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The Road to Hell: The Case Against Solitary Confinement

By Dan Jackson and Nicholas Goldberg

Editor's Note: On May 18, 2016, Dan Jackson and Nicholas Goldberg filed an amicus brief in the United States Army Court of Criminal Appeals for Amnesty International Ltd., in support of PFC Chelsea Manning (http://www.amnestyusa.org/sites/default/files/filed-amnesty_int271_brief.pdf). Amnesty International is a grassroots human rights organization that advocates for prisoners and detainees whose lives or health is at risk from harsh prison conditions that amount to cruel, inhuman or degrading treatment or punishment (<http://www.amnestyusa.org/ourwork/issues/prisoners-and-people-at-risk/detention-and-imprisonment>).

While awaiting trial, Private First Class Chelsea Manning was held at the Marine Corps Brig at Quantico in a 6' ' by 8' ' cell, for 23 to 24 hours a day, for 9 months. Yet the military judge held that this was not "solitary confinement" because "solitary" means "alone and without human contact," whereas PFC Manning had daily contact with prison staff and weekly visits with her lawyers and mental health professionals. The military judge also accepted the military's contention that PFC Manning was held under those conditions to prevent her from committing suicide, noting that suicide prevention is a legitimate government interest. What follows is an abbreviated version of an amicus brief filed on PFC Manning's behalf.

Like the road to hell, the original solitary confinement cells in the United States were paved with good intentions. In 1787, the Philadelphia Society for Alleviating the Miseries of Public Prisons convened at Benjamin Franklin's house. Inspired by the Quakers, the Society proposed that solitary confinement would force prisoners to reflect on their crimes and become truly penitent — hence the word "penitentiary." That theory was put into practice in Walnut Street Penitentiary in 1790; Eastern State Penitentiary in 1829; then in prisons around the world.¹ But it soon became clear that, despite the Quakers' best intentions, solitary confinement is "cruel and wrong," as Charles Dickens wrote after visiting Eastern State Penitentiary in 1842:

I am persuaded that those who devised this system . . . do not know what it is that they are doing. I believe that very few men are capable of estimating the immense amount of torture and agony [of] this dreadful punishment . . . which none but the sufferers themselves can fathom, and which no man has a right to inflict upon his fellow creature. I hold this slow and daily tampering with the mysteries of the brain to be immeasurably worse than any torture of the body: and because its ghastly signs and tokens are not so palpable . . . therefore I the more denounce it, as a secret punishment which slumbering humanity is not roused up to stay. I hesitated once, debating with myself, whether . . . I would allow it to be tried in certain cases, where the terms of imprisonment were short; but now, I solemnly declare, that with no rewards or honors could I walk a happy man beneath the open sky by day, or lie me down upon my bed at night, with the consciousness that one human creature, for any length of time, no matter what, lay suffering this unknown punishment in his silent cell, and I the cause, or I consenting to it in the least degree.²

Dickens further stated — aptly here — that although the prisoner, of course, “sees the prison officers,” he is nevertheless “a man buried alive; to be dug out in the slow round of years; and in the meantime dead to everything but torturing anxieties and horrible despair.”³ Dostoyevsky made similar observations after his own imprisonment in Siberia from 1850 to 1854. “I am firmly convinced that the belauded system of solitary confinement attains only false, deceptive, external results. It drains the man’s vital sap, enervates his soul, crows and enfeebles it, and then holds up the morally withered mummy, half imbecile, as a model of penitence and reformation.”⁴

In 1890, the U.S. Supreme Court found that prisoners held in solitary confinement “fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane,” or “committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community.”⁵ The “whole subject attracted the general public attention, and its main feature of solitary confinement was found to be too severe.”⁶ By 1939, except in “isolated instances,” solitary confinement was “no longer practiced by any civilized nation of the world.”⁷

From the 1970s to the present, however, the War on Drugs, combined with the widespread closure of mental health facilities, among other factors, resulted in a dramatic increase in the number of prisoners and incidents of prison violence, which led, in turn, to the resurgence of solitary confinement.⁸ “It is both tragic and highly disturbing that the lessons of the 19th century experience with solitary confinement are today being so completely ignored by those responsible for addressing the housing and the mental health needs in the prison setting.”⁹ That tragedy is compounded by the fact that, in “the mid-1970s, the United States formally abandoned its commitment to the rehabilitative ideals” that were the only saving grace of the Quaker system.¹⁰ And, because prisons now “meld sophisticated modern technology with the age-old practice of solitary confinement, prisoners experience levels of isolation and behavioral control that are more total and complete and literally dehumanized than has been possible in the past,” making “this extraordinary and extreme form of imprisonment unique in the modern history of corrections.”¹¹

Since the 19th century, legions of psychiatrists, psychologists, neuroscientists, primatologists, and others have proven beyond a shadow of a doubt what Dickens and Dostoyevsky already knew: prolonged solitary confinement exacts “a terrible price.”¹² After decades, if not centuries, of research, “there is not a single published study of solitary or supermax-like confinement . . . lasting for longer than 10 days . . . that failed to result in negative psychological effects,” including “such clinically significant symptoms as hypertension, uncontrollable anger, hallucinations, emotional breakdowns, chronic depression, and suicidal thoughts and behavior.”¹³ Prolonged solitary confinement results in “permanent harm,” with symptoms “characteristic of an acute organic brain syndrome.”¹⁴

Chelsea Manning Receives Commutation

On Jan. 17, 2017, three days before he left office, President Obama commuted all but four months of Chelsea Manning’s remaining prison sentence. Ms. Manning will be released on May 17, 2017, rather than in 2045, as she would have been under her original 35-year sentence — by far the longest ever imposed in the United States for leaking information. As President Obama stated in his final news conference, “Chelsea Manning has served a tough prison sentence,” which was “disproportionate relative to what other leakers had received,” and “in light of all the circumstances, . . . commuting her sentence was entirely appropriate.”

Because prolonged solitary confinement *causes* mental illness, it is especially cruel and counterproductive to impose it on prisoners already suffering from mental illness:

The stress, lack of meaningful social contact, and unstructured days can exacerbate symptoms of illness or provoke recurrence. Suicides occur disproportionately more often in segregation units than elsewhere in prison. All too frequently, mentally ill prisoners decompensate in isolation, requiring crisis care or psychiatric hospitalization. Many simply will not get

better as long as they are isolated. . . . Persons with mental illness are often impaired in their ability to handle the stresses of incarceration and to conform to a highly regimented routine. They may exhibit bizarre, annoying, or dangerous behavior and have higher rates of disciplinary infractions than other prisoners. Prison officials generally respond to them as they do to other prisoners who break the rules. When lesser sanctions do not curb the behavior, they isolate the prisoners in the segregation units, despite the likely negative mental health impact. Once in segregation, continued misconduct, often connected to mental illness, can keep the inmates there indefinitely. . . . Whatever one's views on supermax confinement in general, human rights experts agree that its use for inmates with serious mental illness violates their human rights.¹⁵

One of the "core irrationalities" of prolonged solitary confinement is that "prisoners who cannot 'handle' the profound isolation of supermax confinement are almost always doomed to be retained in it," whereas "those who have adapted all too well to the deprivation, restriction, and pervasive control are prime candidates for release to a social world to which they may be incapable of ever fully readjusting."¹⁶ Plainly, "no penological purpose can be served by herding inmates into an expensive and perpetual cycle of disciplinary infractions and further confinement of which the primary effect appears to be the exacerbation of the mental illness that was the root of their placement in the first place, but which may also render them more violent, unresponsive, impulsive, or disruptive."¹⁷

The extensive literature also makes clear that inevitable contacts with prison guards do not mitigate the cruel effects of prolonged solitary confinement, which are especially dire for those already suffering from mental illness. "Of necessity, prisoners in solitary confinement must have some form of regular and routine contact with staff," and solitary confinement units "typically allow for some minimal form [of] communication between prisoners."¹⁸ Such interactions, however, do not provide the "meaningful and appropriate therapeutic contact" that mentally ill prisoners desperately need.¹⁹ On the contrary, prisoners' interactions with guards are virtually guaranteed to be the opposite of therapeutic, especially "when the inmate experiences the stringencies of his confinement as being the product of an arbitrary exercise of power, rather than the fair result of an inherently reasonable process."²⁰ Prison officials, in turn, tend to "treat disordered behavior as disorderly behavior, responding with disciplinary measures that may reinforce the unavailability of treatment and exacerbate the illnesses contributing to the inmates' conduct."²¹

The law has caught up, again, to the facts that have been known since the 19th century. For example, in *Madrid v. Gomez*²² the court held that the Eighth Amendment prohibits the solitary confinement of prisoners who are either already mentally ill, or "at an unreasonably high risk of suffering serious mental illness as a result of" solitary confinement.²³ Imposing such conditions on mentally ill or at-risk prisoners "is the mental equivalent of putting an asthmatic in a place with little air to breathe. The risk is high enough, and the consequences serious enough, that we have no hesitancy in finding that the risk is plainly 'unreasonable.'²⁴ "Such inmates are not required to endure the horrific suffering of a serious mental illness or major exacerbation of an existing mental illness before obtaining relief."²⁵ The court in *Madrid* was "acutely aware" that officials are entitled to deference in prison management, but courts cannot defer to conditions of confinement that are known to cause or exacerbate serious mental illness.²⁶ "A risk this grave — this shocking and indecent — simply has no place in civilized society."²⁷

In *Ruiz v. Johnson*,²⁸ the court held that solitary confinement, which the prison officials referred to by the euphemism "administrative segregation," violates the Eighth Amendment "both as to the plaintiff class generally and to the subclass of mentally ill inmates housed in such confinement."²⁹ Just as "the pain and suffering caused by a cat-o'-nine-tails lashing an inmate's back are cruel and unusual punishment by today's standards of humanity and decency, the pain and suffering caused by extreme levels of psychological deprivation are equally, if not more, cruel and unusual."³⁰ It is "deplorable and outrageous" that prisons have become a "repository" for the mentally ill, who, "in a tragically ironic twist," are then "confined in conditions that nurture, rather than abate, their psychoses. The U.S. Constitution cannot abide such a perverse and unconscionable system of punishment."³¹

These and many other authorities — not only cases, but international rules and treaties the United States sponsored and ratified, presidential directives, and the congressional testimony of institutions across the political and ideological spectrum, from the National Association of Evangelicals to the National Center for Transgender Equality — leave no doubt that prolonged solitary confinement is unconstitutional punishment for prisoners who have, or are at risk of, serious mental illness.³²

To put a prisoner in solitary confinement not only *despite*, but *because of*, mental illness and suicide risk is “perverse and unconscionable.”³³ It is no excuse to claim that the rules against solitary confinement do not apply as long as the prisoner has contact with guards and occasional visits from lawyers, psychiatrists, and maybe others. The Supreme Court rejected that argument long ago.³⁴

In *Medley*, the Court considered a statute providing for solitary confinement that was enacted after the prisoner committed the murder of which he was convicted. The Court held that the prisoner’s solitary confinement was unconstitutional *ex post facto* punishment.³⁵ Solitary confinement is not “a mere unimportant regulation as to the safe-keeping of the prisoner, and is not relieved of its objectionable features” by the fact that the prisoner is not completely deprived of human contact.³⁶ A prisoner’s inevitable interactions with “the officers of the prison and subordinates, who must necessarily furnish him with his food and his clothing, and make inspection every day that he still exists,” do not ameliorate “the essential character of that mode of prison life,” which is a “punishment” that the common law has always reserved for “the worst crimes of the human race.”³⁷ The fact that a prisoner may be allowed to meet with his “counsel, physicians, the spiritual adviser, and the members of his family,” at the discretion of prison officials, is also “but a small mitigation of this solitary confinement,” which retains its “essential character” as a “severe” punishment of particular “terror” and “infamy.”³⁸ Because that punishment was inflicted *ex post facto*, it was “therefore forbidden by this provision of the constitution of the United States.”³⁹

More recently, in *Davenport v. DeRobertis*⁴⁰ Judge Richard Posner recognized “what anyway seems pretty obvious, that isolating a human being from other human beings year after year or even month after month can cause substantial psychological damage, even if the isolation is not total.”⁴¹ In *Davenport*, prison officials allowed the inmates to exercise in their cells and to leave those cells “for a variety of reasons, such as to use the law library, see visitors, consult with lawyers and other counselors, and visit the medical unit.”⁴² But such “excursions” were limited to a few hours per week, “and the degree of constraint is considerable. A visit to the law library, for example, means being escorted in handcuffs to a caged carrel in the library — not browsing in stacks or working at a library table in a reading room.”⁴³ This “realistically is a form of solitary confinement,”⁴⁴ which violates the Eighth Amendment.⁴⁵ Likewise, the isolation of the mentally ill and at-risk prisoners in *Madrid* was “not complete,” yet their social “opportunities may be infrequent and generally provide only a limited type of interaction,” leaving them “severely deprived of normal human contact,” in violation of the Eighth Amendment.⁴⁶

Thus, there can be no excuse for the solitary confinement of a prisoner who, according to the prison officials themselves, is suffering from mental illness and at risk of committing suicide. Solitary confinement in such circumstances is “shocking and indecent.”⁴⁷ “The U.S. Constitution cannot abide such a perverse and unconscionable system of punishment.”⁴⁸

Notes

1. See, e.g., *In re Medley*, 134 U.S. 160, 167-68 (1890); Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 Wash. U. J. L. & Pol’y 325, 338-43 (2006) [hereinafter Grassian].
2. Charles Dickens, *American Notes* 678 (1842).
3. *Id.* at 679.
4. Fyodor Dostoyevsky, *The House of the Dead* 13 (Constance Garnett trans., 1915).
5. *Medley*, 134 U.S. at 168.
6. *Id.*
7. J.G. Wilson & M.J. Pescor, *Problems in Prison Psychiatry* 25 (1939).
8. See, e.g., U.S. Dep’t of Justice, *R. & Rs. Concerning Restrictive Housing* 7 (2016); Elizabeth Bennion, *Banning the Bing: Why Extreme Solitary Confinement Is Cruel and Far Too Usual Punishment*, 90 Ind. L.J. 741, 747-53 (2015) [hereinafter Bennion]; Thomas L. Hafemeister & Jeff George, *The Ninth Circle of Hell: An Eighth Amendment Analysis of Imposing Prolonged Supermax Solitary Confinement on Inmates with a Mental Illness*, 90 Denv. U. L. Rev. 1, 13-17 (2012) [hereinafter Hafemeister]; Craig Haney, *Mental Health Issues in Long-Term Solitary and ‘Supermax’ Confinement*, 49 Crime & Delinquency 124, 127-30 (2003) [hereinafter Haney].
9. 9Grassian at 329.
10. Haney at 128-29.
11. *Id.* at 127.
12. *Davis v. Ayala*, 135 S. Ct. 2187, 2210 (2015) (Kennedy, J., concurring) (citing Grassian).
13. Haney at 132.
14. Grassian at 332-38.

15. Jeffrey L. Metzner & Jamie Fellner, *Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for Medical Ethics*, 38 J. Am. Acad. Psychiatry & Law 104, 105 (2010) (footnotes omitted); *see also, e.g.*, Grassian at 350-51.
16. Haney at 141.
17. Hafemeister at 51.
18. Haney at 151 n.2.
19. *Id.* at 143.
20. Grassian at 333; *see also, e.g.*, Haney at 137-43.
21. *Developments in the Law: The Impact of the Prison Litigation Reform Act on Correctional Mental Health Litigation*, 121 Harv. L. Rev. 1114, 1145 (2008).
22. *Madrid v. Gomez*, 889 F. Supp. 1146 (N.D. Cal. 1995).
23. *Id.* at 1267.
24. *Id.* at 1265 (quoting *Helling v. McKinney*, 509 U.S. 25, 35 (1993)).
25. *Id.* at 1265-66.
26. *Id.* at 1266.
27. *Id.*; *see also, e.g.*, *Brown v. Plata*, 563 U.S. 493, 511 (2011) ("Courts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration.").
28. *Ruiz v. Johnson*, 37 F. Supp. 2d 855, 908 & n.93 (S.D. Tex. 1999), *rev'd and remanded on other grounds sub nom. Ruiz v. United States*, 243 F.3d 941 (5th Cir. 2001), *on remand at* 154 F. Supp. 2d 975, 984-85 (S.D. Tex. 2001),
29. 37 F. Supp. 2d at 861; *see also McClary v. Kelly*, 4 F. Supp. 2d 195, 199 (W.D.N.Y. 1998) (prisoners' constitutional rights are not "extinguishable simply by virtue of the fact that the confinement was labeled by prison officials as 'administrative'"); George Orwell, *Politics and the English Language* (1946) (criticizing such euphemisms as "the defense of the indefensible").
30. *Ruiz*, 37 F. Supp. 2d at 914.
31. *Id.* at 915.
32. *See, e.g., Coleman v. Brown*, 28 F. Supp. 3d 1068, 1099 (E.D. Cal. 2014) ("[P]lacement of seriously mentally ill inmates in the harsh, restrictive and non-therapeutic conditions of California's administrative segregation units for non-disciplinary reasons for more than a minimal period necessary to effect transfer to protective housing or a housing assignment violates the Eighth Amendment."); *Ind. Prot. & Advocacy Servs. Comm'n v. Comm'r, Ind. Dep't of Corr.*, No. 1:08-CV-01317-TWP, 2012 WL 6738517, at *17, *23 (S.D. Ind. Dec. 31, 2012) ("[T]here is a difference between mental health monitoring and mental health treatment," and the failure to provide the latter "violates the Eighth Amendment's proscription against the imposition of cruel and unusual punishment."); *Lee v. Coughlin*, 26 F. Supp. 2d 615, 636-37 (S.D.N.Y. 1998) (Sotomayor, J.) (solitary confinement is "severe," "harsh," and "punitive"); *McClary*, 4 F. Supp. 2d at 208 ("[T]hat prolonged isolation from social and environmental stimulation increases the risk of developing mental illness does not strike this court as rocket science."); *United States v. Suleiman*, No. 96 CR. 933 WK, 1997 WL 220308, at *1 (S.D.N.Y. Apr. 1, 1997) ("solitary confinement for 23 hours a day with one hour of supervised recreation" does not serve "any legitimate governmental objective"); *Casey v. Lewis*, 834 F. Supp. 1477, 1549 (D. Ariz. 1993) ("This use of lockdown as an alternative to mental health care for inmates with serious mental illnesses clearly rises to the level of deliberate indifference to the serious mental health needs of the inmates and violates their constitutional rights to be free from cruel and unusual punishment."); Int'l Covenant on Civil and Political Rights art. 7, 999 U.N.T.S. 171 (ratified by the United States on Jun. 8, 1992); UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment arts. 1 and 16, 1465 U.N.T.S. 85 (ratified by the United States on Oct. 21, 1994); UN Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules), G.A. Res. 70/175 (Dec. 17, 2015), Rule 44 ("For the purpose of these rules, solitary confinement shall refer to the confinement of prisoners for 22 hours or more a day without meaningful human contact. Prolonged solitary confinement shall refer to solitary confinement for a time period in excess of 15 consecutive days."); *id.* Rules 43 & 45 (prolonged solitary confinement is completely prohibited, and even brief solitary confinement "should be prohibited in the case of prisoners with mental or physical disabilities when their conditions would be exacerbated by such measures"); Barack Obama, *Why We Must Rethink Solitary Confinement*, Wash. Post, Jan. 25, 2016; U.S. Dep't of Justice, *R. & Rs. Concerning Restrictive Housing* 99-101 (2016); *Reassessing Solitary Confinement: The Human Rights, Fiscal, and Public Safety Consequences*, Hearing Before the Subcomm. on Const., Civ. Rights & Human Rights of the S. Comm. on the Judiciary, S. Hrg. 112-879, 112th Cong. (2012).
33. *Ruiz*, 37 F. Supp. 2d at 915.
34. *See Medley*, 134 U.S. at 167-71.
35. *Id.* at 171.
36. *Id.* at 167.
37. *Id.* at 169-70.
38. *Id.*
39. *Id.* at 171.

40. *Davenport v. DeRobertis*, 844 F.2d 1310 (7th Cir. 1988).
41. *Id.* at 1313.
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.* at 1314-15.
46. *Madrid*, 889 F. Supp. at 1229-30.
47. *Id.* at 1266.
48. *Ruiz*, 37 F. Supp. 2d at 915.

About the Authors

Dan Jackson, of counsel at Kecker & Van Nest LLP, specializes in legal writing at the trial court and appellate levels.

Dan Jackson

Kecker & Van Nest LLP
633 Battery Street
San Francisco, CA 94111
415-391-5400
DJackson@kvn.com

Nicholas Goldberg, an associate at Kecker & Van Nest, handles a broad range of civil and criminal matters.

Nicholas Goldberg

Kecker & Van Nest LLP
633 Battery Street
San Francisco, CA 94111
415-391-5400
NGoldberg@kvn.com

1660 L St. NW • 12th Floor • Washington, DC 20036 • Phone: **(202) 872-8600** / Fax: **(202) 872-8690**

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