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# In the Cellars of the Hollow Men: Use of Solitary Confinement in U.S. Prisons and Its Implications Under International Laws against Torture

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ARTICLES

**IN THE CELLARS OF THE HOLLOW MEN:  
USE OF SOLITARY CONFINEMENT IN U.S.  
PRISONS AND ITS IMPLICATIONS UNDER  
INTERNATIONAL LAWS  
AGAINST TORTURE\***

**Tracy Hresko†**

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\* T.S. ELIOT, *The Hollow Men*, in COLLECTED POEMS 1909-1952, 79-82 (1963) (“We are the hollow men/We are the stuffed men/Leaning together/Headpiece filled with straw. Alas!/Our dried voices, when/We whisper together/Are quiet and meaningless/As wind in dry grass/Or rats’ feet over broken glass/In our dry cellar/Shape without form, shade without colour/Paralysed force, gesture without motion;/Those who have crossed/With direct eyes, to death’s other Kingdom/Remember us—if at all—not as lost/Violent souls, but only/As the hollow men/The stuffed men . . .”).

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Since the days of King George II, prison administrators have placed inmates into solitary confinement.<sup>1</sup> While they have done so for a number of reasons, the most common are the desires to punish, rehabilitate, and protect inmates in ways not dictated by their official sentences.<sup>2</sup> Many prison administrators view the imposition of solitary confinement as a vital tool in

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<sup>1</sup> See *In Re Medley*, 134 U.S. 160, 170 (1890). The king wanted “some further terror and peculiar mark of infamy” to be imposed on convicted murderers and thus decreed that:

[A]fter such conviction, and judgment given thereupon, the jailor or keeper towhom such criminal shall be delivered for safe custody shall confine suchprisoner to some cell separate and apart from the other prisoners, andthat no person or persons whatsoever, except the jailor or keeper, or his servants, shall have access to any such prisoner, without license being first obtained.

*Id.* Interestingly, this act was repealed for its “severity” by King William IV.

<sup>2</sup> See, e.g., Scott N. Tachiki, *Indeterminate Sentences in Supermax Prisons Based Upon Alleged Gang Affiliation: A Reexamination of Procedural Protection and a Proposal for Greater Procedural Requirements*, 83 CAL. L. REV. 1115, 1118 (1995); HUMAN RIGHTS WATCH, *COLD STORAGE: SUPER-MAXIMUM SECURITY CONFINEMENT IN INDIANA 19-20* (1997).

maintaining order and discipline in their institutions.<sup>3</sup> Since human contact is in and of itself one of the few remaining privileges in an inmate's life, prison administrators reason that inmates are compelled to conform to prison rules and standards when faced with the risk of losing that privilege.<sup>4</sup> Consequently, courts have given prison administrators a "wide range of discretion in determining when this form of punishment is appropriate."<sup>5</sup>

Over the past twenty years, there has been a dramatic rise in the number of inmates held in solitary confinement in U.S. prisons.<sup>6</sup> Though precise figures are unavailable, in 2000, approximately 60,000 inmates (4.4% of the total prison population of the U.S.) were subjected to solitary confinement.<sup>7</sup> These inmates spend between twenty-two and twenty-three hours per day in isolation, often for several years at a time, in stark cells frequently devoid of personal possessions, books, and windows.<sup>8</sup>

The devastating psychological and physical consequences of solitary confinement have been recognized since the mid-1800s.<sup>9</sup> Indeed, medical studies on the effects of solitary confinement have overwhelmingly shown that it can cause severe psychological distress in inmates including, but not limited to, extreme anxiety, hallucinations, violent fantasies, hypersensitivity to external stimuli, and an increased tendency to inflict self-harm.<sup>10</sup> Inmates in solitary confinement also have a sub-

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<sup>3</sup> Maria A. Luise, *Solitary Confinement: Legal and Psychological Considerations*, 15 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 301, 301 (1989).

<sup>4</sup> See *id.* at 301.

<sup>5</sup> *Id.*

<sup>6</sup> Leena Kurki & Norval Morris, *The Purposes, Practices, and Problems of Supermax Prisons*, 28 CRIME & JUST. 385, 385-88 (2001).

<sup>7</sup> See THE CORRECTIONS YEARBOOK, 2000: ADULT CORRECTIONS 3, 26 (Camille Graham Camp & George M. Camp, eds., 2000).

<sup>8</sup> See, e.g., HUMAN RIGHTS WATCH, *supra* note 3, at 1; Christine Rebman, *The Eighth Amendment and Solitary Confinement: The Gap in Protection From Psychological Consequences*, 49 DEPAUL L. REV. 567, 574 (1999); Nan D. Miller, *International Protection of the Rights of Prisoners: Is Solitary Confinement in the United States a Violation of International Standards?*, 26 CAL. W. INT'L L.J. 139, 158 (1995).

<sup>9</sup> Miller, *supra* note 9, at 160-61. (In Germany, for example, "where the prison system mirrored the U.S. model, thirty-seven articles were published between 1854 and 1909 about the incidence of psychotic disturbances among prisoners.")

<sup>10</sup> See Stuart Grassian & Nancy Friedman, *Effects of Sensory Deprivation in Psychiatric Seclusion and Solitary Confinement*, 8 INT'L J.L. & PSYCHIATRY 49, 53-

stantially higher likelihood of being admitted to prison hospitals for psychiatric morbidity, a likelihood that increases with time spent in isolation.<sup>11</sup>

In light of the psychological and physical harm inflicted on inmates placed in solitary confinement, this Note analyzes the extent to which use of solitary confinement in U.S. prisons violates international laws against torture. Part I of this Note discusses the current use of solitary confinement in the United States and examines the conditions of confinement in which inmates are placed. Part II discusses the lack of strong federal and state guidelines on the use of solitary confinement and examines the relevant international standards on torture and the humane treatment of inmates. The Note concludes with a series of recommendations to bring use of solitary confinement in the U.S. in line with applicable international law.

## I. SOLITARY CONFINEMENT IN THE U.S.

### A. *An Overview of Solitary Confinement*

Solitary confinement is a condition of extreme isolation and deprivation imposed on selected inmates for security, disciplinary, or protective reasons.<sup>12</sup> While solitary confinement is its most commonly used moniker, such intentional isolation of inmates is also called administrative segregation, disciplinary segregation, protective custody, and, more colloquially, “The Hole.”<sup>13</sup> While most prisons in the United States have isolation cells, many states in the U.S. have built prisons where *all* inmates are subjected to solitary confinement.<sup>14</sup> Such institutions are frequently referred to as “supermax” prisons.<sup>15</sup>

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55 (1986)[hereinafter Grassian & Friedman]; Stuart Grassian, *Psychopathological Effects of Solitary Confinement*, 140 AM. J. PSYCHIATRY 1450, 1452-53 (1983)[hereinafter Grassian].

<sup>11</sup> Dorte Maria Sestoft, et. al., *Impact of Solitary Confinement on Hospitalization Among Danish Prisoners in Custody*, 21 INT'L J.L. & PSYCHIATRY 99, 105 (1998).

<sup>12</sup> See Luise, *supra* note 4, at 301.

<sup>13</sup> CORRECTIONS YEARBOOK, *supra* note 8, at 27; Bryan B. Walton, *The Eighth Amendment and Psychological Implications of Solitary Confinement*, 21 LAW & PSYCHOL. REV. 271, 272 (1997).

<sup>14</sup> Walton, *supra* note 14, at 284.

<sup>15</sup> See Charles A. Pettigrew, *Technology and the Eighth Amendment: The Problem of Supermax Prisons*, 4 N.C.J.L. & TECH. 191, 191 (2002).

While, to some extent, all incarcerated individuals are isolated and deprived, solitary confinement has three fundamental components that make it distinct from general incarceration.<sup>16</sup> First, prison administrators specifically design the solitary confinement experience to be one of extremely minimal human contact.<sup>17</sup> Unlike inmates in the general prison population, inmates subjected to penal isolation are generally not allowed to leave their cells for any extended period of time, usually no more than one and one half-hour per day.<sup>18</sup>

The physical conditions of solitary confinement cells also enhance the experience of isolation; solitary confinement cells frequently lack the windows and barred doors found in regular prison cells.<sup>19</sup> Thus, while inmates in the general prison population may experience long periods of time devoid of significant social contact, these experiences are not nearly as poignant as those experienced by inmates in solitary confinement because there is at least the possibility of seeing another human being or the outside world from inside their general population cells.<sup>20</sup>

Second, solitary confinement is always deliberately imposed on inmates.<sup>21</sup> Prison administrators make the active choice to isolate certain inmates by placing them in solitary confinement.<sup>22</sup> Thus, again, while inmates in the general prison population may periodically experience a decrease in human interaction, they have not been specifically selected to experience such a phenomenon.<sup>23</sup>

Third, assignment to solitary confinement units “is not based on the severity of the inmate’s original offense” or on the basis of his or her specific sentence.<sup>24</sup> Instead, isolation cells “are reserved for prisoners who commit serious disciplinary violations once in prison or who are deemed to endanger the safety of others or the security of the prison system.”<sup>25</sup>

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<sup>16</sup> See *infra* notes 18-26 and accompanying text.

<sup>17</sup> Kurki & Morris, *supra* note 7, at 389.

<sup>18</sup> See Miller, *supra* note 9, at 159.

<sup>19</sup> *Id.* at 158.

<sup>20</sup> See Kurki & Morris, *supra* note 7, at 389.

<sup>21</sup> See CORRECTIONS YEARBOOK, *supra* note 8, at 27.

<sup>22</sup> See *id.*

<sup>23</sup> See *id.*

<sup>24</sup> Tachiki, *supra* note 3, at 1118.

<sup>25</sup> *Id.*

B. *A Brief History of Solitary Confinement in the United States*

Prisons in the United States began using solitary confinement in the early nineteenth century.<sup>26</sup> During that time, the Quakers began opening prisons where all inmates were kept in solitary confinement, believing that “in isolation, inmates would reflect on their bad ways, repent, and then reform.”<sup>27</sup>

By the mid-1800s, however, it became increasingly clear to the Quakers and members of the general public that solitary confinement was not working in the way that they had intended.<sup>28</sup> Instead of demonstrating that inmates were substantially reformed by the punishment, statistical evidence began to indicate higher rates of physical and mental illness as well as death among inmates exposed to especially rigid forms of solitary confinement.<sup>29</sup>

Judicial concern about use of “The Hole” began to arise during this time as well and was fueled by the likes of, among others, Alexis de Tocqueville and Charles Darwin.<sup>30</sup> For example, after visiting a prison with solitary confinement, Darwin wrote that the inmates he observed were “dead to everything but torturing anxieties and horrible despair.”<sup>31</sup> Published observations such as this one were effective in swaying members of the judiciary against solitary confinement.<sup>32</sup>

The Supreme Court addressed the issue in 1890 in the landmark case *In Re Medley* and struck down the validity of solitary confinement, observing that it had a horrific capacity to inflict mental illness and despair.<sup>33</sup> In what has become one of the most frequently cited legal passages about solitary confinement, Justice Miller observed that

A considerable number of the prisoners [in solitary confinement] fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others

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<sup>26</sup> Rebman, *supra* note 9, at 574.

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

<sup>28</sup> See Miller, *supra* note 9, at 155.

<sup>29</sup> Grassian, *supra* note 11, at 1450.

<sup>30</sup> Rebman, *supra* note 9, at 576-77.

<sup>31</sup> *Id.* at 576.

<sup>32</sup> *Id.* at 577.

<sup>33</sup> *In Re Medley*, 134 U.S. 161, 171 (1890)

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.<sup>34</sup>

In 1822, for instance, five inmates committed suicide in Auburn prison in New York - one of the first institutions to employ extensive use of solitary confinement - after serving one year in isolation.<sup>35</sup>

Over the next ninety-three years, solitary confinement was used only in a few select prisons, such as Alcatraz.<sup>36</sup> Instead of attempting to maintain order by isolating "problem" inmates, prison administrators during this time period employed the "dispersal model" where "all of the so-called 'rotten apples' were distributed to a number of prisons in the hope that the influence of problem prisoners [would] be diluted in populations of law-abiding inmates."<sup>37</sup>

The second surge of solitary confinement use began in 1983.<sup>38</sup> That year, a riot broke out in the federal super-maximum security prison in Marion, Illinois, resulting in the deaths of two guards and an inmate.<sup>39</sup> In the aftermath of the incident, prison officials implemented a "lockdown policy" in an attempt to combat prison violence.<sup>40</sup> Under the new conditions, every inmate in Marion was subjected to solitary confinement indefinitely.<sup>41</sup> In this way, solitary confinement was now seen as a "disciplinary form of punishment," not as a source of rehabilitation as it was under the Quaker model.<sup>42</sup>

As an interim measure, Marion's lockdown policy was effective in reducing the level of violence in the prison.<sup>43</sup> As a result of this success, Marion's lockdown concept became a popular

<sup>34</sup> *Id.* at 168.

<sup>35</sup> *Id.*

<sup>36</sup> See Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. REV. L. & SOC. CHANGE 477, 488 (1997).

<sup>37</sup> Tachiki, *supra* note 3, at 1122.

<sup>38</sup> See Haney & Lynch, *supra* note 37, at 489.

<sup>39</sup> Tachiki, *supra* note 3, at 1122.

<sup>40</sup> *Id.* at 1122-23.

<sup>41</sup> *Id.*

<sup>42</sup> See Rebman, *supra* note 9, at 574-75.

<sup>43</sup> Alan Elsner, *Supermax Prisons: A Growing Human Rights Issue*, 28 CHAMPION 36, 36 (2004).

method of prison control throughout the country.<sup>44</sup> Since the lockdown, at least thirty-six states have built prisons with similar conditions.<sup>45</sup> Moreover, though precise numbers are exceedingly difficult to come by, one figure puts the current number of inmates in solitary confinement conditions between 25,000 and 100,000.<sup>46</sup>

### C. *Solitary Confinement Conditions in the United States*

Despite the large number of solitary housing units in existence throughout the United States, they are all “predominantly the same because they were all based on the same prototype, the ‘Marion Model.’”<sup>47</sup> Thus, generally, such solitary housing units share a likeness in both their physical conditions and the way in which they are run.<sup>48</sup>

#### 1. *Schedule and Rules*

Inmates in solitary confinement are secluded in their cells between twenty-two and twenty-three and one half hours a day.<sup>49</sup> The remaining one to two hours are reserved for either showering or recreation, both of which the inmate participates in alone.<sup>50</sup> Indeed, throughout their entire time in solitary confinement, inmates are strictly forbidden from talking to other inmates, either by yelling back and forth between cells or in the process of moving from one place to another.<sup>51</sup> In fact, given that “prison officials give instructions through loud speakers and open and close cell doors electronically,” the only time inmates have any sort of routine contact with another person is when their meals are pushed through the slots in their cell doors.<sup>52</sup> This virtually total automation of solitary confinement

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<sup>44</sup> *Id.*; Tachiki, *supra* note 3, at 1123.

<sup>45</sup> Tachiki, *supra* note 3, at 1123.

<sup>46</sup> Kurki & Morris, *supra* note 7, at 392 (“Since there is practically no empirical research, [ . . . ] it is difficult to be sure who is assigned to supermaxes, why they go, who gets out, when they get out, and how they get out.”); Pettigrew, *supra* note 16, at 191-92.

<sup>47</sup> Miller, *supra* note 9, at 157-58.

<sup>48</sup> *See id.* at 157.

<sup>49</sup> HUMAN RIGHTS WATCH, *supra* note 3, at 1.

<sup>50</sup> *See Sandin v. Conner*, 515 U.S. 472, 494 (1995).

<sup>51</sup> *See Walton*, *supra* note 14, at 284-85.

<sup>52</sup> Tachiki, *supra* note 3, at 1124-25.

cells means that inmates “may go for months or even years without any meaningful social or physical contact.”<sup>53</sup>

Recreation time takes place in a completely enclosed space within the prison.<sup>54</sup> Most recreation pens offer no glimpse of the outside world and are scarcely bigger than the cells in which the inmates reside.<sup>55</sup> There is no exercise or sports equipment in these pens in most prisons.<sup>56</sup> Furthermore, every time an inmate leaves his cell, he must undergo a “visual strip search” in front of the control tower officer and whoever else may be there.<sup>57</sup> One scholar has observed that this requirement has drastically reduced the number of inmates who leave their cells for recreation, as “to some, time spent outside of the cell is considered more degrading and torturous than remaining in the solitary confinement cells.”<sup>58</sup>

Inmates in solitary conditions must consume their meals within their cells, depriving them of the socializing opportunities that inmates in the general population have throughout the day.<sup>59</sup> Furthermore, in many prisons, inmates may be fed “Nutri-loaf, a tasteless but nutritious food that requires no utensils to eat.”<sup>60</sup> This use of Nutri-loaf has prompted at least one scholar to note that “the Supermax has thus improved on bread and water.”<sup>61</sup>

Most prisons offer scant educational, vocational, or recreational opportunities to inmates in solitary confinement.<sup>62</sup> These inmates, moreover, are often prohibited from having radios, television sets, or reading materials other than the Bible in their cells.<sup>63</sup>

There is very little information about how long inmates spend in solitary confinement over time.<sup>64</sup> Solitary sentences

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<sup>53</sup> Miller, *supra* note 9, at 159.

<sup>54</sup> Tachiki, *supra* note 3, at 1124.

<sup>55</sup> *See id.*; Mikel-Meredith Weidman, *The Culture of Judicial Deference and the Problem of Supermax Prisons*, 51 UCLA L. REV. 1505, 1527 (2004).

<sup>56</sup> Tachiki, *supra* note 3, at 1124.

<sup>57</sup> Rebman, *supra* note 9, at 581-82.

<sup>58</sup> *Id.* at 582.

<sup>59</sup> Pettigrew, *supra* note 16, at 197.

<sup>60</sup> *Id.*

<sup>61</sup> Kurki & Morris, *supra* note 7, at 400.

<sup>62</sup> HUMAN RIGHTS WATCH, *supra* note 3, at 1.

<sup>63</sup> Rebman, *supra* note 9, at 579.

<sup>64</sup> Kurki & Morris, *supra* note 7, at 392.

seem to range from several days to several years.<sup>65</sup> In one particularly extreme example, three prisoners at the Louisiana State Penitentiary at Angola have been in non-air conditioned isolation cells for 23 hours a day since 1972.<sup>66</sup>

## 2. *Physical Conditions*

Most solitary confinement cells are approximately eight feet by six feet in size.<sup>67</sup> To put these numbers in perspective, solitary confinement cells are roughly the size of an average bathroom.<sup>68</sup> Most solitary housing cells are equipped with a stainless steel sink and toilet, a concrete writing desk and a concrete bed.<sup>69</sup>

The overall décor of each cell is stark, with bare white walls upon which inmates may not affix anything.<sup>70</sup> Moreover, most solitary confinement cells lack windows, severely limiting the availability of natural light.<sup>71</sup> Instead, inmates must rely on a light bulb that remains on, in some prisons, for 24 hours a day.<sup>72</sup>

The doors of solitary housing cells are different from the doors of regular prison cells in that they are “made of solid steel, interrupted only by a small, approximately eye-level clear window and a waist-level food slot.”<sup>73</sup> These doors “effectively cut inmates off from the world outside the cell, muffling sound and severely restricting visual stimulus.”<sup>74</sup>

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<sup>65</sup> Jerry R. DeMaio, *If You Build It, They Will Come: The Threat of Overclassification in Wisconsin's Supermax Prison*, 2001 WIS. L. REV. 207, 245 (2001).

<sup>66</sup> Claire Shaeffer-Duffy, *Solitary Confinement: An American Invention*, NAT'L CATH. REP., (2000), available at [http://www.natcath.com/NCR\\_Online/archives/112400/112400d.htm](http://www.natcath.com/NCR_Online/archives/112400/112400d.htm).

<sup>67</sup> Cassandra Shaylor, “*It's Like Living in a Black Hole*”: *Women of Color in Solitary Confinement in the Prison Industrial Complex*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 385, 387 (1993).

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

<sup>69</sup> Tachiki, *supra* note 3, at 1123.

<sup>70</sup> *Id.*

<sup>71</sup> Miller, *supra* note 9, at 158.

<sup>72</sup> Walton, *supra* note 14, at 285.

<sup>73</sup> HUMAN RIGHTS WATCH, *supra* note 3, at 24.

<sup>74</sup> *Id.*

#### D. *Effects of Solitary Confinement on Inmates*

As discussed, shortly after the advent of widespread solitary confinement use in the 1800s, prison administrators and members of the general public learned that extreme isolation had a strongly negative impact on the psychological well-being of inmates.<sup>75</sup> In Germany, for example, “where the prison system mirrored the U.S. model, thirty-seven articles were published between 1854 and 1909 about the incidence of psychotic disturbances among prisoners.”<sup>76</sup>

It was not until the mid-1980s, however, that the first American clinical studies of the effects of solitary confinement were conducted.<sup>77</sup> Since that time, studies conducted on the effects of solitary confinement all uniformly describe or speculate that solitary confinement has serious psychological consequences.<sup>78</sup> In fact, only one report has indicated that solitary confinement does not have a negative impact on psychological well-being, and its methodology has been severely criticized.<sup>79</sup>

The majority of studies on the psychological effects of solitary confinement have identified six psychiatric symptoms that are “strikingly consistent” in the way that they affect most isolated inmates.<sup>80</sup> These include:

1. Consistent, Intense Anxiety: Inmates in solitary confinement frequently describe feelings of “massive free-floating” anxiety and the occurrence of panic attacks.<sup>81</sup>
2. Perceptual Distortions/Hallucinations: Many inmates report that they begin to hear voices after several days in solitary confinement or witness unreal events.<sup>82</sup> One inmate, for example,

<sup>75</sup> See Miller, *supra* note 9, at 160-61.

<sup>76</sup> *Id.* at 161.

<sup>77</sup> Rebman, *supra* note 9, at 576.

<sup>78</sup> Grassian & Friedman, *supra* note 11, at 53.

<sup>79</sup> *Id.* at 53-54. According to Grassian, the study employed self-selected prisoner volunteers who were subject to, at most, four days of solitary confinement. Moreover, “[n]o attempt was made in that study to describe psychological variables predisposing certain prisoners to volunteer, nor to describe the presumably unique response of prisoners and prison guards to a situation known to them to be clinical and experimental, rather than punitive.” *Id.*

<sup>80</sup> Grassian, *supra* note 11, at 1452.

<sup>81</sup> Grassian & Friedman, *supra* note 11, at 54.

<sup>82</sup> Grassian, *supra* note 11, at 1452.

commented to a researcher that “the cell walls start wavering, melting, everything in the cell starts moving.”<sup>83</sup>

**3. Difficulties with Thinking, Concentration and Memory:** This is another especially common symptom amongst inmates in confinement. Inmates complain that their minds feel “narcotized” and that they “can’t concentrate” or remember words.<sup>84</sup>

**4. Hypersensitivity to External Stimuli:** Due to the stark, lonely condition in which inmates in solitary confinement exist, they become overly sensitive of any stimuli that they do encounter.<sup>85</sup> One inmate has remarked about solitary confinement that “Everything gets exaggerated. After a while, you can’t stand it. I used to eat everything they served. Now I can’t stand the smells—the meat—the only thing I can stand to eat is the bread.”<sup>86</sup>

**5. Emergence of Violent Fantasies:** Many inmates report that after substantial time in isolation, they begin to have highly aggressive or even violent fantasies.<sup>87</sup> One observed, “I get panicky - thoughts come back - picture throwing a guard in lime - eats away at his skin, his flesh - torture him. Try to block it out, but I can’t.”<sup>88</sup>

**6. Reduced Impulse Control:** Perhaps the most disturbing symptom of inmates in solitary confinement is the reduction of impulse control.<sup>89</sup> Segregated inmates may act out on their violent fantasies, harming their cells or themselves.<sup>90</sup> Some prisoners “have smeared feces all over themselves, others have engaged in self-mutilation or have attempted suicide.”<sup>91</sup>

Although one could argue that mentally ill inmates are simply more likely to wind up in solitary confinement and thus that the symptoms listed above are merely a reflection of this demographic, studies have shown otherwise.<sup>92</sup> A Dutch study on solitary confinement, for instance, concluded that “the relative risk of admission to the prison hospital for psychiatric morbidity was higher and increased with time in SC [solitary confinement] compared to nSC [non-solitary confinement], indi-

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<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 1453.

<sup>85</sup> *Id.* at 1452.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 1453.

<sup>88</sup> *Id.*

<sup>89</sup> Rebman, *supra* note 9, at 580.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 573.

<sup>92</sup> *See, e.g.,* Sestoft, *supra* note 12, at 105.

cating new incident cases with psychiatric cases with psychiatric problems in SC.”<sup>93</sup>

Moreover, the study demonstrated that the longer an individual experiences conditions of isolation, the likelier they are to develop significant mental illness:

At the very start of imprisonment, the risk of being admitted due to psychiatric reasons was almost the same in SC and nSC. However, during imprisonment the relative risk increased markedly. If a person remained in SC for 4 weeks the probability of being admitted to the prison hospital for a psychiatric reason was about 20 times as high as for a person remanded in nSC for the same period of time.<sup>94</sup>

Therefore, it is clear, that the use of solitary confinement has a significant, deleterious psychiatric effect on inmates subjected to it for more than a brief period of time.

## II. APPLICABLE INTERNATIONAL AND DOMESTIC LAW

### A. U.S. Law and Policy Towards Solitary Confinement

#### 1. Statutory Law and Prison Policies

Prison administrators have a wide range of discretion in determining when and for how long solitary confinement may be imposed on an inmate.<sup>95</sup> Although the Federal Bureau of Prisons “has regulations requiring approval before a prisoner is put in solitary confinement,” there are currently no federal laws controlling use of solitary confinement.<sup>96</sup> Moreover, very few states have such laws and there is very little consistency among those that do.<sup>97</sup> Only one state, Washington, places any statutory limitation on the imposition of solitary confinement, mak-

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<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 103.

<sup>95</sup> See, e.g., Kurki & Morris, *supra* note 7, at 388-89; Luise, *supra* note 4, at 301.

<sup>96</sup> Walton, *supra* note 14, at 277.

<sup>97</sup> See, e.g., ALA. CODE § 14-11-5 (2005) (providing for a fine to be imposed on any prison employee who releases an inmate from solitary confinement or converses with him unless directed to do so by a physician); LA. REV. STAT. ANN. § 15:865 (2004) (“No prisoner in the state penitentiary shall be placed in solitary confinement, except in enforcing obedience to the police regulations of the penitentiary.”); MICH. COMP. LAWS § 769.2 (2004) (providing that a court may sentence a defendant to solitary confinement.); S.C. CODE ANN. § 17-25-20 (2004) (giving courts discretion to impose solitary confinement during sentencing).

ing it illegal to hold an inmate in solitary confinement for more than twenty days at a time.<sup>98</sup>

Despite the lack of official policy surrounding use of solitary confinement, common criteria for its imposition in both state and federal prisons include “gang activity and disruption of the orderly operation of a prison, both inclusive catchall criteria.”<sup>99</sup> Prison administrators are not required, moreover, to provide even minimal standards of due process protection to inmates sentenced to solitary confinement; inmates have no rights to written notice, to present witnesses or evidence, to be represented by an attorney or to undergo a formal hearing.<sup>100</sup> In fact, the Supreme Court in *Hewitt v. Helms* held that prison administrators are only required to engage in an “informal, non-adversary review” of the information supporting an inmate’s punishment of solitary confinement, including whatever statement an inmate wishes to submit after the start of his or her confinement.<sup>101</sup>

## 2. Overclassification

Lack of due process protections for inmates in the U.S. has led to what one scholar has deemed “overclassification”: a phenomenon of low-risk inmates being subjected to solitary confinement for extremely weak and unsubstantiated reasons.<sup>102</sup> The roots of this phenomenon seem to be two-fold.

First, supermax prisons, which provide most of the solitary confinement units in the U.S., are extremely expensive to build and maintain.<sup>103</sup> As one writer observed, keeping an inmate in a supermax prison costs roughly \$50,000 per year compared with \$20,000 per year for inmates kept in the general population.<sup>104</sup> Basic economics demonstrates that maintaining these prisons below their population capacities increases this cost dif-

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<sup>98</sup> WASH. REV. CODE § 10.64.060 (2005).

<sup>99</sup> Kurki & Morris, *supra* note 7, at 389. The authors note, moreover, that “gang affiliation in itself without proof of engaging in an infraction can be considered a severe threat to the safety of others or the security of the prison and form a basis for admission to [a supermax prison].” *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Hewitt v. Helms*, 459 U.S. 460, 472 (1983).

<sup>102</sup> DeMaio, *supra* note 66, at 209.

<sup>103</sup> See James Brooke, *In ‘Super Max,’ Terms of Endurance*, N.Y. TIMES, June 13, 1999, at A38.

<sup>104</sup> *Id.*

ferential even further, giving prison administrators an economic incentive to fill solitary cells in these prisons. It is not surprising, therefore, that the standards for imposing solitary confinement on inmates have become “diluted in practice.”<sup>105</sup> In Wisconsin, for example, shortly before a supermax prison was opened, there were only fifty inmates in solitary confinement with an additional forty-one being “considered for such status.”<sup>106</sup> One year after a supermax prison opened, however, the number of inmates in solitary confinement was three times what it had been before, *even though* the criteria for solitary confinement use had remained the same.<sup>107</sup>

Second, prison overcrowding has become a nationwide problem in recent years.<sup>108</sup> As a result, prison administrators often turn to solitary cells to alleviate the overflow of inmates in regular cells, imposing solitary confinement on inmates who would otherwise remain in the general population.<sup>109</sup>

### 3. *Judicial Deference*

U.S. courts are, in general, extremely deferential to the decisions and policies of prison administrators.<sup>110</sup> This deference has made it extremely difficult for inmates subjected to solitary confinement to successfully challenge their confinement, particularly under constitutional standards like the Eighth Amendment, which bans cruel and unusual punishment.<sup>111</sup> Courts in such cases typically examine only the physical conditions of the solitary confinement cell - “light, ventilation, bedding and basic elements of hygiene” - and the extent to which the inmate’s most basic needs are met.<sup>112</sup>

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<sup>105</sup> HUMAN RIGHTS WATCH, *supra* note 3, at 11.

<sup>106</sup> DeMaio, *supra* note 66, at 219-20.

<sup>107</sup> *Id.* at 220.

<sup>108</sup> Myrna Pages, *Indefinite Detention: Tipping the Scale Toward the Liberty Interest of Freedom After Zadvydas v. Davis*, 66 ALB. L. REV. 1213, 1236 (2003).

<sup>109</sup> DeMaio, *supra* note 66, at 222.

<sup>110</sup> Weidman, *supra* note 56, at 1505 (“Supreme Court rulings, statutes, and lower courts’ conservative applications of precedent have worked together to create a culture of deference that constrains federal courts from intervening in prison affairs.”).

<sup>111</sup> U.S. CONST. amend. VIII; Weidman, *supra* note 56, at 1552.

<sup>112</sup> Luise, *supra* note 4, at 310

Courts have been particularly reluctant to consider psychological harm in solitary confinement cases.<sup>113</sup> Indeed, the position of most courts on this issue has been similar to the Fifth Circuit's case, *Newman v. State of Alabama*, where the court "declined" to enter the "uncharted bog" of psychological injury.<sup>114</sup> Those courts that have considered the psychological harms of solitary confinement have tended to reject the notion that an Eighth Amendment violation results from them.<sup>115</sup> Again, the prevailing view has been similar to the opinion in *Newman* that "the Constitution does not require that prisoners, as individuals or as a group, be provided with any and every amenity which some person may think is needed to avoid mental, physical and emotional deterioration."<sup>116</sup>

The difficulty in bringing successful challenges against solitary confinement conditions increased even more in 1996 when President Clinton signed the Prison Litigation Reform Act into law.<sup>117</sup> Under this statute, inmates are forbidden from bringing civil actions "for mental or emotional injury suffered while in custody without a prior showing of physical injury."<sup>118</sup> Thus, "even with clear clinical documentation of the severely detrimental psychological syndrome caused by solitary confinement," U.S. courts have failed to find solitary confinement legally, and particularly, constitutionally problematic.<sup>119</sup>

## B. *International Laws Against Torture*

The right to be free from torture is regarded as a *jus cogen*, or preemptory norm, of customary international law.<sup>120</sup> It appears in over five international covenants and declarations as well as in the national constitutions of more than sixty-five

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<sup>113</sup> *Id.* at 315.

<sup>114</sup> *Newman v. State of Alabama*, 559 F.2d 282, 291 (5th Cir. 1977); see also *Kalwasinski v. Morse*, 201 F.3d 103, 106 (2nd Cir. 1999); *Hatch v. District of Columbia*, 184 F.3d 846, 847 (D.C. Cir. 1999); *Thomas v. Ramos*, 130 F.3d 754, 760 (7th Cir. 1997)

<sup>115</sup> Luise, *supra* note 4, at 316 (citing *Jackson v. Meachum*, 669 F.2d 578, 583 (1st Cir. 1983)).

<sup>116</sup> *Newman*, 559 F.2d at 291.

<sup>117</sup> Prison Litigation Reform Act of 1995, 18 U.S.C. § 3626(g) (1996).

<sup>118</sup> 28 U.S.C. § 1346(b)(2) (2005).

<sup>119</sup> Miller, *supra* note 9, at 171.

<sup>120</sup> Hilary Charlesworth, Christine Chinkin & Shelley Wright, *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613, 628 (1991).

countries.<sup>121</sup> The Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (Convention Against Torture) defines “torture” as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person committed or is suspected of having committed, or intimidating or coercing him or a third person for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.<sup>122</sup>

The basis of this right has been traced to “the inherent dignity of the human person.”<sup>123</sup> States are considered responsible for acts of torture when their “designated agents” have a “direct responsibility for such acts.”<sup>124</sup>

Three sources of international law are relevant to an assessment of the extent to which solitary confinement in the U.S. violates international laws against torture: the Universal Declaration of Human Rights,<sup>125</sup> the International Covenant on Civil and Political Rights<sup>126</sup> and the Convention Against Torture.<sup>127</sup>

Article 5 of the Universal Declaration of Human Rights (Universal Declaration) states that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punish-

<sup>121</sup> Suzanne M. Bernard, *An Eye For an Eye: The Current Status of International Law on the Humane Treatment of Prisoners*, 25 RUTGERS L.J. 759, 789 (1994). Prohibitions of torture appear in, among other international law documents, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the American Declaration on the Rights and Duties of Man, the Standard Minimum Rules and the American Convention on Human Rights. *Id.*

<sup>122</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, June 26, 1987, G.A. Res. 39/46, U.N. GAOR, 39th Sess., 93d mtg., U.N. Doc. A/39/51 (December 10, 1984) [hereinafter Convention Against Torture].

<sup>123</sup> *Id.*

<sup>124</sup> Charlesworth, Chinkin & Wright, *supra* note 121, at 692.

<sup>125</sup> Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc A/810 at 71, (December 10, 1948) [hereinafter UDHR].

<sup>126</sup> International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. GAOR, 31st Sess., Supp. No. 16, art. 18(1), U.N. Doc. A/6316 (December 16, 1966), entered into force 23 March 1976 [hereinafter ICCPR].

<sup>127</sup> Convention Against Torture, *supra* note 123.

ment.”<sup>128</sup> Adopted in 1948, the Universal Declaration was not intended to be a binding treaty, but instead to provide guidance on matters of international human rights law.<sup>129</sup> It is, however, generally accepted that the declaration has become “part of customary international law as a result of subsequent state practice.”<sup>130</sup> Indeed, U.S. courts have used the Universal Declaration in interpreting domestic laws on several occasions.<sup>131</sup>

Article 7 of the International Covenant on Civil and Political Rights (ICCPR) prohibits “cruel, inhuman, or degrading treatment or punishment.”<sup>132</sup> The United States ratified this covenant in 1992, with a reservation on Article 7.<sup>133</sup> The reservation stated that the U.S. considered itself bound by the article only to the extent that “cruel, inhuman, or degrading treatment or punishment” means the kind of cruel and unusual punishment prohibited by the Fifth, Eighth and Fourteenth Amendments of the U.S. Constitution.<sup>134</sup> This appears to be a significant reservation given that “though neither the terms used in the ICCPR nor the U.S. Constitution are clearly defined, the language of Article 7 is considered to be more expansive than its Eighth Amendment counterpart.”<sup>135</sup>

Article 1 of the Covenant against Torture prohibits state officials from intentionally inflicting severe physical or mental pain or suffering on individuals for the purposes of coercion or punishment.<sup>136</sup> The U.S. signed on to the Convention in 1988, but it did not deposit its instrument of ratification with the U.N.

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<sup>128</sup> UDHR, *supra* note 126, art. 5.

<sup>129</sup> Bernard, *supra* note 122, at 769.

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

<sup>131</sup> Valerie Neal, *Slings and Arrows of Outrageous Fortune: The Deportation of “Aggravated Felons,”* 36 VAND. J. TRANSNAT’L L. 1619, 1644 (2003) (citing Rodriguez-Fernandez, 654 F.2d 1382, 1338 (10th Cir. 1981); Mojica v. Reno, 970 F. Supp. 130, 147-52 (E.D.N.Y. 1987)).

<sup>132</sup> ICCPR, *supra* note 127, art. 7.

<sup>133</sup> Miller, *supra* note 9, at 144.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> Convention Against Torture, *supra* note 123, art. 1. The Convention excluded, however, “pain or suffering arising only from, inherent in or incidental to lawful sanctions.” *Id.*

Secretary General until 1994.<sup>137</sup> At that point, the Convention became binding law on the United States.<sup>138</sup>

### C. *The Four Elements of Torture*

It is possible to discern “four cardinal features” of torture as it is defined in the Covenant Against Torture and from other sources of international human rights law.<sup>139</sup> First, for an act to constitute torture under international law, it must cause a certain degree of mental or physical pain or suffering.<sup>140</sup> In fact, the severity of the pain and suffering has been identified as the “distinguishing characteristic of torture that sets it apart from similar offences.”<sup>141</sup>

The level of severity required to transform mere ill-treatment into torture is unclear.<sup>142</sup> Moreover, establishing objective standards of measurement of the severity of punishment has proved difficult and problematic.<sup>143</sup> Indeed, because pain and suffering are “fundamentally subjective,” what one individual may experience as moderate suffering another might experience as significant pain.<sup>144</sup> Forcing a frail and elderly individual to remain standing for two hours, for example, is likely to impose substantially more pain and suffering upon that individual than upon a younger and more physically fit counterpart. As a result, some scholars have posited that it is virtually impossible to assess the severity of punishment “without referring to the victim’s point of view.”<sup>145</sup>

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<sup>137</sup> Andrea Montavon-McKillip, *CAT Among Pigeons: The Convention Against Torture, A Precarious Intersection Between International Human Rights Law and U.S. Immigration Law*, 44 ARIZ. L. REV. 247, 251 (2002).

<sup>138</sup> *Id.*

<sup>139</sup> Anthony Cullen, *Defining Torture in International Law: A Critique of the Concept Employed by the European Court of Human Rights*, 34 CAL. W. INT’L L.J. 29, 32 (2003).

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* (citing Prosecutor v. Delalic et. al., ICTY Case No. IT-96-21-T, Trial Chamber Judgment, ¶. 468 (1998)).

<sup>142</sup> *Id.* at 33.

<sup>143</sup> See Marcy Strauss, *Torture*, 48 N.Y.L. SCH. L. REV. 201, 210-15 (2003).

<sup>144</sup> Cullen, *supra* note 140, at 33.

<sup>145</sup> *Id.*

Second, for an act to be torture it must be intentional and “done with a certain purpose or objective.”<sup>146</sup> Pain or suffering that results from mere “incidental neglect,” therefore, does not constitute torture.<sup>147</sup> The perpetrator must desire to inflict such pain or suffering.<sup>148</sup>

Third, the perpetrator must have a specific *objective* for inflicting pain or suffering.<sup>149</sup> The Convention Against Torture lists possible objectives such as obtainment of information, punishment, coercion or intimidation.<sup>150</sup> The Convention’s list, however, is not considered an exhaustive one.<sup>151</sup>

Fourth, torture must have an “official character.”<sup>152</sup> As the Convention Against Torture states, the pain and suffering must be “inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”<sup>153</sup>

### III. ANALYSIS & RECOMMENDATIONS

In light of the ongoing reluctance of U.S. courts to engage in an analysis of the constitutionality of solitary confinement, and their even greater hesitancy to find it legally problematic when they do engage in such analysis, the question remains whether inmates subjected to solitary confinement might find remedy or relief, at least theoretically, in international laws prohibiting torture.<sup>154</sup> The four elements of torture, discussed above, will guide the following analysis—the extent to which use of solitary confinement in U.S. prisons contravenes international laws against torture.<sup>155</sup>

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<sup>146</sup> Joseph A. Vining, *Providing Protection from Torture by “Unofficial” Actors: A New Approach to the State Action Requirement of the Convention Against Torture*, 70 BROOK. L. REV. 331, 344 (2004).

<sup>147</sup> Cullen, *supra* note 140, at 33. “It may be possible, [however,] for such acts to be characterized as cruel, inhuman or degrading treatment.” *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> Cullen, *supra* note 140, at 33.

<sup>150</sup> Convention Against Torture, *supra* note 123, art. 1.

<sup>151</sup> Cullen, *supra* note 140, at 33.

<sup>152</sup> *Id.* at 34.

<sup>153</sup> Convention Against Torture, *supra* note 123, art. 1.

<sup>154</sup> See Weidman, *supra* note 56, at 1505, 1552. This Note does not engage in an analysis of the likelihood that either U.S. courts or international tribunals would hear such cases. Instead, focus is placed on the likelihood of inmates succeeding in such a case once a court has agreed to hear it.

<sup>155</sup> See *supra* notes 142-56 and accompanying text.

## A. *Solitary Confinement as a Form of Torture*

### 1. *Severity*

As discussed, solitary confinement inflicts psychological injury on inmates subjected to it for more than a brief period of time.<sup>156</sup> Though such suffering may be mental rather than physical, the punishment is still likely to be found “severe” under international laws prohibiting torture.<sup>157</sup> Indeed, though none of the three conventions discussed above explicitly state that psychological harm may be severe enough to constitute torture, two factors indicate that it may reach such levels under certain circumstances.<sup>158</sup>

First, the holding of the United Nations Human Rights Committee in *Estrella v. Uruguay* suggests that psychological harm may amount to torture under international law, or at least under Article 7 of the ICCPR.<sup>159</sup> In *Estrella*, the Committee found an Article 7 violation in the case of a prisoner subjected to thirty days of solitary confinement and seven months without mail or recreation.<sup>160</sup> The committee acknowledged in that case that the inmate was subjected to “severe physical *and* psychological torture,” implying that psychological injury may be severe enough to constitute torture under Article 7.<sup>161</sup>

Second, the Human Rights Committee has explicitly acknowledged that the psychological injury that results from solitary confinement may be severe enough to amount to torture.<sup>162</sup> In its 1981-82 report to the General Assembly, the Committee noted in regards to Article 7 of the ICCPR that “as appears from the terms of this article, the scope of protection required goes far beyond torture as normally understood . . . . Even such a measure as solitary confinement may, according to the circumstances . . . be contrary to this article.”<sup>163</sup>

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<sup>156</sup> Grassian & Friedman, *supra* note 11, at 53-55.

<sup>157</sup> Miller, *supra* note 9, at 153.

<sup>158</sup> See Convention Against Torture, *supra* note 123, art. 1; ICCPR, *supra* note 127, art. 7; UDHR, *supra* note 126, art. 5.

<sup>159</sup> *Estrella v. Uruguay*, Comm. No. 74/1980, U.N. GAOR Hum. Rts. Comm., 18th Sess., U.N. Doc. CCPR/C/18/D/74/1980 (1980).

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at ¶ 8.3 (emphasis added).

<sup>162</sup> Annual Report of the Committee to the General Assembly, [1981-1982] II Y.B. Hum. Rts. Comm’n., 383 U.N. Doc. CCPR/3/Add.1 (1989).

<sup>163</sup> *Id.*

Thus, given that the United States routinely subjects inmates to weeks, months and even years of solitary confinement and that such prolonged isolation virtually always results in extreme psychological harm, it is likely that such a practice would meet the severity element of torture.<sup>164</sup>

## 2. *Intent*

Solitary confinement is always deliberately imposed on inmates.<sup>165</sup> One could argue, however, that prison administrators only intend greater prison discipline and security to result from the punishment, not psychological injury.<sup>166</sup> Under this view, solitary confinement would not meet the second element of torture which requires that harm be intentionally inflicted.<sup>167</sup> This view is highly flawed for several reasons.<sup>168</sup>

As discussed, inmates in solitary confinement frequently exhibit significant and highly visible signs of their psychological injuries.<sup>169</sup> Reports show that inmates held in solitary confinement for more than several days have "a glazed stare."<sup>170</sup> Many engage in acts of "random violence" such as throwing objects around their cell and cutting their own wrists.<sup>171</sup> Some even exhibit extremely bizarre behavior: covering themselves in their own excrement, inserting small objects into their genitalia and engaging in other acts of self-mutilation.<sup>172</sup> In light of these obvious and frequent signs of psychological injury amongst inmates in solitary confinement, and the widespread concern over such injuries, prison administrators must have knowledge of them.<sup>173</sup>

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<sup>164</sup> See Miller, *supra* note 9, at 153, 159; Grassian & Friedman, *supra* note 11, at 53.

<sup>165</sup> See Miller, *supra* note 9, at 158.

<sup>166</sup> See Luise, *supra* note 4, at 301.

<sup>167</sup> Cullen, *supra* note 140, at 33.

<sup>168</sup> See *infra* notes 170-77 and accompanying text.

<sup>169</sup> Rebman, *supra* note 9, at 573; Grassian, *supra* note 11, at 1452-53.

<sup>170</sup> Edward Kaufman, *The Violation of Psychiatric Standards of Care in Prisons*, 137 AM. J. PSYCHIATRY 566, 569 (1980).

<sup>171</sup> Grassian, *supra* note 11, at 1453.

<sup>172</sup> Rebman, *supra* note 9, at 573.

<sup>173</sup> See HUMAN RIGHTS WATCH, *supra* note 3, at 62-66.

This knowledge of likely pain and suffering seemingly fulfills the intent element of torture.<sup>174</sup> Article 1 of the Convention Against Torture, for instance, implies that intent may be fulfilled by “consent or acquiescence.”<sup>175</sup> In this way, international laws against torture function much like the Model Penal Code of the U.S., under which acting “intentionally” can mean acting purposely or knowingly.<sup>176</sup> Thus, knowing that psychological injuries will result from solitary confinement, prison administrators would likely be held to have “intent” under international law.<sup>177</sup>

### 3. *Presence of an Objective*

Solitary confinement in the United States fulfills the third element of torture - infliction of pain and suffering for a specific purpose - because it is imposed on most inmates as a form of punishment.<sup>178</sup> The Convention Against Torture, Universal Declaration of Human Rights and ICCPR all list punishment as an objective of torture.<sup>179</sup>

The presence of an objective is more debatable in cases where inmates are placed into solitary confinement solely because of prison overcrowding.<sup>180</sup> In those cases, solitary confinement is imposed on inmates merely out of concern for administrative efficiency rather than out of a desire to punish, coerce or extract information.<sup>181</sup> An international court, however, would probably find that an objective of efficiency fulfills the third element of torture.<sup>182</sup> The implications of finding oth-

<sup>174</sup> Ela Grdinic, *Application of the Elements of Torture and Other Forms of Ill-Treatment, as Defined by the European Court and Commission of Human Rights, to Incidents of Domestic Violence*, 23 HASTINGS INT'L & COMP. L. REV. 217, 228 (2000).

<sup>175</sup> Convention Against Torture, *supra* note 123, art. 1 (emphasis added).

<sup>176</sup> MODEL PENAL CODE § 2.02(8).

<sup>177</sup> See *supra* note 175-77 and accompanying text.

<sup>178</sup> Vining, *supra* note 147, at 344; See Luise, *supra* note 4, at 301.

<sup>179</sup> Convention Against Torture, *supra* note 123, art. 1; ICCPR, *supra* note 127, art. 7; UDHR, *supra* note 126, art. 5.

<sup>180</sup> Pages, *supra* note 109, at 1236.

<sup>181</sup> See *id.*

<sup>182</sup> See Gautam Rana, . . . *And Justice For All: Normative Descriptive Frameworks for the Implementation of Tribunals to Try Human Rights Violators*, 30 VAND. J. TRANSNAT'L L. 349, 355 n.25 (1997) (suggesting that “even if torture could be shown to be efficient in some cases, it could simply never be permissible.”).

erwise would severely weaken the preemptory norm against torture because it would permit states to subject prisoners to cruel and inhumane conditions amounting to torture whenever it was more convenient for them to do so than to abide by international norms.<sup>183</sup> Indeed, if efficiency were not an objective under the third element, States would be able to crowd thirty inmates into a small cell merely to save space and money, a result that should surely contravene the international prohibition of torture.<sup>184</sup>

#### 4. *Officially Sanctioned*

An international court would probably find that solitary confinement in the United States fulfills the fourth element of torture by being “officially sanctioned” because the prison administrators who impose solitary confinement on inmates are employees or contractors of either a state government or the federal government.<sup>185</sup> While, at first glance, this element seems to emphasize nation-states as the “primary agents of torture,” the inclusion of the term ‘acquiescence’ in Article 1 of the Convention Against Torture seemingly “allows for a finding of torture by non-state actors or entities.”<sup>186</sup> In fact, Article 2 of the Convention Against Torture requires states to prevent and punish all acts of torture that occur within their borders, implying state responsibility for acts of torture that may be known to them but not technically officially authorized.<sup>187</sup>

Overall, a strong argument can be made that use of solitary confinement in the United States contravenes international laws prohibiting torture.<sup>188</sup> Placing inmates in solitary confinement fulfils all four elements of torture as a form of punishment, intentionally imposed by instruments of the state, which inflicts severe psychological injury on inmates.<sup>189</sup>

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<sup>183</sup> See *supra* note 183, at pt. II.B-C.

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

<sup>185</sup> See *infra* notes 188-89 and accompanying text.

<sup>186</sup> Vining, *supra* note 147, at 344.

<sup>187</sup> Convention Against Torture, *supra* note 123, art. 2.

<sup>188</sup> See Miller, *supra* note 9, at 168.

<sup>189</sup> See *discussion supra* Part III A.

## B. Recommendations

In light of the problems with solitary confinement use in the United States, international laws prohibiting torture may serve as a useful guide for reform.<sup>190</sup> Indeed, taking steps to mitigate the severity of solitary confinement would go a long way towards making it conform to international law.<sup>191</sup> Three steps, in particular, would drastically reduce the suffering of inmates.<sup>192</sup>

First, U.S. prisons should impose limits on the amount of time that inmates are subjected to solitary confinement.<sup>193</sup> As Human Rights Watch suggests, prisons should “discontinue the policy of indefinite [solitary confinement]” and assign inmates to solitary confinement “for a fixed period of time that is not excessively long.”<sup>194</sup> Inmates should be able to reduce their solitary sentences, moreover, through good behavior.<sup>195</sup> Shorter solitary sentences would mitigate the psychological injuries suffered by inmates kept in isolation for long periods of time.<sup>196</sup>

Second, the physical conditions of solitary confinement cells should be improved.<sup>197</sup> Such cells should be built with windows or skylights that allow natural light into the cell.<sup>198</sup> They should also have doors that “allow prisoners greater opportunities for social interaction” rather than the solid steel cell doors currently used in most prisons.<sup>199</sup> Additionally, recreational areas should be located outdoors in areas exposed to sunlight and should be “large enough to allow inmates to run at a reasonably high speed and to exercise with another person comfortably.”<sup>200</sup>

Third, U.S. prisons should provide inmates in solitary confinement with substantially more educational, recreational and vocational opportunities.<sup>201</sup> This would entail granting inmates

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<sup>190</sup> See discussion *supra* Parts II B–III B.

<sup>191</sup> See discussion *infra* Part III B.

<sup>192</sup> *Id.*

<sup>193</sup> HUMAN RIGHTS WATCH, *supra* note 3, at 14.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> See Sestoft, *supra* note 12, at 105.

<sup>197</sup> HUMAN RIGHTS WATCH, *supra* note 3, at 15.

<sup>198</sup> See *id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> See *id.* at 16.

greater access to reading materials, training opportunities and coursework.<sup>202</sup> Such opportunities would substantially alleviate the long periods of monotony and boredom that contribute to the onset of psychosis.<sup>203</sup>

#### IV. CONCLUSION

Solitary confinement has a long and notorious history in the Western World. Prison administrators have used it as a form of punishment, protection and security. Prisoners subjected to solitary confinement are placed in isolation for upwards of 23 hours per day in extremely small cells. They are often denied access to educational and recreational opportunities.

Since the 1800s, U.S. courts have recognized the problems inherent in the punishment. The vast majority of prisoners subjected to solitary confinement for more than a short period of time begin to exhibit symptoms of severe psychological injury. Such injuries include, but are not limited to, constant anxiety, hallucinations, difficulties with concentration, hypersensitivity to external stimuli, reduced impulse control and the emergence of violent fantasies. Some may even self-mutilate.

Despite these problems, however, U.S. courts have been hesitant to interfere with use of solitary confinement in U.S. prisons. Instead, they have adopted a policy of almost total deference to prison administrators, a policy that has been supported in recent years by legislation. As a result, inmates subjected to solitary confinement have little recourse under U.S. law.

International law very clearly prohibits the use of torture. Indeed, this prohibition is so well-established that it is considered an indisputable "norm" in the international community. Various international treaties and covenants—the Universal Declaration of Human Rights, the Convention Against Torture and the International Covenant on Civil and Political Rights, among others—contain this prohibition. International courts interpreting these documents have found that there are four elements of torture: severity, intent, objective, and officiality.

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<sup>202</sup> See *id.*

<sup>203</sup> See Grassian, *supra* note 11, at 1452.

Solitary confinement use in the United States contravenes international law because it fulfills all four elements of torture. Due to the extreme psychological injury it inflicts on inmates, it would likely be found “severe” under international torture jurisprudence. Moreover, it is intentionally inflicted on inmates and inflicted for a particular reason, usually punishment. Lastly, though U.S. officials may not explicitly sanction the use of solitary confinement, their knowledge of such use and their acquiescence to it makes solitary confinement “officially sanctioned.” Inmates in U.S. prisons, therefore, may find a remedy under international law.

To bring use of solitary confinement in line with international law, U.S. prison administrators should take steps to ease the severity of the punishment. They should limit the amount of time that inmates are subjected to solitary confinement and improve cell conditions. They should also ensure that such inmates receive adequate mental stimulation by providing them greater access to educational, recreational and vocational opportunities. Such steps would go a long way towards mitigating the horrors of solitary confinement and thus make it more acceptable under international law.

In the end, however, perhaps the real lesson to be learned from solitary confinement is one of importance of evolution and growth in the U.S. penal system. Surely, what did not work in the days of George II is unlikely to work now. Perhaps what is needed is not mere reform but a total overhaul of a system that has been flawed since its inception.