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# Punishments in Penal Institutions: (Dis)-Proportionality in Isolation

By Jacob Zoghlin\*

## INTRODUCTION

United Nations Special Rapporteur on Torture, Juan E. Méndez, reports that on any given day in the United States, prisons hold more than 80,000 people in solitary confinement for a wide variety of offenses. Twenty-five thousand of those individuals are being held in “Super-max” prisons, facilities created for long-term solitary confinement.<sup>1</sup> In California’s Pelican Bay State Prison, for example, some prisoners have been held in isolation for over twenty years. In July 2013, an estimated 29,000 prisoners organized a hunger strike throughout California to protest the State’s use of solitary confinement.<sup>2</sup> The widespread use of solitary confinement is particularly troublesome in light of the lack of standards for when punitive solitary confinement may be used, whom it may be used against, and the duration for which it may be used. Moreover, medical experts have confirmed concerns that the overuse of punitive solitary confinement can cause severe physical and psychological harm.<sup>3</sup> In light of these problems, which largely stem from the lack of rules regulating solitary confinement, the Inter-American Commission on Human Rights (IACHR) has urged U.S. authorities “to restrict the use of solitary confinement of prisoners in accordance with international human rights standards.”<sup>4</sup>

This article addresses whether the lack of standards associated with the use of punitive solitary confinement constitutes cruel and unusual punishment in violation of the U.S. Constitution. It begins by discussing the nature, purpose, and effect of solitary confinement. The article then evaluates the use of solitary confinement under both U.S. law and international human rights standards. It argues that the absence of adequate regulation and oversight of solitary confinement risks arbitrary and excessive use and results in punishments that are grossly disproportionate to the underlying offense in violation of the Eighth Amendment. Finally, this article concludes that stricter standards prohibiting punitive solitary confinement – or at least limiting its use to certain enumerated, violent violations – would prevent solitary confinement from being used as a disciplinary measure of first resort and would help alleviate some of its constitutional infirmities.



*Solitary Confinement, photo courtesy of Flickr user Jodi Wilson*

## EXPLORING SOLITARY CONFINEMENT – A STORY FROM THE BOX

The *Istanbul Statement on the Use and Effects of Solitary Confinement* defines solitary confinement as the physical isolation of individuals who are confined to their cells for twenty-two to twenty-four hours per day.<sup>5</sup> Although prisons refer to solitary confinement facilities as “Super-max,” “Secure Housing Unit (SHU),” or “Special Housing Unit,” prisoners know them as “the hole” or “the box.”<sup>6</sup> People in solitary confinement are usually housed in tiny cells and have limited contact with other people. This extreme social isolation is made more severe by intellectual and spiritual deprivation that prisoners face – prisoners in solitary confinement are subject to rigid restrictions on recreation, visitation, reading, religious practice, and other privileges that may be available to the general prison population. Accordingly, the near-total absence of external stimuli leaves prisoners with few options other than to retreat into their own thoughts, which often leads to extreme physiological changes, psychological deterioration, and often lasting physical and emotional harm.<sup>7</sup>

Additionally, prison officials routinely subject youths and individuals with mental disabilities to solitary confinement for prolonged periods despite their known vulnerabilities — a practice that, according to the IACHR, runs contrary to international human rights standards.<sup>8</sup> A fifteen-year-old prisoner placed in solitary confinement for three months described how she hurt herself to deal with the pain and loss she experienced while alone with her thoughts:

I became a cutter [in solitary confinement]. I like to take staples and carve letters and stuff in my arm. Each

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## Even when a hearing is conducted prior to an inmate's confinement, the prisoner often faces serious impediments to due process and basic trial rights; no jury considers the basis for the charge or infraction alleged against the prisoner.

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letter means something to me. It is something I had lost. Like the first one was a [letter], which is the first letter in my mother's name. And every day I would apologize to her. I don't know — I felt like I had a burden I couldn't carry and it made me feel good.<sup>9</sup>

Far from an extraordinary case, this experience expresses common reactions of inmates placed in solitary confinement.<sup>10</sup> Medical studies have confirmed that nearly half of all prisoners in solitary confinement develop serious mental and psychological problems, like the self-inflicted harm described above, or have existing medical and psychological problems exacerbated.<sup>11</sup> Bob Peoples, who spent over two years in isolation for allegedly filing false legal documents, stated, “life in the box stripped me of my dignity, and made me feel like a chained dog.”<sup>12</sup> Solitary confinement goes too far and is used too often. It is not just harsh, it is degrading and damaging.

### WHAT IS REQUIRED BEFORE A PRISONER IS PLACED IN THE HOLE?

In the United States, solitary confinement primarily is used for three reasons: “to punish violations of prison rules (disciplinary segregation); to isolate prisoners who pose a threat to the safety and security of the prison (administrative segregation); and to shield vulnerable prisoners, such as those potentially targeted for violence in the general prison population (protective custody).”<sup>13</sup>

U.S. prisons commonly use solitary confinement to punish a variety of minor, non-violent offenses, such as failure to keep a tidy cell, wasting food, or littering.<sup>14</sup> Disciplinary solitary confinement for these types of minor offenses is not a sentence imposed after a separate jury trial before an impartial judge; rather, it is an administrative punishment imposed with limited oversight against already incarcerated individuals.<sup>15</sup> Although the law entitles inmates to receive notice of the charges and an administrative hearing before being placed in punitive solitary confinement, these procedural safeguards are not always observed.<sup>16</sup> Even when a hearing is conducted prior to an inmate's confinement, the prisoner often faces serious impediments to due process and basic trial rights; no jury considers the basis for the charge or infraction alleged against the prisoner.

Additionally, prisoners do not have access to a lawyer at any point during these hearings. Although inmates may call witnesses to rebut the charges against them, the realities of prison life and the evidentiary rules imposed at these hearings make calling witnesses a practical impossibility. For example, in order to call a fellow inmate as a potential witness, a prisoner must often know the first and last name of the fellow inmate, as well as the prisoner's inmate number, which is information that is not normally available to prison inmates. Furthermore, prison

culture and outright threats of violence often discourage prisoners from calling witnesses or putting on any sincere defense to the administrative charges against them.

The prison administrator's decision is subject to minimal oversight, which makes it extremely difficult for prisoners to challenge their placement in solitary confinement.<sup>17</sup> Because the standard for proving guilt in administrative hearings is particularly low — requiring only a preponderance of the evidence — alleged violations of prison rules routinely result in findings of guilt based on little more evidence than the testimony of a single prison guard.<sup>18</sup> In a Florida facility, a prison guard reportedly punished an entire group of inmates with solitary confinement for a noise violation because he could not determine who was responsible.<sup>19</sup> This represents what many human rights organizations decry as an overuse of punitive solitary confinement — using extreme isolation as a disciplinary tool of first-resort for minor infractions, without regard for the long-term harmful implications that such isolation can have on prisoners.

Most assume that punitive isolation practices, with their damaging physical, emotional, and social consequences, are only used in the gravest circumstances against the most violent offenders who pose a risk to others. That simply is not the case. Although prison officials can generally choose from a range of penalties, they often use solitary confinement in lieu of less severe measures. One adolescent, who had been in prison since the age of fifteen, reported that officials responded to almost every infraction with punitive solitary confinement:

15 days for not making the bed; 15 days for not keeping the cell door open; 20 or 25 days for being in someone else's cell. In the write-up book, they could have suspended privileges or anything. All they did is disciplinary seg[regation]. I would put my ear wax in the toilet in my cell and flush it to watch it spin. I did [solitary confinement] time for that.<sup>20</sup>

Recent reports from the New York Civil Liberty Union (NYCLU) discuss the use of solitary confinement in New York prisons.

[F]rom 2007 to 2011, the Department of Corrections issued more than 68,000 solitary confinement sentences for various rule infractions. Of those 68,000 sentences, only 16 percent were for assault or weapons offenses. For example, between 2007 and 2011, the DOC issued 302 isolation sentences for “smoking in an undesignated area,” 135 for “wasting food,” 114 for “littering,” and 234 for keeping an “untidy cell or person.”<sup>21</sup>

### EFFECTS OF SOLITARY CONFINEMENT

Solitary confinement deprives individuals of the basic need for human interaction, including family ties, and can increase the rate of recidivism among prisoners and released inmates.<sup>22</sup> Several studies have concluded that visitation can reduce and delay recidivism, attributing that result to the positive effects of social interaction.<sup>23</sup> These studies demonstrate that solitary confinement undermines the penological goal of rehabilitation and has significant negative psychological effects.

Dr. Stuart Grassia, one of the first American psychiatrists to study the effects of extreme isolation, found that prisoners placed in prolonged solitary confinement often develop a medical condition known as Reduced Environmental Stimulation (RES),<sup>24</sup> which mirrors the symptoms exhibited by hostages and prisoners of war.<sup>25</sup> Senator John McCain, who was subjected to solitary confinement as a prisoner of war in Vietnam, wrote that solitary confinement “crushes your spirit and weakens your resistance more effectively than any other form of mistreatment.”<sup>26</sup> Testimonials like this, as well as medical data compiled by numerous experts, indicate that “[s]ocial interaction is neither a right nor a privilege — it is a fundamental human need.”<sup>27</sup> Dr. Atul Gawande noted that, “simply to exist as a normal human being requires interaction with other people.”<sup>28</sup> Prolonged solitary confinement results in drastic physiological changes that can cause severe physical and psychological harm. Accordingly, the harmful physical and psychological effects of prolonged punitive solitary confinement run contrary to prisoners’ basic human rights, which entitle all people to dignity and bodily integrity.

Psychologically, solitary confinement may cause many severe conditions such as post-traumatic stress disorder (PTSD), panic attacks, flashbacks, chronic hyper-vigilance, hopelessness, problems with impulse control including random violence and self-harm, overt paranoia, intrusive and obsessive thoughts, difficulties with concentration and memory, perceptual distortions, and hypersensitivity to external stimuli.<sup>29</sup> Physiologically, solitary confinement can cause sleep disturbances, headaches, lethargy, dizziness, heart palpitations, appetite loss, weight loss, severe digestive problems, diaphoresis, back and joint pain, deterioration of eyesight, shaking and feeling cold, and aggravation of pre-existing medical problems.<sup>30</sup>

Moreover, prison administrators who lack expertise in medicine or psychology cannot anticipate or judge the damage caused by placing vulnerable individuals in solitary confinement.<sup>31</sup> Because many states hold juveniles in adult facilities and impose adult punishments like solitary confinement, advocates often raise concerns about the severe effects of isolation on juveniles due to their youth and developing brains.<sup>32</sup> Because of these underdevelopments and age-related vulnerabilities, juveniles are nineteen times more likely to kill themselves in solitary confinement than they are to kill themselves when they are

housed with the general population.<sup>33</sup> The extreme and excessive use of solitary confinement in the U.S. contradicts international human rights standards that protect children.<sup>34</sup>

### CHILDREN AND SOLITARY CONFINEMENT

International human rights derive their standards from fundamental human needs.<sup>35</sup> The Universal Declaration on Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) all prohibit torture and other forms of cruel, inhumane, or degrading treatments or punishments that undermine both shared humanity and basic human needs. In recognition of these treaties, and the rights they protect, the United Nations Human Rights Committee stated, “prolonged solitary confinement of the detained or imprisoned person may amount to [torture or other cruel, inhuman, or degrading treatment or punishment].”<sup>36</sup> Special Rapporteur Méndez, in his official report as the UN Special Rapporteur on Torture, concluded that the “physical conditions” and “regime of solitary confinement” can amount to cruel, inhuman, and degrading treatment or torture.<sup>37</sup> Méndez stressed that solitary confinement should be limited and should always be accompanied by procedural safeguards.

Similarly, the Inter-American Court of Human Rights (IACtHR) has held that “solitary confinement or unnecessary restrictions to visitation regimens constitute a violation to the right to humane treatment.”<sup>38</sup> Because of the severe mental and physiological effects of extreme isolation, international and regional bodies have consistently found that solitary confinement should only be used under exceptional circumstances and not as a punishment of first-resort. The IACtHR has repeatedly held that the conditions of solitary confinement violate international prohibitions against torture.<sup>39</sup> Similarly, the European Court on Human Rights (ECtHR) recognizes the severe mental and physical damage caused by solitary confinement and limits its use.<sup>40</sup> For these reasons, the United Nations General Assembly Resolution on the Basic Principles for the Treatment of Prisoners has made clear that “[e]fforts addressed to the abolition of solitary confinement as a punishment, or to the restriction of its use, should be undertaken and encouraged.”<sup>41</sup>

Additionally, with respect to juvenile inmates, there is an even stronger argument against solitary confinement because it deprives youth of basic human needs, like opportunities for social, physical, educational, and spiritual development, which violates the United Nations Convention on the Rights of the Child (UNCRC). This convention “recogniz[es] the right of every child to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development” as a fundamental human right.<sup>42</sup> International human rights organizations that condemn placing children in solitary confinement

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because of fears that extreme isolation denies basic needs, as well as concerns that solitary confinement is more harmful and disproportionate when used to punish youths.<sup>43</sup>

#### INTERNATIONAL STANDARDS AND SOLITARY CONFINEMENT

The international community has clearly recognized the importance of placing restrictions on solitary confinement to ensure that it is not used in an arbitrary and excessive manner. In the case of *Babar Ahmad v. The United Kingdom*, the ECtHR recognized that, “in order to avoid any risk of arbitrariness resulting from a decision to place a prisoner in solitary confinement, the decision must be accompanied by procedural safeguards guaranteeing the prisoner’s welfare and the proportionality of the measure.”<sup>44</sup>

The ECtHR’s decision limits on the use of solitary confinement in four ways. First, the decision to impose solitary confinement as a punishment must be based on genuine grounds and should only be used in exceptional circumstances, as a measure of last resort, following procedural precautions. Second, authorities must consider a prisoner’s circumstances, situation, and behavior when assigning solitary confinement as a punishment, documenting the substantive reasons for their decision in order to demonstrate that the disciplinary solitary confinement is proportional to the totality of the circumstances surrounding the particular inmate. Third, prisons must monitor the physical and mental condition of inmates in order to ensure that solitary confinement remains appropriate. Finally, prisoners must have an opportunity to challenge their placement in prolonged solitary confinement before an independent judicial authority.

These standards ensure that the imposition of solitary confinement is proportional and comports with international human rights standards. Although the ECtHR did not find a violation in the aforementioned case, its discussion of solitary confinement is useful in understanding what restrictions must be in place to protect the human rights of prisoners. To implement these standards, countries need to impose strict regulations to eliminate the use of disciplinary solitary confinement or at least limit its use to punishment of only serious, violent offenses.

Similarly, the IACtHR has limited the use of solitary confinement, holding that “isolation from the outside world produces in any person moral suffering and psychic perturbations, places them in a situation of particular vulnerability, and increases the risk of aggression and arbitrariness in prisons.”<sup>45</sup> This further supports the requirement that such harsh punishments only be used in enumerated circumstances for serious, violent offenses to avoid arbitrary enforcement that is disproportionate to the underlying offense. These international standards of proportionality are in place to protect the human rights and dignity of prisoners and should be adopted throughout the U.S. to

avoid potential constitutional violations that arise when severe, damaging punishments are used to discipline minor, nonviolent offenses.<sup>46</sup>

#### DOMESTIC LAWS AFFECTING SOLITARY CONFINEMENT IN THE U.S.

##### WHY CHILDREN ARE DIFFERENT

Consistent with international treaties, the U.S. Supreme Court has unequivocally stated that children are not to be treated as having the same culpability as adults and has required courts to consider juveniles’ youthfulness in determining the proportionality, and therefore the constitutionality, of children’s punishments under the Eighth Amendment.<sup>47</sup>

The Supreme Court bases its distinction between juveniles and adults on three distinguishing factors between the two groups. First, children have a “‘lack of maturity and an underdeveloped sense of responsibility,’ leading to recklessness, impulsivity, and heedless risk-taking.” Second, “children ‘are more vulnerable . . . to negative influences and outside pressures,’ including from their family and peers; they have limited ‘contro[l] over their own environment’ and lack the ability to extricate themselves from horrific, crime-producing settings.” Third, “a child’s character is not as ‘well formed’ as an adult’s; his traits are ‘less fixed’ and his actions less likely to be ‘evidence of irremediabl[e] deprav[ity].”

Because of these three factors, the Supreme Court has acknowledged that the traditional penological interests that usually justify harsh punishments are diminished when applied to juveniles.<sup>48</sup> The same diminished penological interests that render capital punishment illegal should also render solitary confinement illegal. Both are inappropriate as a form of retribution and are less likely to deter recidivism. Moreover, studies have shown that solitary confinement actually increases rates of recidivism and therefore cannot be justified by a penological interest in rehabilitation.<sup>49</sup>

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#### FEDERAL CONSTITUTIONAL ISSUES AFFECTING SOLITARY CONFINEMENT

The Eighth Amendment to the U.S. Constitution prohibits the infliction of cruel and unusual punishments.<sup>50</sup> Although the scope of that prohibition is not always clear, the Eighth Amendment undisputedly prohibits torture. In *Weems v. United States*, Justice McKenna explained that, “the inhibition [against cruel and unusual punishment] was directed not only against punishments which inflict torture, ‘but against all punishments which, by their excessive length or severity, are greatly disproportioned to the offenses charged.’”<sup>51</sup> Accordingly, the notion that the punishment should be proportional to the crime has

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become fundamental to interpreting the Eighth Amendment. The Supreme Court bases this proportionality requirement on the following two separate but related principles: (1) sentencing practices with a significant disparity between the culpability of the offenders and the severity of the penalty are prohibited,<sup>52</sup> and (2) courts must consider the “specific character of a defendant.”<sup>53</sup>

The first principle of the proportionality requirement judges what is fair and proportionate from a macro level; it provides that extreme punishments may only be used to punish serious, blameworthy offenses. From this perspective, the Eighth Amendment operates to constrain when and how the government may use force to enforce laws. For example, in *Solem v. Helm*, the Court invalidated a severe sentence using the Eighth Amendment’s proportionality analysis.<sup>54</sup> The Court reasoned that the punishment of life without the possibility of parole was grossly disproportionate to the minor, nonviolent crime that involved only \$100, holding that the sentence constituted a cruel and unusual punishment in contravention of the Eighth Amendment.

Just as the culpability of a nonviolent, \$100 crime does not justify life without parole, the culpability of a minor, nonviolent offense like wasting food does not justify the severe punishment of solitary confinement, which causes lasting physical and psychological harm. In both instances, the culpability of the crime does not warrant the deprivation of liberty imposed by the punishment. Only interests in the health and safety of the prisoners and guards – and not minor disciplinary concerns – can proportionally justify the use of solitary confinement. Only grave and violent infractions can constitutionally warrant such serious and potentially harmful punishments. Given the systematic over use of solitary confinement, stricter standards must be implemented to alleviate the constitutional infirmities associated with the disproportionate and excessive punishment for minor offenses.

The second principle of proportionality looks at what is fair on the micro level and is based on the understanding that a punishment for a particular crime, which ordinarily may be appropriate, can be grossly disproportionate when applied to certain defendants, like youths or individuals with mental disabilities, whose circumstances mitigate their culpability.<sup>55</sup> The mandate that an individual’s circumstances be considered when determining whether a punishment is proportional has led the Court

to forbid the use of certain severe punishments, like the death penalty, against particularly vulnerable populations, like juveniles<sup>56</sup> and individuals with mental disabilities.<sup>57</sup> Because proportionality cannot exist in a vacuum, the Eighth Amendment requires that punishments be appropriate to both the nature of the specific crime and the character of the particular individual.

Just as judges must consider a defendant’s youth and mental fitness when issuing a sentence, prison administrators must consider each prisoner’s individual characteristics before placing them in solitary confinement. Stringent standards that (1) restrict who may be placed in solitary confinement, (2) limit the duration of solitary confinement, and (3) require prison administrators to consider the characteristics of prisoners before placing them in solitary confinement, would reduce the constitutional concerns that arise when isolation is used as a “one size fits all” punishment. Such standards would authorize solitary confinement only on a case-by-case basis and only when penological interests (such as protecting the remainder of the prison population) justify its use.

### WHAT MAKES A PUNISHMENT PROPORTIONAL?

The proportionality analysis draws its meaning from the “evolving standards of decency that mark the progress of a maturing society.” The “evolving standards of decency” standard is used to determine whether the disparity between the severity of a punishment and the culpability of a crime renders a particular penological practice so disproportionate that it violates the Eighth Amendment. Courts consider three factors under this standard: (1) the practices of other civilized nations, (2) the status of state laws on the particular issue, and (3) the direction of changes in state laws.<sup>58</sup>

Accordingly, international standards disfavoring solitary confinement suggest that standards of decency have evolved away from the use of solitary confinement and, at the very least, require strict regulations limiting the use of disciplinary solitary confinement to punishing the most heinous, violent offenses. These international standards require implementing procedures that avoid arbitrariness and promote the proportional use of solitary confinement. The effect of these evolving standards of decency on U.S. law is to raise the bar for what is considered proportional when it comes to the imposition of punitive solitary confinement. Therefore, as the use of solitary confinement becomes increasingly taboo by international standards, the indiscriminate use of solitary confinement by prison administrators becomes increasingly disproportional.

In determining whether a legal punishment is proportional to the crime, courts consider whether the statute, rule, or regulation that permits the punishment is devoid of standards that establish when that punishment may be imposed. In *County of Nassau v. Canavan*, for example, the court held that the fact that the statute was “devoid of standards as to which petty offenses . . . [would] result in the implementation of the forfeiture provisions . . . enhanc[ed] the opportunity for disproportionate enforcement. Indeed, the County’s unilateral decision to invoke the ordinance’s nearly limitless application in certain instances and not in others highlights the infirmity inherent in the statute itself.”<sup>59</sup> Although this case challenged a law based on the excessive fines clause, it highlights the legal problem associated with the lack



Inside Supermax – Something Burning, photo courtesy of Flickr user Ryan Lobo

of cognizable standards for when solitary confinement may be used and for how long it may be used. A lack of standards about when severe punishments may be used unreasonably risks disproportionate and arbitrary enforcement by permitting extreme measures to be used to discipline minor and technical violations that do not warrant such punishments. The lack of standards creates a *per se* challenge to a presumption of proportionality.

Indeed, a Texas court found, in *Morales v. Turman*, that “[p]lacing inmates in solitary confinement or secured facilities, in the absence of any legislative or administrative limitation on the duration and intensity of the confinement and subject only to the unfettered discretion of correctional officers, constitutes cruel and unusual punishment in violation of the eighth amendment.”<sup>60</sup> The court prohibited solitary confinement unless it is “clearly necessary to prevent imminent physical harm to the inmate or to other persons or clearly necessary to prevent imminent and substantial destruction of property.”<sup>61</sup> This decision affirms that, because solitary confinement is severe, its use is unconstitutionally disproportionate when not constrained by standards, time limits, and procedural safeguards.

From this perspective, when no legislative or administrative rule limits what infractions warrant the imposition of extreme isolation, the standard violates the proportionality requirement. Additionally, such loose standards risk running afoul of the Due Process Clause by allowing prison administrators to impose solitary confinement arbitrarily without first affording prisoners a genuine opportunity to challenge their punishment before an independent, judiciary authority.

#### ADDRESSING THE PROBLEMS WITH SOLITARY CONFINEMENT IN THE U.S.

Although the Supreme Court has affirmed that “[c]onfinement in an isolation cell is a form of punishment subject to scrutiny under Eighth Amendment standards,”<sup>62</sup> courts have failed to apply that scrutiny effectively to constrain its continued use, deciding instead to defer to the judgment of prison administrators.<sup>63</sup> Even though courts must necessarily consider proportionality and human dignity in deciding cases challenging prison conditions, because of the presumed expert knowledge of prison administrators, courts have largely deferred to the judgments of prison administrators “in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.”<sup>64</sup> This is because, in considering the legality of prison conditions, courts try to strike a balance between scrutinizing the challenged conditions and considering the difficult realities of prison administration. Ultimately, however, courts defer to the judgment of prison administrators too much.<sup>65</sup>

Prison administrators are not in a position to weigh the penological interests against the inevitable physical, social, and psychological damages associated with solitary confinement because they do not realize the harm that this treatment causes. Furthermore, because prison administrators are not health experts, they are ill equipped to determine whether a penalty that helps maintain discipline (such as solitary confinement) is proportionate to the violation it punishes. Thus, when prison guards are given such discretion in deciding when to impose solitary confinement, disproportionate punishments constituting

constitutional violations consistently result.<sup>66</sup> This concern is magnified when juveniles are subjected to solitary confinement because youth are generally considered less culpable than adults,<sup>67</sup> and solitary confinement has a substantially greater deleterious effect on them.<sup>68</sup> Rather than determining whether the conditions of solitary confinement are proportional, courts should give as much consideration to medical experts, who can put the harmful effects of solitary confinement into perspective, as they do to prison administrators, who understand the penal interests involved.

Although some offenses justify severe punishments under the proportionality analysis, other offenses are so minor that the imposition of one of the harshest punishments is unacceptable. Not only is solitary confinement among the severest punishments in the U.S., it is also one of the least regulated and most arbitrarily employed punishments. The lack of standards creates a constitutional infirmity by permitting prison administrators to impose solitary confinement as a punishment with almost no judicial oversight or due process consideration. The extreme harm of solitary confinement raises severe proportionality concerns. Even if solitary confinement is justified and used proportionally when keeping general prison populations safe from violent inmates, it still is cruel, unusual, and grossly disproportionate when used against nonviolent inmates for minor offenses.

Stricter standards for when solitary confinement may be imposed would help prevent solitary confinement from being used disproportionately and could also protect prisoners’ due process rights. The U.S. ought to establish federal rules for when solitary confinement may be used that comport with international and regional standards. Such standards must consider the objective medical fact that solitary confinement drastically changes prisoners’ physiology and causes severe physical and psychological harm. These standards would recognize that the proportionality requirement of the Eighth Amendment mandates that solitary confinement be used exceedingly sparingly.

By permitting solitary confinement to be used only for protective purposes, and not for disciplinary reasons, penal institutions could reduce arbitrary and disproportionate imposition of solitary confinement. Stricter standards foster greater proportionality of punishments for infractions. Standards would prevent solitary confinement from being used as a punishment of first-resort for minor infractions. Finally, because solitary confinement does not serve penological interests such as reducing recidivism, as discussed above, limiting its use does not undermine prison’s administrators capacity to control the prison population.

#### CONCLUSION

At the very least, solitary confinement is overused. That is something that can be agreed upon and something that can be fixed. Establishing strict standards for when solitary confinement may be used and, more importantly, when it may *not* be used can prevent the most brazen abuses. The government can and should limit its duration, end its utilization as a punitive measure, and forbid its use against youths and individuals with mental disabilities – the government has a legal obligation to do so under both international law and the U.S. Constitution.

Without limited, enumerated standards for when a prisoner may receive solitary confinement, the imposition of this severe

punishment as a disciplinary measure risks arbitrary and disproportionate use, in violation of the Eighth Amendment.

## ENDNOTES

- <sup>1</sup> See Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment, *Torture and other cruel, inhuman or degrading treatment or punishment in accordance with General Assembly Resolution 65/205, transmitted by Note of the Secretary-General*, U.N. Doc. A/66/28, (Aug. 5, 2011) (by Juan Méndez) [hereinafter Méndez Report].
- <sup>2</sup> See Ryan Jacobs and Jaeah Lee, *Maps: Solitary Confinement, State by State*, MOTHER JONES, Nov.-Dec. 2012 ed., available at <http://www.motherjones.com/politics/2012/10/map-solitary-confinement-states> [hereinafter *Maps: Solitary Confinement, State by State*].
- <sup>3</sup> See PHYSICIANS FOR HUMAN RIGHTS, BURIED ALIVE: SOLITARY CONFINEMENT IN THE US DETENTION SYSTEM viii (April 2013) [hereinafter BURIED ALIVE].
- <sup>4</sup> See Press Release, Inter-American Commission on Human Rights, IACHR Expresses Concern over Excessive Use of Solitary Confinement in the U.S., IACHR Press Release No. 51/13 (July 18, 2013) [hereinafter July 18 IACHR Press Release].
- <sup>5</sup> International Psychological Trauma Symposium, Istanbul, *The Istanbul Statement On the Use and Effect of Solitary Confinement*, SOLITARY CONFINEMENT (Dec. 9, 2007).
- <sup>6</sup> See BURIED ALIVE, *supra* note 3, at viii.
- <sup>7</sup> See *id.*
- <sup>8</sup> See July 18 IACHR Press Release, *supra* note 4.
- <sup>9</sup> See AMERICAN CIVIL LIBERTIES UNION & HUMAN RIGHTS WATCH, GROWING UP LOCKED DOWN: YOUTH IN SOLITARY CONFINEMENT IN JAILS AND PRISONS ACROSS THE UNITED STATES 29 (2012) [hereinafter GROWING UP LOCKED DOWN].
- <sup>10</sup> See Stuart Grassian, *Psychopathological Effects of Solitary Confinement*, 140 AM. J. PSYCHIATRY 1450, 1450-54 (1983).
- <sup>11</sup> See generally David Lovell, *Patterns of Disturbed Behavior in a Supermax Population*, 35 CRIMINAL JUSTICE AND BEHAVIOR, 985 (2008).
- <sup>12</sup> See James King, *NYCLU Files Lawsuit Against State Over DOC's Solitary Confinement Policies*, VILLAGE VOICE (Dec. 7, 2012) [http://blogs.villagevoice.com/runninscared/2012/12/nyclu\\_files\\_law.php](http://blogs.villagevoice.com/runninscared/2012/12/nyclu_files_law.php).
- <sup>13</sup> See GROWING UP LOCKED DOWN, *supra* note 9, at 20.
- <sup>14</sup> See *Maps: Solitary Confinement, State by State*, *supra* note 2.
- <sup>15</sup> See NEW YORK CIVIL LIBERTIES UNION, BOXED IN: THE TRUE COST OF EXTREME ISOLATION IN NEW YORK 17 (2012) [hereinafter BOXED IN].
- <sup>16</sup> See GROWING UP LOCKED DOWN, *supra* note 9, at 49.
- <sup>17</sup> See BOXED IN, *supra* note 15, at 17.
- <sup>18</sup> See GROWING UP LOCKED DOWN, *supra* note 9, at 50.
- <sup>19</sup> See *id.* at 50 (“Man, you know how it is. There is [sic] a thousand of you [prisoners] in here—I can’t tell who is kicking the door.”).
- <sup>20</sup> See *id.* at 52.
- <sup>21</sup> See *id.*
- <sup>22</sup> See BOXED IN, *supra* note 15, at 23; NORMAN HOLT & DONALD MILLER, FAMILY & CORRECTIONS NETWORK, EXPLORATIONS IN INMATE-FAMILY RELATIONSHIPS: RESEARCH REPORT NO. 46 (1972).
- <sup>23</sup> See MINN. DEP’T OF CORRECTIONS, THE EFFECTS OF PRISON VISITATION ON OFFENDER RECIDIVISM (2011); William D. Bales & Daniel P. Mears, *Inmate Social Ties and the Transition to Society: Does Visitation Reduce Recidivism?*, JOURNAL OF RESEARCH IN CRIME AND DELINQUENCY 45 (2008) (concluding that visitation reduces and delays recidivism).
- <sup>24</sup> See Grassian, *supra* note 10, at 1450.
- <sup>25</sup> See *Madrid v. Gomez*, 889 F. Supp. 1146, 1230-1232 (N.D. Cal. 1995).
- <sup>26</sup> See *The Inhumane Practice of Solitary Confinement*, BLOOMBERG (Apr. 11, 2013), <http://www.bloomberg.com/news/2013-04-11/solitary-confinement-makes-u-s-prisons-cruel-and-unusual.html>.
- <sup>27</sup> See BURIED ALIVE, *supra* note 3.
- <sup>28</sup> See *id.* at 3.
- <sup>29</sup> See *id.*
- <sup>30</sup> See *id.*
- <sup>31</sup> See GROWING UP LOCKED DOWN, *supra* note 9, at 36.
- <sup>32</sup> See *Poster, Campaign For Youth Justice*, DAILY INFO GRAPHIC (accessed Oct. 20, 2013) [http://dailyinfographic.com/playground-to-prison-youth-in-the-adult-criminal-justice-system-infographic/playground-to-prison\\_5069c59171a67-2](http://dailyinfographic.com/playground-to-prison-youth-in-the-adult-criminal-justice-system-infographic/playground-to-prison_5069c59171a67-2) (explaining that, in 23 states, children as young as 7 can be tried in adult courts, which has resulted in over 10,000 children being held in adult prisons and jails). See generally *id.*
- <sup>33</sup> See *Maps: Solitary Confinement, State by State*, *supra* note 2.
- <sup>34</sup> See BURIED ALIVE, *supra* note 3.
- <sup>35</sup> See, e.g., Convention on the Rights of the Child, art. 27, Nov. 20, 1989, 1577 U.N.T.S. 3; Universal Declaration of Human Rights, G.A. Res. 217A (III) A, U.N. Doc. A/RES/217(III), art. 5, (Dec. 10, 1948).
- <sup>36</sup> Human Rights Comm., General Comment 20, Article 7, ¶ 6, 44th Sess., U.N. Doc. HRI/GEN/1/Rev. 1 at 30 (1994) [hereinafter HRC General Comment 20].
- <sup>37</sup> Méndez Report, *supra* note 1.
- <sup>38</sup> Miguel Castro-Castro Prison v. Peru, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 160, ¶¶ 315, 322 (Nov. 25, 2006) (citing United Nations First Congress, Compendium of the United Nations standards and norms in crime prevention and criminal justice, U.N. Sales No. 1956.IV.4 (1955). Citing also Econ. & Soc. Council Res. 663C (XXIV) of July 31, 1957 and 2076 (LXII) of May 13, 1977, Rules 10 and 11)).
- <sup>39</sup> See, e.g., Basic Principles for the Treatment of Prisoners, G.A. Res. 45/111, annex ¶ 7, U.N. Doc. A/RES/45/111 (December 14, 1990) [hereinafter Basic Principles].
- <sup>40</sup> *Koskinen v. Finland*, App. No. 2056092 18 Eur. H.R. Rep. 146, ¶ 73 (1994).
- <sup>41</sup> Basic Principles, *supra* note 39.
- <sup>42</sup> See Convention on the Rights of the Child, *supra* note 35 (announcing that disabled children, especially, should receive “education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child’s achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development”) (emphasis added).
- <sup>43</sup> See e.g., International Covenant on Civil and Political Rights, art. 10(3). Res. 2200A (XXI), 21 U.N. GAOR, 21st Sess. Supp. (No. 16) at 52, art. 10(3), 999 U.N.T.S. 171 (Dec. 16, 1966); INTER-AM. COMM. ON HUMAN RIGHTS, JUVENILE JUSTICE AND HUMAN RIGHTS IN THE AMERICAS (July 13, 2011); African Charter on the Rights and Welfare of the Child, preamble, OAU Doc. CAB/LEG/24.9/49 (1990).
- <sup>44</sup> *Ahmad et al. v. The United Kingdom*, nos. 2402/07, 11949/08, 36742/08, 66911/09, 6735/09, ¶ 212, ECHR 2012-IV.
- <sup>45</sup> *Miguel Castro-Castro Prison v. Peru*, *supra* note 38, at ¶ 322.



<sup>46</sup> See *id.* at ¶ 323 (Nov. 25, 2006). See also Velasquez Rodriguez Case, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, 9 ¶ 156 (July 29, 1988).

<sup>47</sup> See *Miller v. Alabama*, 132 S. Ct. 2455, 2463, 2466 (2012). See also *Roper v. Simmons*, 543 U.S. 551, 560 (2005).

<sup>48</sup> *Miller*, 132 S. Ct. at 2465.

<sup>49</sup> See BOXED IN, *supra* note 14, at 15.

<sup>50</sup> U.S. Const. amend. VIII.

<sup>51</sup> 217 U.S. 349, 551 (1910).

<sup>52</sup> See *Kennedy v. Louisiana*, 554 U.S. 407 (2008); *Atkins v. Virginia*, 536 U.S. 304 (2002).

<sup>53</sup> See *Woodson v. North Carolina*, 428 U.S. 280 (1976).

<sup>54</sup> *Solem v. Helm*, 463 U.S. 277, 278 (1983).

<sup>55</sup> See *Woodson*, 428 U.S. 280.

<sup>56</sup> See *Roper*, 543 U.S. at 569-70.

<sup>57</sup> See *Atkins*, 536 U.S. at 311.

<sup>58</sup> See *id.* at 318.

<sup>59</sup> See *County of Nassau v. Canavan*, 1 N.Y.3d 134, 140-41 (2003) (emphasis added).

<sup>60</sup> 364 F. Sup 166, 174 (E. D. Tex. 1973) (citing *Furman v. Georgia*, 408 U.S. 238, 257-306 (1972)).

<sup>61</sup> *Id.* at 177.

<sup>62</sup> *Hutto v. Finney*, 437 U.S. 678, 685 (1978).

<sup>63</sup> *Turner v. Safly*, 482 U.S. 78 (1987).

<sup>64</sup> *Rhodes v. Chapman*, 452 U.S. 337, 361-62 (1981) (quoting *Bell v. Wolfish*, 441 U.S. 520, 547 (1979)).

<sup>65</sup> See *Rhodes*, 452 U.S. at 361.

<sup>66</sup> See GROWING UP LOCKED DOWN, *supra* note 9, at 36.

<sup>67</sup> See *Miller*, 132 S. Ct. at 2463, 2466.

<sup>68</sup> See generally GROWING UP LOCKED DOWN, *supra* note 9.

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