

**“EVERYTHING IS AT STAKE IF  
NORWAY IS SENTENCED. IN THAT  
CASE, WE HAVE FAILED”:<sup>\*</sup>**

**Solitary Confinement and the “Hard”  
Cases in the United States and Norway**

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*While the harms caused by solitary confinement and its overuse in American prisons have gained increased recognition over the last decade, most states and the federal government maintain that extensive solitary confinement is both necessary and appropriate for those people deemed “the worst of the worst.” As a result, many of those who have been so labeled have languished in solitary confinement for years or even decades. With limited exceptions, they are there with the blessing of the federal courts, which have generally held that even very lengthy periods of solitary confinement do not violate the Eighth Amendment’s Cruel and Unusual Punishments clause. In this Article, I examine a Norwegian court’s holding that Anders Behring Breivik’s long-term solitary confinement violates the European Convention on Human Rights to consider the lessons it holds for American Eighth Amendment conditions of confinement jurisprudence.*

\* Wenche Fuglehaug & Andreas Bakke Foss, *Everything Is at Stake if Norway Is Sentenced. In That Case We Have Failed*, AFTENPOSTEN (Feb. 13, 2016), <http://www.aftenposten.no/norge/Everything-is-at-stake-if-Norway-is-sentenced-In-that-case-we-have-failed-11187b.html> [<https://perma.cc/5DNJ-FUDF>].

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### Introduction

On July 22, 2011, Anders Behring Breivik murdered seventy-seven people in two separate terrorist attacks in Norway.<sup>1</sup> On that quiet summer afternoon, Breivik first set a car bomb outside a government building in Oslo that killed eight people and injured dozens more. He then went on a shooting spree at a youth camp on the island of Utøya, killing sixty-nine people, most of them teenagers.<sup>2</sup> Accounts of that day describe the events in chilling detail:

Breivik had traveled directly from the bombsite to the small island of Utøya and gained access to the island ferry masquerading as a police officer. He almost immediately started shooting at the 600 persons trapped on the island and killed 69 persons. Using hollow-point, expanding ammunition, he also caused many severe and disfiguring injuries. Survivors report that he went back to previous victims, shooting them repeatedly, and that several times he persuaded those hidden to come forward by saying he was a policeman. Survivors also report that he at times was laughing and shouting while shooting.<sup>3</sup>

The massacre has been called “Norway’s worst peacetime atrocity.”<sup>4</sup>

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1. See *Breivik v. Ministry of Justice and Public Security*, No. 15-107496TVI-OTIR/02 (D. Oslo Apr. 20, 2016) (Sekulic, J.), Certified Translation of Judgment at 2 (Nor.) [hereinafter *Breivik Translation*] (on file with the *Criminal Justice Law Review*). For an exhaustively researched account of Breivik, the attacks, and his criminal trial, see ASNE SEIERSTAD, *ONE OF US: THE STORY OF A MASSACRE IN NORWAY—AND ITS AFTERMATH* (Sarah Death trans., Farrar, Straus and Giroux 2015).
  2. *Breivik Translation*, *supra* note 1, at 2.
  3. Ingrid Melle, *The Breivik Case and What Psychiatrists Can Learn from It*, 12 *WORLD PSYCHIATRY* 16, 16 (2013).
  4. Karl Ove Knausgaard, *The Inexplicable: Inside the Mind of a Mass Killer*, *NEW YORKER* (May 25, 2015), <http://www.newyorker.com/magazine/2015/05/25/the-inexplicable> [<https://perma.cc/X7KJ-QYPV>]. Just prior to leaving his house to set the bomb, Breivik sent a copy of his manifesto to a thousand email addresses. The manifesto described his preparations for the attack and called for a Christian war to protect Europe against the threat of Muslim domination. Matthew Taylor, *Breivik Sent “Manifesto” to 250 UK Contacts Hours Before Norway Killings*, *GUARDIAN* (July 26, 2011), <https://www.theguardian.com/world/2011/jul/26/breivik-manifesto-email-uk-contacts> [<https://perma.cc/MT89-AAV7>].

A little over a year later, Breivik was convicted of mass murder and acts of terrorism and was sentenced to twenty-one years in prison—the maximum sentence available under Norwegian law.<sup>5</sup> From the day he was taken into custody by the Norwegian police, Breivik has been held in solitary confinement.<sup>6</sup> By American standards, his conditions in prison could almost be called luxurious: he lives in a three-room suite with areas for living, work, and exercise. In addition to a television, typewriter, and access to an outdoor exercise yard, he also has an Xbox 360, a “Stressless” recliner, a multipurpose weight training machine, a spinning bike, and the opportunity to take university courses and sit for exams.<sup>7</sup> He prepares his own food, and he entered the prison’s Christmas gingerbread house baking contest.<sup>8</sup> Despite these amenities, however, Breivik sued the Norwegian government in 2015, claiming his nearly five years in solitary confinement violate Article 3 of the European Convention on Human Rights (ECHR), which prohibits “torture or inhuman or degrading treatment or punishment.”<sup>9</sup>

Following a four-day trial in which Breivik presented evidence of his conditions of confinement, a Norwegian court agreed. Presiding judge Helen Sekulic issued a detailed and carefully reasoned opinion in which she held that due to the long duration of Breivik’s isolation and the lack of sufficient measures to compensate for its effects, “it has been proven beyond a reasonable doubt that ECHR, Article 3, has been violated vis-à-vis Breivik during his imprisonment.”<sup>10</sup>

The Norwegian court’s decision stands in stark contrast to those of the American courts, which have largely held that long-term solitary confinement<sup>11</sup> does not violate the Eighth Amendment’s proscription

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5. Breivik was sentenced to *forvaring* or preventive detention, which allows the State to extend his imprisonment in five-year increments for as long as he is deemed a continuing threat to society. See General Civil Penal Code §§ 39c–39h (Nor.).

6. Breivik Translation, *supra* note 1, at 2–3.

7. *Id.* at 3–7.

8. Henrik Pryser Libell, *Anders Behring Breivik, Killer in 2011 Norway Massacre, Says Prison Conditions Violate His Rights*, N.Y. TIMES (Mar. 15, 2016), <https://www.nytimes.com/2016/03/16/world/europe/anders-breivik-nazi-prison-lawsuit.html> [<https://perma.cc/8UE3-NKBJ>].

9. Breivik Translation, *supra* note 1, at 2.

10. Breivik Translation, *supra* note 1, at 32–35. The state has appealed the decision. See *infra* note 74.

11. Throughout this article, I use the term “solitary confinement” interchangeably with administrative segregation, special housing units (SHUs), disciplinary segregation, control units, penal isolation, and restrictive housing. Although there is some variation among prisons, solitary confinement conditions typically share a common set of features. Prisoners spend twenty-two to twenty-four hours each day alone in their cells, which are about the size of a Chevy Suburban. For whatever period of time a prisoner is held in solitary confinement, virtually every aspect of his life occurs in his cell. A prisoner in segregation eats all of his meals there, within arm’s reach of his toilet. He is usually denied many services and programs provided to non-segregated prisoners, such as educational classes, job

against cruel and unusual punishment. This is not to say that U.S. courts have rejected *all* Eighth Amendment challenges to long-term solitary confinement. Litigation on behalf of vulnerable populations—juveniles and people with mental illness—is an area of notable success.<sup>12</sup> These successes are critical, not only because they have resulted in the release of many people from solitary confinement, but also because of their expressive function. They clarify that when it comes to state-sanctioned punishment—at least for some people in some situations—there is a line that our society will not cross. But prohibiting the use of solitary confinement solely for vulnerable people leaves the practice intact and available for others.

In this Article, I focus on the “others.” Often deemed “the worst of the worst” by the media (and sometimes the courts), these men and women are held in solitary confinement for years or even decades.<sup>13</sup> Despite a near-uniform consensus among medical and mental health professionals that isolation causes grave harm and profound suffering, U.S. courts have generally held that even very lengthy periods of solitary confinement do not violate the Eighth Amendment.<sup>14</sup>

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training, work, drug treatment, or other rehabilitative or religious programming. To the extent that a person in solitary receives any programming, it is typically provided in-cell through written materials or via a television screen, though some people in solitary are prohibited from having televisions, radios, art supplies, and even reading materials. For the one hour per day (on average) that prisoners in solitary are permitted to leave their cells, they are taken to a small, kennel-like cage to exercise, and even the time there is spent alone. Access to family visits and phone calls is limited, and any visits that do occur take place through thick glass and over phones. Moreover, prisoners in solitary confinement typically are not permitted any human touch, except when the correctional officers shackle them to escort them from location to location. *See infra* note 20.

12. *Jones'El v. Berge*, 164 F. Supp. 2d 1096 (W.D. Wis. 2001); *Ruiz v. Johnson*, 37 F. Supp. 2d 855 (S.D. Tex. 1999); *Madrid v. Gomez*, 889 F. Supp. 1146 (N.D. Cal. 1995). Also, in the context of disciplinary segregation, there has been some success in limiting the types of offenses for which solitary confinement can be imposed as a sanction. *See, e.g.*, ECF 124, *Peoples v. Fischer*, 2:11-cv-02694-SAS (S.D.N.Y. Feb. 19, 2014).
13. *See, e.g.*, Mark Binelli, *Inside America's Toughest Federal Prison*, N.Y. TIMES (Mar. 26, 2015), <https://www.nytimes.com/2015/03/29/magazine/inside-america-s-toughest-federal-prison.html> [<https://perma.cc/C3G4-CQSS>]; Karen Grigsby Bates, *Moussaoui's New Home: A Cell in Super-Max Prison*, NAT'L PUB. RADIO (May 4, 2006), <http://www.npr.org/templates/story/story.php?storyId=5382725> [<https://perma.cc/XME2-UKN9>] (federal supermax in Florence, Colorado “is designed to isolate what’s often described as the worst of the worst of the prison population”); Daniel P. Mears et al., *Housing for the “Worst of the Worst” Inmates: Public Support for Supermax Prisons*, 59 CRIME & DELINQ. 587 (2009); *see also Jones'El*, 164 F. Supp. 2d 1096.
14. *See, e.g.*, *Silverstein v. BOP*, 559 F. App'x. 739 (10th Cir. 2014); *In re Long Term Admin. Segregation*, 174 F.3d 464, 471–72 (4th Cir. 1999); *Bruscino v. Carlson*, 854 F.2d 162, 166–67 (7th Cir. 1988); *Hale v. BOP*, No. 14-cv-00245-MSK-MJW, 2015 WL 5719649, at \*12 (D. Colo. Sept. 30, 2015).

That said, at least some members of the Supreme Court have signaled a willingness to consider whether very long periods of solitary confinement—par-

Typically, the rationale for these decisions is the claimed dangerousness of the prisoner, and the balancing of the State's need for security (and sometimes, retribution) against the prisoner's right to basic human needs.<sup>15</sup> In cases involving "the worst of the worst," this balancing nearly always tips against the prisoner.

Part of the reason for this is the difficulty of articulating the harm caused by solitary confinement in a constitutionally cognizable way. That difficulty is a function of the way Eighth Amendment conditions of confinement law has developed, with its cramped definition of "basic human needs" and limited conceptions of harm, particularly mental, emotional, or dignitary harms. As Colin Dayan has observed:

Cruelty takes many forms other than the corporeal, but what is striking about contemporary Eighth Amendment cases . . . is the affirmation of the corporal-punishment paradigm, attending only to the body and not to the mind or to the prisoner's place in society—concerns that were once deemed vital to human dignity and worth.<sup>16</sup>

In failing to attend to these concerns, current Eighth Amendment jurisprudence diminishes not only the human dignity of those subjected to solitary confinement, it also diminishes our collective dignity as a society. Leslie Meltzer Henry has explained that "[c]ollective virtue as dignity addresses how members of civilized societies ought to behave and ought to be treated in order to respect the collective dignity of humanity."<sup>17</sup> It is, she explains, "both iconographic and expressive. Treating a person in a subhuman manner is wrong not only for the effect it has on that individual, but also for the consequences it has on collective humanity and society."<sup>18</sup>

Our judicial system has an obligation to be more faithful to the kinds of harm the Eighth Amendment can and should prevent, given the Supreme Court's edict that the Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."<sup>19</sup> The *Brevik* case can show us how.

## I. Solitary Confinement

The United States significantly outpaces the rest of the world in its use of penal isolation, holding upwards of eighty-thousand people in

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particularly of death-sentenced prisoners—might violate the Eighth Amendment. See, e.g., *Davis v. Ayala*, 135 S. Ct. 2187, 2208–10 (2015) (Kennedy, J., concurring); *Ruiz v. Texas*, No. 16–7792 (16A841), 2017 WL 901080 (Mar. 7, 2017) (Breyer, J., dissenting).

15. See generally *Farmer v. Brennan*, 511 U.S. 825 (1994).

16. COLIN DAYAN, *THE STORY OF CRUEL AND UNUSUAL* 43 (2007).

17. Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 220–21 (2011).

18. *Id.* at 221.

19. *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981) (quoting *Trop v. Dulles*, 356 U.S. 86, 1010 (1958)).

solitary confinement on a given day.<sup>20</sup> Some of them have been there for years, or even decades.<sup>21</sup>

As the Supreme Court recognized well over a century ago, people who have been in prolonged solitary confinement are damaged by the experience in painful and often fundamental ways.<sup>22</sup> The wealth of medical and other scientific and health-related research examining the consequences of prolonged solitary confinement overwhelmingly shows that it inflicts profound psychological harm.<sup>23</sup> Studies across nations and decades have found that the social isolation, sensory deprivation, and extreme idleness inherent in solitary confinement is psychologically toxic and deprives people of the basic human needs necessary to function. This leads to dramatic mental deterioration, even in previously healthy people. Indeed, “[n]early every scientific inquiry into the effects of solitary confinement over the past 150 years has concluded that subjecting an individual to more than 10 days of involuntary segregation results in a distinct set of emotional, cognitive, social, and physical pathologies.”<sup>24</sup>

As a result, an inordinately high percentage of people in solitary confinement exhibit a cluster of psychopathologies, including difficulties with thinking and memory, stupor, obsessional thinking, inability to tolerate external stimuli, hallucinations, and, in extreme cases, a delirium with

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20. SARAH BAUMGARTEL ET AL., TIME-IN-CELL: THE ASCA-LIMAN 2014 NATIONAL SURVEY OF ADMINISTRATIVE SEGREGATION IN PRISON 3 (2015) (approximating that “between 80,000 and 100,000 people were in isolation in prisons as of the fall of 2014”). Solitary confinement has been defined as:

the physical isolation of individuals who are confined to their cells for 22 to 24 hours a day. In many jurisdictions, prisoners held in solitary confinement are allowed out of their cells for one hour of solitary exercise a day. Meaningful contact with other people is typically reduced to a minimum. The reduction of stimuli is not only quantitative but also qualitative. The available stimuli and occasional social contacts are seldom freely chosen, generally monotonous, and often not empathetic.

*The Istanbul Statement on the Use and Effects of Solitary Confinement*, 18 TORTURE 63, 63 (2008); Special Rapporteur of the Human Rights Council, *Interim Report of the Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 25, U.N. Doc. A/66/268 (Aug. 11, 2011) (by Juan E. Méndez) (“solitary confinement” is “the physical isolation of individuals who are confined to their cells for 22 to 24 hours a day”).

21. See, e.g., *Silverstein v. Bureau of Prisons*, 559 Fed. App’x. 739 (10th Cir. 2014); *Ashker v. Governor of California*, 2014 WL 2465191 (N.D. Cal. 2014); *Wilkerson v. Stalder*, 639 F. Supp. 2d 654 (M.D. La. 2007).

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

23. See Kristin Cloyes, David Lovell, David Allen & Lorna Rhodes, *Assessment of Psychosocial Impairment in a Supermaximum Security Unit Sample*, 33 CRIM. JUST. AND BEHAV. 760 (2006); Craig Haney, *Mental Health Issues in Long-Term Solitary and “Supermax” Confinement*, 49 CRIME & DELINQ. 124 (2003); Peter Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 CRIME & JUST. 441 (2006).

24. Kenneth Appelbaum, *American Psychiatry Should Join the Call to Abolish Solitary Confinement*, 43 J. AM. ACAD. PSYCHIATRY & L. 406, 410 (2015).

associated psychotic symptoms. As a consequence of the psychological toll, people in solitary confinement disproportionately engage in high rates of self-mutilation and suicide.<sup>25</sup> Even for those eventually released, the damage is often permanent.<sup>26</sup>

The harm caused by solitary confinement is especially grievous because it has the capacity to rob those who are subjected to it of the very things that make us human: the ability to think, to feel, to relate to others, and even to act. This is because, as Dr. Craig Haney has explained, in order to survive the experience, many people must adapt to it in ways that deny fundamental aspects of their humanity:

Solitary confinement is a socially pathological environment that forces long-term inhabitants to develop their own socially pathological adaptations—ones premised on the absence of meaningful contact with people—in order to function and survive. As a result, prisoners gradually change their patterns of thinking, acting and feeling to cope with their largely asocial world and the impossibility of relying on social support or the routine feedback that comes from normal contact with others.<sup>27</sup>

Such was the case with Albert Woodfox, one of the “Angola 3,”<sup>28</sup> who was recently released from prison after forty-three years in solitary confinement. After decades in isolation, he told Dr. Haney, a psychological expert who met with Woodfox in the context of in his conditions of confinement lawsuit against the State of Louisiana, that “he was afraid of how well he’d been ‘adapting to the painfulness.’ ‘There is a part of me that is gone,’ he said. ‘I had to sacrifice that part in order to survive.’”<sup>29</sup>

25. Fatos Kaba et al., *Solitary Confinement and Risk of Self-Harm Among Jail Inmates*, 104 AM. J. PUB. HEALTH 442 (2014).

26. Elizabeth Vasilades, *Solitary Confinement & Int’l Human Rights: Why the U.S. Prison System Fails Global Standards*, 21 AM. U. INT’L L. REV. 71, 76–77 (2005).

Medical research documents that prolonged solitary confinement also can inflict grave physiological harms, including serious sleep disturbances, profound lethargy, dizziness, and deterioration of cardiac, musculoskeletal, gastrointestinal, and genitourinary function. The extreme deprivations of solitary confinement may even alter the physical structure of the brain. Again, the physiological damage is often permanent.

See Stuart Grassian, *Psychopathological Effects of Solitary Confinement*, 140 AM. J. PSYCHIATRY 1450, 1453 (1983).

27. Report or Affidavit of Craig William Haney, Ph.D., J.D., *Silverstein v. Bureau of Prisons*, 704 F. Supp. 2d. 1077 (D. Colo. Apr. 13, 2009) (No. 07CV02471), 2009 WL 8514046 [hereinafter Haney Report]; see also Terry Kupers, *Isolated Confinement: Effective Method for Behavior Change or Punishment for Punishment’s Sake?*, in ROUTLEDGE HANDBOOK OF INTERNATIONAL CRIME AND JUSTICE STUDIES 213, 217–18 (Bruce A. Arrigo & Heather Y. Bersot eds., 2013).

28. Merrit Kennedy, *Last of “Angola 3” Released After More Than 40 Years in Solitary Confinement*, NAT’L PUB. RADIO (Feb. 19, 2016, 7:35 PM), <http://www.npr.org/sections/thetwo-way/2016/02/19/467406096/last-of-angola-3-released-after-more-than-40-years-in-solitary-confinement> [https://perma.cc/J8LJ-JK4T].

29. Rachel Aviv, *How Albert Woodfox Survived Solitary*, NEW YORKER (Jan. 16, 2017), <http://www.newyorker.com/magazine/2017/01/16/how-albert-woodfox-survived-solitary> [https://perma.cc/96CR-KLF6].

In addition to ceding parts of who they are in order to preserve their sanity (and possibly their lives), many people in long-term segregation “are forced to become highly dependent on the surrounding institution to authorize, organize, and oversee even the most minute and mundane aspects of their daily life.”<sup>30</sup> Unsurprisingly, “they may find themselves struggling to initiate behavior on their own, in part because they have been stripped of the opportunity to organize their lives around meaningful activity and purpose. . . . They also often find it difficult to focus their attention, to concentrate, or to organize sustained activity.” Professor Haney concludes: “In extreme cases prisoners may literally stop behaving.”<sup>31</sup>

Following his release from solitary confinement to the free world, Woodfox “discovered that a typical day in the house—moving from the kitchen to the bathroom to the living room—entailed more steps than his entire exercise regimen in prison. He felt overwhelmed by options. ‘I have to submit to the process of developing a new technique to fill the hours.’ ‘I’m trying to strike the right balance with being free.’”<sup>32</sup>

Herbert Wallace, a second member of the Angola 3, testified during his deposition in the same case that being in solitary confinement for forty-one years had reduced him to “a state of being where I can barely collect my own thoughts.”<sup>33</sup> This happens to people in isolation, Dr. Haney explains, because “normal mental and cognitive functioning requires stimulation—including social stimulation—to maintain. The ability to focus attention, concentrate, shift one’s thoughts appropriately from task to task, and to retrieve memories is grounded in social context” and “if these skills are not used in meaningful ways over long periods of time, they can atrophy.” In extreme cases, he says, “a stupor or mental fog results in which prisoners cannot grasp concepts, recall information, think clearly or process information effectively.”<sup>34</sup> Mr. Wallace’s description of the way that isolation affected his mind is less technical but more visceral: “It’s like a killing machine.”<sup>35</sup>

It is difficult to argue that the destruction of personhood wrought by solitary confinement is not torture.<sup>36</sup> In their book, *Because It Is Wrong*,

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30. Haney Report, *supra* note 27.

31. *Id.* at 18.

32. *Aviv, supra* note 29.

33. *Id.*

34. Decl. of Dr. Craig Haney at ¶ 16, *Silverstein v. Bureau of Prisons*, 704 F. Supp. 2d. 1077 (D. Colo. Apr. 13, 2009) (No. 07-cv-02471-PAB-KMT), 2011 WL 7699152 [hereinafter Haney Declaration].

35. *Aviv, supra* note 29.

36. International human rights law defines torture as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person . . . .” Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 3542 (XXX), Supp. No. 34, at 91, U.N. Doc. A/10034 (Dec. 9, 1976) [hereinafter Torture Declaration]. Moreover, international bodies recognize that solitary confinement qualifies as cruel and

Charles and Gregory Fried undertake a study of torture, both to define it and to consider whether or when it is ever justified.<sup>37</sup> They postulate that what distinguishes punishment (which is permissible) from torture (which is not) is that torture violates what Fried and Fried have called “the sacredness of the human person”:

Torture grossly offends the bedrock premise that every human being is a locus of inestimable value: a being with plans, emotions, rational and aesthetic or spiritual capacities, and the capacity to form relations to other persons. Altogether, we would call these aspects of a person her soul. Torture offends that premise because it distorts, destroys, or impairs the physical envelope that contains, enables, and expresses the person’s soul.<sup>38</sup>

Solitary confinement violates the sacredness of the human person. It is, as Dr. Haney has described, “a painfully long form of social death” in which “people [are] consigned to living in suspended animation, not really part of this world, not really removed from it, and not really part of any other world that is tangibly and fully human.”<sup>39</sup>

## II. Solitary Confinement and the Hard Cases—the United States

*There is no torture, no whips, no bright lights, no drugging. We are a nation of laws.*

—Marine Brigadier General Michael R. Lehman, Guantanamo Bay

Although solitary confinement satisfies several legal and moral definitions of torture,<sup>40</sup> most of the federal courts that have considered the issue have held that even long-term segregation does not violate the U.S. Constitution’s prohibition against cruel and unusual punishment.<sup>41</sup>

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inhuman treatment unless applied in strictly limited circumstances and for a strictly limited duration. The U.N. Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules), U.N. Econ. & Soc. Comm. on Crime Prevention and Criminal Justice, 24th Sess., U.N. Doc. E/CN.15/2015/L.6/Rev.1 (May 21, 2015), as well as the U.N. High Comm’r Human Rights, The Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. HR/P/PT/8/Rev. 1 (1999), embody the recent iterations of these well-settled international law principles.

37. CHARLES FRIED & GREGORY FRIED, *BECAUSE IT IS WRONG: TORTURE, PRIVACY AND PRESIDENTIAL POWER IN THE AGE OF TERROR* (2010).

38. FRIED & FRIED, *supra* note 37, at 37, 55.

39. *Hearing on “CDCR’s New Policies on Inmate Segregation: The Promise and Imperative of Real Reform” Before the Cal. S. and Assemb. Comm. on Pub. Safety* (Cal. 2014) (statement of Professor Craig Haney).

40. *See* sources cited *supra* note 36.

41. *See, e.g.,* *Silverstein v. Bureau of Prisons*, 704 F. Supp. 2d 1077, 1089 (D. Colo. 2010); *In re Long Term Admin. Segregation of Inmates Designated as Five Percenters*, 174 F.3d 464, 471 (4th Cir. 1999); *Madrid v. Gomez*, 889 F. Supp. 1146, 1261 (N.D. Cal. 1995); *Bruscino v. Carlson*, 854 F.2d 162, 167–68 (7th Cir. 1988); *but see Johnson v. Wetzell*, No. 1:16-CV-863, 2016 WL 5118149, at \*7 (M.D. Pa. Sept. 20, 2016).

While some (including the late Justice Scalia) have argued otherwise, “[i]f

Part of the reason for this is the way that Eighth Amendment conditions of confinement law has evolved over the past thirty years, particularly during the Rehnquist era.<sup>42</sup> In a series of decisions beginning in the late 1980s, the Supreme Court has increasingly limited the protection of the Eighth Amendment as it pertains to prison conditions.

Under the Court's current interpretation of the Eighth Amendment, to prevail on a claim that a prison condition is cruel and unusual, a person must satisfy a two-pronged test with objective and subjective components. The objective prong requires him to demonstrate the challenged condition is sufficiently serious to merit review because it deprives him of a "basic human need."<sup>43</sup> The subjective prong requires a showing that prison officials acted with "deliberate indifference" in imposing or maintaining the condition despite knowing about the harm or risk of harm.<sup>44</sup> Significantly, in its 1991 decision in *Wilson v. Seiter*,<sup>45</sup> the Court held that general prison conditions cannot cumulatively reach the level of cruel and unusual punishment unless they have a "mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth or exercise."<sup>46</sup>

The federal courts' interpretation of the Cruel and Unusual Punishments Clause was not always so circumscribed. The late 1960s and early 1970s witnessed a period of recognition by the federal courts that prisoners were entitled to minimum constitutional standards during their confinement, which generally coincided with a more rehabilitation-focused view of corrections. For example, in *Laaman v. Helgemoe*,<sup>47</sup> decided in this brief period in which the federal courts functioned as a

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anything is clear in constitutional law, it seems to be that the Eighth Amendment's prohibition against 'cruel and unusual punishments' bars 'torture.'" Seth F. Kreimer, *Too Close to the Rack and the Screw: Constitutional Constraints on Torture in the War on Terror*, 6 U. PA. J. CONST. L. 278, 283 (2003). As Seth Kreimer has observed,

The original impetus for the Eighth Amendment came from the Framers' repugnance towards the use of torture, which was regarded as incompatible with the liberties of Englishmen. Even for those sentenced to death, the Court has held for more than a century that "it is safe to affirm that punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden."

*Id.* at 283–84 (quoting *Wilkerson v. Utah*, 99 U.S. 130, 136 (1879)).

42. In *Bell v. Wolfish*, 441 U.S. 520, 545 (1979), which is widely regarded as the first clear signal of the end of the reform movement in prisoners' rights jurisprudence, Justice Rehnquist observed that although the Court had acknowledged in prior cases that prisoners have rights, "our cases have also insisted on a second proposition: simply because prison inmates retain certain constitutional rights does not mean that these rights are not subject to restrictions and limitations."

43. See *Farmer v. Brennan*, 511 U.S. 831, 832–33 (1994).

44. *Id.* at 836–38.

45. 501 U.S. 294 (1991).

46. *Id.* at 299–304.

47. 437 F. Supp. 269 (D.N.H. 1977).

more meaningful check on state punishment,<sup>48</sup> a federal court in New Hampshire held that conditions of confinement at a state prison constituted cruel and unusual punishment.<sup>49</sup>

The court's opinion is striking in that it focused on the way in which the aggregate effects of the prison conditions combined to "cost[] a man more than a part of his life; [to] rob[] him of his skills, his ability to cope with society in a civilized manner, and, most importantly, his essential human dignity."<sup>50</sup> As Colin Dayan observed,

The court's far-reaching relief order was the broadest application ever of the Eighth Amendment, not only acknowledging the limits it set on the punishment of "the physical body" but ruling that "its protections extend to the whole person as a human being." In a detailed opinion, the court found that confinement itself could violate the Constitution if it made prisoner "degeneration probable and reform unlikely." While recognizing that prisoners were "adequately warehoused," the court denounced the inhumanity of "isolation cells" and the lack of educational programs and vocational training as "coerced stagnation."<sup>51</sup>

This notion of the Eighth Amendment serving as protection against "degeneration" and "coerced stagnation" has all but disappeared in more recent Eighth Amendment conditions of confinement law. Dayan describes the impact of current Eighth Amendment jurisprudence, especially the effect of *Wilson*:

By focusing on discrete "necessities," the court ignored the moral and emotional degeneration that had been so decried in lower federal court cases in the 1970s. In disregarding anything "so amorphous as overall conditions," [Justice] Scalia dismantled the "totality of circumstances" test established in *Laaman*, which had condemned "the cold storage of human beings" and "enforced idleness" as nothing less than a "numbing violence against the human spirit."<sup>52</sup>

Limiting judicial review of prison conditions only to those that deprive a person of a single, identifiable human need, coupled with a cramped conception of what constitutes a human need, has contributed to what Dayan has called "the reproduction of conditions that disfigure personhood and incapacitate prisoners."<sup>53</sup> When "our courts deliberately

48. Prior to the prison reform movement that began in the 1960s, the predominant view of the federal courts was that prisoners had no legal right to humane conditions of confinement that could be judicially enforced. Consequently, the courts maintained a "hands-off" approach to prison cases, often citing concerns about separation of powers, federalism, and lack of judicial expertise in prison management. See MALCOLM FEELEY & EDWARD RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW COURTS REFORMED AMERICA'S PRISONS* 30–31 (1998); LYNN S. BRANHAM, *CASES AND MATERIALS ON THE LAW OF SENTENCING, CORRECTIONS, AND PRISONERS' RIGHTS* 335–36 (6th ed. 2002).

49. *Laaman*, 437 F. Supp. 269.

50. *Id.* at 325.

51. DAYAN, *supra* note 16, at 19–20.

52. *Id.* at 35.

53. *Id.* at 35–36.

and knowingly continue to ignore obvious violations of human dignity and worth, such cruel and unusual treatment becomes protected in law.”<sup>54</sup>

### III. Solitary Confinement and the Hard Cases—Lessons from Norway

*We do not have the death penalty in Norway. Therefore it is a dilemma that we have a system which removes so many of the things that make life worth living.*

—Øyvind Storrvik, counsel to Anders Behring Breivik<sup>55</sup>

Like other aspects of the criminal justice system, punishment as it is practiced in Norway is very different from the United States. Not only is there no death penalty, a “life sentence” (like that given to Breivik) is a maximum of twenty-one years, unless a court rules (as it did with Breivik) that the person is subject to preventive detention. Norwegian prisons look and feel very different, too. In Norway, deprivation of liberty is the key element of custodial punishment and further imposition of suffering is prohibited. This philosophy, coupled with the Norwegian penal system’s emphasis on rehabilitation, results in a strong commitment to what is referred to as “the principle of normalization,” which holds that as far as possible, conditions on the inside should be similar to those on the outside.<sup>56</sup> Norway’s prisons are, in the words of one journalist, “the physical expression of an entire national philosophy about the relative merits of punishment and forgiveness.”<sup>57</sup>

For many in Norway, Breivik’s crimes and his demeanor both during and after his criminal trial offered the single greatest test of the Norwegian commitment to these values. Though some felt that if ever there were a case for the death penalty, Breivik was it, many others—including some family members of victims—“felt no personal rancor” toward him.<sup>58</sup> One victim, a survivor of the Utøya shootings, “said that Norway’s treatment of Breivik was a sign of a fundamentally civilized nation,” and noted that, “[I]f [Breivik] is deemed not to be dangerous any more after 21 years, then he should be released. . . . That’s how it should work. That’s staying true to our principles, and the best evidence that he hasn’t changed our society.”<sup>59</sup>

54. *Id.* at 91.

55. Wenche Fuglehaug & Andreas Bakke Foss, *Everything Is at Stake if Norway Is Sentenced. In That Case We Have Failed*, AFTENPOSTEN (Feb. 13, 2016), <http://www.aftenposten.no/norge/Everything-is-at-stake-if-Norway-is-sentenced-In-that-case-we-have-failed-11187b.html> [<http://perma.cc/62VX-YD7S>].

56. *See, e.g.*, NORWEGIAN MINISTRY OF JUSTICE AND THE POLICE, PUNISHMENT THAT WORKS—LESS CRIME—A SAFER SOCIETY: REPORT TO THE STORTING ON THE NORWEGIAN CORRECTIONAL SERVICES 8–9 (2008).

57. Fuglehaug & Foss, *supra* note 55.

58. Mark Lewis & Sarah Lyall, *Norway Mass Killer Gets the Maximum: 21 Years*, N.Y. TIMES (Aug. 24, 2012), <http://www.nytimes.com/2012/08/25/world/europe/anders-behring-breivik-murder-trial.html> [<https://perma.cc/GA74-F8WC>].

59. *Id.* (quoting Bjorn Magnus Ihler, who survived the shootings).

After his criminal trial, Breivik's lawsuit challenging his conditions of confinement represented the next test of that commitment. Norwegian human rights lawyer Thomas Horn, an expert on solitary confinement, emphasized the importance of ensuring not only that Breivik's rights were scrupulously protected during his criminal trial, but also that his post-conviction treatment at the hands of the State was humane. He explained that in the wake of Breivik's unspeakable violence, "[W]e stood together as a community, in spite of being shocked and traumatized. And the trial in itself was conducted in a way which is worthy of a state under the rule of law. Norway was put [to] a difficult test, which we passed."<sup>60</sup> But, he noted, in reference to Breivik's human rights lawsuit, "Even if Norway passed the first test, it is equally important that we pass the one we are facing now . . . Everything is at stake if Norway is sentenced. In that case we will have failed in the follow-up."<sup>61</sup>

Horn's comments reflect the idea that a criminal justice system is only as just as each of its parts, including the nature and conditions of punishment. So too, his remarks recognize the principle that punishment is a reflection of the society that metes it out, including—perhaps especially—when the punished are "the worst of the worst."<sup>62</sup>

In analyzing Breivik's claims under the European Convention on Human Rights, the district court began by observing that Article 3's prohibition against torture, inhuman and degrading treatment, "[R]epresents a fundamental value in democratic society. It applies regardless—also in relation to the treatment of terrorists and murderers."<sup>63</sup> Recognizing that imprisonment itself—even in high security prisons—does not violate the Convention, the court observed that, "In order for a sentence or treatment associated with a sentence to be regarded as inhuman or degrading, the suffering or humiliation must exceed the inevitable suffering or humiliation that will follow in the wake of a lawful detention."<sup>64</sup>

The court then reviewed the evidence related to Breivik's claim that his extensive isolation violates Article 3. From the outset, the court recognized the severity of solitary confinement and the concomitant obligation this imposes on correctional officials to ensure that it is necessary:

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60. Fuglehaug & Foss, *supra* note 55.

61. *Id.*

62. Mears et al., *supra* note 13.

63. Breivik Translation, *supra* note 1, at 16. The Norwegian Human Rights Act makes the European Convention on Human Rights Norwegian law. *Id.* at 13. In addition to his Article 3 claim, Breivik also asserted that his right, "[T]o respect for private and family life and private correspondence" under Article 8 was violated by virtue of the NCS censoring some of his mail and denying him permission to visit with three people who he did not know prior to his imprisonment and who have links to right-wing extremist communities. *Id.* at 35. The court held that neither of these interventions constituted a breach of Breivik's Article 8 rights, given the security interest of the NCS and the fact that the restrictions on his correspondence and visits were not absolute. *Id.* at 36–40. Breivik did not appeal that decision.

64. *Id.* at 16.

“Isolation is reserved for extraordinary cases, and then only after all other precautions (‘every precaution’) have been taken. The necessity of isolation demands an appropriate justification, and the requirements for this justification increase as time passes.”<sup>65</sup> Starting from the premise that “[t]he concept of isolation is not an absolute,” the court observed, “The reality is that the Plaintiff spends 22–23 hours per day alone in a cell. This is an entirely closed world, with very little human contact.”<sup>66</sup> While acknowledging his access to “relatively well-equipped cells with direct daylight,” the court found that these features of Breivik’s confinement did not diminish his claim about the particular harms of isolation: “The external facilities surrounding the Plaintiff are of little significance; being cut off from other human beings is the important issue here.”<sup>67</sup>

The court described Breivik’s conditions as “a prison within a prison,”<sup>68</sup> where he does not even see, much less interact with, other prisoners. Though staff check on him regularly and have increased their “contact time” with him, the court was not persuaded that this was sufficient to mitigate his isolation.<sup>69</sup> Indeed, the court highlighted two other features of Breivik’s confinement that exacerbated the risk of isolation damage. First was that with the exception of one visit with his mother immediately before her death, all of his visits—including with counsel—have occurred with a glass barrier in place:

The Court believes that communication via microphone through a glass wall results in a sense of detachment. For a person who is already serving his sentence in isolation from all others, such communication could easily reinforce feelings of detachment and loneliness. In such a situation, the importance of being able to carry out conversations with another human being in a normal manner (without a glass wall), must not be under-estimated.<sup>70</sup>

The court also expressed concern about the nature and frequency of the strip-searches Breivik has been subjected to while in solitary confinement, observing that when forced to undergo a strip-search as a condition of participating in an activity such as outdoor exercise, Breivik often elected to forego the activity. “When a person sits in isolation and is otherwise subject to strict security restrictions, it is particularly unfortunate to link strip-searches to activities that are recommended as a means of preventing isolation damage.”<sup>71</sup> For that reason, the court concluded that the extra burden of the strip-searches constitutes “degrading treatment” within the meaning of the ECHR.<sup>72</sup>

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65. *Id.* at 20.

66. *Id.* at 7.

67. *Id.*

68. *Id.* at 22.

69. *Id.* at 23.

70. *Id.* at 27.

71. *Id.* at 33–34.

72. *Id.* at 35.

The court's focus on these additionally isolating aspects of Breivik's conditions reflect its concern with the idea that Breivik—like anyone else serving a lawfully imposed sentence—should not be subjected to conditions that violate the sacredness of the human person. Though the State disputed that Breivik's conditions have harmed him, the court was more circumspect, crediting evidence that he has already suffered some cognitive and emotional damage and finding that there is a greater risk of him underreporting his symptoms than exaggerating them.<sup>73</sup> This, coupled with the length of Breivik's isolation and the court's conclusion that the State had not adequately assessed whether aspects of it were strictly necessary, formed the basis for the court's holding that the "prison regime entails an inhuman treatment of Breivik; the threshold of severity has been exceeded."<sup>74</sup>

But the *Breivik* decision is significant for reasons that go beyond acknowledging the harmful psychological effects of solitary confinement. As Breivik's lawyer told the court at his hearing: "It is a big responsibility a state takes upon it when it chooses not to use capital punishment." The *Breivik* decision is significant in that it respects the inherent dignity that Breivik possesses by virtue of being a member of the human family, despite the heinousness of his crimes and his disregard for the humanity

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73. *Id.* at 31.

Breivik himself has reported, for example, protracted headaches, which he characterizes as "isolation headaches," dizziness and pressure in his head. The fact that he may take a headache tablet is not of particular interest for the Court. It is not the treatment of the headache that is the key issue here—attention must be directed to the cause of the headache.

*Id.*

74. *Id.* at 32.

The government appealed the district court's decision in early 2017, and the Borgarting Court of Appeal issued a decision reversing the district court just as this Article was going to press. See Ministry of Justice and Public Security v. Breivik, No. 16-111749ASD-BORG/02 (Borgarting Ct. App., Mar. 1, 2017) Certified Translation of Judgment (Nor.) (on file with the *Criminal Justice Law Review*). Part of the appellate court's rationale in holding that Breivik's conditions do not violate Article 3 was based on its finding that "the Correctional Service has implemented highly extensive mitigating measures" and that the "scope of social contact has increased; not least during 2016." *Id.* at 40, 45. Those mitigating measures include "organized joint activities with personnel twice each week," and "considerable conversations with the social consultant, chaplain, volunteer prison visitor, and, if desired, medical personnel." *Id.* at 40. The Court of Appeal also signaled that greater reduction in Breivik's isolation would be warranted as more time passed, stating "there are now grounds for, relatively soon, at least attempting interaction with one or a couple of inmates under highly controlled circumstances." *Id.* at 46.

Breivik's counsel has stated his intent to appeal the decision to the Norwegian Supreme Court, and possibly the European Court of Human Rights. Alister Doyle & Terje Solsvik, *Mass Killer Breivik Loses Human Rights Case Against Norway*, REUTERS (Mar. 1, 2017), <http://www.reuters.com/article/us-norway-breivik-idUSKBN168454> [https://perma.cc/Z75U-H9YW].

and dignity of his victims. In so doing, the decision also respects the humanity and collective dignity of the society of which Breivik is a part.

Harald Føsker, Director of International Cooperation of the Norwegian Correctional Service, embodies these values. Føsker worked at the Ministry of Justice and was grievously harmed by the bomb Breivik set, sustaining extensive injuries to his head and face and permanent loss of much of his vision and hearing. “I lost my liberty that day,” he says, noting that among other things, he can no longer drive or ride a bicycle and has not been able to work full-time.<sup>75</sup> “But [Breivik] is not my destiny.”<sup>76</sup> It is critically important to Director Føsker that Norway be able to “stand upright and say that we treated him according to our values and the Council of Europe’s values. In that way, we have our own dignity.”<sup>77</sup> Føsker recognizes that in that sense, Breivik’s dignity is tied up with his own, and with the society that levels and executes his punishment. It is a philosophy that honors Norway’s collective virtue.

### Conclusion: Lessons for the United States

*A decent and free society, founded in respect for the individual, ought not to run a system with a sign at the entrance for inmates saying, “Abandon Hope, All Ye Who Enter Here.”*

—Justice Anthony Kennedy, United States Supreme Court<sup>78</sup>

It is often said that bad facts make bad law. But sometimes the converse is also true: the hardest cases can serve as the truest measure of a society’s commitment to its most fundamental values. *Breivik* is such a case.

In ruling that Breivik’s long-term isolation violated his human rights, the Norwegian court did the difficult work of drawing the line between permissible punishment and inhuman and degrading treatment, regardless of how unspeakable the crimes or unrepentant the prisoner. That distinction is at the heart of the Eighth Amendment’s Cruel and Unusual Punishments Clause as well, though even a cursory review of Eighth Amendment jurisprudence demonstrates that “there is no long-established heritage of using the Eighth Amendment to protect the rights of those we hate and fear. On the contrary, there is a long tradition in our courts of limiting and narrowing its application.”<sup>79</sup> But as Justice Kennedy has observed,

75. Harald Føsker, Comments to Participants of the 2016 U.S. Criminal Justice Innovation Program (Sept. 16, 2016) (notes on file with author).

76. *Id.*

77. *Id.* Føsker is not alone in this sentiment. At the trial on Breivik’s human rights lawsuit, one of his victims commented, “I think it’s important that we give him this trial. It is a victory in itself for us, as a society, not for him.” Libell, *supra* note 8.

78. Anthony M. Kennedy, Assoc. J., U.S. Sup. Ct., Speech Delivered at the American Bar Association Annual Meeting (Aug. 9, 2003), in 16 FED. SENT’G REP. 126, 128 (2003).

79. JEREMY WALDRON, *Foreword to COLIN DAYAN, THE STORY OF CRUEL & UNUSUAL*,

We have a greater responsibility. To be sure the prisoner has violated the social contract; to be sure he must be punished to vindicate the law, to acknowledge the suffering of the victim, and to deter future crimes. Still, the prisoner is a person; still, he or she is part of the family of humankind.<sup>80</sup>

It is for exactly that reason that the Supreme Court held that the punishment at issue in *Trop v. Dulles*<sup>81</sup>—loss of citizenship for the crime of wartime desertion—was too severe a punishment to fit any crime because it destroyed a person’s identity and his place in the community.<sup>82</sup> So too with solitary confinement, which inflicts a profound assault on what makes us human, depriving those subjected to it of what we ordinarily think of as a life. To proscribe it, as the *Breivik* court did, honors the dignity and humanity that is the birthright of every person, and in so doing, respects the collective dignity and humanity of society. These are ideals to which Eighth Amendment jurisprudence should aspire.

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at ix, xvi (2007).

80. Kennedy, *supra* note 78, at 127.

81. 356 U.S. 86 (1958).

82. *Id.* at 101–02.

