

## INTERNATIONAL PROTECTION OF THE RIGHTS OF PRISONERS: IS SOLITARY CONFINEMENT IN THE UNITED STATES A VIOLATION OF INTERNATIONAL STANDARDS?

Since the discovery of the human rights atrocities committed against detainees of World War II, treatment of prisoners has been an issue of worldwide concern. The international community's approach toward the treatment of prisoners has evolved into a formal recognition of basic prisoners' rights. These rights are embodied in a series of resolutions, several conventions and elaborate model instruments setting out minimum standards and prohibitions applicable to prisoners and prison conditions. However, in spite of the development of this international body of law, prisoners remain a vulnerable population, and as such, are easy targets for continued human rights abuses. Routine cruelty of imprisonment is tolerated even in countries that are generally "respectful of human rights, because prisons, by their nature, are out of sight; and because prisoners, by definition are outcasts."<sup>1</sup>

According to the American Civil Liberties Union/Human Rights Watch Report, *Human Rights Violations in the United States*, the United States is guilty of many human rights violations against prisoners.<sup>2</sup> These violations include overcrowding,<sup>3</sup> lack of protection against violence creating fear for personal safety,<sup>4</sup> issues pertaining to female prisoners,<sup>5</sup> and disciplinary and

1. HUMAN RIGHTS WATCH, *THE HUMAN RIGHTS WATCH GLOBAL REPORT ON PRISONS* xv (1993).

2. HUMAN RIGHTS WATCH & AMERICAN CIVIL LIBERTIES UNION, *HUMAN RIGHTS VIOLATIONS IN THE UNITED STATES* 98-114 (1993).

3. Overcrowding is the most significant cause of human rights abuses in the U.S. prison system. *Id.* at 103. At any given time, approximately 1.3 million men and women are incarcerated in the U.S. prisons and jails. *Id.* Overcrowding results in a lack of privacy, deteriorating prison conditions and sanitation, and reduced levels of basic necessities, such as staff supervision and health care services. *Id.* "In the United States in January 1992, the courts found that overcrowding was so severe that it violated the constitutional prohibition on cruel and unusual punishment in forty states, the District of Columbia, and more than 500 jail jurisdictions." HUMAN RIGHTS WATCH, *supra* note 1, at 10.

4. Ultimately, these conditions can create significant stress which leads to violent resolution of a problem or dispute. HUMAN RIGHTS WATCH & AMERICAN CIVIL LIBERTIES UNION, *supra* note 2, at 101-03. Overcrowding exacerbates the problem of inmate-on-inmate violence by forcing prisoners to live together with little regard for individual tendencies toward violence. *Id.* at 103-108. Lack of space and privacy increases tension and stress which results in violent attacks by both prisoners and staff. *Id.* For a discussion of research on the effects of overcrowding, see Barton L. Ingraham & Charles F. Wellford, *The Totality of Conditions Test in Eighth Amendment Litigation in America's Correctional Crisis: PRISON POPULATIONS AND PUBLIC POLICY* 13, 24-29 (Stephen D. Gottfredson & Sean McConville eds., 1987). For a statistical study of the effects of overcrowding on prison violence, see Gerald G. Gaes & William J. McGuire, *Prison Violence: The Contribution of Crowding Versus Other Determinants of Prison Assault Rates*, 22 *J. RESEARCH IN CRIME & DELINQUENCY* 41 (1985).

confinement conditions in super maximum security (supermax) facilities.<sup>6</sup> This Comment focuses on the solitary confinement conditions found in most U.S. prisons with an emphasis on the supermax prisons. The issue is whether solitary confinement, as used by the U.S. prison system, is a violation of the international standards under the instruments developed to ensure the protection of prisoners. Many of these instruments set forth standards for the humane treatment of prisoners but leave to interpretation the ambiguous terms used, such as “cruel,” “inhuman” and “degrading.” Therefore, to determine whether solitary confinement is a violation of international standards, it is necessary to first examine how courts and political bodies have interpreted and applied the standards, then apply these standards to the detrimental psychological syndrome created in prisoners by solitary confinement to determine whether the practice is “cruel, inhuman or degrading” punishment.

Part I of this Comment provides a summary of the body of international law relating to the humane treatment of prisoners. Part II analyzes how these standards have been applied and interpreted by the international community. Part III examines the conditions and use of solitary confinement in U.S. prisons and Part IV details its psychological effects on prisoners. Part V concludes that the psychological effects of solitary confinement violate international standards for the humane treatment of prisoners. Part VI looks at the steps taken by the United States to remedy this violation.

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5. Because women make up only a small percentage (less than 7%) of the prison population, there are only a few prisons that house women. HUMAN RIGHTS WATCH & AMERICAN CIVIL LIBERTIES UNION, *supra* note 2, at 112. Consequently, they are often forced to serve their time in prisons that are far from their family and friends, resulting in few outside visits. *Id.* In addition, female prisoners generally have fewer educational, recreational and vocational opportunities in prison than male prisoners. *Id.* at 112-13. See also HUMAN RIGHTS WATCH, *supra* note 1, at xxiv-xxv; Rosemary Herbert, *Women's Prisons: An Equal Protection Evaluation*, 94 YALE L.J. 1182 (1985); Tracy Thornburg & Diane Trunk, *A Collage of Voices: A Dialogue with Women in Prison*, 2 S. CAL. REV. L. & WOMEN'S STUD. 155 (1992); Nicole Hahn Rafter, *Even in Prison, Women Are Second Class Citizens*, 14 HUM. RTS. 28 (1987).

6. Super-maximum security “supermax” prisons are the United States’ way of dealing with the most feared and dangerous prisoners. HUMAN RIGHTS WATCH & AMERICAN CIVIL LIBERTIES UNION, *supra* note 2, at 108-12. Unfortunately, the conditions in these facilities are extremely harsh and result in numerous human rights violations. *Id.* at 108-12. In a recent case, the supermax prison in California called Pelican Bay came under attack for conditions that clearly violated the U.S. Constitution’s 8th Amendment prohibition against cruel and unusual punishment. *Madrid v. Gomez*, 889 F. Supp. 1146 (N.D. Cal. 1995) [hereinafter *Pelican Bay*]. District Court Judge Henderson held that the prison had “unmistakably crossed the constitutional line with respect to . . . [providing] adequate medical and mental health care, and [had] permitted and condoned a pattern of using excessive force, all in conscious disregard of the serious harm that these practices inflict.” *Id.* at 1279. The court also found an 8th Amendment violation for confining mentally ill prisoners to the Security Housing Unit which is a solitary confinement unit. *Id.* at 1267, 1279-80.

## I. INTERNATIONAL LAW RELATING TO THE TREATMENT OF PRISONERS

### A. Background

A substantial body of law relating to the treatment of prisoners has been developed since the end of World War II as a continuing outgrowth of the Charter of the United Nations which entered into force in 1945.<sup>7</sup> Article 55 of the U.N. Charter promotes, *inter alia*, “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”<sup>8</sup> The Universal Declaration of Human Rights followed in 1948 and specifically indicates in Article 5 that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”<sup>9</sup> This phrase is echoed in several of the human rights instruments developed later.<sup>10</sup> Though neither the U.N. Charter nor the Declaration are “legally binding in the sense that treaties or conventions bind parties under international law . . . they carry great weight. . . It is generally accepted that the Universal Declaration of Human Rights . . . has become part of customary international law as a result of subsequent state practice.”<sup>11</sup>

The trend toward international protection of prisoners began with the “codification of the laws of war” in the Geneva Conventions of 1949.<sup>12</sup> In

7. U.N. CHARTER.

8. U.N. CHARTER art. 55.

9. *Universal Declaration of Human Rights*, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948) [hereinafter *Universal Declaration*].

10. *E.g.*, Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. E/CN.4/1984/72 (1984) (entered into force June 26, 1987) [hereinafter *Convention Against Torture*]; International Covenant on Civil and Political Rights, Dec. 16, 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966) [hereinafter *ICCPR*].

11. 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, 769 (1994); see also Louis Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 AM. U.L. REV. 1, 17 (Declaration has become part of customary international law, binding on all states); ROSALYN HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* 2-10 (1963). *But see* OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 335-342 (“neither governments nor courts have accepted the Universal Declaration as an instrument with obligatory force.”)

12. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3115, 75 U.N.T.S. 31 (entered into force Oct. 21, 1950; for the United States, Feb. 2, 1956) [hereinafter *Geneva Convention I*]; Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3219, 75 U.N.T.S. 85 (entered into force Oct. 21, 1950; for the United States, Feb. 2, 1956) [hereinafter *Geneva Convention II*]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3317, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950; for the United States, Feb. 12, 1956) [hereinafter *Geneva Convention III*]; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3517, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950; for the United States, Feb. 12, 1956) [hereinafter *Geneva Convention IV*].

particular, the Geneva Convention III was the first instrument to specifically list protections that must be extended to all prisoners of war and provides that prisoners of war, "must at all times be humanely treated."<sup>13</sup> The scope of this Convention is limited to prisoners of war,

[n]evertheless, [it provides] basic definitions and relevant standards that clearly evince dawning norms of customary international law for all prisoners. It would be absurd to argue that prisoners taken amidst the chaos of armed conflict or civil disturbance are entitled to better treatment than prisoners taken as a result of criminal or administrative processes in time of peace.<sup>14</sup>

In response to this attitude, many international treaties, conventions and documents have been developed that, at least to some degree, address prisoners' rights. Some apply exclusively to prisoners,<sup>15</sup> while others have only a few prisoner-specific provisions among their general human rights provisions.<sup>16</sup>

The standards for acceptable treatment of prisoners are stated in the relevant instruments. However, the problem of interpreting these requirements remains at issue. Terms like "cruel," "inhuman," and "degrading" are used frequently but are never clearly defined. To determine whether solitary confinement is a violation of international standards, it is necessary to determine which instruments apply, then interpret their meaning.

## *B. Chronological Development of International Treaties, Conventions and Instruments Relevant to the Treatment of Prisoners*<sup>17</sup>

### 1. American Declaration of the Rights and Duties of Man (1948)

At the same time the U.N. was drafting the Universal Declaration of Human Rights, the Organization of American States (OAS) was drafting the

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13. Geneva Convention III, *supra* note 12, art. 13.

14. Bernard, *supra* note 11, at 765.

15. *First U.N. Congress on the Prevention of Crime and the Treatment of Offenders* [Aug. 22-Sept. 3, 1955], *Standard Minimum Rules for Treatment of Prisoners*, Aug. 30, 1955, Annex I, at 67, U.N. Doc. A/CONF/6/1 (1956), adopted by E.S.C. Res. 663 (XXIV) C, U.N. ESCOR, 24th Sess., Supp. No. 1, at 11, U.N. Doc. E/3048 (1957) [hereinafter *Standard Minimum Rules*]; *Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment*, G.A. Res. 43/173, U.N. GAOR, 43d Sess., Supp. No. 49, U.N. Doc. A/43/49 (1988) [hereinafter *Body of Principles*].

16. *E.g.*, *Ninth International Conference of American States* [March 30-May 2, 1948], *American Declaration of the Rights and Duties of Man*, O.A.S. Res. XXX, O.A.S. Off. Rec. OEA/Ser. L/V/I.4 Rev. (1965) [hereinafter *American Declaration*].

17. This Comment will focus on the treaties, conventions and documents that use ambiguous terms such as "cruel, inhuman and degrading," as these are the instruments that are relevant to determining whether solitary confinement is a violation of the international standards. For a thorough discussion of the entire body of law relating to the treatment of prisoners, see Bernard, *supra* note 11; see also NIGEL S. RODLEY, *THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW Annexes 1-8e* (1987).

analogous, regional American Declaration of the Rights and Duties of Man<sup>18</sup> (American Declaration). The American Declaration was actually adopted some months ahead of the Universal Declaration in 1948.<sup>19</sup> Like its U.N. analog, the American Declaration was not intended to be legally binding.<sup>20</sup> The American Declaration has two articles that pertain to treatment of prisoners: Article XXV states, in pertinent part, that “[e]very individual who has been deprived of his liberty . . . has the right to humane treatment during the time he is in custody”; Article XXVI states that an accused has the right “not to receive cruel, infamous or unusual punishment.”<sup>21</sup> Unfortunately, these critical terms are not defined within the instrument itself.

## 2. European Convention for the Protection of Human Rights and Fundamental Freedoms (1953)

The regional European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>22</sup> (European Convention) and its five protocols were signed in 1950 and entered into force in 1953.<sup>23</sup> Though none of its articles specifically mention prisoners’ rights, Article 3 provides that “*no one* shall be subjected to torture or to inhuman or degrading treatment or punishment.”<sup>24</sup> Additionally, Article 15 allows no derogation from . . . Article 3 even in time of war or other public emergency threatening the life of the nation.<sup>25</sup> Though not defined in the Convention itself, the meaning of this language has been construed by the European Court of Human Rights and the European Human Rights Commission.<sup>26</sup>

## 3. International Covenant on Civil and Political Rights (1976)

### The International Covenant on Civil and Political Rights<sup>27</sup> (ICCPR)

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18. American Declaration, *supra* note 16.

19. The Universal Declaration was adopted on December 10, 1948 approximately seven months after the American Declaration was adopted on May 2, 1948. See RODLEY, *supra* note 17, at 48.

20. SCOTT DAVIDSON, THE INTER-AMERICAN COURT OF HUMAN RIGHTS 13-14 (1992).

21. American Declaration, *supra* note 16, arts. XXV and XXVI.

22. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Europ. T.S. No. 5, 213 U.N.T.S. 221 [hereinafter European Convention].

23. *Id.*

24. *Id.* art. 3 (emphasis added).

25. *Id.* art. 15.

26. See, e.g., Soering v. United Kingdom, 11 Eur. H.R. Rep. 439, 489, paras. 104-05 (1989); Ireland v. United Kingdom, 2 Eur. H.R. Rep. 25, 79, paras. 162-63 (1978); Tyrer v. United Kingdom, 2 Eur. H.R. Rep. 1, 10, paras. 29-30 (1978); McFeeley v. United Kingdom, 3 Eur. H.R. Rep. 161, 194-95, paras. 40-41 (1980); The Greek Case, 12 Y.B. Eur. Conv. on Hum. Rts. 1 (1972). For discussion of the interpretation of the European Convention, see *infra* Part IIA.

27. ICCPR, *supra* note 10.

which entered into force in 1978, has two provisions applicable to prisoners. Article 7 prohibits torture and "cruel, inhuman, or degrading treatment or punishment."<sup>28</sup> Article 10(1) provides that "[all] persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."<sup>29</sup> Though the ICCPR has been ratified by nearly one hundred parties, it has yet to achieve the status of customary international law.<sup>30</sup>

The United States was the most recent party to ratify the ICCPR. It did so in 1992 with a reservation on Article 7 notwithstanding protests presented at the Senate hearings.<sup>31</sup> The reservation on Article 7 is as follows:

That the United States considers itself bound by Article 7 to the extent that 'cruel, inhuman or degrading treatment or punishment' means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.<sup>32</sup>

According to Human Rights Watch and the ACLU, this reservation limits the protection provided to prisoners by Article 7.<sup>33</sup> 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>34</sup> "In addition to providing broader protection on its face, Article 7 is clearly stronger than the Supreme Court's current

28. *Id.* art. 7.

29. *Id.* art. 10(1).

30. Bernard, *supra* note 11, at 768. Cf. Louis B. Sohn, *The Human Rights Law of the Charter*, 12 TEX. INT'L L.J. 129, 135-36 (1977) ("although the covenants apply directly to the states that have ratified them, they are of some importance . . . with respect to the interpretation of the Charter obligations of the non-ratifying states"); Jeffrey M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction Over International Human Rights Claims: The Alien Tort Claims Act After Filartiga v. Pena-Irala*, 22 HARV. INT'L L.J. 53, 69-70 (1981) (it may be said that the Covenants clearly constitute a source of obligation for states parties). Though the ICCPR, as a whole, has not achieved the status of customary international law, some authors are of the opinion that many of its articles have. For a discussion on which ICCPR articles appear to have passed into customary international law, see THEODOR MERON, *HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW* 95-96 (1989).

31. *Hearing on International Covenant on Civil and Political Rights Before the Committee on Foreign Relations of the United States Senate*, 102d Cong., 1st Sess. 91, 95-97, 101, 111-13 (1991) (statements of Amnesty International USA and International Human Rights Law Group).

32. UNITED NATIONS, *MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY GENERAL* 133 (1994) (status as of Dec. 31, 1993). On June 1, 1992, President Bush signed the instrument of ratification. White House Statement on Signing the International Covenant on Civil and Political Rights, 28 WEEKLY COMP. PRES. DOC. 1008 (June 5, 1992). The instrument of ratification was deposited at the United Nations on June 8, 1992 and the Covenant entered into force for the United States on September 8, 1992. John Quigley, *The International Covenant on Civil and Political Rights and the Supremacy Clause*, 42 DEPAUL L. REV. 1287, 1291 (1993).

33. HUMAN RIGHTS WATCH AND AMERICAN CIVIL LIBERTIES UNION, *supra* note 2, at 99.

34. For discussion of the interpretation of the ICCPR, see *infra* Part IIB; see also PAUL R. WILLIAMS, *TREATMENT OF DETAINEES: EXAMINATION OF ISSUES RELEVANT TO DETENTION BY THE UNITED NATIONS HUMAN RIGHTS COMMITTEE* 28-29, 35 (1990); DOMINIC MCGOLDRICK, *THE HUMAN RIGHTS COMMITTEE: ITS ROLE IN THE DEVELOPMENT OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS* 369, 389 n.99 (1991).

interpretation of the Eighth Amendment, which requires a prisoner to demonstrate that prison officials acted with 'deliberate indifference' in subjecting him to abusive conditions of confinement."<sup>35</sup>

#### 4. American Convention on Human Rights (1978)

The Organization of American States (OAS) developed the American Convention on Human Rights,<sup>36</sup> a regional code of human rights protection which entered into force in 1978. Article 5, "The Right to Humane Treatment," begins by stating that "[e]very person has the right to have his physical, mental and moral integrity respected."<sup>37</sup> Article 5 goes on to state that "no [person] shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person."<sup>38</sup> The American Convention does not explain the specific meaning of "respect for the inherent dignity of the human person" nor does it define "torture" or "cruel, inhuman, or degrading punishment or treatment."

#### 5. African Charter on Human and Peoples' Rights (1986)

The regional African Charter on Human and Peoples' Rights<sup>39</sup> entered into force in 1986. Article 5 states that "[a]ll forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited."<sup>40</sup> As with most of the other human rights documents, the terms used in Article 5 to ensure humane treatment are not defined in the document, leaving them open to interpretation.

#### 6. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (1984)

The Convention Against Torture and Other Cruel, Inhuman, or

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35. HUMAN RIGHTS WATCH & AMERICAN CIVIL LIBERTIES UNION, *supra* note 2, at 99 (citing *Wilson v. Seiter*, 501 U.S. 294, 301-02 (1991); *Hudson v. McMillian*, 503 U.S. 1, 6 (1992); *Whitley v. Albers*, 475 U.S. 312, 320 (1986)).

36. American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, O.A.S. Off. Rec. OEA/Ser. K/XVI/I.1 doc. 65, Rev. 1, Corr. 2 (1970), *reprinted in* 9 I.L.M. 673 (1970), entered into force July 18, 1978 [hereinafter American Convention].

37. *Id.* art. 5(1).

38. *Id.* art. 5(2).

39. African Charter on Human and Peoples' Rights, June 27, 1981, O.A.U. Doc. CAB/LEG/67/3/Rev. 5 (entered into force Oct. 21, 1986), *reprinted in* 21 I.L.M. 58 (1982).

40. *Id.* art. 5.

Degrading Treatment or Punishment<sup>41</sup> (Convention Against Torture) was opened for signature in 1984. According to Sandra M. Bernard, the Convention Against Torture, “is highly significant in terms of prisoners’ rights, since victims of torture are virtually all imprisoned or otherwise detained. Nevertheless, the Convention Against Torture falls short of a ‘bill of rights’ for prisoners.”<sup>42</sup> Article 1 prohibits torture which is defined 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. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.<sup>43</sup>

Article 16 prohibits “other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1.”<sup>44</sup> Unfortunately, as with other human rights documents, the Convention does not define this phrase, ultimately limiting the potential protection provided by the Convention.

While considering ratification, the United States decided to attach a reservation to Article 16 which would confine “cruel, inhuman or degrading treatment or punishment” to mean the “cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution.”<sup>45</sup> According to a report by the Foreign Relations Committee, “degrading treatment or punishment . . . has been interpreted as potentially including treatment that would probably not be prohibited by the U.S. Constitution” and the reservation is necessary “[t]o make clear that the United States construes the phrase to be coextensive with its constitutional guarantees[.]”<sup>46</sup>

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41. Convention Against Torture, *supra* note 10; For a thorough discussion, see Matthew Lippman, *The Development and Drafting of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 17 B.C. INT’L & COMP. L. REV. 275 (1994).

42. Bernard, *supra* note 11, at 766.

43. Convention Against Torture, *supra* note 10, art. 1.

44. *Id.* art. 16.

45. COMMITTEE ON FOREIGN RELATIONS, CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT, S. EXEC. REP. NO. 30, 101st Cong., 2d Sess. 26 (1990) (statement of Mr. Pell).

46. *Id.* at 25. The report cites as an example of what the United States would not find “degrading” under the Constitution, a European Commission of Human Rights case which held that the refusal of authorities to give formal recognition to an individual’s change of sex might constitute degrading treatment. *Id.* (citing Case of X. v. Federal Republic of Germany (No. 6694/74)). See also Richard B. Lillich, Note, *The Soering Case*, 85 AM. J. INT’L L. 128, 147 (1991). The United States ultimately ratified the Convention Against Torture in October 1994. Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*,



## 7. Inter-American Convention to Prevent and Punish Torture (1987)

The Inter-American Convention to Prevent and Punish Torture<sup>47</sup> entered into force in 1987. Its language is parallel to the Convention Against Torture and Article 2 uses the same definition of torture.<sup>48</sup> Article 7 of the Inter-American Convention prohibits “cruel, inhuman or degrading treatment or punishment” and, as with the International Convention Against Torture, does not define the phrase further.<sup>49</sup>

### C. Model Instruments Relating to the Treatment of Prisoners

Other than the Geneva Convention III, none of the international instruments deal exclusively with the treatment of prisoners. Therefore, though not binding, the model standards dealing with prisoners’ rights are influential in this area of international law.<sup>50</sup>

#### 1. Standard Minimum Rules for Treatment of Prisoners (1955)

In 1957, the U.N. Economic and Social Council (ECOSOC) formally approved the Standard Minimum Rules for Treatment of Prisoners<sup>51</sup> and recommended “that favourable consideration be given to their adoption and application in the administration of penal and correctional institutions”<sup>52</sup> with the primary goal being enactment in national penal codes.<sup>53</sup>

The Standard Minimum Rules set forth the minimum acceptable conditions for “all categories of prisoners, criminal or civil, untried or convicted, including prisoners subject to ‘security measures’ or corrective

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89 AM. J. INT’L L. 341, 348 (1995). In addition to the reservation, the instrument of ratification included the following:

The United States understands that international law does not prohibit the death penalty, and does not consider this Convention to restrict or prohibit the United States from applying the death penalty consistent with the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States, including any constitutional period of confinement prior to the imposition of the death penalty.

*Id.* at 324 n.10.

47. Inter-American Convention to Prevent and Punish Torture, Dec. 9, 1985, O.A.S.T.S. No. 67, O.A.S. Doc. OEA/Ser. P./AG/doc. 2023/85 Rev. 1, at 46 (1986), *reprinted in* 25 I.L.M. 519 (1986) [hereinafter Inter-American Convention].

48. *See supra* text accompanying notes 41-44.

49. For discussion of the interpretation of the Inter-American Convention, *see infra* Part IIC; *see also* DAVIDSON, *supra* note 20, at 155-56.

50. Bernard, *supra* note 11, at 770.

51. Standard Minimum Rules, *supra* note 15.

52. *Id.*; *see also* Daniel L. Skoler, *World Implementation of the United Nations Standard Minimum Rules for Treatment of Prisoners*, 10 J. INT’L L. & ECON. 453, 454-57 (1975).

53. Skoler, *supra* note 52, at 454.

measures ordered by the judge.”<sup>54</sup> The Rules contain a section that deals exclusively with discipline and punishment in which Rule 31 expressly prohibits “[c]orporal punishment, punishment by placing in a dark cell and all cruel, inhuman and degrading punishments.”<sup>55</sup> Another section requires that prisoners be allowed to maintain contact with the outside world.<sup>56</sup>

The United States has incorporated the Standard Minimum Rules in the 1962 Model Penal Code and the correctional standards developed by the National Advisory Commission on Criminal Justice Standards and Goals in 1973.<sup>57</sup> Additionally, a few U.S. states have adopted the Rules as a “Bill of Rights” for the treatment of prisoners.<sup>58</sup> Though not universally implemented, the Standard Minimum Rules “have been increasingly recognized as a generally accepted body of basic minimal requirements.”<sup>59</sup>

## 2. Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment (1988)

The Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment<sup>60</sup> is a model that was drafted by the General Assembly’s Sixth Committee and adopted by the General Assembly in 1988.<sup>61</sup> It was developed to protect, not only prisoners as the Standard Minimum Rules do, but also all persons “deprived of personal liberty” by actions of state authority.<sup>62</sup> Principle 6 prohibits “cruel, inhuman, or degrading treatment or punishment” and includes a footnote stating that these terms

should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental, including the holding of a detained or imprisoned person in conditions which deprive him, temporarily or permanently, of the use of any of his natural senses, such as sight or hearing, or of his awareness of place and the passing of time.<sup>63</sup>

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54. Standard Minimum Rules, *supra* note 15, rule 4(1).

55. *Id.* rule 31.

56. *Id.* rules 37-39.

57. Skoler, *supra* note 52, at 460.

58. *Id.* at 462. Pennsylvania, South Carolina, Ohio, Minnesota, Connecticut and Illinois have adopted the Standard Minimum Rules. *Id.*

59. *Id.* at 455.

60. Body of Principles, *supra* note 15. For a thorough discussion of the Body of Principles, see Tullio Treves, *The UN Body of Principles for the Protection of Detained or Imprisoned Persons*, 84 AM. J. INT’L L. 578 (1990).

61. Treves, *supra* note 60, at 578 (1990).

62. *Id.* at 580-81.

63. Body of Principles, *supra* note 15, princ. 6.

This footnote was inspired by the treatment of “disappeared” persons,<sup>64</sup> however, it might also be seen to apply to any and all solitary confinement conditions.

## II. APPLICATION AND INTERPRETATION OF INTERNATIONAL STANDARDS FOR THE HUMANE TREATMENT OF PRISONERS

Because of the ambiguity inherent in the “cruel, inhuman or degrading treatment or punishment” standard, a clear definition of the international standard for the humane treatment of prisoners must be derived from the work of the interpreting bodies. In general, the international community appears inclined to find violations of the various human rights instruments where the United States does not.<sup>65</sup> Moreover, the non-governmental organizations and the United Nations are likely to extend the protections for prisoners even beyond where the international community is willing to go.<sup>66</sup>

This section will examine how international standards have been applied to both general complaints of inhumane treatment and specific complaints of solitary confinement.

### A. *European Court of Human Rights and European Human Rights Commission*

Both the European Court of Human Rights and the European Human Rights Commission were developed exclusively to evaluate possible violations of the European Convention for Protection of Human Rights and Fundamental Freedoms. In the *Soering* case, the European Commission of Human Rights stated with regard to defining the terms of Article 3 that

[t]he concepts of inhuman and degrading treatment have been elucidated in

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64. Treves, *supra* note 60, at 581. The phenomenon of “disappearances” became an international concern when governments and their supporters in Guatemala in the 1960’s and in Chile and Argentina in the 1970s began a practice of covert detention and execution of persons, with their true fates remaining a mystery to the person’s friends and family. J. Daniel Livermore & B. G. Ramcharan, “*Enforced and Involuntary Disappearances*”: *An Evaluation of the Decade of United Nations Action*, 6 CANADIAN HUM. RTS. Y.B. 217, 218 (1989-90).

65. For example, the European Court of Human Rights found a violation of article 3 of the European Convention in *Soering v. United Kingdom*, 11 Eur. H.R. Rep. 439 (1989), because of the “death row phenomenon.” The United States’ reservation to the ICCPR was in direct response to the *Soering* holding, limiting protection under Article 7 of the ICCPR to the extent of “cruel and unusual” punishment referred to in the Eighth Amendment to the U.S. Constitution. For further discussion, see Lillich, *supra* note 46, at 147-48.

66. Human Rights Watch and the ACLU indicate in their reports that the general conditions in U.S. prisons are below acceptable standards. HUMAN RIGHTS WATCH & AMERICAN CIVIL LIBERTIES UNION, *supra* note 2. Failure of the international community to accept and follow the U.N. Conventions on human rights in their entirety as customary international law, is indicative of the disparity between international practice and the aspirations of the United Nations. It is apparent to this author that the NGOs, in developing and supporting the U.N. Conventions in their entirety, have higher standards with regard to human rights than the international community in general.

the following ways by both the Commission and the European Court of Human Rights. The notion of inhuman treatment covers at least such treatment as deliberately causes severe suffering, mental or physical. Further, treatment of an individual may be said to be degrading if it grossly humiliates him before others or drives him to act against his own will or conscience.<sup>67</sup>

The Commission goes on to point out how the European Court of Human Rights stressed in prior cases that:

ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 [of the European Convention for Protection of Human Rights and Fundamental Freedoms]. The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim.<sup>68</sup>

In *Tyrer v. United Kingdom*,<sup>69</sup> the European Court of Human Rights found a violation of Article 3 by looking at all the circumstances surrounding the “judicial birching”<sup>70</sup> of a juvenile as punishment for a crime.<sup>71</sup> In holding that the punishment would be a violation of Article 3, the Court emphasized various factors including the possible adverse psychological

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67. *Soering v. United Kingdom*, 11 Eur. H.R. Rep. 439, 489, para. 104 (1989) (citing *Ireland v. United Kingdom*, Commission Report, 2 Eur. H.R. Rep. 25, 79, para. 162).

68. *Id.* at 489, para. 105 (citing *Ireland v. United Kingdom*, 2 Eur. Ct. H.R. 25, 79, para. 162; *Tyrer v. United Kingdom*, 2 Eur. H.R. Rep. 1, 10, paras. 29-30); see also *McFeeley v. United Kingdom*, 3 Eur. H.R. Rep. 161, paras. 40-41 (1980); *The Greek Case*, 12 Y.B. Eur. Conv. on H.R. 1 (1972).

69. 2 Eur. H.R. Rep. 1 (1978).

70. Section 56(1) of the Petty Sessions and Summary Jurisdiction Act 1927 set forth the punishment for assault for which the defendant in *Tyrer* was convicted. The penalty included a fine and up to six months in prison, “and in the case of a male child (i.e. aged 10-13) or male young person (i.e. aged 14-16) to be whipped in addition to or instead of either of these.” *Id.* at 4. The Act provided that a forty-inch birch rod not exceeding nine ounces in weight was to be used for males between 14 and 20 years old and that the punishment be inflicted privately as soon as practicable after the sentence. *Id.* In the *Tyrer* case, the defendant was sentenced to three strokes of the birch. *Id.* at 3. After waiting for the doctor to declare the defendant fit to receive the punishment, the birching was carried out in the presence of the defendant’s father and the doctor.

He was made to take down his trousers and underpants and bend over a table; two policemen held him while a third administered the punishment, pieces of the birch breaking at the first stroke. His father had to be restrained from attacking one of the police officers. The applicant’s skin was raised but not cut and he was sore for about a week and a half afterwards.

*Id.* at 4.

71. In *Tyrer*, a schoolboy was convicted by a juvenile court of unlawful assault on another schoolboy. He was sentenced to three strokes of the birch, intended to cause actual bodily harm, to be carried out by a police officer in the presence of a doctor. *Id.* at 3-4.

effects and mental anguish suffered in anticipation of the punishment.<sup>72</sup> This may be seen as a departure from prior Article 3 cases where the Court focused primarily on the physical conditions of confinement rather than the psychological effects of the confinement.<sup>73</sup>

In subsequent cases, the Court developed the “totality of conditions” analysis of Article 3<sup>74</sup> and, in the landmark case, *Soering v. United Kingdom*,<sup>75</sup> found a violation of the Article 3 prohibition against “cruel, inhuman or degrading treatment” based on the risk of exposure to the “death row phenomenon.”<sup>76</sup> The Court held that the Convention cannot be read to include a general prohibition of the death penalty.<sup>77</sup> However, where circumstances would lead to “ever-present and mounting anguish of awaiting execution” and “increasing tension and psychological trauma” caused by the long period of time spent on death row in conditions which amount to solitary confinement,<sup>78</sup> treatment would go beyond the threshold set by Article 3.<sup>79</sup> It follows from this holding that the Court is willing to find that, even though the specific treatment (i.e.: “birching” or the death penalty) is not a *per se* violation of Article 3, the underlying adverse psychological effect can, in itself, be a violation. Use of the “totality of conditions” test in evaluating possible “cruel, inhuman or degrading treatment” enables the Court to extend its evaluation to both physical conditions and psychological effects.

In *Hilton v. United Kingdom*,<sup>80</sup> the Human Rights Commission used a “totality of conditions” test to determine if solitary confinement constituted a breach of the Article 3 prohibition against inhuman or degrading treatment

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72. *Id.* at 11-12, para. 35. The court noted that there had been a delay of several weeks between the time of the conviction and the actual administration of the punishment and an additional delay at the police station. Therefore, according to the court, the defendant “was subjected to the mental anguish of anticipating the violence he was to have inflicted upon him” which caused humiliation sufficient to attain “the level inherent in the notion of ‘degrading punishment.’” Thus, the court concluded that the judicial birching amounted to a violation of Article 3 of the Convention. *Id.*

73. For a discussion of the prior cases and their holdings, see Renee E. Boxman, *The Road to Soering and Beyond: Will the United States Recognize the “Death Row Phenomenon?”*, 14 Hous. J. INT’L L. 151, 156-60 (1991).

74. For discussion of cases in which the Court developed the “totality of conditions” test, see Boxman, *supra* note 73, at 156-60.

75. 11 Eur. H.R. Rep. 439 (1989).

76. *Id.* at 478, para. 111.

77. *Id.* at 474, para. 103. Since the Convention is meant to be read as a whole, reading Article 3 as prohibiting the death penalty would be in direct conflict with Article 2(1) which allows executions. Abolition of the death penalty, however, is a goal of the European Court of Human Rights. *Id.*

78. *Id.* at 460, para. 68. Conditions on death row were described as follows: “A death row prisoner is moved to the death house 15 days before he is due to be executed. The death house is next to the death chamber where the electric chair is situated. Whilst a prisoner is in the death house he is watched 24 hours a day. He is *isolated and has no light in his cell*. The lights outside are permanently lit.” *Id.* (emphasis added).

79. *Id.* at 478, para. 111.

80. 3 Eur. H.R. Rep. 104 (1978).

or punishment.<sup>81</sup> The majority held that even though the conditions were extremely unsatisfactory, the treatment did not amount to a violation of Article 3 because, *inter alia*, the solitary confinement of the prisoner was often at his own request for fear of hostilities from other prisoners.<sup>82</sup> The Commission evaluated the adverse psychological effects caused by the isolation conditions but did not find the effects sufficient to cross the Article 3 threshold.<sup>83</sup> Four on the Commission dissented stating that “the general treatment of the applicant in its cumulative effect, constituted degrading treatment contrary to Article 3 of the Convention” despite the fact that the prisoner was uncooperative and difficult.<sup>84</sup>

### B. Human Rights Committee

The Human Rights Committee’s primary purpose is to evaluate complaints brought pursuant to the First Optional Protocol of the International Covenant on Civil and Political Rights.<sup>85</sup> The two ICCPR articles relevant to treatment of prisoners are Article 10 and Article 7. The first paragraph of Article 10 states, “All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”<sup>86</sup> In deciding how to evaluate this article, the Human Rights Committee looks at “[t]hree potential values [that] underlie this guarantee of human dignity.”<sup>87</sup> The first is that “almost every detainee will some day return to live in society, therefore the goal of detention should be to reform the detainee, or at least to make him no more dangerous than he was when he entered the detention facility.”<sup>88</sup> Second, compliance with a specific measure must be viewed by looking at whether, not only the letter of the treatment meets the standard, but also whether the “the spirit and ends . . . are consistent with preserving the right to human dignity.”<sup>89</sup> Finally, the right to human dignity gives the Committee justification to evaluate a vast array of detention practices that may not fall under any other provision of the ICCPR.<sup>90</sup> Thus, the Commission can examine specific issues under the purview of the right to human dignity.<sup>91</sup>

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81. *Id.* at 125-27, paras. 88-102.

82. *Id.* at 125-24, paras. 93-94.

83. *Id.* at 127, para. 102.

84. *Id.* at 128 (Messrs. Fawcett, Tenekides, Trechsel and Klecker, dissenting).

85. Optional Protocol to the International Covenant of Civil and Political Rights, Dec. 16, 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 59, U.N. Doc. A/6316 (1966) (entered into force, Mar. 23, 1976).

86. ICCPR, *supra* note 10, art. 10(1).

87. WILLIAMS, *supra* note 34, at 28-29.

88. *Id.* at 28.

89. *Id.* at 29.

90. *Id.*

91. *Id.*

To ensure the prevention of cruel, inhuman or degrading treatment or punishment under Article 7, the Commission looks for procedural safeguards on decisions to punish detainees and on the types of punishments administered, particularly solitary confinement, corporal punishment and prison labor.<sup>92</sup> The Committee has interpreted Article 7 protection to go “far beyond torture as normally understood.”<sup>93</sup> Distinctions between torture and other ill-treatment only depend on the kind, purpose and severity of the particular practice.<sup>94</sup> Examples of *physical* suffering are found in abundance in the communications received by the Committee. They include cases describing, *inter alia*, permanent physical damage due to broken bones, ‘*planton*’ (prisoner forced to stand for many hours at a time), electric shock, and ‘*submarino*’ (pushing prisoner’s hooded head into water). These have all been deemed violations of Articles 7 and 10.<sup>95</sup> Moreover, the Committee has evaluated claims of ill-treatment consisting primarily of *mental* suffering and has found violations of both articles.<sup>96</sup> Though the Committee has failed to state explicitly that mental or psychological suffering can amount to torture, this does seem to be the clear implication from the holding in *Estrella v. Uruguay*, in which the Committee found that non-physical torture can amount to a violation of the ICCPR.<sup>97</sup>

The Committee has gone as far as to state that “[e]ven such a measure as solitary confinement may, according to the circumstances, and especially when the person is kept incommunicado, be contrary to this article [7].”<sup>98</sup> According to the Committee “the use of solitary confinement presents a problem for reformation and treatment in a humane manner because it deprives the prisoner of valuable and necessary contact with his peers” which impedes the prisoner’s social and mental health.<sup>99</sup> The Committee receives numerous communications alleging violations of Articles 7 and 10 due to solitary confinement conditions.<sup>100</sup> Where a hostage was kept in a damp,

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92. *Id.* at 35.

93. RODLEY, *supra* note 17, at 79-86.

94. *Id.*

95. *Id.*

96. *Id.* at 82-83.

97. MCGOLDRICK, *supra* note 34, at 369, 389 n.99.

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

99. WILLIAMS, *supra* note 34, at 35-36.

100. Admissible communications may originate from a person or group of persons who can be reasonably presumed to be victims of certain kinds of violations, or from any person or group of persons who have reliable knowledge of those violations, or non-governmental organizations acting in good faith. These communications shall be admissible if “there are reasonable grounds to believe that they may reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms.” *Question of the Violation of Human Rights and Fundamental Freedoms*, E.S.C. Res. 1, U.N. ESCOR Sub-Comm’n on Prevention of Discrimination and Protection of Minorities, 24th Sess., Agenda Item 3(a), U.N. Doc. E/CN.4/Sub.2/L.549/Rev.1 (1971). For further discussion on the procedural aspects of communications to the Human Rights Committee, see Jakob Th. Möller, *Petitioning the United Nations*, 1 UNIVERSAL HUM. RTS. 57 (1979); HOWARD TOLLEY, THE U.N. COMMISSION ON

windowless cell underground for twenty-four hours a day with only a mattress, the Committee found violations of both relevant articles.<sup>101</sup> In another communication, the petitioner alleged that his brother was held for one month in "La Isla," a prison wing of small windowless cells where artificial light was left on for twenty-four hours a day. The Committee found violations of "Article 7 and 10(1), because Gustavo Raul Larrosa Bequio [had] not been treated in prison with humanity and with respect for the inherent dignity of the human person."<sup>102</sup>

Overall, it appears that the Committee uses an approach similar to the "totality of conditions" test applied by the European Human Rights Court and Commission when evaluating the humane treatment requirement.

### C. *Inter-American Court of Human Rights*

Because of its relatively low case load, the Inter-American Court of Human Rights has had little opportunity to develop and define the substantive rights in the American Convention on Human Rights.<sup>103</sup> However, the Inter-American Court has decided that "disappearances" violate Articles 4, 5, and 7 of the Convention.<sup>104</sup> Article 5 is the relevant article for applying the "cruel, inhuman and degrading" standard. In the disappearance case of *Velasquez*,<sup>105</sup> the Court found "that prolonged isolation and deprivation of communication, [were] in themselves cruel and inhuman treatment, harmful to the psychological and moral integrity of the person" detained and, thus, a violation of the right to humane treatment.<sup>106</sup> Therefore, though the number of cases heard by the Inter-American Court is limited, the Court seems willing to extend evaluation of possible violations to include, not only the physical conditions of the practice, but also its psychological effects.

## III. CONDITIONS OF SOLITARY CONFINEMENT IN THE UNITED STATES

With the construction of the very first prisons in the United States,

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HUMAN RIGHTS 124-32 (1987); For a historical perspective on the procedures under ECOSOC Resolutions 1235 and 1503, see TON J.M. ZUIJDWIJK, *PETITIONING THE UNITED NATIONS: A STUDY IN HUMAN RIGHTS* (1982).

101. Communication No. 63/1979, Selected Decisions of the Human Rights Committee Under the Optional Protocol, U.N. GAOR Human Rights Comm., 2d to 16th Sess., U.N. Doc. CCPR/C/OP/1, at 101 (1985).

102. Communication No. 88/1981, Selected Decisions of the Human Rights Committee Under the Optional Protocol, U.N. GAOR Human Rights Comm., 17th to 32d Sess., U.N. Doc. CCPR/C/OP/2, at 118-121 (1985).

103. DAVIDSON, *supra* note 20, at 155.

104. *Id.* at 156.

105. *Velasquez Rodriguez Case*, 9 HUM. RTS. L.J. 212 (1988).

106. *Id.* at 239, para. 156.



solitary confinement was seen as an appropriate way to reform prisoners.<sup>107</sup> In the spirit of the Quakers, the common sentiment about using complete isolation as a rehabilitation tool was that an individual, separated from all others, would be “enlightened from within” by his own conscience and come to hate his own crime.<sup>108</sup> The predominant feeling was that

‘[a]lone in his cell, the convict is handed over to himself; in the silence of his passions and of the world that surrounds him, he descends into his conscience, he questions it and feels awakening within him the moral feeling that never entirely perishes in the heart of man.’ It is not, therefore, an external respect for the law or fear of punishment alone that will act upon the convict but the workings of the conscience itself.<sup>109</sup>

However, even in 1842, people concerned about medical problems of prisoners wondered “does total isolation drive convicts insane?”<sup>110</sup> Charles Dickens visited the Eastern Penitentiary in Philadelphia and wrote of the conditions.<sup>111</sup>

At that time, solitary confinement lasted for the duration of the sentence in this prison. The cell walls were thick; each had a small yard; and each cell had a double door—one of solid oak, the other of iron grating. Hence prisoners never saw each other and their only human contact was with the guards.<sup>112</sup>

Eventually, the early prison models which used solitary confinement as the sole means of incarceration were abandoned, partly because of the detrimental effects isolation had on the prisoners.<sup>113</sup> However, most prisons in the United States still use solitary confinement, at least to some degree, as a form of punishment within the prison system.<sup>114</sup> Moreover, with the advent of the new supermax prisons, punitive solitary confinement has reached new heights with the “application of sophisticated, modern technology dedicated entirely to the task of social control . . . they isolate,

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107. MICHAL FAUCAULT, *DISCIPLINE AND PUNISHMENT: THE BIRTH OF THE PRISON* 236 (1979); see also GUSTAVE DE BEAUMONT & ALEXIS DE TOCQUEVILLE, *ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION IN FRANCE* 37-53 (1964).

108. FAUCAULT, *supra* note 107, at 238-39.

109. *Id.* at 238 (citations omitted).

110. *Id.* at 239.

111. HUMAN RIGHTS WATCH, *supra* note 1, at 72-73 (citing CHARLES DICKENS, *AMERICAN NOTES FOR GENERAL CIRCULATION* (1842)).

112. *Id.* at 73.

113. In 1890, the Supreme Court characterized solitary confinement as “infamous punishment” and recognized the extent of harm caused to prisoners by its use. In *re Medley*, 134 U.S. 160, 169 (1890). In this case, the Court held that solitary confinement, as the only form of confinement, was “an additional punishment of the most important and painful character” which was, thus, prohibited. *Id.* at 171.

114. Craig Haney, “*Infamous Punishment*”: *The Psychological Consequences of Isolation*, 1993 NATIONAL PRISON PROJECT JOURNAL OF THE ACLU FOUNDATION 3.

regulate, and surveil more effectively than anything that has preceded them.”<sup>115</sup> For example, the new solitary confinement units are designed with video and audio equipment that allows prison authorities to communicate and monitor inmates without any physical contact, such that prisoners are now completely denied even minimal social interaction.<sup>116</sup> The almost total automation of the solitary confinement units, including automatic cell doors, means that inmates may go for months or even years without any meaningful social or physical contact.<sup>117</sup> Professor Haney of the University of Santa Cruz summed up the situation as follows:

The technological structure of this environment adds to its impersonality and anonymity. Prisoners interact with their captors over microphones, in chains or through thick windows, peering into the shields that hide the faces of cell extraction teams as they move in coordinated violence. It is axiomatic among those who study human behavior that social connectedness and social support are the prerequisites to long-term social adjustment.<sup>118</sup>

Solitary confinement is used within the prison system as a means of maintaining control over the prison population.<sup>119</sup> Generally, the administrative decision to place a prisoner in isolation is not based on the underlying offense for which he or she was convicted, but instead on activities that occur within the prison including a violation of prison rules or gang affiliation.<sup>120</sup>

In 1994, for example, the Pelican Bay “Supermax” Prison held between 1000 to 1500 prisoners in its solitary confinement complex called the Security Housing Unit (SHU).<sup>121</sup> Approximately half of these inmates were prison-rule violators who were transferred temporarily to serve a predetermined term based on the violation.<sup>122</sup> The next largest group,

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115. *Id.* at 3.

116. *Id.* at 3-4.

117. Author Haney states that on his tour of Pelican Bay, a guard told him that “the only flaw in the design of the prison [was] that they had not figured out how to feed the prisoners ‘automatically’ thus eliminating the need for any contact with them.” *Id.* at 4. Author Lassiter, in his article about the lock-down conditions at the United States Federal Penitentiary at Marion, Illinois explains “[a] forced cell move is the only physical contact some prisoners get. ‘We had a guy last week who greased himself up with vaseline just to make it last.’” Cisco Lassiter, *Robo Prison*, MOTHER JONES, Sept./Oct. 1990, at 54. A forcible cell extraction is a violent maneuver in which an inmate is forcibly removed from his cell by a team of armed prison authorities wearing protective helmets and carrying shields. For a thorough discussion of cell extractions as conducted at Pelican Bay State Prison, see Pelican Bay, 889 F. Supp. 1146, 1172 (N.D. Cal. 1995).

118. Haney, *supra* note 114, at 7.

119. Maria A. Luise, *Solitary Confinement: Legal and Psychological Considerations*, 15 NEW ENG. J. CRIM. & CIV. CONFINEMENT 301, 319-20 (1989) (citing *O’Brien v. Moriarity*, 489 F.2d 941, 944 (1st Cir. 1974)).

120. Pelican Bay, 889 F. Supp. at 1155.

121. *Id.*

122. *Id.* at 1227.

about 600 inmates, was composed of those affiliated with a prison gang. The gang members were moved to the SHU for indeterminate terms and could remain in solitary confinement indefinitely up to the full length of their prison sentences.<sup>123</sup> Early release from SHU may only be obtained if the inmate furnishes detailed information about other gang-affiliated prisoners or activities.<sup>124</sup> According to the *Prison Discipline Study*, based on a questionnaire distributed nationally to prisoners, 72.7 percent had experienced solitary confinement and of those, 63.2 percent had endured it for more than a year.<sup>125</sup>

### A. Physical Conditions of Solitary Confinement

The physical conditions in the various solitary confinement complexes of the many "supermax" prisons are all predominantly the same because they were all based on the same prototype, the "Marion Model."<sup>126</sup> The Federal Penitentiary at Marion, Illinois was opened in 1963 when Alcatraz closed.<sup>127</sup> The prison administrators looked to the "German Stammheim"<sup>128</sup> example as a "blueprint for coercive behavior modification" achieved through severe isolation techniques.<sup>129</sup> Plans to convert

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123. *Id.* In some instances this may mean 10 or 15 years, or even the duration of their lives. *Id.* at 1227-28.

124. *Id.* at 1228 n.163. It does not appear that this would be a very likely occurrence because of the potential severe ramifications to the gang member of "ratting" on his "homeboys."

125. Mark Hamm et al., *Prison Discipline Study: Shattering the Myth of Humane Imprisonment in the United States* 3, tbl. 3 (1990) (unpublished manuscript on file with the *California Western International Law Journal*). The sample size for the study generating these statistics was 576 prisoners. A typical respondent to the questionnaire was a long-time prisoner in a maximum security prison. However, the questionnaire was also sent to prison administrators, guards, prisoners' visitors and families. *Id.* at tbl. 2.

126. Robert Perkinson, *Shackled Justice*, Z MAGAZINE, Feb. 1994, at 40-41.

127. *Id.* at 40.

128. According to Amnesty International, conditions in the high-security German prisons, including Stammheim prison, consisted of long-term, and at times, almost complete isolation resulting in forced extensive prevention of contact with other human beings. This long-term isolation militates against reform and rehabilitation because of the detrimental effects on prisoners' health.

The following conditions (taken from a [judge's] order) may be seen as typical: The suspect [or convicted prisoner] is forbidden contact with any other prisoner. The window of the cell is to be covered with a special security mesh or blind to prevent 'uncontrolled contact.' No supplementary lighting such as lamps is permitted. Participation in any social function, or any form of contact with other prisoners, is to be excluded (including attendance at church service). Meals are to be served in the cell by two prison officers, not (as under the normal regime) by other prisoners. There is to be continuous 'unobtrusive' observation.

*Amnesty International's Work on Prison Conditions of Persons Suspected or Convicted of Politically Motivated Crimes in the Federal Republic of Germany: Isolation and Solitary Confinement* (May 1980) (Amnesty International Manuscript, AI Index No.: EUR 23/01/80) [hereinafter *Amnesty International*].

129. Perkinson, *supra* note 126, at 40.

Marion to a permanent isolation facility were hastened in 1983 when violence broke out.<sup>130</sup> Since then, Marion has been in a permanent state of “lock down” which means prisoners spend twenty-three hours a day alone in their cells.<sup>131</sup> Despite condemnation of such facilities by Amnesty International and Human Rights Watch, by 1991, such control unit prisons were in operation in thirty-six states.<sup>132</sup> The newest facilities like the federal prison in Florence, Arizona and Pelican Bay in California are extremely sophisticated, using modern technology to ensure complete isolation of the prisoners in the control units.<sup>133</sup>

At Pelican Bay Prison, the SHU has a stark, windowless, slate-gray exterior that “gives no hint that [it] is a place where human beings live. But the barrenness of the prison’s interior is what is most startling.”<sup>134</sup> Each cell is eighty square feet and comes equipped with two built-in bunks and a toilet-sink unit.<sup>135</sup> Cell doors are made of heavy-gauge metal, a design which prevents objects from being thrown through the door but also blocks vision and light.<sup>136</sup> “The cell blocks are marked throughout by a dull sameness in design and color. The cells are windowless; the walls are white concrete. When inside the cell, all one can see through the perforated metal door is another white wall.”<sup>137</sup> Prisoners in their cells “are completely isolated from the natural environment and from most of the natural rhythms of life.”<sup>138</sup> Skylights in the “pods” provide a glimpse of natural light but the atmosphere is “devoid of social stimulation.”<sup>139</sup> There are no human touches. “The ‘pods’ where prisoners live are virtually identical; there is little inside to mark location or give prisoners a sense of place.”<sup>140</sup>

Each “pod” has an attached exercise pen.<sup>141</sup> It is a barren concrete encasement with walls that are twenty feet high precluding any view of the outside world. The pen is covered in part by a roof and in part by a wire screen which allows inmates their only view of open sky.<sup>142</sup> The pen

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130. *Id.* Following the riot at Attica Prison in New York in 1971, the Bureau of Prisons (BOP) began to concentrate on handling “problem prisoners” in long term control units at Marion. By 1979, the BOP’s plans to convert Marion to a permanent isolation facility were underway. In 1983, after three killings and a brutal shakedown, Marion was “locked down,” immediately creating the planned permanent isolation facility basically overnight. *Id.*

131. *Id.*; see also Bill Dunne, *Modern Methods of Penology: A Political Prisoner Tells of Life in Marion, THE EDGE*, Mar. 1990, at 3; Lassiter, *supra* note 117, at 52.

132. Perkinson, *supra* note 126, at 41.

133. *Id.*

134. Haney, *supra* note 114, at 3.

135. Pelican Bay, 889 F. Supp. 1146, 1228 (N.D. Cal. 1995).

136. *Id.*

137. *Id.*

138. Haney, *supra* note 114, at 3.

139. *Id.*

140. *Id.*

141. Pelican Bay, 889 F. Supp. at 1228.

142. *Id.* at 1228-29.

contains no recreational equipment, not even a ball.<sup>143</sup> Inmates are video monitored while they are in the pen and are often seen pacing around the perimeter of the pen. “[T]he image created is hauntingly similar to that of caged felines pacing in the zoo.”<sup>144</sup> The overall effect of the SHU is one of “stark sterility and unremitting monotony.”<sup>145</sup>

### B. Social Isolation

“Prisoners in the SHU can go for weeks, months or potentially years without any normal social contact with other people.”<sup>146</sup> All SHU inmates are confined to their cells for twenty-two and a half hours a day, regardless of the reason for their confinement.<sup>147</sup> Meals are slid into the cell through a slot in the door and are eaten in the cell.<sup>148</sup> Prisoners are never allowed out of the cells unless they are moving to or from the showers or the yard or being escorted in chains to the library or the infirmary.<sup>149</sup> Prisoners are precluded from job, education and vocation opportunities, further enhancing their social isolation.<sup>150</sup>

Inmates may have some privileges including television, radio and reading material, all of which are subject to removal as punishment.<sup>151</sup> If they desire, inmates may have visits from the chaplain, however, they are usually non-contact visits in which the chaplain remains outside the cell door.<sup>152</sup>

Interaction with prison staff is kept to an absolute minimum. For example, when an inmate goes to the exercise pen, his cell door is opened automatically by a correctional officer in a control booth.<sup>153</sup> Once the inmate steps into the tier area outside the cell, he must stand naked in front of the control booth to be subjected to a visual search.<sup>154</sup> Physical interaction is limited to times when the guard is putting on or taking off the inmate’s chains.<sup>155</sup>

Approximately two-thirds of the inmates are double-celled.<sup>156</sup> This, however, does not compensate for the otherwise severe level of isolation in

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143. Haney, *supra* note 114, at 3; Pelican Bay, 889 F. Supp. at 1228-29.

144. Pelican Bay, 889 F. Supp. at 1229.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. Haney, *supra* note 114, at 4.

150. *Id.*; Pelican Bay, 889 F. Supp. at 1229.

151. Pelican Bay, 889 F. Supp. at 1230.

152. *Id.* at 1229 n.166.

153. Haney, *supra* note 114, at 4.

154. *Id.* at 4.

155. Pelican Bay, 889 F. Supp. at 1229.

156. *Id.*

the SHU.<sup>157</sup> On the contrary, this kind of constant, forced intimacy, often with a total stranger, can create extreme feelings of hostility which often result in violence.<sup>158</sup> Hence, having a cellmate is unlikely to provide a normal social relationship sufficient to overcome the effects of social isolation.

Though Pelican Bay Prison may be on the harsh end of the supermax spectrum, the conditions at the other supermax prisons are generally comparable.<sup>159</sup> At the Florida State Prison at Starke, some inmates are held alone in poorly-ventilated, windowless cells for years, only allowed out three times a week, for ten minutes, to shower.<sup>160</sup> Inmates in Westerville, Indiana Maximum Control Complex are confined to their cells for twenty-two and a half to twenty-four hours a day and are punished with loss of reading materials.<sup>161</sup> The following are the words of Adrian Lomax, a solitary confinement prisoner at Green Bay Correctional Facility, describing the conditions under which he is confined:

The segregation unit here is under ground; the cell is probably 10 feet long by 6 feet wide with no furnishings except a toilet and a sink and a bed. What strikes me is, it is essentially like a type of a bathroom with a bed in place of a bathtub and that's it. So if you can imagine, kind of, being locked in a bathroom for 24 hours a day for months on end and they come by three times a day and slide a meal through a slot in the door, that's pretty much it. They don't allow watches or calendars. I build my own calendar but if the guards find it in my cell, they'll confiscate it. I have no way of even keeping track of what time it is except when they bring meals around, I have some idea then.<sup>162</sup>

Clearly, the conditions of confinement which predominate the new approach to imprisonment must have a serious impact on both the mental and physical well-being of those subjected to them.

#### IV. PSYCHOLOGICAL EFFECTS OF SOLITARY CONFINEMENT

As early as 1820, when New York decided to eliminate the system of absolute isolation at Auburn Prison, the detrimental psychological effects of solitary confinement were recognized.<sup>163</sup> "Because of mental breakdowns,

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157. *Id.* at 1229-30.

158. *Id.*; Haney, *supra* note 114, at 4. Author Haney opines that "double-celling in Security Housing Units like those at Pelican Bay constitutes a clear form of overcrowding. As such, it can be expected to produce its own, independently harmful effects, as the literature on the negative consequences of overcrowding attests." *Id.* at 7 n.4.

159. Pelican Bay, 889 F. Supp. at 1230.

160. HUMAN RIGHTS WATCH & AMERICAN CIVIL LIBERTIES UNION, *supra* note 2, at 109.

161. *Id.* at 109-10.

162. CORRECTING CORRECTIONS, PART 1: CRIMES OF PUNISHMENT (WI CURE/Inside Voices Video Production 1992).

163. Thomas B. Benjamin & Kenneth Lux, *Solitary Confinement as Psychological Punishment*, 13 CAL. W. L. REV. 265, 268; see also FAUCAULT, *supra* note 107, at 238-39.

the system was changed to permit prisoners to work together during the day in total silence and return to their cells at night."<sup>164</sup> Moreover, in the 1830s, statistical evidence began indicating severe problems caused by solitary confinement, especially insanity.<sup>165</sup> Charles Darwin wrote of observing inmates in isolation as "dead to everything but torturing anxieties and horrible despair."<sup>166</sup> By 1890, the U.S. Supreme Court had condemned solitary confinement on psychological grounds, indicating that

[a] considerable number of the prisoners fell, even after 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 . . . did not recover sufficient mental activity to be of any subsequent service to the community.<sup>167</sup>

Unfortunately, in the United States, these findings did not lead to many clinical studies about the psychological impact of solitary confinement.<sup>168</sup> However, in Germany, 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>169</sup> A review of the literature described a "hallucinatory, paranoid, confusional psychosis" with certain characteristic symptoms including, *inter alia*, hallucinations, agitation, and delusions.<sup>170</sup>

More recently "social science and clinical literature have consistently reported that when human beings are subjected to social isolation and reduced environmental stimulation, they may deteriorate mentally and in some cases develop psychiatric disturbances."<sup>171</sup>

#### A. "Reduced Environmental Stimulation" Syndrome

A clinical study conducted by Dr. Stuart Grassian on the psychopathological effects of solitary confinement revealed major psychiatric consequen-

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164. O. LEWIS, *THE DEVELOPMENT OF AMERICAN PRISONS AND PRISON CUSTOMS* 82 (1967); see also FAUCAULT, *supra* note 107, at 238.

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

166. *Id.* at 1450 (citing P. Liederman, *Man Alone: Sensory Deprivation and Behavior Change*, 8 *CORRECTIONAL PSYCHIATRY AND J. SOC. THERAPY* 64, 66 (1962)).

167. *In re Medley*, 134 U.S. 160, 168 (1890).

168. Grassian, *supra* note 165, at 1450.

169. *Id.* at 1450-51; For a review of the literature, see P. NITSCHKE & K. WILLIAMS, *THE HISTORY OF THE PRISON PSYCHOSES, NERVOUS AND MENTAL DISEASE MONOGRAPH SERIES*, NUMBER 13 (1913).

170. Grassian, *supra* note 165, at 1451.

171. *Pelican Bay*, 889 F. Supp. 1146, 1230 (N.D. Cal. 1995).

ces.<sup>172</sup> The psychiatric evaluation of fourteen inmates was conducted at the Massachusetts Correctional Institution at Walpole.<sup>173</sup> The court mandated the evaluations in response to a class action suit alleging violations of the Eighth Amendment prohibition against “cruel and inhuman punishment” because of the solitary confinement conditions in which the prisoners were held.<sup>174</sup> The psychiatric symptoms were remarkably consistent among the inmates.<sup>175</sup>

The information obtained by Dr. Grassian indicated that inmates experienced a variety of symptoms including generalized hypersensitivity<sup>176</sup> to external stimuli, perceptual distortions, hallucinations, derealization experiences, anxiety, difficulties with thinking, concentration and memory, and impulse control.<sup>177</sup> In general, the inmates denied ever having experienced these symptoms prior to their solitary confinement and reported that symptoms subsided rapidly after their release from isolation.<sup>178</sup> According to Dr. Grassian, “[t]he observations here suggest that rigidly imposed solitary confinement may have substantial psychopathological effects and that these effects may form a *clinically distinguishable syndrome*.”<sup>179</sup>

Dr. Grassian also evaluated prisoners for the Pelican Bay case and was able to further clarify the syndrome associated with isolation.<sup>180</sup> Dr. Grassian observed the same set of symptoms in inmates who were confined in the Pelican Bay SHU that he had documented in past studies.<sup>181</sup> In-depth interviews with 50 inmates suspected of experiencing some psychiatric problems due to the severe isolation revealed that, in fact, the SHU conditions had exacerbated existing symptoms or had caused symptoms associated with what has been termed “Reduced Environmental Stimulation” (RES) Syndrome.<sup>182</sup> “According to Dr. Grassian, the complex of symptoms associated with RES is rarely, if ever, observed in other psychotic

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172. Grassian, *supra* note 165; Stuart Grassian & Nancy Friedman, *Effects of Sensory Deprivation on Psychiatric Seclusion and Solitary Confinement*, 8 INT’L J. LAW & PSYCHIATRY 49 (1986).

173. Grassian, *supra* note 165, at 1451.

174. *Id.*

175. *Id.* at 1452.

176. Hypersensitivity, an exaggerated response to certain stimuli, was experienced by eleven of the interviewees. Dr. Grassian included examples of inmates’ responses to questions about this symptom: “You get sensitive to noise—the plumbing system. Someone in the tier above me pushes the button on the faucet, the water rushes through the pipes—it’s too loud, gets on your nerves. I can’t stand it. . . .”; “Meals—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.”; “What really freaks me out is when a bee gets into the cell—such a small thing.” *Id.* at 1452.

177. *Id.* at 1452-53.

178. *Id.* at 1452.

179. *Id.* at 1453 (emphasis added).

180. Pelican Bay, 889 F. Supp. 1146, 1230-37 (N.D. Cal. 1995).

181. Grassian, *supra* note 165, at 1451-52; Grassian & Friedman, *supra* note 172, at 53-54.

182. Pelican Bay, 889 F. Supp. at 1232.



syndromes or in humans not subject to [reduced environmental stimulation].”<sup>183</sup> Even the defendant’s expert in the Pelican Bay case, Dr. Dvoskin, acknowledged that a “syndrome” might be associated with the isolation conditions in the SHU, though he felt the evidence was insufficient to support “an exact syndrome.”<sup>184</sup> However, in his work, he referred to the “Ad Seg [Administrative Segregation] Syndrome” to describe those inmates who “can’t handle” segregation.<sup>185</sup>

In an article examining solitary confinement as psychological punishment, authors Benjamin and Lux emphasized that “[t]he evidence appears overwhelming that solitary confinement alone, even in the absence of physical brutality or unhygienic conditions, can produce emotional damage, declines in mental functioning and even the most extreme forms of psychopathology, such as depersonalization, hallucination and delusions.”<sup>186</sup> Moreover, the emotional deterioration caused by solitary confinement does not seem to serve any significant penological purpose.<sup>187</sup> According to the same authors, the use of solitary confinement does not deter crime.<sup>188</sup> “In fact, evidence indicates that the slow torture of psychological breakdown in solitary can produce such resentment and rage that the prisoner confined for long periods commits not only more *numerous* but also more *severe* breaches of discipline.”<sup>189</sup>

Furthermore, the psychological symptoms caused by isolation are antithetical to rehabilitation.<sup>190</sup> According to Dr. Kaufman in his evaluation of psychiatric care in prisons, inmates often leave solitary confinement more resentful, antagonistic and violence-prone than they were when they entered.<sup>191</sup> Others are left with a “resigned passivity” which may reduce their chances of being returned to solitary but is contrary to successful rehabilitation.<sup>192</sup> In addition, inmates often complain of being unable to communicate with others and continue to display other neurological symptoms which can last for weeks after their release from solitary

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183. *Id.* at 1230-31. RES Syndrome (including perceptual distortions, hallucinations, hypersensitivity to external stimuli, aggressive fantasies, overt paranoia, inability to concentrate and impulse control problems) has been observed not only in the extreme case where a subject is completely isolated in a dark room but also in hostages, prisoners of war, patients undergoing long term immobilization in a hospital and pilots on long solo flights. *Id.*

184. *Id.* at 1231.

185. *Id.*

186. Benjamin & Lux, *supra* note 163, at 268.

187. Luise, *supra* note 119, at 319-20 (citing *Rhodes v. Chapman*, 452 U.S. 337 (1981)).

188. Benjamin & Lux, *supra* note 163, at 288. The authors explained that roughly four of five prisoners that are in solitary confinement have been confined there in the past. *Id.*

189. *Id.* at 288 (citing *Spain v. Procunier*, 408 F. Supp. 534, 544-45 (N.D. Cal. 1976); *Pugh v. Locke*, 406 F. Supp. 318, 326 (M.D. Ala. 1976)) (emphasis in original).

190. Edward Kaufman, M.D., *The Violation of Psychiatric Standards of Care in Prisons*, 137 AM. J. PSYCHIATRY, 566, 569 (1980).

191. *Id.*

192. *Id.*

confinement.<sup>193</sup>

### B. Small Group Isolation

The set of symptoms associated with the RES Syndrome occur, not only in prisoners who are confined alone, but also among those confined in “small group isolation.”<sup>194</sup> According to Amnesty International’s final report on prison conditions of political prisoners in the Federal Republic of Germany, prisoners held in “small group isolation” have significant adverse psychological symptoms.<sup>195</sup> These symptoms fit the syndrome described by Dr. W. Sluga in the Council of Europe publication, *Treatment of Long-term Prisoners*.<sup>196</sup> The characteristics of the syndrome include:

emotional disturbances, disturbances in comprehension and ability to think, infantile regressive changes in the mode of life, and difficulty in making social contacts. . . [Also] psychosomatic disturbances . . . [and] disturbances relating to the intellectual capabilities, e.g., severe concentration problems; articulation problems; in extreme cases hallucinatory symptoms. . . . These symptoms represent a pronounced form of the ‘functional psycho-syndrome.’<sup>197</sup>

In a “small group isolation” situation in the United States very similar to the one in Germany, the prisoners experienced the same set of symptoms.<sup>198</sup> At the federal prison in Lexington, Kentucky, four female prisoners were held together in a stark, white confinement unit.<sup>199</sup> The lights in the common area were left on twenty-four hours a day and the prisoners were monitored by video camera at all times.<sup>200</sup> The conditions in the unit resulted in severe sensory and sleep deprivation.<sup>201</sup> According to Dr. Richard Korn, the prisoners had become lethargic, hopeless and depressed due to the conditions of their confinement.<sup>202</sup> Further, at least one prisoner complained of “seeing black spots” and other hallucinations.<sup>203</sup>

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193. *Id.*

194. THROUGH THE WIRE (Daedalus Productions 1990); Amnesty International, *supra* note 128, at 10 §1.3. Small group isolation is a term used to describe confinement in which a prisoner is housed in a cell alone but may associate with other prisoners for certain periods during the day. Usually the group size is between two and five prisoners but a group of eight was allowed to associate in Stammheim prison between April and August of 1977. *Id.*

195. Amnesty International, *supra* note 128, at 12 § 2.1.

196. *Id.*

197. *Id.* at 12-13 § 2.1.

198. THROUGH THE WIRE, *supra* note 194.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

Therefore, how an individual prisoner will cope with conditions of isolation depends on both his or her personality and the severity of the isolation regime.<sup>204</sup> However, it seems apparent that a certain set of serious, detrimental psychological symptoms associated with RES are likely to occur when prisoners are confined for any significant length of time in solitary confinement or small group isolation.

#### V. SOLITARY CONFINEMENT: A VIOLATION OF INTERNATIONAL STANDARDS?

In defining the “cruel, inhuman or degrading treatment or punishment” standard, the international community has extended the protection of prisoners to include, not only the physical confinement conditions, but also the psychological effects of the confinement.<sup>205</sup> Generally, international courts, commissions and committees have applied the “totality of conditions” test for ascertaining prisoners’ rights violations.<sup>206</sup>

Both the Commission and the European Court of Human Rights agree on a “totality of conditions” test to evaluate possible violations of the standard. The test requires that ill-treatment “attain a minimum level of severity” to amount to a violation and defines the minimum as “relative,” depending on all the circumstances including “physical or mental effects.”<sup>207</sup> The Court elaborated on the definition by clarifying that “inhuman treatment covers at least such treatment as deliberately causes severe suffering, *mental or physical* . . . or treatment that drives [one] to act against his own will or conscience.”<sup>208</sup> In the *Soering* case, discussed *supra*, the Court used this test to find a violation of the “cruel, inhuman or degrading” standard based solely on the psychological effects caused by confinement on death row, despite the fact that the death penalty was not held to be a *per se* violation of prisoners’ rights.<sup>209</sup>

The RES Syndrome caused by solitary confinement can be analogized to the “death row phenomenon” upon which the European Court relied in finding a human rights violation in the *Soering* case. As elucidated by the literature,<sup>210</sup> the psychological impact of solitary confinement amounts to a syndrome which causes severe and possibly permanent mental suffering. Due to its severity, the syndrome would probably “attain the minimum level required” to establish it within the scope of the “cruel, inhuman or degrading” standard. Moreover, the symptoms of RES syndrome are almost

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204. Amnesty International, *supra* note 128, at 13 § 2.3.

205. *See supra* Part II.

206. *Id.*

207. *Ireland v. United Kingdom*, 2 Eur. H.R. Rep. 25, 79, para. 162 (1978).

208. *Soering v. United Kingdom*, 11 Eur. H.R. Rep. 439, 489, para. 104 (1989) (citing *Ireland v. United Kingdom*, 2 Eur. H.R. Rep. 25, 79, para 162).

209. *Id.* at 478, para. 111.

210. *See supra* Part IV.

certain to occur with any case of prolonged solitary confinement which is even more tangible than the situation in *Soering*. The *Soering* Court was willing to find a violation where the Court was uncertain as to whether the defendant would even be subjected to the "death row phenomenon" at all.<sup>211</sup> The *Soering* holding may be considered a departure from the holdings in previous cases<sup>212</sup> but it demonstrates the Court's willingness to extend protection to prisoners as required by a changing world. That is, as more and more information becomes available regarding the importance of psychological well-being as critical to human dignity, the Court is, and should be, flexible in expanding the definition of the standard. Therefore, notwithstanding the fact that solitary confinement, in itself, is not a *per se* violation of prisoners' rights, the European Court of Human Rights would probably find a violation of the "cruel, inhuman or degrading" standard based strictly on the clinically-defined psychological syndrome caused by solitary confinement.

The Human Rights Committee has also applied a "totality of conditions"-type test in evaluating possible violations of Articles 7 and 10 of the ICCPR and has found that solitary confinement can be a violation of both articles.<sup>213</sup> The Committee seemed willing to extend the protection against "cruel, inhuman or degrading" treatment to include protection from emotional and psychological harm. Moreover, even if the Committee was unable, or unwilling, to find a violation of the "cruel, inhuman or degrading" standard based solely on the psychological effects of solitary confinement, they would assuredly find a violation of the Article 10 requirement that "all persons deprived of their liberty shall be treated with humanity and respect for the inherent dignity of the human person."<sup>214</sup> As discussed *supra*, the symptoms of RES syndrome can be so emotionally devastating that they can lead to anger, hostility, violence and even death by suicide.<sup>215</sup>

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211. *Soering*, 11 Eur. H.R. Rep. at 474-78, paras. 105-110. The Court in this case was not confronted with a breach that had already occurred. Instead, the Court was faced with determining whether, if extradited to the United States, the defendant would likely face the death penalty and the 'death row phenomenon' as a result. Therefore, the Court's determination was of an anticipatory breach of the Convention. The Court ultimately decided that the risk that the defendant would be sentenced to death was a real one and that he would thus be exposed to death row and the resulting psychological phenomenon. This exposure was held to be a violation of the Convention. *Id.* at 479, para. 111.

212. *Boxman*, *supra* note 73, at 163. In *Kirkwood v. United Kingdom*, 37 Eur. Comm'n H.R. Dec. & Rep. 158 (1984), the Commission held, after a cursory review of California's death row conditions that although the risks and the possible treatments were grave, they were not severe enough to violate the Convention. The *Soering* case seems to represent a change in the previous trend. The allegations in the *Soering* case were identical to *Kirkwood* in that the alleged violations had not then occurred and might not occur at all. However, in *Soering*, the Commission was willing to refer the case to the European Court of Human Rights. The Court undertook a more intensive investigation of the circumstances than the Commission did in *Kirkwood*, ultimately finding a violation of the Convention. *Id.* at 157-58.

213. *See supra* Part IIB.

214. ICCPR, *supra* note 10, art. 10(1)

215. Benjamin & Lux, *supra* note 163, at 296.

As clearly stated by authors Benjamin and Lux,

[i]n a broader sense, the penal use of long-term solitary confinement can be properly called a 'crime' precisely because the prisoners are under the control and capture of the prison system. Since they are no longer free citizens, the prisoners' natural and ordinary powers of self-protection have been taken away. In addition, they are deprived of meaningful access to the media or the public. They are, in essence, helpless-inmates of a 'total institution.' If, while they are vulnerable and under the complete mercy of the prison system, they are subjected to injury at its hand, then this is a crime morally comparable to that of child abuse.<sup>216</sup>

Solitary confinement is one such crime; it causes injury to the *psychological* health of the prisoners in the same way that beatings cause injury to their *physical* health. The isolated prisoner's inherent dignity is threatened, as he or she is deprived of valuable and necessary contact with peers which severely impedes the prisoner's social and mental health.<sup>217</sup> Further, since the goal of solitary confinement is punitive, rather than reformatory and because the "spirit" of the practice is not consistent with "preserving the right to human dignity," the Committee would likely find that isolated prisoners were not treated "with humanity" as required by Article 10. Therefore, in spite of the United States' reservation on Article 7,<sup>218</sup> the Human Rights Committee would likely find that solitary confinement in the United States is a violation of the ICCPR under Article 10(1).

The Inter-American Court of Human Rights has also shown its willingness to extend protection for prisoners to include the psychological effects of prison practices.<sup>219</sup> Based on a limited number of "disappearance" cases, the Inter-American Court defined "cruel, inhuman or degrading treatment" to include prolonged isolation and deprivation of communication *because of the adverse psychological effects*.<sup>220</sup> Therefore, if the United States were a party to the Inter-American Convention,<sup>221</sup> use of solitary confinement in the U.S. prison system would be in violation of the standard because of the resultant RES syndrome.

Under the model instruments relating to the treatment of prisoners, solitary confinement as used in the United States would clearly be considered a violation of prisoners' rights. The "Guiding Principles" of the Standard Minimum Rules explain that the "spirit in which penal institutions should be administered and the purposes at which they should aim"<sup>222</sup> should be

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216. *Id.*

217. WILLIAMS, *supra* note 34, at 35-36.

218. *See supra* text accompanying note 29.

219. *See supra* Part IIC.

220. *Id.*

221. The United States signed on June 1, 1977 but has not yet ratified the American Convention on Human Rights. BURNS H. WESTON ET AL., *BASIC DOCUMENTS IN INTERNATIONAL LAW AND WORLD ORDER* 924 (2d ed. 1990).

222. Standard Minimum Rules, *supra* note 15, Part II, rule 56.

focused toward ensuring that, upon return to society, prisoners are “not only willing but able to lead a law-abiding and self-supporting life.”<sup>223</sup> To that end, as set forth in Rule 60, the institution should “seek to minimize any differences between prison life and life at liberty which tend to lessen the responsibility of the prisoners or the respect due their dignity as human beings.”<sup>224</sup> Solitary confinement is wholly antithetical to this basic goal; “it does not rehabilitate, instead it destroys prisoners” because it is strictly punitive.<sup>225</sup> Consequently, because of the mental deterioration that results, prisoners frequently leave isolation more embittered and prone to violence than they were before they entered.<sup>226</sup> Therefore, upon release from prison, inmates who have spent prolonged terms in solitary confinement are likely to have significant difficulty in re-entering and functioning successfully in society. Therefore, punitive solitary confinement fails to further even the general mandate of the Standard Minimum Rules requiring rehabilitation of prisoners.

Moreover, the Standard Minimum Rules specifically prohibit placement in a “dark cell, and all cruel, inhuman or degrading punishments.”<sup>227</sup> Since these rules are set forth as the aspirational model for the *minimum* acceptable conditions allowed in treatment of prisoners, this prohibition against inhumane treatment would certainly extend to a prohibition against punishment that would cause severe psychological harm. Therefore, solitary confinement would also violate specific provisions of the Standard Minimum Rules.

Under the Body of Principles, solitary confinement is unquestionably a violation of the Principle 6 prohibition against conditions that deprive a detainee, “temporarily or permanently, of the use of any of his natural senses, such as sight or hearing, or of his awareness of place and the passing of time.”<sup>228</sup> The “reduced environmental stimulation” syndrome, as the name implies, is a direct result of the kind of sensory deprivation prohibited by the Body of Principles and, thus a violation of Principle 6.

In summary, based on the international community’s interpretation and application of the standards prohibiting inhumane treatment and punishment of prisoners and on the aspirational model instruments, solitary confinement as used in the United States would clearly be a violation of the international standards. Recent cases, especially *Soering*,<sup>229</sup> and developments regarding mistreatment of “disappeared” persons, indicate the international community’s willingness to find human rights violations based solely on the detrimen-

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223. *Id.* rule 58.

224. *Id.* rule 60.

225. Benjamin & Lux, *supra* note 163, at 288.

226. Kaufman, *supra* note 190, at 569.

227. Standard Minimum Rules, *supra* note 15, rule 31.

228. Body of Principles, *supra* note 15, princ. 6.

229. *Soering v. United Kingdom*, 11 Eur. H.R. Rep. 439 (1989).

tal psychological effects of certain prison practices. Therefore, because of the severity of the clinically-proven RES syndrome caused by isolation, the United States is in violation of international standards when prison administration chooses solitary confinement as an acceptable punitive practice.

## VI. STEPS TAKEN BY THE UNITED STATES TO REMEDY THIS VIOLATION

Article 2(2) of the ICCPR, to which the United States is a party provides: "Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps . . . to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant."<sup>230</sup> Therefore, the United States is required to take steps to ensure that prison administration complies with the requirements of the Covenant. So far, no specific legislation has been passed prohibiting solitary confinement in the United States and with the continued construction of supermax prisons, this seems highly improbable. However, as indicated by the holding in the *Pelican Bay* case, the courts are establishing more stringent guidelines for the use of solitary confinement. Unfortunately, as mentioned *supra*, the United States placed a reservation on Article 7 of the ICCPR in direct response to the *Soering* holding,<sup>231</sup> limiting its protection only to the extent of the "cruel and unusual" clause in the Constitution. This reservation effectively limits the courts' analysis to the lower U.S. standard.<sup>232</sup>

Nevertheless, courts have recently begun to expand the meaning of the "cruel and unusual" clause to cover more than just the physically cruel punishments that the Eighth Amendment was originally meant to ban.<sup>233</sup> Today, prison conditions are measured against what the United States Supreme Court has described as "the evolving standards of decency that mark the progress of a maturing society."<sup>234</sup> According to the court in *Davenport v. DeRobertis*,<sup>235</sup> "[t]he term 'cruel and unusual punishments' is relative rather than absolute. The conditions in which prisoners are housed, like the poverty line, is a function of a society's standard of living. As that standard rises, the standard of minimum decency of prison conditions, like the poverty line, rises too."<sup>236</sup> "[T]herefore, as society becomes

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230. ICCPR, *supra* note 10, art. 2(2).

231. Lillich, *supra* note 46, at 148.

232. See *supra* Part IB-3 (regarding the effect of the U.S. ratification of the ICCPR with a reservation); see also David P. Stewart, *Reflections on the Ratification of the International Covenant on Civil and Political Rights by the United States Senate: The Significance of the Reservations, Understandings, and Declarations*, 42 DEPAUL L. REV. 1183 (1993).

233. Luise, *supra* note 119, at 307-08.

234. *Trop v. Dulles*, 356 U.S. 86, 101 (1958); cf. *Rhodes v. Chapman*, 452 U.S. 337, 345-46 (1981) ("Eighth Amendment concepts are not 'static' and have transformed with the passage of time.").

235. 844 F.2d 1310 (7th Cir. 1988).

236. *Id.* at 1315.

wealthier, more comfortable, more sensitive, more civilized, the constitutional minimum of decency in incarceration rises.”<sup>237</sup>

The court in the Pelican Bay case used this standard in applying the Eighth Amendment to solitary confinement conditions and did expand the prohibition against “cruel and unusual punishments” to include the mental health of the prisoners.<sup>238</sup> The court stated that

it is beyond any serious dispute that mental health is a need as essential to a meaningful human existence as other basic physical demands our bodies may make for shelter, warmth or sanitation. As the Supreme Court has made quite clear, we cannot, consistent with contemporary notions of humanity and decency, forcibly incarcerate prisoners under conditions that will, or very likely will, make them seriously physically ill. Surely, these same standards will not tolerate conditions that are likely to make inmates seriously mentally ill.<sup>239</sup>

Unfortunately, the court only went as far as to find a violation with regard to certain subgroups of the inmate population.<sup>240</sup> However, even this holding is an indication that U.S. courts are becoming somewhat more sensitive to the importance of mental health as “a mainstay of life.”<sup>241</sup> Yet, this kind of holding is insufficient to satisfy international standards or the requirement of Article 2(2) of the ICCPR that the United States take measures to assure compliance.

Moreover, one of the crime bills being pushed by the new Republican regime, The Prison Litigation Reform Act of 1995, would limit the ability of prisoners to voice their concerns through the courts by stopping “frivolous” lawsuits by placing strict requirements and restrictions on prisoners filing suit.<sup>242</sup> Though some of the lawsuits that could be avoided, indeed seem to be frivolous,<sup>243</sup> many may not be,<sup>244</sup> and, in fact, may be neces-

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237. *Bruscino v. Carlson*, 854 F.2d 162, 164 (7th Cir. 1988), cert. denied, 109 S. Ct. 3193 (1989) (citing *Davenport v. DeRobertis*, 844 F.2d 1310, 1314-15 (7th Cir. 1988)).

238. *Pelican Bay*, 889 F. Supp. 1146, 1261 (1995).

239. *Id.* at 1261-62.

240. *Id.* at 1267. The court found that conditions were “cruel and unusual punishment in violation of the Eighth Amendment for two categories of inmates: those who are already mentally ill and those who . . . are at unreasonably high risk of suffering serious mental illness as a result of present conditions in the SHU.” *Id.* This author feels that, in light of the literature describing the likelihood of RES syndrome for all prisoners as a result of solitary confinement, the court in *Pelican Bay* should have found a violation in all cases.

241. *Pelican Bay*, 889 F. Supp. at 1261.

242. S. 1279, 104th Cong., 1st Sess. (1995).

243. In addressing the President regarding the introduction of the new legislation, Mr. Dole describes suits involving grievances such as “insufficient storage locker space, a defective haircut by a prison barber, the failure of prison officials to invite a prisoner to a pizza party for a departing prison employee and . . . being served chunky peanut butter instead of the creamy variety” as the kind of lawsuit meant to be avoided by this crime bill. S. 1279, 104th Cong., 1st Sess. (1995).



sary to ensure the protection of prisoners' rights. This kind of governmental action is in total contradiction to the Article 2(2) provision requiring implementation of the Covenant through legislation and other measures necessary to give effect to the rights recognized in the Covenant.<sup>245</sup>

Therefore, though the U.S. courts may be willing in the future to extend the protection provided by the Eighth Amendment until it effectively complies with the international standard prohibiting inhumane treatment of prisoners (thus rendering the Article 7 reservation meaningless), Congress appears unlikely to do so when promulgating new legislation.

### CONCLUSION

In conclusion, the international community, in the spirit of a changing, more sophisticated understanding of the importance of mental well-being to human dignity, has recently extended the protection against "cruel, inhuman or degrading treatment or punishment" to include, not only physical conditions, but also the mental effects of certain prison practices. Because of this application, the use of solitary confinement as used in the United States would clearly violate the evolving international standards. Unfortunately though, even with clear clinical documentation of the severely detrimental psychological syndrome caused by solitary confinement, the United States has failed to find a general violation of the Eighth Amendment to which its analysis of prisoners' complaints is limited.

Because the Eighth Amendment was meant to be dynamic and because the United States should take responsibility for preventing any and all human rights violations in its own country, both the courts and Congress should extend the prohibition against "cruel and unusual punishments" to include any and all definitions provided by the international community. Additional

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244. Anthony Lewis, *Cruel and Unusual*, N.Y. TIMES, Feb. 17, 1995, at A11. Author Lewis suggests that, *inter alia*, the following lawsuits challenging prison conditions as "cruel and unusual" would be affected by the new legislation:

In Ohio, a 15-year-old girl who ran away from home for one night was put in an adult jail by a judge to 'teach her a lesson.' There a guard raped her. Hundreds of other children were put in that jail every year, mostly for minor offenses like truancy. When suit was filed in Federal court, local officials signed a consent order agreeing not to put children in the jail anymore. In Pennsylvania, a suit charged that state prisoners were threatened by a tuberculosis epidemic, and there was no medical screening. A Federal judge issued an emergency injunction that required the screening of the prisoners. In one jail alone, 400 were found to have TB.

*Id.*

245. ICCPR, *supra* note 10, art. 2(2).

ly, the United States should lift the reservation from Article 7 of the ICCPR to show that it is willing to extend protections to the outer limits of the international boundaries to ensure recognition and protection of all human rights in the United States.

*Nan D. Miller\**

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