



**THE UNITED STATES TORTURES BEFORE IT KILLS:**

**AN EXAMINATION OF THE DEATH ROW EXPERIENCE FROM A  
HUMAN RIGHTS PERSPECTIVE**

**A Position Paper by the Center for Constitutional Rights**

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## **AN EXAMINATION OF THE DEATH ROW EXPERIENCE FROM A HUMAN RIGHTS PERSPECTIVE**

### **I. Factual Overview<sup>1</sup>**

According to recent figures, there are approximately 3,250 prisoners on death row in the United States.<sup>2</sup> The vast majority of these men and women will serve years in solitary and crippling conditions, awaiting execution. Conditions on death row are bleak, characterized by “rigid security, isolation, limited movement, and austere conditions.”<sup>3</sup> Of the 34 states which impose the death penalty, at least 25 hold death row inmates in solitary confinement 23 hours or more a day.<sup>4</sup> All but two states (Missouri and Oklahoma) hold prisoners on death row in solitary cells for at least 16 hours a day.<sup>5</sup>

Contact with family members is minimal. Seventeen out of 34 states do not allow prisoners any physical contact with family or friends for the duration of their time on death row, other than on the weeks leading up to execution.<sup>6</sup> Most death row prisoners have extremely restricted access to non-contact visits, books, telephones, and programming, limited showers and exercise, and are not removed from their cells without

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<sup>1</sup> The Center for Constitutional Rights is dedicated to advancing and protecting the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights. Founded in 1966 by attorneys who represented civil rights movements in the South, CCR is a non-profit legal and educational organization committed to the creative use of law as a positive force for social change. If you have any questions regarding this paper, please feel free to contact Rachel Meeropol, Staff Attorney at the Center for Constitutional Rights, at [rachelm@ccrjustice.org](mailto:rachelm@ccrjustice.org).

<sup>2</sup> Death Penalty Information Center, *Death Row Inmates by State*, available at: <http://www.deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year>.

<sup>3</sup> Lombardi G, Sluder RD, Wallace D. 1997, *Mainstreaming death-sentenced inmates: the Missouri experience and its legal significance*, Federal Probation 61: 3.

<sup>4</sup> NAACP Legal Defense and Educational Fund, Inc. *Death Row USA*, April 1, 2010 available at <http://www.deathpenaltyinfo.org/documents/DeathRowConditions.xls>.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

shackles and a waist chain.<sup>7</sup> Only two states allow for *any* access to educational programming, and three more allow only limited occupational training or opportunity.<sup>8</sup>

Sensory deprivation is prevalent. One scholar described a relatively new Texas death row facility, where hundreds of condemned men are isolated in 60 square foot, single-person, solid-front cells for 23 hours a day. These men exercise alone for one hour each day. Meals are served through a locking metal flap in the cell door. There are no work or group recreation programs. Nor can the prisoners speak to each other through the solid cell walls and door. All visits are non-contact.<sup>9</sup>

### *Time on Death Row*

Death row prisoners in the United States spend decades in these dehumanizing conditions. Of the 52 people executed in the United States in 2009, the average length of time on death row was 169 months – over fourteen years.<sup>10</sup> Many spend even longer. In *Thompson v. McNeil*, for example, the United States Supreme Court declined to review the case of William Thompson, who had been on death row in Florida. Thompson spent 23 hours a day locked in a solitary 6-by-9-foot cell for 32 years.<sup>11</sup> He had twice come within hours of execution, only to receive last minute stays.

The details of these prisoners’ experiences are instructive. In their evenhanded analysis of death row syndrome, explained below, Dr. Karen Harrison and Anouska

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<sup>7</sup> Andrea D. Lyon & Mark D. Cunningham, “Reason Not the Need:” *Does the Lack of Compelling State Interest in Maintaining a Separate Death Row Make it Unlawful?*, 33 Am. J. Crim. L. 1, 2 (2005).

<sup>8</sup> NAACP Legal Defense and Educational Fund, Inc. *Death Row USA*, April 1, 2010 available at <http://www.deathpenaltyinfo.org/documents/DeathRowConditions.xls>.

<sup>9</sup> *Id.* at 15.

<sup>10</sup> Bureau of Justice Statistics, *Capital Punishment 2009, Statistical Tables*, at Table 12, available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cp09st.pdf>

<sup>11</sup> *Thompson v. McNeil*, 129 S. Ct. 1299, 1299-3000 (2009), quoting *People v. Anderson*, 6 Cal. 3d 628, 649 (1972) for the proposition that “the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture.”

Tamony describe the experience of a Virginia death row prisoner in his tenth year of solitary confinement:

The inmate spends approximately 23 hours a day in his 7 x 9 feet cell, with one hour of solitary exercise, followed by the opportunity to shower. The only human contact experienced, apart from being taken to and from the exercise yard, is when his meals are delivered on a plastic food tray, which is pushed through a small portal in the cell door. Visitation rights include one hour of family non-contact, to be taken at weekends and one face-to-face meeting every three months; although for this particular prisoner his only visits are from his legal representatives. When a visit is arranged, he is led out of his cell by a leash, hands shackled behind his back and ankles bound together.

Everything, apart from a metal sanitation unit, is grey concrete; including the bed, stool and walls. There is one slim window but this provides so little natural light that the cell is illuminated by strip lighting. Although the prisoner spoke about conditions being sometimes eerily silent, he also described how it could also be unbearably noisy; the sound of keys rattling, toilets flushing, pipes gargling and prisoner's voices echoing through the labyrinth of cells...

Since living on death row, the prisoner has shown increasingly severe mental health problems, including symptoms of chronic depression and active psychosis. Whilst, it cannot be categorically proven that he would not have suffered such deterioration in any event, his mental health team think this is unlikely; with them stating that his condition has been exacerbated by the psychological effects of the sensory and social deprivation which solitary confinement causes. Psychological and psychiatric professionals have noted how his behavior has become increasingly bizarre, including paranoid delusions and hallucinatory thoughts. A clinical psychologist describes his speech as tangential and rambling, his manner, at times, as intensely subdued, and at others as, manic and disorganized....<sup>12</sup>

While relatively few women are held on death row, their experiences mirror those of men sentenced to die. The attorney for one such woman described her conditions:

My client is held in a small area isolated from the rest of the prison. She is only allowed to see one prisoner .... She is allowed out of her cell for a 15 minute shower each day and one hour outside (alone) five days per week, weather permitting. ... [T]wo guards sit in front of her cell 24 hours each day, seven days a week. There is also a video camera on her at all times.<sup>13</sup>

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<sup>12</sup> Dr. Karen Harrison and Anouska Tamony, *Death Row Phenomenon, Death Row Syndrome and their Affect on Capitol Cases in the US*, 2010 Internet J. Cri m., available at [www.internetjournalofcriminology.com](http://www.internetjournalofcriminology.com)

<sup>13</sup> The ACLU & American Friends Service Committee, *The Forgotten Population: A Look at Death Row in the United States Through the Experiences of Women*, Dec 2004, at 12-13.

*Coming Close to Death, Again and Again*

The intensity of the death row experience is not solely the result of abnormally prolonged solitary confinement. It is also based on the knowledge of one's impending, but uncertain, execution and the intense strain of repeatedly coming within hours or days of execution.<sup>14</sup> As anecdotes from just the last year show, it is not uncommon for a death row prisoner to come within hours of being killed, only to receive a temporary stay or reprieve, soon followed by a new execution date.<sup>15</sup> Cleve Foster, currently on death row in Texas, has already faced death three times. On September 20, 2011, he was granted a temporary reprieve two hours before he was scheduled to be executed. Months earlier, in January of 2011, he came within six hours of his scheduled execution. Hank Skinner, also on death row in Texas, was scheduled to be executed on February 24, 2010. That date was changed to March 24, due to a clerical error. He was finishing his last meal, thirty-five minutes before his scheduled execution on March 24th, when he again received a stay. He now anticipates execution on November 9, 2011. Jeffrey Matthews was sentenced to die in Oklahoma. He was given an execution date of June 17, which was stayed until July 17, 2010. Less than a week before his date of execution, he received another stay, until August 17, 2010. He received yet another stay, until October 16, 2010, so the State could seek permission to use a new drug to carry out the lethal injection. The date was continued once again, until November 20. He was finally executed on January 11, 2011.

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<sup>14</sup> Though important, an exploration of the means of execution, and its concomitant physical pain and suffering, is beyond the scope of this paper. However, a death row prisoner's anticipation of this pain, along with his/her fear of death, must be considered in analyzing the experiential component of life on death row.

<sup>15</sup> The following information is compiled from reports of execution stays in 2010 and 2011 available at <http://www.deathpenaltyinfo.org/upcoming-executions>.

Recently, in late September, Troy Davis was executed by the state of Georgia despite global protest on his behalf and significant evidence of his innocence. While the details of Troy Davis' underlying prosecution became common knowledge to his legions of supporters, few knew that he had already come within minutes of execution before his final eleventh-hour ordeal. In 2008, Davis came within 90 minutes of execution – he was already strapped down on the gurney when the Supreme Court granted his stay. Later that year, he again came within three days of an execution date. In 2007, he came within a day of execution.

Perhaps most disturbingly, on July 25, 2010, the Florida Supreme Court stayed the execution of Manuel Valle, scheduled for August 2, less than two weeks later. The execution date was reset for September 6. He received another stay, only to be killed on September 28, 2011. Valle had spent 33 years on death row in Florida, and had watched 69 other prisoners walk by his cell to the execution chamber to die.<sup>16</sup>

*Death Row Phenomenon & the Psychological Impact  
of Prolonged Solitary Confinement*

Decades in isolation without access to programming, family, other prisoners, or any other form of intellectual or social stimulation, along with the constant knowledge of one's impending, but uncertain, death, combine to create "death row phenomenon." The phenomenon can be broken down into three elements: (1) a temporal component based on the length of time between sentencing and execution; (2) a physical component based on the punishing conditions in which the condemned prisoner is held; and (3) an

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<sup>16</sup> Clive Stafford Smith, *Manuel Valle's Excruciating 33-year Execution*, Guardian.co.uk, Sep. 29, 2011. Available at <http://www.guardian.co.uk/commentisfree/cifamerica/2011/sep/29/manuel-valle-execution-breyer?newsfeed=true>.

experiential component, based on the meaning of living under sentence of death.<sup>17</sup>

“Death row syndrome,” in turn, refers to the significant negative psychological impacts of prolonged detention on death row. In a definitive and much-cited literature review, clinical psychologists Mark Cunningham and Mark Vigen summarized relevant research regarding conditions on death row and the impact of these conditions on prisoners facing execution.<sup>18</sup> In-depth interviews of 35 out of 37 prisoners on Alabama’s death row in 1979, for example, uncovered “four adverse psychological processes... pervading the experience of death row inmates: (1) a sense of helplessness and defeat; (2) a sense of widespread and diffuse danger with an accompanying perception of helpless vulnerability; (3) emotional emptiness characterized by loneliness and a deadening of feelings for self and others; and (4) a decline in mental and physical acuity.”<sup>19</sup> The prisoners experienced “chronically unstable, fluctuating moods and recurrent depression” along with severe deterioration in mental capability including slowness, confusion, forgetfulness, and lethargy.<sup>20</sup> The Alabama researchers “compared this deterioration to senility, describing the death row inmates as writing rambling correspondence, misplacing objects within a small cell, and expressing disconnected thoughts.”<sup>21</sup>

While not yet recognized by the American Psychological Association, there has long been international recognition of death row syndrome. Indeed, the serious mental health impact of prolonged solitary confinement, in itself, is extraordinarily well documented.

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<sup>17</sup> Amy Smith, *Not “Waiving” but Drowning: the Anatomy of Death Row Syndrome and Volunteering for Execution*, 17 B.U. Pub. Int. L.J. 237, 240 (2008); see also Death Penalty Information Center, *Time on Death Row*, available at <http://www.deathpenaltyinfo.org/time-death-row>.

<sup>18</sup> Mark D. Cunningham & Mark P. Vigen, *Death Row Inmate Characteristics, Adjustment and Confinement: a Critical Review of the Literature*, 20 BEHAV. SCI. & L. 191 (2002).

<sup>19</sup> *Id.* at 204.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

One of the most common psychological effects of prolonged solitary confinement is a persistent and heightened state of anxiety. For example, a 2003 study of prisoners in California's Pelican Bay Supermax facility by Dr. Craig Haney found that 91% of inmates suffered from abnormal levels of what Haney termed anxiety or "nervousness."<sup>22</sup> Similarly, a 1983 study by Dr. Stuart Grassian in the *American Journal of Psychiatry* found that 71% of inmates in his sample complained of "massive free-floating anxiety."<sup>23</sup> This anxiety and nervousness is reported by all accounts of those familiar with prolonged solitary confinement; frequently, it inspires a severe paranoia in inmates. In a 2006 paper summing up his findings from two different extensive studies, Grassian found that nearly half of the prisoners suffered from "paranoid and persecutory fears."<sup>24</sup> It is not uncommon for this paranoid mindset to persist long after prisoners are released from solitary confinement or incarceration.<sup>25</sup>

Another extremely common result of prolonged solitary confinement is the emergence of severe headaches. In the aforementioned Haney study, 88% of prisoners complained of recurring headaches, while a study by Danish psychiatrists found that 53% of prisoners held in solitary confinement for only two months suffered similarly.<sup>26</sup> A 2003 Norwegian study reported 40% of prisoners with the same complaint.<sup>27</sup>

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<sup>22</sup> Craig Haney, *Mental Health Issues in Long-Term Solitary and "Supermax" Confinement*, 49 *Crime & Delinquency* 124, 2003.

<sup>23</sup> Stuart Grassian, *Psychopathological Effects of Solitary Confinement*, 140 *Am. Psychiatric Ass.* 1450, (1983).

<sup>24</sup> Stuart Grassian, *Prison Reform: Commission on Safety and Abuse in America's Prisons: Psychiatric Effects of Solitary Confinement*, 22 *J.L. & Politics* 325 (2006)

<sup>25</sup> Vince Beiser, *A Necessary Evil*, *L.A. Times*, Oct. 19, 2003

<sup>26</sup> Andersen, Henrik Steen, Tommy Lillebæk, and Dorte Sestoft. 1997. *Efterundersøgelsen - en opfølgingsundersøgelse af danske varetoegtsarrestanter*. Copenhagen: Schultz.

<sup>27</sup> Stang, Jan, Jens Moe, Inge Arne Teigset, Bjørn Østberg, and Tron Anders Moger, *Fanger i sikkerhetscelle - en utfordring*, 123 *Tidsskrift for Den norske Lægeforening*, 1844-46 (2003).

Haney's 2003 study also found 88% of prisoners in his sample suffered from ruminations, irrational anger, and "intrusive thoughts."<sup>28</sup> Grassian, too, reported finding prisoners suffering in this manner at a rate of nearly 1-out-of-2.<sup>29</sup> Grassian describes prisoners experiencing "the emergence of primitive aggressive fantasies of revenge, torture, and mutilation of the prison guards," and in every instance, prisoners described such thoughts as "unwelcome, frightening and uncontrollable."<sup>30</sup> While often difficult to measure scientifically, such disturbing, unsettling thoughts are reported throughout the literature on prolonged solitary confinement. Sixty-one percent of Haney's 2003 study participants reported "violent fantasies."<sup>31</sup>

Both Grassian and Haney found that an extremely high percentage of prisoners in their sample suffered from oversensitivity to stimuli. Eighty-six percent of Haney's study were thusly impaired, while Grassian reported nearly half of his sample similarly affected.<sup>32</sup>

It is extremely common for prisoners in prolonged isolation to find their ability to concentrate significantly impaired. Haney's 2003 study reported 84% of participants experiencing an "extreme state of confusion," and Grassian has repeatedly found this to also be the case in his studies. In his 2006 paper, Grassian quotes a prisoner stating, "Your mind is narcotized," and Grassian reports that one prisoner "slashed his wrists during such a state." Often, prisoners descend into this state to the point that they are no longer able to read.<sup>33</sup>

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<sup>28</sup> See *supra*, note 22, at p. 134.

<sup>29</sup> See *supra*, note 24.

<sup>30</sup> *Id.* at 7.

<sup>31</sup> See *supra*, note 22.

<sup>32</sup> *Id.*; *supra* note 24.

<sup>33</sup> Smith, Peter S, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 Crime and Justice 441-528 (2006).

Grassian concludes that nearly one-third of prisoners he worked with “described hearing voices,” while others reported “noises taking on an increasing meaning and frightening significance.” Haney’s 2003 study found that 41% of his sample experienced hallucinations, 44% experienced perceptual distortions, and 56% suffered from frequent bouts of dizziness. Sixty-three percent reported frequently talking to themselves. Grassian also links “overt psychosis” to especially bad cases of paranoia.<sup>34</sup> In this state, prisoners lose touch with reality, frequently falling into paranoid fantasies that lead them to self-mutilation. It should be noted that in much of the non-clinical literature on solitary confinement, prisoners report losing themselves for days in hallucinatory fantasies. Sometimes this is described as a good thing (the fantasies are positive, pleasant, frequently sexual); other times, the experience is far more harrowing.

While it is clear that prisoners in prolonged solitary confinement suffer from a decreased ability to control their impulses, this is one of the hardest areas to measure scientifically, as the line between different, co-mingling pathologies becomes rather blurred. Without a doubt, there is a shockingly high frequency of prisoners responding to prolonged isolation by becoming violent against others and themselves. But it is hard to determine whether a prisoner’s behavior is due to diminished impulse control, hallucinations, confusion, irrational anger, or, most likely, a combination of these factors. Generally, researchers tend to classify instances of self-mutilation as examples of weak impulse control. Grassian, for example, reports a prisoner, upon cutting himself, saying, “[E]very time I did it, I wasn’t thinking – lost control – cut myself without knowing what

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<sup>34</sup> See *supra*, note 25 at p 7.

I was doing.” Smith links a lack of impulse control to prevalence of suicidal thoughts, of which 27% of Haney’s Pelican Bay Prison sample experienced.<sup>35</sup>

Grassian states that “well over half” of the inmates he interviewed described “severe” panic attacks while in solitary confinement. Haney doesn’t use the term panic attack but, in his 2003 study, 70% of participants report a sense of an “impending nervous breakdown,” while 67% suffer from “overall deterioration.”

As destructive as each of these individual harms are, on their own, to inmates in solitary confinement, the true malignant nature of the practice cannot be understood by looking at its consequences piecemeal. It is not just because prolonged isolation causes prisoners to feel paranoid or confused that it is so horrible. It is because prolonged isolation causes prisoners paranoia and confusion, while annihilating their ability to concentrate – thus denying them the escape of reading or watching television – and *simultaneously* denying them the ability to sleep, digest, communicate, or even dream.

Indeed, the effects of solitary confinement do not harm prisoners like individual blows – this is not the psychological equivalent of a beating. Rather, prolonged isolation debilitates prisoners as if it were a far-ranging disease of the mind. In this vein, both Drs. Grassian and Haney have presented a more holistic view of prolonged solitary confinement’s detrimental nature. Grassian considers the confluence of symptoms that those held in prolonged isolation experience to be so unique and rare that it is best understood as what he calls an “acute organic brain syndrome,” or “a delirium.”

This medical research backs up what should be obvious to us all: a human being cannot live without human interaction, intellectual and sensory stimulation, and hope. To deny all three denies the basic humanity of the individual.

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<sup>35</sup> See *supra*, note 22; note 16.

## II. Legal Discussion

It is widely accepted that the death penalty constitutes cruel, inhuman or degrading treatment or punishment.<sup>36</sup> Through this analysis, we seek to determine whether the conduct that forms an integral part a death sentence in the United States, which constitute the “death row phenomenon” discussed above – prolonged solitary confinement, sensory deprivation, dehumanizing conditions for extended periods of time and a form of mock execution<sup>37</sup> – also constitutes torture, thus rendering the death penalty in the United States a form of torture. Particularly in light of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment’s recent statement that he would be examining the death penalty and prolonged solitary confinement<sup>38</sup> and the theme of this year’s World Day Against the Death Penalty, we consider such an inquiry necessary and instructive.

We conclude that the course of conduct employed by the United States, from sentence, to just before execution, constitutes torture.

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<sup>36</sup> See, e.g., *Soering v. United Kingdom*, 11 Eur. Hum. Rts. Rep. 439 (1989), para. 104 (finding that the facts used to determine whether the death penalty violates the prohibition on torture or inhuman or degrading treatment or punishment including “[t]he manner in which it is imposed or executed, the personal circumstances of the condemned person and a disproportionality to the gravity of the crime committed, as well as the conditions of detention awaiting execution” are present due to *inter alia* “death row phenomenon” existing in Virginia); *Pratt and Morgan v. The Attorney General of Jamaica*, 3 SLR 995, 2 AC 1, 4 All ER 769 (Privy Council 1993) (en banc).

<sup>37</sup> As noted above, the means and methods of execution are beyond the scope of this policy paper. It is worth noting, however, that the UN Committee Against Torture expressed concern “at the fact that substantiated information indicates that executions in the State party can be accompanied by severe pain and suffering,” in its 2006 report on the United States compliance with CAT. See *Consideration of Reports Submitted by States Parties under Article 19 of the Convention, Conclusions and recommendations of the Committee against Torture, United States of America, CAT/C/USA/CO/2*, July 25, 2006, para. 31.

<sup>38</sup> Report submitted by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, A/HRC/16/52, Feb 3, 2011, para. 70: “The Special Rapporteur recognizes that the question as to whether the death penalty, as well as some health and drug policies, prolonged solitary confinement, some treatments for mental disability, and domestic violence constitute *per se* cruel, inhuman or degrading treatment or punishment has given rise to much debate and discussion in the Human Rights Council. ... The Special Rapporteur will look more deeply into these issues and also suggests that they be the subject of further research by the Human Rights Council and its mechanism.” Available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/16session/A.HRC.16.52.pdf>

## *Torture Defined under International Law*

The United States ratified the Convention Against Torture (CAT) on October 21, 1994. Article 1, para. 1, of CAT, provides a definition of torture:

For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, 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>39</sup>

Numerous other international treaties also prohibit torture.<sup>40</sup>

Torture constitutes a crime against humanity, war crime, and violation of the Geneva Conventions, as reflected in the statutes of the International Criminal Court, the International Tribunal for the former Yugoslavia, and the International

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<sup>39</sup> Article 1 further provides that torture “does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.” This provision does not allow for a party to CAT to establish sanctions, or a regime for implementing sanctions “that defeat the object and purpose of the Convention Against Torture to prohibit torture.” The former Special Rapporteur on Torture, Manfred Nowak, and another international law expert, recently clarified that this provision was related to “certain disciplinary measures below the threshold of corporal punishment” including solitary confinement. See Manfred Nowak and Elizabeth McArthur, *The United Nations Convention Against Torture - A Commentary*, (Oxford University Press 2008) (“Nowak and McArthur Commentary”), pp. 79-80. *C.f.*, 8 C.F.R. 1208.18 (Implementation of the Convention Against Torture) provides “Torture does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. Lawful sanctions include judicially imposed sanctions and other enforcement actions authorized by law, including the death penalty, but do not include sanctions that defeat the object and purpose of the Convention Against Torture to prohibit torture.”

<sup>40</sup> See, e.g., International Covenant on Civil and Political Rights, Art. 7; European Convention on Human Rights, Art. 3; Inter-American Convention to Prevent and Punish Torture, Art. 5; African Charter on Human and Peoples Rights, Art. 5. See also U.S. definition of torture, 18 U.S.C. § 2340:

Definitions: As used in this chapter—(1) “torture” means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control;(2) “severe mental pain or suffering” means the prolonged mental harm caused by or resulting from—(A) the intentional infliction or threatened infliction of severe physical pain or suffering; (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (C) the threat of imminent death; or (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.

Tribunal for Rwanda, among other sources. Over the last fifteen years, a substantive body of jurisprudence has developed setting forth the elements of torture under customary international law, which largely reflects the definition of torture under CAT.<sup>41</sup> Torture has been found to be “a violation of personal dignity and is used for such purposes as intimidation, degradation, humiliation and discrimination, punishment, control or destruction of a person.”<sup>42</sup>

Of particular relevance here, torture is not limited to physical acts; the infliction of severe *mental* pain or suffering with the requisite intention and purpose is sufficient to constitute torture. There is not a particular threshold that must be crossed for pain or suffering to constitute “severe” mental harm; it is assessed in the circumstances of each case, taking into account the “nature, purpose and consistency of the acts committed.”<sup>43</sup> Factors related to the alleged victim, including their “age, sex, state of health and position of inferiority” are relevant for assessing harm.<sup>44</sup>

*The Course of Conduct for Administration of the Death Penalty  
in the United States Constitutes Torture*

As discussed above, prolonged solitary confinement, sensory deprivation, and dehumanizing conditions for extended periods of time are all aspects of the death penalty. Furthermore, the preparation for death followed by a temporary reprieve only to be followed by a later execution date can be said to constitute a mock execution. Each of these acts has been examined, either in isolation or

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<sup>41</sup> See, e.g., *Prosecutor v. Mucic, et al. (Čelebići Case)*, Case No. IT-96-21-T, Judgement, para. 494 (Nov. 16, 1998); *Prosecutor v. Furundžija*, Case No. IT-95-17/1-A, Judgement, para. 111 (July 21, 2000).

<sup>42</sup> *Prosecutor v. Bradjanin*, Case No. IT-99-36-T, Judgement, para. 485 (Sept. 1, 2004).

<sup>43</sup> *Id.* at para. 484.

<sup>44</sup> *Id.*

together, by United Nations bodies, international tribunals, legal experts, and non-governmental organizations, and found to constitute torture.

Most notably, the Special Rapporteur on Torture, Juan Méndez, recently issued a report on solitary confinement, in which he concluded that “where the physical conditions and the prison regime of solitary confinement cause severe mental and physical pain or suffering, when used as a punishment, during pre-trial detention, indefinitely, prolonged, on juveniles or persons with mental disabilities, *it can amount to cruel, inhuman or degrading treatment or punishment and even torture.*”<sup>45</sup>

The Special Rapporteur examined the conditions of solitary confinement, prolonged or indefinite solitary confinement, as well as the psychological, physiological, and latent effects of solitary confinement. In relation to the conditions, the Special Rapporteur highlighted the physical conditions, including the small cell size, the presence or absence of windows, and the stark appearance and dull colors; the prison regime, including access to outdoor exercise, meaningful human contact, and contact with the outside world; and social isolation. As for what constitutes “prolonged” solitary confinement, after observing that the European Court of Human Rights (ECHR) found that detention for three years in solitary confinement constituted a violation of the prohibition against torture and inhuman or degrading treatment or punishment,<sup>46</sup> and that

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<sup>45</sup> Report to the General Assembly, A/66/268, August 5, 2011 (“Special Rapporteur Report on Solitary Confinement”), Summary (emphasis added). *See also id.* at para. 80 (Conclusions): “Depending on the specific reason for its application, conditions, length, effects and other circumstances, solitary confinement can amount to a breach of article 7 of the International Covenant on Civil and Political Rights, and to an act defined in article 1 or article 16 of the Convention against Torture”

<sup>46</sup> *A.B. v. Russia*, Application No. 1439/06, European Court of Human Rights, para. 135 (2010).

prisoners in the United States have been kept in solitary confinement for up to 40 years, the Special Rapporteur concluded that confinement exceeding 15 days is prolonged.

In his report, the Special Rapporteur provides an overview of international practice. This survey leads to the conclusion that prolonged solitary confinement, under the conditions applied to many persons on death row in the United States, constitute torture. For example, the Inter-American Court of Human Rights found that “prolonged isolation and deprivation of communication are in themselves cruel and inhuman treatment, harmful to the psychological and moral integrity of the person, and a violation of the right of any detainee to respect for his inherent dignity as a human being.”<sup>47</sup> The Court went further in its 2000 decision in *Cantoral-Benavides v. Peru*, when it found that the conditions of solitary confinement, including being kept in a small cell with no ventilation or natural light, for up to 23 ½ hours a day, without being allowed physical contact with family members, constitutes torture.<sup>48</sup> The ECHR has found that “complete sensory isolation, coupled with total social isolation, can destroy the personality and constitutes a form of inhuman treatment which cannot be justified by the requirements of security or any other reason.”<sup>49</sup> Two United Nations bodies have also issued authoritative findings on solitary confinement. In examining Article 7 of the ICCPR (the prohibition on torture and cruel treatment or punishment), the Human Rights Committee

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<sup>47</sup> Special Rapporteur Report on Solitary Confinement, para. 37, citing *Velázquez-Rodríguez v. Honduras*, Inter-American Court of Human Rights, Series C, No. 4, para. 156.

<sup>48</sup> Special Rapporteur Report on Solitary Confinement, para. 38, citing *Cantoral-Benavides v. Peru*, Inter-American Court of Human Rights, Series C, No. 69, paras. 62 and 104 (2000).

<sup>49</sup> Special Rapporteur Report on Solitary Confinement, para. 55, citing *Ilaşcu and others v. Moldova and Russia*, Application No. 48787/99, European Court of Human Rights (2004), para. 432. See also *Krocher v. Switzerland*, 34 Eur. Comm’n H.R. Dec. & Rep. 24, 53, P 62 (1982) for the same proposition. As noted in a recent report by Committee on International Human Rights of the Association of the Bar of the City of New York, solitary confinement has rarely been used in Europe since the 1992 *Krocher* decision. New York City Bar, Committee on International Human Rights, “Supermax Confinement in U.S. Prisons,” September 2011, p. 20, available at: <http://www2.nycbar.org/pdf/report/uploads/20072165-TheBrutalityofSupermaxConfinement.pdf>.

found in 1992 that “prolonged solitary confinement of the detained or imprisoned person may amount to acts prohibited by article 7.”<sup>50</sup> The Special Rapporteur also observed that the Committee against Torture “has recognized the harmful physical and mental effects of prolonged solitary confinement” and “has recommended that the use of solitary confinement be abolished ... or at least that it should be strictly and specifically regulated by law (maximum duration, etc.) and exercised under judicial supervision, and used only in exceptional circumstances.”<sup>51</sup>

The Special Rapporteur made numerous conclusions related to solitary confinement, which bear directly on the nature of the death penalty in the United States and its qualification as a form of torture:

- Given its severe adverse health effects, the use of solitary confinement itself can amount to acts prohibited by article 7 of the International Covenant on Civil and Political Rights, torture as defined in article 1 of the Convention against Torture or cruel, inhuman or degrading punishment as defined in article 16 of the Convention. (para. 70)
- Solitary confinement, when used for the purpose of punishment, cannot be justified for any reason, precisely because it imposes severe mental pain and suffering beyond any reasonable retribution for criminal behaviour and thus constitutes an act defined in article 1 or article 16 of the Convention against Torture, and a breach of article 7 of the International Covenant on Civil and Political Rights. (par. 72)
- Where the physical conditions of solitary confinement are so poor and the regime so strict that they lead to severe mental and physical pain or suffering of individuals who are subjected to the confinement, the conditions of solitary confinement amount to torture or to cruel and

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<sup>50</sup> General Comment 20, 44<sup>th</sup> Session, 1992, para. 6, available at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/6924291970754969c12563ed004c8ae5?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/6924291970754969c12563ed004c8ae5?Opendocument).

<sup>51</sup> Special Rapporteur Report on Solitary Confinement, para. 31. (citations omitted). *See also* Consideration of Reports Submitted by States Parties under Article 19 of the Convention, Conclusions and recommendations of the Committee against Torture, Mongolia, CAT/C/MNG/CO/1, Jan. 20, 2011, para. 16 (“The Committee is particularly concerned by reports that death row prisoners are detained in isolation, kept handcuffed and shackled throughout their detention and denied adequate food. Such conditions of detention were described by the Special Rapporteur as constituting additional punishments which can only be qualified as torture as defined in article 1 of the Convention”).

inhuman treatment as defined in articles 1 and 16 of the Convention, and constitute a breach of article 7 of the Covenant. (para. 74)

- The adverse acute and latent psychological and physiological effects of prolonged solitary confinement constitute severe mental pain or suffering. Thus the Special Rapporteur concurs with the position taken by the Committee against Torture in its General Comment No. 20 that prolonged solitary confinement amounts to acts prohibited by article 7 of the [ICCPR], and consequently to an act as defined in article 1 or article 16 of the Convention. For these reasons, the Special Rapporteur reiterates that, in his view, any imposition of solitary confinement beyond 15 days constitutes torture or cruel, inhuman or degrading treatment or punishment, depending on the circumstances. (para. 76)
- Considering the severe mental pain or suffering solitary confinement may cause when used as a punishment, during pretrial detention, indefinitely or for a prolonged period, for juveniles or persons with mental disabilities, it can amount to torture or cruel, inhuman or degrading treatment or punishment. The Special Rapporteur is of the view that where the physical conditions and the prison regime of solitary confinement fail to respect the inherent dignity of the human person and cause severe mental and physical pain or suffering, it amounts to cruel, inhuman or degrading treatment or punishment. (para. 81)

Solitary confinement is not the only condition of U.S. death row inmates that has been found to constitute torture. Severe isolation combined with sensory deprivation or overstimulation constitute torture under international legal standards. The Committee Against Torture expressly stated its concern about the publication of the revised United States Army Field Manual's authorization of questionable interrogation techniques, including sensory deprivation methods.<sup>52</sup> The Committee Against Torture has also concluded that holding prisoners in conditions of sensory deprivation and isolation consisting of an almost complete prohibition of communication caused "persistent and unjustified suffering which amounts to torture."<sup>53</sup> Similarly, the Special Rapporteur on

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<sup>52</sup> See United Nations Committee Against Torture, 36<sup>th</sup> Session, Geneva, CAT/C/USA/Q/2, Feb. 8, 2006, para. 52.

<sup>53</sup> See UN Doc A/56/44, Report of the Committee Against Torture, para. 186, 2001: Peru.

Torture has enumerated acts severe enough to constitute torture, including exposure to excessive light or noise, prolonged denial of rest or sleep, and *total isolation and sensory deprivation*, and simulated executions.<sup>54</sup>

Mock executions have also been found to violate international law. In a 1992 decision, the Human Rights Committee found that a mock execution set up by prison wardens constituted cruel and inhuman treatment.<sup>55</sup> The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia found that mental suffering associated with telling individuals that they would be put before a firing squad violated international law.<sup>56</sup> In addition, waterboarding – a form of mock execution employed recently by the United States – has long been found to amount to torture.<sup>57</sup>

### **III. Conclusion**

As the above analysis makes clear, thousands of prisoners on death row in the United States face decades in isolation, haunted by the approach of their execution. This phenomenon gives rise to a pattern of significant psychological harm, amounting to severe mental pain and suffering. The international consensus is clear that such suffering amounts to cruel, inhuman, or degrading treatment; but a growing consensus also defines this phenomenon, appropriately, as torture.

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<sup>54</sup> See *Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Report of the Special Rapporteur, Mr. P. Kooijmans, appointed pursuant to Commission on Human Rights res. 1985/33 E/CN.4/1986/15, 19 Feb. 1986, para. 119 (emphasis added). In their report on

<sup>55</sup> See *Linton v. Jamaica*, Comm'n No. 255/1987(1992), para. 8.5

<sup>56</sup> See *Prosecutor v. Natelić and Martinović*, Judgement, Case No. IT-98-34-A, May 3, 2006, para. 292. See also para. 300 (“telling prisoners falsely that they will be executed, in a ‘brutal context’ that makes the statement believable, can amount to willfully causing great suffering”).

<sup>57</sup> See, e.g., G. SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW AT WAR* 461-466 (Cambridge University Press 2010) (surveying jurisprudence and collecting statements by international bodies and experts that waterboarding constitutes torture); Transcript of Confirmation Hearing for Eric Holder as Attorney General of the United States, Jan. 16, 2009, available at [http://www.nytimes.com/2009/01/16/us/politics/16text-holder.html?\\_r=1&pagewanted=all](http://www.nytimes.com/2009/01/16/us/politics/16text-holder.html?_r=1&pagewanted=all); See also E. Wallach, *Drop by Drop: Forgetting the History of Water Torture in U.S. Courts*, 45 Colum. J. Transnat'l L. 468 (2007).

Beyond the legal analysis, we must each undertake our own ethical and moral analysis. Did anyone who closely followed Troy Davis' execution, and his temporary reprieve from the Supreme Court, doubt that the hours leading up to his execution, the hope and then betrayal, amounted to torture? Is there any significant difference between mock executions, long recognized as torture by the international community, and Mr. Davis's last-minute brush with death in 2008? And can we conceive of thirty years in a small gray cube, without access to another human being beyond the hands of the guard who slides your food tray through the slot in your solid cell door, as anything but torture?