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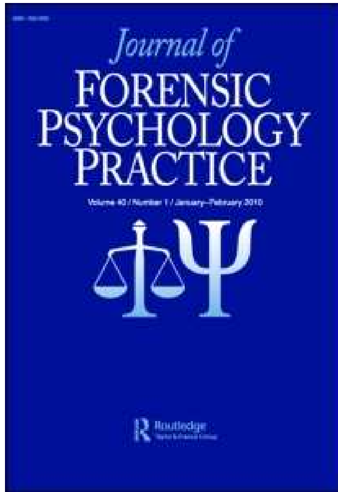

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Solitary Confinement and Supermax Prisons: A Human Rights and Ethical Analysis

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Solitary Confinement and Supermax Prisons: A Human Rights and Ethical Analysis

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This article examines how the prolonged solitary confinement and additional deprivations in supermax prisons measure up against legal protections afforded to those deprived of their liberty. It suggests that if the prohibition against cruel, inhuman or degrading treatment were to be taken at face value, supermax confinement would meet the definition of what constitutes such treatment, and urges the courts to re-examine their position regarding supermax confinement. It also suggests that health professionals are well placed, and ethically bound, to play a more active part in efforts to curtail the use of prolonged solitary confinement in all places of detention.

KEYWORDS solitary confinement, supermax, medical ethics, human rights

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SOLITARY CONFINEMENT AND SUPERMAX PRISONS: DEFINITIONS AND OVERVIEW

Solitary Confinement

Solitary confinement is a form of confinement whereby prisoners are held alone in a single cell where they spend between 22.5 and 24 hours a day. They have no contact with the outside world or with their fellow prisoners and very limited contact with prison staff. This form of confinement is also known as *isolation*, *segregation*, *separation*, and *cellular confinement* and, though there may be variations in the finer points of its application,

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the core practice in all forms of solitary confinement, at least in Western liberal democracies, involves the prisoner spending all or most of his or her day locked up inside a cell with little or no human contact. In this respect, notwithstanding any assertions that "solitary confinement" is a thing of the past and that confinement in ultra-modern maximum-security prisons cannot be equated to the isolation of prisoners in dark dungeons or "the hole," I would argue that the term *solitary confinement* must surely mean simply that—being confined alone—and is, therefore, the correct term to use.

The use of solitary confinement predates the birth of the modern prison and has been a constant and universal feature of prison systems, with periodic "waves" of accelerated use, ever since. Solitary confinement was first widely and systematically used on both sides of the Atlantic in the newly built "separate" and "silent" penitentiaries of the early to mid-nineteenth century, which were specially designed to enable the strict isolation of convicts from one another and from the outside world. Viewing crime as an infectious but curable disease, it was believed that once left alone with their conscience and the Bible, prisoners would engage in inner reflection, see the error of their ways, and be reformed into law-abiding citizens.[1] It soon became clear, however, that the new penitentiaries did not reform criminals, were expensive to run, and offered little proof that they were any more effective than other forms of confinement. As evidence of the devastating health effects of solitary confinement surfaced, there was also a growing moral and ethical debate about whether it was right to keep prisoners in strict solitary confinement for long periods of times.

By the late nineteenth century, the isolation system was mostly dismantled on both sides of the Atlantic. Although the systematic use of prolonged solitary confinement was abandoned, however, it had become a permanent feature of prison systems worldwide, used mainly as a form of short-term but severe punishment for prison offences; for protective custody of vulnerable prisoners; for holding those suspected, or convicted, of crimes against the state; and as a technique for "softening-up" detainees, particularly those detained on national security grounds, before and between interrogation sessions. To date, most prisons around the world, new and old, regardless of their security level, retain a number of cells or a special section of the prison dedicated to holding prisoners in solitary confinement.[2]

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[1] For an excellent account of the thinking behind the isolation prisons of the nineteenth century, see Evans (1982). See also Morris & Rothman (1998) and Rothman (1980).

[2] For a detailed discussion of the history of solitary confinement and its various uses, see Chapters 4 and 2, respectively, in Shalev (2009).

Supermax Prisons

Toward the end of the twentieth century and at the beginning of the twenty-first, the use of long-term, large-scale solitary confinement returned to the fore, in the form of "supermax" (short for super-maximum security) prisons, an extreme variant of solitary confinement. This trend is particularly evident in the United States, though similar prisons now operate elsewhere, albeit on a much smaller scale. The large, high-tech supermax prisons are specially designed for the strict and prolonged isolation of prisoners classified as high risk and/or difficult to control. Although expensive to construct and run, throughout the 1990s and early 2000s, these prisons have proliferated across the United States, where the federal government and an estimated 44 states now operate at least one supermax prison. These prisons were built as an addition to, not replacement of, existing segregation units that one would find in most prisons and jails, thus dramatically increasing the number of isolation cells throughout the United States. A survey of supermax confinement commissioned by the National Institute of Corrections defined supermax as

> A highly restrictive, high-custody housing unit within a secure facility or an entire secure facility, that isolates inmates from the general prison population and from each other due to grievous crimes, repetitive assaultive or violent institutional behaviour, the threat of escape or actual escape from high-custody facility(s) or inciting or threatening to incite disturbances in a correctional institution (Riveland, 1999).

This definition, which is widely accepted by corrections staff (Mears, 2005) and external observers, is adopted here, too.

The design of supermax units reflects the emphasis on security, control, and isolation. Although units may vary slightly in terms of the fine details of regime and physical construction, central features are nevertheless constant. The entire prison site is equipped with high-tech measures of security and surveillance, as is the prison's interior. Many supermax housing units utilize the "small pod" design. This entails each housing unit being divided into sections (or pods), each consisting of eight to ten single cells arranged in two tiers which are separately secured and designed in a semi-circle around a centralized control booth to enable supervision of the housing unit by a single prison guard. All cells face a wall. Each pod has its own exercise area attached, so that prison staff can let a prisoner out of his of her cell and into the exercise area using an automated system and without direct staff contact. Cells are arranged so that prisoners have no view of one another and can communicate only by shouting. Units are stark, monotonous, and sterile in appearance and "feel."

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Prisoners are typically held for 22.5 to 24 hours a day in single cells measuring between 60 and 80 sq. feet, which are either windowless or have a very small window that affords little view to the outside world. They exercise alone in a small cage or concrete exercise yard with no recreational equipment for an hour a day. They have no work or workshop opportunities or sport nor any communal activities. Where offered, the few educational, self-help, and religious programs are provided in-cell through a closed circuit television. Books, magazines, and personal possessions are highly limited in number and type and are subjected to regular and close inspection and monitoring. Hobby and craft materials are prohibited.

Cell doors are equipped with a slot through which prisoners receive all their daily provisions including food, mail, and medication. In some units, cell doors are made of perforated metal, allowing constant supervision of prisoners inside their cell and permitting them no privacy. In others, cells are sealed off with solid metal doors, which completely block out views, sounds, and smells. Cells are self-contained with a toilet and a washbasin. Cells also contain a raised concrete slab and a thin mattress, a shelf, a desk, and a stool, made of tamper-proof materials. In some jurisdictions, prisoners are allowed to have a small black-and-white TV set, especially adjusted for use in prisons. In others, prisoners have access only to small radios. This is a privilege that may be withdrawn at any time.

Visits from family and, where allowed, friends, are limited in number and duration and held through a thick barrier so that prisoners have no physical contact with visitors at any time. Conversations are held through a telephone receiver and may be monitored and recorded. Phone calls, where allowed, are also limited in number and duration and may be monitored and recorded. With the exception of legal correspondence, both outgoing and incoming mail is monitored. Apart from no-contact visits, the only human contact that prisoners have is with prison staff delivering food and other services to them inside their cells or with medical staff conducting their daily "rounds," which are often cursory and conducted at the pod-front. The design, regime, and ethos of supermaxes do not encourage staff to engage in dialogue with prisoners, and contact with them cannot be said to be "meaningful" in any ordinary sense of the word.

On the few occasions that prisoners leave their housing unit for a medical examination or a family visit, they are handcuffed and shackled, and escorted by a minimum of two prison guards. Before they return to their cells, they will be body-searched despite having had no physical contact with anyone other than prison staff. Prisoners can be held in these conditions for years and, in the case of lifers placed in a supermax for an indeterminate time, for the duration of their natural life.

I have discussed some of the issues around prisoner classification and placement in a supermax elsewhere (Shalev, 2007, 2009) and have argued that the concept of "isolating risk" is inherently problematic and that, in

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practice, those who end up in supermax prisons are not necessarily the "worst of the worst" that official rhetoric would have them be. I have also argued that, even if supermax prisons did house those for whom they are officially intended, the social isolation, extremely restricted sensory stimulation, humiliating routine practices, and additional deprivations inflicted on supermax prisoners cannot be justified as being penologically necessary. In what follows, I focus mainly on the problems of social isolation and highly restricted sensory stimulation in supermax prisons and their implications for prisoners' health and well-being. I begin by briefly examining some of the medical literature on the health effects of solitary confinement and some of the ethical challenges faced by health professionals working with isolated prisoners. I then examine how the American courts have viewed the practice of prolonged solitary confinement in supermax prisons, how these practices are viewed by international human rights law and bodies, and whether and how these two views differ.

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SOLITARY CONFINEMENT: HEALTH EFFECTS AND MEDICAL ETHICS

> The self . . . is essentially a social structure and it arises in social experience. After a self has arisen, it in a certain sense provides for itself its social experiences, and so we can conceive of an absolutely solitary self. But it is impossible to conceive of a self arising outside social experience. When it has arisen we can think of a person in solitary confinement for the rest of his life, but who still has himself as a companion, and is able to think and to converse with himself as he had communicated with others . . .. This process of abstraction cannot be carried on indefinitely (Mead, 1934, p. 140).

The Health Effects of Solitary Confinement: A Brief Overview of Research Findings[3]

There is a substantial body of evidence dating back to the nineteenth century demonstrating that solitary confinement has a profound impact on health and well-being, particularly when used punitively, without clear time limits, for periods that are longer than 4 weeks, and for people with prior mental health problems and poor social adjustment. The extent of

[3] This section is adapted from Chapter 2 in Shalev (2008), which offers a fuller analysis of the harmful aspects of solitary confinement and a review of historic and contemporary research findings on its health effects. For studies focusing specifically on supermax confinement, see Cloyes, Lovell, Allen, & Rhodes (2006); Grassian (2006); Haney (2003, 2008); Kupers (1999); Miller (1994); Miller & Young (1997); and Rhodes (2004).

psychological damage varies and will depend on individual factors (e.g., personal background and pre-existing health problems), environmental factors (e.g., physical conditions and provisions), regime (e.g., time out of cell, degree of human contact), the context of isolation (e.g., punishment, own protection, voluntary/non-voluntary, political/criminal), and its duration. Notwithstanding variations in individual tolerance and environmental and contextual factors, there is remarkable consistency in research findings on the health effects of solitary confinement throughout the decades. These have mostly demonstrated negative health effects, with studies reporting no negative effects being few and far between and virtually no study reporting positive effects.[4]

The most widely reported effects of solitary confinement are psychological. These will vary with the premorbid adjustment of the individual and the context, length, and conditions of confinement. The experience of previous trauma will render the individual more vulnerable, as will the involuntary nature of confinement as punishment and confinement that persists over a sustained period of time. Initial acute reactions may be followed by more chronic symptoms if the confinement persists. Though the majority of those held in solitary confinement will report some form of disturbance, there may be a small number of prisoners who show few signs and symptoms and are more resilient to the negative effects of solitary confinement.

Reported symptoms occur in the following areas: *anxiety*, ranging from feelings of tension to full-blown panic attacks; *depression*, varying from low mood to clinical depression; *anger*, ranging from irritability and hostility to unprovoked anger, sometimes manifesting as rage; *cognitive disturbances*, ranging from lack of concentration to confused thought processes; *perceptual distortions*, ranging from hypersensitivity to hallucinations affecting all five senses; and *paranoia and psychosis*, ranging from obsessional thoughts to full-blown psychosis and increased incidents of self-harm and suicide.

Studies have also reported physiological effects resulting from solitary confinement. Some of these may be physical manifestations of psychological stress, but the lack of access to fresh air and sunlight and long periods of inactivity are likely also to have physical consequences. Grassian (1983) and Grassian and Friedman (1986) list gastrointestinal, cardiovascular, and genitourinary problems; migraine headaches; and profound fatigue. Other reported signs and symptoms include insomnia; back and other joint pains; deterioration of eyesight; poor appetite and weight loss; feeling cold; and aggravation of pre-existing medical problems.

[4] With the exception of Suedfeld & Roy (1975), who suggested that short-term, non-punitive solitary confinement of volunteer participants may have beneficial effects, which are not elaborated. More generally, although there is some debate about methodological issues and on whether one can draw generalized conclusions about the damaging effects of solitary confinement from any given study, no one, including prison officials, asserts that supermax prisons are in fact *conducive* to health and well-being.

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Harvard psychiatrist Stuart Grassian, who has been studying the effects of solitary confinement for more than two decades, suggests that the symptoms experienced by isolated prisoners form a distinct syndrome,

> That is, a constellation of symptoms occurring together and with a characteristic course over time, thus suggestive of a discrete illness . . . while this syndrome is strikingly atypical for the functional psychiatric illnesses, it is quite characteristic of an acute organic brain syndrome: delirium, characterised by a decreased level of alertness, EEG abnormalities . . . perceptual and cognitive disturbances, fearfulness, paranoia, and agitation; and random, impulsive and self-destructive behavior . . . (Grassian, 2006, p. 338).

This constellation of symptoms had since come to be known as the "isolation syndrome" or the "SHU (secure housing unit) syndrome."

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Solitary Confinement, Supermax Prisons, and Medical Ethics

Health care professionals working in prisons face particular ethical challenges stemming from the inherent tension between the role of the prison as a place of punishment and their role as protectors and promoters of health. They need to provide care in an environment that is geared toward security, to patients who are held involuntarily in conditions that greatly diminish their personal freedoms, and they often face high workloads coupled with limited resources (Shalev, 2008).

These ethical challenges are particularly acute in solitary confinement units, where health professionals are required to provide care to individuals who are isolated in conditions that are known to be detrimental to health and well-being and where prison authorities place a particularly high emphasis on security and control in the management of prisoners.

Where health professionals work in supermax prisons that are purposely designed to ensure the near-total and prolonged isolation of prisoners who are considered to pose a particularly high risk to prison security, they are likely to regularly face situations wherein they are asked, or expected, to allow for security considerations to take precedence over their clinical judgement and over normal rules of medical ethics. Some of the routine practices in supermax prisons are, quite simply, in direct violation of basic principles of medical ethics. Examples include holding medical consultations at the cell or pod front in violation of the principle of patient confidentiality; conducting medical examinations in the presence of prison guards; and the use of restraints during medical examinations as routine practice rather than in exceptional cases based on careful risk assessment of the individual prisoner at any given time. In other situations, the ethical position may be more nuanced. For example, should health professionals have any role in

certifying prisoners' fitness for isolation? And once prisoners are isolated, what role should the health professional play in monitoring the effects of isolation on their health and well-being? More broadly, is it ethical to provide care to individuals who are held in conditions that may run contrary to the prohibition on any form of torture or inhuman or degrading treatment?

Some of these situations are difficult to resolve, but health professionals have access to a raft of well-thought-out and easily accessible guidance issued by international professional and human rights bodies designed to assist health professionals who work in prisons to carry out their roles in an ethical and professional way.[5] These guidelines reaffirm principles of medical ethics, including the principle that prisoners are entitled to medical care of the same quality afforded to those not incarcerated, the principle of medical confidentiality, and that "the physician's obligation to provide medical care to the prisoner should not be compromised by an obligation to participate in the prison's security system."[6] In addition to general principles, some specific issues and practices are addressed, such as the participation of doctors in the administration of torture and other forms of cruel or unusual punishment, their duty to report such practice, the treatment of prisoners on hunger strike, the position regarding body searches of prisoners, and the thorny issue of "certifying" prisoners as "fit for punishment," including solitary confinement.

There are also guidelines for medical professionals in "dual loyalties" situations (that is, a situation wherein the health professional faces "simultaneous obligations, expressed or implied, to a patient and a third party"[7]) and guidance on how to report abuse.

Health professionals working in prisons have a duty to familiarize themselves with these guidelines and principles and to strive to apply them in their daily work. Crucially, health professionals need to debate and address their role in solitary confinement and supermax units more widely, the ethical challenges they face in their work, and how these may be resolved.

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SOLITARY CONFINEMENT, SUPERMAX PRISONS, AND THE AMERICAN CONSTITUTION

From Re: Medley To Madrid: A Brief History of Legal Challenges to Solitary Confinement in the American Courts

Although prisoners in those days did not have legal rights as such, challenges to the use of solitary confinement in prisons, asserting its damaging effects to

[5] For referencing and a fuller discussion of medical ethics with specific reference to solitary confinement and segregation units, see Shalev, 2008. See also Metzner & Fellner, 2010.

[6] Principle 1 of the Principles of Medical Ethics (United Nations, 1982).

[7] Physicians for Human Rights, 2002, at 1.

prisoners' health, have come before the courts since the nineteenth century. In 1890, the U.S. Supreme Court referred back to earlier debates on solitary confinement, noting that "it is within the memory of many persons interested in prison discipline that some 30–40 years ago the whole subject attracted the general public attention, and its main feature of solitary confinement was found to be too severe" (*Re: Medley*, 1890, p. 162). Rejecting prison officials' claims that prisoners were subjected to "close confinement" but not "solitary confinement," the court stated "the matter of solitary confinement is not . . . a mere unimportant regulation as to the safe keeping of the prisoner, and is not relieved of its objectionable features by the qualifying language."[8] Rather, solitary confinement was a highly problematic practice that at best failed to reform prisoners and at worst caused serious mental health problems:

> . . . experience demonstrated that there were serious objections to it. A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others still, committed suicide; while those who stood the ordeal better were not generally reformed and in most cases did not recover sufficient mental activity to be of any subsequent service to the community (*Re Medley*, 1890, p. 164).

The issue at hand was new regulations introduced in Colorado, where Medley was held, which mandated all prisoners awaiting execution to be held in solitary confinement until the day of their execution. As these regulations were not in place when Medley was convicted, he argued that they constituted ex post facto punishment. The court accepted Medley's argument and ordered his release: "the solitary confinement to which the prisoner was subjected . . . was an additional punishment of the most important and painful character, and is therefore forbidden by . . . the constitution of the United States" (*Re Medley,* ibid.).

Throughout the decades since *Medley*, prisoners have continued to challenge the practice of solitary confinement, and courts have continued to debate its constitutionality, examining the issue anew as if the accumulated experience that the judge referred to in 1890 had not existed. Courts have been generally more inclined to intervene only where physical conditions of confinement were inadequate[9] and, as a 1983 court of appeals reviewing jurisprudence on the use of solitary confinement almost a century after

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[8] In subsequent cases, courts held that "solitary confinement" and "close confinement" do not "import the same kind of punishment. Solitary confinement may involve close confinement, but a criminal could be held in close confinement without being subjected to solitary confinement" (*Rooney*, 1905; *Rogers*, 1905).

[9] For example, courts held that isolation and deprivation of soap, hot running water, and clothing created constitutionally intolerable conditions (*Wright*, 1967), but allowing isolated prisoners to take a shower once every 5 day was constitutionally acceptable (*Ford*, 1969) and that without additional deprivations, solitary confinement did not constitute cruel and unusual punishment (*Sostre*, 1970).

Medley put it, courts had a "widely shared disinclination to declare even very lengthy periods of segregated confinement beyond the pale of minimally civilized conduct on the part of prison authorities" (Jackson, 1983, pp. 582–583).

As supermax prisons proliferated across the United States in the 1990s, so did legal challenges to their constitutionality. Prisoners in one supermax alone—the SHU at Pelican Bay prison in California—filed more than 200 complaints with the courts within the first 2 years of the SHU's operation (Haney & Lynch, 1997, p. 478). Indeed, one of the first major challenges to supermax confinement was mounted by SHU prisoners in a class-action lawsuit (*Madrid v. Gomez,* 1995; hereafter *Madrid*) when, more than a century after the *Medley* judgement, a U.S. District Court in San Francisco was asked to rule whether solitary confinement and other conditions at the SHU violated the American Constitution.

Recognizing Pelican Bay's status as a "state-of-the-art modern day SHU, and thus a potential forerunner for other similar units around the country" (*Madrid*, p. 1261), the *Madrid* court dedicated considerable space to a detailed analysis of solitary confinement and other conditions of supermax confinement and the courts' powers of intervention in penal practices. Judge Henderson's written opinion, which extends over 138 pages, makes a fascinating read, encouraging in its thoroughness and critical analysis of official discourses but also extremely depressing, for although he was clearly outraged by conditions of confinement and routine practices in the SHU and went as far as stating that the unit "operated on the verge of what most human beings can psychologically tolerate," he stopped short of ordering its closure or a reversal of the regime of relentless solitary confinement.

The analysis that follows is largely based on the *Madrid* judgment, supplemented by some of the case law that followed it. It examines the degree to which solitary confinement and supermax prisons are considered by the courts to be compatible with constitutional protections offered to prisoners and detainees.[10]

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The Judicial Position Regarding Supermax Prisons and the Madrid Case

Legal framework: the eighth amendment to the U.S. constitution

The Eighth Amendment reads, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." There is no consensus among the courts on what qualifies as unconstitutional conditions of confinement, but the following principles have been

[10] This is a brief and selective overview of legal issues arising from solitary and supermax confinement. For a more comprehensive analysis see Collins (1998), and Fathi (2004).

established by the courts: that the meaning of the Eighth Amendment is not fixed but develops with "the evolving standards of decency that mark the process of maturing society" (*Estelle*, 1976, p. 102); that "Whatever right one might lose at the prison gate . . . the full protection of the eighth amendment most certainly remains in force", based on the "fundamental premise that prisoners are not to be treated as less than human beings" (*Spain*, 1979, p. 193), and thus, "though his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for a crime" (*Wolff*, 1974, p. 418). The courts have also established that the infliction of serious mental pain or injury also implicates the Eighth Amendment.

Prisoners' constitutional rights impose on the state a corresponding duty of care "to assume some responsibility for his safety and well being" (*Helling*, 1993). Government officials must provide prisoners with at least the minimum essentials such as food, shelter, clothing, medical care, and safety and ensure that prisons, though perhaps "restrictive and even harsh" (*Rhodes*, 1981, p. 347), do not "degenerate into places that violate basic standards of decency and humanity" (*Madrid,* p. 1245).

For prisoners to establish cruel and unusual punishment, they must demonstrate that the punishment either "inflicts unnecessary or wanton pain" or is "grossly disproportionate to the severity of the crime warranting punishment" (*Rhodes*, 1981). To attain this level, officials must have acted with "deliberate indifference": "An official is liable only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take responsible measure to abate it" (*Estelle,* 1976, p. 104). Every Eighth Amendment claim thus embodies an objective and subjective component: "The former focuses on whether there has been a deprivation or infliction of pain serious enough to implicate constitutional concerns, while the latter requires inquiry whether the infliction of pain was 'unnecessary and wanton."' The burden of proof is on the prisoner, who must show that "he is incarcerated under conditions posing a substantial risk of serious harm" (*Madrid*, p. 1246).

Reversing the *Holt* (1970) "totality of conditions" test, in *Wilson* (1991) the court held that "nothing as amorphous as 'overall conditions' can rise to the level of cruel and unusual punishment when no specific deprivations of a single human need exists" (p. 2327). In considering whether the objective component has been met, therefore, "the court must focus on discrete and essential human needs such as health, safety, food, warmth or exercise" (*Madrid,* p. 1251, citations omitted). For the subjective component to be met, prisoners must show that "the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference" (Farmer, 1994, p. 979).

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Case study: the constitutionality of conditions at Pelican Bay SHU

The *Madrid* court examined, in great detail, all aspects of confinement in the SHU, ranging from the prisoner classification system through to the use of force against prisoners (which was found to be grossly excessive) and the provision of health services at the SHU, where it found that "appalling systematic deficiencies render the mental and health care system and the medical care system incapable of satisfying minimum constitutional standards" *(Madrid,* p. 1256*)*. The prolonged solitary confinement of prisoners and its health implications occupied a considerable part of the court's analysis.

In the case before the court, prisoners did not claim that they were deprived of adequate food, clothing, heat or other basic physical needs but rather that "the conditions of extreme social isolation and reduced environmental stimulation in the SHU inflict psychological trauma and in some cases deprive inmates of sanity itself" (*Madrid,* p. 1261). The California Department of Corrections (as it was then called), in turn, asserted that prisoners "failed to establish any link between the conditions at the SHU and mental illness and that, in any event, the conditions . . . comport with contemporary Eighth Amendment standards" (Ibid). Balancing these claims, the court partially rejected both:

> We are not persuaded that the SHU, as currently operated, violates Eighth Amendment standards vis-à-vis all inmates. We do find, however, that conditions in the SHU violate such standards when imposed on certain subgroups of the inmate population, and that defendants have been deliberately indifferent to the serious risks posed by subjecting such inmates to the SHU over extended periods of time (*Madrid*, p. 1261).

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The analysis that led to this conclusion was as follows. First, the court noted that solitary confinement was a "well established and penologically justified practice . . . there is nothing per se improper about segregating prisoners, even for lengthy or indefinite terms" (*Madrid*, p. 1261). Second, it established that in assessing any one prison condition or practice "the mental impact of a challenged condition should be considered in conjunction with penological considerations" (*Madrid*, p. 1262). In the case of the SHU, the stated purpose of controlling disruptive prisoners was a legitimate one: "the decision to segregate inmates who threaten the security of the general population falls well within defendants' far ranging discretion to manage California's prison population" (*Madrid*, p. 1261). Noting its own limited powers of intervention, the court added that

> it is not the Court's function to pass judgment on the policy choices of prison officials . . . Rather, prison administration is a matter peculiarly within the province of the legislative and executive branches of

> the government. . . . Defendants are thus entitled to design and operate the SHU consistent with the penal philosophy of their choosing, absent constitutional violations" (p. 1262).

Next, the court assessed the health effects of segregated confinement, noting that imprisonment may have a "deleterious impact" on mental health, particularly for segregated prisoners who are "subjected to additional isolation . . . leaving them to endure a regimen of prolonged and forced idleness. The resulting extreme boredom may cause prisoners to suffer loneliness and psychological pain" (*Madrid,* Ibid.). In itself, however, the psychological pain "is not sufficient to implicate the Eighth Amendment, particularly where the exclusion from prison programs is not without some penological justification" (*Madrid,* p. 1262, internal citations omitted). The legitimacy of some of the other aspects of SHU confinement, however, was somewhat less clear. These included

> Lack of an outside view, the extreme sterility of the environment, and the refusal to provide any recreational equipment . . . appear tenuously related to legitimate interests . . . the totality of the SHU conditions may be harsher than necessary to accommodate the needs of the institution with respect to these populations. However, giving defendants the wide-ranging deference they are owed in these matters, we cannot say that the conditions overall lack any penological justification (*Madrid*, p. 1263).

Though the court found that conditions at the SHU were unnecessarily harsh, then, it felt it was outside its mandate to intervene as it could not be said that the *overall* conditions lacked *any* penological justification. Once it established that conditions at the SHU served some legitimate (if "tenuously related") penological purpose, the court went on to set the Eighth Amendment standard in assessing the mental health impact of segregation:

> If the particular conditions of segregation being challenged are such that they inflict a serious mental illness, greatly exacerbate mental illness, or deprive inmates of their sanity, then defendants have deprived inmates of a basic necessity of human existence—indeed, they have crossed in to the realm of psychological torture (*Madrid,* p. 1264).

To meet this standard, "the critical inquiry is whether . . . the risk involved was 'unreasonable' in that the challenged conditions were 'sure' 'very likely' or 'imminently likely' to cause 'serious' damage to the inmates future health . . ." (*Madrid*, p. 1265). Assessing whether this standard was met at Pelican Bay SHU, the court appeared to be at pains to find that it was not:

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> The record demonstrates that the conditions of extreme social isolation and reduced environmental stimulation found in the Pelican Bay SHU 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. While a risk of a more serious injury is not non-existent, we are not persuaded . . . that the risk to developing an injury to mental health of sufficiently serious magnitude due to current conditions in the SHU is high enough for the SHU population as a whole, to find that current conditions in the SHU are per se in violation of the Eighth Amendment with respect to all potential inmates (*Madrid*, p. 1265).

However, though the court did not find that conditions at the SHU violated the prohibition against cruel and unusual punishment for all prisoners, it found that for certain categories of prisoners they did. These included

> The already mentally ill, as well as persons with borderline personality disorders, brain damage or mental retardation, impulse-ridden personalities, or a history of prior psychiatric problems or chronic depression. For these inmates, placing them in the SHU is the mental equivalent of putting an asthmatic in a place with little air to breath. The risk is high enough that we have no hesitancy in finding that the risk is plainly "unreasonable" (*Madrid*, ibid).

The court continued:

> We are acutely aware that defendants are entitled to substantial deference with respect to their management of the SHU. However, subjecting individuals to conditions that are "very likely" to render them psychotic or otherwise inflict a serious mental illness or seriously exacerbate an existing mental illness cannot be squared with evolving standards of humanity or decency, especially when certain aspects of those conditions appear to bear little relation to security concerns. A risk this grave—this shocking and indecent—simply has no place in civilized society (*Madrid*, p. 1266)

The final section of the judgment opens with a reiteration of the court's view of its own limited mandate in prison litigation, and continues:

> Defendants [CDC] have unmistakably crossed the constitutional line with respect to some of the claims raised by this action. In particular, defendants have failed to provide inmates at Pelican Bay with constitutionally adequate medical and mental health care, and have permitted and condoned a pattern of using excessive force, all in conscious disregard of the serious harm that these practices inflict. With respect to the

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> SHU, defendants cross the constitutional line when they force certain subgroups of the prison population, including the mentally ill, to endure conditions at the SHU, despite knowing that the likely consequences for such inmates is serious injury to their mental health, and despite the fact that certain conditions in the SHU have a relationship to legitimate security interests that is tangential at best . . . defendants have subjected plaintiffs to 'unnecessary and wanton infliction of pain' in violation of the Eighth Amendment . . . We observe that while this simple phrase articulates the legal standard, dry words on paper cannot adequately capture the senseless suffering and sometimes wretched misery that defendants' unconstitutional practices leave in their wake (*Madrid,* pp. 1279–1280).

For those who did not suffer mental illness, conditions at the SHU were also potentially damaging, but they did violate the Eighth Amendment,

> Conditions in the SHU may well hover on the edge of what is humanly tolerable for those with normal resilience, particularly when endured for extended periods of time. They do not, however, violate exacting Eighth Amendment standards, except for the specific population subgroups identified in this opinion (*Madrid*, Ibid).

One reading of the *Madrid* judgment, then, is that rather than accepting the constitutionality of the SHU, the court felt that its mandate fell short of allowing it to find that the SHU, in its entirety, operated outside what is permissible under the Constitution. The court's concluding order was that mentally ill prisoners should be transferred out of the SHU, that the provision of medical and mental health care be dramatically improved, and that the policies and procedures regarding the use of force be modified. The court also appointed a Special Master to monitor the implementation of its orders.[11]

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Madrid and beyond

Some of the court rulings that followed the *Madrid* judgment were more explicit about the effects of solitary confinement more generally. The Texas Administrative Segregation units, for example, were found to

[11] Space does not permit in-depth discussion of issues arising from compliance with court orders, but it is useful to note that it is not always forthcoming. Following the *Madrid* judgment, the California Department of Corrections set up at Pelican Bay prison a psychiatric services unit (PSU) and, in 1998, transferred there some 100 seriously mentally ill prisoners from the SHU. The PSU is essentially a regular SHU, but prisoners are offered medication and some mental health treatment, though remaining subjected to tight security and control. Group therapy, for example, is provided in the form of a number of individual cages being arranged in a semi-circle with the therapist standing at the center. In October 2000, the Pelican Bay Special Master reported that PSU prisoners did not receive enough out-of-cell programming and that the unit suffered "chronic staffing shortages, including psychiatrist shortages and a long-term problem with inadequate numbers of psychiatric technicians . . .. For two and one half years the PSU has failed to meet its structured therapy requirements" (Pelican Bay Special Master's Report, 2000).

> . . . deprive inmates of the minimal necessities of civilized life. While the court recognizes and appreciates the formidable task of those public servants saddled with the task of dealing with problematic, violent inmates, even those inmates who must be segregated from general population for their own or others' safety retain some constitutional rights. Texas' administrative segregation units violate those rights through extreme deprivations which cause profound and obvious psychological pain and suffering. Texas' administrative segregation units are virtual incubators of psychoses-seeding illness in otherwise healthy inmates and exacerbating illness in those already suffering from mental infirmities (*Ruiz,* 1999, p. 907).

Mostly, however, in assessing the constitutionality of supermax prisons, the courts have followed *Madrid's* distinction between prisoners who are mentally ill and those who are not. In a class action lawsuit challenging conditions at Wisconsin's Supermax prison at Boscobel (now renamed the "Wisconsin Secure Facility"), the court asserted that

> Most inmates have a difficult time handling these conditions of extreme social isolation and sensory deprivation, but for seriously mentally ill inmates, the conditions can be devastating. Lacking physical and social points of reference to ground them in reality, seriously mentally ill inmates run a high risk of breaking down and attempting suicide (*Jones 'El*, 2001, p. 1099).

The *Jones 'El* court went on to explain:

> The conditions at Supermax are so severe and restrictive that they exacerbate the symptoms that mentally ill inmates exhibit. Rather than being supplied the programming, human contact and psychiatric support that seriously mentally ill inmates need to prevent their illnesses from escalating, inmates at Supermax are kept isolated from all other humans, whether guards, other inmates or family members. . . . Many of the severe conditions serve no legitimate penological interest; they can only be considered punishment for punishment's sake (*Jones 'El*, 2001, pp. 1116–1117).

The Wisconsin Department of Corrections was thus ordered not to house prisoners previously identified as seriously mentally ill at the Boscobel supermax and to arrange for independent mental health professionals to evaluate prisoners who are prescribed psychotropic medications, those who have been hospitalized in a psychiatric institution at any time, those who have spent longer than 30 days at Level One [basic regime], those who have spent longer than 90 days at the facility without progressing beyond Level Two, and those who have been placed on suicide watch. Finally, the court ordered that if independent experts determine that "any of these inmates are

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seriously mentally ill, they should not be housed at Supermax Correctional Institution" (*Jones 'El*, 2001, p. 49).

In a more recent case involving a mentally ill prisoner housed at the Illinois Tamms prison, District Judge Phil Gilbert similarly noted that

> It is beyond argument that mental health care constitutes a serious medical need. It is also fair to assume that the conditions described by Knox—solitary confinement to an 80-square-foot concrete cell, strip searches, confinement to restraint chairs, lack of contact with family and friends—could be detrimental to one's mental health, particularly to one already suffering from any degree of mental illness (*Knox*, 2009).

Though the courts increasingly accept that supermax confinement exacerbates mental illness, however, and have even gone some way in defining which categories of prisoners should be excluded from supermaxes, they have mostly been reluctant to find that access to social and meaningful human contact is a distinct basic human need within the meaning of the Eighth Amendment and that supermax confinement may actively *cause* mental illness also in those with no prior history of mental illness.

In sum, over the years, the U.S. courts have intervened to ensure that prisoners placed in supermaxes are afforded due process rights (see in particular *Wilkinson v. Austin*, 2005), and where basic provisions (food, light, exercise, etc.) and services (medical, psychological, dental) have been at issue. Under current U.S. case law, nonetheless, though the severity and potentially damaging effects of prolonged solitary confinement in supermax prisons have been recognized by the courts, it is still considered to be a legitimate and constitutionally acceptable prison practice. Assessing the use of solitary confinement in any one given case, courts balance the reasons for its use and its damaging effects and more often than not have ruled that those reasons outweigh the damage it causes. Thus, the managerial discourse regarding the necessity of supermaxes has mostly been accepted by the courts as having, on balance, precedence over the discourse on the psychophysical effects of solitary confinement and supermaxes have, so far, been judged to be compatible with the American Constitution.

The Human Rights Position Regarding Solitary Confinement

> . . . complete sensory isolation coupled with total isolation, can destroy the personality and constitutes a form of inhuman treatment which cannot be justified by the requirements of security or any other reason (*Ramirez Sanchez v. France,* 2006, par. 123).

International human rights law offers prisoners and detainees across the world additional protections to those afforded to them by national laws,

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such as those set out in the American Constitution. Human rights law includes both instruments (treaties, conventions, declarations, standards, codes) designed for the universal protection of all human beings and instruments designed specifically for the protection of all those deprived of their liberty. The former are designed to ensure that all human beings are treated with respect for their inherent human dignity and without discrimination. The latter address both general aspirations, for example, that the purpose of imprisonment should be rehabilitation and not punishment and specific aspects of imprisonment, including prison conditions, prisoner provisions, and the conduct of prison personnel.[12]

International human rights law: the legal framework

The basic premise of international human rights law instruments designed for the protection of prisoners and detainees is that, other than limitations inherent in the deprivation of liberty, they retain their human rights while incarcerated. These rights include, for example, the right to a free and fair trial or hearing; the right to freedom of thought, conscience, and religion; the right to a private and family life; the right to adequate food, shelter, and clothing; the right to health; and the right to education.

The right of prisoners to be treated in a manner respectful of their human dignity and the prohibition against all forms of torture or inhuman or degrading treatment or punishment are reaffirmed in a large number of human rights instruments, including two international treaties—the International Covenant on Civil and Political Rights (ICCPR) and the United Nations Convention Against Torture (CAT)—which are legally binding on all signatory parties to them, and parallel regional instruments.[13] Additional instruments lay out rules of conduct for prison officers and health and other prison personnel and set acceptable minimum standards for prison design, provisions, and conditions. Other instruments set standards for very specific issues and situations from strip searches of prisoners to the use of arms inside prisons. These include the UN Standard Minimum Rules for the Treatment of Prisoners (SMR) and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.[14]

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[12] Parts of the following section were first published in Shalev (2008). For a comprehensive analysis of prisoners' rights under human rights law, see Rodley & Pollard (2009) and Coyle (2002).

[13] Including the European Convention on Human Rights, the American Convention on Human Rights, and the African Charter on Human and People's Rights.

[14] The Body of Principles was adopted the UN General Assembly in December 1988. It contains 39 principles reaffirming that prisoners and detainees retain their human rights when detained and lists some of the procedural and substantial principles that should direct the operation of all places of detention universally. Other relevant human rights instruments include the Basic Principles for the Treatment of Prisoners (adopted in 1990, affirming that prisoners retain their fundamental human rights); the UN Code of Conduct for Law Enforcement Officials (1979); and the UN Principles of Medical Ethics (1982).

The International Covenant on Civil and Political Rights

The ICCPR came into force in 1976. Its provisions are interpreted and its implementation monitored by the UN Human Rights Committee (HRC). Under Article 40 of the ICCPR, all state parties to it are required to submit a report on their compliance with its provisions, initially upon ratification and periodically thereafter. Under the Covenant's Optional Protocol, the HRC may also consider individual communications from nationals of signatory states to the Protocol.

Two articles of the ICCPR, Articles 7 and 10, relate directly to the treatment of prisoners and prison conditions, including solitary confinement. Article 7 proclaims that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment . . ." The Human Rights Committee has interpreted Article 7 to mean

> [2] The aim of the provisions of Article 7 is to protect both the dignity and the physical and mental integrity of the individual . . . [3] The text allows no limitation, even in time of public emergency . . . no justification or extenuating circumstances may be invoked to excuse a violation of Article 7 for any reason. [4] [The Committee] does not consider it necessary to draw up a list of prohibited acts, or to establish sharp distinction between the different kinds of punishment or treatment; the distinction depends on the nature, purpose and severity of the treatment applied (General Comment 20/44, 1992).

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Although the Committee did not see it necessary to draw a distinction between different forms of punishment, it explicitly mentions solitary confinement: "[6] the committee notes that prolonged solitary confinement of the detained or imprisoned person may amount to acts prohibited by Article 7." In contrast to interpretations of the American Constitution, nowhere in the text of Article 7, or in its official interpretation, is any reference made to the question of the intentionality in inflicting pain. The terms *cruel*, *inhuman*, or *degrading* treatment or punishment

> Should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental, including the holding of a detained or imprisoned person in conditions which deprive him, temporarily or permanently, of the use of any of his natural senses, such as sight or hearing, or of his awareness of place and the passing of time (Note to Principle 6, Body of Principles).

This interpretation would apply to some uses of solitary confinement, for example, in dark, windowless, or soundproofed cells, such as those used in a number of supermax prisons. In such cases, conditions of confinement may amount to inhuman or degrading treatment and sometimes even to torture.

Article 7 is closely linked to Article 10 of the ICCPR, which states that

> [1] All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person . . . [3]The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.

Together, Articles 7 and 10 of the ICCPR set out a blanket protection from any form of ill-treatment. The Human Rights Committee stipulated that

> Article 10(1) imposes on state parties a positive obligation . . . thus, not only may persons deprived of their liberty not be subjected to treatment that is contrary to Article 7 . . . but neither may they be subjected to any hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as that of free persons. Persons deprived of their liberty enjoy all the rights set forth, subject to the restrictions that are unavoidable in a closed environment . . . Treating all persons deprived of their liberty with humanity and respect for their dignity is a fundamental and universally applicable rule . . . this rule must be applied without distinction of any kind, such as race, colour, sex, language, religion, political opinion, national or social origin, property, birth or other status (General Comment 21/44, 1992).

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Based on this interpretation, supermax prisons may violate article 10(1) by their very nature. Prisoners are subjected to substantial and sustained hardship and constraint, well beyond those inherent in the deprivation of liberty. Solitary confinement—and supermax prisons—also clearly run contrary to Article 10(3) in depriving the individual of human contact and social interaction.

The HRC pays particular attention to the use of solitary confinement in prisons and other places of detention across the world and has been consistently critical of the practice in its published country reports. It called on the government of Peru, for example, to "reconsider the practice of solitary confinement which affected the physical and mental health of persons deprived of freedom and which amounted to a cruel, inhuman and degrading treatment" and on the government of Denmark

> to assure that it [solitary confinement] was imposed only in cases of urgent need . . . except in exceptional circumstances, solitary confinement should be abolished, especially for pre-trial detainees, and that solitary confinement be strictly regulated with precisely set out rules.[15]

[15] UN Human Rights Committee (2001). The Committee also found a violation of Articles 7 and/or 10 in considering individual communications under the Optional Protocol. For discussion and additional examples, see UN General Assembly (2008) and Shalev (2008).

The UN Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment

The Convention against Torture was adopted by the UN General Assembly in 1984 and came into force in 1987. Article 1 of the Convention stipulates that

> For the purpose of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person . . ..

This definition includes a number of important elements. Both mental and physical suffering can amount to torture, and the question of intent is introduced. The terms *cruel*, *inhuman*, or *degrading treatment* are viewed as a "continuum in which a number of factors are relevant, including the nature and intensity of the practice, its purpose, its duration and frequency, and the vulnerability of the victim" (Human Rights Watch, 1997, p. 6).

The implementation of the Convention is monitored by a body of independent experts, the Committee Against Torture (CAT). All state parties to the Convention are required to submit a report on their compliance with the Convention within a year of ratification, and periodically thereafter. These reports are considered by the Committee, which then makes its findings public. The Committee has found a violation of the prohibition against inhuman or degrading treatment or punishment in several cases involving the use of solitary confinement. For example, it found that isolation in cold and damp punishment cells measuring 1.5 × 2 metres without proper bedding or sanitation in Bolivia was "tantamount to torture," and the strict isolation in soundproof cells of political prisoners in high-security prisons in Peru amounted to torture.[16]

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UN Standard Minimum Rules for the Treatment of Prisoners

The SMR were approved by the UN Economic and Social Council in 1957 and set out principles and guidelines as to "what is generally accepted as being good principle and practice in the treatment of prisoners and the management of institutions" (SMR preamble). The SMR list a very specific set of guidelines for the treatment of prisoners, ranging from basic food, shelter, and exercise requirements to guidelines on prisoner classification and the provision of educational and vocational training. The SMR also set out general principles, including Rule 60, which reaffirms that prisoners are

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[16] UN Committee Against Torture (2001) paragraphs 95(g) and 186, respectively.

entitled to respect owing to their dignity as human beings; Rules 64 and 65, which reaffirm that prisoners should be imprisoned as punishment, not for punishment; and Rule 27, which affirms that prisons should operate with "no more restriction than is necessary for safe custody and well ordered community life." Rule 57 stipulates that

> Imprisonment and other measures which result in cutting off an offender from the outside world are afflictive by the very fact of taking from the person the right of self-determination by depriving him of his liberty. Therefore the prison system shall not, except as incidental to justifiable segregation or the maintenance of discipline, aggravate the suffering inherent in such a situation.

Rule 31 addresses solitary confinement directly. It prohibits placement in a dark cell and all cruel, inhuman, or degrading punishments for disciplinary offences. Other relevant Rules stipulate the importance of maintaining contact with the outside world (Rules 37 and 39) and the importance of educational programs and other activities (Rule 78). These rules are routinely breached in supermax prisons by the very nature of these prisons.

Although the SMR are not strictly legally binding on state officials, they set out minimum standards and recommendations for the operation of prisons that are now widely accepted as the main universal guidance for the treatment of prisoners. This is evidenced by the fact that in some countries, they have been enacted into law or form the basis for national prison regulations. The SMR have also been cited by the American courts as an authority and evidence of "contemporary standards of decency" relevant to interpreting the scope of the Eighth Amendment of the US Constitution (see, for example, *Estelle,* 1976, p. 104 and *Lareau,* 1980, pp. 1187–1189).

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Do American Supermax Prisons Meet International Human Rights Standards?

The United States is party to both the ICCPR and the CAT. It ratified the ICCPR in 1992 (but did not sign the Optional Protocol allowing complaints from individuals to the HRC), and the CAT in 1994.

Considering the first United States report on its compliance with the ICCPR, submitted to the HRC in 1995, the Committee noted that "conditions of detention in certain maximum security prisons are incompatible with Article 10 of the Covenant and run counter to international human rights law standards" (Comment 20, HRC, 1995). To comply with its international obligations, the United States needed to adopt measures to

> [B]ring conditions of detention in federal and state prisons in full conformity with article 10 of the Covenant . . . Conditions of detention in

> prisons, in particular in maximum security prisons, should be scrutinised with a view to guaranteeing that persons deprived of their liberty be treated with humanity and with respect for the inherent dignity of the human person, and implementing the United Nations Standard Minimum Rules for the Treatment of Prisoners and the Code of Conduct for Law Enforcement Officials therein (Comment 34, HRC, 1995).

This position was expressed in stronger terms when the Committee considered the second and third United States reports (which were combined and submitted seven years overdue):

> The Committee reiterates its concern that conditions in some maximum security prisons are incompatible with the obligation contained in article 10(1) of the Covenant to treat detainees with humanity and respect for the inherent dignity of the human person. It is particularly concerned by the practice in some such institutions to hold detainees in prolonged cellular confinement, and to allow them out-of-cell recreation for only five hours per week, in general conditions of strict regimentation in a depersonalized environment. It is also concerned that such treatment cannot be reconciled with the requirement in article 10(3) that the penitentiary system shall comprise treatment the essential aim of which shall be the reformation and social rehabilitation of prisoners. It also expresses concern about the reported high numbers of severely mentally ill persons in these prisons, as well as in regular in U.S. jails (HRC, 2006, par. 32).

The CAT was ratified by the United States in October 1994. Its ratification was conditional on a number of reservations. The most important of these was a limitation of the scope of U.S. obligations under the Convention to the prohibition against cruel and unusual punishment as set by the American Constitution, contending that the constitutional protections of prisoners suffice and need not be supplemented by international instruments.

In 1996, the UN Special Rapporteur on Torture[17] reported to the HRC that

> Conditions at certain maximum security facilities were said to result in the inhuman and degrading treatment of the inmates in those facilities. At the H-Unit in the Oklahoma State Penitentiary at McAlester, death row inmates were reportedly confined for 23 or 24 hours per day in windowless, sealed, concrete cells, with virtually no natural light or fresh air. The only time spent outside these cells was one hour per day on

[17] The Special Rapporteur is an independent expert appointed by the UN Commission on Human Rights (now replaced by the HRC), who is mandated to report on the situation of torture anywhere in the world, regardless of whether the country is a signatory of the CAT. Successive Rapporteurs have addressed the use of solitary confinement around the world and have identified situations where its use constitutes cruel, inhuman, or degrading treatment or punishment and sometimes even torture.

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> weekdays, when four prisoners at a time were able to exercise in a bare concrete yard with 18 foot solid walls giving no view of the outside. There was very little direct contact between prisoners and guards and no work, recreational or vocational programmes. Similarly, at the Special Housing Unit (SHU) of Pelican Bay prison in California, prisoners were reportedly confined, either alone or with one other prisoner, for 22½ hours per day in sealed, windowless cells with bare white concrete walls. . . . A substantial number of prisoners in SHU were said to be suffering from mental illness, which had been caused or exacerbated by their confinement in the unit . . . (1996, par. 183)

Addressing these concerns, the U.S. government stated in its initial report to the CAT (submitted in October 1999, some five years overdue), that

> As a general matter, only in limited circumstances may convicted prisoners be subjected to special security measures such as segregation or separation from the general prison population in specially constructed cells. Such measures may be employed for punitive reasons or as a means of maintaining the safety and security of inmates and staff in the institutions as well as of the general public. No conditions of confinement, including segregation, may violate the Eighth Amendment's proscription against cruel or unusual punishment, nor may it violate the prisoner's right to due process and access to the court under the Fifth and Fourteenth Amendments.

Considering the report, the Committee restated its concerns over the U.S. government's limitation of the scope of the CAT and over the "excessively harsh regime of the 'Supermaximum' prisons" (CAT, May 2000). A coalition of 60 non-governmental organizations (NGOs) that was formed for the specific purpose of monitoring U.S. compliance with the ICCPR and CAT similarly noted that "the scope and nature of these abuses [in supermax facilities] . . . belie the claims of the US government that adequate domestic standards and remedies exist to prevent these type of violations of the CAT" (Sherman, Magnani, & Kerness, 1998, p. 28).

Some six years later, considering yet another overdue report by the U.S. government, the Committee stated that it

> . . . remains concerned about the extremely harsh regime imposed on detainees in "supermaximum prisons." The Committee is concerned about the prolonged isolation periods detainees are subjected to, the effect such treatment has on their mental health, and that its purpose may be retribution, in which case it would constitute cruel, inhuman or degrading treatment or punishment . . . The State party should review the regime imposed on detainees in "supermaximum prisons," in particular the practice of prolonged isolation (CAT, 2006, par. 36.).

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Reporting to the UN General Assembly in 2008, the Special Rapporteur on Torture dedicated a special section to the issue of solitary confinement, where he stated that

> 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. (UN General Assembly, 2008, par. 83).

Independent human rights organizations have also been monitoring and reporting on prison conditions in the United States and have focused efforts on exposing conditions in supermax prisons. Examples include Human Rights Watch's reports (1997, 1999) on Indiana's Supermax and on conditions of confinement and racial and physical abuse by guards in Virginia's first supermax prison, Red Onion State Prison (which led to a formal investigation by the U.S. Department of Justice in 2000) and its supermax prison at Walden's Ridge (which led to an investigation by the FBI in 2000); Amnesty International's (1998, 2000) reports on the H-Unit at the Oklahoma State Penitentiary and the Maximum Control Complex in Westville, Indiana, where conditions were found to amount to cruel and inhuman or degrading treatment or punishment, and Human Rights Watch's report (2003) on the isolation of mentally ill prisoners. Amnesty International's position regarding supermax prisons is typical of the human rights discourse:

> [Amnesty] does not dispute that it is sometime necessary to segregate prisoners for safety or security reasons. However, we believe that conditions in many US supermax facilities are far more punitive than is required for legitimate security purposes and constitute cruel, inhuman or degrading treatment. Conditions often fall below specific international minimum standards . . . We are concerned that the growing use of long-term isolation in the US prison system is itself a violation of standards for humane treatment of prisoners (2000).

To sum up the human rights position: Solitary confinement is considered to be an undesirable prison practice, but its use is not prohibited as such. However, the interpretation of human rights standards, measured against routine practices in supermax prisons, indicates that the lengthy period of social isolation and the additional deprivations suffered by those confined in supermaxes do amount to inhuman or degrading treatment or punishment, in violation of human rights law instruments to which the United States is signatory. Nonetheless, as the U.S. government has limited the scope of the ICCPR and the CAT to constitutional protections

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that, as previously discussed, U.S. courts have not found to be violated in supermaxes, and as human rights law has no—or very weak—enforcement mechanisms, this conclusion is largely academic.

The problem of the limited success of interventions and pressures applied by UN human rights bodies and NGOs is not confined to the United States. Human rights instruments are drafted by states, their provisions are generalized, and states maintain the right to modify them to "fit" national laws by entering reservations upon ratification of these instruments. Such modifications limit the scope of international law to protections offered by national laws, as is the case with the Unites States' ratification of the ICCPR and CAT discussed earlier. Further, state bodies and prison authorities retain wide discretion in the treatment of prisoners, particularly when official narratives of "dangerousness" and "security" enter the discourse: security of the state, the prison system, prison staff, and prisoners. The many UN standards and codes of conduct for prison officials and related professionals are merely recommendations setting out desirable practices and are not legally binding or enforceable instruments. In short, it cannot currently be said that human rights provisions offer supermax prisoners viable and accessible protections. One human rights organization captured the state of affairs quite accurately in stating that "at best, the UN has succeeded in establishing a useful standard by which to judge the failures of prison systems worldwide" (Human Rights Watch, 1993, p. 115).

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Morality, Ethics, and Supermax Confinement

> . . . Plaintiffs tried to prove that the design of [supermax] made inmates mentally ill. However, what was finally determined,[was that] it wasn't the design that made inmates mentally ill, however the design contributed to exacerbating pre-existing mental illnesses (Supermax administrator, interview).

> However, he provides no allegations to demonstrate how the conditions at ADX, even if lonely or uncomfortable, fail to provide basic human necessities . . . ADX is a prison, after all, and confinement is intended to punish inmates, not coddle them. (*Magluta v. US Federal Bureau of Prisons*, 2009)

Prolonged solitary confinement, at the very minimum, gives rise to both constitutional and international human rights law issues. It also presents particular ethical challenges to health professionals who work in solitary confinement and supermax units and raises moral questions about the treatment of prisoners more widely. As the legal standards and case law examined in this article have demonstrated, neither international human

rights law nor the American Constitution prohibit solitary confinement as such. Yet these two positions diverge with respect to supermax prisons, viewed by human rights bodies as a potential violation of the international prohibition against cruel, inhuman, or degrading treatment and by the American courts as a legitimate, and constitutional, penal tool to be used as deemed necessary by prison authorities.

The *Madrid* judgment plainly and painfully demonstrated that U.S. courts view their role in matters of prison management as a limited one. It was obvious that the court was outraged by conditions at Pelican Bay SHU, but it was equally obvious that the court felt that it was beyond its mandate to go further than it did. Mostly, the U.S. courts shy away from intervening in prison practices and, where they do intervene, departments of corrections do not always comply, sometimes through willful obstruction, sometimes because of bureaucratic incapacity to produce change, and sometimes because of political issues and inadequate resources (Jacobs, 1983, p. 49). Where courts do intervene, institutions have their own survival mechanisms in response to changes enforced by external bodies: A condemned “adjustment center” is reincarnated as a “decompression unit”; court-sanctioned “group therapy” is provided in individual holding cages arranged in a semi-circle; a special committee for investigating incidents involving the use of force is established, but it has only two members and always finds that the use of force was justified in any given case. These and other such institutional adaptations engage prisoners, departments of corrections, and the courts in ongoing and costly lawsuits and often result in lowering the bar of what are considered to be constitutionally acceptable prison practices.

There are, to be sure, structural constraints on the courts’ powers of intervention in prison matters, including decades of narrow interpretation of constitutional rights, dependence on the legislature and the executive branch, and limited powers of implementation (Carroll, 1998, pp. 321–323, citing Rosenberg, 1991). However, whatever the reasons for the courts’ reluctance to intervene in prison practices may be, there is something disturbing in the legalistic wrangling over the exact point at which the mental suffering caused by supermax confinement—undisputed by most experts and the courts—becomes unacceptable and over the precise types of mental illness from which a prisoner needs to suffer to avoid being housed in conditions that are likely to adversely affect any human being.

The courts’ acceptance of the basic premise of supermax prisons may also serve to distort the true nature of these prisons, and normalize conditions of confinement and the treatment of prisoners within them. As Haney and Lynch (1997) commented,

> The normative acceptability of supermax confinement . . . threatens to distort any implicit comparative standard used to gauge the constitutional significance of the psychological harm, making even clearly cruel

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> punishment appear commonplace to the courts. That is, the increasingly widespread use of segregation is beginning to substitute as its legal and psychological justification: conditions that are no worse than even a deteriorating norm or inflict no more harm than other equally bad prisons are presumed to be tolerable and constitutional (p. 539).

Delivering the opinion of the Supreme Court in *Bell v. Wolfish* (1979), Justice Rehnquist criticized the federal courts for discarding the "hands-off" approach to the administration of prisons and becoming "increasingly enmeshed in the minutiae of prison operations" in the name of the Constitution. I would suggest that, in the face of current prison practices in the United States and in the absence of other forms of authoritative and viable interventions, the courts must involve themselves in close examination of what happens inside prisons. I would further argue that judges are morally bound to categorically reject prisons that they themselves have described as ones that operate as "virtual incubators of psychoses-seeding illness in otherwise healthy inmates" (*Ruiz*, 1999, p. 907) and that "inflict lasting psychological and emotional harm" (*Westefer*, 2010, p. 51). If supermax confinement does not constitute a "risk to developing an injury to mental health of sufficiently serious magnitude" (*Madrid*, 1995, p. 1265) so as to violate the prohibition against inhuman treatment, where do we draw the line? If confining people to a small windowless cell and keeping them in perpetual isolation from other human beings for years on end while drastically limiting their access to any form of activity—physical, educational, vocational, therapeutic, and recreational—does not constitute "cruel and unusual punishment," what does?

A recent interim decision by the European Court of Human Rights to halt the extradition of four men from the United Kingdom to the United States to face terrorism charges may go some way in encouraging the U.S. government, and courts, to reassess supermax confinement. The court considered that the stringency of conditions at the Federal Bureau of Prisons' supermax, ADX, where the men were likely to be held after trial should they be convicted, and in particular the regime of virtual solitary confinement and the possibility that they would spend the rest of their lives under these conditions, raise "serious questions" about the compatibility of these prisons with Article 3 of the European Convention on Human Rights (ECHR) and the prohibition on the use of torture, inhuman or degrading treatment or punishment (*Babar Ahmad v. UK,* 2010).

The court asked both parties for additional submissions regarding the regime, conditions, and avenues out of the ADX and the length of time that prisoners may expect to spend there. It also asked for clarification as to whether Eighth Amendment protections were equivalent to those provided by Article 3 of the ECHR before making its final decision. Regardless of whether the court eventually decides to allow for extradition to go ahead,

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the fact that it felt that it needed to look more closely at conditions of confinement at the ADX is telling and will undoubtedly lend credence to international efforts to limit the use of solitary confinement in supermax prisons and elsewhere.

The American courts, too, may be moving closer to acknowledging that supermax confinement not only exacerbates existing mental illness but may actively cause it. A recent ruling on conditions at the Tamms Correctional Center in Illinois stated that

> On the record before the Court it is clear that conditions at Tamms impose atypical and significant hardship in relation to the ordinary incidents of prison life under any plausible baseline. . . . Tamms imposes drastic limitations on human contact, so much so as to inflict lasting psychological and emotional harm on inmates confined there for long periods (*Westefer,* 2010, p. 51).

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A powerful ally in the courts' analysis of supermax confinement could, and should, be health professionals and their representative bodies, such as the American Medical Association, the American Nurses Association, and the American Psychological Association. They are well placed to comment on conditions of confinement and their health effects and to contribute to an informed public debate about prison practices in general and prolonged solitary confinement in particular. Their input may also assist the courts in the difficult task of balancing the competing narratives of institutional necessity and of the health effects of solitary confinement and prisoners' right to be treated with respect for their inherent human dignity. In my view, health professionals have an ethical duty to make their voice heard in this debate.

However, their voice has thus far been conspicuous in its absence among critics of supermax confinement. Despite evidence of the adverse health effects of solitary confinement and the centrality of these negative effects in court deliberations over the constitutionality of supermax prisons and despite the unethical practices that routinely take place in supermaxes, these organizations have, thus far, been very reluctant to address the issue of supermax confinement, its health effects, and the role of health professionals working in these prisons.

As one observer commented, reflecting on the failure of health professionals and their representative bodies to be more forthcoming in criticizing conditions of confinement at Guantanamo Bay and their potential health implications,

> Perhaps our professionals are so silent because we have become accustomed to maintaining silence about the massive human rights violations so prevalent on US jails and prisons. However, public examination and

discussion of the Guantánamo situation may also help us take a clearer look at our responsibilities at home (Mathews, 2004).

Revelations about some of the practices that took place at Guantanamo Bay and the involvement of health professionals in these practices have indeed led to some public debate about issues of ethics and morality in the treatment of prisoners and detainees. International bodies have also focused efforts in recent years on exposing the adverse health effects of solitary confinement and limiting its use in prisons and other places of detention. The Istanbul Statement on the Use and Effects of Solitary Confinement, drafted by a group of international experts (including the UN Special Rapporteur on Torture) and adopted at the International Psychological Trauma Symposium in Istanbul in December 2007, is one example of recent efforts to address the use of solitary confinement and provide a clear and concise overview of the international position regarding the practice.[18] Such efforts give momentum to the debate on solitary confinement. It makes this a good time for health professionals to reexamine some of the routine practices that take place in American prisons and their role in these prisons. It also makes this a good time for the courts to reassess their position regarding intervention in prison practices and for a wider public debate about the profound moral and ethical issues raised by solitary confinement.

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