social equality. Id.

394. Id. at 104.


396. See id. at 495 n.11. Footnote 11 has become famous for its citation to seven different social science references. However, written opinions of the Supreme Court Justices reveal "ignored, misused, distorted and misinterpreted psychological literature" to justify decisions at odds with empirical data. See J. Alexander Tanford, The Limits of a Scientific Jurisprudence: The Supreme Court and Psychology, 66 Ind. L.J. 137, 145 (1990) (discussing the Court's mistreatment of psychological studies on jury behavior in its trial law cases). However, today's society would agree that regardless of the "flimsiness" of the data, the Court correctly decided that the separate-but-equal doctrine was inherently unequal.
adapt to "evolving standards" in judicial decision-making.\textsuperscript{397} \textit{Brown} effectively overruled \textit{Plessy v. Ferguson},\textsuperscript{398} the earlier "separate-but-equal" decision on racial segregation.\textsuperscript{399} Although unacknowledged, the Court in \textit{Plessy} relied on assertions of social fact in determining the legitimacy of segregation.\textsuperscript{400} In justifying the "separate-but-equal" doctrine, the Court premised its argument on the prevailing Darwinist theories against government intervention in social relations.\textsuperscript{401} As the years progressed, so too did society's theories on segregation.\textsuperscript{402} Social science studies during this period determined that segregation generated a feeling of inferiority among the children as to their status in the community that may affect them in years to come.\textsuperscript{403} The Court recognized that the \textit{Plessy} Court did not have the psychological knowledge to realize these effects, but that the emergence of this knowledge mandated the Court to grant the plaintiffs equal protection of the laws because "separate educational facilities are inherently unequal."\textsuperscript{404}

Similarly, in regards to the issue of solitary confinement, courts upheld the use of solitary confinement in the absence of psychological data suggesting its harmful effects. As discussed above, studies reflecting the devastating impact of social isolation in solitary confinement did not become prevalent until the 1980s with Drs. Grassian and Haney's work.\textsuperscript{405} Now that these reports have become more prevalent and acceptable, courts are beginning to reconsider their earlier stances on the issue of solitary confinement. For instance, the United States District Court of the Northern District of California utilized social science data and literature in analyzing the inmates' psychological claims resulting from confinement at Pelican Bay.\textsuperscript{406} The court acknowledged that:

\begin{quote}
[social science and clinical literature have consistently reported when human beings are subjected to social isolation and reduced environmental stimulation, they may deteriorate mentally and in
\end{quote}

\begin{footnotesize}
\textsuperscript{397} "Evolving standards of decency" applies to Eighth Amendment characterization of cruel and unusual punishment. Other areas of law, such as Equal Protection, rely on "evolving standards" as well, as seen in \textit{Brown v. Board of Education}, 347 U.S. 483 (1954).
\textsuperscript{398} 163 U.S. 537 (1896).
\textsuperscript{399} \textit{Brown}, 347 U.S. at 494-95 (concluding that the doctrine of separate but equal had no place in education).
\textsuperscript{400} See Haney, \textit{Social Factfinding, supra} note 381, at 47-48 (citing \textit{Plessy}, 163 U.S. at 531).
\textsuperscript{401} See id.
\textsuperscript{402} \textit{Brown}, 347 U.S. at 495 n.11.
\textsuperscript{403} See id. at 494.
\textsuperscript{404} Id. at 495.
\textsuperscript{405} See supra notes 96-136 and accompanying text.
\end{footnotesize}
some cases develop psychiatric disturbances. . . . [S]ome people may sustain long-term effects. . . . [T]he Court finds that many, if not most, inmates in the SHU experience some degree of psychological trauma in reaction to their extreme social isolation. . . .

The Madrid court used psychological testimony to call for modifications in certain practices, such as in the administration of mental health care services. However, the trial court stopped short of protecting the majority of prisoners from psychological suffering and long-term harm because the Court appeared restrained from addressing the "totality of conditions" by current legal doctrine. Because the conditions in isolation "[did] not have a uniform effect on all inmates," the court held that "for many inmates, it does not appear that the degree of mental injury suffered significantly exceeds the kinds of generalized psychological pain that courts have found compatible with Eighth Amendment standards." The court was not persuaded that the risk of developing mental injuries was of a sufficiently serious magnitude to find that the conditions at Pelican Bay violated the Eighth Amendment.

2. The Use of Sociological Data to Define Sufficiently Serious Injuries

Tamms presents circumstances similar to those seen at Pelican Bay, therefore, a legal analysis similar to that employed in Madrid v. Gomez can be applied to Tamms. However, this Comment has just set out a large amount of background information to provide a framework for what appears to be a just solution to the constitutionally questionable implementation of solitary confinement at supermax facilities, such as Tamms, as applied to all inmates.

Courts use the two-prong test refined in Farmer v. Brennan to analyze psychological conditions-of-confinement claims under the breadth of the Eighth Amendment. In order to demonstrate cruel and unusual punishment, a Tamms' inmate must show that a sufficiently serious injury or risk to mental health exists and that prison officials acted with deliberate indifference in recognizing and resolv-
To prevent mental injury before it occurs, an inmate can allege that the psychological conditions-of-confinement pose substantial risks to mental health.\textsuperscript{415} \textit{Helling} requires the inmate to show that the conditions at Tamms are "sure," "very likely," or "imminently" likely to cause "serious" damage to the inmate's future health.\textsuperscript{416} However, the plaintiff does not need to prove that every inmate at Tamms would be injured from the health risk;\textsuperscript{417} for it is the "threat that makes the punishment obnoxious" and a violation of the Eighth Amendment.\textsuperscript{418} The inmate must then show that society considers the exposure to the risk a violation of contemporary standards of decency.\textsuperscript{419} The courts need to rely on social science to define this standard similar to the manner in which the Court in \textit{Brown v. Board of Education} relied on these types of studies to determine "contemporary standards of decency" in relation to racial segregation.

The courts, according to \textit{Helling}, can rely on science and statistics but must also consider whether today's society would tolerate these psychological risks.\textsuperscript{420} The first part of the societal view analysis can be met by relying on the studies performed by Drs. Grassian and Haney. Legal doctrine allows courts to look to studies similar to the conditions at Tamms; and the uncovered conditions closely resemble the conditions at Tamms.\textsuperscript{421} The psychological effects reflected in the Tamms complaint and letters closely mirror the psychological effects witnessed by Drs. Grassian and Haney.\textsuperscript{422} Therefore, the conclusions drawn by Drs. Grassian and Haney from their observations at Walpole and Pelican Bay could substantially support theories of psychological trauma at Tamms. Each study revealed that inmates suffer devastating mental injury from conditions of social isolation.\textsuperscript{423} Drs. Grassian and Haney do not suggest that every inmate subjected to

\begin{footnotesize}
\begin{enumerate}
\item[414.] See \textit{supra} notes 241-244 and accompanying text.
\item[416.] Id.
\item[417.] Id.
\item[419.] See \textit{Helling}, 509 U.S. at 36.
\item[420.] See id. See also Hoptowit v. Ray, 682 F.2d 1237, 1246 (9th Cir. 1981) ("In determining whether a challenged condition violates 'evolving standards of decency,' courts may consider opinions of experts and pertinent organizations.").
\item[421.] Compare \textit{supra} notes 11-45 and accompanying text, with \textit{supra} notes 96-99, 117-123 and accompanying text.
\item[422.] Compare \textit{supra} notes 46-49 and accompanying text, with \textit{supra} notes 100-116, 124-136 and accompanying text.
\item[423.] See \textit{supra} notes 96-136 and accompanying text.
\end{enumerate}
\end{footnotesize}
these conditions will actually suffer mental illness; but *Helling* stated that such a burden need not be shown.\textsuperscript{424}

The second part of the societal analysis requires courts to determine the subjective beliefs of society with respect to social isolation. Currently, though, the majority of society has little or no opinion regarding the conditions at Tamms, considering that the prison just opened its doors less than two years ago. Assuming that society was aware of most of the psychological studies concerning solitary confinement, their reaction would most probably be one of awe and disapproval. Many inmates, psychologists, and commentators have suggested that inmates leave solitary confinement with a concern for the safety of themselves and others upon their release back into society.\textsuperscript{425} If inmates and experienced psychologists are concerned, so too should society, because their safety is at risk. Imprisonment does not have to rehabilitate inmates, but hopefully prison conditions will not create more violent inmates than existed before confinement.

Assuming that most of society is unaware of the psychological studies and conditions of solitary confinement, Tamms inmates should not be held to a standard as high as in *Helling* in ascertaining society’s views. The subject matter concerned in each of the two cases have completely different exposure levels in the media. Society is reminded daily about the harmful effects of cigarette smoking through newspapers, billboards, commercials, lawsuits, and even the labels on the cigarettes themselves. Solitary confinement does not receive near the amount of media attention as does cigarette smoking.\textsuperscript{426} Constant media attention increases the public’s exposure and awareness to the harmful effects of cigarettes, which allows the public to form opinions

\textsuperscript{424} See *Helling*, 509 U.S. at 33.

\textsuperscript{425} See Haney, *Infamous Punishment*, supra note 48, at 6; *Inmate Letters*, supra note 11; see also Israel L. Barak-Blanz, *Who’s in the “Hole”?*, 8 CRIM. JUST. REV. 29 (1983) (finding that prisoners in punitive isolation were more likely to be repeat offenders than a control population).

\textsuperscript{426} Numerous articles regarding Tamms have appeared in local papers, but most of them describe only the prison goals, the types of prisoners admitted, and the physical conditions-of-imprisonment, without ever addressing the possibilities of psychological trauma. *See Hard Times Getting Harder*, supra note 29, at 1; *New Prison No Country Club*, CHI. SUN-TIMES, Mar. 9, 1998, at 51; Parsons, *Locked Out*, supra note 15; Michael Pearson, *New Jail’s Residents: Worst of the Worst Tamms Prison is ‘Someplace You Don’t Want to Go’*, PEO. J. STAR, Mar. 9, 1998, at B1; Rosenbery, supra note 377, at 4A; Terry Wilson, *Designed to Isolate Bad Apples Superprison Awaits I” Inmates*, CHI. TRIB., Feb. 4, 1998, at N2. Most of these articles were written before the psychological effects of placement at Tamms became visible. *See id.* However, the psychological evidence of mental torture at similar prisons would have been available.
The public is less likely to form an opinion on a topic with which they are unfamiliar, such as the topic of solitary confinement; if they do form an opinion, the opinion may be based on one-sided information. Society's views were much more informed in the Helling case than society's views will ever be on the topic of solitary confinement. Courts must also be careful when looking to society's views on a topic that is usually presented from one perspective. An analogy can be drawn to the media's portrayal of criminal justice. The media forms society's perception of crime by presenting only the sensational side of crime, such as a gruesome murder scene or a guilty verdict. This portrayal by the media presents one-sided information that society absorbs as the entire story. In a study conducted by The Center for Media and Public Affairs, researchers found that "even though the homicide rate in the United States dropped by 20 percent from 1993 through 1996, major network news coverage of murders increased on an average of 721 percent within the same time period." As a result, society has a skewed perception on the amount of violence in our society and the reaction that should be taken by our government. Similarly, the Illinois Department of Corrections has portrayed one-sidedly the conditions of solitary confinement at Tamms. Therefore, the courts should not look to an uninformed society but instead should rely on psychologists who have the resources and expertise to be informed of the true nature of solitary confinement.

However, if courts feel the need to rely on some form of public view, the court should consider a number of news articles and psychological analogies in support of the view that those that are informed in society find solitary confinement a violation of "contemporary standards of decency." Individuals and groups have spoken out against

428. See id.
429. Id. at 89-90. As a result, society tends to view all criminals with disgust. Andrew E. Taslitz, Abuse Excuses and the Logic and Politics of Expert Relevance, 49 HASTINGS L.J. 1039, 1052 (1998). This practice by the media creates further devastating effects by fueling efforts to impose harsher punishment to reduce the falsely perceived increase and severity of crime. See Jason Dzubow, Fear-Free Public Housing?: An Evaluation of HUD's "One Strike and You're Out" Housing Policy, 6 TEMP. POL. CIV. RTS. L. REV. 55, 55 (1997).
432. See supra note 426 and accompanying text.
the cruel nature of Tamms in news articles and political activist committees. Some members of society have spoken out against the nature of supermax prisons in other areas of the country as well. Furthermore, in the absence of public knowledge or opinion, courts should allow the inmate to analogize society’s perception of the contested issue to related issues. The effects of social isolation in solitary confinement has been analogized to the mental injuries sustained by prisoners-of-war. The majority of society believes that the mental torture suffered by prisoners-of-war surpasses humanitarian standards of decency. If the effects of exposure to mental torture are analogous to the effects of social isolation in solitary confinement, then the public perception of those effects should be analogous as well. Some may argue that a flaw exists in this argument considering that POWs are portrayed as heroes while inmates are seen as filth. However, the argument regarding the media’s portrayal of crime, discussed above, also applies in this context. While the media portrays inmates as evil human beings unworthy of substantive rights, the media glorifies POWs as heroes. As a result of these characterizations, society empathizes with the POWs’ sufferings but cannot extend the same kind of empathy necessary for understanding the mental torture suffered by inmates.

433. See Lisa Anderson, Is ‘Supermax’ Too Much? Strict Isolation of Inmates Called Cruel, Ineffective, CHI. TRIB., Aug. 2, 1998, at C1; Editorial, Cruel and Unusual, St. LOUIS POST-DISPATCH, Jan. 6, 1999, at B6; Eig, supra note 15, at 64; Gauen, supra note 23, at C1; Patrick Gauen, Lawsuit Will Challenge Conditions at Tamms Prison: Mentally Ill Inmates are Plaintiffs, St. LOUIS POST-DISPATCH, Jan. 7, 1999, at B1 [hereinafter Gauen, Lawsuit]; Andrew Herrmann, Editorial, A Solitary Fate Worse than Death, CHI. SUN-TIMES, Jan. 13, 1998, at 23; Emily B. Hertz, Commentary, A Criminal Solution to Crime, CHI. TRIB., Apr. 11, 1998, at N16; The Tamms Experiment: Treatment or Torture?, MICH. CHRON., Apr. 28, 1998, at 6A; The Tamms ‘Experiment’: Treatment or Torture?, Illinois Opens ‘Supermax’ Control Unit Prison in Tamms, WALKIN’ STEEL, Fall 1998, at 1 (a production of the Committee to End the Marion Lockdown). Furthermore, a political activist committee has been formed to “Shut Down Tamms.” This group includes Amnesty International, the American Civil Liberties Union, the Uruhu Movement, the MacArthur Justice Center, family members of the inmates, and concerned citizens.

434. See HUMAN RIGHTS WATCH, supra note 1, at 1-2; Miller, supra note 378, at 139; Bruce Porter, Is Solitary Confinement Driving Charlie Chase Crazy?, N.Y. TIMES, Nov. 8, 1998, § 6, at 52.


437. See Miller, supra note 378, at 169.

438. See supra notes 427-432 and accompanying text.

439. See Taslitz, supra note 429, at 1039. It is hard to imagine that society would tolerate the United States employing mental torture tactics to enemy POWs. These tactics violate American and international standards no matter who the victims are. Id. Also, one cannot forget that the
3. The Use of Sociological Data to Impute Prison Officials' Knowledge

Psychological pain does not always display physical characteristics. As discussed above, prison psychiatrists rarely see disturbed inmates; therefore, the determination is left to the prison guards and staff. Psychological effects are often hidden to the average observer, and hence, to the prison officials. Prison officials are not experienced psychologists and are not trained to recognize certain psychological symptoms. Furthermore, prison officials cannot envision the long-term effects of solitary confinement on the inmates. As current law stands, with the exception of Madrid and Ruiz, the subjective component of the Farmer test will rarely be met in psychological conditions-of-confinement cases.

Psychological studies have shown that the psychological consequences of living in conditions similar to Tamms for long periods of time are “predictably destructive, and the potential for these psychic stressors to precipitate various forms of psychopathology is clear-cut.” The Supreme Court relied on sociological data to acknowledge the detriments of long hours of work and the damaging effects of segregation on children’s self-identity. Similarly, courts have recognized the harmful effects of cigarette smoke in prisons and the devastating effects of social isolation in prison. Therefore, courts should impute knowledge to prison officials who institute certain meas-

inmates at Tamms may not be the “worst of the worst” in our society’s eyes. For instance, Robert Boyd, one of the inmates at Tamms, was sent to prison for auto theft, but then was sent to Tamms for assaulting prison staff members. See Eig, supra note 15, at 62. Robert Boyd does not appear to be the ruthless, unrehabilitative type of inmate that the Department suggests they house.

440. See supra notes 362-364 and accompanying text.

441. See Haney, Infamous Punishment, supra note 48, at 5. Most people have never experienced or witnessed another experience hallucinations, paranoia, and confusional psychoses. Therefore, the common observer would be less likely than an experienced psychologist or psychiatrist to recognize these symptoms when they occur. Id. As a result, the common observer may tend to characterize abnormal symptoms as volitional acts by the inmate to either instill fear or feign mental illnesses. Therefore, prison officials may escape liability for Eighth Amendment violations by claiming either that they were unaware of the effects or that they believed the inmate was malingering.

442. See id.

443. See id.


446. See supra notes 387-389 and accompanying text.

447. See supra notes 395-404 and accompanying text.

448. See supra notes 212-220 and accompanying text.

ures while knowing the harmful effects.\textsuperscript{450} This knowledge and prison officials’ failure to alleviate the risks of social isolation should satisfy the deliberate indifference portion of the Eighth Amendment test.

Evidence suggests that prison officials at Tamms are familiar with the devastating effects of solitary confinement. Nic Howell, a spokesman for the Illinois Department of Corrections commented in a news article that the Department has been anticipating litigation in regards to Tamms before they ever opened the doors.\textsuperscript{451} Presumably, the Department was aware of the Pelican Bay litigation and/or the increase in psychological research suggesting the inhumanity of conditions similar to those implemented at Tamms. The supermax facilities have all been designed and modeled after one another.\textsuperscript{452} The Department must be aware that if Pelican Bay has constitutionally questionable conditions, then so does Tamms. This type of knowledge and failure to act constitutes deliberate indifference.

**Conclusion**

In conclusion, the Eighth Amendment prohibits conditions-of-confinement that amount to cruel and unusual punishment if the condition causes a sufficiently serious injury or risk and prison officials were aware of the risk and disregarded it. Prison officials are neither psychiatrists nor psychologists; therefore, they cannot look at an inmate and diagnose the inmate with a particular psychiatric condition. However, prison officials are aware of the potential consequences that solitary confinement may bring; prison administrators created supermax facilities with the intention of using some of the psychological consequences as a means of controlling prisoner’s behavior. Prison officials should have some latitude in defining measures for inmate control, but not when it strips the inmate of their sanity and identity. According to psychological studies, not only are the psychological effects an Eighth Amendment violation, but also the effects solitary confinement create larger risks for the general prison population and for society. Society places a strong reliance on social sciences in making everyday decisions. The courts must follow and rely on psychological studies to interpret the “evolving standards of decency” for a society generally uneducated about the true nature of solitary confinement conditions in supermax facilities such as Tamms.

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\textsuperscript{450} See Romano, supra note 50, at 1132-33.
\textsuperscript{451} See Gauen, Lawsuit, supra note 433, at B1.
\textsuperscript{452} See Rosenbery, supra note 377, at Al.