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SUPERMAX CONFINEMENT IN U.S. PRISONS

Committee on
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THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

Supermax Confinement in U.S. Prisons

By The Committee on International Human Rights

I. Introduction

During the past three decades, “supermax” confinement has become a widespread and integral element of prison administration in the United States.¹ As many as 80,000 prisoners are held in supermax facilities or in isolation units within prisons. These prisoners endure conditions of extreme sensory deprivation for months or years on end, an excruciating experience in which the prisoner remains isolated from any meaningful human contact. Access to a telephone, books, magazines, radio, television, even sunlight and outside air may be denied or severely restricted.²

¹ The term “supermax” is used to describe “the new, specialized segregation facilities.” Human Rights Watch, *Ill-Equipped: U.S. Prisons and Offenders with Mental Illness* 146 (2003). In supermax, “[p]risoners typically spend their waking and sleeping hours locked alone in small, sometimes windowless cells, some of which are sealed with solid steel doors. They are fed in their cells, their food passed to them on trays through a slot in the door. Between two and five times a week, they are let out of their cells for showers and solitary exercise in a small enclosed space. Most have little or no access to education, recreational, or vocational activities or other sources of mental stimulation.” *Id.*

² Two Supreme Court justices, in describing a supermax prison that denied inmates any reading material, described supermax as “perilously close to a state-sponsored effort at mind control.” *Beard v. Banks*, 548 U.S. 521, 552 (2006) (Stevens, J., and Ginsburg, J., dissenting) (dissenting from a ruling in which the Court held that inmates can be deprived of reading material while in supermax confinement without running afoul of the First Amendment).

The policy of supermax confinement, on the scale which it is currently being implemented in the United States, violates basic human rights. We believe that in many cases supermax confinement constitutes torture under international law according to international jurisprudence³ and cruel and unusual punishment under the U.S. Constitution. The time has come to critically review and reform the widespread practice of supermax confinement.

This Report first describes supermax confinement in the United States, then surveys the surprisingly limited role of courts in reviewing that practice and concludes with a number of recommendations that suggest the outlines of the reforms we believe are needed. These reforms should encompass not just the administration of supermax confinement in state and federal prisons, but also the legal framework within which this practice is reviewed by courts.

Courts in recent years have largely deferred to prison administrators with regard to the implementation and expansion of supermax confinement, stretching the limits of constitutionality so that supermax is largely immunized from judicial review. Indeed, as long as a prisoner receives adequate food and shelter, the extreme sensory deprivation that characterizes supermax confinement will, under current case law, almost always be considered within the bounds of permissible treatment.

³ See, e.g., Jules Lobel, *Prolonged Solitary Confinement and the Constitution*, 11 U. Pa. J. Const. Law 115, 130-31 (2008) (“Supermaximum security prisons that place inmates in solitary confinement for long periods of time without providing meaningful review of their situations . . . 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.”).

Although supermax confinement does not produce visible scars or bruises, its impact on prisoners can be comparable to physical torture. As Senator John McCain, who experienced five years of solitary confinement as a prisoner of war, wrote, “[i]t’s an awful thing, solitary. It crushes your spirit and weakens your resistance more effectively than any other form of mistreatment.”⁴ Numerous studies confirm the psychological damage caused by supermax confinement, and the adverse effects are especially pronounced for mentally ill prisoners.⁵ As two leading medical authorities recently wrote, “[j]ust about everyone who has taken a serious look a long-term isolated confinement (as in supermaximum security or long-term administrative segregation) has concluded there is serious harm from long-term isolated confinement.”⁶

The inhumane conditions of supermax are well documented by numerous federal court decisions, blue ribbon commissions, journalists and the media.⁷ One district judge observed the following about inmates in supermax confinement:

⁴ John McCain, *Faith of My Fathers* 206 (Random House, 1999).

⁵ See, e.g., Jeffrey L. Metzner and Jamie Fellner, *Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for Medical Ethics*, *J. Am. Acad. Psychiatry Law*: 104-08 (2010) (“The adverse effects of solitary confinement are especially significant for persons with serious mental illness”).

⁶ Stuart Grassian and Terry Kupers, *The Colorado Study vs. the Reality of Supermax Confinement*, *Correctional Mental Health Report*, Vol. 13, No. 1 (May/June 2011), at 1, 9. *But see* Jeffrey L. Metzner and Maureen L. O’Keefe, *Psychological Effects of Administrative Segregation: The Colorado Study*, *Correctional Mental Health Report*, Vol. 13, No. 1 (May/June 2011), at 1-2, 12-14 (one-year study at Colorado State Penitentiary of psychological effects of administrative segregation concluding that supermax confinement may not cause deterioration of mental health).

⁷Peter Yost’s powerful 2010 documentary *Solitary Confinement*, which estimates that 80,000 persons are held in solitary confinement in the United States, provides a

[Inmates] can go weeks, months or potentially years with little or no opportunity for normal social contact with other people [They] remain confined to their cells for 22 and 1/2 hours of each day. Food trays are passed through a narrow food port in the cell door. Inmates eat all meals in their cells. Opportunities for social interaction with other prisoners or vocational staff are essentially precluded [S]ome 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.⁸

The overriding rationale for supermax confinement is to impose order and maintain safety in the prison environment.⁹ Other related factors for the spread of supermax confinement are the need to manage gang activity and reduce violence against prison staff and inmates. The use of supermax became more prevalent because of its perceived effectiveness in achieving these goals. See Mears and Watson, *infra* note 28, at 232-34.

The unmitigated suffering caused by supermax confinement, however, cannot be justified by the argument that it is an effective means to deal with difficult prisoners.¹⁰ The issue, we believe, is not whether supermax achieves its purposes

harrowing portrayal of inmates subjected to long-term solitary confinement at Colorado State Penitentiary. In addition, Internet sites such as www.solitarywatch.com and www.supermaxed.com provide coverage.

⁸ *Madrid v. Gomez*, 889 F. Supp. 1146, 1129 (N.D. Cal. 1995).

⁹ See *Wilkinson v. Austin*, 545 U.S. 209, 229 (2005) (“Prolonged confinement in Supermax may be the State’s only option for the control of some inmates”).

¹⁰ In July 2011, hundreds of prisoners held in the Security Housing Unit at Pelican Bay State Prison in California went on a hunger strike to protest conditions, including “prolonged solitary confinement in small windowless concrete boxes with little to no human interaction and other severe physical deprivations.” Press Release, ACLU, ACLU of California Statement on California Prison Hunger Strike (July 19, 2011), *available at* <http://www.aclu.org/prisoners-rights/aclu-california-statement-california-prison-hunger-strike>.

or is effective at controlling and punishing unruly inmates.¹¹ Instead, the question is whether the vast archipelago of American supermax facilities, in which some prisoners are kept isolated indefinitely for years, should be tolerated as consistent with fundamental principles of justice. Even prisoners who have committed horrific crimes and atrocities possess basic rights to humane treatment under national and international law. Although the Constitution “does not mandate comfortable prisons,”¹² it does require humane prisons that comport with the Eighth Amendment’s prohibition against punishments that are “incompatible with ‘the evolving standards of decency that mark the progress of a maturing society’” or which “involve the unnecessary and wanton infliction of pain.”¹³ More recently, the Supreme Court stated that “[p]risoners retain the essence of human dignity inherent in all persons. Respect for that dignity animates the Eighth Amendment prohibition against cruel and unusual punishment.”¹⁴ Supermax confinement as extensively implemented in the United States falls short of this standard and must be substantially reformed.

II. THE EXPANSION OF SUPERMAX CONFINEMENT

A. Nineteenth Century Practice

¹¹ It is far from clear that that supermax confinement reduces incidents of violence. See Atul Gawande, *Hellhole*, *The New Yorker*, 36, 41 (Mar. 30, 2009) (discussing 2003 study finding that after opening of supermax prisons in Arizona, Illinois and Minnesota “levels of inmate-on-inmate violence were unchanged”).

¹² *Rhodes v. Chapman*, 452 U.S. 337, 349 (1981).

¹³ *Estelle v. Gamble*, 429 U.S. 97 (1976).

¹⁴ *Brown v. Plata*, 131 S. Ct. 1910, 1928 (2011).

The resurgence of supermax confinement in the last three decades arose a century after the practice had been largely abandoned as inhumane and cruel. In the early nineteenth century, prison reformers viewed solitary as an effective method of compelling prisoners to achieve penitence. After observing the practice, however, many early observers condemned it. Alexis de Tocqueville reported that solitary confinement as practiced in New York in the 1820's "proved fatal for the majority of prisoners. It devours the victims incessantly and unmercifully, it does not reform, it kills."¹⁵ Charles Dickens also observed a solitary confinement prison in 1842 in Pennsylvania and wrote that "there is a depth of terrible endurance in it which none but the sufferers themselves can fathom . . . this slow and daily tampering with the mysteries of the brain [is] immeasurably worse than any torture of the body."¹⁶

The U.S. Supreme Court, in a late nineteenth century case, was repelled by the practice. In *In re Medley* a prisoner on death row at Walnut Street Penitentiary in Philadelphia brought a *habeas corpus* petition challenging a state law requiring that he be kept "in solitary confinement until the infliction of the death penalty."¹⁷ Noting that it required "the complete isolation of the prisoner from all human society, and his confinement in a cell of considerable size, so arranged that he had

¹⁵Craig Haney and Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. Rev. L. & Soc. Change 477, 483 (1997).

¹⁶Lobel, *supra* note 2, at 118 (quoting Charles Dickens, American Notes 146 (Fromm Int'l 1985) (1842)).

¹⁷ 134 U.S. 160, 167 (1890).

no direct intercourse with or sight of any human being, and no employment or instruction,”¹⁸ the Supreme Court grimly described the effects of 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. It became evident that some changes must be made in the system[.]¹⁹

B. The Expansion of Supermax After 1980

The modern period of widespread use of solitary confinement began with the construction of supermax prisons and long-term isolation units in the 1980’s, with entire prisons, or units within prisons, designed specifically to hold inmates in conditions of sensory deprivation for extended periods.²⁰ The first real American supermax prison of the twentieth century was created in 1983 following a riot at the federal prison in Marion, Illinois. After two guards were murdered by inmates, the prison was placed in permanent lockdown for the next twenty-three years. During that time, the inmates were kept in solitary confinement between twenty-two and twenty-three hours each day, with no human contact allowed.

Other supermax prisons were constructed as state and federal prison populations

¹⁸ *Id.* at 168.

¹⁹ *Id.*

²⁰ See Human Rights Watch, *supra*, note 1, at 145 (2003) (“In the last two decades, ... corrections departments have increasingly chosen to segregate or isolate disruptive, rule-breaking or otherwise dangerous prisoners for prolonged periods. Many of them have been placed in special super-maximum security facilities; others are confined in segregation units within regular prisons.”).

rapidly expanded. As demonstrated by the Department of Justice's Bureau of Justice Statistics, the incarceration rate has exploded in the last three decades. In 1980, there were 139 sentenced inmates incarcerated under state and federal jurisdiction per 100,000 population. By 1990, that number had more than doubled to 297 inmates per 100,000. By 2000, the number had increased to 478 per 100,000, and grew again to 502 per 100,000 by 2009. By the end of 2009, over 7.2 million people were on probation, in jail or in prison, constituting 3.1% of all U.S. adult residents (1 in every 32 adults). State and federal prison authorities had jurisdiction over 1,613,740 prisoners at year-end 2009: 1,405,622 under state jurisdiction and 208,118 under federal jurisdiction.²¹

The relentless rise in the prison population over the past thirty years, during which the United States became the country with the highest rate of incarceration, created severe conditions of overcrowding and, increasingly, a public health problem.²² Faced with unprecedented numbers of inmates, prison administrators struggled to devise means to control the expanding numbers of inmates.²³

²¹ These statistics are taken from the Department of Justice's Bureau of Justice Statistics web site, www.usdoj.gov.

²² Josiah D. Rich, Sarah E. Wakeman and Samuel L. Dickman, *Medicine and the Epidemic of Incarceration in the United States*, N. Engl. J. Med. 364: 22 (June 2, 2011).

²³ See Human Rights Watch, *Out of Sight: Super-Maximum Security Confinement in the United States*, A Human Rights Watch Report, vol. 12, no. 1(G), Feb. 2000 ("Many correction authorities have turned to prolonged supermax confinement in an effort to increase their control over prisoners."); Haney & Lynch, *supra* note 15, at 480 ("In part in response to increasing pressures in badly overcrowded prison systems and then absence of resources with which to attempt alternative approaches, correctional administrators are turning to aggressive policies of punitive segregation in hopes of enhancing their control over prisoners.").

Supermax confinement became one method to address the problems resulting from this rapid increase in prison population.

There is uncertainty regarding the number of inmates held in long-term solitary confinement. The DOJ's Bureau of Justice Statistics, which offers a wide range of numerical measures of prisons and corrections policy, offers no numbers relating to supermax or long-term solitary confinement.

A commission chaired by former Judge John Gibbons and Nicholas Katzenbach, former Attorney General of the United States estimated that 80,000 persons were confined in state and federal segregation units.²⁴ Other estimates of the number of persons held in supermax confinement vary from "tens of thousands"²⁵ to "at least twenty-five thousand inmates in isolation in supermax prisons [with] . . . fifty to eighty thousand [] in restrictive segregation units, many of them in isolation."²⁶ Eight states keep between five and eight percent of their prison population in

²⁴ Comm'n on Safety and Abuse in America's Prisons, Vera Institute of Justice, *Confronting Confinement* 52-53 (2006).

²⁵ See flyer announcing congressional briefing sponsored by Congressmen John Conyers, Robert Scott and Cedric Richmond entitled *The Abuses of Solitary Confinement in the U.S. Criminal Justice System*, 3:00 p.m., Apr. 6, 2011 ("Each day tens of thousands of prisoners in the U.S. are held in solitary confinement.").

²⁶ Gawande, *supra*, note 9, at 42 ("By the end of the nineteen-nineties, some sixty supermax institutions had opened across the country. And new solitary confinement units were established within nearly all of our ordinary maximum-security prisons.").

isolation.²⁷ Another researcher found that there were at least 57 supermax prisons in 40 states housing approximately 20,000 inmates.²⁸

There is no dispute that large numbers of inmates are being held in solitary confinement for seemingly indefinite durations. In nearly every state, there are prisons where supermax excesses are found. In Illinois, 54 prisoners have been held in continuous solitary confinement for more than 10 years.²⁹ Two inmates have endured more than 30 years of solitary confinement at Louisiana State Penitentiary. In New York State, a 2003 report from the Correctional Association found that nearly 5,000 inmates, 7.6% of the total state inmate population, were held in “highly restrictive disciplinary lockdown units for 23 to 24 hours per day.”³⁰

C. *De Facto Impunity for Supermax*

The expansion of supermax confinement practices has been largely unchecked by the courts, even though courts have detailed the appalling conditions in supermax facilities. Some courts have made findings that solitary causes mental illness and have banned the practice for those prisoners. Nevertheless, courts generally have stopped short of finding the practice of supermax confinement unconstitutional or illegal, no matter how severe or extreme unless imposed on

²⁷ *Id.*

²⁸ Jules Lobel, *Prolonged Solitary Confinement and the Constitution*, 11 J. Const. Law 115, 115 Dec. 2008) (citing Daniel Mears and Jamie Watson, *Towards a Fair and Balanced Assessment of Supermax Prisons*, 23 Just. Q. 232, 232-33 (2006)).

²⁹ David Fathi, *Turning the Corner on Solitary Confinement?*, Feb. 24, 2011, at www.aclu.org/blog/prisoners-rights.

³⁰ Lockdown New York: Disciplinary Confinement in New York State Prisons, A Report of the Correctional Association of New York, at 2 (Oct. 2003).

people with an active psychosis or for whom solitary has been demonstrated to be an imminent cause of psychosis . However, courts have refused to enjoin the practice in any other circumstances despite the acute pain caused by it.

Judge Posner of the Seventh Circuit found that it “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,” and that “there is plenty of medical and psychological literature concerning the ill effects of solitary confinement.” *Davenport v. DeRobertis*, 844 F.2d 1310, 1313, 1316 (7th Cir. 1988).

In *Madrid v. Gomez*, 889 F.Supp. 1146 (N.D.Cal. 1995), the Court also found “[s]ocial 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. . . . [There is] an ample and growing body of evidence that this phenomenon may occur among persons in solitary or segregated confinement – persons who are, by definition, subject to a significant degree of social isolation and reduced environmental stimulation.” *Madrid*, 889 F.Supp. at 1146.

The deleterious impact of supermax is exacerbated with mentally ill inmates. According to one of the studies referred to in *Madrid*, in 40 of 50 inmates studied, long-term isolation “had either massively exacerbated a previous psychiatric illness or precipitated psychiatric symptoms associated with [reduced environmental stimulation] conditions.” 889 F. Supp. at 1232. The Court found that “many, if not most, inmates in the SHU [long-term isolation] experience some degree of

psychological trauma in reaction to their extreme social isolation and the severely restricted environmental stimulation in the SHU.” 889 F. Supp. at 1235. The behavior of prisoners subjected to extended solitary confinement also underscores the effects. In evaluating an extensive evidentiary record of the Texas prison system, a court described “a world in which smeared feces, self-mutilation, and incessant babbling and shrieking are almost everyday occurrences.” *Ruiz v. Johnson*, 37 F.Supp. 2d 855, 908 (S.D.Tex. 1999).

There are two formidable obstacles to any judicial challenge to supermax confinement: the “deliberate indifference” standard” and the Prison Litigation Reform Act of 1995 (PLRA). First, to show an Eighth Amendment violation a prisoner must show “deliberate indifference.” 429 U.S. 97 (1976). *See also Wilson v. Seiter*, 501 U.S. 294, 297 (1991) (to prove prison conditions violate Eighth Amendment must show “deliberate indifference” by prison officials). *See also Farmer v. Brennan*, 511 U.S. 825, 837 (1994) (“Eighth Amendment does not outlaw cruel and unusual ‘conditions’; it outlaws cruel and unusual ‘punishments’”). Requiring that prisoners prove that a prison official “knows of and disregards an excessive risk to inmate health or safety,” *Farmer*, 511 U.S. at 837, often constitutes a difficult barrier. The consequence is that if “the minimal measure of life’s necessities” are provided, *Helling v. McKinney*, 509 U.S. 25, 36 (1993), which can mean not much more than food, clothing and shelter, then evidence of psychological damage is not sufficient.

The deliberate indifference standard, though, is not always insurmountable. In *Hutto v. Finney*, 437 U.S. 678, 687 (1978), the Court applied the “deliberate

indifference” standard to find that Arkansas’ practice of solitary confinement exceeding thirty days violated the Eighth Amendment. The Court found that solitary confinement “is not necessarily unconstitutional, but it may be depending on the duration of the confinement and conditions thereof. A filthy, overcrowded cell and a diet of ‘grue’ might be tolerable for a few days and intolerably cruel for weeks or months.”

Second, the Prison Litigation Reform Act of 1995 imposes an additional obstacle to relief. 18 U.S.C. 2626. Intended to reduce frivolous prisoner litigation, the PLRA provides 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.” 42 U.S.C. § 1997e(e). Courts have interpreted the physical-injury requirement to dismiss Eighth Amendment claims for money damages even in egregious circumstances. In *Harden-Bey v. Rutter*, 524 F.3d 789 (6th Cir. 2008), for example, the Sixth Circuit affirmed the dismissal of an Eighth Amendment claim for damages by an inmate held for more than three years in solitary confinement “because he did not allege a physical injury,” 524 F.3d at 795, but nevertheless reinstated the inmates due process claim based on his allegation that prison officials had refused to give him a hearing.

These judicial and legislative barriers to prison litigation are relatively recent. In earlier cases, the Supreme Court took a more expansive view of the scope of prohibited conduct, and found that the measure of “cruel and unusual punishments” under the Eighth Amendment should be expected to evolve. In

Weems v. United States, 217 U.S. 349, 378 (1910), for example, the Court found that a sentence of twelve-years at hard labor for falsifying public records was cruel and unusual. And in *Trop v. Dulles*, 356 U.S. 86, 101 (1958), which found that the scope of Eighth Amendment is “not static,” the Court stated that the phrase “cruel and unusual punishment” should be broadly interpreted:

[T]he basic policy reflected in these words [cruel and unusual punishment] is firmly established in the Anglo-American tradition of criminal justice. The phrase in our Constitution was taken directly from the English Declaration of Rights of 1688, and the principle it represents can be traced back to the Magna Carta. The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. ***While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards.***

365 U.S. at 597-598 (emphasis added).

In *Trop*, a soldier who deserted from the U.S. Army was stripped of his citizenship. In finding that “denationalization as a punishment is barred by the Eighth Amendment,” the Court expressly found that an Eighth Amendment violation does not require physical harm. Denationalization, the Court recognized, involved “no physical mistreatment, no primitive torture.” 356 U.S. at 100. Nevertheless, the punishment violated the Eighth Amendment because it “strips the citizen of his status in the national and international community.” *Id.* The Court also based its decision on the “ever-increasing fear and distress” suffered by the defendant. *Id.* at 598-599.

Successful court challenges to supermax confinement have been rare. In *Madrid v. Gomez*, where 1,000 to 1,500 prisoners were isolated in windowless cells for 22 hours each day, and with an extensive evidentiary record of the impact of that isolation on prisoners, the Court found the record sufficient to establish an Eighth Amendment violation only with regard to mentally ill inmates. *Madrid* found that

placing mentally ill prisoners in solitary confinement was “shocking and indecent [and] simply has no place in civilized society.” 889 F. Supp. at 1266. Placing a mentally ill inmate in solitary confinement, the district court found, “is the mental equivalent of putting an asthmatic in a place with little air to breathe.” 889 F.Supp. at 1255. The Court also found that the prison authorities displayed “deliberate indifference” and a “callous lack of concern for the mental health of those inmates that are particularly at risk in the [isolation unit].” 889 F.Supp. at 1267.

In *Jones El v. Berge*, 164 F.Supp.2d 1096, 1125 (W.D.Wis. 2001), the district court described the extreme conditions at the Supermax Correctional Institution in Wisconsin, which constituted “almost complete isolation and sensory deprivation.” *Id.* at 1117. The inmates spend “all but four hours a week” confined to a cell; they experience “almost total idleness”; “[t]he cells are illuminated 24 hours a day”; and inmates are not allowed to possess “clocks, radios, watches, cassette players or televisions.” *Id.* at 1098. Finding that “[t]he conditions at Supermax are so severe and restrictive that they exacerbate the symptoms that mentally ill inmates exhibit,” the Court granted the plaintiffs’ motion for a preliminary injunction and ordered mentally ill inmates removed from the prison. *Id.* at 1116.

In *Ruiz v. Johnson*, 37 F. Supp.2d 855 (S.D.Tex. 1999), the district court described in vivid detail the conditions of solitary confinement in Texas prisons, and concluded that the evidence showed that “an incarceration that inflicts daily, permanently damaging, physical injury and pain is unconstitutional. Such a practice would be designated as torture.” 37 F.Supp.2d 855, 914 (S.D.Tex. 1999). *See also Hilao v. Marcos*, 103 F.3d 789, 795 (9th Cir. 1996) (in alien tort claim by victim of

Ferdinand Marcos, finding that “it seems clear that all of the abuses ... including the eight years during which he was held in solitary or near solitary confinement – constituted a single course of conduct of torture”).

The district court decisions in *Madrid*, *Jones El* and *Ruiz* represent rare examples of judicial scrutiny of the reality of supermax confinement. In general, the courts have been unreceptive to supermax cases and have found constitutional cases involving indefinite 23-hour confinement. *See, e.g., Ajaj v. United States*, 293 Fed.Appx.575, 582-84 (10th Cir. 2008) (conditions imposing “lockdown 23 hours per day in extreme isolation,” “indefinite confinement” and “limited ability to exercise outdoors” did not violate Eighth Amendment); *Matthews v. Wiley*, 744 F.Supp.2d 1159, 1175 (D.Colo. 2010) (prisoner’s allegation of “long-term and indefinite solitary confinement” was “too vague and conclusory;” granting motion to dismiss).

In *Beard v. Banks*, 548 U.S. 521 (2006), the issue was whether prison administrators could constitutionally deprive supermax prisoners of all reading material. Inmates in a Pennsylvania prison were “confined to cells for 23 hours a day, [with] limited access to the commissary or outside visitors . . . may not watch television or listen to the radio . . . [and] no access to newspapers, magazines or personal photographs.” 548 U.S. at 526. The Third Circuit Court of Appeals reversed the district court’s summary judgment for the defendants. The Supreme Court reversed, and in a 5-3 vote, found that the prison authorities has justified the policies and that the “incurribility of the inmates” necessitated the harsh conditions. 584 U.S. at 534.

III. SUPERMAX CONFINEMENT UNDER INTERNATIONAL LAW

Supermax confinement as practiced in the United States violates well-established international law.³¹ Article 5 of the Universal Declaration of Human Rights, adopted in 1948, and considered part of customary international law, states that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” In addition, the American Declaration of the Rights and Duties of Man states that prisoners have “the right to humane treatment” (Art. XXV) and the right “to be free from cruel, infamous, or unusual treatment.” Article 5 of the American Convention on Human Rights repeats the prohibition of “torture or to cruel, inhuman or degrading punishment or treatment.” In 1955, the United Nations adopted the Standard Minimum Rules for the Treatment of Prisoners, which recognizes that solitary confinement should be restricted to extraordinary circumstances.

The International Covenant on Civil and Political Rights (ICCPR), ratified by the US in 1992, in Article 7, prohibits “cruel, inhuman, or degrading treatment or punishment,” and Article 10 provides that “all persons deprived of their liberties shall be treated with humanity and with respect for the inherent dignity of the human person.”

³¹ The New York City Bar Association has previously concluded that “prolonged solitary confinement and incommunicado detention” is a violation of Article 7 of the International Covenant on Civil and Political Rights. *See* The Committee on International Human Rights and The Committee on Military Affairs and Justice, *Human Rights Standards Applicable to the United States’ Interrogation of Detainees*, 59 *The Record* 183, 220 (2004). *See also* Human Rights Watch, *supra* note 1 at 145 n.493 (“Based on visits to a dozen such facilities and extensive other research, Human Rights Watch has criticized prolonged supermax confinement as . . . in violation of international human rights standards.”).

The Convention Against Torture (CAT), ratified by the US in 1990, defines torture as:

An act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as . . . 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 . . . 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.

In its May 2000 report, the UN Committee against Torture expressed concern about “[t]he excessively harsh regime of the ‘supermaximum’ prisons” in the United States.” And in 2008, the UN Special Rapporteur of the Human Rights Council submitted a report to the UN General Assembly finding that:

In general comment No. 20 (1992), the Human Rights Committee stated that the use of prolonged solitary confinement may amount to a breach of article 7 of the International Covenant on Civil and Political Rights (para. 6). The Committee against Torture has recognized the harmful physical and mental effects of prolonged solitary confinement and has expressed concern about its use, including as a preventive measure during pre-trial detention, as well as a disciplinary measure.

Except in exceptional circumstances, such as when the safety of persons or property is involved, the Committee has recommended that the use of solitary confinement be abolished, particularly during pre-trial detention, or at least that it should be strictly and specifically regulated by law (maximum duration, etc.) and exercised under judicial supervision. The Committee on the Rights of the Child has recommended that solitary confinement should not be used against children. Principle 7 of the Basic Principles for the Treatment of Prisoners states, “Efforts addressed to the abolition of solitary confinement as a punishment, or to the restriction of its use, should be undertaken and encouraged.”

* * *

The weight of accumulated evidence to date points to the serious and adverse health effects of the use of solitary confinement: from insomnia and confusion to hallucinations and mental illness. The key adverse factor of solitary confinement is that socially and psychologically meaningful contact is reduced to the absolute minimum, to a point that is insufficient for most detainees to remain

mentally well functioning. Moreover, the effects of solitary confinement on pre-trial detainees may be worse than for other detainees in isolation, given the perceived uncertainty of the length of detention and the potential for its use to extract information or confessions. Pre-trial detainees in solitary confinement have an increased rate of suicide and self-mutilation within the first two weeks of solitary confinement.

In the opinion of the Special Rapporteur, the use of solitary confinement should be kept to a minimum, used in very exceptional cases, for as short a time as possible, and only as a last resort. Regardless of the specific circumstances of its use, effort is required to raise the level of social contacts for prisoners: prisoner-prison staff contact, allowing access to social activities with other prisoners, allowing more visits and providing access to mental health services.

Torture and other cruel, inhuman or degrading treatment or punishment, U.N. Doc. A/63/175 (28 July 2008).

The ICCPR and the CAT have had little impact on prisoner litigation in the United States due to reservations adopted by the US upon ratification of these treaties. These reservations bind the US to ICCPR Article 7 and to CAT Article 16 only to the extent such practices are also prohibited by the Fifth, Eighth and Fourteenth Amendments to the US Constitution. The result is that in the litigated cases, international law has not been an independent factor for U.S. courts.

This too needs to change. The U.S. is bound by customary international law, including the prohibitions on torture and cruel, inhuman and degrading treatment of inmates, without reference to any reservations in its ratification of the ICCPR or the CAT. If courts took cognizance of international law and practice, they would see that the scale with which supermax confinement is used in the United States is unmatched and that the practice raises profoundly troubling questions. No other country uses supermax confinement as broadly and systematically as does the

United States.³² In Europe, solitary confinement has rarely been used since a 1982 decision of the European Commission found that “[c]omplete sensory isolation coupled with total social isolation, can destroy the personality and constitutes a form of treatment which cannot be justified by the requirements of security or any other reason.” *Krocher v. Switzerland*, 34 Eur. Comm’n H.R. Dec. & Rep. 24, 53, P 62 (1982). European rules also require that solitary confinement only be used if a medical officer certifies in writing that the prisoner is sufficiently fit, and that the medical officer must observe the prisoner daily for any changes.³³ The Council of Europe’s European Committee for the Prevention of Torture also stated in 1992 that “solitary confinement can, in certain circumstances, amount to inhuman and degrading treatment; in any event, all forms of solitary confinement should be as short as possible.”³⁴

Finally, conditions in US prisons, including supermax confinement, have provided grounds for criminal defendants to resist extradition to the United States. The European Court of Human Rights, in applying the European Convention on the Protection of Human Rights and Fundamental Freedoms, has established that extradition from Europe to US prisons may violate European law. In the 1989 *Soering* case, for example, the European Court refused extradition to the United

³² Rachel Kamel and Bonnie Kerness, *The Prison Inside the Prison: Control Units, Supermax Prisons, and Devices of Torture* (American Friends Service Committee 2003) (“While other countries do operate isolation units, their use is far more restricted.”).

³³ Elizabeth Vasiliades, *Solitary Confinement and International Human Rights: Why the U.S. Prison System Fails*, 21 Am. U. Int’l L. rev. 71, 93-94 (2005).

³⁴ *Id.* at 94.

States based on the extreme psychological effects of confinement on death row. 161 Eur. Ct. H.R. (ser. A) at 44 (1989).

The European Court is also considering whether supermax conditions in US prisons violate Article 3 of the European Convention, which prohibits the extradition to a state where the prisoner is at risk of inhuman and degrading treatment. Babar Ahmad, a British citizen, and three others, were indicted in the US on terrorism charges. The Court blocked the extraditions and as of July 2011 was considering whether the defendants' post-trial confinement to the federal supermax prison amounts to a violation of Article 3 of the European Convention.

IV. RECOMMENDATIONS

Supermax confinement has become so embedded in the culture of prison administration that it will take a significant effort to reverse this abhorrent practice. In recent years, there has been some indications that the expansion of solitary confinement has slowed. New York has passed legislation limiting solitary confinement for mentally ill persons, and the legislatures of Maine (which has begun limiting the practice of segregation) and Colorado have introduced bills designed to curb the practice.³⁵ In addition, the ABA Standards for Criminal Justice Treatment of Prisoners, adopted in February 2010, recommend that “[c]onditions of extreme isolation” be prohibited and that no prisoner with serious mental illness be placed in long-term segregated housing.

³⁵ See ACLU Press Release, *Bill Introduced in Colorado Legislature Aims to Curb Use of Solitary Confinement in Prisons*, Feb. 22, 2011, available at www.aclu.org.

We therefore make the following recommendations³⁶:

1. The provision in the PLRA providing that inmate plaintiffs may not recover damages “without a prior showing of physical injury” should be repealed;
2. Prisoners with serious mental illness should never be subjected to supermax confinement;
3. Conditions of extreme isolation and restriction should be imposed only when an extremely serious threat to prison safety has been established, and even in such circumstances supermax confinement should be for the shortest time possible and inmates should be afforded due process, and an opportunity to contest the confinement and appeal;
4. Any form of segregated housing should provide meaningful forms of mental, physical and social stimulation; and

³⁶ These recommendations are based on recommendations made by Human Rights Watch, *supra* note 15, and the ABA Standards adopted in 2010.

5. A national task force should be established to promptly report on the numbers of inmates being held in supermax confinement in state and federal prisons and their conditions of confinement, and to propose further legislative and administrative reforms.

Respectfully submitted,

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