

jueces, sino como una realidad novedosa en la historia convulsiva de América latina.

## SOLITARY CONFINEMENT AND INTERNATIONAL HUMAN RIGHTS: WHY THE U.S. PRISON SYSTEM FAILS GLOBAL STANDARDS

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### INTRODUCTION

Media coverage of prisoner abuse describes disturbing U.S. military prison conditions, the International Red Cross has expressed concern of "significant problems" with U.S. confinement techniques, and U.S. prison policies have faced mounting legal challenges.<sup>1</sup>

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1. See generally *Torture in U.S. Prisons in Iraq, Guantanamo*, MIAMI HERALD, Dec. 4, 2004, at 24A; *Guantanamo Bay: Tantamount to Torture*,

These critiques are indicative of a U.S. detention system far below the basic minimum standards for treatment of prisoners under international law. Accounts of long-term solitary confinement and other torture techniques demonstrate that current detention methods are not indications of U.S. leadership in human rights.<sup>2</sup> Use of extreme conditions and degrading treatment for political prisoners or enemy combatants should come as no surprise, however, given the United States' increasingly harsh treatment of its civilian prison population in maximum security prisons ("supermax facilities") nationwide.<sup>3</sup> The near pervasive practice of extended solitary confinement as a commonplace and legally legitimate detention method demonstrates extreme disregard for incarcerated U.S. citizens and is a tangible basis upon which torture for foreign nationals seems somehow more feasible.<sup>4</sup>

This essay will first discuss the history of solitary confinement as a prison technique and its negative psychological consequences. Parts II-IV then recount the international standards for prison conditions and, comparatively, the protection afforded under the Eighth Amendment of the U.S. Constitution. Part V will then discuss progressive European prison standards and protection of international human rights. This essay concludes, in Part VI, that

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GUARDIAN, Dec. 1, 2004, at 25; Carol D. Leonnig, *Further Detainee Abuse Alleged; Guantanamo Prison Cited in FBI Memos*, WASH. POST, Dec. 26, 2004, at A1.

2. See Nan D. Miller, *International Protection of the Rights of Prisoners: Is Solitary Confinement in the United States a Violation of International Standards?*, 26 CAL. W. INT'L L.J. 139, 169 (1995); Christine Rebman, *The Eighth Amendment and Solitary Confinement: The Gap in Protection from Psychological Consequences*, 49 DEPAUL L. REV. 567, 617 (1999).

3. Alan Elsner, *Supermax Prisons: A Growing Human Rights Issue*, CHAMPION, Aug. 2004, at 36 (reviewing a U.S. Department of Justice report noting how at least thirty states operated supermax facilities, keeping inmates in constant solitary confinement with minimal interaction).

4. Charles A. Pettigrew, Comment, *Technology and the Eighth Amendment: The Problem of Supermax Prisons*, 4 N.C. J. L. & TECH. 191, 191-92 (2002). At the end of 2000, 6.5 million people were either in prison, jail, on probation or on parole, accounting for 3.5% of the U.S. population. *Id.* at 191 (citing a Bureau of Justice statistics report and Claire Schaeffer-Duffy, *Long Term Lockdowns: Psychological Effects of Solitary Confinement and Stun Devices*, NAT'L CATHOLIC REP., Dec. 8, 2000). The number of supermax prisoners in 2000 was estimated to be between 25,000 and 100,000. *Id.* at 191-92.

U.S. solitary confinement practices contravene international treaty law, violate established international norms, and do not represent sound foreign policy.

## I. SOLITARY CONFINEMENT—NEW USE OF AN OLD TECHNIQUE

Solitary confinement as a technique for prison management and rehabilitation has been utilized in the United States since the creation of U.S. penitentiaries nearly two hundred years ago.<sup>5</sup> The Quakers created the first American penitentiaries as a means of encouraging self-reflection and repentance for criminals.<sup>6</sup> Initially constructing individual rooms for solitary introspection, penitence and reform, the Quakers largely abandoned the concept after observing detrimental psychological effects generated by prolonged solitude.<sup>7</sup> In 1826, Beaumont and Alexis de Tocqueville denounced a New York prison experiment using continuous solitary confinement for all inmates: "This experiment, of which the favorable results had been anticipated, proved fatal for the majority of prisoners. It devours the victims incessantly and unmercifully; it does not reform, it kills."<sup>8</sup> Nonetheless, solitary confinement persisted as a practice of punishment in U.S. prisons.<sup>9</sup>

Today, solitary confinement is typically referred to as "segregation."<sup>10</sup> Segregation comes in a variety of forms: as standard

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5. See JOSEPH T. HALLINAN, *GOING UP THE RIVER: TRAVELS IN A PRISON NATION* xvi (2003).

6. See *id.*; see also Miller, *supra* note 2, at 155, 160 (discussing the "Auburn Prison System," which was disbanded in 1820 after prisoners in long-term solitary confinement displayed negative psychological repercussions).

7. See Miller, *supra* note 2, at 155.

8. Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. REV. L. & SOC. CHANGE 477, 483 (1977) (quoting TORSTEN ERIKSSON, *THE REFORMERS, AN HISTORICAL SURVEY OF PIONEER EXPERIMENTS IN THE TREATMENT OF CRIMINALS* 49 (1976)).

9. *Id.*

10. See *id.* at 497 (noting how the terms can be used interchangeably for the purpose of referring to their punitive effect on the prisoner). Segregation, however, may involve instances where a prisoner is not completely cut off from the entire

operating procedure, as a protective measure arising from situational prison incidents, for punishment, and even to ensure mental stability.<sup>11</sup> Segregation units encompass a specific prison area, known in the most up-to-date maximum-security facilities as secure housing units ("SHUs").

The first supermax facility was created in Marion, Illinois in 1963, and most supermax prisons replicate the structure of the "Marion Model."<sup>12</sup> Because Marion was built with "a blueprint for coercive behavior modification achieved through severe isolation techniques" in mind, most supermax prisons have similar characteristics.<sup>13</sup> For example, once a prisoner is selected for segregation for whatever reason, they are confined to a cell for approximately twenty-two hours a day.<sup>14</sup> There is no human contact when such prisoners are given meals, which are eaten in their cells, or if they are allowed to exercise, which occurs in solitary cages.<sup>15</sup> Although the general prison population has access to educational vocational training, SHU prisoners usually are not able to participate in any of these rehabilitative techniques.<sup>16</sup> Craig Haney, a psychologist widely recognized for his studies of the psychological effects of solitary confinement, recounts the theory: "Solitary confinement has been around for a long time . . . . What's different about these supermax units is that the technology of the modern correctional institution allows for a separation, almost a technological separation, of inmates

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prison population, but rather the prisoner is segregated with other prisoners. *Id.* The end effect is that "these prisoners are simultaneously and paradoxically isolated and overcrowded." *Id.*

11. *Id.* at 493-94, 496-97, 507.

12. *See id.* at 495 (explaining that the repeated replication of such facilities is, in part, a response to academic literature minimizing the psychological impact of such confinement conditions and practices).

13. *See* Miller, *supra* note 2, at 157; *see also* JAMIE FELLNER & JOANNE MARINER, HUM. RTS. WATCH, COLD STORAGE: SUPERMAXIMUM SECURITY CONFINEMENT IN INDIANA (1997), available at <http://hrw.org/reports/1997/usind/> (adding that such confinement techniques are also derivative of a changing political climate and used as a management tool).

14. *See* Miller, *supra* note 2, at 159.

15. *Id.* (noting that before inmates are permitted to go to the "exercise pen," the prisoner is subject to an inspection while standing nude in front of the prison cell).

16. *Id.*

from the social world around them in ways that [really were not] possible in the past."<sup>17</sup>

Of course the initial question to consider is why, after determining over a century ago that prolonged isolation has detrimental and even counterproductive effects on prisoners, would institutions in the last forty years reinstitute the practice? Likely, it is a culmination of factors, and prison administrators often proffer justifications from an increasingly violent inmate profile to insufficient funding for proper security.<sup>18</sup> A primary problem is legislative actions, such as sentence length, mandatory sentencing, and stricter sentencing guidelines for minor offenses, which contribute to overcrowded institutions.<sup>19</sup> With increased numbers come increased security risks and the need to "manage" individuals. Under current prison practices, virtually all inmates from death row or the general prison population will spend time in segregation.<sup>20</sup> Joseph T. Hallinan, a *Wall Street Journal* columnist, has traveled extensively throughout the nation's supermax facilities and describes the Texas system of segregation:

Theoretically, [administrative segregation] is not intended as punishment. Texas inmates are placed in here not because they have done something wrong, but "for the purposes of maintaining safety, security, and order" in the prison . . . . There are three levels of [administrative segregation] in Texas, and most newcomers spend at least ninety days in level 3, the most restrictive. Level 3 inmates receive no deodorant, no shampoo, and no toothpaste—only a small box of baking soda to use to brush their teeth. The other items are

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17. Pettigrew, *supra* note 4, at 194-95 (quoting J.E. Relly, *Inside, No One Can Hear You Scream*, TUCSON WKLY., May 3, 1999).

18. *See* HALLINAN, *supra* note 5, at xv-xvi (noting how cost concerns have drastically changed prison designs from the early nineteenth century to today).

19. *See* Craig Haney, *Psychology and the Limits to Prison Pain: Confronting the Coming Crisis in Eighth Amendment Law*, 3 PSYCHOL. PUB. POL'Y & L. 499, 523-25, 542-48 (1997) (explaining the origins of the "just deserts" theory of incarceration, where retribution by the government trumps notions of rehabilitation, and providing an overview of the negative psychological effects of overcrowding on prisoners, including impeded cognitive development).

20. *See* HALLINAN, *supra* note 5, at 5-7.

considered perks to be handed out as rewards for good behavior.<sup>21</sup>

Unfortunately, because the Supreme Court has found no affirmative right to rehabilitation, the fears of prison administrators, while not completely unfounded, manifest into an extraordinary emphasis on repressive control.<sup>22</sup> Some posit that this is a near-obsessive level of control, manifested in the implementation of regular segregation, surveillance devices, "widespread and unprecedented deployment of lethal weapons, and the installation of highly sophisticated and expensive security hardware and technology."<sup>23</sup> There were periods during the 1980s where the use of prolonged segregation was so pervasive in California prisons—San Quentin and Folsom, for example—that fifty percent or more of all the inmates were in long-term lockup.<sup>24</sup> Although one psychiatrist working in such California SHUs at the time described them as producing "an atmosphere of terror rarely seen elsewhere" in society, it is increasingly common for prisoners to be confined in SHUs for years.<sup>25</sup>

## II. PROBLEMS ARISING FROM SOLITARY CONFINEMENT

Prisoners subjected to extensive segregation in SHUs have additional difficulties severe enough to cause near permanent mental

21. *Id.* at 5.

22. See Hum. Rts. Watch, World Report 1994, *United States [Report Overview]*, <http://www.hrw.org/reports/1994/WR94/Back.htm> (last visited Oct. 27, 2005) (contrasting U.S. rejection of an affirmative rehabilitation right with international principles requiring more proactive protection of human dignity).

23. Haney, *supra* note 19, at 548-49 (reviewing various types of devices used to ensure control, including metal detectors, x-ray machines and tasers).

24. *Id.* at 549.

25. *Id.*; see also Robert M. Ferrier, Note, "An Atypical and Significant Hardship": The Supermax Confinement of Death Row Prisoners Based Purely on Status—A Plea for Procedural Due Process, 46 ARIZ. L. REV. 291, 293 (2004) (analyzing the psychological effects of supermax confinement on death-row inmates).

and emotional damage.<sup>26</sup> The lack of social contact and environmental stimulation often results in extreme psychological problems, such as extraordinary malaise and increased violent tendencies.<sup>27</sup> Dr. Stuart Grassian was one of the first American psychiatrists to conduct an extensive study on such effects.<sup>28</sup> In 1983, pursuant to a court order mandating psychiatric evaluation of fifteen inmates at Massachusetts Correctional Institution at Walpole, Dr. Grassian observed and interviewed inmates in segregation.<sup>29</sup> He determined that prisoners subjected to extensive periods of segregation demonstrated a medical condition that is termed Reduced Environmental Stimulation ("RES").<sup>30</sup> Dr. Grassian found that the the main consequential symptoms of RES were "perpetual distortions, hallucinations, hyperresponsivity to external stimuli, aggressive fantasies, overt paranoia, inability to concentrate, and problems with impulse control."<sup>31</sup> Dr. Grassian concluded that rigidly

26. See Haney & Lynch, *supra* note 8, at 534 (noting that the risk of permanent damage is greater for inmates with preexisting psychological impairments).

27. Holly Boyer, Comment, *Home Sweet Hell: An Analysis of the Eighth Amendment's 'Cruel and Unusual Punishment' Clause as Applied to Supermax Prisons*, 32 SW. U. L. REV. 317, 327 (2003).

28. See *id.* (noting that Dr. Grassian commonly testifies in lawsuits brought by prisoners concerning prison conditions). Dr. Grassian had established an impressive academic and professional record by the mid-1990s to back up the veracity of his findings, including being a professor at Harvard medical school, maintaining a private practice as a board certified psychiatrist, and serving in a supervisory capacity to a number of organizations. *Madrid v. Gomez*, 889 F. Supp. 1146, 1159 n.12 (N.D. Cal. 1995).

29. Stuart Grassian, *Psychopathological Effects of Solitary Confinement*, 140 AM. J. PSYCHIATRY 1450 (1983).

30. See *Madrid*, 889 F. Supp. at 1230-32 (noting how RES symptoms also appear in, inter alia, hostages and prisoners of war); see also Boyer, *supra* note 23, at 327. For the purposes of this essay, the term RES is limited to characterizing the deleterious symptoms of solitary confinement as reported in Grassian's study. Cf. Haney & Lynch, *supra* note 7, at 519 n.210 (recounting potentially beneficial uses of RES, such as quitting smoking and helping to cure alcoholism, through the use of placement in a flotation tank and other similar techniques).

31. *Madrid*, 889 F. Supp. at 1230; see also Boyer, *supra* note 27, at 327. The effects of these symptoms are in many cases quite dire. Recounting the words of a prisoner taking part in the Walpole study: "I cut my wrists—cut myself many times when in isolation. Now it seems crazy. But every time I did it, I wasn't thinking—lost control—cut myself without knowing what I was doing." Grassian, *supra* note 29, at 1453.

imposed solitary confinement strongly suggests substantial psychopathological effects.<sup>32</sup>

Although RES had not been previously reported or clinically identified in medical literature, the observations conducted were extremely similar to earlier German studies.<sup>33</sup> Between 1854 and 1909, thirty-seven articles published in German journals collectively delineated hundreds of cases of psychoses linked to conditions of imprisonment.<sup>34</sup> Similar to Dr. Grassian's study, the German studies described hallucinatory, paranoid, and confusional psychosis characterized by vivid hallucinations, dissociative tendencies, agitation, aimless violence, and delusions. Although many of the studies failed to specify the exact conditions of imprisonment, in more than half the literature solitary confinement techniques were specifically cited as responsible for precipitating the psychosis.<sup>35</sup>

In the last decade, as incidences of long-term segregation increased, psychological studies of Pelican Bay's SHUs indicate extraordinarily high rates of psychological trauma among prisoners, including anxiety, nervousness, ruminations, irrational anger, social withdrawal, violent fantasies, hallucinations, and suicidal ideation.<sup>36</sup> Examinations of administrative segregation units in Texas prisons revealed inmates "who had smeared themselves with feces. In other instances, there were people who had urinated in their cells, and the urination was on the floor."<sup>37</sup> Still others in the same unit could be seen babbling and shrieking, banging their hands on the wall, and one prisoner scrubbed his body to remove imaginary bugs.<sup>38</sup>

It is evident, therefore, that the psychological effects of prison isolation have been recognized for at least the last century and certainly in American medical journals for the past twenty years. But, if the purpose of prisons is rehabilitative, as well as punitive and

32. See Grassian, *supra* note 29, at 1454.

33. *Id.* at 1453.

34. *Id.* at 1450-51.

35. *Id.* at 1451.

36. See Haney & Lynch, *supra* note 8, at 524 (explaining how such symptoms were present in over eighty percent of the inmates evaluated).

37. Ruiz v. Johnson, 37 F. Supp. 2d 855, 909 (S.D. Tex. 1999).

38. See *id.* at 909, 912; see also HALLINAN, *supra* note 5, at 6.

restitutive, how can segregation be harmonized with ultimate criminal justice goals? According to prison administrators, the use of segregation techniques is a security measure necessary to protect both staff and prisoners from the assault and predatory tendencies of inmates.<sup>39</sup> It is notable, however, that especially for women prisoners who undergo similar, if not identical, forms of segregation in SHUs, that the percentage of violence against other inmates and prison staff is small.<sup>40</sup> In addition, records from the infamous California Department of Corrections show that some inmates assigned to SHUs at Pelican Bay Prison have had their segregation times extended for relatively minor offenses.<sup>41</sup> Moreover, psychological studies of inmates in long-term segregation suggest the degree of social contact lost can seriously affect coping skills, thus creating further alienation and social withdrawal.<sup>42</sup> While prison officials posit that inmates in segregation are only there as long as it takes them to turn their behavior around, the psychological effects of this punishment make it difficult, perhaps impossible, to distinguish between behavior resulting from prolonged isolation and that which will perpetually pose a threat to prison security.<sup>43</sup>

### III. U.S. PRISONERS' RIGHTS AND INTERNATIONAL STANDARDS

A number of international treaties and declarations establish the scope of prisoner rights. Signatories to such documents are expected

39. AMNESTY INT'L, UNITED STATES OF AMERICA: RIGHTS FOR ALL: "NOT PART OF MY SENTENCE": VIOLATIONS OF THE HUMAN RIGHTS OF WOMEN IN CUSTODY 95 (AI Index No. 51/01/99, 1999), available at <http://web.amnesty.org/library/Index/engAMR510011999>.

40. See generally *id.*

41. See Madrid v. Gomez, 889 F. Supp. 1146, 1240-41, 1244, 1280 (N.D. Cal. 1995) (adjudicating a lawsuit over prison conditions and treatment of prisoners at Pelican Bay Prison in California); see also *infra* notes 110-14 and accompanying text (discussing Madrid).

42. See Rebman, *supra* note 2, at 582 (recounting the words of Dr. Haney, who noted that "many prisoners become entirely dependent upon the structure and routines of the institution for the control of their behavior," resulting in further social and behavioral difficulties).

43. See Haney & Lynch, *supra* note 8, at 490-91; Rebman, *supra* note 2, at 572-75.



to not only respect the established rules of law created therein, but also to encourage systems of dignity and respect for human life.<sup>44</sup> In essence, by signing international treaties, especially those of a self-executing nature,<sup>45</sup> governments explicitly agree to regulation of their actions and balancing of government interests with that of individual liberties.<sup>46</sup> Currently, the United States is a signatory to numerous treaties, which incorporate international human rights standards that originated from non-binding legal principles; these non-binding principles provided legitimacy in form rather than substance.<sup>47</sup>

Following the end of World War II, creation of an international regulatory organization was thought essential to ensure continued peace, economic growth, and democracy. The degree of protection afforded to prisoners has increased significantly since the creation of the United Nations Charter ("U.N. Charter") in 1945.<sup>48</sup> The U.N. Charter represented an initial recognition of individual rights that served to legitimize the United Nations as not only a guarantor of government oversight, but also as an innovative international coordinator of democratic ideals.<sup>49</sup> Though there is no specific language addressing the rights of prisoners, Article 55 of the U.N. Charter, by promoting "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion," makes clear a general standard of rights applicable to all individuals.<sup>50</sup> Shortly thereafter, in 1948, the Universal Declaration of Human Rights ("Universal Declaration")

44. Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 CORNELL L. REV. 97, 109-10 (2004).

45. See generally *id.* at 125-26 (debating whether the Geneva Conventions, in whole or in part, are self-executing).

46. See U.S. CONST. art. VI; Vienna Convention on the Law of Treaties art. 2, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Law of Treaties].

47. See Miller, *supra* note 2, at 141.

48. U.N. Charter.

49. See *id.* pmbl. (setting forth as its goals, inter alia, the reaffirmation of "faith in fundamental human rights, in the dignity and worth of the human person, [and] in the equal rights of men and women and of nations large and small").

50. *Id.* art. 55(c).

further illuminated the importance of recognizing human rights.<sup>51</sup> Article 5 of the Universal Declaration specifically states that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."<sup>52</sup> Although neither of these initial human rights documents were legally binding, they were generally accepted as part of customary international law.<sup>53</sup> In terms of prisoners' rights specifically, the Universal Declaration served to bring international attention to issues of torture and punishment, upon which further developments on protecting individuals could be established.<sup>54</sup>

Prisoner protection itself, however, was largely formulated in the Geneva Conventions of 1949, most notably in the Geneva Convention Relative to the Treatment of Prisoners of War ("Geneva III").<sup>55</sup> Geneva III was the first legal instrument to acknowledge and implement protections for prisoners of war.<sup>56</sup> It not only delineated that prisoners of war were to be treated humanely at all times, but also provided basic definitions and principles for future international prisoner standards.<sup>57</sup> The rationale behind basing modern civil prisoner standards on documents specifically defining the rights of prisoners of war is that no government should legitimately treat

51. See Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (1948) [hereinafter Universal Declaration].

52. *Id.* art. 5.

53. See Miller, *supra* note 2, at 141; see also Suzanne M. Bernard, *An Eye for an Eye: The Current Status of International Law on the Humane Treatment of Prisoners*, 25 RUTGERS L.J. 759, 769 (1994) (noting how the Universal Declaration carries "great weight and may be taken as evidence of binding customary international law").

54. See Bernard, *supra* note 53, at 769.

55. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12 1949, 6 U.S.T. 3317, 75 U.N.T.S. 135 [hereinafter Geneva III]; see also Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

56. See generally Jinks & Sloss, *supra* note 44, at 108-12 (analyzing the foundation of Geneva III and the other three Geneva Conventions).

57. Geneva III, *supra* note 55, art. 13; Miller, *supra* note 2, at 142.

prisoners captured during unrest and conflict better than civil prisoners.<sup>58</sup>

The United States, as a member of the Organization of American States ("OAS"), has also agreed to specific prisoner rights in a more regional context. The American Declaration of the Rights and Duties of Man ("American Declaration"), established shortly before the Universal Declaration, provided two articles dealing specifically with prisoner rights.<sup>59</sup> Article XXV of the American Declaration vowed that "every individual who has been deprived of his liberty . . . has the right to humane treatment during the time he is in custody."<sup>60</sup> Article XXVI further determined that every prisoner has the right "to be free from cruel, infamous, or unusual punishment."<sup>61</sup> Thirty years later in the American Convention on Human Rights ("American Convention"), the OAS identified what might be considered outside the realm of acceptable government conduct.<sup>62</sup> Article 5 of the American Convention states that "[e]very person has the right to have his physical, mental, and moral integrity respected."<sup>63</sup> Further, Article 5 reiterates the prohibition of "torture or to cruel, inhuman or degrading punishment or treatment," and encourages inmate reformation by stating: "Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners."<sup>64</sup> Perhaps these statements are not coextensive, but it is likely that some textual relation exists given the

58. Miller, *supra* note 2, at 142 (arguing that treating prisoners captured "amidst the chaos of armed conflict" better than civil prisoners would be "absurd").

59. American Declaration of the Rights and Duties of Man, O.A.S. Official Rec., OEA/Ser. L./V./II.23, doc. 21 rev. 6 (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser. L./V./II.82, doc. 6 rev. 1, at 17 (1992), available at <http://www.cidh.oas.org/Basicos/basic2.htm>.

60. *Id.* art. XXV.

61. *Id.* art. XXVI.

62. American Convention on Human Rights, Nov. 22, 1969, art. 74(2), O.A.S.T.S. No. 36, available at <http://www.oas.org/juridico/english/Treaties/b-32.htm>.

63. *Id.* art. 5.

64. *Id.*

specific description of mental and physical integrity in the same context as cruel and degrading punishment.

In terms of specific international rules setting forth how prisons should operate globally, the U.N. in 1955 adopted the Standard Minimum Rules for the Treatment of Prisoners ("Standard Rules").<sup>65</sup> The Standard Rules recognize solitary confinement and prolonged segregation as appropriate only in exceptional circumstances, to be used sparingly.<sup>66</sup> Analogizing to European standards, "Imprisonment is by the deprivation of liberty a punishment in itself. The conditions of imprisonment and the prison regimes shall not, therefore, except as incidental to justifiable segregation, or the maintenance of discipline, aggravate the suffering inherent in this."<sup>67</sup> Standard Rule 31 expressly prohibits discipline and punishment by placing in a dark cell, as well as all cruel, inhuman, and degrading punishments.<sup>68</sup> The United States incorporated the Standard Rules in the Model Penal Code of 1962.<sup>69</sup> Though the Standard Rules are not strictly enforced, they "have been increasingly recognized as a generally accepted body of basic minimal requirements."<sup>70</sup>

Prisoner rights have been increasingly defined in the latter half of the twentieth century, beginning with the International Covenant on Civil and Political Rights ("ICCPR") in 1966.<sup>71</sup> Article 7 of the ICCPR applies to prisoners and prohibits any use of "cruel, inhuman,

65. Standard Minimum Rules for the Treatment of Prisoners, E.S.C. Res. 2076, U.N. ESCOR, 62d Sess., Supp. No. 1, UN Doc. E/5988 (1977) [hereinafter Standard Minimum Rules], available at [http://www.unhcr.ch/html/menu3/b/h\\_comp34.htm](http://www.unhcr.ch/html/menu3/b/h_comp34.htm).

66. *Id.* R. 57.

67. Daniel J. Sharfstein, *European Courts, American Rights: Extradition and Prison Conditions*, 67 BROOK. L. REV. 719, 749 (2002) (quoting European Prison Rules, Council Recommendation No. R (87) 3, at 78-79 (1987). See generally Standard Minimum Rules, *supra* note 65.

68. Standard Minimum Rules, *supra* note 65, R. 31.

69. Miller, *supra* note 2, at 148.

70. *Id.* (quoting Daniel L. Skoler, *World Implementation of the United Nations Standard Minimum Rules for the Treatment of Prisoners*, 10 J. INT'L L. & ECON. 453, 455 (1975)).

71. International Covenant on Civil and Political Rights, G.A. Res. 2200, at 52, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966).

or degrading treatment or punishment.”<sup>72</sup> Article 10 further provides that “[a]ll persons deprived of their liberties shall be treated with humanity and with respect for the inherent dignity of the human person.”<sup>73</sup> In 1984, the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (“Convention Against Torture”) expanded the protection of prisoners.<sup>74</sup> Article 1 of the Convention Against Torture both prohibits and defines torture for the international community as:

[A]ny 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 a confession, punishing him for an act he or a third person committed or is suspected of having committed or intimidating or coercing him or a third person . . . when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.<sup>75</sup>

The United States ratified the ICCPR in 1992, and the Convention Against Torture in 1990, with reservations on specific articles.<sup>76</sup> These reservations present perhaps the greatest obstacle to prisoners’ rights in the United States.<sup>77</sup> The reservation on ICCPR Article 7 binds the United States only to the extent that the “cruel, inhuman or

72. *Id.* art. 7.

73. *Id.* art. 10(1).

74. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 46, at 197, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (1984) [hereinafter Convention Against Torture].

75. *Id.* art. 1; see also HUM. RTS. WATCH, ILL EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS 203-14 (2003), available at <http://www.hrw.org/reports/2003/usa1003.25.htm>.

76. *International Covenant on Civil and Political Rights: Hearing Before the Senate Comm. on Foreign Relations*, 102d Cong. (1991) [hereinafter ICCPR Hearing]; *Convention Against Torture: Hearing Before the Senate Comm. on Foreign Relations*, 101st Cong. 22 (1990).

77. See John Henry Stone, *The International Covenant on Civil and Political Rights and the United States Reservations: The American Conception of International Human Rights*, 7 U.C. DAVIS J. INT’L L. & POL’Y 1, 9-10 (2001) (positing that these reservations allow the U.S. government to make laws in contravention of ICCPR standards).

degrading treatment” means such treatment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.<sup>78</sup> Similarly, the U.S. reservation on the Convention Against Torture’s Article 16 makes sure to clarify that the treatment prohibited is only treatment which is cruel, inhuman, or degrading punishment as interpreted via the Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution.<sup>79</sup>

#### IV. EIGHTH AMENDMENT JURISPRUDENCE

The numerous international treaties and conventions to which the United States is a party suggests that protecting individual rights, especially against cruel, inhuman, or degrading punishment and treatment, is an important goal of the U.S. government.<sup>80</sup> The Eighth Amendment protects individuals in the United States from “cruel and unusual punishment.”<sup>81</sup> However, the specific language, as interpreted by U.S. law, has a narrower scope than international instruments. The differences in the language between the Eighth Amendment and that of the U.N. Charter, ICCPR, or Convention Against Torture is two-fold: (1) the Eighth Amendment protects against “cruel *and* unusual punishment,” while the international treaties recognize “cruel, inhuman, *or* degrading punishment;” and (2) the Eighth Amendment does not mention prohibitions against *treatment* as well as punishment, while all of the aforementioned

78. ICCPR Hearing, *supra* note 76, at 8 (describing other U.S. reservations, such as those involving free speech, capital punishment, criminal penalties and juveniles).

79. Miller, *supra* note 2, at 146. Note too the reservation on Article 30(1) requiring parties to submit disputes to arbitration and, if no change, to the International Court of Justice. 136 CONG. REC. S17486-01 (1990) (using the authority granted by Article 30(2), which permits a State to declare that it is not bound by Article 30(1)); see also Convention Against Torture, *supra* note 63, art. 30.

80. See *supra* notes 44-79 and accompanying text.

81. U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).



treaties recognize certain cruel, inhuman, or degrading treatment as well as punishment.<sup>82</sup>

Some have described the phrase "cruel and unusual punishments" as a "three-word term of art," noting that the adjectives operate interdependently rather than independently of each other in the Eighth Amendment realm.<sup>83</sup> There has been a great deal of debate in the U.S. Supreme Court over the meaning of the word "unusual." Justice Scalia has put forth the notion that a punishment authorized by the legislative branch of government and "regularly and customarily employed" must not be "unusual;" this is certainly a viable interpretive option given the general vagueness and lack of corresponding international definitions.<sup>84</sup> The differentiation between American interpretations of prisoner rights and those of the international legal community is perhaps primarily founded in the fact that the Eighth Amendment does not protect the *treatment* of prisoners.<sup>85</sup> Because the Eighth Amendment does not specifically include *treatment* with *punishment* as a constitutional protection, the standard for determining what is egregious enough to be *punishment* and what may be considered merely 'prison conditions' or unprotected *treatment*, leaves an obvious gap in protection standards.<sup>86</sup>

Initially, only Eighth Amendment claims of physical torture or abuse arose, but the Supreme Court has steadily created rules which lower courts and scholars believe indicate that the Court recognizes

82. David Heffernan, Comment, *America the Cruel and Unusual? An Analysis of the Eighth Amendment Under International Law*, 45 CATH. U. L. REV. 481, 540 (1996) (emphasis added).

83. *Id.* (quoting John E. Theuman, Annotation, *Conditions of Confinement as Constituting Cruel and Unusual Punishment in Violation of Federal Constitution's Eighth Amendment*, 115 L. ED. 2D 1151 (1994)).

84. *Id.*; see also Harmelin v. Michigan, 501 U.S. 957, 962-65 (1991) (discussing judicial interpretations of "cruel and unusual" through proportionality analyses).

85. Heffernan, *supra* note 82, at 540 (quoting Manfred Nowak, U.N. Covenant on Civil and Political Rights, CCPR Commentary 126-41 (1993)).

86. *Id.*; see also Celia Rumann, *Tortured History: Finding Our Way Back to the Lost Origins of the Eighth Amendment*, 31 PEPP. L. REV. 661, 684-93 (2004) (describing judicial interpretations of the word "punishment" in the Eighth Amendment).

how the worst kinds of punishment can be psychological.<sup>87</sup> Although Supreme Court jurisprudence initially suggested liberal interpretations and forward thinking motivations for defining the kinds of treatment which violated prisoner rights, in the latter half of the twentieth century the Eighth Amendment standards have become more subjective.<sup>88</sup> This makes a showing of mental abuse or psychological harm difficult to establish and even if established, unlikely to rise to a constitutional violation.<sup>89</sup>

As early as 1910, the Supreme Court adopted a prospective approach to Eighth Amendment interpretation, noting that the meaning of "cruel and unusual punishments" was expected to evolve as social conditions did.<sup>90</sup> Fifty years later, in *Trop v. Dulles*, the Court again reiterated its understanding that the scope of the Eighth

87. See Stone, *supra* note 77, at 19 (reasoning that the early cases addressing physical punishment provide implicit recognition of the severe consequences of psychological harm); see also Hutto v. Finney, 437 U.S. 678, 685 (1978) (affirming that conditions of isolation can contribute to an Eighth Amendment violation); *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (determining that non-physical harm could violate the Eighth Amendment); *Madrid v. Gomez*, 889 F. Supp. 1146, 1267 (N.D. Cal. 1995) (finding that the severe isolation of mentally ill prisoners violates the Eighth Amendment).

88. See Boyer, *supra* note 27, at 322; see also *Wright v. McMann*, 387 F.2d 519, 525-26 (2d Cir. 1967) (finding that deprivation for substantial time of such basic hygiene elements as soap and toilet paper violated civilized standards of human decency); *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968) (concluding that the use of the strap in Arkansas penitentiaries offended contemporary concepts of decency and human dignity); *Gates v. Collier*, 349 F. Supp. 881, 899-900 (N.D. Miss. 1972) (enjoining prison officials from imposing corporal punishment of such severity that it would offend present-day concepts of decency); *Simmons v. Russell*, 352 F. Supp. 572, 577 (M.D. Pa. 1972) (maintaining that solitary confinement does not rise to an Eighth Amendment violation unless confinement becomes so foul and inhuman that it violates basic decency standards).

89. See Mikel-Meredith Weidman, Comment, *The Culture of Judicial Deference and the Problem of SuperMax Prisons*, 51 UCLA L. REV. 1505, 1517-21 (2004) (describing the high thresholds that inmates must meet to succeed in constitutional claims).

90. *Weems v. United States*, 217 U.S. 349, 378 (1910); see also Boyer, *supra* note 27, at 319.

Amendment is "not static."<sup>91</sup> Further, the Court determined that a punishment such as denationalization, wherein a person is stripped of their nationality and status as a citizen, is a non-physical harm that could be considered violative of the Eighth Amendment, reasoning that "ever increasing fear and distress" arising from the punishment was equivalent, if not worse than, torture.<sup>92</sup> This was the first recognition that mental anguish as a form of punishment was unacceptable under evolving standards of decency.

A notable change in the Court's attitude and increasing deference to prison officials occurred in 1976 with *Estelle v. Gamble*, where the Court addressed the question of inadequate medical attention received in prison.<sup>93</sup> Moving away from the evolving standards idea, the Court adopted a new approach which called for both an objective and subjective inquiry. To show an Eighth Amendment violation, prisoners must demonstrate that a prison official acted with more than the ordinary lack of due care.<sup>94</sup> A prisoner must establish more than a purely objective standard of foreseeability of the risk of harm, such that the subjective intent of the prison official is revealed.<sup>95</sup> This "deliberate indifference" standard was applied in *Hutto v. Finney*, when the Court found that Arkansas' prison practice of solitary confinement exceeding thirty days violated the Eighth Amendment.<sup>96</sup> However, five years later in *Rhodes v. Chapman*, Justice Powell posited that prison life should not be comfortable.<sup>97</sup> Justice Brennan's concurrence in *Rhodes* affirmed the notion that the running of prisons is entrusted to the "legislature and prison

91. *Trop v. Dulles*, 356 U.S. 86, 101 (1958); see also Boyer, *supra* note 27, at 319 (highlighting the court's acknowledgment that the Eighth Amendment "draw[s] its meaning from evolving standards of decency").

92. *Trop*, 356 U.S. at 102.

93. *Estelle v. Gamble*, 429 U.S. 97, 103 (1976).

94. *Id.* at 105; Boyer, *supra* note 27, at 320.

95. *Estelle*, 429 U.S. at 106 ("Medical malpractice does not become a constitutional violation merely because the victim is a prisoner.").

96. *Hutto v. Finney*, 437 U.S. 678, 687 (1978).

97. *Rhodes v. Chapman*, 452 U.S. 337, 349 (1981) (reasoning that because the Constitution does not "mandate comfortable prisons," prisoners' level of discomfort is a matter for legislators and prison officials to decide).

administration rather than a court."<sup>98</sup> In 1991, Justice Scalia reiterated the subjective "deliberate indifference" standard of *Estelle* when deciding Eighth Amendment claims.<sup>99</sup> The Court in *Wilson v. Seiter* indicated that plaintiffs in Eighth Amendment cases which cite poor prison conditions must still show a "deliberate indifference" in the harm caused by prison officials.<sup>100</sup> Additionally, the totality of circumstances approach to determining prison standards applied in *Rhodes* was by now completely rejected.<sup>101</sup>

The Court slightly changed its standards for finding an infringement of prisoners' rights in *Helling v. McKinney*, where it found that the Eighth Amendment protects against future harm.<sup>102</sup> By looking at "objectivity" slightly differently, inhalation of second-hand smoke from being involuntarily placed with an inmate with excessive smoking habits was determined to be an infringement of a prisoner's rights.<sup>103</sup> While showing actual likelihood that the injury will occur, a prisoner must also show that society would find the risk so grave as to violate contemporary standards of decency.<sup>104</sup>

More recently, the Court in *Farmer v. Brennan* found that the "Eighth Amendment does not outlaw cruel and unusual 'conditions'; it outlaws cruel and unusual 'punishments.'"<sup>105</sup> For this, the Court applied the two-prong test and explained what "deliberate indifference" by prison guards entailed. In essence, a prison guard may be liable for denying humane conditions "only if he knows that inmates face a substantial risk of serious harm and disregard that risk

98. *Rhodes*, 452 U.S. at 354; Boyer, *supra* note 27, at 321.

99. *Wilson v. Seiter*, 501 U.S. 294, 297 (1991).

100. *Id.* at 303 (citing *Estelle v. Gamble*'s "deliberate indifference" standard).

101. Boyer, *supra* note 27, at 322.

102. *Helling v. McKinney*, 509 U.S. 25, 35 (1993).

103. *Id.* at 35-36.

104. *Id.* at 36 ("Determining whether McKinney's conditions of confinement violate the Eighth Amendment requires more than a scientific and statistical inquiry . . . . It also requires a court to assess whether society considers the risk that the prisoner complains of to be so grave that it violates contemporary standards of decency . . . .").

105. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).

by failing to take reasonable measures to abate it."<sup>106</sup> Usually, then, denial of humane conditions manifests in Eighth Amendment claims regarding conditions such as prison officials' medical indifference, failure-to-protect, and excessive use of force rather than an overall challenge that techniques such as extreme segregation are inherently inhumane.<sup>107</sup> The outcome typically has been courts setting basic standards for physical conditions of incarceration, which are generally applicable to segregation units as well.<sup>108</sup> Practically, however, such standards only address the requirements of adequate food, clothing, shelter, medical care, and a reasonably safe environment without discussing long-term psychological effects.<sup>109</sup>

Subsequent to *Farmer*, lower courts began moving toward specifically acknowledging the serious psychological effects of supermax segregation techniques, notably in 1995 with *Madrid v. Gomez*.<sup>110</sup> The decision found specific SHU conditions, such as severe isolation at the Pelican Bay State Prison in California, violative of mentally ill prisoners' Eighth Amendment rights.<sup>111</sup> Though *Madrid* certainly exemplifies a successful Eighth Amendment case, illuminating the harsh effects of prolonged segregation, it was a narrow success for specific inmates. The court concluded that conditions which inflict serious mental pain or injury implicate the Eighth Amendment, but that not all inmates in the SHU were sufficiently at risk of developing serious mental health problems as a result of their confinement.<sup>112</sup> The court found that it was unreasonable to subject inmates who showed a "particularly high risk for suffering very serious or severe injury to their mental

106. *Id.* at 847.

107. See Rebman, *supra* note 2, at 595.

108. *Id.*; see, e.g., *Hutto v. Finney*, 437 U.S. 678, 686 (1978) (maintaining that the length of incarceration is a factor used to determine whether particular conditions of confinement fall within constitutionally permissible standards).

109. See Rebman, *supra* note 2, at 595; see also *Hudson v. Palmer*, 468 U.S. 517, 526-27 (1984) (explaining that prison officials must take steps to ensure the safety of the prison staff, administrative personnel, visitors, and prisoners).

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

111. *Id.* at 1279-80 (declaring that "certain conditions in the SHU have a relationship to legitimate security interests that is tangential at best").

112. *Id.* at 1265.

health" to a SHU, but not all SHU prisoners demonstrated such a risk of injury.<sup>113</sup> Thus, while the court posited about the severe deprivation of normal human contact in the SHU, not all prisoners were seemingly eligible to avoid such conditions: "those incarcerated in the SHU for any length of time are severely deprived of normal human contact regardless of whether they are single or double celled . . . conditions in SHU amount to a 'virtual total deprivation, including, insofar as possible, deprivation of human contact.'"<sup>114</sup> This standard was followed in the 2001 case of *Jones'El v. Berge* where the court granted a preliminary injunction in favor of inmates, ordering the removal of mentally ill patients from supermax confinement.<sup>115</sup> A 2004 Tenth Circuit decision, however, cited *Rhodes v. Chapman* when denying relief from supermax segregation techniques because the plaintiff had not alleged facts of wanton, unnecessary infliction of pain or punishment grossly disproportionate to the crime committed.<sup>116</sup>

## V. EUROPE: GLOBAL LEADERS FOR PRISONERS' RIGHTS

The European Union is becoming known for its progressive policies on individual human rights, including prisoner rights<sup>117</sup> as evidenced by the Intergovernmental Conference in 2003, and the integration of the European Charter of Human Rights into the draft constitution of the European Union.<sup>118</sup> Indeed, given U.S. prison policies, such as segregation and minimal protection of prisoner rights, the global community may soon turn to Europe for future prison prototypes. Currently, the EU has a complex system of

113. *Id.* (listing such situations where the prisoner exhibits "overt paranoia, psychotic breaks with reality or massive exacerbations of existing mental illness").

114. *Id.* at 1230.

115. *Jones'El v. Berge*, 164 F. Supp. 2d 1096, 1125 (W.D. Wis. 2001).

116. *Herrera v. Williams*, 99 F. App'x. 188, 190 (10th Cir. 2004) (citing *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)).

117. Sharfstein, *supra* note 67, at 748-50; see also *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989) (finding death row isolation inhuman because it caused intense physical and mental suffering).

118. Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364) 1 [hereinafter Fundamental Rights Charter].

ensuring prisoner rights, based upon the Charter of Fundamental Rights of the European Union ("FREU"), as well as upon the European Convention on the Protection of Human Rights and Fundamental Freedoms ("European Convention").<sup>119</sup> While the FREU protects prisoner rights under community law, the premise of these rights is ultimately derived from the European Convention, which governs individual member states as well as European state signatories not a party to the European Union.<sup>120</sup>

Articles 1 and 4 of the FREU identify the rights of human dignity and protection from torture, inhuman or degrading treatment or punishment, respectively.<sup>121</sup> Praesidium explanatory notes and reference to the European Convention in FREU Article 52(3) require those rights and protections to follow the meaning found in the European Convention and through the European Court of Human Rights ("Strasbourg Court") jurisprudence.<sup>122</sup> Article 3 of the European Convention is the basis for FREU Article 4, and provides parallel language to the international treaties discussed above, stating that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment."<sup>123</sup> Through their interpretations of Article 3, the Strasbourg Court and European Human Rights Commission have repudiated the use of torture, inhuman treatment or

119. See Draft Treaty Establishing a Constitution for Europe, July 18, 2003, art. 2, CONV 850/03, available at <http://european-convention.eu.int/docs/Treaty/cv00850.en03.pdf> (declaring the E.U.'s values "of respect for human dignity, liberty, democracy, equality, the rule of law and respect for human rights," and that "[t]hese values are common to the Member States in a society of pluralism, tolerance, justice, solidarity and non-discrimination"); Treaty on European Union, art. 6, 1992 O.J. (C 191) 1.

120. See Giorgio Sacerdoti, *The European Charter of Fundamental Rights: From a Nation-State Europe to a Citizens' Europe*, 8 COLUM. J. EUR. L. 37, 48-50 (2002).

121. Fundamental Rights Charter, *supra* note 118, arts. 1, 4 (declaring that "human dignity is inviolable" and reiterating the often repeated phrase prohibiting torture and degrading treatment).

122. See Draft Charter of Fundamental Rights of the European Union, July 28, 2000, Charte 4422/00, Conv. 45.

123. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 3, Europ. T.S. No. 5 [hereinafter European Convention]; accord Universal Declaration, *supra* note 51, art. 5.

punishment, and degrading treatment or punishment as three points along a single continuum of rights violations.<sup>124</sup>

The Strasbourg Court has largely been a positive force toward creating a high standard for prisoner rights as it interprets the European Convention for all European signatory countries.<sup>125</sup> In the *Soering* case of 1989, the court anticipated a violation of the "cruel, inhuman or degrading" standard and refused extradition to the United States based upon the extreme psychological effects caused by death row confinement.<sup>126</sup> Recently, the Strasbourg Court has further outlined specific instances of legitimate segregation techniques along this continuum, which cumulatively represent significant strides ahead of U.S. jurisprudence.<sup>127</sup>

In addition to Strasbourg Court decisions, Europeans have continued establishing a high level of rights protection on segregation usage through legislation and incorporation of basic standards.<sup>128</sup> As early as 1982, the European Commission of Human Rights condemned solitary confinement in its *Krocher v. Switzerland* decision.<sup>129</sup> Since then, solitary confinement techniques have undergone considerable criticism and scrutiny within the Council of Europe.<sup>130</sup> The European states revised the Standard Minimum Rules

124. Sharfstein, *supra* note 67, at 748.

125. See generally European Convention, *supra* note 123, sec. II; Sacerdoti, *supra* note 120, at 38 (discussing Britain's acceptance of the binding nature of the European Convention in October 2000).

126. *Soering v. United Kingdom*, 161 Eur. Ct. H. R. (ser. A) at 44 (1989).

127. See *Iorgov v. Bulgaria*, 40 E.H.R.R. 7 (2004); *Dankevich v. Ukraine*, 38 E.H.R.R. 25 (2003); *Kalashnikov v. Russia*, 2002-VI Eur. Ct. H.R. 93; *Dougoz v. Greece*, 2001-II Eur. Ct. H.R. 273; *Soering*, 161 Eur. Ct. H.R. (ser. A) at 44. See generally *Carlos the Jackal Loses Case Over Jail Treatment*, REUTERS, Jan. 27, 2005.

128. It should be noted that non-EU European countries are also parties to the European Convention and thus fall under the jurisdiction of the Strasbourg Court. These countries, however, are not party to the new EU Human Rights Charter.

129. *Krocher v. Switzerland*, App. No. 8463/78, 34 Eur. Comm'n H.R. Dec. & Rep. 24, 53, ¶ 62 (1982) ("[C]omplete sensory isolation coupled with total social isolation, can destroy the personality and constitutes a form of treatment which cannot be justified by the requirements of security or any other reason.").

130. The Council of Europe differs from the European Union. The Council of Europe is an independent multi-national body composed of EU and non-EU European nations.

for Prisoners, creating a European version that reemphasizes a commitment to human dignity and minimal use of segregation techniques.<sup>131</sup> For example, in the European revision, Prison Rule 38(1) requires that "punishment by disciplinary confinement . . . shall only be imposed if the medical officer after examination certifies in writing that the prisoner is fit to sustain it" and Rule 38(3) requires the medical officer to observe prisoners in such confinement daily, monitoring any change in their psychological state, which prompts immediate termination or alteration of punishment.<sup>132</sup> The International Centre for Prison Studies ("ICPS"), in connection with the Foreign and Commonwealth Office in London, recently codified the importance of upholding international standards.<sup>133</sup> In 2002, the ICPS distributed a handbook for prison staff, reiterating solitary confinement as inappropriate punishment other than in the most exceptional circumstances and emphasizing that the careful monitoring of prisoners' mental states was integral to maintaining the welfare of inmates.<sup>134</sup>

Similarly, the Council of Europe's European Committee for the Prevention of Torture ("ECPT"), in its second general report, stated how "[s]olitary confinement can, in certain circumstances, amount to inhuman and degrading treatment; in any event, all forms of solitary confinement should be as short as possible."<sup>135</sup> In its 1991 assessment of Spanish prisons, the ECPT found that subjecting someone to very long periods of isolation with little or no activity

131. Recommendation No. R (87) 3 of the Committee of Ministers to Member States on the European Prison Rules, Rs. 37, 38(1), 38(3) (1987), available at [http://www.coe.int/T/E/Legal\\_affairs/Legal\\_co-operation/Prisonsand\\_alternatives/Legal\\_instruments/Rec.R\(87\)3.asp](http://www.coe.int/T/E/Legal_affairs/Legal_co-operation/Prisonsand_alternatives/Legal_instruments/Rec.R(87)3.asp).

132. *Id.* R. 38(1), (3).

133. ANDREW COYLE, A HUMAN RIGHTS APPROACH TO PRISON MANAGEMENT: HANDBOOK FOR PRISON STAFF 80 (Int'l Centre for Prison Studies, 2002), available at <http://www.fco.govprisonstudies.co.uk/Files/kfile/fcohandbook1,0.pdf>.

134. *Id.*

135. EUROPEAN COMM. FOR THE PREVENTION OF TORTURE AND INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, 2ND GENERAL REPORT ON THE CPT'S ACTIVITIES COVERING THE PERIOD 1 JANUARY TO 31 DECEMBER 1991 ¶ 56 (CPT/Inf (92) 3, 1992), available at <http://www.cpt.coe.int/en/annual/rep-02.htm>.

constitutes inhuman treatment.<sup>136</sup> Minimal use of solitary confinement, especially as it manifests in high security prisons, has been repeatedly recommended by the ECPT, more recently in its 2000 General Report.<sup>137</sup> According to the ECPT, prison security and management should not ultimately result in any inhuman treatment or compromise of prisoner dignity.<sup>138</sup>

## VI. HARMONIZING THE EIGHTH AMENDMENT AND INTERNATIONAL STANDARDS

Because the U.S. case law surrounding "cruel and unusual punishment" has created standards deferential to prison administration, the likelihood of successful prisoner claims in this area is minimal.<sup>139</sup> Specifically, there seems to be a presumption against prisoner claims due to both subjective legal standards of proof and the Prison Litigation Reform Act of 1995 ("PLRA"), which created additional procedures for prisoner claims in an attempt

136. EUROPEAN COMM. FOR THE PREVENTION OF TORTURE AND INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, REPORT TO THE SPANISH GOVERNMENT ON THE VISIT TO SPAIN ¶ 113 (CPT/Inf (96) 9, 1996), available at <http://www.cpt.coe.int/documents/esp/1996-09-inf-eng-1.pdf>.

137. See EUROPEAN COMM. FOR THE PREVENTION OF TORTURE AND INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, 11TH GENERAL REPORT ON THE CPT'S ACTIVITIES (CPT/Inf (2001) 16, 2001), available at <http://www.cpt.coe.int/en/annual/rep-11.htm>.

In every country there will be a certain number of prisoners considered to present a particularly high security risk and hence to require special conditions of detention. The perceived high security risk of such prisoners may result from the nature of the offences they have committed, the manner in which they react to the constraints of life in prison, or their psychological/psychiatric profile. This group of prisoners will (or at least should, if the classification system is operating satisfactorily) represent a very small proportion of the overall prison population. However, it is a group that is of particular concern to the CPT, as the need to take exceptional measures vis-à-vis such prisoners brings with it a greater risk of inhuman treatment.

*Id.* ¶ 32

138. *Id.*

139. See Weidman, *supra* note 89, at 1524 (explaining that the current judicial standards make it difficult to protect prisoners' Eighth Amendment rights).



to prevent frivolous litigation.<sup>140</sup> Essentially, the PLRA restricts federal courts' ability to grant injunctive relief to inmates and provides a highly deferential standard of review for prison administration actions.<sup>141</sup> Prolonged segregation under international standards, as evidenced above, has been considered cruel, inhuman, or degrading in circumstances where psychological effects and extremely long terms of isolation are present. The Supreme Court's Eighth Amendment jurisprudence, however, has defiantly proclaimed its own standards apart from international rights obligations.<sup>142</sup>

In terms of treaty obligations, the fact that the United States has still upheld its reservations to both the ICCPR and Convention Against Torture suggests it continues to protect specific types of punishment under its own Eighth Amendment standards which provide fewer rights for prisoners than are available in Europe.<sup>143</sup> This fact presents a dismal view of the possibility of successful future litigation attempting to mitigate the devastating psychological effects that are perpetuated by segregation techniques used in the United States. This is because a litigant must establish a subjective intent of prison administration before the court can find any "cruel and unusual punishment" occurring; prisons remain simply uncomfortable, according to Justice Powell.<sup>144</sup>

140. Pub. L. No. 104-134 (codified at 18 U.S.C. § 3626 (2000)); see Weidman, *supra* note 89, at 1520 (detailing the constraints placed upon the courts by the Prison Litigation Reform Act, which mandates "deference as the default position for federal courts in prison litigation").

141. § 3626(a)(2) ("Preliminary injunctive relief must be narrowly drawn, extend no further than necessary to correct the harm . . . and be the least intrusive means necessary to correct the harm. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the preliminary relief . . ."). See generally Weidman, *supra* note 89, at 1520 (summarizing the Prison Litigation Reform Act).

142. See, e.g., *Hutto v. Finney*, 437 U.S. 678, 685 (1978) (affirming that conditions of isolation in addition to inadequate diet and overcrowding amounted to Eighth Amendment violations, but that isolation conditions themselves may not).

143. Sharfstein, *supra* note 67, at 761-70.

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

There are, however, potential solutions to the situation of prisoners exposed to severe segregation and other unsatisfactory treatment in American prisons. Customary international law may be the best means of both holding supermax prisons accountable and broadening the narrow scope of Eighth Amendment protection of prisoner rights.<sup>145</sup> According to Restatement (Third) of the Foreign Relations Law of the United States: "A state violates international law if, as a matter of state policy, it practices, encourages, or condones . . . (d) torture or other cruel, inhuman, or degrading treatment or punishment, or . . . (g) a consistent pattern of gross violations of internationally recognized human rights."<sup>146</sup> In determining what is entailed in "international customary law" or "law of nations," the federal government and courts are to review a multitude of sources, such as the writings of foreign jurists, the general usage and practice of other nations, and judicial decisions recognizing and enforcing such law.<sup>147</sup> Truly this has historically been an American legal standard: from Justice Jay's proclamation in *Chisolm v. Georgia* that "the United States by taking a place among the nations of the earth [became] amenable to the law of nations" to the signing of the Constitution when the law of nations manifested into federal matter.<sup>148</sup>

It is also important to consider basic laws on the regulation of international treaties themselves. The Vienna Convention on Treaties states that a nation may not enter a reservation that "is incompatible with the object and purpose of the treaty."<sup>149</sup> In terms of the ICCPR,

145. Heffernen, *supra* note 82, at 542-45.

146. Martin A. Geer, *Human Rights and Wrongs in Our Own Backyard: Incorporating International Human Rights Protections Under Domestic Civil Rights Law—A Case Study of Women in United States Prisons*, 13 HARV. HUM. RTS. J. 71, 107 (2000) (quoting from Restatement (Third) of the Foreign Relations Law of the United States § 702 (1987)).

147. *Id.* at 107-08.

148. *Chisolm v. Georgia*, 2 U.S. 419, 474 (1793); see *Ware v. Hylton*, 3 U.S. 199, 281 (1796) (explaining that in declaring independence, the United States was bound by the law of nations); see also *Filartiga v. Pena-Irala*, 630 F.2d 876, 877-78 (2d Cir. 1980) (explaining that upon ratification of the Constitution, the thirteen former colonies were fused into one nation and bound to observe and construe international law); Geer, *supra* note 146, at 108.

149. Law of Treaties, *supra* note 46, art. 19(c).

the U.N. has found that states should not enter reservations when the scope of, or intent behind, such reservations permit the country to accept a limited number of human rights obligations.<sup>150</sup> The meaning of these principles for determining U.S. accountability under the ICCPR and the Convention Against Torture is vague. However, the ICCPR has been interpreted to protect mental integrity, as well as protecting against physical confinement.<sup>151</sup> Considering the reservation to Article 7 of the ICCPR as a significant divergence from international standards, the United States only reserves obligations regarding *treatment* or *punishment*, but still remains accountable on the torture *prohibition*.<sup>152</sup>

### CONCLUSION

Solitary confinement and prolonged segregation in U.S. prisons follow neither international standards for prison management nor internationally established protections for prisoner rights. Although the United States has determined that the Eighth Amendment of the U.S. Constitution provides adequate protection against punishments compromising prisoners' human dignity, it is a lesser standard than other industrialized nations. The psychological effects of solitary confinement, particularly in supermax SHUs, is extremely serious and a violation of international customary law. While solutions exist, the United States has carefully crafted jurisprudence and treaty reservations to prevent interpretations of domestic prison practice under international standards. Numerous organizations, from Amnesty International to the U.N. Committee Against Torture, have condemned the use of segregation techniques and the abrasive conditions in U.S. supermax prisons.<sup>153</sup> The United States cannot, as

150. Concluding Observations of the Human Rights Committee: United States, U.N. H.R.C., ¶¶ 266-304, 53d Sess., U.N. Doc. CCPR/C/79/Add.50 (1995), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/b7d33f6b0f726283c12563f000512bd1?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/b7d33f6b0f726283c12563f000512bd1?Opendocument).

151. Stone, *supra* note 77, at 16; Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, cmt. 20, U.N. Doc HRI/GEN/1/Rev.1 (1994).

152. Stone, *supra* note 77, at 21.

153. Conclusions and Recommendations of the Committee Against Torture: United States of America, U.N. Comm. Against Torture, ¶ 179, 24th Sess., U.N.

a matter of legal principle nor from an international policy perspective, pick and choose the human rights it decides to uphold.<sup>154</sup> If such practices continue, it will not be long before European countries emerge, if they have not already done so, as the true leaders in global prisoner rights.

Doc. A/55/44 (2000), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/59a7a114139ef798802568e3004e289e?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/59a7a114139ef798802568e3004e289e?Opendocument).

154. Press Release, Amnesty Int'l, U.S. Government Questioned by U.N. Committee Against Torture, Due to Respond Tomorrow (May 10, 2000) ("We have long expressed concern about the USA's pick and choose approach to international human rights treaties . . . . Such an approach undermines not only the protection afforded to individuals in the USA, but also the whole enterprise of creating a viable international system to ensure respect for human rights.").