Before Rajiv Sharma & Gurvinder Singh Gill, JJ.

STATE OF HARYANA—*Prosecutor*

versus

ARUN AND OTHERS—*Respondents*

Murder Reference No.03 of 2017

December 06, 2018

"Death penalty" "solitary confinement"—Indian Penal Code, 1860—Ss. 73, 74, 363, 366-A, 302, 201, 376-A, 376-D—The Protection of Children from Sexual Offences Act, 2012—S. 6—Code of Criminal Procedure, 1973—S. 366,368,371 & 413—Prisons Act, 1894—S. 30 and 59—Punjab Jail Manual—Chapter XXIX. Murder Reference received from the Additional Sessions Judge for confirmation of death sentence—Appeals also preferred by convicts against conviction under Ss. 366-A, 302, 377 of IPC and S. 6 of POSCO Act—Imposition of death sentence also assailed by appellants— Appeal also preferred by complainant against acquittal of one accused—Appellants were seen following 9 year old prosecutrix—Her body was found next day in the morning—Recoveries were made from them pursuant to disclosures—Clothes were subjected to examination by forensic science laboratory—Cause of death was asphyxia due to throttling— Appellants were convicted by trial court and awarded death sentence—Held—Chain is complete—Conviction upheld—Death violent but cannot be termed that it has pricked collective conscious of the society—Death sentence commuted to life imprisonment—Appellants to mandatorily serve minimum 20 years without claiming remission—Further held—Practice adopted by the jail authorities in the State of Haryana of segregating a convict sentenced todeath immediately after the pronouncement of sentence by the trial Court and after confirmation of sentence by the High Court abolished being unconstitutional.

Held that chain is complete in the present case. PW-30 Sanpati has also identified Arun. She could identify the accused from their voice since she was living in the same locality. There is no enmity between the family of the complainant and the accused. The dead boy of the prosecutrix was found in open space as per the statement of PW-17 Rajender. The voice sample also matched. The investigation on certain issues is defective but has not prejudiced the case of the appellants.....Recoveries have been effected on the basis of

disclosure statements made by the appellants. There are numerous injuries on the body of the prosecutrix as per post- mortem report.....The prosecutrix was throttled which was duly proved by post- mortem report.

(Para 42)

Further held that voice spectrographic examination of questioned voice samples revealed that the questioned voice samples marked were similar to specimen voice samples marked in respect of their format frequencies distribution, intonation pattern, number of formants and other general visual features in voice grams. The probable voice was of Narender. Similarly the questioned voice of Smt. Sanpati was found to be similar to her specimen voice. The accused were found capable of intercourse as per MLR reports Ex.PW5/A, PW5/B, PW5/C. Thus the prosecution has proved the case against the appellants beyond reasonable doubt.

(Para 42)

Further held that we are of the view that this case does not fall in the ambit of the "rarest of rare case" for awarding death sentence to the appellants. Though according to the final opinion Ex.PW22/R, death is violent but it cannot be termed that it has pricked collective conscious of the society. The young girl was killed by throttling but it cannot be termed gruesome murder.

(Para 48)

Further held that appellant Arun, Rajesh and Deepak were sent to solitary confinement immediately after the judgment and order dated 18.01.2017/19.01.2017.

(Para 49)

Further held that State of Punjab has framed the Rules called the Punjab Jail Manual. Chapter XXIX deals with prisoners condemned to death. These Rules have been adopted by the State of Haryana.

(Para 51)

Further held that paragraph 758 provides that every prisoner under sentence of death shall, immediately on his arrival in the prison after sentence, be searched by, or by order of, the Deputy Superintendent, and all articles shall be taken from him which the Deputy Superintendent deems it dangerous or inexpedient to leave in his possession. Every prisoner is to be confined in a cell apart from all other prisoners, and is to be placed by day and by night under the charge of a guard. (Para 52)

Further held that it is clear from the paragraphs of the Punjab Jail Manual that every prisoner condemned to death is to be confined in a cell apart from all other prisoners and is to be placed by day and by night under the charge of a special guard. No person can communicate with him without the authority of the Superintendent. The prisoner condemned to death is only permitted to occupy the court yard of his cell for half an hour each morning and evening. The light is on from sunset to sunrise so that the prisoner is under observation all the time, though he is permitted reasonable indulgence in the matter of interviews with relatives, friends, legal advisers and approved religious ministers.

(Para 73)

Further held that United Nations have laid down "the Standard Minimum Rules for the Treatment of Prisoners" called "the Nelson Mandela Rules." Rule 45 defines that the solitary confinement shall be used only in exceptional cases as a last resort, for as short a time as possible and subject to independent review, and only pursuant to the authorization by a competent authority. It shall not be imposed by virtue of a prisoner's sentence. The imposition of solitary confinement should be prohibited in the case of prisoners with mental or physical disabilities when their conditions would be exacerbated by such measures.

(Para 75)

Further held that according to Paragraph 368, cited hereinabove, every convict under sentence of death is to be confined in a cell apart from all other prisoners and is to be placed by day and by night under the charge of a special guard. He is only permitted half an hour in the morning and in evening to occupy the verandah in front of his cell. During this period, the convict has to remain handcuffed. It is thus, evident that the convict under sentence to death is to be kept in a segregated cell. He is permitted only half an hour to come out of his cell to occupy the verandah. He is put under the gaze of light. He is to be kept always under the observation of guards.

(Para 86)

Further held that as discussed hereinabove, keeping a convict in an isolated cell has psychiatric impact on him. It causes him heart palpitations (awareness of strong and/or rapid heartbeat while at rest), diaphoresis (sudden excessive sweating), insomnia, back and other joint pains, deterioration of eyesight, poor appetite, weight loss and sometimes diarrhoea, lethargy, weakness, tremulousness (shaking),

feeling cold, aggravation of pre- existing medical problems, anxiety, ranging from feelings of tension to full blown panic attacks, persistent low level of stress, irritability or anxiousness, fear of impending death, panic attacks, depression, varying from low mood to clinical depression, emotional flatness/blunting – loss of ability to have any 'feelings', emotional ability (mood swings), hopelessness, social withdrawal; loss of initiation of activity or ideas; apathy; lethargy, major depression, anger, ranging from irritability to full blown rage, irritability and hostility, poor impulse control, outbursts of physical and verbal violence against others, self and objects, unprovoked anger, sometimes manifesting as rage, cognitive disturbances, ranging from lack of concentration to confusional states, short attention span, poor concentration, poor memory, confused thought processes; disorientation, perceptual distortions, ranging from hypersensitivity to hallucinations, hypersensitivity to noises and smells, distortions of sensation (e.g. walls closing in), disorientation in time and space, depersonalisation/ derealisation, hallucinations affecting all five senses, visual, auditory, tactile, olfactory and gustatory (e.g.hallucinations of objects or people appearing in the cell, or hearing voices when no-one is actually speaking), paranoia and psychosis, ranging from obsessional thoughts to full blown psychosis, recurrent and persistent thoughts (ruminations) often of a violent and vengeful character (e.g. directed against prison staff), paranoid ideas – often persecutory, psychotic episodes or states: psychotic depression, schizophrenia, self-harm and suicide etc.

(Para 87)

Further held that United Nations Standard Minimum Rules for the Treatment of Prisoners laid down that the solitary confinement shall be used only in exceptional cases as a last resort. It shall not be imposed by virtue of a prisoner's sentence. The solitary confinement means the confinement of prisoners for 22 hours or more a day without meaningful human contact. Prolonged solitary confinement shall refer to solitary confinement for a time period in excess of 15 consecutive days.

(Para 88)

Further held that Punjab Jail Manual lays down that warder shall not allow any person to go near or communicate with the prisoner except by the authorised person. He is supposed to be in isolation for more than 23 hours in a day. This is against the Nelson Mandela Rules. He has no contact with outside world. He is kept in a solitary

confinement till he is acquitted or pardoned or hanged. There is no scientific reason why the convict sentenced to death should be kept in isolation for indefinite period till he exhausts all his constitutional and legal remedies. It causes immense pain, agony and anxiety to the condemned convict. It is violative of Articles 20 (2) and 21 of the Constitution of India. A man, even sentenced to death, has certain privileges and rights which cannot be denied to him due to colonial mindset. The provisions of the Punjab Jail Manual are anarchic, cruel and insensitive.

(Para 89)

Further held that procedure prescribed by law must be fair, just and reasonable and not oppressive and arbitrary. The law should be neither glacial nor remote. The law should be the framework and guarantor of civilization.

(Para 91)

Further held that this practice to keep the convict in custodial segregation/solitary confinement before the exhaustion of his constitutional, legal and fundamental rights is without authority of law. It will amount to additional punishment. It also amounts to torture and violative of his basic human rights.

(Para 92)

Further held that accordingly, we abolish the practice adopted by the jail authorities in the State of Haryana, of segregating a convict sentenced to death, immediately after the pronouncement of sentence by the trial Court and after confirmation of sentence by the High Court, being unconstitutional. The convict shall not be segregated/ isolated till the sentence of death has become final, conclusive and indefeasible which cannot be annulled or voided by any judicial process. The period to keep a convict sentenced to death in segregation/isolation should be for the shortest possible time i.e. 2-3 days.

(Para 93)

Vinod Ghai, Senior Advocate with
Amrit S.Kang, Advocate *for the appellants*
in CRA-D-98-DB-2017 & CRA-D-104-DB-2017

Gaurav Mahunta, Advocate with
Preeti Aggarwal, Advocate
for the appellant in CRA-D-187-DB-2017

S.P.Yadav, Advocate
for the applicant in CRM-A-993-MA-2018

Shubhra Singh, Addl.A.G. Haryana.

RAJIV SHARMA, J.

(1) Since common questions of law and facts are involved in the aforesaid murder reference and appeals, therefore these are taken up together and disposed of by a common judgment.

(2) Murder Reference No.03 of 2017 has been received from the Additional Sessions Judge, Narnaul, for confirmation of death sentence awarded to (1) Arun son of Subhash Chand, resident of Ward no.10, Mandi Ateli, District Mohindergarh; (2) Deepak son of Mahender, resident of Ward no.10, Mandi Ateli; and (3) Rajesh son of Rohtash, resident of Ward no.10, Mandi Ateli, District Mohindergarh, as per judgment and order dated 18.01.2017/19.01.2017.

(3) Criminal Appeal no.D-98-DB-2017 has been preferred by Arun; Criminal Appeal no.D-104-DB-2017 by Rajesh; and Criminal Appeal no.D-187-DB-2017 by Deepak against the judgment and order dated 18.01.2017/19.01.2017 whereby the appellants were charged with and tried for offences punishable under Sections 363, 366-A, 302, 201, 376-A, 376-D of the Indian Penal Code (in short 'IPC') and under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (in short "POCSO Act"). Appellant Deepak was convicted and sentenced to undergo rigorous imprisonment for seven years and pay fine of Rs.10,000/- and in default of payment of fine to undergo SI for two years for offence under Section 366-A IPC. Deepak along with Rajesh and Arun were convicted and sentenced to undergo rigorous imprisonment to life and pay fine of Rs.20,000/- each and in default of payment of fine, to undergo SI for three years for offence under Section 6 of POCSO Act and 377 of IPC. Deepak, Rajesh and Arun were also sentenced to be hanged by neck till they were dead and pay fine of Rs.20,000/- each. The death sentence awarded to the appellants was subject to confirmation by this Court.

(4) The complainant Indu has also filed criminal appeal no.CRM-A-993-MA-2018 against the acquittal of Sanjay Chaudhary. Leave had been granted to file an appeal on the date of hearing. The appeal has been heard on merits.

(5) The case of the prosecution in a nutshell is that on 01.11.2014 at about 11.25 P.M., Balwan Singh ASI along with HC Jugal Kishore and Constable Anil Kumar was patrolling near the old bus stand Ateli. The complainant Indu wife of Rakesh Kumar appeared

and moved an application. According to the averments made in the application, her daughter (name withheld) aged about 9 years had gone to leave the mouse at 5.30 P.M. in the neighbouring plot. She did not come back. They searched for her but could not find her. Her daughter may be searched. Ruqa was sent to the police station. FIR was registered. The appellants were arrested. They were medically examined. Their cell phones were taken into possession. The statements of witnesses under Section 161 Cr.P.C. were recorded. Inquest report was prepared. Dead body was sent for post-mortem examination. The opinion of the Board is Ex.PW22/R. The post-mortem reports are Exs.P22/B and PW22/C. Recoveries were effected. The FSL reports were obtained vide Ex.PW22/J, PW22/K, PW22/N, PW22/P, PW22/Q. The investigation was completed and the challan was put up after completing all the nodal formalities. Two supplementary challans were also put up.

(6) Prosecution examined as many as 37 witnesses. The statements of appellants were also recorded under Section 313 Cr.P.C. They have denied the case of the prosecution.

(7) The appellants Arun, Rajesh and Deepak were sentenced to death under Section 302 IPC; for life imprisonment under Section 6 of POCSO Act and under Section 377 IPC whereas Deepak was also sentenced to undergo rigorous imprisonment for seven years under Section 366-A IPC. Hence these appeals against their conviction and sentences; death reference by the learned Additional Sessions Judge, Narnaul for confirmation of death sentence; and one appeal against acquittal of Sanjay Chaudhary.

(8) Learned counsel appearing for the appellants (convicts) have vehemently argued that the prosecution has failed to prove the case against the appellants.

(9) Learned counsel appearing on behalf of the State has supported the judgment and order dated 18.01.2017/19.01.2017.

(10) Sh. S.P. Yadav, learned counsel appearing on behalf of the appellant Indu Devi has vehemently argued that Sanjay Chaudhary has been wrongly acquitted.

(11) We have heard learned counsel for the parties and have gone through the judgment and record very carefully.

(12) PW-1 Phool Kumar has proved the CDs of place of occurrence and post-mortem examination as Ex.MO-1 and Ex.MO-2.

He also proved photographs of the place of occurrence as Ex.P1 to Ex.P6.

(13) PW-2 Bijender Singh SI has recorded a formal FIR Ex.PW2/A. PW-3.

(14) PW-3 Ranvir Singh ASI testified that on 04.11.2014 accused Deepak made a disclosure statement Ex.PW3/A. On the basis of his disclosure statement, the place of occurrence was demarcated from where he had allured the prosecutrix. Accused Arun also made disclosure statement Ex.PW3/B. The place was also got demarcated where the dead body of prosecutrix was dumped. On his disclosure statement, motor cycle was also recovered. Accused Rajesh also made disclosure statement Ex.PW3/C on the basis of which, the place of occurrence was also demarcated where the dead body was thrown. Accused were arrested on 03.11.2014.

(15) PW-4 HC Jugal Kishore deposed that one trouser of blue colour with belt, one underwear and slippers of green and yellow colour were recovered from near the dead body. These were taken into possession. Deepak led the police party to the place where the deceased was allured away by him. The place was demarcated vide Ex.PW4/B. The place where the mouse trap was abandoned, was also demarcated vide Ex.PW4/C. The place where the dead body was dumped was also got demarcated by accused Deepak vide memo Ex.PW4/E. He signed all the memos. Similarly accused Rajesh and Arun led the police party and pointed out the place of occurrence and place of dumping of the body vide Ex.PW4/F, Ex.PW4/G and Ex.PW4/H, Ex.PW4/K respectively. Some clothes were also recovered from sofa. Some blood stained leaves of Calotropis plant (Aak plant) were also taken into possession.

(16) PW-5 Dr.Ashish Rao had medically examined the appellants. According to his opinion with regard to accused Deepak, there was nothing to suggest that person was not competent to perform sexual intercourse. He also examined Rajesh. According to his opinion, there was nothing to suggest that person was not competent to performs sexual intercourse. He also examined Arun. According to his opinion, there was nothing to suggest that person was not competent to performs sexual intercourse. He also medically examined Sanjay Chaudhary.

(17) PW-6 Sawroop Singh is material witness. According to him, he used to sell boiled eggs and prepare omelette. The appellants never

came to him for eating eggs or omelette. He was declared hostile and cross-examined by the learned Public Prosecutor.

(18) PW-7 Brahm Parkash Inspector has partly investigated the case.

(19) PW-8 Yogesh Kumar ASI deposed that on 04.11.2014, Mahender Singh SI/SHO moved an application for obtaining call details of phone of the appellants.

(20) PW-9 Manoj Kumar deposed that Bhalender Yadav handed over one CD of videography of confessions made by accused Arun, Deepak and Rajesh to Malkhan Singh SI/ SHO. This CD was taken into possession vide Ex.PW9/A.

(21) PW-10 Sombir, PW-11 Anil Kumar, PW-12 Samay Singh, PW-13 ESI Rohtash Singh, PW-14 Jai Parkash and PW-15 Mukesh Kumar are formal witnesses.

(22) PW-16 Collector is a material witness. According to him, he was working as a salesman since 1991 on the liquor vend of Rattan Lal & Company. On 01.11.2014 appellant Rajesh came to the liquor vend and purchased one half from him at about 7.00 P.M. He was daily customer.

(23) PW-17 Rajender deposed that he along with other residents was searching for the girl. The dead body of girl was found at 9.30 P.M. in open land.

(24) PW-19 Rajesh Yadav deposed that on 01.11.2014 there was lagan ceremony of his nephew Nishant. He was declared hostile. He has denied the statement Ex.PW19/A. However he has admitted about the incident which took place in Ward no.10.

(25) PW-20 Ashok Kumar is formal witness.

(26) PW-21 Bijender son of Sardar Singh deposed that he was running a photography shop. He had videographed lagan ceremony in the house of Ashok Kumar.

(27) PW-22 Dr.Jagmohan had conducted post mortem examination. He proved post mortem report Ex.PW22/B. He has admitted his signatures on Ex.PW22/R.

(28) PW-23 Malkhan Singh has deposed that Sanpati and Narender Singh were asked to give voice samples. He had recorded the statements of Sanpati under Section 161 Cr.P.C. The polygraph test of

accused Sanjay Chaudhary was also conducted. He also proved report Ex.PW22/F and Ex.PW22/G. He also got the spot demarcated and prepared Aks shajra.

(29) PW-24 Bahlender Yadav deposed that the matter was reported in the TV Channel. Press reporters were invited by police for press conference in the office of the DSP (Headquarter), Narnaul. All the three accused namely Arun, Deepak and Rajesh confessed their guilt. The video was prepared vide Ex.MO-9. He has identified the appellants in the Court. All the three persons had made their confessions separately.

(30) PW-25 Pardeep Kumar deposed that they had participated in search of the prosecutrix. She was found lying naked in a ditch.

(31) PW-26 Indu is the mother of the prosecutrix. She had identified the signature on complaint Ex.PW26/A.

(32) PW-27 ASI Balwan Singh deposed that PW-26 had submitted the complaint before him. He conducted the inquest proceedings. The clothes of the deceased were taken into possession. The dead body was sent for post-mortem examination to Government Hospital, Narnaul. The accused were arrested by SI Mahender Singh. The mobile phone was recovered from them. He identified mobile phone which was taken into possession from the accused on 03.11.2014. He also identified the phones which were taken into possession from Sanjay Chaudhary.

(33) PW-28 Surender Singh has proved polygraphic test report of Sanjay Chaudhary as Ex.PW22/P.

(34) PW-29 Narender is a material witness. He testified that he had gone towards the vacant plot. He saw the prosecutrix going to plot no.1. One boy was following her. The deceased's mother enquired about the whereabouts of her daughter. He told her that he had seen her going with mouse trap in her hand and followed by a boy. The dead body was found at 6.00 A.M. He identified Arun in the Court. He also identified Deepak in the Court. He also identified Rajesh in the Court. The accused had got the places demarcated. He signed the confessions made by the accused. He denied the suggestion that none was interrogated in his presence. He was also called for further examination after filing of supplementary challan. He identified his voice as well as voice of Rohtash father of accused Rajesh. He had voluntarily given his voice sample.

(35) PW-30 Sanpati testified that she was present in the house. At about 3.00 A.M. she had gone to answer the call of nature towards a vacant plot. She heard the voice of boys that they have committed a serious offence. She came back to her house. She identified one of the accused namely Arun. Her statement was recorded by the police. Her voice sample was taken along with Narender. She was declared hostile and cross-examined by the learned Public Prosecutor. She was confronted with her statement made vide Ex.PW23/A.

(36) PW-31 Mahender Singh deposed that he requested Balwan Singh for conducting post mortem examination. He arrested Arun, Rajesh and Deepak. The accused were interrogated. They made disclosure statements. He also moved an application for getting call details of mobile phones. Recoveries were got effected by the accused. Sofa set and iron drum were taken to police station. Motor cycle was also recovered. PW-31 Mahender Singh was recalled. He admitted that application was moved for seeking remand of Sanjay Chaudhary on 06.11.2014. Neither any recovery was got effected by accused Sanjay Chaudhary, nor any new fact was discovered during his interrogation.

(37) PW-33 Amit was called for examination after filing supplementary challan. He deposed that on 12.02.2016 he along with his mother and PW Kaka was present in their house. Rohtash father of Rajesh came to their house. Kaka, Rohtash and his mother Sanpati were talking to each other. He recorded the conversation of Rohtash, Sanpati and Kaka in his mobile sim. In his cross-examination he had admitted that he was not an expert in recording voice.

(38) PW-35 Pritam @ Tilu deposed that he visited the police station on 12.02.2016. He made his deposition about recording of conversation.

(39) PW-36 Ashok Kumar had prepared site plan Ex.PW36/A.

(40) PW-37 Amitosh Kumar has proved the report Ex.PW37/A and PW37/B.

(41) What emerges from the discussion of the statements, discussed herein above is that the prosecutrix was 9 years old. She left her house to release the mouse at 5.30 P.M. She did not come back. Her mother approached the police. Her dead body was recovered at 6.00 A.M. next day. The appellants were recognized by PW-29 Narender in the Court. He had also seen one of the appellants following the girl. The girl was kept in a room. Thereafter the appellants consumed liquor as per statement of PW-16 Collector. The appellants have made

disclosure statements on the basis of which the recoveries were effected. The clothes etc. were sent for FSL examination. These reports were duly proved. The post-mortem report has been proved by PW-22 Dr.Jagmohan. He has also proved final opinion Ex.PW22/R. The cause of death as per Ex.PW22/R was asphyxia due to throttling. The Board has given opinion about the possibility of rape duly supported by the report dated 27.01.2015. The death was violent in nature. According to post-mortem examination report, following injuries were recorded:-

> "gynecologic external examination A 3x2 cm contusion present on right labia majora, a contusion of size 5 x 4 cm present on left perineal region. An abrasion mark of size 8 x .3 cm present on mid of right buttock. A white sticky material was present on the posterior aspect of left thigh which was scraped and sample was taken.
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> INTERNAL EXAMINATION 3 swabs and 3 smears were prepared from high vagina, lower vagina and anal region respectively.
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> ON internal examination bleeding per vagina hymen was ruptured vaginal orifice was dilated and was on finger admitting.
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> On opening the abdomen on inspecting the uterus and adenexa, uterus to be found normal in shape, size and consistency and adenexa was clear."
>
> There were seven external injuries. The probable time between the death and post-mortem examination was within 24 hours.

(42) The chain is complete in the present case. PW-30 Sanpati has also identified Arun. She could identify the accused from their voice since she was living in the same locality. There is no enmity between the family of the complainant and the accused. The dead boy of the prosecutrix was found in open space as per the statement of PW-17 Rajender. The voice sample also matched. The investigation on certain issues is defective but has not prejudiced the case of the appellants. PW-37 Amitosh Kumar has proved reports Ex.PW37/A and PW37/B. PW-30 Sanpati has not supported the case of the prosecution in its entirety but has proved the case on material aspects regarding presence of the appellants on the spot. Recoveries have been effected on the basis of disclosure statements made by the appellants. There are numerous injuries on the body of the prosecutrix as per post-mortem

report. The hymen was fractured. There were three abrasions of size 1 x .75 cm, .75 cm x .75 cm and .75 x .75 cm on right side of neck and on left side of neck .75 x .75 cm contusion and 2 x .75 cm abrasion was present on neck. There was contusion of 3 x 2 cm on right labia majora. A contusion of size 5 x 4 cm was present on left perineal region. An abrasion mark of size 8 x 3 cm was present on mid of right buttock. Vaginal orifice was dilated. The prosecutrix was throttled which was duly proved by post-mortem report. The contents of the FIR has been duly proved by PW-26 Indu. Human semen was detected on exhibit 3a (underwear), exhibit-4a (underwear), exhibit-5a (underwear), exhibit-5b (pubic hair) and exhibit-6a (underwear). However, semen could not be detected on exhibit-1a (High vaginal smear), exhibit-1b (Low vaginal smear), exhibit-1e (Anal smear), exhibit-1d (High vaginal swab), exhibit-1e (Low vaginal swab), exhibit-1f (Anal swab). The blood was detected on exhibit-1a (High vaginal smear), exhibit-1b(Low vaginal smear), exhibit-1e (Anal smear), exhibit-1d (High vaginal swab), exhibit-1e (Low vaginal swab), exhibit-1f (Anal swab), exhibit-2 (shirt) & exhibit 8 (Leaves), as per Ex.PW22/J. The blood was detected on exhibit-8 (Leaves) as per Ex.PW22/K. Human semen was detected on exhibit-1a (underwear). However, semen could not be detected on exhibit-1(b) (Jeans) and exhibit-2 (Chappal), as per PW22/N. According to Ex.PW37/A, the auditory examination in question was marked Q-1(1)(A) and specimen voice of Sh.Narender marked exhibit S-1(1)(A) revealed that questioned voice marked exhibit Q-1(1)(A) was similar to the specimen voice marked exhibit S-1(1)(A) in respect of their linguistic and phonetic features. The voice spectrographic examination of questioned voice samples revealed that the questioned voice samples marked were similar to specimen voice samples marked in respect of their format frequencies distribution, intonation pattern, number of formants and other general visual features invoice grams. The probable voice was of Narender. Similarly the questioned voice of Smt. Sanpati was found to be similar to her specimen voice. The accused were found capable of intercourse as per MLR reports Ex.PW5/A, PW5/B, PW5/C. Thus the prosecution has proved the case against the appellants beyond reasonable doubt.

(43) Their Lordships of the Hon'ble Supreme Court in ***Bachan Singh*** *versus* ***State of Punjab***[1] have categorically held that the death penalty is to be imposed only when the alternative of life imprisonment is totally inadequate, and therefore unquestionably foreclosed, i.e. if it

[1] (1980) 2 SCC 684

is the only inevitable conclusion. The aggravating circumstances shall also be taken into consideration.

(44) Their Lordships of Hon'ble Supreme Court in the case of ***C. Muniappan and others*** *versus* ***State of Tamil Nadu***[2] along with connected appeal, have laid down the social effect of punishment and proportional considerations, when the principle of rarest of rare rule is to be applied. Their Lordships have further held that death sentence can be given in rarest of rare cases if the "collective conscience" of a community is so shocked that death penalty is the only alternative. The "rarest of the rare case" comes when the convict would be a menace and threat to the harmonious and peaceful coexistence of the society. Their Lordships have also held as under :-

> "87. In Machhi Singh v. State of Punjab this Court expanded the "rarest of rare" formulation beyond the aggravating factors listed in Bachan Singh to cases where the "collective conscience" of a community is so shocked that it will expect the holders of the judicial powers to inflict the death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining the death penalty, and stated that in these cases such a penalty should be inflicted. But the Bench in this case underlined that full weightage must be accorded to the mitigating circumstances in a case and a just balance had to be struck between aggravating and mitigating circumstances. The Court further held that the relevant factors to be taken into consideration may be motive for, or the manner of commission of the crime, or the anti-social or abhorrent nature of the crime, such as:
>
> (i) Murder is in extremely brutal manner so as to arouse intense and extreme indignation of the community.
>
> (ii) Murder of a large number of persons of a particular caste, community, or locality, is committed.
>
> (iii)Murder of an innocent child; a helpless woman, is committed.
>
> **91.** Thus, it is evident that criminal law requires strict adherence to the rule of proportionality in providing punishment according to the culpability of each kind of

[2] (2010) 9 SCC

> criminal conduct keeping in mind the effect of not awarding just punishment on the society. The "rarest of the rare case" comes when a convict would be a menace and threat to the harmonious and peaceful coexistence of the society. Where an accused does not act on any spur of the moment provocation and he indulged himself in a deliberately planned crime and meticulously executed it, the death sentence may be the most appropriate punishment for such a ghastly crime.
>
> **92.** Life imprisonment is the rule and death penalty an exception. Therefore, the court must satisfy itself that death penalty would be the only punishment which can be meted out to a convict. The court has to consider whether any other punishment would be completely inadequate and what would be the mitigating and aggravating circumstances in the case. Murder is always foul, however, the degree of brutality, depravity and diabolic nature differ in each case. Circumstances under which murders take place also differ from case to case and there cannot be a straitjacket formula for deciding upon circumstances under which death penalty must be awarded. In such matters, it is not only the nature of crime, but the background of criminal, his psychology, his social conditions, his mindset for committing offence and effect of imposing alternative punishment on the society are also relevant factors."

(45) Their Lordships of Hon'ble Supreme Court in the case of ***Rabindra Kumar Pal @ Dara Singh*** versus ***Republic of India***[3] have explained the principles for imposition of death sentence. Their Lordships have also held as under:-

> "90. Though the trial court awarded death sentence for Dara Singh, the High Court after considering the entire materials and finding that it is not a rarest of the rare case, commuted the death sentence into life imprisonment. The principles with regard to awarding punishment of death have been well settled by judgments of this Court in Bachan Singh v. State of Punjab, Machhi Singh v. State of Punjab and Kehar Singh v. State (Delhi Admn.). It is clear from the above decisions that on conviction under Section 302 IPC, the

[3] (2011) 2 SCC 490

normal rule is to award punishment of life imprisonment and the for the rarest of rare cases.

91***. Whether a case falls within the rarest of the rare case or not, has to be examined with reference to the facts and circumstances of each case and the court has to take note of the aggravating as well as mitigating circumstances and conclude whether there was something uncommon about the crime which renders the sentence of imprisonment for life inadequate and calls for death sentence. However, more than 12 years have elapsed since the act was committed, we are of the opinion that the life sentence awarded by the High Court need not be enhanced in view of the factual position discussed in the earlier paras."

(46) Their Lordships of Hon'ble Supreme Court in the case of ***Mohd. Mannan @ Abdul Mannan*** versus ***State of Bihar***[4] have discussed the broad guidelines for imposition of death penalty. Their Lordships have also held as under :-

"23. It is trite that death sentence can be inflicted only in a case which comes within the category of the rarest of rare cases but there is no hard-and-fast rule and parameter to decide this vexed issue. This Court had the occasion to consider the cases which can be termed as the rarest of rare cases and although certain comprehensive guidelines have been laid to adjudge this issue but no hard-and-fast formula of universal application has been laid down in this regard. Crimes are committed in so different and distinct circumstances that it is impossible to lay down comprehensive guidelines to decide this issue. Nevertheless it is widely accepted that in deciding this question the number of persons killed is not decisive.

24*. Further, crime being brutal and heinous itself does not turn the scale towards the death sentence. When the crime is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community and when collective conscience of the community is petrified, one has to lean towards the death sentence. But this is not the end. If these factors are present the court has to see as to whether the

[4] (2011) 5 SCC 317

accused is a menace to the society and would continueto be so, threatening its peaceful and harmonious coexistence. The court has to further enquire and believe that the accused condemned cannot bereformed or rehabilitated and shall continue with the criminal acts. In this way a balance sheet is to be prepared while considering the imposition of penalty of death of aggravating and mitigating circumstances and a just balance is to be struck. So long the death sentence is provided in the statute and when collective conscience of the community is petrified, it is expected that the holders of judicial power do not stammer dehors their personal opinion and inflict death penalty. These are the broad guidelines which this Court has laid down for imposition of the death penalty.

25. When we test the present case bearing in mind what has been observed, we are of the opinion that the case in hand falls in the category of the rarest of rare cases. The appellant is a matured man aged about 43 years. He held a position of trust and misused the same in a calculated and pre-planned manner. He sent the girl aged about 7 years to buy betel and few minutes thereafter in order to execute his diabolical and grotesque desire proceeded towards the shop where she was sent. The girl was aged about 7 years of thin built and 4 ft of height and such a child was incapable of arousing lust in normal situation. The appellant had won the trust of the child and she did not understand the desire of the appellant which would be evident from the fact that while she was being taken away by the appellant no protest was made and the innocent child was made prey of the appellant's lust.

26. The post-mortem report shows various injuries on the face, nails and body of the child. These injuries show the gruesome manner in which she was subjected to rape. The victim of crime is an innocent child who did not provide even an excuse, much less a provocation for murder. Such cruelty towards a young child is appalling. The appellant had stooped so low as to unleash his monstrous self on the innocent, helpless and defenceless child. This act no doubt had invited extreme indignation of the community and shocked the collective conscience of the society. Their expectation from the authority conferred with the power to

adjudicate is to inflict the death sentence which is natural and logical. We are of the opinion that the appellant is a menace to the society and shall continue to be so and he cannot be reformed. We have no manner of doubt that the case in hand falls in the category of the rarest of rare cases and the trial court had correctly inflicted the death sentence which had rightly been confirmed by the High Court.

(47) In the case of ***Shatrughan Chauhan & another*** *versus* ***Union of India & others***[5] their Lordships of the Hon'ble Supreme Court reiterated the principles as under:-

"90. It was, therefore, held in Sunil Batra case38 that the solitary confinement, even if mollified and modified marginally, is not sanctioned by Section 30 of the Prisons Act for prisoners "under sentence of death". The crucial holding under Section 30(2) is that a person is not "under sentence of death", even if the Sessions Court has sentenced him to death subject to confirmation by the High Court. He is not "under sentence of death" even if the High Court imposes, by confirmation or fresh appellate infliction, death penalty, so long as an appeal to the Supreme Court is likely to be or has been moved or is pending. Even if this Court has awarded capital sentence, it was held that Section 30 does not cover him so long as his petition for mercy to the Governor and/or to the President permitted by the Constitution, has not been disposed of. Of course, once rejected by the Governor and the President, and on further application, there is no stay of execution by the authorities, the person is under sentence of death. During that interregnum, he attracts the custodial segregation specified in Section 30(2), subject to the ameliorative meaning assigned to the provision. To be "under sentence of death" means "to be under a finally executable death sentence".

91. Even in Triveniben23, this Court observed that keeping a prisoner in solitary confinement is contrary to the ruling in Sunil Batra38 and would amount to inflicting "additional and separate" punishment not authorised by law. It is completely unfortunate that despite enduring pronouncement on judicial side, the actual implementation

[5] 2014 (3) SCC 1

> of the provisions is far from reality. We take this occasion to urge to the Jail Authorities to comprehend and implement the actual intent of the verdict in Sunil Batra38."

(48) We are of the view that this case does not fall in the ambit of the "rarest of rare case" for awarding death sentence to the appellants. Though according to the final opinion Ex.PW22/R, death is violent but it cannot be termed that it has pricked collective conscious of the society. The young girl was killed by throttling but it cannot be termed gruesome murder.

(49) However before parting with the judgment, we were informed by the learned Advocates appearing on behalf of the appellants that appellant Arun, Rajesh and Deepak were sent to solitary confinement immediately after the judgment and order dated 18.01.2017/19.01.2017.

(50) In view of this development, it is necessary to go into the entire gamut of construing the term 'prisoner sentenced to death' as per various enactments.

Section 30 of the Prisons Act, 1894 reads as under:-

> "Prisoners under sentence of death- "(1) Every prisoner under sentence of death shall, immediately on his arrival in the prison after sentence, be searched by, or by order of, the Jailer and all articles shall be taken from him which the Jailer deems it dangerous or inexpedient to leave in his possession.
>
> (2) Every such prisoner shall be confined in a cell apart from all other prisoners, and shall be placed by day and by night under the charge of a guard."

(51) Section 59 empowers the State Government to make Rules by notification in the Official Gazette. The State of Punjab has framed the Rules called the Punjab Jail Manual. Chapter XXIX deals with prisoners condemned to death. These Rules have been adopted by the State of Haryana.

(52) Paragraph 758 provides that every prisoner under sentence of death shall, immediately on his arrival in the prison after sentence, be searched by, or by order of, the Deputy Superintendent, and all articles shall be taken from him which the Deputy Superintendent deems it dangerous or inexpedient to leave in his possession. Every

prisoner is to be confined in a cell apart from all other prisoners, and is to be placed by day and by night under the charge of a guard.

(53) Paragraph 759 provides that every cell in which the convict who is under sentence of death, before such convict is placed in it, is to be examined by the Deputy Superintendent, or other officer appointed.

(54) Paragraph 760 provides that the date fixed for the execution, the period within which petition must be despatched and the result of the petition in case, is to be intimated to the condemned prisoner by the Deputy Superintendent.

(55) Paragraph 761 provides that from sunset to sunrise a good light is to keep burning in front of the grated door of every cell in which a condemned prisoner is confined so that he may at all times be under observation.

(56) Paragraph 764 provides for number of warders required for guarding.

(57) Paragraph 767 provides that condemned prisoner should (unless there are any special reasons against it, which reasons should be recorded, by the Superintendent in his journal), be permitted to occupy the court-yard of his cell for half an hour each morning and evening, but only one such prisoner at a time should be allowed to do so.

(58) Paragraph 769 provides that the condemned prisoner is to be searched twice daily.

(59) Paragraph 770 provides for diet and precautions to be taken.

(60) The condemned prisoner is allowed to use books and tobacco as per paragraph 771.

(61) There are certain exceptions which are carved out for female convicts. No person except authorised jail visitors can communicate with the prisoner without order in writing from or accompanied by the Superintendent.

(62) Paragraph 782 provides the warder guard at execution and the police force when necessary. The Superintendent is responsible for execution only.

(63) Adult male relatives of the condemned prisoner and respectable male adults up to a maximum of 12 in all, may be admitted under the sanction of the Inspector General, to witness an execution either inside the jail, or into the gallows enclosure when the gallows is

outside the jail; provided that the Inspector General may, in his discretion refuse admission altogether or to any particular individual as per paragraph 786.

(64) Paragraph 784 provides that execution shall take place at 8 am in the months of November to February and 7 am in March, April, September and October and 6 am in the months of May to August. The Superintendent and Deputy Superintendent will visit the condemned prisoner in his cell a few minutes before the execution. The Superintendent is required to identify the prisoner as named in the warrant and read over a translation of the warrant in vernacular to the prisoner.

(65) Sections 73 and 74 of the Indian Penal Code read as under:-

> "73-Solitary confinement- Whenever any person is convicted of an offence for which under this Code the Court has power to sentence him to rigorous imprisonment, the Court may, by its sentence, order that the offender shall be kept in solitary confinement for any portion or portions of the imprisonment to which he is sentenced, not exceeding three months in the whole, according to the following scale, that is to say— a time not exceeding one month if the term of imprisonment shall not exceed six months;a time not exceeding two months if the term of imprisonment shall exceed six months and 1 [shall not exceed one] year;a time not exceeding three months if the term of imprisonment shall exceed one year.
>
> 74. Limit of solitary confinement- In executing a sentence of solitary confinement, such confinement shall in no case exceed fourteen days at a time, with intervals between the periods of solitary confinement of not less duration than such periods; and when the imprisonment awarded shall exceed three months, the solitary confinement shall not exceed seven days in any one month of the whole imprisonment awarded, with intervals between the periods of solitary confinement of not less duration than such periods."

(66) Section 366 of the Code of Criminal Procedure, 1973, provides that when the Court of Session passes a sentence of death, the proceedings shall be submitted to the High Court, and the sentence shall not be executed unless it is confirmed by the High Court. The

Court passing the sentence shall commit the convicted person to jail custody under a warrant.

(67) Section 368 deals with power of High Court to confirm sentence or annul conviction.

(68) Section 371 provides that in cases submitted by the Court of Session to the High Court for the confirmation of a sentence of death, the proper officer of the High Court shall, without delay, after the order of confirmation or other order has been made by the High Court, send a copy of the order under the seal of the High Court and attested with his officer signature, to the Court of Session.

(69) Section 413 provides that when in a case submitted to the High Court for the confirmation of a sentence of death, the Court of Session receives the order of confirmation or order of the High Court thereon, it shall cause such order to be carried into effect by issuing a warrant or taking such other steps as may be necessary.

(70) Section 415 deals with postponement of execution of sentence of death in case of appeal to Supreme Court.

(71) Article 72 of the Constitution of India empowers the President to grant pardons, etc., and to suspend, remit or commute sentences in certain cases.

(72) Article 161 empowers the Governor to grant pardons, etc., and to suspend, remit or commute sentences in certain cases.

(73) It is clear from the paragraphs of the Punjab Jail Manual that every prisoner condemned to death is to be confined in a cell apart from all other prisoners and is to be placed by day and by night under the charge of a special guard. No person can communicate with him without the authority of the Superintendent. The prisoner condemned to death is only permitted to occupy the court yard of his cell for half an hour each morning and evening. The light is on from sunset to sunrise so that the prisoner is under observation all the time, though he is permitted reasonable indulgence in the matter of interviews with relatives, friends, legal advisers and approved religious ministers.

(74) In an article “Psychiatric Effects of Solitary Confinement”, by author Stuart Grassian, published by Washington University Journal of Law & Policy, the author has dealt the entire gamut of solitary confinement and its scientific harms to the convicts as under:-

Solitary confinement—that is the confinement of a prisoner alone in a cell for all, or nearly all, of the day with minimal environmental stimulation and minimal opportunity for social interaction—can cause severe psychiatric harm. It has indeed long been known that severe restriction of environmental and social stimulation has a profoundly deleterious effect on mental functioning; this issue has been a major concern for many groups of patients including, for example, patients in intensive care units, spinal patients immobilized by the need for prolonged traction, and patients with impairment of their sensory apparatus (such as eye-patched or hearing-impaired patients). This issue has also been a very significant concern in military situations, polar and submarine expeditions, and in preparations for space travel. The United States was actually the world leader in introducing prolonged incarceration, and solitary confinement, as a means of dealing with criminal behavior. The "penitentiary system" began in the United States, first in Philadelphia, in the early nineteenth century, a product of a spirit of great social optimism about the possibility of rehabilitation of individuals with socially deviant behavior.

2 The Americans were quite proud of their "penitentiary system" and they invited and encouraged important visitors from abroad to observe them.

3 This system, originally labeled as the "Philadelphia System," involved almost an exclusive reliance upon solitary confinement as a means of incarceration and also became the predominant mode of incarceration, both for post conviction and also for pretrial detainees, in the several European prison systems which emulated the American model.

4 The results were, in fact, catastrophic. The incidence of mental disturbances among prisoners so detained, and the severity of such disturbances, was so great that the system fell into disfavor and was ultimately abandoned. During this process a major body of clinical literature developed which documented the psychiatric disturbances created by such stringent conditions of confinement.

5 The paradigmatic psychiatric disturbance was an agitated confusional state which, in more severe cases, had the

characteristics of a florid delirium, characterized by severe confusional, paranoid, and hallucinatory features, and also by intense agitation and random, impulsive, often self-directed violence. Such disturbances were often illness. In addition, solitary confinement often resulted in severe exacerbation of a previously existing mental condition. Even among inmates who did not develop overt psychiatric illness as a result of solitary confinement, such confinement almost inevitably imposed significant psychological pain during the period of isolated confinement and often significantly impaired the inmate's capacity to adapt successfully to the broader prison environment. It is both tragic and highly disturbing that the lessons of the nineteenth century experience with solitary confinement are today being so completely ignored by those responsible for addressing the housing and the mental health needs in the prison setting. For, indeed, the psychiatric harm caused by solitary confinement had become exceedingly apparent well over one hundred years ago. Indeed, by 1890, with In re Medley,6 the United States Supreme Court explicitly recognized the massive psychiatric harm caused by solitary confinement: This matter of solitary confinement is not . . . a mere unimportant regulation as to the safe-keeping of the prisoner. . . . . [E]xperience [with the penitentiary system of solitary confinement] demonstrated that there were serious objections to it. A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; 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.7 The consequences of the Supreme Court's holding were quite dramatic for Mr. Medley. Mr. Medley had been convicted of having murdered his wife. Under the Colorado statute in force at the time of the murder he would have been executed after about one additional month of incarceration in the county jail. But in the interim between Mr. Medley's crime and his trial the Colorado legislature had passed a new statute which called for the convicted murderer to be, instead, incarcerated

in solitary confinement in the state prison during the month prior to his execution.8 Unhappily, when the legislature passed the new law it simultaneously rescinded the older law without allowing for a bridging clause which would have allowed for Mr. Medley's sentencing under the older statute.9 Mr. Medley appealed his sentencing under the new statute, arguing that punishment under this new law was so substantially more burdensome than punishment under the old law as to render its application to him ex post facto.10 The Supreme Court agreed with him, even though it simultaneously recognized that if Mr. Medley was not sentenced under the new law, he could not be sentenced at all.11 Despite this, the Court held that this additional punishment of one month of solitary confinement was simply too egregious to ignore; the Court declared Mr. Medley a free man, and ordered his release from prison.12 Dramatic concerns about the profound psychiatric effects of solitary confinement have continued into the twentieth century, both in the medical literature and in the news. The alarm raised about the "brain washing" of political prisoners of the Soviet Union and of Communist China— and especially of American prisoners of war during the Korean War— gave rise to a major body of medical and scientific literature concerning the effects of sensory deprivation and social isolation, including a substantial body of experimental research.13 This literature, as well as my own observations, has demonstrated that, deprived of a sufficient level of environmental and social stimulation, individuals will soon become incapable of maintaining an adequate state of alertness and attention to the environment. Indeed, even a few days of solitary confinement will predictably shift the electroencephalogram (EEG) pattern toward an abnormal pattern characteristic of stupor and delirium. This fact is not surprising. Most individuals have at one time or another experienced, at least briefly, the effects of intense monotony and inadequate environmental stimulation. After even a relatively brief period of time in such a situation an individual is likely to descend into a mental torpor or "fog," in which alertness, attention, and concentration all become impaired. In such a state, after a time, the individual becomes increasingly incapable of processing external

stimuli, and often becomes "hyperresponsive" to such stimulation. For example, a sudden noise or the flashing of a light jars the individual from his stupor and becomes intensely unpleasant. Over time the very absence of stimulation causes whatever stimulation is available to become noxious and irritating. Individuals in such a stupor tend to avoid any stimulation, and withdraw progressively into themselves and their own mental fog. An adequate state of responsiveness to the environment requires both the ability to achieve and maintain an attentional set and the ability to shift attention. The impairment of alertness and concentration in solitary confinement leads to two related abnormalities: the inability to focus, and the inability to shift attention. The inability to focus (to achieve and maintain attention) is experienced as a kind of dissociative stupor—a mental "fog" in which the individual cannot focus attention, and cannot, for example, grasp or recall when he attempts to read or to think. The inability to shift attention results in a kind of "tunnel vision" in which the individual's attention becomes stuck, almost always on something intensely unpleasant, and in which he cannot stop thinking about that matter; instead, he becomes obsessively fixated upon it. These obsessional preoccupations are especially troubling. Individuals in solitary confinement easily become preoccupied with some thought, some perceived slight or irritation, some sound or smell coming from a neighboring cell, or, perhaps most commonly, by some bodily sensation. Tortured by it, such individuals are unable to stop dwelling on it. In solitary confinement ordinary stimuli become intensely unpleasant and small irritations become maddening. Individuals in such confinement brood upon normally unimportant stimuli and minor irritations become the focus of increasing agitation and paranoia. I have examined countless individuals in solitary confinement who have become obsessively preoccupied with some minor, almost imperceptible bodily sensation, a sensation which grows over time into a worry, and finally into an all-consuming, life-threatening illness. Individuals experiencing such environmental restriction find it difficult to maintain a normal pattern of daytime alertness and nighttime sleep. They often find themselves incapable of resisting their bed

during the day— incapable of resisting the paralyzing effect of their stupor—and yet incapable of any restful sleep at night. The lack of meaningful activity is further compounded by the effect of continual exposure to artificial light and diminished opportunity to experience natural daylight. And the individual's difficulty in maintaining a normal day-night sleep cycle is often far worsened by constant intrusions on nighttime dark and quiet, such as steel doors slamming shut, flashlights shining in their face, and so forth. There are substantial differences in the effects of solitary confinement upon different individuals. Those most severely affected are often individuals with evidence of subtle neurological or attention deficit disorder, or with some other vulnerability. These individuals suffer from states of florid psychotic delirium, marked by severe hallucinatory confusion, disorientation, and even incoherence, and by intense agitation and paranoia. These psychotic disturbances often have a dissociative character, and individuals so affected often do not recall events which occurred during the course of the confusional psychosis. Generally, individuals with more stable personalities and greater ability to modulate their emotional expression and behaviour and individuals with stronger cognitive functioning are less severely affected. However, all of these individuals will still experience a degree of stupor, difficulties with thinking and concentration, obsessional thinking, agitation, irritability, and difficulty tolerating external stimuli (especially noxious stimuli). Moreover, although many of the acute symptoms suffered by these inmates are likely to subside upon termination of solitary confinement, many—including some who did not become overtly psychiatrically ill during their confinement in solitary—will likely suffer permanent harm as a result of such confinement. This harm is most commonly manifested by a continued intolerance of social interaction, a handicap which often prevents the inmate from successfully readjusting to the broader social environment of general population in prison and, perhaps more significantly, often severely impairs the inmate's capacity to reintegrate into the broader community upon release from imprisonment. Many inmates housed in such stringent conditions are extremely

fearful of acknowledging the psychological harm or stress they are experiencing as a result of such confinement. This reluctance of inmates in solitary confinement is a response to the perception that such confinement is an overt attempt by authorities to "break them down" psychologically, and in my experience, tends to be more severe when the inmate experiences the stringencies of his confinement as being the product of an arbitrary exercise of power, rather than the fair result of an inherently reasonable process. Furthermore, in solitary confinement settings, mental health screening interviews are often conducted at the cell front, rather than in a private setting, and inmates are generally quite reluctant to disclose psychological distress in the context of such an interview since such conversation would inevitably be heard by other inmates in adjacent cells, exposing them to possible stigma and humiliation in front of their fellow inmates.

D. Factors Effecting Response to Sensory Restriction and Solitary Confinement

Much of the subsequent research in this area attempted to delineate variables which might explain these differing outcomes. These variables can be divided into two categories: i) differences among various conditions of perceptual deprivation, and ii) differences in preexisting personality functioning among individuals experiencing such conditions.

1. Differing Conditions of Isolation

One of the factors that was commonly cited in the research was the intensity and duration of the sensory deprivation. More severe sensory restriction, the presence of noxious stimulation, and longer duration of the sensory deprivation experience have all been associated with an increased risk of adverse psychiatric consequences.

In my experience, conditions experienced by inmates in various prison solitary confinement settings generally bear some similarities (a cell of roughly fifty to eighty square feet; approximately twenty two and one-half hours per day locked in the cell; about one hour per day of yard exercise, five out of the seven days each week), in other respects the conditions are fairly variable. For example, some cells have

barred doors, which allow better ventilation, sound transmission, and visual connection with the outside environment than do mesh steel doors; solid steel doors are the most restrictive— especially when they are either hinged or slide shut with almost no air gap from the wall. Moreover, administrative conditions regarding the amount and circumstances of visitation, the availability of reading material and television, and so forth are all factors which vary from institution to institution, and even from time to time within a given institution.

2. The Perceived Intent of the Isolation Experience

In addition to the factors described above, another critical factor in determining the effect of isolation appears to be the perceived intent of the isolation. Experimental research has demonstrated that an individual who receives clues which cause him to experience the isolation situation as potentially threatening is far more likely to develop adverse psychiatric reactions to the isolation experience. Conversely, if the subject has reason to believe the situation is likely to be benign he will be far more likely to tolerate or even enjoy it. Among the latter group of subjects who tolerated isolation well, many reported pleasant or at least non-threatening visual imagery, fantasy, and hallucinatory experiences. "His mind may begin to wander, engage in daydreams, slip off into hypnogogic reveries with their attendant vivid pictorial images . . . he may be quietly having sexual or other pleasurable thoughts."

This finding is perhaps not surprising. It appears that sensory restriction produces perceptual disturbances and illusions which are analogous to those produced by hallucinogenic drugs, and clearly, while there are some individuals who could be said to have volunteered to undergo such hallucinatory, psychotic-like experiences it must be almost uniformly terrifying to be forced to undergo an experience similar to that induced by hallucinogenic drugs.

3. Individual Differences in Response

Many studies have demonstrated that there is great variability among individuals in regard to their capacity to

tolerate a given condition of sensory restriction. This variability helps to provide further insight into the nature of the toxic effect of such isolation conditions, and provides striking corroboration of the fact that such deprivation of environmental stimulation, especially when of prolonged duration, is toxic to brain functioning and causes symptoms characteristic of stupor and delirium. Generally, individuals with mature, healthy personality functioning and of at least average intelligence are most able to tolerate the regressive pull and perceptual intrusions of such isolation situations. On the other hand, individuals with primitive or psychopathic functioning or borderline cognitive capacities, impulse ridden individuals, and individuals whose internal emotional life is chaotic or fearful are especially at risk for severe psychopathologic reactions to such isolation. Moreover, there is clear evidence that, in a situation of restricted environmental stimulation, preexisting central nervous system dysfunction is a major predisposing factor to the development of adverse psychiatric reactions and of overt delirium. For example, in one study of patients suffering visual deprivation following eye surgery (eye-patched patients), those patients with preexisting central nervous system dysfunction were found to be at especially high risk to develop symptoms of delirium. Further, the presence of a preexisting personality disorder or impairment of psychosocial functioning was associated with increased risk of incapacitating fearfulness, paranoia, agitation, and irrational aggression toward staff. In addition, individuals may at times be exposed to situations which cause impairment of central nervous system functioning. Such situations—especially if they impair the individual's state of alertness (for example, sleep deprivation, abnormal sleep-wake cycles, or the use of sedating medication) will substantially increase the individual's vulnerability to the development of delirium. Delirium among post-surgical patients and the so-called "ICU psychoses" are examples of this phenomenon. One of the characteristic difficulties experienced by inmates in solitary confinement is abnormal sleep wake cycles and impaired sleep.

III. CONCLUSIONS

The restriction of environmental stimulation and social isolation associated with confinement in solitary are strikingly toxic to mental functioning, producing a stuporous condition associated with perceptual and cognitive impairment and affective disturbances. In more severe cases, inmates so confined have developed florid delirium—a confusional psychosis with intense agitation, fearfulness, and disorganization. But even those inmate who are more psychologically resilient inevitably suffer severe psychological pain as a result of such confinement, especially when the confinement is prolonged, and especially when the individual experiences this confinement as being the product of an arbitrary exercise of power and intimidation. Moreover, the harm caused by such confinement may result in prolonged or permanent psychiatric disability, including impairments which may seriously reduce the inmate's capacity to reintegrate into the broader community upon release from prison.

Many of the prisoners who are housed in long-term solitary confinement are undoubtedly a danger to the community and a danger to the corrections officers charged with their custody. But for many they are a danger not because they are coldly ruthless, but because they are volatile, impulse-ridden, and internally disorganized.

As noted earlier in this statement, modern societies made a fundamental moral division between socially deviant behavior that was seen as a product of evil intent, and such behavior that was seen as a product of illness. Yet this bifurcation has never been as simple as might at first glance appear. Socially deviant behavior can in fact be described along a spectrum of intent. At one end are those whose behavior is entirely "instrumental"—ruthless, carefully planned, and rational; at the other are individuals whose socially deviant behaviour is the product of unchecked emotional impulse, internal chaos, and often of psychiatric or neurological illness.

It is a great irony that as one passes through the levels of incarceration—from the minimum to the moderate to the maximum security institutions, and then to the solitary confinement section of these institutions— one does not

pass deeper and deeper into a subpopulation of the most ruthlessly calculating criminals. Instead, ironically and tragically, one comes full circle back to those who are emotionally fragile and, often, severely mentally ill. The laws and practices that have established and perpetuated this tragedy deeply offend any sense of common human decency.

APPENDIX B:

THE NINETEENTH CENTURY GERMAN EXPERIENCE WITH SOLITARY CONFINEMENT

Between 1854 and 1909 thirty-seven articles appeared in the German medical literature on the subject of psychotic disturbances among prisoners, summarizing years of work and many hundreds of cases. A major review of this literature was published in 1912. Solitary confinement was the single most important factor identified in the etiology of these psychotic illnesses. Indeed, the first report on the subject of prison psychoses was that of Delbruck, chief physician of the prison at Halle, in which the frequency of mental disturbances was at last so great that it attracted the attention of the authorities. Delbruck's report concluded that prolonged absolute isolation has a very injurious effect on the body and mind and that it seems to predispose inmates to hallucinations and advised the immediate termination of solitary confinement. In 1863 Gutsch reported on eighty four cases of psychosis stemming from solitary confinement and described vivid hallucinations and persecutory delusions, apprehensiveness, psychomotor excitation, sudden onset of the syndrome, and rapid recovery upon termination of solitary confinement. Many of these individuals developed "suicidal and maniacal outbreaks."

In 1871, in a report on fifteen cases of acute reactive psychoses, some of which apparently occurred within hours of incarceration in solitary, Reich described hallucinosis and persecutory delusions in addition to severe anxiety leading to motor excitement—"[t]he patient becomes noisy, screams, runs aimlessly about, destroys and ruins everything that comes in his way."132 He also described an acute confusional state accompanying these symptoms, sudden cessation of symptoms, recovery, and subsequent amnesia

for the events of the psychosis. In a statistical summary, Knecht reported in 1891 on the diagnostic assessment of 186 inmates at the "insane department" of the prison at Waldheim and concluded that over half of the total inmates in this department were there due to reactive manifestations to solitary confinement. The majority of these inmates became insane within two years of confinement in solitary. In 1884 Sommer reported on 111 cases describing an acute, reactive, hallucinatory, anxious, confusional state associated with solitary confinement, emphasizing the "excited outbursts" and "vicious assaults" of these patients. His patients' illness began with difficulty in concentration and hyperresponsivity to minor "inexplicable" external stimuli. These "elementary disturbances of the sensorium (i.e., the five senses)" were seen as leading to "elementary hallucinations" which became more numerous, eventually including auditory, visual, and olfactory hallucinations and eventually becoming incorporated with fearful persecutory delusions.

In 1889 Kirn described 129 cases of psychosis among the inmates at the county jail at Freiburg, concluding that in fifty of those cases, "solitary confinement can be definitely considered as the etiological factor, (and these) show a certain characteristic stamp" including persecutory delusions and hallucinations in multiple spheres (auditory, visual olfactory, tactile). He also noted that these symptoms often precipitated at night: [T]he patient is suddenly surprised at night by hallucinatory experiences which bring on an anxious excitement. These manifestations become constant from now on, in many cases occurring only at night, in others also in the daytime. Attentive patients not infrequently hear at first a humming and buzzing in their ears,unpleasant noises and inarticulate sounds which they cannot understand until finally they hear well differentiated sounds and distinct words and sentences. . . . . .

. . .The visual hallucinations are very vivid.

In 1888 Moeli contributed a description of "vorbereiden"—also known as "the symptom of approximate answers." Ten years later Ganser contributed to the literature the elucidation of a syndrome which included Moeli's

symptom. As Arieti points out, Ganser's Syndrome became well known— indeed, almost a codification of the whole body of literature on the prison psychoses. Ganser provided a comprehensive and well-elucidated synthesis of symptoms, most of which had been previously described elsewhere. The syndrome he described included (in addition to vorbereiden) vivid visual and auditory hallucinations, a distinct clouding of consciousness, sudden cessation of symptoms "as from a dream," and "a more or less complete amnesia for the events during the period of clouded consciousness." Ganser's most original description was of "hysterical stigmata" within the syndrome, including conversion symptoms, especially total analgesia. Some of the German authors failed to note whether the inmates they were describing were housed in solitary confinement and, unfortunately, Ganser was one of these, stating only that his were prisoners awaiting trial. However, Langard, in 1901, also reporting on observations of accused prisoners awaiting trial, described an acute violent hallucinatory confusion with persecutory delusions and specifically stated that 45 this syndrome occurred exclusively among those who awaited trial in solitary confinement. Also in 1901 Raecke similarly reported on prisoners awaiting trial and described the full syndrome described by Ganser, including vorbereiden; he specifically condemned solitary confinement as responsible for the syndrome. He described his cases as beginning with apathy, progressing to "inability to concentrate, a feeling of incapacity to think," and even catatonic features, including negativism, stupor, and mutism. In another report, written the same year, Skliar reported on sixty case histories of which he identified twenty-one as acute prison psychoses caused by solitary confinement. While vorbereiden was not noted, most of the other symptoms described by Ganser and Raecke were, including massive anxiety and fearful auditory and visual hallucinations; in severe cases, hallucinations of smell, taste, and "general sensation" as well as persecutory delusions, senseless agitation and violence, confusion, and disorientation. The psychosis developed rapidly, at times within hours of incarceration in solitary confinement.150 Catatonic symptomatology was also noted. The German literature reported only on prisoners who suffered gross

psychotic symptomatology, some of whom were observed in hospitals or "insane departments" of prisons; thus, these reports generally described only syndromal expressions that rose to the level of overt psychosis. The German reports do, however, powerfully demonstrate the existence of a particular, clinically distinguishable psychiatric syndrome associated with solitary confinement. These multiple reports described a syndrome which included:

1. Massive free-floating anxiety.

2. "Disturbances of the Sensorium," including—

a. hyperresponsivity to external stimuli; and

b. vivid hallucinations in multiple spheres (including auditory, visual, olfactory, gustatory, and tactile modalities); in some reports, these began as simple "elementary" hallucinations and progressed to complex, formed hallucinations.

3. Persecutory delusions, often incorporating coexistent complex hallucinations.

4. Acute confusional states. In some reports these were seen as beginning with simple inattention and difficulty in concentration. In others, the onset was described as sudden. The confusional state and disorientation was in several reports described as resembling a dissociative, dreamlike state, at times involving features of a catatonic stupor, including negativism and mutism; and, upon recovery, leaving a residual amnesia for the events of the confusional state. Ganser and others observed hysterical conversion symptoms during this confusional state.

5. Vorbereiden: This was an infrequent finding, mostly described in conjunction with a confusional, hallucinatory state.

6. Motor excitement, often associated with sudden, violent destructive outbursts.

7. Characteristic course of the illness:

a. onset was described by some authors as sudden, by others as heralded by a progression beginning with

sensory disturbances and/or inattention and difficulty in concentration; and

b. in many cases, rapid subsidence of acute symptoms upon termination of solitary confinement.

The German reports were generally based upon prisoners who had been hospitalized because of their psychotic illness. In contrast, the population reported upon in the Walpole study was not preselected by overt psychiatric status. Despite this, all of the major symptoms reported by the German clinicians were observed in the Walpole population, except for vorbereiden and hysterical conversion symptoms. In addition, less severe forms of the isolation syndrome were observed in the Walpole population, including:

- Perceptual distortions and loss of perceptual constancy, in some cases without hallucinations.

- Ideas of reference and paranoid ideation short of overt delusions.

- Emergence of primitive aggressive fantasies which remained ego-dystonic and with reality-testing preserved.

- Disturbances of memory and attention short of overt disorientation and confusional state.

- Derealization experiences without massive dissociative regression.

Since Ganser's report has become the twentieth century's clearest memory of a much vaster body of literature, it is also of interest to review the literature describing observations of Ganser's Syndrome in non-prison populations. Several of these reports have been studies of patients in psychiatric hospitals suffering from this syndrome. Since these patients were hospitalized, it was possible to obtain more extensive evaluation and testing of their status. Several reports described a majority of the patients studied as suffering long standing hysterical conversion symptoms; impulsivity, childhood truancy, and antisocial behavior were also commonly described.152 These findings suggest also that antisocial behavior patterns

> and psychopathic personality disorder may bear a close relationship to primitive hysterical personality disorder, a relationship which has been described by other authors as well.

(75) The United Nations have laid down "the Standard Minimum Rules for the Treatment of Prisoners" called "the Nelson Mandela Rules." Rule 45 defines that the solitary confinement shall be used only in exceptional cases as a last resort, for as short a time as possible and subject to independent review, and only pursuant to the authorization by a competent authority. It shall not be imposed by virtue of a prisoner's sentence. The imposition of solitary confinement should be prohibited in the case of prisoners with mental or physical disabilities when their conditions would be exacerbated by such measures.

(76) In a well researched article "A Death Before Dying, Solitary Confinement on Death Row", by American Civil Liberties Union, the following devastating effects of prolonged solitary confinement are highlighted as under:-

> "Empirical research consistently demonstrates that prisoners subjected to isolation suffer many of the same symptoms caused by physical torture.7
>
> Research shows that people subjected to solitary confinement exhibit a variety of negative physiological and psychological reactions, including:
>
> - Hypersensitivity to external stimuli;
> - Perceptual distortions and hallucinations;
> - Increased anxiety and nervousness;
> - Fears of persecution;Lack of impulse control;
> - Severe and chronic depression;
> - Appetite loss and weight loss;
> - Heart palpitations;
> - Withdrawal;Blunting of affect and apathy;
> - Talking to oneself;
> - Headaches;

- Problems sleeping;
- Confused thought processes;
- Nightmares;
- Dizziness;
- Self-mutilation; and
- Lower levels of brain function, including a decline in EEG activity after only seven days in solitary confinement."

(77) In the case of "Wilkinson vs. Austin", a 2005 U.S. Supreme Court case, Justice Kennedy opined as under:-

> "[A]lmost every aspect of an inmate's life is controlled and monitored. Inmates must remain in their cells, which measure 7 by 14 feet, for 23 hours per day. A light remains on in the cell at all times . .. and an inmate who attempts to shield the light to sleep is subject to further discipline. . . . Incarceration [in supermax] is synonymous with extreme isolation. In contrast to any other Ohio prison . . . [the] cells have solid metal doors with metal strips along their sides and bottoms which prevent conversation or communication with other inmates. All meals are taken alone. . . . Opportunities for visitation are rare….. It is fair to say [that] inmates are deprived of almost any environmental or sensory stimuli and of almost all human contact. . . . [P]lacement . . . is for an indefinite period of time, limited only by an inmate's sentence."

(78) In the case of ***Sunil Batra*** versus ***Delhi Administration & others***[6] their Lordships of the Hon'ble Supreme Court have explained that the term 'prisoner under sentence to death' can only mean the prisoners whose sentence of death has become final, conclusive and indefeasible which cannot be annulled or voided by any judicial or constitutional procedure. In other words, it must be a sentence which the authority charged with the duty to execute and carry out must proceed to carry out without intervention from any outside authority. Their Lordships have also interpreted Section 366 (2) Cr.P.C. and Section 30 (2) of the Prisons Act read with Articles 20(2) and 21 of the Constitution of India.Their Lordships have held as under:-

[6] In AIR 1978 SC 1675

"102. This 'safe keeping' in jail custody is the limited jurisdiction of the jailor. The convict is not sentenced to imprisonment. He is not sentenced to solitary confinement. He is a guest in custody, in the safe keeping of the host-jailor until the terminal hour of terrestrial farewell whisks him away to the halter. This is trusteeship in the hands of the Superintendent, not imprisonment in the true sense. Section 366(2) Criminal Procedure Code (Jail Custody) and Form 40 (safely to keep) underscore this concept, reinforced by the absence of a sentence of imprisonment under Section 53, read with Section 73, Indian Penal Code. The inference is inevitable that if the 'condemned' men were harmed by physical or mental torture the law would not tolerate the doing since injury and safety are obvious enemies. And once this qualitative distinction between imprisonment and safe keeping within the prison is grasped, the power of the jailor becomes benign. Batra, and others of his ilk, are entitled to every creature comfort and cultural facility that compassionate safekeeping implies. Bed and pillow, opportunity to commerce with human kind, worship in shrines, if any, games, books, newspapers, writing material, meeting family members, and all the good things of life, so long as life lasts and prison facilities exist. To distort safekeeping into a hidden opportunity to cage the ward and to traumatize him is to betray the custody of the law. Safe custody does not mean deprivation, isolation, banishment from the Lenten banquet of prison life and infliction of travails as if guardianship were best fulfilled by making the ward suffer near-insanity. Maybe the Prison Superintendent has the alibi of prison usage, and may be he is innocent of the inviolable values of our Constitution. Maybe, there is something wrong in the professional training and the prison culture. Maybe, he conceives his mission unwittingly to help God ! 'Whom God wishes to destroy, He first makes mad'. For, long segregation lashes the senses until the spirit lapses into the neighbourhood of lunacy. Safe keeping means keeping his body and mind in fair condition. To torture his mind is unsafe keeping. Injury to his personality is not safe- keeping. So,Section 366 CrPC forbids any act which disrupts the man in his body and mind. To preserve

his flesh and crush his spirit is not safe-keeping, whatever else it be.

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114. A convict is 'under sentence of death' when, and only when, the capital penalty inexorably operates by the automatic process of the law without any slip between the cup and the lip. Rulings of this Court in Abdul Azeez v. Karnataka44 and D.K. Sharma v. M.P. State45, though not directly on this point strongly suggest this reasoning to be sound.

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120. The conclusion inevitably follows that Batra, or, for that matter, others like him, cannot be classed as persons "under sentence of death". Therefore, they cannot be confined apart from other prisoners. Nor is he sentenced to rigorous imprisonment and so cannot be forced to do hard labour. He is in custody because the Court has, pending confirmation of the death sentence, commanded the Prison Authority to keep the sentencee in custody. The concrete result may be clearly set out.

xxxx xxxx xxxx

223.The expression "prisoner under sentence of death" in the context of sub-section (2) of Section 30 can only mean the prisoner whose sentence of death has become final, conclusive and indefeasible which cannot be annulled or voided by any judicial or constitutional procedure. In other words, it must be a sentence which the authority charged with the duty to execute and carry out must proceed to carry out without intervention from any outside authority. In a slightly different context in State of Maharashtra v. Sindhi alias Raman it was said that the trial of an accused person under sentence of death does not conclude with the termination of the proceedings in the Court of Session because of the reason that the sentence of death passed by the Sessions Court is subject to confirmation by the High Court. A trial cannot be deemed to have concluded till an executable sentence is passed by a competent court. In the context of Section 303 of the Indian Penal Code it was said in Shaik Abdul Azeez v. State of Karnataka that an accused

cannot be under sentence of imprisonment for life at the time of commission of the second murder unless he is actually undergoing such a sentence or there is legally extant a judicially final sentence which he is bound to serve without the requirement of a separate order to breathe life into the sentence which was otherwise dead on account of remission under Section 401 CrPC. Therefore, the prisoner can be said to be under the sentence of death only when the death sentence is beyond judicial scrutiny and would be operative without any intervention from any other authority. Till then the person who is awarded capital punishment cannot be said to be a prisoner under sentence of death in the context of Section 30, sub-section (2). This interpretative process would, we hope, to a great extent relieve the torment and torture implicit in sub-section (2) of Section 30, reducing the period of such confinement to a short duration.

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224. What then is the nature of confinement of a prisoner who is awarded capital sentence by the Sessions Judge and no other punishment from the time of sentence till the sentence becomes automatically executable? Section 366(2) of the CrPC enables the Court to commit the convicted person who is awarded capital punishment to jail custody under a warrant. It is implicit in the warrant that the prisoner is neither awarded simple nor rigorous imprisonment. The purpose behind enacting sub-section(2) Section 366 is to make available the prisoner when the sentence is required to be executed. He is to be kept in jail custody. But this custody is something different from custody of a convict suffering simple or rigorous imprisonment. He is being kept in jail custody for making him available for execution of the sentence as and when that situation arises. After the sentence becomes executable he may be kept in a cell apart from other prisoners with a day and night watch. But even here, unless special circumstances exist, he must be within the sight and sound of other prisoners and be able to take food in their company.

225. If the prisoner under sentence of death is held in jail custody, punitive detention cannot be imposed upon him by

jail authorities except for prison offences. When a prisoner is committed under a warrant for jail custody under Section 366(2) CrPC and if he is detained in solitary confinement which is a punishment prescribed by Section 73, IPC, it will amount to imposing punishment for the same offence more than once which would be violative of Article 20(2). But as the prisoner is not to be kept in solitary confinement and the custody in which he is to be kept under Section 30(2) as interpreted by us would preclude detention in solitary confinement, there is no chance of imposing second punishment upon him and therefore, Section 30(2) is not violative of Article 20.

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228. The challenge under Article 21 must fail on our interpretation of sub-section (2) of Section 30. Personal liberty of the person who is incarcerated is to a great extent curtailed by punitive detention. It is even curtailed in preventive detention. The liberty to move, mix, mingle, talk, share, company with coprisoners, if substantially curtailed, would be violative of Article 21 unless the curtailment has the backing of law. Sub-section (2) of Section 30 establishes the procedure by which it can be curtailed out it must be read subject to our interpretation. The word "Law" in the expression "procedure established by law" in Article 21 has been interpreted to mean in Maneka Gandhi case that the law must be right, just and fair, and not arbitrary, fanciful or oppressive. Otherwise it would be no procedure at all and the requirement of Article 21 would no be satisfied. If it is arbitrary it would be violative of Article 14. Once Section 30(2) is read down in the manner in which we have done, its obnoxious element is erased and it cannot be said that it is arbitrary or that there is deprivation of personal liberty without the authority of law."

(79) In the case of ***Smt. Triveniben*** *versus* ***State of Gujarat and other***[7] analogous matters, their Lordships of the Hon'ble Supreme Court have held that so long as the matter is pending in any court before final adjudication even the person who has been condemned or who has been sentenced to death has a ray of hope and he does not

[7] 1989 (1) SCC 678

suffer that mental torture which a person suffers when he knows that he is to be hanged but waits for the Doomsday. Their Lordships have held as under:-

> "16. Even in this Court although there does not appear to be a specific rule but normally these matters are given top priority. Although it was contended that this reference before us — a Bench of five Judges, was listed for hearing after a long interval of time. We do not know why this reference could not be listed except what is generally well known the difficulty of providing a Bench of five Judges but ordinarily it is expected that even in this Court the matters where the capital punishment is involved will be given top priority and shall be heard and disposed of as expeditiously as possible but it could not be doubted that so long as the matter is pending in any court before final adjudication even the person who has been condemned or who has been sentenced to death has a ray of hope. It therefore could not be contended that he suffers that mental torture which a person suffers when he knows that he is to be hanged but waits for the doomsday. The delay therefore which could be considered while considering the question of commutation of sentence of death into one of life imprisonment could only be from the date the judgment by the Apex Court is pronounced i.e. when the judicial process has come to an end."

(80) In Black's Law Dictioinary, 8th Edition, the term "solitary confinement" has been defined as "separate confinement that gives a prisoner extremely limited access to other people."

(81) In "Words and Phrases, Permanent Edition, Volume 39", the term 'solitary confinement' has been defined as under:-

> 'The peculiarities of the system of punishment by "solitary confinement" were the complete isolation of the prisoner from all human society and his confinement in a cell of considerable size so arranged that he had no direct intercourse or sight of any human being and no employment or instruction. Leach v. Whitbeck, 115 N.W.253, 254, 151 Mich. 327, quoting and adopting definition in Re Medley, 10 S.Ct. 384, 134 U.S. 160, 33 L.Ed. 835.'

> "Close confinement" and "solitary confinement" do not import the same kind of punishment. Although "solitary confinement" may involve "close confinement," a criminal could be kept in "close confinement" without being subject to "solitary confinement." "Confinement" and "close confinement," equally means such custody, and only such custody, as will safely secure the production of the body of the prisoner on the day appointed for his execution. Rooeny v. State of North Dakota, N.D., 25 S.Ct. 264, 266, 196 U.S. 319, 49 L.Ed. 494, 3 Ann.Cas. 76."

(82) In Article under the caption "Does the Death Penalty Require Death Row? The Harm of Legislative Silence", written by Marah S. McLeod, published by Notre Dame Law School, learned Author has dealt with various issues in his article including the prolongation of preexecution confinement, (a) is death row necessary to incapacitate the condemned? (b) is death row necessary to rehabilitate the condemned? (c) is death row necessary for retributive justice? and (d) is death row necessary to deter others from crime? as under:-

> **INTRODUCTION**
>
> Life on death row has been likened to torture. The European Court of Human Rights famously refused to allow England to extradite a European citizen to face capital charges in the United States because of the risk that the person would end up confined on Virginia's death row in inhuman conditions. In states like Virginia, death-sentenced prisoners are held in solitary confinement for the years and often decades leading up to their executions a condition so severe that, in the words of Justice Anthony Kennedy in a recent capital case, it may bring prisoners "to the edge of madness, perhaps to madness itself." Many scholars and judges have attacked death row as barbaric and cruel; some even have concluded that death row inmates are being impelled to drop their appeals and "volunteer" for execution because life on death row is worse than death itself. In fact, over ten percent of the prisoners executed since 1976 have volunteered for execution.
>
> If prisoners were executed within weeks or months, as they were two hundred years ago, death row might not warrant such attention. But today, death-sentenced inmates await execution for an average of fifteen-and-a half years

the amount of time that other prisoners are confined as punishment for serious felonies. Of the approximately 3,000 prisoners on death row today, more are likely to die of natural causes than to be executed.' I Execution delays have transformed the death penalty from relatively prompt execution into a de jure sentence of death and a de facto sentence of something close to life in prison. The segregation and isolation of living on death row compounds the suffering imposed on these prisoners by their long de facto term of incarceration. The unique harms caused by solitary confinement recently have become the focus of intensive study and media attention, with calls to end the use of solitary confinement based on its debilitating psychological effects.

Yet death row, and the isolation it typically entails, often is treated as an inevitable administrative aspect of a death sentence. To the extent that scholars and courts have focused on death row, they have objected primarily to the degree of its harshness and its crippling psychological effects.' None has challenged the fact that prison administrators are the ones that have chosen to establish death row, without any legislative mandate. Just recently, the Fourth Circuit held in a Virginia case that "tethered to the death sentence in Virginia is preexecution confinement on death row." The court stated that, "Virginia law mandates that all persons convicted of capital crimes are, upon receipt of a death sentence, automatically confined to death row . . . because of the crime they have committed and the sentence they have received." In fact, although death-sentenced prisoners in Virginia and elsewhere are sent automatically and permanently to death row, few jurisdictions require death row by statutory law. In Virginia, and in most states, death row is imposed only as a prison policy. In the words of capital punishment scholar David Garland, death row is "an administrative arrangement with no specific legal authority."

This Article addresses for the first time the authority of prison administrators to establish death row. The analysis begins with a consideration of the nature of the decision to establish death row, and concludes— contrary to prevailing

assumptions-that death row cannot be justified for administrative reasons. Instead, it may be justified only based on a punishment rationale. This conclusion leads to the second and more significant conclusion in the Article, which is that legislatures alone are competent to require death row.

To understand the nature of the death row decision, the Article asks what possible purposes such confinement may serve, focusing on the traditional aims of incapacitation, rehabilitation, retribution, and deterrence. The first of these, incapacitation, closely tracks the primary administrative rationale for death row, which is prison security.

Mounting evidence has undermined the claim that death row is needed for prison security. The most powerful evidence comes from Missouri, which eliminated death row over twenty years ago. After Missouri abolished death row, and began to evaluate its death-sentenced prisoners individually to determine their proper custody level, it discovered that the vast majority of them did not require isolation. And a follow-up study showed that after elimination of death row in Missouri, the death sentenced inmates committed less violent misconduct than prisoners in the same institution who had been sentenced to lesser terms. Missouri's experience-and other studies of prison violence reveals that the automatic and permanent isolation on death row of all death-sentenced prisoners leads to substantial needless suffering for many prisoners.

The lack of an adequate security rationale for isolating all death-sentenced prisoners does not mean that death row cannot be justified, however. The Article next considers whether death row may serve the purposes of rehabilitation, retribution, or deterrence. It concludes that retribution and deterrence are plausible reasons for retaining death row. An advocate of retributive justice might contend that prisoners who have committed the worst crimes should be held in conditions that reflect the gravity of their offenses. Pursuit of deterrence might lead others to support death row in the hope that prospective capital murderers would fear the certainty of cruel death row conditions, even if they might discount the possibility of execution long in the future. The

point here is not that death row ought to be retained for these reasons, but only that these punishment purposes offer conceivable reasons why some might want to preserve it.

Once one recognizes that death row might be retained for punishment reasons, the inquiry must turn to who should decide. Only legislatures are suited to decide whether to retain death row, for at least three reasons. First, legislatures have the greatest claim to democratic legitimacy in answering moral questions that do not admit of any empirically correct answer-such as the proper quantum of retributive punishment or whether to pursue retribution or deterrence in the first place. Second, the separation of powers grants legislatures alone the power to prescribe punishment. Third, prior statutory authorization of punishment is needed to satisfy the principle of legality. Each of these three considerations demands express legislative imprimatur before death row may be retained.

Legislatures, moreover, may not be allowed simply to delegate the power to establish death row to prison administrators. In many states, the power to impose punishment is nondelegable under the constitutional separation of powers. And even in those states in which such delegation might be permitted, the Article contends, it would be unwise to entrust the death row decision to prison administrators. For prison administrators may choose to retain death row simply because such restrictive custody makes it psychologically easier for them to command and oversee the execution process, and not for legitimate purposes.

The foregoing arguments present a substantial challenge to the death row status quo. Courts should be prepared to hold existing death row policies ultra vires and void, at least in those states that retain a strict separation of powers. Legislatures then may choose whether to enact statutes to preserve death row. Some may decide not to reinstate death row, perhaps because of its cruelty or its expense. Others may decide to authorize sentencing authorities to impose death row only in certain severe cases or only for a limited time.

Some will do nothing due to legislative gridlock.All of these results would be permissible, and preferable, to the status quo of illegitimate administrative action. Some may object to this argument for legislative choice. Two main objections seem most likely. One goes to the breadth of the argument: Will legislatures be expected to micromanage all other decisions by prison administrators? This objection would reflect a legitimate reluctance to intrude upon prison decisions based on administrators' experience and expertise. But death row placement differs in important ways from most or all decisions made by prison administrators. Three features typically set death row apart: its permanence, its categorical imposition, and its severity. These three characteristics reveal why death row is not a choice properly made by prison administrators, why we should care, and why reallocating power over death row to legislatures would not lead to micromanagement of the array of routine prison rules.

The other likely objection goes to the consequences of an argument for legislative choice: Would not lawmakers be even less humane than prison administrators? William Stuntz famously explored the pathological politics of criminal law and the tendency of politicians to impose ever harsher penalties in order to appear tough on crime. This objection, however, overlooks the importance of public deliberation and democratic legitimacy in the prescription of punishment, limitations imposed by the separation of powers, and the principle of legality's requirement of statutory authorization when punishment is prescribed. These crucial considerations do not depend on the consequences of legislative choice.

The consequentialist critique also may be wrong on its own terms. More democratic decisions regarding death row might not lead to greater inhumanity.

Historically, legislatures have adopted more humane methods of execution, for example. It would be hard to imagine legislatures being significantly harsher regarding death row than prison administrators have been to date. And even if some politicians would ignore humanitarian concerns, they might agree to abolish death row for fiscal

reasons, because custody restrictions (particularly solitary confinement) impose high costs. Death row housing has been estimated to cost nearly $100,000 more per prisoner per year. Thus, legislatures might abolish death row for many reasons, financial as well as humanitarian.

B. Current Death Row Conditions

Death row involves the segregation of death sentenced inmates and their placement in "a separate enclosure" away from other inmates. Today, almost all of the thirty-one capital punishment states (as well as the federal government and the military) segregate their death-sentenced inmates. In those jurisdictions, death sentenced inmates are housed in a unit or tier away from non capital prisoners, though in some states they may be housed with temporarily segregated non capital inmates also removed from the general prison population.

Death row involves more than segregation, however, most states impose restrictions on death-sentenced inmates that isolate them from human interactions. These restrictions come in different forms, such as isolation in a single-person cell, confinement in cells sealed with solid walls and doors to prevent communication, isolation during meals (taken alone in the cell), isolation during exercise (in a single-person pen), denial of work opportunities and group programs, denial of group religious services, and visitation restrictions including the prohibition of contact visits with family and friends. A recent investigation revealed that "most death row prisoners ... are locked alone in small cells for 22 to 24 hours a day with little human contact or interaction; reduced or no natural light; and severe constraints on visitation, including the inability to ever touch friends or loved ones."

Isolation and denial of privileges have been common features of death row for many years. Indeed, several Supreme Court cases show that states started imposing solitary confinement on death-sentenced inmates in the late 1800s. By the late 1900s, isolation of death sentenced prisoners had become the norm. Scholars reported in 1997 that "while there is some variability in policy from state to state, death row conditions nationally are characterized by

'rigid security, isolation, limited movement, and austere conditions.' They noted that "in 35 jurisdictions death row inmates [were housed in individual cells. In 18 jurisdictions these death row inmates average[d] less than an hour daily of activity outside of their cells, and in five other jurisdictions out of- cell time [was less than three hours daily. Social visitation [was non-contact in 21 of 37 jurisdictions." Criminologist Robert Johnson has written that because death rows are "maintained in the same way that they were when the stay on death row prior to execution was minimal, ... what formerly was a brief but debilitating experience has . . . become a seemingly endless and agonizing one."

C. The Allocation of Decisional Power over Death Row

Death row has become an entrenched aspect of capital punishment that greatly augments the punishment for capital crimes. Yet in most states, death row is not mentioned in capital punishment statutes. Most legislatures have remained silent about the practice. Instead, death row has been created by prison authorities as a matter of prison policy. In his book on capital punishment, Garland writes that death row is "an administrative arrangement with no specific legal authority."

Only a small number of states have statutes that require death row. Research for this Article has revealed four states-South Dakota, Texas, Washington, and California that prescribe by statute the segregation of death-sentenced inmates and thus require the creation of death row.

Some other states have legislated restrictions for death-sentenced inmates, but have not required the creation of death row. Louisiana, for example, mandates that death-sentenced inmates be held "in a manner affording maximum protection to the general public, the employees of the department, and the security of the institution." Indiana and Mississippi statutes require death-sentenced inmates to be housed in maximum security facilities. Wyoming requires death-sentenced inmates to be held in solitary confinement. And Delaware limits visitors to inmates in maximum security, including death-sentenced inmates. Statutes in these states do not require death row, but they also do not

forbid prison administrators from establishing it. And prison administrators in Wyoming, Louisiana, Indiana, Mississippi, and Delaware all have chosen, then, to create death row.

Similarly, in the remaining states (for which research has revealed no statute imposing special restrictions for death-sentenced prisoners) death row has been established by prison administrators. These states include Virginia, in which all death-sentenced inmates are held in segregation and solitary confinement under prison operating procedures. (The Fourth Circuit recently upheld Virginia's death row policy, stating that "Virginia law mandates that all persons convicted of capital crimes are, upon receipt of a death sentence, automatically confined to death row." The court's statement here, however, may mislead the reader. In Virginia, as in most states, there is no statutory mandate to hold prisoners on death row. Death row in Virginia, as in many other states, is a matter of administrative policy.

Of the thirty-one states with capital punishment and the additional state with death-sentenced inmates, only one-Missouri--has chosen to abolish death row and fully integrate death-sentenced prisoners with non capital inmates in a general prison population. Missouri's prison administrators did so without any statutory mandate for or against death row, after a federal court issued a consent decree requiring them to ameliorate death row conditions and to establish different custody levels for death-sentenced inmates. In all other capital punishment states, death-sentenced prisoners remain segregated as they await execution.

Thus, death row accompanies the death penalty in nearly every capital punishment state. Though a few state statutes require death row, in most states prison administrators simply have retained it under their operating regulations. It is remarkable that, in these states, prison administrators on their own have established what scholars and courts increasingly recognize to be an "added punishment" and even "the punishment" for prisoners sentenced to death.

The next Part of this Article will show that despite its widespread use, death row is not an inevitable part of the death penalty. Instead, death row requires a choice-a

normative choice about what punishment is just. Understanding the normative nature of the decision to establish death row points to the final claim of this Article, made in Part IV: that legislatures, not prison administrators, should decide whether to retain death row.

III. ARGUMENTS FOR AND AGAINST DEATH ROW

This Article has offered a brief account of the origins, prevalence, and legal authority for death row. This Part will ask whether death row is necessary, highlighting arguments for and against death row based on the four traditional purposes of punishment. Whether to retain death row turns out to be a primarily normative question, one that requires balancing the purposes and harms of criminal punishment.

A.Is Death Row Necessary to Incapacitate the Condemned?

Death row scholars have attributed death row conditions to "assumptions that the nature of capital offenses renders death-sentenced inmates more likely to assault and injure correctional personnel and other inmates in prison, and that this risk is amplified by their having 'nothing to lose.'" In her work on prison conditions, Mona Lynch has described how these assumptions have led some states to place death sentenced inmates into the harsh and extremely isolating conditions of "supermax" confinement. She writes that "[penal administrators justify the use of Supermax as necessary to maintain internal security [for those] inmates who are defined as 'the worst of the worst."

Some death-sentenced inmates have been found to pose a risk of future dangerousness by the sentencing jury. Two states, Texas and Oregon, allow the penalty of death only if the jury has made a finding of future dangerousness. There, the state must prove to the jury beyond a reasonable doubt that "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." In another state, Virginia, the jury must make either a dangerousness finding, or alternatively find beyond a reasonable doubt that the crime committed was "outrageously or wantonly vile, horrible or inhuman."

Numerous other state sallow dangerousness findings to be used as an aggravating factor in capital sentencing.

Assessments of future dangerousness to society in death sentencing have been attacked as inaccurate, unjust, and perhaps not even relevant where the alternative to a death sentence is life without parole (dangerousness to society having begun to be considered at a time when the alternative to a death sentence was a parole-eligible term). Despite their claimed inaccuracy, unfairness, and possible irrelevance, however, such future dangerousness findings continue to be cited not only to support death sentences but to support death row conditions. Indeed, prison officials in Virginia recently argued that death-sentenced inmates categorically warrant stricter conditions of confinement because their sentences are based on findings that they either would commit violent crimes again or that their crimes were particularly vile.

Several notable escapes from death row have contributed to the belief that death-sentenced inmates are particularly dangerous and hard to control. In his historical study of capital punishment in the United States, Robert Bohm recounts several well-publicized escapes of death row inmates over the last fifty years: A woman, Marie Arrington, escaped from Florida's death row in 1969; six inmates escaped from Oklahoma's death row in 1972; four inmates escaped from Georgia's death row in 1980; six inmates escaped from Virginia's death row in 1984; six inmates attempted (and one succeeded in) an escape from Texas's Huntsville prison in 1998; and another death row inmate escaped from a county jail in Houston in 2005 after attending a resentencing. These escapes caused great alarm, fueled by disturbing media reports. In Virginia, the Mecklenberg prison became renowned for the death row escape debacle. The escape led to a bevy of investigations, which resulted in recommendations for better prison organization and morale through measures that included "increased job, recreational and educational opportunities for inmates." Ultimately, however, Virginia prison officials chose to eliminate opportunities for death-sentenced inmates, rather than to enhance them to encourage good

behavior: Death row was transferred to Sussex I State Prison, where death-sentenced prisoners now live in solitary confinement. Virginia correctional officials have cited the 1984 escape incident to explain why the current death row strictures are necessary.

Despite the alarm generated by these escapes, however, the risk of escape offers only a weak reason for condemning death-sentenced prisoners categorically to harsher confinement. Though escapes by death sentenced prisoners may generate publicity, research for this Article has found no study or claim asserting that death-sentenced prisoners attempt to escape at higher rates than other murderers sentenced to lesser penalties, or that death sentenced prisoners are more likely than such other murderers to commit violence during an escape. Indeed, the escapes of death-sentenced prisoners over the years have not resulted in the death of any third party. All were recaptured, except for two who died before being found. With regard to the risk of death row escapes, an event that occurred in 2004 in Arkansas is telling. For three minutes, all the death row cell doors were accidentally unlocked. Though apparently aware, no death row inmate left his cell. Quoted in a news report after the incident, the spokeswoman for the Arkansas prison system recounted: "[The prisoners] sat there. They didn't move.... [T]he death row inmates are the best behaved inmates in prison." In other words, the data we have suggests, at the very least, that not every prisoner sentenced to death is a prisoner likely to escape or commit violence in the future. The claimed risk of escape by capital inmates is simply insufficient to warrant subjecting every death-sentenced inmate automatically to the harshness of permanent isolation.

More importantly, recent and ongoing evidence further undercuts the general assumption that death sentenced inmates will always be exceptionally dangerous. The best evidence comes from the Missouri prison system, which abolished death row and integrated its death-sentenced inmates with non capital inmates at its maximum security Potosi Correctional Center over twenty years ago. Rather than automatically sending every death-sentenced prisoner

into high-security segregation on death row, Missouri prison officials began to evaluate each prisoner individually for risk of institutional violence and to determine a custody level accordingly. For the first time, evidence of likely institutional behavior (including a variety of factors such as psychological traits and past prison behavior), rather than the mere fact of a death sentence, mattered for placement in segregation.

As a result of the integration, within just over a decade eighty-four percent of the death-sentenced inmates in the Missouri prison system (then sixty-two prisoners) had been placed in some form of general population housing, including twenty-one percent who were placed in the "honor dorm" reserved for exceptionally well-behaved inmates.103 Prisoners in the honor dorm remained out of their cells at all times except during roll call. Only five percent of the death-sentenced prisoners had required segregated confinement due to the risks they posed to others or for disciplinary reasons. The abolition of death row greatly improved life for death sentenced prisoners, and-according to the current Director of the Missouri Department of Corrections, George Lombardi-also improved the "general climate and environment of the institution.

When studying reports from the Missouri Department of Corrections eleven years after mainstreaming, forensic psychologists Mark Cunningham and Thomas Reidy, assisted by criminal justice professor Jon Sorensen, it made several surprising discoveries. They found that the mainstreamed death sentenced inmates were significantly less likely to commit violent misconduct than prisoners sentenced to a term of years in the same facility. Indeed, the rate of violent misconduct for death sentenced inmates (and also for prisoners sentenced to life without parole (LWOP)) was only one-fifth of the rate of violent misconduct among parole-eligible inmates at the same facility.

Even after accounting for predictor variables such as age and education, variables death-sentenced and LWOP inmates were half as likely to engage in violent misconduct as term-sentenced inmates housed under similar conditions of confinement at [Potosi Correctional Center]."

Furthermore, none of the death-sentenced inmates attempted to escape during the study period, and Cunningham has heard of no subsequent escape attempt by a death-sentenced inmate in Missouri.

The fact that both LWOP and death-sentenced inmates "were significantly less likely than parole eligible inmates to be involved in violent misconduct"bears attention. For LWOP inmates, like death-sentenced inmates, have little hope of release. The evidence from Missouri thus unsettles the claim that such prisoners categorically pose higher risks and therefore must be confined more strictly.

At least two factors may explain why mainstreamed death-sentenced inmates would commit relatively low rates of misconduct. The first reason is that these inmates acquire something to lose when they are given more privileges. When death-sentenced inmates are not automatically and categorically segregated and isolated on death row, the threat of segregation and isolation may be used to deter them from misconduct, just as this threat deters non capital prisoners from prison misconduct. This would explain why Missouri's mainstreamed inmates committed relatively low levels of violent misconduct. It might also explain why they did not attempt to escape, for if recaptured they faced return to solitary confinement as a consequence.

A second reason may help explain why death sentenced inmates in the Missouri study committed less violent misconduct than inmates with lower sentences: Death-sentenced inmates may view prison differently because they expect to be there for the rest of their lives. They may see the importance of establishing a good reputation and good rapport with prison officials more than inmates who expect to spend a shorter time in prison. They may recognize that the loss of even small privileges, such as contact visits with family and increased time for recreation, may affect dramatically their quality of life over the long term. This long-term view could explain why death sentenced and LWOP inmates would commit less violent misconduct than parole-eligible inmates, and why LWOP inmates would commit the least violence of all.

The mainstreaming experience in Missouri offers strong empirical support for the claim that not all death sentenced inmates pose a higher risk of prison violence." Earlier studies bolster that account, though they did not study prisoner conduct after abolition of death row. Some studies revealed relatively low rates of violence for inmates who were still on death row. Other studies found relatively low rates of violence of former death row inmates who, after their death sentences were vacated, were incarcerated in the general population. The Missouri study also accords with broader studies of recidivism, which show that a crime of conviction is a poor predictor of violence in prison. Specifically, studies have indicated that "a murder conviction is not predictive of a greater risk of prison violence relative to a conviction for some other offense." And "research has consistently found the true incidence of recidivism among murderers released from prison to be much lower than for other types of parolees. Furthermore, studies have shown that the risk of violence by prisoners decreases significantly as they age. Many death row prisoners are quite old; a recent government report counted over 350 death row inmates aged sixty or older. In the last decades, hundreds have died awaiting execution. As death-sentenced prisoners age in the many years leading up to execution, their permanent isolation on death row becomes less and less justified for security reasons. An accumulating body of evidence thus supports the claim that death-sentenced inmates do not pose exceptional security threats as a categorical matter.

This growing evidence has undercut the dangerousness rationale for death row. Security needs do not require a death sentence to be dispositive for automatic and permanent placement on death row.Individual assessments of death-sentenced offenders offer a way to determine which inmates require more restrictive confinement-assessments that are made routinely for non capital prisoners.

But it is not yet clear that death row serves no legitimate penological purpose. For other traditional punishment purposes--rehabilitation, retribution, and deterrence-still

might be served by death row. Without considering these other purposes of punishment, one cannot conclude that death row has no legitimate place in capital punishment. The Article now will turn to whether death row may serve the aim of rehabilitation.

B. Is Death Row Necessary to Rehabilitate the Condemned?

Historically, states hoped that pre-execution confinement would facilitate rehabilitation of the offender. In colonial days, executions were delayed intentionally for up to a few weeks to enable death sentenced inmates to meditate on their crimes and potential damnation, and with the help of visits from clergy, to express remorse and repent. Pre-execution confinement thus was designed to rehabilitate the soul of the offender. This purpose of pre-execution confinement can be seen in the words of Massachusetts Chief Justice Lemuel Shaw in 1839, when he warned a defendant he was sentencing to death to use his remaining time in preparation for "the great change that awaits you.

Some remnants of the historical aim of rehabilitation appear in current death row policy, despite the fact that secular aims largely have displaced religious purposes in American penal policy. Some statutes still expressly provide for visitation by clergy to death row inmates. And some prison administrators have sought to make death row an environment that draws inmates' thoughts toward God. Literature and books have depicted famous religious conversions on death row.

The historical rehabilitative purpose of preexecution confinement, however, now offers little reason for death row. Pre-execution confinement lasts far too long to provide the temporal pressure that historically was seen to foster repentance. In 1839, New York minister John McLeod explained the importance of a short period of pre-execution confinement:

> May we not fairly reason from what we know of the nature of the mind, and the deceitfulness of sin, that the criminal will be more likely to give all the energies of his mind to the work of preparation for meeting his

> God, when he knows that his days are numbered, than when they appear to him to be lengthened out indefinitely?

Today, prisoners who are executed spend an average of a decade and a half on death row-and most prisoners sentenced to death are not executed at all. The religiously oriented purpose of pre-execution confinement would seem at most to justify special prison conditions designed to focus the prisoner on his eternal fate for the limited period immediately preceding his execution.

One scholar has suggested an alternative, secular rehabilitative purpose for the segregated confinement of death-sentenced prisoners. Criminologist Robert Johnson has argued for a "humane death row," where death sentenced inmates receive more caring treatment than other inmates. He contends that prisons should provide a special type of confinement for death-sentenced inmates that would mitigate the psychological and physical harms of preexecution delay and prepare them for a dignified death. He argues that death sentenced inmates are "persons in the process of dying at the hands of the state, a class of individuals analogous to and as deserving of humane care as terminally ill patients. He envisions death row as a kind of hospice. Johnson's vision of death row would require states to treat death-sentenced inmates better than non capital inmates; it seems to justify the creation of death row, but one very different from the harsh death row we see today.

Many scholars have argued that death row as it exists today degrades rather than rehabilitates. Mona Lynch describes the harsh conditions of death row as part of a "post-rehabilitative, 'waste management' new penological regime. Lynch writes that death row conditions are "literally transforming those waiting to die from sociologically and psychologically rich human beings into a kind of untouchable toxic waste that need only be securely contained until its final disposal."

To prison administrators who decide death row policy, rehabilitation may seem pointless. In the litigation over Virginia death row conditions in the Prieto case mentioned above, state prison officials defended the categorical denial

of work and educational privileges to death-sentenced inmates on the ground "that they are less deserving of limited prison resources because they will never reenter society." This utilitarian argument ascribes little or no value to the human development of prisoners who are marked for execution, treating such inmates, in Lynch's words, as human "waste.

But the argument that rehabilitation is wasted on death row inmates because they will never reenter ordinary society, or even prison society, presumes that death-sentenced inmates will be executed. That is not true. Many death-sentenced inmates will not be executed. Recent records from the Bureau of Justice Statistics indicate that over forty percent of the persons sentenced to death between 1976 and 2013 were removed from death row due to court decisions or commutations. An earlier and more detailed study conducted by James Liebman, Jeffrey Fagan, and Valerie West had found that over half of capital sentences from 1973 to 1995 were reversed based on prejudicial error. Some death row inmates will end up with sentences of life in prison. A much smaller number will be exonerated. Thus some of these inmates initially placed on death row will reenter society-at least the larger prison community. The claim that rehabilitation is wasted on death-sentenced inmates because they will never reenter society is not only morally questionable but often factually incorrect. Any death row that is retained should prepare its inmates for the possibility of eventual reentry into human community, because many of its inmates will do so. Thus, rehabilitation provides no justification for the debilitating conditions of death row that prevail today.

C. Is Death Row Necessary for Retributive Justice?

Advocates of retributive punishment might view the idea of a rehabilitative death row-particularly the "humane death row" that Johnson -as profoundly unjust. One self-professed advocate of retributive punishment is Robert Blecker, who contends that justice requires harsh death row conditions. According to Blecker, prevailing death row conditions are far too lenient. In his 2013 book, The Death of Punishment, Blecker recounts life on death row. His book focuses in

particular on the lives and executions of inmates he interviewed in Florida and Tennessee. Blecker describes seeing death row inmates playing games and watching television. He contrasts the way that the death row inmates lived with the way in which they made their victims suffer. In gruesome detail, Blecker recounts how one death row inmate in Florida, Danny Rolling, mercilessly raped, murdered, and gutted a young university student and killed four other students in a killing spree. He recounts how Florida death row prisoner David Keen raped an eight-year-old child, strangled her with a shoelace, and dumped her, still living, into a river. And he describes how Daryl Holton, an inmate confined on death row in Tennessee, took his unsuspecting children into his garage, lined them up two at a time, and shot them to death. To Blecker, death row is not nearly harsh enough in light of these prisoners' crimes.

Retributive justice, Blecker contends, requires punishment that far better fits the crime. He proposes a "model" death penalty statute in which death sentenced inmates live in "permanent punitive segregation":

> Those condemned to die shall be permanently housed in a separate prison [wing], with their daily conditions no better than prisoners already subject to punitive or administrative segregation for the worst prison infractions. Specifically, within constitutional bounds, those condemned to death shall have only the minimum constitutionally mandated exercise, recreation, phone calls, or physical contact. They shall not be permitted any communal form of play. Their sole food shall be nutraloaf, nutritionally complete and tasteless. Photographs of their victims shall be posted in their cells, out of reach, in visibly conspicuous places.

Blecker criticizes prison officials for providing too many privileges to death-sentenced inmates out of a self interested desire to make the inmates easier to handle and thus their own lives easier. From his perspective, lenient treatment of death-sentenced criminals tends to be unjustly generous and leaves "[the nature of the crime completely severed from the experience of the punishment.

Blecker's depiction of current death row conditions as lenient seems startling and inconsistent with the representations of death row conditions as extraordinarily harsh presented by so many scholars and studies. But he does not appear to have focused on states where prisoners are held in solitary confinement or denied most human interactions. In his book, Blecker describes his experiences in a handful of states that do offer some privileges to death row inmates, including the opportunity to exercise with one another, which are not granted in many other capital punishment states. At least eleven other capital punishment states report that they do not permit death row inmates to engage in any congregate activities. Some states, including Arizona, hold their death-sentenced inmates in supermax confinement, as Lynch has described. Blecker might be pleased to find out that, at least in some states, his arguments for retributive justice are defenses of much of the status quo.

Though Blecker's demands for harsh death row conditions may seem extreme, retributive justifications for harsh prison conditions are not new. In the late eighteenth century, some critics of the penal system advocated harsher prison conditions in lieu of capital punishment; they urged states to seal prisoners away in remote locations where prisoners would be forced to meditate on their offenses without any visitors. Blecker simply wants some murderers to get both punishments harsh conditions and death as well.

Blecker offers a particularly harsh vision of death row; other retributive justice advocates might desire death row to be harsh, but not quite so severe, perhaps seeking to combine the purposes of retributive justice with those of rehabilitation. Stephanos Bibas has advocated involving inmates in restorative justice, to repair some of the harm done by their crimes, but at the same time he has criticized other advocates of restorative justice who would "sweep away the traditional goals and processes of criminal justice" and who view "retribution for retribution's sake [as] pointless." He has written:

> [Punishment is supposed to hurt. The bite of punishment sends an unequivocal message condemning the

> wrongdoer and vindicating the victim. It pays the criminal's debt to society. It teaches criminals and others not to hurt others, humbling proud wrongdoers. Restitution and fines can supplement prison and perhaps reduce the need for it. But because they lack the bite of condemnation and pain, they send too soft a message, overlooking the wrong and trying to hurry by it too fast. Criminals need to atone, to be humbled, to suffer. If they do not, the criminal does not learn a lesson and victims and the public never see justice done, leaving them dissatisfied.

If states viewed harsh death row conditions as just retribution, they nonetheless might limit the prisoners' isolation to encourage restoration and reconciliation. States might permit death row inmates, for example, to meet with the families of their victims to express remorse (something not contemplated under many current visitation policies). Or states might permit death row inmates to join in work programs only if they agreed to have their compensation sent to the families of their victims. In other words, a retributive vision of death row need not reflect the monolithic harshness of the permanent punitive segregation that Blecker proposes.

Retributive theory surfaces in other academic and judicial discourse about death row conditions. Even when speaking of security rationales for death row conditions, courts sometimes advert to the moral desert of capital inmates. For example, Justice Clarence Thomas has written:

> Justice [John Paul] Stevens criticizes the "dehumanizing effects" of the manner in which [the death row prisoner] has been confined, but he never pauses to consider whether there is a legitimate penological reason for keeping certain inmates in restrictive confinement.....…
>
> Justice Stevens altogether refuses to take into consideration the gruesome nature of the crimes that legitimately lead States to authorize the death penalty and juries to impose it....

> ... It is the crime-and not the punishment imposed by the jury or the delay in petitioner's execution-that was "unacceptably cruel."

Like Blecker, Justice Thomas invokes the death row inmate's capital crime in his evaluation of the justice of harsh death row conditions. In a recent case, he responded to concerns that a death-sentenced prisoner had been held for decades in solitary confinement by noting that the prisoner's "accommodations are a far sight more spacious than those in which his victims now rest." The idea that retributive justice supports harsh death row conditions has appeared in lower court decisions as well, such as an opinion regarding death row in Pennsylvania in which the Third Circuit stated: "[We cannot conclude that the totality of the conditions on Pennsylvania's death rows constitute punishment 'grossly disproportionate to the severity of the crime[s].

But not all would agree that retribution justifies harsh confinement on death row. Russell Christopher contends that substantial death row incarceration may render the full experience of punishment retributively excessive. If one defends the death penalty on retribution grounds, he argues, one sees the death penalty as proportional to at least some capital crimes. Death row incarceration then adds punishment and renders the death penalty disproportionately harsh under a retributive calculus.

But Christopher's argument that death row incarceration is inconsistent with retributive justice appears to assume that execution is the maximum punishment a retributivist would consider appropriate for capital murder. That seems far from clear, at least for some of the most egregious capital murders such as the ones that Blecker describes. If some capital crimes-and only some-are severe enough to justify harsh death row conditions as well as execution, such additional punishment could be limited to offenders who have committed very aggravated capital murders (based on jury findings of specific aggravation). Limiting harsh death row conditions in this manner might be a way to calibrate retributive punishment to fit a range of capital crimes.

Retributive justifications for harsh death row conditions would still raise a significant concern, however. The problem lies in the extraordinarily high rates of capital sentencing error. As mentioned above, yearly capital punishment statistics provided by the Bureau of Justice Statistics show that over forty percent of inmates sentenced to death have been removed from death row. For inmates who are exonerated or resentenced to life or to a lesser term, the additional suffering caused by harsh death row conditions would be unjust.

The problem of unjust suffering by persons improperly sent to death row might be reduced by selective abolition of capital punishment for crimes that do not involve the highest degree of culpability (eliminating felony murder, for example, as even Blecker would do) or by allowing death sentences only if a jury has found several aggravating factors. One study of sentencing error revealed that for each additional aggravating factor found by a jury, the likelihood that the capital sentence would be reversed decreased by fifteen percent. If this measure is correct, then sentencing error could be reduced if prosecutors proved to a capital jury a higher number of aggravating factors (and no longer pursued the death penalty if the jury found only a low number of aggravating factors).

Perhaps another way to reduce the potential injustice of harsh death row conditions would be to impose them only after a death sentence has been upheld on state appellate and collateral review. According to the study by Liebman, Fagan, and West, most sentencing error is discovered during state court review. The risk of unjust punishment through harsh death row conditions thus could be mitigated by waiting until the end of state court review to send death-sentenced inmates to death row. But because the federal courts also find sentencing error, further mitigation of the problem of unjustly harsh death row conditions would require states to wait until both state and federal courts complete their review. Then, though later investigation still might find evidence of actual innocence, the risk of unjust placement on death row would be low.

Unless some such solution can be found, however, the high incidence of capital sentencing error presents a profound challenge to the justice of harsh death row conditions imposed on retributive grounds. Retributive theory thus continues to provide arguments not only for and against the death penalty 8 but also for and against death row.

D. Is Death Row Necessary to Deter Others from Crime?

Those who do not believe that retributive justice by itself requires harsh death row conditions nonetheless might find that general deterrence necessitates such conditions (within the bounds permitted by justretribution183). Indeed, the Supreme Court has recognized that states may impose harsh death row conditions for a deterrent as well as retributive purpose. In 1890, the Supreme Court described a law requiring solitary confinement of death-sentenced inmates as imposing "an additional punishment of the most important and painful character" that was designed "to mark [the prisoners] as examples of the just punishment of the worst crimes of the human race."

To be sure, deterrence may no longer motivate strongly most proponents of capital punishment and might not influence their approach to death row. The latest Gallup poll showed that only six percent of Americans stated that they supported the death penalty on deterrence grounds, when supporters were given a list of grounds from which to choose. The poll also showed that roughly half as many people today believe the death penalty deters as people did in 1985. Some research suggests that the death penalty in fact does not deter, but these findings are controverted by other studies.

Perhaps deterrence rationales no longer influence many death penalty supporters because so few persons who commit capital crimes are actually executed. But even if execution is improbable, the de facto punishment of death row is not. Making life on death row much worse than life in the general prison population might help deter others from capital crime. Predicting a deterrent effect is difficult, and depends on evidence about whether potential criminals know what crimes carry the death penalty and whether they

will weigh rationally the costs and benefits. But it seems at least plausible to think that harsh prison conditions might have some marginal deterrent effect.

Whether achieving such marginal deterrence would justify imposing harsh death row conditions on all death sentenced prisoners raises a different question and a potential problem. Reversal rates in capital cases are exceptionally high. For those prisoners sentenced to death in error, death row incarceration augments their improperly imposed punishment. Deterrence objectives thus may bolster the argument for harsh death row conditions, but only if one accepts, as a normative matter, the risk of unjust additional harm to prisoners improperly sentenced to death.

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The foregoing discussion of punishment purposes for death row reveals that retaining death row requires normative choices. The administrative rationale for death row, grounded in claims that death-sentenced inmates are particularly the study of Missouri's abolition of death row. Retaining death row is not a necessity for security reasons. The fact that some death-sentenced prisoners are exceptionally dangerous does not require that all death-sentenced prisoners endure the harshness of permanent isolation. Missouri's experience has shown that individual assessments can be used to determine the appropriate custody level for death-sentenced prisoners, as is done with other, non capital prisoners.

Death row still might be seen to serve other punishment purposes, however. Retribution and deterrence aims offer potential reasons to retain harsh death row conditions, and perhaps to make them more severe. Some advocates of harsh punishment might favor punitive death row conditions, as Robert Blecker does. Others might believe that capital offenders deserve less harsh conditions than Blecker proposes, but still harsher conditions than noncapital prisoners experience. Still others might believe that juries should be authorized to decide whether certain particularly heinous murderers deserve the additional punishment of death row-serial killers, perhaps, but not felony murderers.

Ultimately, the decision whether to retain death row requires judgments about the purposes of punishment and how much potentially undeserved suffering society should inflict in the interest of punishment objectives. The next Part of this Article will contend that these normative judgments should be made by legislatures rather than prison administrators.

I. Inmates As Savages

Segregation of inmates on death row reinforces an image of the death sentenced inmates as dangerous savages. Justice Brennan viewed the denial of common humanity as an inevitable aspect of capital punishment. Concurring in Furman v. Georgia, he wrote that "[t]he calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity." He argued that the death penalty marked the condemned as categorically different from other prisoners and no longer "member[s] of the human family."

Indeed, researchers have found that persons who must assist executions tend to engage in psychological self-protection by "dehumanizing]" capital murderers as "devoid of any human qualities." Dehumanization may be expressed by assertions that, "Murderers who receive the death penalty have forfeited the right to be considered full human beings."

Social and psychological studies have shown that participation in killing creates enormous psychological stress, even when fully legal. Executioners (and others who must kill, such as soldiers) develop psychological coping mechanisms that limit their inhibitions and the psychological impact or "moral injury" caused by their lethal roles.

Researchers have studied the kinds of coping mechanisms employed by prison personnel involved in the execution process. In a study published in 2005, Stanford researchers visited three penitentiaries where executions were carried out, and studied the moral disengagement levels of execution team members, support team members who consoled the victims' families and the condemned inmates, and prison guards with no involvement in the

execution process. The researchers found that "[to negate moral self-sanctions, executioners do not focus on the taking of life, but rather seek solace in the dignity of the process and in the view that condemned killers have a bestial aspect to their nature and executing them will protect the public." All three groups-executioners, supporters, and guards-"dehumanized" the prisoners to some degree, and the executioners did so the most. Building upon earlier studies, the researchers concluded that "the offenders tend to be dehumanized by those who have to take a human life."

The Stanford study illuminated the psychological tendencies of executioners, and its findings could suggest that prison administrators who direct executioners also might treat death-sentenced prisoners in ways that dehumanize them. As Lyon and Cunningham have noted, segregation on death row labels the death row inmate as a vicious criminal who has committed a hideous crime for which he must live permanently apart from others, awaiting execution. His segregation and isolation confirm the sense that he is dangerous, vicious, and unfit for human interaction. The isolation, restriction of personal hygiene, and physical and mental stagnation increases the sense of death row defendants as bestial and different from human beings who retain the right to life. Indeed, such treatment may push inmates actually to become the enemy of humanity that they were first labeled to be.

Some prisons may use additional visual markers as well as physical barriers to set death-sentenced inmates apart. In Florida, for example, death row inmates are distinguished visibly from other inmates because they must wear orange t-shirts. These superficial distinctions serve as a reminder of the crimes these prisoners have committed, setting them apart from the rest of humanity and even the prison community.

By adopting death row policies that require the automatic isolation of prisoners without individual evaluations, prison officials avoid the need for personal contacts that might cast doubt on their view of these prisoners as savages, and might reveal their common humanity. By marking death sentenced inmates as savages

> who must be segregated and isolated for the safety of others, prison administrators may find it easier to justify killing them on incapacitation grounds, or even for reasons of retribution or general deterrence. Moreover, to the extent the condemned inmates are segregated from others and unable to contribute to society (even prison society), their continued existence may seem a waste and their execution may be rationalized on economic grounds as well."

(83) In the article published in Harvard Law Review under the caption "The Psychology of Cruelty: Recognizing Grave Mental Harm in American Prisons", learned author has dealt with following serious constitutional/legal issues of " solitary confinement":-

> Over the past forty years, American prisons have increasingly relied on a brutal method of confinement that inflicts severe suffering on prisoners. Inmates confined in this manner have endured symptoms ranging from hallucinations and perceptual distortions to selfmutilation and suicidal ideation. Walking past these inmates, one can observe babbling, shrieking, and the banging of prisoners' bodies against the walls of their cells. There is no dispute that this method of confinement has a terrible effect on prisoners' well-being, and yet because it inflicts mental harm, rather than physical harm, courts have largely turned a blind eye.
>
> Solitary confinement — the confinement of a prisoner in isolation with limited chance for social interaction or environmental stimulus — has existed in America for centuries, but until the late twentieth century, it was rarely used. In the 1970s and 1980s, the use of solitary confinement began to expand, as prisons started to employ it not only for discipline and safety, but also, in America's supermax prisons, as a method of long-term imprisonment. Supermax prisons — prisons that house inmates in perpetual conditions of solitary confinement — have continued to spread across the country since the first one opened in 1983. Today, about forty states have at least one supermax prison, and nearly sixty total facilities are in operation around the country. Though estimates vary, most conclude that about 25,000 inmates are currently incarcerated in supermax

facilities, with another 55,000 in solitary confinement outside the supermax setting.

Although there has been no shortage of Eighth Amendment challenges to solitary confinement, they have only rarely succeeded. This is because a condition of confinement must deprive a prisoner of a "single, identifiable human need" to be unconstitutional and all but a handful of courts have restricted those needs to things that a person cannot be deprived of without suffering grave physical harm — for the purposes of this Note, "physical needs." Substantial psychological and neuroscientific research shows that the deprivation of social interaction results in grave harm, but that harm is mental, not physical — meaning social interaction would be a "mental need" — and this difference has proven largely insurmountable. Lower courts have only rarely recognized grave mental harm in the conditions of confinement context, and the Supreme Court has never done so. In the past fifteen years, though, the Court has relied on recent psychological and neuroscientific evidence to inform its application of another Eighth Amendment test, the proportionality inquiry. The conditions of confinement assessment would similarly become more comprehensive and robust if the Court used psychological and neuroscientific research as a basis for identifying grave mental harm and the unconstitutional mental deprivations that cause it. By equipping itself with this information, the Court would more fully ensure that it carries out its constitutional duty to prevent cruelty, no matter its form.

This Note proceeds in four parts. Part I lays out the doctrinal frameworks of the proportionality and conditions of confinement inquiries and examines the Court's past use of psychological and neuroscientific research to inform the two tests. Part II first describes how the Court's use of psychological and neuroscientific research regarding juvenile culpability strengthened the proportionality assessment. It then contends that the Court would similarly improve the conditions of confinement inquiry were it to use scientific research to identify mental needs. This Part focuses specifically on psychological and neuroscientific

research regarding social interaction. Part III considers and rejects arguments against judicial use of psychological and neuroscientific research to identify mental needs. Part IV concludes.

I. APPLYING PSYCHOLOGICAL AND NEUROSCIENTIFIC RESEARCH TO THE EIGHTH AMENDMENT INQUIRIES

The Eighth Amendment's prohibition on cruel and unusual punishment is an evolving standard, one that prohibits more than the "physically barbarous punishments" that were its focus in the early days of the Republic. While the Court's Eighth Amendment doctrine continues to develop, today it splits into two branches. The first branch governs punishments that are delivered in response to a crime, the primary inquiry in this area being whether the punishment is "grossly out of proportion to the severity of the crime."24 The second branch of Eighth Amendment jurisprudence polices conditions within prisons.

A. Unconstitutional Punishments: The Proportionality Inquiry

1. Doctrinal Framework. — The Supreme Court's examination of punishments using the proportionality inquiry has generally divided into two groups of cases. The first group considers whether a term of years sentence is disproportionate to the crime committed. In performing this assessment, the Court first undertakes a threshold examination of the sentence to determine whether it is "grossly disproportionate" to the crime committed. If the Court finds that it is, the Court then conducts intrajurisdictional and interjurisdictional" comparisons in order to "validate" the initial judgment. Although the Court has occasionally struck term-of-years sentence for being disproportionate, victories for defendants have been rare.

The second group of cases assesses whether a particular punishment is categorically disproportionate for a certain offense or class of offenders. Coker v. Georgia presents an example of the former. There, the Court held that the death penalty was a disproportionate punishment for the offense of raping an adult woman. Roper v. Simmons

shows an example of the latter. In Roper, the Court held that the death penalty was a disproportionate punishment for people who committed their crimes while under the age of eighteen. Whether an offense or a class of offenders is at issue, the Court follows the same steps. It first looks to objective indicia of societal approval for applying the punishment to that offense or class of offenders and then examines the punishment using its own independent judgment. In Coker, for example, the Court first determined that state legislatures had rarely approved, and that juries had infrequently imposed, the death penalty for the crime of rape. It then used its independent judgment to affirm that death was a disproportionate punishment for the rape of an adult woman, largely because the victim does not die. In recent years, the Court has shown greater willingness to use its independent judgment to find punishments categorically disproportionate despite objective indicia of societal approval."

2. Use of Psychological and Neuroscientific Research. — Starting in the early 2000s, the Court began looking to psychology and neuroscience when examining whether a punishment was proportionate to the crime committed for certain classes of offenders. After conducting the initial inquiry into objective indicia, the Court has then considered psychological and neuroscientific evidence as part of its independent inquiry. Primarily, the Court has employed such evidence to show that a class of offenders does not possess the requisite culpability to receive a particular punishment. But the Court has also found such evidence relevant to proportionality for other reasons: because a defendant with diminished mental capacity may be less capable of presenting a formidable defense and because, for such a defendant, the central justifications for punishment — deterrence and retribution — are less efficacious.

The Court has not always been inclined to use psychological and neuroscientific evidence when performing the proportionality inquiry. In the 1989 case Stanford v. Kentucky, the Supreme Court narrowly refused to look to psychology in assessing whether juvenile defendants possess the requisite culpability to be punished with the

death penalty. That same year, in Penry v. Lynaugh,45 the Court declined to adopt a holding proposed by amici that persons with intellectual disability never possess the requisite culpability to merit the death penalty. The Court changed course in Atkins v. Virginia. There, after determining that objective indicia —including the opinions of professional psychological organizations — pointed toward abolition of the death penalty for defendants with intellectual disability, the Court looked to psychological and neuroscientific research during its independent inquiry, which affirmed that the death penalty was inappropriate. The Court applied the same approach in a series of decisions following Atkins that examined the proportionality of certain punishments for juvenile offenders. In the first of these cases, Roper, the Court relied on psychological and neuroscientific evidence in reaching its conclusion that the death penalty is unconstitutional when applied to juvenile offenders. The Court cited similar evidence in Gra-ham v. Florida, where it held that life without parole (LWOP) is a disproportionate sentence for a juvenile who does not commit a homicide. The Court pointed to both its analysis in Roper and subsequent evidence showing the diminished culpability of juveniles. In the most recent of these cases, Miller v. Alabama, the Court turned to psychological and neuroscientific evidence when it held that mandatory LWOP is unconstitutional when applied to juveniles, no matter the crime. Departing from the approach of its earlier decisions, the Court considered the science first and then turned to objective indicia such as legislative approval. The Court also emphasized that it was not bound by the decision of the majority of state legislatures that LWOP is an acceptable punishment for juveniles who commit a homicide.

(84) In the article published in Fordham Law Review in its Volume 85 Issue 6 under the caption **"Jail Isolation After Kingsley: Abolishing Solitary Confinement at the Intersection of Pretrial Incarceration and Emerging Adulthood"**, learned author Deema Nagib has in depth dealt with the issue of "solitary confinement" as under:-

Solitary Confinement: Creating Madness

Solitary confinement typically consists of isolation in a "windowless cell [that is] no larger than a typical parking spot" for twenty-two to twenty-four hours per day. A quintessential characteristic of the practice is "extreme sensory deprivation." Individuals placed in solitary confinement are often "allowed little or no opportunity for conversation or interaction with anyone" in the limited time that they are allowed outside of their cells.

Initially established as a tool for criminal justice Murder Reference No.03 of 2017 & other connected appeals 88 reform, solitary confinement is now used primarily for security purposes. Despite judicial deference to jail and prison administrators, research demonstrates that the practice is more likely to cause long-lasting, sometimes permanent, adverse health effects than to increase institutional order and security.

1. Justification and Effects on Institutional Violence

Solitary confinement was first introduced to reform criminal punishment. The practice's proponents were concerned with the barbaric nature of criminal punishment as a public spectacle. In the early nineteenth century, isolation was "intended to redeem the soul through quiet contemplation." However, the practice's justifications have shifted over time. As one scholar noted, solitary confinement has "changed from an open, optimistic experiment in social reform into a hidden, secretive place of punishment and control."

Today, jail administrators primarily support the use of solitary confinement as a security measure. Administrators and officers must be able to effectively manage their facilities, and solitary confinement provides officers with an easy-to-enforce sanction for the violation of disciplinary rules. Jails cannot refuse admission. They house populations that are transient and often in crisis. Thus, correction officers are forced to make choices about how to care for a variety of individuals who may pose a threat to institutional safety, often without sufficient time to deliberate.

Correction officers are, first and foremost, concerned with assaults on staff and other people who are incarcerated.

Marc Steier, the director of legal affairs for the Correction Officers' Benevolent Association, justified solitary confinement by explaining that he does not know of another way to deal "with people who have assaulted staff 20, 40, 60 times." He believes that the solution is simple: "[I]f I can't reach you, I can't attack you.

Isolation, in Steier's mind, is a regulatory mechanism to ensure that the most dangerous people do not have access to others. However, justifying solitary confinement as an instrument necessary to reduce levels of institutional violence is likely "unsubstantiated." First, it is important to clarify that the use of solitary confinement is not exclusively reserved for people who pose a serious threat to institutional safety. Second, research suggests that solitary confinement does not decrease levels of institutional violence. One researcher has found that solitary confinement has no effect on violence—overall levels of violence in his study neither increased nor decreased. Others have found that solitary confinement actually increases violence. In some instances, isolation will drive people to throw "feces, urine, and/or semen" at officers. Isolation can also lead to "uncontrollable outbursts of anger, rage and aggression." The penal response to such behavior is more time in solitary confinement, creating a feedback loop where institutionally unacceptable conduct is met with a sanction that tends to increase the likelihood that the conduct will recur.

2. Effects of Solitary Confinement

> The potential harmful effects of solitary confinement were known as early as 1890. In In re Medley, the Supreme Court found that, while in solitary confinement,
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> [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; 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.

Dr. Stuart Grassian, an expert on the effects of solitary confinement, addressed and rebuked concerns that the self-reports typically characterizing solitary confinement research might be exaggerated. He found that his interviewees actually rationalized and avoided full engagement with the extent of the deprivation they were facing until he probed further. For example, he reported that one of his interviewees rationalized his selfharm while in solitary confinement with a desire to leave.

Grassian found a pattern of initial denial and rationalization, progressing to overt anxiety once subjects were pressed through questioning. Some of the interviewees expressed fear that the guards would exploit their weaknesses or that they were, in fact, "going insane." This research suggests that interviewees' potential biases typically point toward a lack of acknowledgment of the practice's effects as opposed to exaggeration.

In his studies, Grassian identified a distinct psychiatric syndrome associated with solitary confinement, explaining that many of the associated symptoms are either rare or not found elsewhere. In his evaluation of forty-nine individuals incarcerated in Pelican Bay State Prison's solitary confinement unit, he found that "at least seventeen were actively psychotic and/or acutely suicidal . . . , and twenty-three others suffered serious psychopathological reactions to solitary confinement." The most severely affected by solitary confinement often suffer from delirium, hallucinations, and disorientation. In these mental states, individuals often dissociate and cannot recall what occurred.

Among the more resilient in Grassian's sample—whom he described as highly educated and high functioning—he found symptoms of "perceptual disturbances, free-floating anxiety, and panic attacks." Grassian concluded that the conditions inherent in solitary confinement "are strikingly toxic to mental functioning, producing a stuporous condition associated with perceptual and cognitive impairment and affective disturbances."

A study conducted in Denmark demonstrated that individuals placed in solitary confinement experienced significantly higher incidences of psychiatric disorders than

those in general population housing. The researchers found that individuals in solitary confinement were at a higher risk for developing adjustment disorders such as depression and anxiety, coupled with psychosomatic symptoms. Panic attacks, posttraumatic stress disorder, "chronic hyper-vigilance," and obsessive thoughts are also symptomatic.

In solitary confinement, an individual's emotional well-being also suffers. Humans are social creatures, and healthy brain functioning thrives on "social thinking and sensory interpretation." People need "continuous meaningful contact with the outside world" to function. Health and wellbeing improve with access to "close social relationships and rich social networks," from which people in solitary confinement are necessarily restricted. Complete isolation, in many ways, can be worse than negative social interaction.

People who are isolated can suffer a great deal of emotional damage, cycling between "bitterness and despair." They feel like incarceration is trying to "break" them and "describe a complete loss of control over their emotions." Stemming from these thoughts, they also feel a tremendous amount of rage, resentment,and hopelessness.

Dr. Craig Haney identified five social pathologies that emerge from isolation: dependence on the institution, inability to initiate behavior, a pervading "feeling of unreality," frustration and anger, and social withdrawal,. Solitary confinement can also cause regression into primary processes, consisting of "unrealistic, prelogical modes of thought, or [thoughts] which contain[] inappropriate drive intrusions." Consistent with this regression are a lack of impulse control, fantasies of revenge, and paranoia.

Solitary confinement also impacts sensitivity to external stimuli. One's attention to the environment and levels of alertness are diminished during isolation. Those who are isolated may lose "perceptual constancy," characterized by "objects becoming larger and smaller, seeming to 'melt' or change form, [and] sounds becoming louder and softer." In addition, they demonstrate an extreme hypersensitivity to stimuli, which "become[] intensely unpleasant," and report that "small irritations become maddening."

> Further, the effects of solitary confinement are physical. Solitary confinement can be "as strong a risk factor for . . . mortality as are smoking, obesity, a sedentary lifestyle, and high blood pressure." Solitary confinement also causes "sleep disturbances, headaches, lethargy, dizziness, heart palpitations, appetite loss, weight loss, severe digestive problems, diaphoresis, back and joint pain, deterioration of eyesight, shaking and feeling cold, and aggravation of pre-existing medical problems."
>
> The harm of solitary confinement is often permanent, even if symptoms subside over time after one's release. This can have implications for successful reentry to society. In fact, prolonged isolation can cause lasting detrimental emotional damage and, in the worst cases, permanent "functional disability." Harms associated with solitary confinement can become permanent even after a short duration.

Immediately after release from segregation, whether into general population housing or society, individuals demonstrate difficulties with adjustment. Solitary confinement can thus have a negative impact on public safety. Jails, pretrial detention in particular, are designed for shortterm incarceration. The majority of people incarcerated pretrial will be released, and they will not be "well prepared to return to a social milieu."

The permanence of the harm and the likelihood that individuals will develop psychiatric disorders render emerging adults especially vulnerable to the practice. Further, emerging adults are the most likely age demographic to be exposed to solitary confinement in jail.

In his call to "banish" solitary confinement for juveniles in the United States, Professor Ian M. Kysel "suggest[s] that there are both practical and jurisprudential reasons for viewing children as different from adults when it comes to evaluating how the constitution protects them when they are deprived of their liberty" while incarcerated. The following section, through a discussion of the empirical research surrounding emerging adulthood, demonstrates that there are similar practical and jurisprudential reasons to view emerging adults differently."

(85) In a source book on **"Solitary Confinement"**, written by Sharon Shalev, the following negative health effects of solitary confinement have been highlighted:-

Physiological effects

Although psychological effects are most common and usually dominant, physiological effects are nevertheless commonly reported. Some of these may be physical manifestations of psychological stress, but the lack of access to fresh air and sunlight and long periods of inactivity are likely also to have physical consequences. Grassian and Friedman (1986) list gastro-intestinal, cardiovascular and genito-urinary problems, migraine headaches and profound fatigue. Other signs and symptoms recorded by the some of the studies reviewed above are

- Heart palpitations (awareness of strong and/or rapid heartbeat while at rest)
- Diaphoresis (sudden excessive sweating)
- Insomnia
- Back and other joint pains
- Deterioration of eyesight
- Poor appetite, weight loss and sometimes diarrhea
- Lethargy, weakness
- Tremulousness (shaking)
- Feeling cold
- Aggravation of pre-existing medical problems.

Psychological effects

The most widely reported effects of solitary confinement are its psychological effects. These will vary with the premorbid adjustment of the individual and the context, length and conditions of confinement. The experience of previous trauma will render the individual more vulnerable, as will the involuntary nature of confinement as punishment, and confinement that persists over a sustained period of time. Initial acute reactions may be followed by more chronic symptoms if the confinement persists. While the majority of

those held in solitary confinement will report some form of disturbance, there may be a small number of prisoners who show few signs and symptoms and may be more resilient to the negative effects of solitary confinement. Symptoms occur in the following areas and range from acute to chronic.

Anxiety, ranging from feelings of tension to full blown panic attacks

- Persistent low level of stress
- Irritability or anxiousness
- Fear of impending death
- Panic attacks

Depression, varying from low mood to clinical depression

- Emotional flatness/blunting – loss of ability to have any 'feelings'
- Emotional ability (mood swings)
- Hopelessness
- Social withdrawal; loss of initiation of activity or ideas; apathy; lethargy
- Major depression

Anger, ranging from irritability to full blown rage

- Irritability and hostility,
- Poor impulse control
- Outbursts of physical and verbal violence against others, self and objects
- Unprovoked anger, sometimes manifesting as rage

Cognitive disturbances, ranging from lack of concentration to confusional states

- Short attention span
- Poor concentration
- Poor memory
- Confused thought processes; disorientation.

Perceptual distortions, ranging from hypersensitivity to hallucinations

- Hypersensitivity to noises and smells
- Distortions of sensation (e.g. walls closing in)
- Disorientation in time and space
- Depersonalisation/derealisation
- Hallucinations affecting all five senses, visual, auditory, tactile, olfactory and gustatory (e.g.hallucinations of objects or people appearing in the cell, or hearing voices when no-one is actually speaking).

Paranoia and Psychosis, ranging from obsessional thoughts to full blown psychosis

- Recurrent and persistent thoughts (ruminations) often of a violent and vengeful character (e.g. directed against prison staff)
- Paranoid ideas – often persecutory
- Psychotic episodes or states: psychotic depression, schizophrenia.

Self-harm and suicide

Historical reports of 19th Century isolation prisons repeatedly describe acts of auto-aggression, selfmutilation, and suicide. Contemporary studies have also shown that self-harm (including banging one's head against the cell wall) and suicides are more common in isolation units than in the general prison population (Haney & Lynch 1997:525). In California, for example, a reported 69% of prison suicides in 2005 occurred in segregated housing units (USA Today, 27/12/2006), and in England and Wales in 2004/5 a fifth of prison suicides took place in segregation units (National Offender Management Service, Safer Custody Group. Self inflicted deaths Annual Report, 2004/5).

Other forms of self-harm are also prevalent in solitary confinement. Researchers have noted that self-mutilation or cutting is often "a result of sudden frustration from situational stress with no permissible physical outlet...Self-addressed aggression forms the only activity outlet" (Scott &

Gendreau,1969: 341). Another study found that self-mutilation was a means to "liberate the self from unbearable tension- the physical pain becomes a compensatory substitute for psychic pain or shame" (Dabrowski (1937), cited in McCleery, 1961:303). Former prisoners have testified that self harm played another role for them when they were held in segregation – it asserted that they were still alive.

I was totally frustrated… I started smashing up the cell. I refused to eat. I started refusing water. I was totally paranoid. I started sipping my own urine because I thought they were trying to poison me. I resorted to self-injury, was put in a body belt. You become so angry. It's an outlet, but you have to vent it out. Even your own blood is something real [Former prisoner, UK, cited in Shalev, forthcoming]. I found myself curled up in a foetal position rocking myself back and forth and banging my head against the wall. In the absence of sensation, it's hard sometimes to convince yourself that you're really there [Former prisoner, US, cited ibid.].

It is difficult to obtain figures for forms of self-harm that do not result in death. Nonetheless, there is compelling anecdotal evidence that the prevalence of such incidents in segregation and isolation units is particularly high.

2.4 What makes solitary confinement harmful?

Each of the three main factors inherent in solitary confinement- social isolation, reduced environmental stimulation and loss of control over almost all aspects of daily life- is potentially distressing. Together they create a potent mix. Moreover, psychiatric morbidity studies of prisoners indicate that they are a particularly vulnerable population, even when not in solitary confinement. In England and Wales, a morbidity survey of prisoners carried out by the Office for National Statistics in 1998 found that only 10% were without any history of neurotic disorder, psychotic disorder, personality disorder or substance misuse, and many experienced some or all of these in combination (ONS psychiatric morbidity survey, 1998). It is also known that about 7% of prisoners have a severe learning disability, with an IQ of 70 or below, and that those with learning disabilities find it particularly difficult to cope with isolation. About 12% will also be receiving psychiatric treatment while in prison for

severe and enduring mental illness (HMCIP, The mental health of Prisoners, 2007). One cause of these high levels of disturbance is the experience of early life traumaand the resulting poor personal and social adjustment. All these features conspire to render prisoners particularly vulnerable to the effects of isolation, reduced activity, under-stimulation and loss of control over their lives. Conversely, anecdotal evidence suggests that some prisoners are protected from the worst impact of solitary confinement by the meaning they are able to make of the experience. Some political prisoners, for example, have demonstrated remarkable resilience during prolonged periods of confinement. That does not mean that the experience was not a difficult one. Describing his time in Robben Island, Nelson Mandela writes: "I found solitary confinement the most forbidding aspect of prison life. There is no end and no beginning; there is only one's mind, which can begin to play tricks. Was that a dream or did it really happen? One begins to question everything." (Nelson Mandela, The Long Walk to Freedom, 1995). Leaders of the Tupamaro movement in Uruguay, who were imprisoned in strict solitary confinement (they were not allowed to communicate with anyone, meals were delivered to them through a hatch in the cell-door by guards who were instructed not to exchange a word with them) for several years during the 1970's, reported that solitary confinement was the worst form of torture; one prisoner said that "electricity [torture] is mere child's play in comparison to prolonged solitude" (cited in Reyes, 2007:607).

Social isolation

Social well-being is seen by the World Health Organisation as integral to its definition of 'health'. Solitary confinement removes the individual from the company of others and deprives him or her of most forms of meaningful and sympathetic social interaction, as well as physical contact. In most cases the isolated individual is deprived of any form of interaction with fellow prisoners, and sometimes with family and friends through restrictions on visits. Where visits do take place they can be closed, with a barrier separating the prisoner from his visitors, preventing any physical contact between them. Social learning theories highlight the importance of social contact with others not just for pleasure and play but for

the individual's very sense of 'self' which is shaped and maintained through social interactions. Social contact is crucial for forming perceptions, concepts, interpreting reality and providing support.

> The self… is essentially a social structure and it arises in social experience. After a self has arisen, it in a certain sense provides for itself its social experiences, and so we can conceive of an absolutely solitary self. But it is impossible to conceive of a self arising outside social experience. When it has arisen we can think of a person in solitary confinement for the rest of his life, but who still has himself as a companion, and is able to think and to converse with himself as he had communicated with others….
>
> **This process of abstraction cannot be carried on indefinitely**. (Mead, 1934, emphasis added).

Paradoxically, social isolation can lead to further withdrawal. One study found support for the hypothesis that the "shut-in" or "seclusive" personality, "generally considered to be the basis of schizophrenia, may be the result of an extended period of 'cultural isolation', that is, separation from intimate and sympathetic social contact" (Faris, 1962:155). Faris adds that "seclusiveness is frequently the last stage of a process that began with exclusion or isolation which was not the choice of the patient" (Ibid. at p. 159).

Deprived of meaningful and sympathetic social contact and interaction with others, the prisoner in solitary confinement may withdraw and regress. Even when isolated prisoners do not show any obvious symptoms, upon release from isolation they can become uncomfortable in social situations and avoid them, with negative consequences for subsequent social functioning in both the prison community and the outside community, again undermining the likelihood of successful resettlement.

Reduced activity and stimulation

Monotony and reduced sensory stimulation are part and parcel of the experience of isolation. In the isolation prisons of the 19th century, where prisoners had access to work, great care was taken to ensure that they were given intentionally tedious and dull jobs usually performed in silence. In 'modern'

isolation sections of prisons, work, education or other diversion such as reading material, radio or television, can be withheld or restricted as part of a system of punishment. When work is allocated, it is often conducted inside the cell and, as in the 19th century, can be simple and monotonous, for example stuffing envelopes. Prisoners can be detained in sparsely furnished cells for up to 23 hours a day with little sensory or mental stimulation.

Prisoners' accounts illustrate the effects of monotony and boredom on their mental state during a period of isolation:

> Boredom is a major enemy. Sensory deprivation is a way of life. There is simply nothing to do. Sit in your bathroom alone with none of your intimate possessions and try to imagine years of it, week after week. Slowly it tears you down, mentally and physically31. The utter and monstrous boredom that becomes so obvious after a short period of isolation is an all-powering one… in order to fight off the tendency to complete idleness and to retain a hold on the senses, it is necessary to make great exertions… Yet no matter how successful a prisoner may be in staving off the effects of... isolation, it is only a matter of time before it catches up with him (Wakefield 1980:28).

> …you sit in solitary confinement stewing in nothingness, not merely your own nothingness but the nothingness of society, others, the world. The lethargy of months that add up to years in a cell, alone, entwines itself about every 'physical' activity of the living body and strangles it slowly to death, the horrible decay of the truly living death. You no longer do push-ups or other physical exercise in your small cell; you no longer pace the four steps back and forth across you cell. You no longer masturbate; you can call forth no vision of eroticism in any form…time descends in your cell like the lid of a coffin in which you lie and watch it as it slowly closes over you… solitary confinement in prison can alter the ontological makeup of a stone (Abbott 1982:44-45).

These personal accounts are supported by studies which indicate that reduced sensory input may lead to reduced brain activity. Building on the input-output theory, one study suggested that sensory input and motor-mental output work in parallel:

A drop in sensory input through sensory restriction produces a drop in mental alertness, an inability to concentrate, a drop in planning and motivation, together with a drop in physical activity in the speech and motor systems… In prison life boredom generates boredom. A drop in stimulus input results in mental sluggishness, a disinclination to learn and a correlated drop in planning, motivation and physical activity (Scott & Gendreau, 1969:338).

To evaluate this hypothesis, the brain activity of isolated prisoners was measured daily. Researchers found that following seven days in isolation there was a decline in brain activity. This decline "was correlated with apathetic, lethargic behaviour… and with a reduction in stimulation seeking behaviour Up to seven days the EEG decline is reversible, but if deprived over a long period this may not be the case" (Scott & Gendreau, ibid.).

Lack of control

A third aspect of segregated confinement is the rigid regime and exceptionally high level of control over all aspects of prisoners' lives, or what has been termed "an authoritarian system of social control" (McCleery, 1961:272), or the "totality of control" (Haney, 1993). While undergoing any special control or disciplinary measure, some degree of increased control and watchfulness from the authorities is inevitable. However, in the case of solitary confinement, this control is extreme and prisoners have few avenues or areas where they can exercise personal autonomy, and are completely dependent on staff for the provision of all their basic needs. When this degree of control is exercised over long periods of time, the psychological impact is proportionally greater.

Various studies have examined the socio-psychological aspects of long-term imprisonment in highly controlled environments and have identified some common psychological reactions. These typically range from apathy to aggression: "either reaction to the system of rigid discipline tends to become something very much like insanity – apathy, listlessness, vagaries, or else irritability, hatred and nervous instability" (Sutherland Cressey, 1955:473). Another study similarly noted that over time, symptoms experienced by

isolated prisoners are "likely to mature into either homicidal or suicidal behaviour" (McCleery, 1961:265).

Thus, contrary to the aims of enforcing calm and control on a prisoner, solitary confinement can produce further irritability and even violent outbursts, often unprovoked. Such violent outbursts may be directed against staff, but may also be turned upon the prisoner himself in the form of self harm or suicide. Where the prisoner does become more docile and apparently conforming to the rules, it may in fact be a pathological reaction in the form of withdrawal, emotional numbing and apathy. Further, the 'totality of control' means that some prisoners become so reliant on the prison to organise their lives and daily routines that they lose the capacity to exercise personal autonomy. This, again, may render them dysfunctional in society upon their release and some will seek to return to prison.

2.5 The duration of solitary confinement

All studies of prisoners who have been detained involuntarily in solitary confinement in regular prison settings for longer than ten days have demonstrated some negative health effects (Haney, 2003), and even apologists of the practice agree that prolonged punitive solitary confinement "presents considerable risk to the inmates" (Gendreau and Bonta, 1984:475).

A study comparing subsequent admission to psychiatric hospitals in Denmark for prisoners held in solitary confinement compared to those held with other prisoners, found that hospitalisation rates diverged significantly after four weeks. The "probability of being admitted... for psychiatric reasons was about 20 times as high as for a person remanded in non-solitary confinement for the same period of time" (Sestoft et al. 1998:105). Siegel's (1984) study of 31 people who were subjected to isolation, visual deprivation and restraint on physical movement in different situations (hostages, POWs, prisoners) and for varying times reported visual and auditory hallucinations within hours of being isolated, becoming more severe with time Studies with volunteer prisoners isolated for periods of up to ten days have commonly reported minimal negative effects. Walters et al (1963:772) noted that for 20 longterm prisoners in a Canadian

Federal Penitentiary who volunteered to stay in solitary cells for four days "while social isolation may produce some change in subjective feelings, it does not result in mental or psychomotor deterioration or increased susceptibility to social influence." Similarly Ecclestone, Gendreau and Knox in 1974 reported that for eight volunteers over a period of 10 days "solitary confinement was not more stressful than normal institutional life." But these outcomes may be accounted for by the short duration of stay in isolation and by the fact that prisoners who participated in these studies welcomed the opportunity to spend time away from the general prison population.

Experimental studies with volunteers have reported relatively short-lived tolerances for isolation. Although such studies are not equivalent to enforced isolation in the prison context where prisoners are not free to end the experiment at any time, the findings serve to illustrate the powerful impact of isolation on human subjects. In a study aimed at measuring levels of tolerance to isolation, approximately two-thirds of the volunteers were able to remain in an isolated room for periods ranging from three to fourteen days (Zuckerman, 1964:255-276). In another, twenty volunteers were placed separately in a silent room, and asked to remain in it for as long as they could. The average quitting times were 29.24 hours for men and 48.70 hours for women. None of the participants endured the 'silent room' for longer than four days (Smith & Lewty, 1959:342-345). Where the duration of isolation was unspecified, two hours were sufficient to generate confusion and the fear of becoming insane (Solomon et al, 1961).

Other studies have also demonstrated that an important element in the level of endurance of solitary confinement is prior knowledge of its duration. Uncertainty as to its duration "promotes a sense of helplessness. Finite sentences imposed for acknowledged acts seem less prone to inspire panic" (Toch, 1992:250). Another study concluded that uncertainty is a critical factor relating to the outcome of hostility and aggression (McCleery 1961:303). Knowing how long the experience is to last is therefore a clear mitigating factor available to those responsible for placing a prisoner in segregation.

2.6 Sequelae of isolation: the lasting effects of solitary confinement

There are few longitudinal studies of the effects of solitary confinement and no follow-up studies of formerly isolated prisoners following their release from prison. Again, any long term effects are likely to be dependent on the individual, the type of confinement and its duration. One study of detainees held on remand in solitary confinement at the Western prison in Copenhagen, which examined them on the second to fourth day of their isolation and thereafter at monthly intervals, found a decrease in symptoms soon after transfer to the general population, indicating that "solitary confinement conditions are distressing and probably temporary, at least partially" (Andersen et al. 2003:174). The authors note, however, that "the finding that mental health condition improved when prisoners were moved from solitary confinement to non-solitary confinement indicates that solitary confinement imposes a condition that arguably could be avoided by abolishing it" (Ibid. at page 175).

Similarly, Grassian's (1983) study of prisoners held in solitary confinement at Walpole prison in Massachusetts, where the legal statute required that isolated prisoners be relieved from their status for at least 24 hours every 15 days, reported rapid diminution of symptoms during breaks in confinement.

However, other studies report sleep disturbances, nightmares, depression, anxiety, phobias, emotional dependence, confusion, impaired memory and concentration (Hocking, 1970) long after release from isolated environments. These symptoms are similar to those experienced by prisoners in isolation and may imply a degree of irreversibility. But the lasting effects of solitary confinement are perhaps most evident in social settings and with interpersonal relationships:

Although many of the acute symptoms suffered by inmates are likely to subside upon termination of solitary confinement many [prisoners], including some who did not become overtly psychiatrically ill during their confinement in solitary, will likely suffer permanent harm… this harm is most commonly manifested by a continued intolerance to social interaction, a handicap which often prevents the inmate from successfully readjusting to … general population prison and often severely

> impairs the inmate's capacity to reintegrate into the broader society upon release from imprisonment (Grassian, 2006:332).
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> Former prisoners who have spent prolonged periods in solitary confinement have testified to experiencing difficulties in social situations long after their release:
>
> I mean there are still times where I may go to the walk-in and after the movie's over and, you know, it'slike I've been in the dark and all of the sudden the light comes on and boom all these millions of people around me, I'm like, you know, looking around like, okay, okay, who's gonna hit me, what's gonna happen ... I mean, you feel real uncomfortable and then all of the sudden you start shaking, you know, you feel your heart beat and then you realise, wait a minute, I'm at a theatre, what am I tripping on? There ain't nobody out here all crazy. I'm not in prison. It gets real uncomfortable when I'm around a big crowd. Like sometimes even going to the grocery store I feel uncomfortable, you know, when people look at me, and I'm wondering, you know, wow, what are they looking at? [Former prisoner, US. Cited in Shalev, forthcoming].
>
> My character and personality have undergone many negative changes and I am now a very paranoid and suspicious person. The paranoia has become so extensive that I find it impossible to trust anyone anymore and I have developed a tendency to hate people for no apparent reason (Wakefield, 1980:30).
>
> Unable to regain the necessary social skills for leading a 'normal' life, some may continue to live in relative social isolation after their release. In this sense, solitary confinement operates against one of the main purposes of the prison which is to rehabilitate offenders and facilitate their reintegration into society."

(86) According to Paragraph 368, cited hereinabove, every convict under sentence of death is to be confined in a cell apart from all other prisoners and is to be placed by day and by night under the charge of a special guard. He is only permitted half an hour in the morning and in evening to occupy the verandah in front of his cell. During this period, the convict has to remain handcuffed. It is thus, evident that the convict under sentence to death is to be kept in a segregated cell. He is permitted only half an hour to come out of his cell to occupy the

verandah. He is put under the gaze of light. He is to be kept always under the observation of guards.

(87) As discussed hereinabove, keeping a convict in an isolated cell has psychiatric impact on him. It causes him heart palpitations (awareness of strong and/or rapid heartbeat while at rest), diaphoresis (sudden excessive sweating), insomnia, back and other joint pains, deterioration of eyesight, poor appetite, weight loss and sometimes diarrhoea, lethargy, weakness, tremulousness (shaking), feeling cold, aggravation of pre-existing medical problems, anxiety, ranging from feelings of tension to full blown panic attacks, persistent low level of stress, irritability or anxiousness, fear of impending death, panic attacks, depression, varying from low mood to clinical depression, emotional flatness/blunting – loss of ability to have any 'feelings', emotional ability (mood swings), hopelessness, social withdrawal; loss of initiation of activity or ideas; apathy; lethargy, major depression, anger, ranging from irritability to full blown rage, irritability and hostility, poor impulse control, outbursts of physical and verbal violence against others, self and objects, unprovoked anger, sometimes manifesting as rage, cognitive disturbances, ranging from lack of concentration to confusional states, short attention span, poor concentration, poor memory, confused thought processes; disorientation, perceptual distortions, ranging from hypersensitivity to hallucinations, hypersensitivity to noises and smells, distortions of sensation (e.g. walls closing in), disorientation in time and space, depersonalisation/ derealisation, hallucinations affecting all five senses, visual, auditory, tactile, olfactory and gustatory (e.g.hallucinations of objects or people appearing in the cell, or hearing voices when no-one is actually speaking), paranoia and psychosis, ranging from obsessional thoughts to full blown psychosis, recurrent and persistent thoughts (ruminations) often of a violent and vengeful character (e.g. directed against prison staff), paranoid ideas – often persecutory, psychotic episodes or states: psychotic depression, schizophrenia, self-harm and suicide etc.

(88) The United Nations Standard Minimum Rules for the Treatment of Prisoners laid down that the solitary confinement shall be used only in exceptional cases as a last resort. It shall not be imposed by virtue of a prisoner's sentence. The solitary confinement means the confinement of prisoners for 22 hours or more a day without meaningful human contact. Prolonged solitary confinement shall refer

to solitary confinement for a time period in excess of 15 consecutive days.

(89) The Punjab Jail Manual lays down that warder shall not allow any person to go near or communicate with the prisoner except by the authorised person. He is supposed to be in isolation for more than 23 hours in a day. This is against the Nelson Mandela Rules. He has no contact with outside world. He is kept in a solitary confinement till he is acquitted or pardoned or hanged. There is no scientific reason why the convict sentenced to death should be kept in isolation for indefinite period till he exhausts all his constitutional and legal remedies. It causes immense pain, agony and anxiety to the condemned convict. It is violative of Articles 20 and 21 of the Constitution of India. A man, even sentenced to death, has certain privileges and rights which cannot be denied to him due to colonial mindset. The provisions of the Punjab Jail Manual are anarchic, cruel and insenstive.

(90) The prisoner sentenced to death is to be informed about the date of his execution in accordance with law. No purpose would ever be served by keeping the convict in an isolation/segregation for indefinite period. The law should be humane and reformative.

(91) The procedure prescribed by law must be fair, just and reasonable and not oppressive and arbitrary. The law should be neither glacial nor remote. The law should be the framework and guarantor of civilization.

(92) This practice to keep the convict in custodial segregation/solitary confinement before the exhaustion of his constitutional, legal and fundamental rights is without authority of law. It will amount to additional punishment. It also amounts to torture and violative of his basic human rights.

(93) Accordingly, we abolish the practice adopted by the jail authorities in the State of Haryana, of segregating a convict sentenced to death, immediately after the pronouncement of sentence by the trial Court and after confirmation of sentence by the High Court, being unconstitutional. The convict shall not be segregated/ isolated till the sentence of death has become final, conclusive and indefeasible which cannot be annulled or voided by any judicial process. The period to keep a convict sentenced to death in segregation/isolation should be for the shortest possible time i.e. 2-3 days.

(94) The learned trial Court on the basis of correct appreciation of evidence has acquitted Sanjay Chaudhary who was not connected

with the commission of offence. Thus the findings recorded by the learned trial Court qua his acquittal are not to be interfered with.

(95) Consequently, appeals bearings nos. CRA-D-98-DB-2017, CRA-D-104-DB-2017, CRA-D-187-DB-2017 filed by Arun, Rajesh and Deepak are partly allowed and death sentence awarded to the appellants is commuted to life imprisonment out of which the appellants would have to mandatorily serve out minimum 20 years without claiming remission. The sentence imposed upon Deepak under Section 366-A IPC is upheld. The murder reference no.3 of 2017 is answered accordingly. There is no merit in the appeal filed by Indu and the same is dismissed.

J.S. Mehndiratta