

PROLONGED SOLITARY CONFINEMENT AND THE CONSTITUTION

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A disturbing trend in the American prison system is the increasing use of prolonged and even permanent forms of harsh solitary confinement in what are known as supermax prisons to incarcerate those prisoners the government considers dangerous. The recent prestigious Commission on Safety and Abuse in America's Prisons, chaired by former Chief Judge of the Third Circuit John J. Gibbons and former Attorney General Nicholas de B. Katzenbach, reported that on June 30, 2000, approximately 80,000 people were confined in state or federal segregation units, and that between 1995 and 2000, "the growth rate in the number of prisoners housed in segregation far outpaced the growth rate of the overall prison population."¹ As of 2006, there were at least fifty-seven supermax prisons in forty states that housed approximately 20,000 prisoners.²

Many of those prisoners are held for long periods of time in solitary confinement. Indeed, in many state systems and in the federal system there are some prisoners who have been effectively sentenced to harsh forms of solitary confinement for the rest of their lives. In Ohio, for example, the state designated a group of prisoners held in the Ohio supermax prison as "long-termers" who prison officials

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1 COMM'N ON SAFETY AND ABUSE IN AMERICA'S PRISONS, VERA INSTITUTE OF JUSTICE, CONFRONTING CONFINEMENT 52-53 (2006), http://www.prisoncommission.org/pdfs/confronting_confinement.pdf; see also Kevin Johnson, *Commission Warns of Harm Isolation Can Do to Prisoners: Use of Solitary Confinement Rises*, USA TODAY, June 8, 2006, at 14A.

2 See Daniel P. Mears & Jamie Watson, *Towards a Fair and Balanced Assessment of Supermax Prisons*, 23 JUST. Q. 232, 232-33 (2006).

never intend to release from 23-hour-a-day solitary confinement.³ The federal government has been sending prisoners convicted of serious terrorist crimes to the federal supermax prison in Florence, Colorado, where they are condemned to live their lives in virtually total solitary confinement.⁴ These prisoners almost never see other prisoners or converse with anyone else, and only rarely leave their small cells.⁵ Absent judicial intervention, this group of prisoners will never have any meaningful review of their solitary confinement.

These prisoners are living in what Robert Hood, the former Warden at the federal supermax in Florence, recently described to CBS *60 Minutes* as a “clean version of hell.”⁶ While prisoners held for very long periods of time in supermax prisons are not generally physically abused, conditions of prolonged solitary confinement have long been known to cause serious mental harm. Tommy Silverstein, who has been in virtually total isolation for almost twenty-five years in federal prison, described his confinement as being like an “endless toothache,” or a “slow constant peeling of the skin, stripping of the flesh, the nerve-wracking sound of water dripping from a leaky faucet in the still of the night while you’re trying to sleep. Drip, drip, drip, the minutes, hours, days, weeks, months, years, constantly drip away with no end or relief in sight.”⁷

This Article will address whether this increasing practice of prolonged or permanent solitary confinement constitutes cruel and unusual punishment in violation of the Constitution, and whether it violates the due process rights of the prisoners so confined. It will not only look at United States case law, but at the jurisprudence of international human rights courts, commissions, and institutions. As the

3 CORR. INSTITUTIONAL INSPECTION COMM., INSPECTION REPORT FOR THE OHIO STATE PENITENTIARY AND OSP CORRECTIONAL CAMP, UNANNOUNCED INSPECTION 3, 11 (2004), <http://www.ciic.state.oh.us/reports/osp.pdf>.

4 Dan Eggen, *New Home Is ‘Alcatraz of the Rockies’: Moussaoui to Join Many High-Profile Inmates at Federal Prison in Colorado*, WASH. POST, May 5, 2006, at A6; see also Jim Hughes, *The Feds Plan to Make the Supermax Facility in Florence the Nation’s Premier Prison for Terrorists ‘Alcatraz of the Rockies’*, DENVER POST, Aug. 3, 2003, at A1 (explaining that one-third of the cells are solitary); Greg B. Smith, *Terror Sheik Shifted to Supermax Prison*, DAILY NEWS (New York), May 19, 2002, at 6 (explaining the “special administrative measures” for incarcerating some inmates, under which they can only speak to immediately family and lawyers, and all conversations are monitored).

5 Niles Lathem, *‘Supermax’ for Worst of Worst*, N.Y. POST, May 4, 2006, at 4.

6 *60 Minutes: Supermax: A Clean Version of Hell* (CBS television broadcast Oct. 14, 2007), available at http://www.cbsnews.com/stories/2007/10/11/60minutes/main3357727.shtml?source=RSSattr=60Minutes_3357727.

7 Alan Prendergast, *The Caged Life: Is Thomas Silverstein a Prisoner of His Own Deadly Past—or the First in a New Wave of Locked-Down Lifers?*, DENVER WESTWORD, Aug. 16, 2007.

U.S. Supreme Court has noted, international jurisprudence can be helpful in determining the scope and meaning of broad terms in our Constitution such as “cruel and unusual punishments”⁸ or “due process,”⁹ as those terms ought to be understood in the context of what has been deemed unacceptable by the world community.¹⁰ This practice of long-term solitary confinement constitutes cruel and unusual punishment and violates the due process rights of prisoners, yet the unfortunate trend in the United States has been to downplay and ignore the cruel and inhuman effects of psychological abuse to prisoners where there is no long-term physical injury.

I. INDEFINITE, PERMANENT SOLITARY CONFINEMENT AND THE EIGHTH AMENDMENT

The federal courts have not yet definitively addressed the question of whether confining a prisoner permanently or for very long periods of time in a supermax prison, without meaningful periodic review of his or her behavior, constitutes cruel and unusual punishment. Nonetheless, the practice of confining prisoners to a permanent existence of severe isolation clearly implicates the Eighth Amendment. As the Supreme Court declared in 1978, “[c]onfinement in . . . an isolation cell is a form of punishment subject to scrutiny under Eighth Amendment standards.”¹¹

Numerous psychological studies of prolonged solitary confinement detail the serious psychological harm to prisoners of such isolation.¹² As one recent comprehensive survey of the psychiatric research on solitary confinement concludes, “Solitary confinement can have serious psychological, psychiatric, and sometime physiological effects on many prison inmates. A long list of possible symptoms from insomnia and confusion to hallucinations and outright insanity

⁸ U.S. CONST. amend. VIII.

⁹ U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

¹⁰ *See Roper v. Simmons*, 543 U.S. 551, 578 (2005) (“It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.” (citations omitted)).

¹¹ *Hutto v. Finney*, 437 U.S. 678, 685 (1978).

¹² *E.g.*, HANS TOCH, *MEN IN CRISIS: HUMAN BREAKDOWNS IN PRISONS* 54 (1975); Stuart Grasian, *Psychopathological Effects of Solitary Confinement*, 140 AM. J. PSYCHIATRY 1450, 1451–54 (1983); Craig Haney, *Mental Health Issues in Long-Term Solitary and “Supermax” Confinement*, 49 CRIME & DELINQ. 124 (2003).

has been documented.”¹³ Mental health experts conclude that “[n]o study of the effects of solitary or supermax-like confinement that lasted longer than 60 days failed to find evidence of negative psychological effects.”¹⁴

Indeed, nineteenth century state experiences with isolating prisoners in solitary confinement cells led observers to reach the same conclusions as modern researchers. Pennsylvania prison models, first developed in Philadelphia in the Cherry Hill State Prison, focused on isolating prisoners in solitary cells. Charles Dickens visited the Cherry Hill prison in 1842 and reported that:

I believe that very few men are capable of estimating the immense amount of torture and agony which this dreadful punishment, prolonged for years, inflicts upon the sufferers . . . there is a depth of terrible endurance in it which none but the sufferers themselves can fathom, and which no man has a right to inflict upon his fellow-creature. I hold this slow and daily tampering with the mysteries of the brain, to be immeasurably worse than any torture of the body¹⁵

Danish fairy tale author Hans Christian Andersen reported that a similar Pennsylvania-model prison in Sweden, which used solitary confinement, was “a well-built machine—a nightmare for the spirit.”¹⁶ And the well-known sociologist Alexis de Tocqueville and his colleague Gustav Beaumont observed that a similar form of solitary confinement tried in Auburn, New York, “proved fatal for the majority of prisoners. It devours the victim incessantly and unmercifully; it does not reform, it kills. The unfortunate creatures submitted to this experiment wasted away”¹⁷

Numerous states adopted the Pennsylvania system of solitary confinement during the nineteenth century, only to abandon the practice because of its harmful effects on prisoners. In 1890, the U.S. Su-

¹³ Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 CRIME & JUST. 441, 502 (2006).

¹⁴ Brief for Professors & Practitioners of Psychology & Psychiatry as Amici Curiae Supporting Respondent at 4, *Wilkinson v. Austin* (*Austin V*), 545 U.S. 209 (2005) (No. 04-495). “The overall consistency of these findings—the same or similar conclusions reached by different researchers examining different facilities, in different parts of the world, in different decades, using different research methods—is striking.” *Id.* at 22.

¹⁵ CHARLES DICKENS, AMERICAN NOTES 146 (Fromm Int’l 1985) (1842).

¹⁶ HANS CHRISTIAN ANDERSEN, PICTURES OF SWEDEN 27 (Tutis Digital Publ’g 2007) (1851); see also Smith, *supra* note 13, at 460 (quoting same).

¹⁷ See TORSTEN ERIKSSON, THE REFORMERS, AN HISTORICAL SURVEY OF PIONEER EXPERIMENTS IN THE TREATMENT OF CRIMINALS 49 (1976) (quoting DU SYSTEME PENITENTIAIRE AUX ETATS-UNIS ET DE SON APPLICATION EN FRANCE (1833)). For an alternate English translation, see GUSTAVE DE BEAUMONT & ALEXIS DE TOCQUEVILLE, ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION IN FRANCE 41 (1964).

preme Court summarized almost a hundred years of experience with solitary confinement:

A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane, others, still, committed suicide, while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community.¹⁸

More recently, various federal courts have recognized the substantial adverse mental health effects of solitary confinement. The Seventh Circuit noted that “there is plenty of medical and psychological literature concerning the ill effects of solitary confinement,”¹⁹ and concluded that in the case before the court, “the record shows, what anyway seems pretty obvious, that isolating a human being from other human beings year after year or even month after month can cause substantial psychological damage, even if the isolation is not total.”²⁰ So too, a district court hearing a case challenging conditions at the Security Housing Unit of Pelican Bay State Prison, California, recognized that social science and clinical literature have consistently reported that humans subjected to social isolation may develop serious psychiatric disturbances.²¹ District Court Chief Judge Henderson toured the prison and observed that “some inmates spend the time simply pacing around the edges of the pen; the image created is hauntingly similar to that of caged felines pacing in a zoo.”²²

Despite this extensive historical evidence, social science and clinical research, and empirical and “obvious” observations that prolonged solitary confinement causes substantial psychological harm to a significant percentage of prisoners exposed to such conditions, the federal courts have, with some exceptions,²³ not found that solitary

¹⁸ *In re Medley*, 134 U.S. 160, 168 (1890).

¹⁹ *Davenport v. DeRobertis*, 844 F.2d 1310, 1316 (7th Cir. 1988), *cert. denied*, 488 U.S. 908 (1988).

²⁰ *Id.* at 1313.

²¹ *Madrid v. Gomez*, 889 F. Supp. 1146, 1230–32 (N.D. Cal. 1995).

²² *Id.* at 1229.

²³ In *Ruiz v. Johnson*, 37 F. Supp. 2d 855, 914–15 (S.D. Tex. 1999), *rev'd sub nom. in part on other grounds, Ruiz v. United States*, 243 F.3d 941 (5th Cir. 2001), the Court found that a “systemic pattern of extreme social isolation and reduced environmental stimulation” in the most restrictive levels of administrative segregation in the Texas prison system was “the cause of cruel and unusual pain and suffering by inmates,” and thus violated the Constitution. *See also* *Ruiz v. Johnson*, 154 F. Supp. 2d 975 (S.D. Tex. 2001). The *Ruiz* case was eventually settled.

confinement violates the Eighth Amendment.²⁴ For example, in the leading case of *Madrid v. Gomez*, the court found that:

the record demonstrates that the conditions of extreme social isolation and reduced environmental stimulation found in the Pelican Bay [Security Housing Unit] will likely inflict some degree of psychological trauma upon most inmates confined there for more than brief periods. Clearly, this impact is not to be trivialized; however, for many inmates, it does not appear that the degree of mental injury suffered significantly exceeds the kind of generalized psychological pain that courts have found compatible with Eighth Amendment standards.²⁵

The Court nonetheless held that while there was a risk of serious psychological injury to inmates, that risk was not of “sufficiently serious magnitude” to find a “*per se*” violation of the Eighth Amendment for all prisoners placed in long-term solitary confinement.²⁶ The Court did find that it would violate the Eighth Amendment to subject prisoners who already had serious mental illnesses to prolonged solitary confinement, because such prolonged social isolation was very likely to inflict serious psychological pain on that subclass of prisoners. The *Madrid* court’s distinction between prisoners who already had serious mental illness and the general prison population has been followed in other cases.²⁷

Nonetheless, while cases have permitted prolonged solitary confinement in very restrictive supermax conditions, none have addressed Eighth Amendment claims of the subcategory of prisoners who have been in essence relegated to such confinement on a permanent or virtually permanent basis. Several recent Supreme Court decisions suggest that claims by prisoners confined in a supermax permanently ought be accorded different Eighth Amendment scrutiny.²⁸ In *Overton v. Bazzetta*, the Court rejected a challenge to a

24 *See* *Brown v. Nix*, 33 F.3d 951, 954–55 (8th Cir. 1994); *Fleming v. Neb. Dep’t of Corr. Servs.*, No. 4:03CV3307, 2006 U.S. Dist. LEXIS 76256 (D. Neb. Oct. 18, 2006); *Madrid v. Gomez*, 889 F. Supp. 1146, 1260–66 (N.D. Cal. 1995).

25 889 F. Supp. at 1265.

26 *Id.* (emphasis omitted in first quote).

27 *Jones’El v. Berge*, 164 F. Supp. 2d 1096 (W.D. Wis. 2001) (placing seriously mentally ill prisoners in Wisconsin supermax violates the Eighth Amendment); *Austin v. Wilkinson*, No. 4:01-CV-071, Doc. 134 at *27 (N.D. Ohio Nov. 21, 2001) (order granting preliminary injunction) (noting that the defendants offered little opposition to a preliminary injunction prohibiting the placement of seriously mentally ill prisoners at the Ohio supermax); *Ruiz v. Johnson*, 37 F. Supp. 2d 855, 915 (S.D. Tex. 1999) (finding that prison conditions can pose too great a threat to the psychological health of mentally ill inmates, violating the Eighth Amendment).

28 *E.g.*, *Beard v. Banks*, 548 U.S. 521, 536 (2006); *Overton v. Bazzetta*, 539 U.S. 126, 134 (2003).

Michigan prison regulation restricting visitation for inmates with drug violations, in part because the restriction, while “severe,” was only for a limited, generally two-year period. The Court noted, however, that “[i]f the withdrawal of all visitation privileges were permanent or for a much longer period . . . the case would present different considerations.”²⁹ Similarly in *Beard v. Banks*, the Court affirmed Pennsylvania’s prohibition on access to any newspapers, magazines or personal photographs for prisoners housed at the most restrictive level of its Long Term Segregation Unit, but repeated *Overton’s* admonition that if faced with a “*de facto* permanent ban . . . we might well reach a different conclusion.”³⁰ And one appellate court has held that the federal government does not have the statutory authority to sentence a prisoner to supermax confinement for the rest of his life.³¹

That a very lengthy or permanent supermax confinement should raise different Eighth Amendment concerns would seem obvious. The Supreme Court has long recognized that the “length of confinement cannot be ignored” in determining whether a particular restriction constitutes intolerably cruel and unusual punishment.³²

²⁹ 539 U.S. at 137.

³⁰ 548 U.S. at 536 (alteration in original).

³¹ *United States v. Johnson*, 223 F.3d 665, 673 (7th Cir. 2000) (holding that the purpose of confinement is to maintain order in the prison and cannot be used for a prisoner who poses no threat to those around him).

³² *Hutto v. Finney*, 437 U.S. 678, 686 (1978).

The Supreme Court’s Eighth Amendment jurisprudence holds that prison officials violate the Eighth Amendment only when two requirements are met. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). First, the deprivation alleged must be objectively sufficiently serious, and second, the prison officials’ subjective state of mind must be one of deliberate indifference to prisoner health or safety. *Id.* In the case of very prolonged or permanent solitary confinement, the objective requirement should be met by the overwhelming opinion of social science research and practical experience that such confinement deprives a prisoner of an “identifiable human need such as food, warmth or exercise”—namely contact with other human beings—and causes prisoners significant psychological pain. *Wilson v. Seiter*, 501 U.S. 294, 304 (1991) (articulating the identifiable human need standard). At least for purposes of injunctive relief, the subjective element would also be satisfied, because prisoners confined to very prolonged solitary confinement and suffering significant psychological pain could show at both the time of bringing their lawsuit and at trial that the defendants knew of the psychological harm they were suffering. See *e.g.* *Helling v. McKinney*, 509 U.S. 25, 36 (1993) (“for purposes of injunctive relief ‘deliberate indifference’ should be determined in light of the prison authorities’ current attitudes and conduct”). As the Court noted in *Brennan*, “If, for example, the evidence before a district court establishes that an inmate faces an objectively intolerable risk of serious injury, the defendants could not plausibly persist in claiming lack of awareness . . .” 511 U.S. at 846 n.9; see also *Austin v. Hopper*, 15 F. Supp. 2d 1210, 1262 (M.D. Ala. 1998) (noting that even if prison officials had been unaware of the risk of substantial harm from the use of the whipping post, that would not foreclose a finding

Lower federal courts have generally looked to the duration of solitary confinement to determine whether a particular confinement constitutes “an atypical and significant hardship” for Fourteenth Amendment purposes.³³ While prolonged periods of several years in supermax confinement certainly is severe and undoubtedly causes significant psychological harm in many prisoners, to confine someone in such isolation for the rest of his or her life, or for very many years seems extreme—akin to a death sentence for life. To deprive someone of virtually all human contact for the rest of his or her life, or very many years is to reach levels of inhumanity that ought to be recognized as violative of the Eighth Amendment.

International law also supports the proposition that very lengthy, virtually permanent conditions of harsh solitary confinement constitute either torture or cruel, inhuman, and degrading treatment. The U.S. Supreme Court has increasingly looked to the experience of the international community, particularly European countries, in determining the meaning of cruel and unusual punishment in modern society.³⁴

International human rights bodies agree that “[s]olitary confinement can, in certain circumstances, amount to inhuman and degrad-

that the plaintiffs had met both the subjective and objective requirements of their Eighth Amendment challenge to the extent that the plaintiffs seek injunctive relief).

The real Eighth Amendment assessment of whether very prolonged or de facto permanent solitary confinement violates the Constitution is “whether society considers the risk that the prisoner complains of to be so grave that it violates contemporary standards of decency to expose *anyone* unwillingly to such a risk.” *Helling*, 509 U.S. at 36. While no case has thus far addressed that question, to condemn a prisoner to a situation with virtually no meaningful contact with other humans for the rest of their life or for very many years, is to strip the person of their humanity and to risk such serious psychological harm to their personality that such a practice should be held to violate contemporary standards of human decency.

³³ *Colon v. Howard*, 215 F.3d 227, 231–32 (2d Cir. 2000) (finding 305 days in segregated housing unit to be an atypical and significant hardship); *Shoats v. Horn*, 213 F.3d 140, 144 (3d Cir. 2000) (finding eight years in segregation atypical and significant); *Hatch v. District of Columbia*, 184 F.3d 846, 858 (D.C. Cir. 1999) (ruling that on remand, court should determine whether twenty-nine weeks of segregation is atypical); *Keenan v. Hall*, 83 F.3d 1083, 1087–89 (9th Cir. 1996) (considering length of segregation, which in that case was one year); *Williams v. Fountain*, 77 F.3d 372, 374 n.3 (11th Cir. 1996) (finding one year in solitary confinement atypical and significant); *Herron v. Schriro*, 11 F. App’x 659 (8th Cir. 2001) (upholding a judgment that segregation for more than thirteen years is atypical and significant hardship).

³⁴ *Roper v. Simmons*, 543 U.S. 551, 575 (2005) (“[A]t least from the time of the Court’s decision in *Trop*, the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment’s prohibition of ‘cruel and unusual punishments.’”).

ing treatment,”³⁵ especially when it is prolonged.³⁶ According to the Inter-American Court of Human Rights, “prolonged isolation and coercive solitary confinement are, in themselves, cruel and inhuman treatments, damaging to the person’s psychic and moral integrity and the right to respect of the dignity inherent to the human person.”³⁷ Because of its potentially deleterious effect on prisoners’ mental and physical health, the Committee Against Torture, the official body established pursuant to the Convention Against Torture (a treaty ratified by the United States and part of United States law), has recommended that the practice be abolished altogether.³⁸

The Committee Against Torture recently reviewed the practices of the United States in detaining prisoners and expressed concern about the extremely harsh regime imposed on detainees in “super-maximum prisons.” Specifically, the Committee was concerned about the prolonged isolation periods detainees are subjected to and

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- 35 See Eur. Comm. for the Prevention of Torture & Inhuman or Degrading Treatment or Punishment, *2nd General Report on the CPT’s Activities Covering the Period 1 January to 31 December 1991*, CPT ANNUAL GENERAL REPORTS, CPT/Inf(1992) 3, at ¶ 56, available at <http://www.cpt.coe.int/en/annual/rep-02.htm>; see also Eur. Comm. for the Prevention of Torture & Inhuman or Degrading Treatment or Punishment (CPT), *The CPT Standards: “Substantive” Sections of the CPT’s General Reports*, CPT ANNUAL GENERAL REPORTS, CPT/Inf/E (2002) 1, Rev. 2006, at 20, available at <http://www.cpt.coe.int/en/documents/eng-standards-prn.pdf> [hereinafter *The CPT Standards*]; Ramirez Sanchez v. France, App. No. 59450/00, 45 Eur. H.R. Rep. 49, ¶ 83 (2007).
- 36 U.N. Comm. Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Switzerland*, ¶ 133, U.N. Doc. CAT/A/49/44 (Apr. 20, 1994); U.N. Comm. Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: New Zealand*, ¶ 5, U.N. Doc. CAT/C/CR/32/4 (May 19, 2004); U.N. Human Rights Comm., *General Comment No. 20*, ¶ 6, U.N. Doc. CCPR/A/47/40/1992, Annex VI (1994). In its 1991 assessment of prisons in Spain, the ECPT found that subjecting a prisoner to a “regime of isolation” with “little or nothing by way of activity” for “very long periods” constitutes inhuman treatment. Eur. Comm. for the Prevention of Torture & Inhuman or Degrading Treatment or Punishment, *Report to the Spanish Government on the Visit to Spain from 1 to 12 April 1991*, CPT/Inf(1996) 9 [Part 1], ¶ 113, available at <http://www.cpt.coe.int/documents/esp/1996-09-inf-eng-1.pdf>.
- 37 Case of the Miguel Castro-Castro Prison v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 160, at ¶ 323 (Nov. 25, 2006); see also Velasquez Rodriguez Case, Inter-Am. Ct. H.R. (ser. C) No. 4, at 9 ¶ 156 (1988) (finding that “prolonged isolation and deprivation of communication are in themselves cruel and inhuman treatment”).
- 38 U.N. Comm. Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Denmark*, ¶ 14, U.N. Doc. CAT/C/DNK/CO/5 (July 16, 2007); U.N. Comm. Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Luxembourg*, ¶ 6, CAT/C/CR/28/2 (June 12, 2002); U.N. Comm. Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Norway*, ¶ 156, U.N. Doc. CAT/A/53/44 (May 6, 1998); U.N. Comm. Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Sweden*, ¶ 225, U.N. Doc. CAT/A/52/44 (May 6, 1997).

the effect such treatment has on their mental health. The Committee recommended that “[t]he State party should review the regime imposed on detainees in ‘supermaximum prisons,’ in particular the practice of prolonged isolation.”³⁹

The duration of confinement is an important factor in international law’s assessment of solitary confinement. While a short period of isolation will not be held to constitute inhuman or degrading treatment,⁴⁰ the former European Commission on Human Rights observed that “[i]t is generally acknowledged that all forms of solitary confinement without appropriate mental and physical stimulation are likely, *in the long term*, to have damaging effects, resulting in deterioration of mental faculties and social abilities.”⁴¹

Indeed, while the European Court of Human Rights has upheld lengthy periods of solitary confinement in extreme cases for prisoners such as one “considered one of the world’s most dangerous terrorists,” it has expressed concern “about the possible long term effects” of solitary confinement, “the particularly lengthy period” of such confinement, and required that for lengthy confinement in solitary, “a rigorous examination is called for by the Court to determine whether it was justified.”⁴² In the case of a convicted terrorist held in solitary confinement for eight years until transferred to a normal prison regime, the court upheld the prolonged solitary confinement but nevertheless emphasized “that solitary confinement, even in cases entailing only relative isolation, cannot be imposed on a prisoner indefinitely.”⁴³ Similarly, while the European Court of Human Rights upheld Turkey’s detention of Abdullah Öcalan—the leader of the Kurdistan Workers’ Party who had been convicted of responsibility in the killings of thousands of people—for six years in solitary confinement on the remote prison Imrali Island, the court pointedly noted that the detention had “thus far” not “reached the minimum level of

39 U.N. Comm. Against Torture, 36th Session, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Conclusions and Recommendations of the Committee Against Torture: United States of America*, CAT/C/USA/CO/2, at ¶ 36 (May 18, 2006), available at http://www.aclu.org/images/torture/asset_upload_file807_25607.pdf.

40 Thus, a military serviceman who was kept in solitary confinement for only ten days did not suffer inhuman or degrading treatment, as the Human Rights Committee found the punishment had no noticeable effect on his physical or mental state. Antti Vuolanne v. Finland, U.N. Doc. CCPR/C/35/D/265/1987 ¶¶ 2.2, 9.2 (Feb. 5, 1989).

41 Koskinen v. Finland, 18 Eur. H.R. Rep. CD 146 ¶ 73 (1994) (emphasis added).

42 Ramirez Sanchez v. France, App. No. 59450/00, 45 Eur. H.R. Rep. 49, ¶¶ 125, 136, 150 (2007).

43 *Id.* at ¶ 145.

severity required to constitute inhuman or degrading treatment.”⁴⁴ Subsequently, the European Committee for the Prevention of Torture (CPT), an official organ of the Council of Europe, visited the prison in May 2007 and found that eight and a half years of solitary confinement had caused a marked deterioration of Öcalan’s mental state and called upon the Turkish government to integrate him into a setting—either on the island prison or at another prison—“where contacts with other inmates and a wider range of activities are possible.”⁴⁵ While the Öcalan case is unique, it illustrates that even in extraordinary situations, and even where the prisoner has some access to the outside world,⁴⁶ the European community recognizes that very long-term, indefinite solitary confinement may constitute inhuman or degrading treatment.

II. MEANINGFUL REVIEW AND THE CONSTITUTION

While very prolonged solitary confinement raises serious Eighth Amendment concerns, the practice also implicates due process protections. A fundamental contradiction exists between the practice of very long-term solitary confinement in supermax or other segregation units in the United States and due process jurisprudence. The Supreme Court has held that prisoners confined in such segregation must be accorded meaningful periodic review to ensure that segregation is not a “pretext for indefinite confinement.”⁴⁷ When a prisoner is placed in a supermax, the due process requirement of meaningful periodic review requires that his or her behavior be re-evaluated at regular intervals to determine whether supermax confinement is still warranted. Yet the trend in prolonged supermax confinement is for the federal or state government to simply designate certain prisoners for essentially lifetime or very long solitary confinement. In such cases, the due process requirement of periodic review becomes meaningless. While prison officials may still go through the formality of providing review, the decision is predetermined, the review is a sham,

⁴⁴ Öcalan v. Turkey, App. No. 46221/99, 41 Eur. H.R. Rep., 45 ¶ 196 (2005).

⁴⁵ Eur. Comm. for the Prevention of Torture & Inhuman or Degrading Treatment or Punishment, *Report to the Turkish Government on the Visit to Turkey*, CPT/Inf (2008), ¶ 33.

⁴⁶ For example, in the *Ramirez Sanchez* case, the prisoner had access to books, newspapers, television, two hours of outdoor exercise, and one hour of indoor exercise per day, regular visits from lawyers, and no bar on family visits. *Ramirez Sanchez*, 45 Eur. H.R. Rep. at ¶¶ 128, 131.

⁴⁷ *Hewitt v. Helms*, 459 U.S. 460, 477 n.9 (1983).

and there is nothing the prisoner can do to get out of solitary confinement. Such a review violates due process.

Due process requires a “meaningful hearing.”⁴⁸ A hearing in which the outcome is predetermined is not “meaningful,” and therefore violates due process.⁴⁹ Moreover, the opportunity to be heard, so central to procedural due process, is rendered meaningless where the state makes a decision without first hearing from the person affected by its decision.⁵⁰

Various courts have held that prisoners are entitled to meaningful periodic hearings when confined in long-term solitary confinement and that those hearings must not be “simply perfunctory.”⁵¹ As one court put it, “[d]ue process is not satisfied where the periodic reviews are a sham”⁵² For example, in *Sourbeer v. Robinson*, the Third Circuit held that while “the monthly review procedures . . . were facially adequate,” and those procedures were followed by prison officials, the prisoner’s due process rights were nonetheless violated because the reviews “were perfunctory, thus denying [the prisoner] the most fundamental right of due process: a *meaningful* opportunity to be heard.”⁵³

Hewitt’s requirement of a meaningful periodic review presumes that the reviewing entity considers whether the prisoner’s conduct during the period since the most recent security review warrants re-

48 *Leary v. Daeschner*, 228 F.3d 729, 744 (6th Cir. 2000).

49 *See Ryan v. Ill. Dep’t of Children & Family Servs.*, 185 F.3d 751, 762 (7th Cir. 1999) (producing “evidence that the decision has already been made and any hearing would be a sham” sets forth a procedural due process claim); *Patrick v. Miller*, 953 F.2d 1240, 1245 (10th Cir. 1992) (holding that due process requires an impartial tribunal that has not predetermined facts); *Francis v. Coughlin*, 891 F.2d 43, 46 (2d Cir. 1989) (“[I]t is axiomatic that a prison disciplinary hearing in which the result is arbitrarily and adversely predetermined violates [the right of due process].”); *Wagner v. City of Memphis*, 971 F. Supp. 308, 319 (W.D. Tenn. 1997) (finding that the Mayor predetermined the hearing and thus violated plaintiffs’ procedural due process rights).

50 *See Hamby v. Neel*, 368 F.3d 549, 562 (6th Cir. 2004) (finding that, because plaintiffs were not permitted to demonstrate critical facts at the hearing, they were “denied a meaningful hearing”); *Matthews v. Harney County Sch. Dist. No. 4*, 819 F.2d 889, 893–94 (9th Cir. 1987) (finding that due process would be violated if plaintiff was not given adequate notice and an opportunity to be heard); *Washington v. Kirksey*, 811 F.2d 561, 564 (11th Cir. 1987) (“Due process of law does not allow the state to deprive an individual of property where the state has gone through the mechanics of providing a hearing, but the hearing is totally devoid of a meaningful opportunity to be heard.”).

51 *McClary v. Kelly*, 4 F. Supp. 2d 195, 212–13 (W.D.N.Y. 1998); *see also, e.g., Sheley v. Dugger*, 824 F.2d 1551, 1556 (11th Cir. 1987), *vacated on other grounds*, 833 F.2d 1420 (11th Cir. 1987); *Sourbeer v. Robinson*, 791 F.2d 1094, 1101 (3d Cir. 1986); *Giano v. Kelly*, 869 F. Supp. 143, 149–51 (W.D.N.Y. 1994).

52 *McClary*, 4 F. Supp. 2d at 213.

53 *Sourbeer*, 791 F.2d at 1101.

classification. Consideration of behavior is an integral component of a fair and meaningful hearing. For example, in *Giano v. Kelly*,⁵⁴ the court remarked that “there is no indication that [Warden] Kelly or the Committee ever considered anything that occurred subsequent to Giano’s placement [in solitary confinement].”⁵⁵ The decisionmaker must determine “if the reason for . . . confinement remains valid.”⁵⁶ Similarly, the Seventh Circuit has held that prison officials could not constitutionally commit a prisoner to solitary confinement for life and refuse to consider facts that might justify release from such confinement.⁵⁷

In *Wilkinson v. Austin*, the Supreme Court held that prisoners confined at the Ohio supermaximum prison had a due process right to a statement of the reasons why they were placed or retained at the supermax, which would “serve[] as a guide for future behavior.”⁵⁸ The procedural requirement that prison officials provide the prisoner with a statement of reasons as to why he is being retained in solitary confinement implies that the officials must provide something more than a general statement that the prisoner is very dangerous. The statement of reasons must explain what the prisoner must do to work their way out of solitary confinement. Otherwise, the statement would not serve the function of providing the prisoner with a “guide for future behavior.”

A recent district court decision in *Austin v. Wilkinson*, a class action challenging the state’s practices at the Ohio supermax—the Ohio State Penitentiary (“OSP”)—held that procedural due process requires prison officials to inform prisoners in their annual reviews as to what they must do to be eligible to get out of supermax confinement.⁵⁹ At OSP, supermax prisoners face a stark regime of isolation typical of most supermax prisons. As in most supermax prisons, prisoners are locked into small cells for twenty-three hours a day with solid steel doors preventing almost all communication. At OSP, prison officials welded metal strips along the sides and bottom of the metal doors which further prevent conversation or communication between prisoners. Prisoners have very limited privileges. They have

54 *Giano v. Kelly*, No. 89-CV-727(C), 2000 WL 876855 (W.D.N.Y. May 16, 2000).

55 *Id.* at *15.

56 *Id.* at *17.

57 *United States v. Johnson*, 223 F.3d 665, 673 (7th Cir. 2000).

58 545 U.S. 209, 226 (2005) (citing *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 15 (1979)).

59 *Austin v. Wilkinson (Austin IV)*, No. 4:01-CV-71, 2007 WL 2840352, at *6–7 (N.D. Ohio Sept. 27, 2007).

no contact visits, no work opportunities other than to serve as porters, and limited educational programs.⁶⁰

Austin v. Wilkinson has a lengthy history. In 2001, a class of plaintiffs brought a lawsuit claiming, *inter alia*, that their placement and retention at OSP violated procedural due process. The District Court and Court of Appeals agreed.⁶¹ The Supreme Court, however, rendered a mixed verdict, affirming the lower courts' holdings that a prisoner's placement at the supermax constituted an "atypical and significant hardship" that gave rise to a liberty interest, but reading Ohio's new procedures, which it had adopted after the litigation was instituted (in fact on the eve of trial), as providing the prisoners with sufficient due process protections.⁶²

The Supreme Court's decision did not, however, resolve the *Austin* case, which continued for almost three years after the Court's decision was handed down. In the aftermath of the Court's decision, it turned out that Ohio was not following, nor was it prepared to follow, the procedures that it had represented to the Supreme Court that it would implement.⁶³ The District Court found that Ohio's actual practice was violating the Supreme Court's decision as to what constituted adequate due process, and ordered Ohio to change its practices.⁶⁴

In addition, it became clear in the course of the litigation that Ohio had determined that certain prisoners would be confined permanently at OSP in solitary confinement. The plaintiffs sought on various occasions to have the District Court address this practice, by

60 For a description of the conditions at OSP supermax, see generally *Austin v. Wilkinson* (*Austin I*), 189 F. Supp. 2d 719 (N.D. Ohio 2002). When OSP was constructed, it had no outdoor recreation facilities; prisoners were allowed to recreate individually in another cell down the hall which was almost identical to their own cell except that it had a pull-up bar and narrow slats in the wall which allowed in some fresh air, which Ohio officials termed "outdoor recreation." *Id.* at 724. Plaintiffs challenged the recreation facilities as violations of the Eighth Amendment, and as part of an overall settlement of the Eighth Amendment claims, the state agreed to construct outdoor recreation facilities. *Id.* at 725, n.6. Throughout the course of the litigation, the State has also made other modifications to the conditions under which the supermax prisoners are held at OSP, which have improved conditions somewhat, even for those prisoners still held as long-termers. Most importantly, after the District Court's order went into effect, the State dramatically reduced the number of prisoners held in supermax conditions, and turned a significant percentage of the prison into a maximum security, but not supermaximum facility.

61 See *Austin I*, 189 F. Supp. 2d at 719; *Austin v. Wilkinson* (*Austin IV*), 372 F.3d 346 (6th Cir. 2004).

62 *Wilkinson*, 545 U.S. 209.

63 *Austin v. Wilkinson* (*Austin VI*), 502 F. Supp. 2d 660 (N.D. Ohio 2006).

64 *Id.*

way of either the Eighth Amendment, substantive due process, or procedural due process. Finally, in September 2007, they succeeded in getting the district court to address the procedural due process issues.⁶⁵ The district court issued an opinion finding that some prisoners were indeed being incarcerated at OSP on a permanent or semi-permanent basis, and holding that Ohio officials had violated these prisoners' procedural due process rights by not considering their positive behavior while at OSP and by not giving them notice of what they could do to work their way out of OSP. The court held that the prison officials' notices to prisoners that the inmate's prior "offense is so severe that [he] should remain confined at the OSP for many years regardless of [his] behavior while confined at the OSP" did not provide the inmate with "a reasoned decision . . . as to what [he] must do to reduce [his classification status]," and get out of supermax confinement.⁶⁶

International law also requires a meaningful periodic review of a prisoner's long-term solitary confinement to consider the prisoner's behavior while in prison. The European Court of Human Rights recently held that:

[I]n order to avoid any risk of arbitrariness, substantive reasons must be given when a protracted period of solitary confinement is extended. The decision should thus make it possible to establish that the authorities have carried out a *reassessment that takes into account any changes in the prisoner's circumstances, situation or behaviour*. The statement of reasons will need to be increasingly detailed and compelling the more time goes by.⁶⁷

The Committee Against Torture, the European Court of Human Rights, and the Inter-American Court of Human Rights have emphasized that solitary confinement should be "an exceptional measure of

⁶⁵ *Austin v. Wilkinson (Austin VII)*, No. 4:01-CV-71, 2007 WL 2840352, at *7 (N.D. Ohio Sept. 27, 2007); *see also Austin VI*, 502 F. Supp. 2d at 673–74 (refusing to grant long-termers specific relief for alleged due process violations).

⁶⁶ *Austin VII*, 2007 WL 2840352, at *7. Similarly, the Eighth Circuit has recently concluded that a prisoner had a due process claim where he was held in solitary confinement for over eight years and had been given review hearings, but the defendants had not shown that they had given him meaningful hearings in which they considered his behavior and demeanor while in segregation and had not simply given "undue weight" to his past conduct. *Williams v. Norris*, 277 F. App'x 647, 649–50 (8th Cir. 2008).

To the same general effect, a recent settlement of a class action case challenging aspects of the confinement of prisoners housed in solitary confinement in the Mississippi State Penitentiary provided that the prison officials were required to implement a plan whereby all non-death row prisoners in the unit may, "through good behavior and a step-down system, earn their way to less restrictive housing." Consent Decree at 4, *Presley v. Epps*, No. 4:05CV 00148-MPM-JAD (N.D. Miss. Mar. 6, 2006).

⁶⁷ *Ramirez Sanchez v. France*, App. No. 59450/00, 45 Eur. H.R. Rep. 49, ¶ 139 (2007) (emphasis added).

limited duration” that is subject to strict judicial review both when it is applied and when it is prolonged.⁶⁸ The European Court has held that “it is essential that the prisoner should be able to have an independent judicial authority review the merits of and reasons for a prolonged measure of solitary confinement.”⁶⁹ Similarly, the Inter-American Commission on Human Rights has observed that the judicial guarantees enshrined in the American Convention on Human Rights are “applicable to all types of proceedings,” including decisions to place or retain prisoners in solitary confinement.⁷⁰ So too, the United Nations Human Rights Committee agrees that the right to have a judge determine the lawfulness of one’s detention, embodied in Article 9(4) of the International Covenant on Civil and Political Rights,⁷¹ applies to all people who are deprived of liberty, and is applicable to the placement and retention of prisoners in solitary confinement.⁷²

Supermaximum security prisons that place inmates in solitary confinement for long periods of time without providing meaningful re-

68 See U.N. Comm. Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Japan*, ¶ 18, U.N. Doc. CAT/C/JPN/CO/1 (May 18, 2007); U.N. Comm. Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Denmark*, ¶ 14, U.N. Doc. CAT/C/DNK/CO/5 (May 14, 2007); U.N. Comm. Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: France*, ¶ 19, U.N. Doc. CAT/C/FRA/CO/3 (Nov. 24, 2005); U.N. Comm. Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Luxembourg*, ¶ 6, U.N. Doc. CAT/C/CR/28/2 (May 15, 2002); U.N. Comm. Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Denmark*, ¶ 7, U.N. Doc. CAT/C/CR/28/1 (May 10, 2002); see also International Covenant on Civil and Political Rights, art. 10(2), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR]; American Convention on Human Rights, art. 5(4), 1144 U.N.T.S. 123 (1969); *Ramirez Sanchez*, 45 Eur. H.R. Rep. at ¶¶ 139, 145; *Case of the Miguel Castro-Castro Prison v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 160, at ¶ 323 (Nov. 25, 2006) (“[S]olitary confinement may only be used in an exceptional manner . . .”); *Case of De La Cruz-Flores v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 115, at ¶ 127 (Nov. 18, 2004).

69 *Ramirez Sanchez*, 45 Eur. H.R. Rep. at ¶ 145.

70 *Special Report on the Human Rights Situation at the Challapalca Prison, Department of Tacna, Republic of Peru*, Inter-Am. C.H.R., Report No. OEA/Ser.L/V/II.118, doc. 3 ¶¶ 70–71 (2003). The Commission found a violation of Article 8 when prison officials subjected inmates to thirty days of solitary confinement without following any type of procedure or allowing the prisoners to defend themselves. *Id.*

71 ICCPR, 999 U.N.T.S. 171 (“Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.”).

72 U.N. High Comm’r for Human Rights, *General Comment No. 8: Right to Liberty and Security of Persons (Art. 9)*, ¶ 1, A/37/40 (1982). *Antti Vuolanne v. Finland*, U.N. Doc. CCPR/C/35/D/265/1987 ¶ 9.6 (Feb. 5, 1989).

view of their situations therefore violate international human rights law according to the jurisprudence of the European Court, the Inter-American Court and Commission, and the U.N. Human Rights Committee and Committee Against Torture. That American supermax prisons impose solitary confinement as a normal, rather than an “exceptional,” practice for thousands—not just a handful—of prisoners, and that the duration of confinement is often very lengthy, runs counter to the core principles that international human rights law has established governing the use of solitary confinement. Furthermore, when prison officials prolong an inmate’s solitary confinement without providing him with written justification or reviewing his circumstances, situation, and behavior, or without affording him the opportunity to appeal the decision to some judicial body, they have violated his right to due process.

III. MENTAL PAIN AND THE EIGHTH AMENDMENT

The justification that prison officials provide for the use of prolonged solitary confinement in the United States is the need for security. Prison officials claim that certain gang members or leaders, prisoners who engage in violence against other prisoners, or terrorists cannot be housed in less restrictive conditions because of the danger they pose to other prisoners or prison personnel, or because they will be in communication with their violent associates outside of prison.⁷³ Moreover, prison officials claim that the very restrictive conditions in modern supermax prisons do not afford prisoners any opportunity to misbehave, since they are essentially sitting alone in their cell for virtually the entire day and are under heavy restraints whenever they are moved from their cell. Therefore, officials often claim that a prisoner’s good behavior with no misconduct for many years at the supermax does not support placing very dangerous prisoners in a less restrictive environment because his good behavior is simply a reflection of the lack of opportunity to commit misconduct and not of any change in the prisoner’s attitude. The prisoner therefore has no way to demonstrate that he has changed and is no longer dangerous. His good behavior at the supermax does not help him get out of solitary confinement. This leads to the situation in the Ohio supermax and other supermaxes in which some prisoners are being held in solitary

⁷³ See, e.g., *Wilkinson v. Austin* (*Austin V*), 545 U.S. 209, 229 (2005) (“Prolonged confinement in Supermax may be the State’s only option for the control of some inmates . . .”).

confinement indefinitely, irrespective of their behavior at the supermax.⁷⁴

There are three answers to this conundrum. The first is that prison officials can develop mechanisms to gradually permit all prisoners housed in supermax confinement to have greater contact with other prisoners in supervised conditions so as to afford them an opportunity to demonstrate that they can be moved to less restrictive conditions. For example, at the Ohio supermax, prison officials constructed outdoor recreation facilities that permit small groups of prisoners to recreate together (“congregate recreation”).⁷⁵ These recreation units are closely observed by prison guards, so that it ought to be possible for all the supermax prisoners to be afforded the opportunity to have congregate recreation in a secure environment and for prison officials to determine if their behavior warrants a less restrictive placement. In response, prison officials sometimes claim that there are some prisoners who are so inherently dangerous that even if they can demonstrate that they do not misbehave when allowed to interact with other prisoners, the potential for them to commit seriously violent misconduct in the future warrants a very long solitary confinement term. Even assuming that officials could demonstrate such a risk for a handful of prisoners, if those prisoners could show good behavior over a significant period of time, they should not be confined in solitary indefinitely, but placed in very supervised circumstances with other prisoners. The point is that even for those prisoners, it is not consistent with our notions of human decency and dignity to simply warehouse them in an isolated cell for the rest of their lives, but rather prison officials need to develop solutions that accord them some reasonable amount of human contact combined with appropriate security measures.

Second, prison officials could improve conditions at supermax prisons so that even prisoners retained there for lengthy periods will have more stimulation with access to books, television, and radio, and more frequent communication with and visits from family and friends. There is simply no strong security need for the total social isolation that exists at some supermax prisons.

Finally, and perhaps most importantly, the courts and prison officials must recognize the serious mental and emotional pain and suffering that prolonged solitary confinement causes many prisoners.

⁷⁴ See *Austin VI*, 502 F. Supp. 2d 660 (N.D. Ohio 2006).

⁷⁵ *Austin v. Wilkinson*, 2002 U.S. Dist. LEXIS 27430 (N.D. Ohio April 5, 2002) (approving settlement providing for new, outdoor recreation facilities at Ohio supermax).

While courts have recognized that placing seriously mentally ill prisoners in prolonged solitary confinement risks causing them mental pain that rises to the level of cruel and unusual punishment, many ordinary prisoners also face the risk of suffering serious mental pain when placed in long-term supermax confinement. Nonetheless, the courts, prison officials, and legislators have been unwilling to recognize that significant risk of mental pain and illness as constituting an Eighth Amendment violation.

A significant part of the reason for this judicial, executive, and legislative lack of recognition of the mental suffering caused many prisoners by prolonged solitary confinement is the discounting of mental pain in the United States' approach to cruel and inhuman treatment. For example, while the courts have clearly recognized that psychological harm inflicted by prison officials can constitute an Eighth Amendment violation,⁷⁶ Congress, in Section 1997e(e) of the Prison Litigation Reform Act of 1995, provided that "[n]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury."⁷⁷ This provision reflects an often-articulated view that, because claims for mental and emotional injuries are seen as easily feigned or exaggerated, they should be limited or denied in the absence of observable physical injury.⁷⁸ While courts have generally held that § 1997e(e) does not prohibit claims for injunctive or declaratory relief because to do so might render the statute unconstitutional,⁷⁹ and some courts have held that nominal and punitive damages are available where prison-

76 Calhoun v. DeTella, 319 F.3d 936, 939 (7th Cir. 2003) (finding that the strip search of male prisoners in front of female prison guards sufficed for an Eighth Amendment claim if the search was "conducted in a harassing manner intended to humiliate and inflict psychological pain"); Babcock v. White, 102 F.3d 267, 273 (7th Cir. 1996) ("[T]he Constitution does not countenance psychological torture merely because it fails to inflict physical injury."); Shakka v. Smith, 71 F.3d 162, 166 (4th Cir. 1995) (stating that "significant . . . emotional injury" can constitute Eighth Amendment pain); Hobbs v. Lockhart, 46 F.3d 864, 869 (8th Cir. 1995) (finding that allegations of severe emotional distress, nightmares, and constant fears set forth a constitutional claim); see also Hudson v. McMillian, 503 U.S. 1, 16–17 (1992) (Blackmun, J., concurring). See generally James E. Robertson, *Psychological Injury and the Prison Litigation Reform Act: A "Not Exactly," Equal Protection Analysis*, 37 HARV. J. ON LEGIS. 105 (2000).

77 Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, § 803(d), 110 Stat. 1321 (1996), codified at 42 U.S.C. § 1997e(e).

78 See Zehner v. Trigg, 952 F. Supp. 1318, 1325 (S.D. Ind. 1997), *aff'd* 133 F.3d 459 (7th Cir. 1997).

79 See Davis v. District of Columbia, 158 F.3d 1342, 1346 (D.C. Cir. 1998); Zehner, 133 F.3d at 462.

ers allege violations of constitutional rights,⁸⁰ various courts have denied plaintiffs damage relief even where the prisoner was clearly subjected to abusive treatment by prison officials. Thus, for example, the Eleventh Circuit dismissed a damages claim in which prison officials had “ordered prisoners to strip naked, and performed body cavity searches while members of the opposite sex were present; physically harassed some prisoners . . . made harassing comments to an inmate because of his perceived sexual orientation; and ordered one prisoner to ‘tap dance’ while naked.”⁸¹ So too, while some courts have held that rape or sexual assault constitute a physical injury within the meaning of 1997e(e),⁸² several courts have held that “the bare allegation of sexual assault” does not constitute a physical injury under the statute.⁸³ Prisoners have also been denied relief because of the physical injury requirement even when they were placed in cells with human waste and subjected to the screams of psychiatric patients;⁸⁴ or forced to sleep for two months, despite repeated complaints, on a concrete floor in a cramped cell with a mentally ill HIV-positive prisoner who urinated on him;⁸⁵ or had urine thrown at her by a guard which splashed on her face and shirt.⁸⁶

The PLRA preclusion of a damage action to prisoners who suffer only psychological injuries violates the United States’ international obligations. The U.N. Committee Against Torture recently expressed concern over PLRA’s § 1997e(e) and indicated that it raises an issue under Article 14 of the Torture Convention, which requires that each victim of torture have “an enforceable right to fair and adequate

80 *E.g.*, *Hutchins v. McDaniels*, 512 F.3d 193, 196–98 (5th Cir. 2007); *Royal v. Kautzky*, 375 F.3d 720, 723 (8th Cir. 2004); *Calhoun*, 319 F.3d at 941–42; *Thompson v. Carter*, 284 F.3d 411, 418 (2d Cir. 2002); *Allah v. Al-Hafeez*, 226 F.3d 247, 251 (3d Cir. 2000). *But see Harris v. Garner*, 190 F.3d 1279, 1287–89 (11th Cir. 1999) (holding that only injunctive relief is available).

81 *Harris*, 190 F.3d at 1282 (setting forth facts), *rev’d en banc*, 216 F.3d 970 (11th Cir. 2000) (holding that claims of prisoners who were released after the lawsuit was filed had to be dismissed).

82 *Liner v. Goord*, 196 F.3d 132, 135 (2d Cir. 1999).

83 *Hancock v. Payne*, No. Civ.A.1.03CV671JMRJMR, 2006 WL 21751, at *3 (S.D. Miss. Jan. 4, 2006); *Smith v. Shady*, No. 3:CV-05-2663, 2006 WL 314514, at *2 (M.D. Pa. Feb. 9, 2006). *See Margo Schlanger & Giovanna Shay, Preserving the Rule of Law in America’s Prisons: The Case for Amending the Prison Litigation Reform Act* 11 U. PA. J. CONST. L. 139 (2009); Stephen B. Bright, Statement Regarding the Prison Abuse Remedies Act to the Subcommittee on Crime, Terrorism and Homeland Security, Committee on the Judiciary, United States House of Representatives (Apr. 22, 2008).

84 *Harper v. Showers*, 174 F.3d 716, 717–20 (5th Cir. 1999).

85 *Watts v. Gaston*, No. 97-0114-CB-M, 1999 U.S. Dist. LEXIS 6593 (S.D. Ala. Apr. 1, 1999).

86 *Fackler v. Dillard*, No. 06-10466, 2006 WL 2404498 (E.D. Mich. July 7, 2006).

compensation.”⁸⁷ The mere availability of an injunctive remedy to prisoners who are psychologically tortured does not satisfy the Convention: instead, they must be able to receive compensation for their injuries. In many cases, injunctive relief will not be available, and in others it is the potential of officials’ personal liability that serves as the most important deterrent of misconduct. As the respected human rights group Human Rights Watch has argued, the PLRA “cannot be squared with US international human rights obligations.”⁸⁸

That prison officials may have a legitimate penological reason for placing a prisoner in prolonged solitary confinement does not make such placement constitutional if the officials are deliberately indifferent to serious mental harms that such placement is causing the prisoner.⁸⁹ But all too often, prison officials and courts view prisoners’ allegations of mental harm as made up or manipulative. For example, prisoners in supermaxes who make repeated attempts to commit suicide or exhibit other serious psychotic symptoms are often not viewed as suffering serious mental illness but merely as manipulative, using suicide attempts as a tactic to get out of the supermax.⁹⁰ Similarly, U.S. officials at Guantanamo did not view detainees held there who attempted or committed suicide as suffering from serious mental pain, but merely as using attempted suicide as a tactic of warfare.⁹¹ The failure to understand the depth and extent of mental pain that many prisoners feel when kept in solitary confinement for many years—even when the prisoner makes a serious suicide attempt—is a reflection of the view that such mental pain is not serious.

The diminution of the seriousness of psychological and emotional harm can also be seen in the United States’ position on torture in our international agreements. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in-

87 United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. No. 51, U.N. Doc. A/39/51 (1984).

88 *Proposed Revisions to the Prison Litigation Reform Act: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security, and the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. (2007) (statement of Human Rights Watch), available at <http://hrw.org/english/docs/2007/11/07/usdom17277.htm>. On November 7, 2007, a bill was introduced before the U.S. House of Representatives that would amend the law by striking § 1997e(e): the Prison Abuse Remedies Act of 2007, H.R. 4109, 110th Cong., 1st Session (Nov. 7, 2007).

89 *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

90 *Jones’El v. Berge*, 164 F. Supp. 2d 1096, 1107 (W.D. Wis. 2001).

91 James Risen & Tim Golden, *3 Prisoners Commit Suicide at Guantánamo*, N.Y. TIMES, June 11, 2006, at 1 (quoting a U.S. official who viewed the suicides not as “an act of desperation, but [as] an act of asymmetrical warfare waged against us”).

cludes in its definition of torture “any act by which severe pain or suffering, whether *physical or mental*, is intentionally inflicted.”⁹² While the definition clearly includes mental or physical pain, the United States defined mental torture narrowly when it ratified the Convention by submitting an understanding with its ratification. According to U.S. officials, the understanding was necessary to ensure that a vague and ambiguous concept of mental torture, which some international law experts argued might preclude solitary confinement, was not imposed on U.S. officials.⁹³ The United States’ understanding stated that:

in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from

- (1) the intentional infliction or threatened infliction of severe physical pain or suffering;
- (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
- (3) the threat of imminent death; or
- (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.⁹⁴

Several aspects of this understanding are in tension with international norms. The requirement that the victim suffer “prolonged mental harm” is not contained in the Torture Convention. The Department of Justice at one point interpreted “prolonged mental harm” as “significant psychological harm of significant duration, e.g., lasting for months or even years.”⁹⁵ Examples of this type of harm in-

⁹² G.A. Res. 39/46, Annex., 39 U.N. GAOR Supp. No. 5 at 197, U.N. Doc. A/39/51 (1984), 1465 U.N.T.S. 85 (emphasis added).

⁹³ See *Convention Against Torture: Hearing Before the Senate Comm. on Foreign Relations*, 101st Cong. 13, 17 (1990) (testimony of Deputy Assistant Attorney General Mark Richard).

⁹⁴ Resolution of Advice and Consent to Ratification of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 138 CONG. REC. S17486-01 (daily ed. Oct. 27, 1990). See also information regarding reservations, understandings, and declarations to the Convention Against Torture at the website of the Office of the High Commissioner for Human Rights at <http://www2.ohchr.org/english/bodies/ratification/9.htm>.

⁹⁵ Memorandum from Jay C. Bybee, Office of Legal Counsel, U.S. Dep’t of Justice, to Alberto Gonzales, Counsel to the President, at 1 (Aug. 1, 2002), in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* 172 (Karen J. Greenberg & Joshua L. Dratel eds., 2005) [hereinafter Bybee Memo]. The Bybee memo was subsequently withdrawn and superseded by a memorandum issued by Acting Assistant Attorney General Daniel Levin on December 30, 2004. Legal Standards Applicable Under 18 U.S.C. §§ 2340–2340A, Memorandum

clude the development of posttraumatic stress disorder or chronic depression which last for months or years.⁹⁶ According to the Department of Justice, “this understanding ensured that mental torture would rise to a severity seen in the context of physical torture.”⁹⁷ In response to this understanding, the Committee Against Torture instructed the United States that “acts of psychological torture, prohibited by the Convention, are not limited to ‘prolonged mental harm’ as set out in the State party’s understandings . . . but constitute a wider category of acts, which cause severe mental suffering, irrespective of their prolongation or its duration.”⁹⁸

The second inconsistency in the U.S. position comes from its conclusion that mental torture may *only* result from the four acts enumerated in its understanding, as the list is exhaustive.⁹⁹ Legal memoranda have also provided greater specificity to the meaning of these acts: in order to constitute torture, the administration of drugs must produce “an extreme effect” such that it “penetrate[s] to the core of an individual’s ability to perceive the world around him, substantially interfering with his cognitive abilities, [or] fundamentally alter[s] his personality.”¹⁰⁰ Examples of these effects must include dementia, significant memory impairment, obsessive compulsive disorder, or

Opinion for the Deputy Attorney General from Acting Assistant Attorney General Daniel Levin, December 30, 2004, *available at* <http://www.usdoj.gov/olc/18usc23402340a2.htm> [hereinafter Levin Memo]. The Levin memo also concluded that mental harm must be of some lasting duration to be “prolonged,” but did not agree that the mental harm would have to last for at least “months or even years.” *Id.* at n.24. The Levin memo cited *Villeda Aldana v. Fresh Del Monte Produce, Inc.* 305 F. Supp. 2d 1285 (S.D. Fla. 2003), in which the court rejected a claim that individuals who had been held at gunpoint overnight and repeatedly threatened with death suffered prolonged mental harm. Fortunately, that court ruling was subsequently reversed by the Eleventh Circuit Court of Appeals. *Aldana v. Del Monte Fresh Produce* 416 F. 3d 1242, 1252–53 (11th Cir. 2005), *cert. denied*, 549 U.S. 1032 (2006).

96 U.S. DEP’T OF DEF., WORKING GROUP REPORT ON DETAINEE INTERROGATIONS IN THE GLOBAL WAR ON TERRORISM: ASSESSMENT OF LEGAL, HISTORICAL, POLICY, AND OPERATIONAL CONSIDERATIONS 11 (Apr. 4, 2003), *available at* http://www.dod.mil/pubs/foi/detainees/working_grp_report_detainee_interrogations.pdf [hereinafter WORKING GROUP REPORT].

97 Bybee Memo, *supra* note 95, at 18; Levin Memo, *supra* note 95 (“We conclude that Congress intended the list of predicate acts to be exclusive—that is, to constitute the proscribed ‘severe mental pain or suffering’ under the statute, the prolonged mental harm must be caused by acts falling within one of the four statutory categories of predicate acts.”).

98 U.N. Comm. Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: United States of America*, ¶ 13, U.N. Doc. CAT/C/USA/CO/2 (May 18, 2006).

99 WORKING GROUP REPORT, *supra* note 96, at 12; Bybee Memo, *supra* note 95, at 1.

100 WORKING GROUP REPORT, *supra* note 96, at 15.

“pushing someone to the brink of suicide.”¹⁰¹ Similarly, the mere threat that an individual might suffer death is not a sufficient predicate act to induce mental torture: instead, the government considers mock executions or Russian Roulette to be threats that might cause mental torture.¹⁰²

The restriction of the definition of mental torture to the four enumerated acts means that all sorts of vicious, degrading, and inhuman treatment of prisoners or detainees would not constitute torture unless it caused severe physical pain. Under this definition, many of the actions of American prison guards at Abu Ghraib would not be torture. Moreover, under this definition the placement of even mentally ill prisoners in prolonged solitary confinement would not constitute torture even if the mental pain caused thereby drove the prisoner to commit suicide. While such actions would still constitute inhuman and degrading treatment, the United States reservation is yet another reflection of the lack of recognition accorded to mental pain in the context of the treatment of prisoners.

CONCLUSION

The increasing practice of condemning those prisoners which state or federal officials consider very dangerous to very long, indefinite, or even permanent confinement in supermax prisons is inhuman. Courts, legislators, and prison officials ought to recognize the serious psychological pain such isolation from human contact causes many prisoners. One important aspect of human existence is social contact with others; such contact does constitute a basic human need. Moreover, when officials confine someone permanently or virtually permanently to supermax existence, it violates the due process requirement that prisoners be accorded meaningful review of solitary confinement, and that even very dangerous prisoners should be given some notice and mechanism to improve their behavior and work their way back into a normal prison existence.

¹⁰¹ *Id.* at 15–16.

¹⁰² *Id.*