SOLITARY CONFINEMENT: A HUMAN RIGHTS VIOLATION AND AN INSTRUMENT OF TORTURE

By Tara Dunn

I. Introduction

The only thing left to do is go crazy-just sit and talk to the walls. . . Sometimes I go crazy and can’t even control my anger anymore . . . Screaming, throwing stuff around . . . I feel like I am alone, like no one cares about me-sometimes I feel like, why am I even living? [1]

These are the words of a juvenile recounting his experience in solitary confinement in a Florida detention center. This adolescent is among the 80,000 United States prisoners who are isolated in their cells 22 to 24 hours daily. [2] Technical titles for solitary confinement vary, [3] however their underlying systems all share the same characteristics: isolation, being held in a cell for close to a 24 hour period, and limited interpersonal contact. [4] Blackstone describes these elements of solitary confinement as “terror, benevolence, and reformation . . . happily blended together.” [5]

In the United States, solitary confinement is used for disciplinary as well as administrative purposes. These purposes are reflected in varying titles of solitary confinement such as Administrative

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1 HUMAN RIGHTS WATCH & AM. CIVIL LIBERTIES UNION, GROWING UP LOCKED DOWN: YOUTH IN SOLITARY CONFINEMENT IN JAILS AND PRISONS ACROSS THE UNITED STATES 22 (2012), AVAILABLE AT HTTPS://WWW.ACLU.ORG/FILES/ASSETS/US1012WEBWCOVER.
3 Alternate names include Administrative Segregation, Special Management, Special Management Units, Special Housing Units, Disciplinary Segregation; The Hole.
Segregation (ADSEG)\(^6\) or Disciplinary Segregation, however the conditions will most likely be the same.\(^7\) Author Leonard Orland provides a general description of solitary confinement as:

I was placed in a 4 x 8 foot steel box with no windows, a bare light bulb, a small peephole (which only the guards could control and which was kept closed most of the time), a sink (occupied by three cockroaches), a toilet, and one steel shelf on which, if the guards so desired, a mattress could be placed for sleeping. It was very much like being forced into a very small stalled elevator. Its effect on me was devastating: I was terrified; I hallucinated; I was cold (I was nude and the temperature was in the low '60's).\(^8\)

An immigrant detainee in a New York special housing unit recalled "[t]hey put you in a cage like an animal. It’s smaller than a cell."\(^9\) Individuals in solitary confinement are subject to little to no natural light, provided no materials for intellectual stimulation and suffer from severe sensory deprivation.\(^10\) Inmates, juveniles and immigrant detainees may experience these conditions for nearly 23 hours with little recreational relief.\(^11\) Immigrants detainees housed in a Georgia jail were only allowed to exercise outside once every 30 days.\(^12\) Adolescents at a California Juvenile Justice facility spent 78 days in solitary confinement with only an average of 74 out of cell minutes a day.\(^13\) Supermax prisons, which overall are only slightly less restrictive than ADSEG, have been reported to detain inmates in solitary confinement for years at a time.\(^14\)

The philosophy behind solitary confinement is to induce “enlightening within.”\(^15\) Research has indicated however, solitary confinement has resulted in “serious psychopathological consequences,”\(^16\)

\(^6\) The most common term for supermax units is administrative segregation (ADSEG); H. Daniel Butler et al., \textit{What Makes You the “Worst of the Worst?” An Examination of State Policies Defining Supermaximum Confinement}, 24 CRIM. JUST. POL’Y REV. 687 (2012).
\(^7\) Id.
\(^9\) Nat’l Immigrant Justice Ctr. et al \textit{supra} note 4, at 10.
\(^11\) Id.; Nat’l Immigrant Justice Ctr. et al \textit{supra} note 4, at 10.
\(^12\) Nat’l Immigrant Justice Ctr. et al \textit{supra} note 4, at 10.
\(^13\) \textit{HUMAN RIGHTS WATCH, supra} note 1, at 21.
\(^14\) Butler \textit{supra} note 6.
\(^15\) Nat’l Immigrant Justice Ctr. et al \textit{supra} note 4.
\(^16\) Walton \textit{supra} note 8, at 271, 278.
increased prison misconduct, and violent behavior. Prolonged solitary confinement is said to have raised a number of constitutional challenges, however, the US continues to rationalize its use. While advocates may coin this practice, “tough on crime,” the international community has deemed it torture. The United Nations and Norway for example, advocate for a rehabilitative-focused penal systems, not codified and legally sanctioned cruel and unusual punishment. Consequently, solitary confinement has been applied disproportionately to already marginalized groups. As a result, its employment has further perpetuated the social inequity of communities of color, immigrants and the mentally ill. In addition to discussing these disparate impacts, this paper will explore the legal framework that has enabled solitary confinement and the constitutional arguments that challenge it. The paper will also discuss solitary confinement as a form of torture as defined by the international community and human rights treaty law. Lastly, there will be an analysis of alternative approaches to the penitentiary system as an avenue to eradicate solitary confinement.

II. Solitary Confinement in the US

Solitary confinement in the U.S first began in the nineteenth century, however it wasn’t until the 1980’s that the practice became prevalent. “Tough on crime” policies, crack-cocaine sentencing laws and the development of supermax prisons are attributed to the routine use of solitary confinement. Currently, solitary confinement has taken on alternate titles and definitions, including supermax prisons.

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18 H. Daniel Butler et al., The Treatment of the Mentally Ill in Supermax Facilities, 41 CRIM. JUST. & BEHAV. 1338, 1339 (2014); HUMAN RIGHTS WATCH, supra note 1, at 5.
23 High security prisons that are only slightly less restrictive than Administrative Segregation (ADSEG); Eric Lanes, The Association of Administrative Segregation Placement...
administrative segregation\textsuperscript{25} special management units\textsuperscript{26} or disciplinary segregation\textsuperscript{27} in what appears to be an attempt to avoid the stigma associated with its practice. The strategy behind solitary confinement is to identify the “worst of the worst” individuals and segregate them from the general population.\textsuperscript{28} Instead of aiming to rehabilitate these individuals, the focus is on correctional incapacitation.\textsuperscript{29} For many states, the characteristic for placement in a supermax prison merely requires a person to be considered a “threat of institutional safety.”\textsuperscript{30} Other state policies generally include four additional criteria in determining supermax admittance: “risky to escape, repeated violent behavior, riotous behavior, and risk to the group.”\textsuperscript{31}

\textbf{Solitary Confinement Cripples Vulnerable Communities}

Generally, solitary confinement has been applied disproportionally across socio-economic and racial divides, further crippling communities of color, immigrants and the mentally ill.\textsuperscript{32} Among low socio-economic communities and minorities,\textsuperscript{33} inmates with mental disorders make-up a large portion of this targeted population.\textsuperscript{34} Many states use solitary confinement as a way to “protect” mentally ill from other inmates and ensure individualized medical care.\textsuperscript{35} Ninety percent of state policies include two or more mental health guidelines regarding confinement, with the most common being precautionary.

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\textsuperscript{25} Administrative segregation definition is described as being placed in a 6 by 8 single-person cell for an undisclosed period of time for non-punitive reasons; Id.

\textsuperscript{26} Special management units definition is described as isolated units that contain a disciplinary section and an administrative section for detainees; Nat’l Immigrant Justice Ctr. et al supra note 4

\textsuperscript{27} Disciplinary segregation definition is described as an isolated cell where detainees who have committed a violation are housed; Id.

\textsuperscript{28} Butler supra note 6, at 678.

\textsuperscript{29} Id.

\textsuperscript{30} Butler supra note 18, at 688.

\textsuperscript{31} Id.


\textsuperscript{34} Butler supra note 18.

\textsuperscript{35} Butler supra note 18, at 1340.
measures.\textsuperscript{36} Oregon for example allows convicted mentally ill to serve their sentence in a mental health infirmary, rather than a supermax prison.\textsuperscript{37}

Another aspect of solitary confinement policy is its use in immigration detention. Immigration detention is the fastest growing form of incarceration in the US.\textsuperscript{38} The US Immigration and Customs Enforcement (ICE) contracts with detention centers and jails to contain immigrants prior to deportation.\textsuperscript{39} This population includes legal and illegal immigrants who are often housed with non-immigrant offenders. ICE has failed to enforce segregation standards for detained immigrants and therefore they are subjected to stage long-term solitary confinement without means of due process or appeal.\textsuperscript{40}

There has been indication, however that U.S policy is creeping away from its reliance on solitary confinement. In 2014 Attorney General Eric Holder released a statement urging against subjecting mentally disabled juveniles to solitary confinement.\textsuperscript{41} Recently, ten states have implemented 14 measures that either restrict or abolish solitary confinement for minors or the mentally ill, improve conditions for segregated units, or steadily integrate inmates into less restrictive prisons.\textsuperscript{42} Regardless, much of the country has yet to take action, and much of the reform limited.

Definitional ambiguity has led to inconsistencies in reporting requirements across the states,\textsuperscript{43} making it difficult to measure and assess the collateral impacts of solitary confinement. The data available however suggests communities of color, people suffering from mental illness, and immigrants have disproportionately suffered as a result of solitary confinement.\textsuperscript{44} In Arkansas, African Americans make up

\begin{itemize}
\item \textsuperscript{36} \textit{Id} at 1345.
\item \textsuperscript{37} \textit{Id} at 1344.
\item \textsuperscript{38} Nat’l Immigrant Justice Ctr. et al \textit{supra} note 4, at 3.
\item \textsuperscript{39} \textit{Id}.
\item \textsuperscript{40} \textit{Id}.
\item \textsuperscript{43} Butler \textit{supra} note 6, at 678.
\item \textsuperscript{44} Nat’l Immigrant Justice Ctr. et al \textit{supra} note 4, at 10.
\end{itemize}
15.3% of the state general population, yet they are 45% of prison, and 70.7% of supermax prison population.\textsuperscript{45} In Colorado, Hispanics make up 19.5% of the state general population, 31.5% of prison and 46% of supermax prison-population.\textsuperscript{46} Six out of seven of the states included in the study indicated higher numbers minorities housed in supermax prisons. Historically, prisons with nearly all white guards and administrators have inflicted harsher treatment of minority inmates, free of judicial checks.\textsuperscript{47} This also rings true for the juvenile penal system. Studies have shown that minority adolescent offenders receive harsher treatment than their similarly positioned white counterparts.\textsuperscript{48} In New York in 2010, African Americans and Hispanics comprised 89% of the pretrial detainees who could not afford $1,000 bail and who were subjected to solitary confinement prior to conviction.\textsuperscript{49} For the majority of these adolescents, a history of abuse and neglect, compounded with immaturity and underdevelopment, are intensified by prolonged solitary confinement.\textsuperscript{50} Furthermore, adolescents in solitary confinement are routinely denied access to adequate education, especially those with intellectual disabilities.\textsuperscript{51} It then follows that these same juveniles, further damaged from the effects of solitary confinement, join the ranks of the young, ill-educated,\textsuperscript{52} violent and re-offending minorities most likely to be housed in supra-prisons.

Inmates with mental health issues are heavily impacted by solitary confinement because their illness makes them susceptible to behavioral problems and misconduct.\textsuperscript{53} It has been asserted that prolonged solitary confinement further deteriorates mental health.\textsuperscript{54} Additionally, mentally ill inmates are more likely to be subjected to longer periods of time in administrative segregation.\textsuperscript{55} Without proper

\textsuperscript{45} Schlanger, supra note 32.
\textsuperscript{46} Id.
\textsuperscript{48} HUMAN RIGHTS WATCH, supra note 1, at 13.
\textsuperscript{49} Id at 13.
\textsuperscript{50} Id at 24.
\textsuperscript{51} Id at 42.
\textsuperscript{52} Lanes supra note 17.
\textsuperscript{53} Butler supra note 18, at 1341.
\textsuperscript{54} Id.
\textsuperscript{55} Lanes supra note 17, at 533.
treatment, solitary confinement used in any capacity, can have a cyclical effect in those in need of psychiatric attention.

Lastly, solitary confinement has continued to have a devastating impact on documented and undocumented immigrants. Currently, there are over 35,000 immigrants being detained. The majority of the detained immigrants have not committed a crime nor are they a danger to society. Regardless they are subjected to solitary confinement over 23 hours a day for long periods of time up until their hearing. Solitary confinement is often applied arbitrarily or as a mechanism to restrict reported complaints or treat the mentally ill. Many do not understand why they are being punished or what rights and resources are available to them. Then, the individual returns to society with long lasting symptoms of psychosis and an impaired ability to reintegrate into society.

The Legal Framework That Has Facilitated Torture

The US has upheld a legal framework that has facilitated the use of solitary confinement and made it difficult to challenge. For one, Federal law currently does not prohibit solitary confinement. Despite constitutional challenges on the grounds of the Fifth, Eighth, and amendments, states and federal prisons employ solitary confinement with loose guidance and oversight. Under the direction of the Attorney General, the Bureau of Prisons:

1) is responsible for the management and regulation of all Federal penal and correctional institutions
2) provide suitable quarters safekeeping, care and substance of all persons charged with or convicted of offenses
3) provide protection, instruction, and discipline of all persons charged with or convicted of offenses against the United States.

57 Id at 14.
58 Id.
59 Id at 13.
60 18 U.S.C.A. § 4042 (West).
Allah v. Bartkowski, 574 F. App’x 135 (3d Cir. 2014).
Whether they have adhered to these responsibilities is largely up for debate. According to the 28 C.F.R only the Discipline Hearing Officer (DHO) can impose disciplinary segregation status as a punitive measure. Consequently, the DHO does not always manage punitive measures. In 1992, President Bush issued an Executive Order to privatize federal and state prisons. This has placed private contractors in position to impose their own disciplinary system, having a direct effect on the length of time an inmate is confined. Additionally, contractors have a financial incentive to prolong an inmate’s punishment as a means to keep prisons fully populated. Only five of the 25 states that rely on privatized prisons prohibit their contractors from “unilaterally” determining prisoner disciplinary systems. If the majority of contractors are unilaterally dictating punishment in nearly half of the states, this calls into question the extent of state and federal oversight. Furthermore, if prison administrators impose punishment that is a greater deprivation of an inmate’s substantive rights than initially adjudicated by the court, it is arguably a violation of due process. Sadin v. Conner 515 U.S. 472, (1995) is an example of how the courts have interpreted due process in a way that allows for solitary confinement. In Sadin, an inmate’s assertion that solitary confinement was a violation of due process was struck down. Writing for the court, Chief Justice Rehnquist ruled:

1) due process liberty interests created by prison regulations will be generally limited to freedom from restraint which, while not exceeding sentence in such unexpected manner as to give rise to protection by due process clause of its own force, nonetheless imposes atypical and significant hardship on inmate in relation to ordinary incidents of prison life;
(2) prisoner's discipline in segregated confinement did not exceed similar, but totally discretionary confinement in either duration or degree of restriction, and thus did not implicate due process liberty interest;

63 28 C.F.R § 541.22.
65 Id at § 409.
66 Id.
67 Id at § 414.
68 No person shall be deprived of life, liberty, or property, without due process of law U.S. Const. amend. V; Wilkerson v. Goodwin, 774 F.3d 845 (5th Cir. 2014); McMillan v. Wiley, 813 F. Supp. 2d 1238 (D. Colo. 2011).
69 Prior to reaching the Supreme Court, the Ninth Circuit Court of Appeals found that the inmate retained a “liberty interest in remaining free from disciplinary segregation;” Sandin v. Conner, 515 U.S. 472, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995).
(3) state’s action in placing prisoner in segregated confinement for 30 days as discipline did not inevitably affect duration of his sentence under Hawai‘i law, so as to implicate due process liberty interest.\textsuperscript{70}

In other words, the decision established that solitary confinement was an acceptable use of discretionary authority, thereby potentially making it difficult for future challengers.\textsuperscript{71}

The court’s consideration of public safety and its deference to penitentiary and legislative authority have posed a significant obstacle in challenging solitary confinement.\textsuperscript{72} Federal regulations have provided for heightened standards for inmates to bring suit. For example, Title 18 of the U.S.C.A prevents any felon awaiting sentencing from bringing suit against a state actor for mental or emotional injury suffered, while in custody without prior proof of physical or sexual misconduct.\textsuperscript{73} Under this law a convicted felon detained in solitary confinement while waiting for sentencing could not file suit as a result, unless solitary confinement resulted in physical or sexual misconduct.\textsuperscript{74} Federal regulation provides guidelines for “Reasonability” of confinement.\textsuperscript{75} The reasonability guideline can be viewed as an avenue to consider competing public policy and give deference to lawmakers and officials.\textsuperscript{76} In Bistrain v. Levi, an inmate placed in a Special Housing Unit (SHU) in an attempt to protect him from other inmates, sued under the Eighth amendment of cruel and unusual punishment.\textsuperscript{77} The Third Circuit court of Appeals ruled that under the 28 C.F.R. § 541.22 that prison officials are in a better position to protect inmates

\textsuperscript{70} This has since been abrogated by an number of state courts however is still considered good law. This case has been cited by over 20,000 cases: Sandin v. Conner, 515 U.S. 472, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995).

\textsuperscript{71} Sandin supra note 62.

\textsuperscript{72} Ratliff supra note 64.

\textsuperscript{73} 28 U.S.C.A. § 1346 (West); This is proposed legislation; Rendered unconstitutional by Krafsur v. Davenport, 736 F.3d 1032 (6th Cir. 2013).

\textsuperscript{74} 28 U.S.C.A. § 1346 (West).

\textsuperscript{75} 28 C.F.R § 541.22 states provides definition and parameters for administrative detention and SHU.

\textsuperscript{76} Bistrain v. Levi 696 F.3d 352, 368 (3d Cir. 2012).

\textsuperscript{77} Id.
rather than the general population. Therefore the decision to place the inmate in solitary confinement for those purposes was justified in light of deference to penitentiary authority.

Qualified immunity is another example of the court’s concern and often deference to public policy interests. The court in Wilkerson v. Goodwin referred to qualified immunity as an attempt to “strike a balance between competing social objectives . . . vigorous exercise of official authority,” while allowing public redress. Qualified immunity acts as an affirmative defense for federal officials sued under individual capacity. It is intended to protect “all [officials] but the plainly incompetent or those who unknowingly violate the law.” The majority of academics assert that qualified immunity is one of the most substantial hurdles when pursuing damages from the government. The Bivens test was introduced as a means to circumvent qualified immunity, however the success rates under Bivens is not promising. The Bivens test has public interest implications in that it attempts to limit the courts exposure to frivolous suits and protect state actors from the burdensome litigation. The reasonable person standard is used to determine if a defendant did not overtly violate clearly established law or reasonably believed they were acting lawfully. It may follow that unless there is clearly established law regarding solitary confinement, the suit is as at the mercy of the court’s interpretation of reasonableness.

Furthermore, the court’s interpretation has historically fell victim to its generally negative biases towards Bivens. Even if a plaintiff attempts to sue the institution as opposed to the official, various courts have ruled that a penitentiary institution does not qualify as a “person” subject to a 42 U.S.C. § 1983 civil

78 Id.
79 Id.
80 Wilkerson v. Goodwin, 774 F.3d 845 (5th Cir. 2014).
81 Id.
85 Id.
86 Bivins supra note 71.
87 Reinert supra note 93, at 477, 486.
88 Id at 477, 478.
rights action suit. A “person” acting under the color of state law is required in order to bring the civil rights action, thus dismantling the civil action claim.

There has been recent success under Eighth amendment clause prohibiting cruel and unusual punishment. Traditionally, the courts have followed a “minimum intrusion” policy regarding prison conditions and deferred to prison official discretion for the appropriate loss of liberties. However, the standard in Trop v. Dulles that prison conditions are measured by an “evolving standard of decency that mark the progress of a maturing society,” provides promise. There’s hope that solitary confinement will no longer meet the national standard of decency. In 1995, Madrid v. Gomez, the United States Supreme Court ruled that knowingly admitting mentally inmates into supermax prisons is unconstitutional. Most recently, in 2014 the American Civil Liberties Union (ACLU) filed a settlement agreement resolving a class-action suit on behalf of more than 33,000 prisoners against the Arizona Department of Corrections. The settlement provides for solitary confinement and mental health reform, among others. The New York Civil Liberties Union (NYCLU) in Peoples v. Fischer resulted in New York being the largest prison system to ban punitive solitary confinement for juveniles.

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89 In order to state a claim for damages under 42 U.S.C. § 1983, an aggrieved party must sufficiently allege that he or she was injured by “the deprivation of any [of his or her] rights, privileges, or immunities secured by the [United States] Constitution and laws” by a “person” acting “under color of state law.”

90 In McDaniel, the court found that the S.C Dept of Corrections did not qualify as a “person” subject to 1983 civil action, therefore preventing an inmate from bringing suit; McDaniel v. S.C. Dep’t of Corr., No. 4:09-1732-TLW-TER, 2010 WL 625368, at *2 (D.S.C. Feb. 19, 2010).

91 Eighth amendment relevant clause states “nor cruel and unusual punishment inflicted”; U.S. Const. amend. VIII.

92 Walton supra note 8, at 273-274.


95 Hager et al supra note 42.

96 Reforms include: permitting prisoners in solitary confinement with serious mental illnesses to have more mental health treatment and time outside their cells, and will make other critical reforms in prison conditions; Shifting Away From Solitary Confinement.

97 In Peoples, a State prisoner who was housed in segregation for over two years brought action against prison officials, alleging defendants violated his right to be free from cruel and unusual punishment. The court held that certain prison officials were not entitled to qualified immunity at the motion to dismiss stage Peoples v. Fischer, 898 F. Supp. 2d 618 (S.D.N.Y. 2012); Hager supra note 42.
II. International Standards: Solitary Confinement is Torture

The varying forms of solitary confinement utilized in the United States do not meet international standards and are considered a form of torture. The United Nation (U.N) Standard of Minimum Rules for the Treatment of Prisoners (SMR), the International Covenant on Civil and Political Rights (ICCPR), and the Convention Against Torture (CAT) are three primary sources that shape prisoner rights for the international community. The United Nation (U.N) Standard of Minimum Rules for the Treatment of Prisoners (SMR) states asserts that prisoners still retain innate human rights and liberties while incarcerated. Among the list of rights, the right to health and education are particularly violated in respect to solitary confinement. Additionally, SMR provides general guidelines that reaffirm inmates’ right to respect and dignity as human beings. Punishment should be “. . . maintained with firmness, but with no more restriction than is necessary for safe custody and well-ordered community life.” The deterioration of US prisoners’ mental health while in solitary confinement is contrary to humane treatment and the right to health. SMR lists a number of what it considers to be healthy prison conditions:

Rule 10 All accommodation provided for the use of prisoners and in particular all sleeping accommodation shall meet all requirements of health, due regard being paid to climatic conditions and particularly to cubic content of air, minimum floor space, lighting, heating and ventilation.

Rule 11(a) The windows shall be large enough to enable the prisoners to read or work by natural light, and shall be so constructed that they can allow the entrance of fresh air whether or not there is artificial ventilation.

Rule 21 Every prisoner shall be provided with the opportunity of at least one hour of exercise every day in the open air, if the weather permits.

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99 Article 1 of the Convention reads in pertinent part CAT
101 *Id.* at 5.
Rule 21(1) When the weather is inclement alternative arrangements shall be made to allow prisoners to exercise.

Rule 77 Provisions shall be made for the further education of all prisoners capable of profiting thereby . . . the education of illiterates and young prisoners shall be compulsory and special attention shall be paid to it by the administration.

Rule 78 Recreational and cultural activities shall be provided in all institutions for the benefit of the mental and physical health of prisoners. 103

For the most part, solitary confinement in the US does not incorporate any of the above requirements. Individuals in solitary confinement are not afforded natural light, means of fresh air, the proper amount of exercise, nor intellectual stimulation. 104 Furthermore, the majority of juveniles in solitary confinement are not provided educational opportunities. 105

The Special Rapporteur states the solitary confinement of juveniles is inhumane, and a clear violation of article 7 of the International Covenant on Civil and Political Rights (ICCPR) and article 16 of the Convention Against Torture (CAT). 106 The ICCPR recognizes age-appropriate measures to enable rehabilitation, not punishment. As a co-sponsor of this article, the US is cognizant that its harsh treatment of juveniles does not align with the principles endorsed. 107 Additionally, Article 7 stipulates conditions and treatment for prisoners with the premise that “No one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment.” 108 The United Nations has interpreted Article 7 to protect the “mental integrity” of a prisoner, and prevents conditions that “deprive him temporarily or permanently of the use of any of his natural sense, such as sight or hearing or of his awareness of place and the passing of time.” 109 In solitary confinement US prisoners may experience days without any awareness of time or space. 110 Article 10 of the ICCPR asserts that the focus of a penitentiary system should be rehabilitation

103 SMR supra note, 112.
104 Shalev supra note 110.
105 HUMAN RIGHTS WATCH, supra note 1.
106 Id. at 75.; United States ratified CAT Oct 1994.
107 Id. at 72.
108 Shalev supra note, at 110.
109 Id. at 4.
110 HUMAN RIGHTS WATCH, supra note 1.
and reintegration. Contrasting, “tough on crime” movements, and the proliferation of supermax prisons in the US focus are intended to deter and punish. Research has demonstrated that this strategy is counterproductive to rehabilitation and increases the chances of recidivism.

Article 1 of the CAT defines torture as: Article 1 of the Convention reads in pertinent part:

> 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

Countless inmates, detainees, and juveniles subjected to solitary confinement describe extreme mental suffering as a common experience. The loss of sensory stimulation contributed to an experience described as unbearable which in some cases led to the deterioration of an otherwise sane individual’s mental health. For many individuals, solitary confinement has torturous lasting affects including memory loss, post traumatic stress syndrome, and deteriorated social skills. The effects of solitary confinement have also shown to exacerbate an inmate with preexisting mental incapacities to the point of suicide. How do administrators of solitary confinement characterize the treatment? Don Poston, an administrator of the Estelle supermax prison in Texas, stated, “It's sad to say, but there are some people who deserve to be treated like animals.” A treatment not suited for humans is certainly inhumane, and unquestionably torturous.

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111 Shalev _supra_ note 110 at 4.
112 Butler _supra_ note 18, at 2; proliferation is described as the drastic increase in the number of supermax prisons.
114 _Human Rights Watch_, _supra_ note 1.
115 _Id._
116 Butler _supra_ note 18.
117 _Id._
118 _Id._
119 Shira _supra_ note 123, at 497.
III. Adopting International Principles and Eliminating Solitary Confinement

Juan Mendez, Independent United Nations Special Rapporteur on torture advocates that even the most limited use of solitary confinement inflicts inhumane circumstances. The current, routine use of solitary confinement is counterproductive and inefficient. The effects of solitary confinement incite the very violent, uncontrollable behavior the system seeks to restrain. Instead of rehabilitation and treatment, inmates and juveniles are subjugated to torturous treatment, crippling their chances of societal reintegration. The US needs to abandon its practice of solitary confinement, beginning with its application to juveniles and the mentally ill. The US can work in this direction by adopting and clearly establishing penitentiary policies and legislation that embodies international standards of human rights, rehabilitation and reintegration into society. Countries with the lowest recidivism rates such as Norway and the Netherlands should be used as examples to help build a penitentiary model that encompasses these principles, and no longer relies on solitary confinement. Lastly, the US must wholly commit to these principles by enabling better oversight and accountability by prison administrators and guards. Clearly defined legislation that reflects international principles should be created to aid accountability.

Norway Takes International Standards Seriously

The ultimate goal for the US should be to keep people out of prison, and successfully reintegrate them back into society. Therefore, adopting practices and idealisms from countries such as Norway who

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121 Shira *supra* note 123.
122 Butler *supra* note 18.
123 Butler *supra* note 18.
124 H.R. Rep. No. 112-879; Established "Children are Constitutionally different from adults" and are "less deserving of the most severe punishments." - *Miller v. Alabama*, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012).
125 Article 10 ICCPR.
have the lowest recidivism rates would be instrumental.\textsuperscript{127} From a fundamental rights standpoint, Norway has attempted to build its system with the intention of reintegration and rehabilitation.\textsuperscript{128} This coincides with the SMR, which states that the aim of treatment of prisoners should:

\begin{quote}
. . . establish in them the will to lead law-abiding and self-supporting lives after their release and to fit them to do so. The treatment shall be such as will encourage their self-respect and develop their sense of responsibility.\textsuperscript{129}
\end{quote}

Furthermore, Norway does not practice excessively long cellular confinements, employ the death penalty nor do they practice unnecessarily intrusive forms of punishment.\textsuperscript{130} With all obvious socio-economic differences aside,\textsuperscript{131} Norway has the lowest incarceration rate of 72 in the world, nearly a tenth of the United States.\textsuperscript{132} More strikingly, Norway has one of the lowest recidivism rates in the world at 20%, contrasted with the U.S’s 76%.\textsuperscript{133} In Norway, the philosophical aim of the penal system is rehabilitation. Norwegians believe that justice does not reside in “traditional, repressive prison systems,” but by releasing prisoners who are less likely to reoffend.\textsuperscript{134} Humane treatment of prisoners is believed to enable reintegration into society. The Norwegian penal system is centered on three “principles of normalcy” to induce humane treatment of inmates .\textsuperscript{135} The first is, punishment is limited to the loss of

\begin{footnotesize}
\textsuperscript{127} Id.  \\
\textsuperscript{128} See ICCPR; See Geneva Convention; See SMR.  \\
\textsuperscript{129} SMR (65).  \\
\textsuperscript{130} See ICCPR; See Geneva Convention; See Standard Min Rules.  \\
\textsuperscript{131} Norway is a primarily homogeneous society made up of 94% of Norwegian ethnic group. It has a very small population of 5,147,792 (July 2014 est.). The Norwegian economy is a prosperous mixed economy, with a vibrant private sector, a large state sector, and an extensive social safety net. Norway is not a member of the EU.; Central Intelligence Agency, https://www.cia.gov/library/publications/the-world-factbook/geos/no.html (last visited Mar. 17, 2015).  \\
\textsuperscript{133} - a rate of 72 incarcerated per 100,000 people. US has 716.  \\
\textsuperscript{134} Deady supra note 137.  \\
\textsuperscript{135} Deady supra note 137, at 3.  \\
\end{footnotesize}
liberty, and no sentence may remove any other rights. This is includes the right to life. The second, is that the offender should be placed in the least restrictive “security regime” necessary to ensure citizen security. Lastly, while serving a sentence, “life inside should resemble life outside as much as possible.” Normalcy is based on the principle that “you need a reason to deny an offender’s rights, not grant them.” These concepts of rehabilitation and normalcy are reflected in current and future government endeavors. For example, the government has taken an active role in easing the transition of ex-convicts back into society with the “reintegration guarantee.” The reintegration guarantee promises any offender education, a form of income, healthcare services, an offer of employment, and any medical services such as addiction treatment, upon completion of their sentence. Regarding future policy, when the proper resources are available, Norway hopes to create specialized prisons that focus on psychiatric and mental illnesses.

Perhaps Norway’s strongest example of its commitment to international standards is Skien maximum-security prison in Bastoy Island. Five years out from serving a full sentence (the maximum is 21 years), prisoners can apply to transfer to Skien, commonly referred to as “Bastoy.” Bastoy is organized in small “pod” communities that resemble that of a college dorm-suite. Each pod houses six inmates who share a kitchen. Within each cell, each inmate contains a television, computer, sanitation and shower. Additionally, there are quarters designated for family visits and conjugal relations. The community setup is in an attempt to minimize detrimental prison “subculture”, and induce

\[\text{Id.}\]
\[\text{Id.}\]
\[\text{Id.}\]
\[\text{Id.}\]
\[\text{Id.}\]
\[\text{Kriminalomsorgen }\text{supra note at 149.}\]
\[\text{Id.}\]
\[\text{Id.}\]
\[\text{Id.}\]
\[\text{Id.}\]
\[\text{Id.}\]
normalcy. The inmates are only provided one meal a day, and earn food allowances they must budget. They cultivate most of their own food, whether it is growing vegetables or raising cattle. Each inmate has a designated job, ranging from running a bike shop to teaching music. They are required to work all day, however are given free time to fish and exercise. Lastly, education, rehabilitative, and skills classes are also offered for inmates to attend. The idea, behind these amenities is to acclimate prisoners to a lifestyle they will most likely experience once they are released. Norway has been criticized for its seemingly luxurious and lenient approach to incarceration. However, Bastoy’s less than 16% recidivism rate suggests their alternative approach is highly effective. There is some merit to the idea that keeping someone locked under the most restrictive circumstances does not prepare an inmate to have responsibilities again.

The U.S Can Start With Small Steps

Norway’s model may seem outlandish and overwhelming in comparison. The US however can take small steps towards eliminating solitary confinement. Eliminating solitary confinement does eliminate all ability to segregate an inmate. It also does not surrender all means of controlling extremely dangerous or high-risk inmates. The Netherlands for example, still separate individuals without exposing them to all the harsh conditions that are associated with solitary confinement. Individuals that are likely to escape are placed in a special unit that has extra security. These individuals are still afforded phone calls home, daily exercise, group activities, and weekly pre-arranged

\[\begin{align*}
^{147} & Id. \\
^{148} & Id. \\
^{149} & Id. \\
^{150} & Id. \\
^{151} & Id. \\
^{152} & Id. \\
^{153} & Id. \\
^{154} & Id. \\
^{155} & James supra note 156. \\
^{156} & Id. \\
^{157} & Gordon supra note 123. \\
^{158} & Id. \\
^{159} & Shalev supra note 110, at 48. \\
^{160} & Id.
\end{align*}\]
visits. Additionally, allow for sensory and intellectual stimulation.\textsuperscript{161} Segregation is an opportune time for a prisoner to have access to in-cell educational and self-help material or art supplies for therapeutic release.\textsuperscript{162} Alternatively, the UN has endorsed the use of “direct supervision” as the preferred method for managing disruptive prisoners.\textsuperscript{163} Direct supervision increases “face to face” contact with prisoners and is applied in a proactive rather than reactionary nature.\textsuperscript{164} Research has also indicated that direct supervision provide more effective surveillance and attribute to a dramatic reduction of prison violence.\textsuperscript{165}

Proposed legislation such as The Convention of the Rights of Persons with Disabilities (CRPD), which guarantees fundamental freedoms and liberties to youth, indicates the US may be moving in a progressive direction.\textsuperscript{166} However legislation without accountability often lacks effectiveness. The Individuals with Disabilities Education Act (IDEA) is an example of the type of federal law that embodies international standards of humane treatment but has not been strictly adhered to.\textsuperscript{167} It requires the least restrictive environments and individualized care for youth with disabilities, yet juveniles with disabilities are still currently being held in solitary confinement.\textsuperscript{168} States also need to take a more active role in ensuring privatized prisons have oversight, and cannot unilaterally impose their own punishment system.\textsuperscript{169} Clearly defined legislation may also aid the courts. The controversial decision previously discussed in Sadin is an example of where legislation prohibiting conditions associated with solitary confinement may have helped clarify what was considered to be punishment that imposed due process rights.\textsuperscript{170} Specifically, Sadin used a standard requiring “atypical” punishment that imposed “significant

\textsuperscript{161} Id. at 50.
\textsuperscript{162} Id.
\textsuperscript{163} Id.
\textsuperscript{164} Id.
\textsuperscript{165} Id.
\textsuperscript{166} HUMAN RIGHTS WATCH, supra note, at 43.
\textsuperscript{167} Id at 45.
\textsuperscript{168} Id.
\textsuperscript{169} Ratliff supra note#, at 414.
\textsuperscript{170} This has since been abrogated by a number of state courts however is still considered good law. This case has been cited by over 20,000 cases: Sandin.
“hardship” on inmate in order to be considered a violation of due process. Legislation that prohibits solitary confinement due to its cruel and unusual nature would indicate atypical treatment that most likely inflicted significant hardship.

**Conclusion**

“If we treat people like animals when they are in prison they are likely to behave like animals.” Consequently the majority of those treated as such, are the communities that need to be uplifted the most. As a democratic institution that values life, liberty and property, it cannot continue to systematically perpetuate subhuman treatment. Solitary confinement is torture and its affects are evident in the recidivism rates alone. The US not only needs to reevaluate its constitutional values, but hold itself accountable as party who ratified the Committee against Torture. Inhumane punishment without purpose is expensive and ineffective. Realigning US penitentiary principles with international standard of maintaining human rights and dignity will refocus on what should be the goal: healthy reintegration.

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171 This has since been abrogated by a number of state courts however is still considered good law. This case has been cited by over 20,000 cases: Sandin.

172 James *supra* note 156.

173 Two studies--matched prisoners held in solitary confinement with those held in the general population--found that solitary confinement increased recidivism. – Gordon supra note 123.

174 CA T/C/28/Add.5 9 February 2000.