Human Dignity and Evolving Standards of Decency: Disciplinary Segregation of Inmates in South Africa and the United States

By Patricia Carole Perkins and Emily Seawell[1]

"Solitary confinement reduces meaningful social contact to an absolute minimum. The level of social stimulus that results is insufficient for the individual to remain in a reasonable state of mental health."
UN Interim Report of the Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2011)

"It is a great irony that as one passes through the levels of incarceration—from the minimum to the moderate to the maximum security institutions, and then to the solitary confinement section of these institutions—one does not pass deeper and deeper into a subpopulation of the most ruthlessly calculating criminals. Instead, ironically and tragically, one comes full circle back to those who are emotionally fragile and, often, severely mentally ill. The laws and practices that have established and perpetuated this tragedy deeply offend any sense of common human decency."
Dr. Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, at 355

I. Introduction

Although historically the South African and United States courts were reluctant to intervene in the treatment of prisoners, observing that prisoners retained few if any rights after sentencing,[2] the prisoner rights jurisprudence in both countries reflects developing recognition of human rights. In particular, a comparison of the laws regulating the use of segregated housing for disciplinary purposes in South Africa and the United States offers a vehicle for exploring the progressive understanding of human rights, the tension between the need to secure dangerous prisoners and those rights, and opportunities for improvement in both countries.

The Bill of Rights in the South African Constitution of 1996 recognizes that "[e]veryone has inherent dignity and the right to have their dignity respected and protected," and further protects "the right to freedom and security of the person which includes the right . . . not to be tortured in any way; and not to be treated or punished in a cruel, inhuman, or degrading way."[3] The Constitution further guarantees "the right to conditions of detention that are consistent with human dignity."[4] Taking a step toward the protection of human rights, Parliament amended the Correctional Services Act in 2008 to abolish the practice of solitary confinement.[5] However, segregated housing is still authorized.[6]

[1] Patricia Carole Perkins is an assistant professor of law at Elon University School of Law. Emily Seawell is a member of the
[2] Ruffin v. Commonwealth of Virginia, 62 Va. 790, 796 (Ct. App. Va. 1871); Human Rights Watch, PRISON CONDITIONS IN SOUTH AFRICA 28 (1994) *available at* http://www.hrw.org/reports/pdfs/s/safrica/safrica942.pdf.
[3] S. AFR. CONST., 1996 §§ 10, 12(d)-(e).
[4] S. AFR. CONST., 1996 § 35(2)(e).
[5] *See* Correctional Services Act 111 of 1998 § 25 (S. Afr.).

In contrast to the broad language of the South African Bill of Rights, the Eighth Amendment to the United States Constitution contains a more narrow prohibition against "cruel and unusual punishment."[7] While the United States Constitution does not directly address inhuman or degrading treatment or conditions of confinement, the United States Supreme Court has observed that human dignity is the underpinning of the Eighth Amendment and found that it prohibits practices that violate evolving standards of decency.[8] While the Bureau of Prisons denies the use of solitary confinement, it operates segregated housing for prisoners such as Special Housing Units ("SHUs").[9]

Recently, the place of prisoner rights within the broader spectrum of basic human rights has attracted international attention, particularly with respect to the use of solitary confinement and segregated housing. Psychological studies have focused on the detrimental effects of prolonged segregation, adding to the debate surrounding the impact of segregation on human dignity.[10] In the coming year, the United Nation's Open-Ended Intergovernmental Expert Group on the Standard Minimum Rules for the Treatment of Prisoners ("IEG") will meet to continue its examination of best practices in prisoner rights throughout the world and consideration of revisions to the Standard Minimum Rules for the Treatment of Prisoners ("SMRTPs") related to the use of solitary confinement.[11]

This paper will discuss how, given the social isolation inherent in its use, segregated housing of inmates for disciplinary purposes can effectively amount to solitary confinement under the SMRTPs, as well as under South African and United States law. Part II of this paper focuses on the emergence of social isolation as a tool for prison discipline and its potential for causing irreversible psychological harm. Part III discusses comparative approaches to modern use of segregation under the SMRTPs, South African law, and United States law. Part IV explores current international momentum for re-evaluating prison practices and identifying alternatives to disciplinary segregation of prisoners.

II. The Emergence of Isolation as a Tool for Prisoner Discipline

The use of segregated housing has its roots in the practice of solitary confinement, which because of its well-documented potential for psychological harm

---

[6] *Id.*
[7] U.S. CONST. amend. VIII.
[8] Brown v. Plata, 131 S. Ct. 1910, 1928 (2011); Estelle v. Gamble, 429 U.S. 97 at 102.
[9] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-429, BUREAU OF PRISONS: IMPROVEMENTS NEEDED IN BUREAU OF PRISONS' MONITORING AND EVALUATION OF IMPACT OF SEGREGATED HOUSING 2 n.2, 7, 9 (2013).
[10] *See, e.g.*, Special Rapporteur of the Human Rights Council, *Interim Rep. on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. DOC. A/66/268 (Aug. 5, 2011) (by Juan E. Mendez) [hereinafter *Special Rapporteur*]; Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 Wash. U. J.L. & Pol'y 325 (2006) [hereinafter *Grassian*].
[11] *See* Report on the Open-Ended Intergovernmental Expert Group on the Standard Minimum Rules for the Treatment of Prisoners at Its Third Meeting, ¶¶ 9, 19, 24, E/CN.15/2014/19 (Apr. 10, 2014) [hereinafter *April 2014 IEG Report*].

has fallen out of favor in corrections systems worldwide, including those in South Africa and the United States. A discussion of the potential for psychological harm stemming from isolation and the evolution of the use of segregated housing in South Africa and the United States raises questions about the meaningfulness of any distinction between the terms "solitary confinement" and "segregated housing."

A. "Solitary," "Segregation," and Alternative Terminology

It is noteworthy that jurisdictions around the world use a host of terms to refer to the practice of separating a prisoner from the general population and restricting his access to amenities and social contacts.[12] Common terms for isolation of this type include "solitary confinement," "segregated housing," and "special housing."[13]

The United Nations has no express standards for "segregation" or "special housing" but has initiated an analysis of "solitary confinement," which it defines as "the physical and social isolation of individuals who are confined to their cells for 22 to 24 hours a day."[14]

South Africa, which abolished the use of solitary confinement in 2008,[15] simply defines that practice as "being held in a single cell with loss of all amenities."[16] South Africa has replaced solitary confinement with disciplinary segregation, "which may be for part of or the whole day and which may include detention in a single cell,"[17] with "a loss of gratuity for a period not exceeding two months"[18] and "restriction of amenities not exceeding 42 days."[19] In media reports of abuses in private prisons in South Africa, reference has been made to "high care," which prison officials have reportedly said does not rise to the level of segregation.[20] The South African corrections statute defines "care" as "the provision of services and programmes aimed at enhancing and maintaining the social, mental, spiritual,

---

[12] *Special Rapporteur, supra* note 10.
[13] *See, e.g.*, *id.* (referencing nine different phrases used throughout the world)*;* Hope Metcalf, et al., LIMAN PUBLIC INTEREST PROGRAM AT YALE LAW SCHOOL, ADMINISTRATIVE SEGREGATION, DEGREES OF ISOLATION, AND INCARCERATION: A NATIONAL OVERVIEW OF STATE AND FEDERAL CORRECTIONAL POLICIES 3 (Jun. 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2286861 (referencing sixteen phrases used to describe administrative segregation in the United States); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-429, BUREAU OF PRISONS: IMPROVEMENTS NEEDED IN BUREAU OF PRISONS' MONITORING AND EVALUATION OF IMPACT OF SEGREGATED HOUSING 2, 9 (2013) (hereafter cited as GAO-13-429) (describing six terms used by the United States Bureau of Prisons to describe separate housing of inmates).
[14] UN Interim Report of the Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2011)
[15] *See* Correctional Services Act 111 of 1998 § 25 (S. Afr.).
[16] Correctional Services Act 111 of 1998 § 1 (S. Afr.). "Amenities" are defined as "recreational and other activities, diversions or privileges which are granted to inmates in addition to what they are entitled to as of right." *Id.* The definition expressly "includes (a) exercise; (b) contact with the community; (c) reading material; (d) recreation; and (e) incentive schemes." *Id.*
[17] Correctional Services Act 111 of 1998 § 24(5)(d) (S. Afr.).
[18] Correctional Services Act 111 of 1998 § 24(5)(b) (S. Afr.).
[19] Correctional Services Act 111 of 1998 § 24(5)(c) (S. Afr.).
[20] *See, e.g.*, Ruth Hopkins, *G4S Accused of Holding South African Prisoners in Isolation Illegally*, GUARDIAN (May 28, 2013), http://www.theguardian.com/world/2013/may/28/g4s-south-african-prisoners-isolation.

health and physical well-being of inmates,"[21] but neither the statute nor the regulations mentions "high care."[22]

The United States government has not defined "solitary housing," and the United States Bureau of Prisons ("BOP") contends that it "does not hold anyone in solitary confinement because BOP staff interacts with inmates who are held in single cells alone.[23] Rather, the BOP operates a variety of segregated housing units, under different names, that significantly isolate inmates.[24] For example, inmates in SHUs can be restricted to five hours of out-of-cell exercise and three showers per week, one telephone call per month, and four hours of visitation per month.[25] Inmates could be held in the SHU for as long as twenty-four months for disciplinary purposes, or even indefinitely for administrative purposes.[26]

Though terminology varies, the discussion in Part III suggests that inmates in both South Africa and the United States can be held in segregated housing that falls within the definition of solitary confinement offered by Dr. Stuart Grassian in a widely cited report to the United States Supreme Court: "the confinement of a prisoner alone in a cell for all, or nearly all, of the day with minimal environmental stimulation and minimal opportunity for social interaction."[27]

B. The Harmful Psychological Effects of Segregation

The United Nations has cautioned against "the harmful psychological effects of isolation."[28] Such effects begin within a few days of placement in segregation,[29] and commonly include:

- "a progressive inability to tolerate ordinary stimuli";
- "hearing voices" and "noises taking on increasing meaning and frightening significance";
- "severe panic attacks";
- "emergence of primitive aggressive fantasies of revenge, torture, and mutilation";
- "paranoid and persecutory fears"; and
- "episodes of loss of impulse control with random violence."[30]

---

[21] Correctional Services Act 111 of 1998 § 1 (S. Afr.).
[22] *See generally* Correctional Services Act 111 of 1998 (S. Afr.); Government Notice (GN) R323/2012 (S. Afr.).
[23] GAO-13-429 at 2 n.2.
[24] GAO-13-429 at 7, 9.
[25] GAO-13-429 at 7.
[26] 28 C.F.R. §§ 541.3, Table 1; 28 C.F.R. § 541.33(a)-(b); BOP PROGRAM STATEMENT P5217.0, SPECIAL MANAGEMENT UNITS Table 1, 2 (Nov. 19, 2008)
[27] *Grassian*, *supra* note 10, at 327.
[28] *Special Rapporteur*, *supra* note 10; *see also Grassian*, *supra* note 10, at 327 ("Solitary confinement . . . can cause severe psychiatric harm. It has indeed long been known that severe restriction of environmental and social stimulation has a profoundly deleterious effect on mental functioning.").
[29] *Special Rapporteur*, *supra* note 10; *Grassian*, *supra* note 10, at 331.
[30] *Grassian*, *supra* note 10, at 335-36.

These specific symptoms, while "strikingly consistent" among inmates in isolation,[31] are "found in virtually no other psychiatric illness."[32] The United Nations refers to this discrete syndrome[33] as "prison psychoses," with symptoms generally including "anxiety, depression, anger, cognitive disturbances, perceptual distortions, paranoia and psychosis and self-harm."[34]

For inmates held in isolation, "the health risks rise with each additional day spent in such conditions."[35] Psychological decline may become pronounced in as little as seven days, and irreversible as confinement continues.[36] Even where psychological damage may be reversed, "some of the negative health effects are long term," including "continued sleep disturbances, depression, anxiety, phobias, emotional dependence, confusion, impaired memory and concentration long after the release from isolation."[37] Such effects impair or altogether prevent the inmate's ability to readjust to the general prison population and society upon release.[38]

Isolation causes psychological damage, in part, by depriving inmates of social stimulation.[39] The overall lack of stimulation causes even minor stimuli to become overwhelming.[40] As a result, inmates begin to avoid stimulation altogether, and to respond adversely when confronted with environmental or social stimuli.[41] The more severe the sensory restriction and the longer the isolation, the higher the risk of "adverse psychiatric consequences."[42] As isolation continues, inmates withdraw into a stupor from which it becomes more and more difficult to emerge.[43] Isolated with their own thoughts, inmates begin to obsess over minor bodily sensations and minor environmental stimuli, leading to disproportionate reactions and destructive, sometimes violent, behavior.[44] Disciplinary segregation may pose a greater threat

---

[31] *Grassian*, *supra* note 11, at 335
[32] *Id.* at 337.
[33] *Id.*
[34] *Special Rapporteur*, *supra* note 10. The Special Rapporteur provides a comprehensive list of symptoms in the annexure to his report. *See id.* at annexure.
[35] *Special Rapporteur*, *supra* note 10.
[36] *Id.* "[E]ven a few days of solitary confinement will shift an individual's brain activity towards an abnormal pattern characteristic of stupor and delirium." *Id.* "One study found that 'up to seven days, the [brain activity] decline is reversible, but if deprived over a long period this may not be the case'." *Id.*
[37] *Id.*; *see also Grassian*, *supra* note 10, at 354 (noting that long-term effects "not only include persistent symptoms of post traumatic stress (such as flashbacks, chronic hypervigilance, and a pervasive sense of hopelessness), but also lasting personality changes—especially including a continuing pattern of intolerance of social interaction, leaving the individual socially impoverished and withdrawn, subtly angry and fearful when forced into social interaction").
[38] *Grassian*, *supra* note 10, at 333.
[39] *Special Rapporteur*, *supra* note 10. "[D]eprived of a sufficient level of social stimulation, individuals soon become incapable of maintaining an adequate state of alertness and attention to their environment." *Id.*
[40] *Grassian*, *supra* note 10, at 331.
[41] *Id.* at 331.
[42] *Id.* at 346.
[43] *Id.* at 331.
[44] *Id.* at 331-32. "Individuals in solitary confinement easily become preoccupied with some thought, some perceived slight or irritation, some sound or smell coming from a neighboring cell, or, perhaps most commonly, by some bodily sensation. Tortured by it, such individuals are unable to stop dwelling on it. In solitary confinement ordinary stimuli become intensely unpleasant and small irritations become maddening. Individuals in such confinement brood upon normally unimportant stimuli and minor irritations become the focus of increasing agitation and paranoia. I have examined countless individuals in solitary confinement

to an inmate's mental health than other forms of segregation because it is more likely to be perceived as threatening, rather than understood as merely an administrative measure.[45] The potential for isolation is greater today than ever before, as "[a]dvancements in new technologies have made it possible to achieve indirect supervision and keep individuals under close surveillance with almost no human interaction."[46]

Although the psychological effects of isolation may be more pronounced in vulnerable groups such as those with pre-existing mental illness, "even those inmate[s] who are more psychologically resilient inevitably suffer severe psychological pain as a result of such confinement."[47] In fact, common conditions of incarceration—for example, disrupted sleep cycles, extensive use of artificial lighting, and repeated banging noises—can increase an inmate's vulnerability the psychological effects of isolation.[48] Furthermore, those who are likely to become disruptive in the prison population also fit the profile of those most vulnerable to the adverse effects of isolation.[49] Identifying inmates who are experiencing psychological effects as a result of isolation is difficult because often the inmates do not respond truthfully when asked about their mental health.[50] As a result, even those who are not considered "overtly psychiatrically ill" while in isolation "will likely suffer permanent harm as a result of such confinement."[51]

Isolation is not redeemed by its effectiveness as a reformative measure. On the contrary, isolation fails as a corrective practice because it lacks the two required

---

who have become obsessively preoccupied with some minor, almost imperceptible bodily sensation, a sensation which grows over time into a worry, and finally into an all-consuming, life-threatening illness." *Id.*

[45] *Grassian*, *supra* note 10, at 347 ("Experimental research has demonstrated that an individual who receives clues which cause him to experience the isolation situation as potentially threatening is far more likely to develop adverse psychiatric reactions to the isolation experience. Conversely, if the subject has reason to believe the situation is likely to be benign he will be far more likely to tolerate or even enjoy it. Among the latter group of subjects who tolerated isolation well, many reported pleasant or at least non-threatening visual imagery, fantasy, and hallucinatory experiences.").

[46] *Special Rapporteur*, *supra* note 10.

[47] *Grassian*, *supra* note 10, at 354. "Generally, individuals with more stable personalities and greater ability to modulate their emotional expression and behavior and individuals with stronger cognitive functioning are less severely affected. However, all of these individuals will still experience a degree of stupor, difficulties with thinking and concentration, obsessional thinking, agitation, irritability, and difficulty tolerating external stimuli (especially noxious stimuli)." *Id.* at 332. "Some individuals experience discrete symptoms while others experience a 'severe exacerbation of a previously existing mental condition or the appearance of a mental illness where none had been observed before'. Still, a significant number of individuals will experience serious health problems regardless of pre-existing personal factors." *Special Rapporteur*, *supra* note 10.

[48] *Grassian*, *supra* note 10, at 348-49.

[49] *Grassian*, *supra* note 10, at 350-51 ([M]edical literature demonstrates that individuals whose internal emotional life is chaotic and impulse-ridden and individuals with central nervous system dysfunction may be especially prone to psychopathologic reactions to restricted environmental stimulation in a variety of settings. Yet, among the prison population, it is quite likely that these are the very individuals who are especially prone to committing infractions that result in stricter incarceration, including severe isolation and solitary confinement."). "Many of the prisoners who are housed in long-term solitary confinement are undoubtedly a danger to the community and a danger to the corrections officers charged with their custody. But for many they are a danger not because they are coldly ruthless, but because they are volatile, impulse-ridden, and internally disorganized." *Id.* at 354.

[50] *Grassian*, *supra* note 10, at 333 ("[I]n solitary confinement settings, mental health screening interviews are often conducted at the cell front, rather than in a private setting, and inmates are generally quite reluctant to disclose psychological distress in the context of such an interview since such conversation would inevitably be heard by other inmates in adjacent cells, exposing them to possible stigma and humiliation in front of their fellow inmates.")

[51] *Grassian*, *supra* note 10, at 332-33.

elements of an effective behavior modification scheme: its use is not linked to "a single, very clearly defined behavior," and its imposition is not "brief and immediate."[52]

These psychological findings appear to reflect anecdotal evidence from corrections officers such as Don Cabana, the former warden at Parchman prison in Mississippi, who led the movement to develop the state's supermaximum prison.[53] Although at first the threat of long-term isolation improved behavior in the general prison population, Cabana found that behavior got worse and that "[s]ome inmates were crazy, and wouldn't know they were throwing urine at somebody."[54] Inmates in long-term isolation make similar observations.[55] An exonerated death row inmate who lived nearly fifteen years in solitary at Angola prison explained that

> [b]eing in that environment for 23 hours a day will slowly kill you. Mentally, you have to find some way to live as if you were not actually there. If you cannot do that, you will die a slow mental death and may actually wish for your physical death, so that you do not have to continue that experience.[56]

In stark contrast to the psychological harm of long-term isolation identified in the present-day discourse, the current practice of disciplinary segregation in the United States evolved from the rehabilitative efforts of Quakers in the late 1700s.[57] Close to two hundred years later, South Africa modeled its supermaximum prisons, in part, on those developed in the United States.[58]

---

[52] *Grassian*, *supra* note 10, at 378-79. "When multiple behaviors are responded to by the same reinforcer or punishment, learning and behavior change does not occur. Thus, placement in [segregated housing], which is 'punishment' for a host of different behaviors, is simply not being used in a manner consistent with an intent of behavior modification; there is inadequate linkage of any specific behavior to this 'punishment.'" *Id.* at 379. "To be effective, a 'punishment' must be very closely linked in time to the targeted behavior, and for learning to occur, there must be repeated opportunities to experience this close link between the target behavior and the punishment." *Id.*

[53] Laura Sullivan, *As Populations Swell, Prisons Rethink Supermax*, All Things Considered, NAT'L PUB. RADIO (July 27, 2006) *available at* http://www.npr.org/templates/story/story.php?storyId=5587644. After an inmate in the Aryan Brotherhood stabbed three guards in one morning, Cabana decided to pursue building a supermaximum security facility. *Id.* "[D]escribing his conversation with the inmate," Cabana said, "'I'm going to lock this place down so tight and so long that you'll never see the sunshine. And you see, I'm going to do it to a thousand inmates in here, not just you." *Id.*

[54] *Id.*

[55] *See, e.g.*, Alastair Leithead*, Are California's prison isolation units torture?*, Altered States, BBC NEWS US & CANADA (Dec. 10, 2013), *available at* http://www.bbc.com/news/world-us-canada-25243002. A California inmate observed "[t]his is a dangerous place for prisoners with mental illness," saying "[o]n the street I kept pit bulls and had dog kennels about the same size as the cells on the yard . . . . I didn't let them around other people, so they would be mean. That's pretty much how we're kept here." *Id.*

[56] *Sen. Richard J. Durbin Holds a Hearing on Reassessing Solitary Confinement*, *Before the S. Subcomm. on Constitution, Civil Rights and Human Rights* (2014) (written statement of Damon A. Thibodeaux).

[57] Jeffrey Ian Ross, *Invention of the American Supermax Prison*, *in* THE GLOBALIZATION OF SUPERMAX PRISONS, 10, 12 (Jeffrey Ian Ross ed., 2013) [hereinafter *Ross*].

[58] Fran Buntman & Lukas Muntingh, *Supermaximum Prisons in South Africa*, *in* THE GLOBALIZATION OF SUPERMAX PRISONS, 80, 88 (Jeffrey Ian Ross ed., 2013) [hereinafter *Buntman & Muntingh*].

C. Comparative Evolution of Disciplinary Segregation

Isolation of prisoners has been widely used as a form of discipline in both South African and United States prisons, as the practice born in the United States in the 1700s found new life in South Africa's twentieth-century apartheid regime. Today, the dialogue in both countries is raising concerns about the impact of isolation and exploring opportunities for reform.

1. South Africa

Although South Africa's prison policy has long been focused on rehabilitation over punishment,[59] apartheid policies did not reflect this ideal. In the segregated housing context, perhaps the most egregious example of abusive apartheid prison policy is the case of Robert Sobukwe, founding president of the Pan Africanist Congress, who spent six years in solitary confinement in an isolated two-room house on Robben Island.[60] After he was transferred from Robben Island to house arrest in Kimberley, Sobukwe expressed his ongoing discomfort and suspicions in a letter sent to the Minister of Justice.[61] In the letter, Sobukwe complained that he had been tortured on Robben Island by prison officers using "gadgets" he could not catch a glimpse of, and that he continued to be harassed by use of such gadgets in Kimberley.[62] He wrote, "Knowing myself to be absolutely normal [and] mentally healthy, I cannot pretend to believe that I have delusions. These things are happening. They are being deliberately done, in my house and in the street. But I cannot say how."[63]

Apartheid abuses left a stain on the image of the criminal justice system in South Africa, particularly undermining the legitimacy of the police and correctional system.[64] The courts have provided some help by acknowledging the individual rights of prisoners since the Constitution took effect.[65] However, even before the Constitution took effect, South African courts recognized isolation as a violation of a prisoner's rights, stating in 1993 that segregation and lack of access to exercise,

---

[59] *See, e.g.*, THE FREEDOM CHARTER para. 27 (S. Afr. 1955) ("Imprisonment shall be only for serious crimes against the people, and shall aim at re-education, not vengeance.").

[60] Office of the Secretary General, Pan Africanist Congress of Azania, *Brief History of Mangaliso Robert Sobukwe* (May 2013), *available at* http://www.pac.org.za/docs/Sobukwe-gavz.pdf.

[61] Letter from Robert Sobukwe to Minister of Justice, *in* ROBERT SOBUKWE PAPERS, UNIV. OF WITWATERSRAND HISTORICAL PAPERS RESEARCH ARCHIVE, *available at* http://www.historicalpapers.wits.ac.za/?inventory_enhanced/U/Collections&c=129939/R/A2618-Ba7-41.

[62] *Id.*

[63] *Id.*

[64] Charl Cilliers, *The South African Prison Policy*, 533, 533, *in* PRISON POLICY AND PRISONERS' RIGHTS, PROCEEDINGS OF THE COLLOQUIUM OF THE IPPF, STAVERN, NORWAY, 25-28 JUNE 2008 (Wolf Legal Publishers 2008).

[65] *See, e.g.*, *Lekgau v. S.*, Case No. A388/2009, ZAGPPHC 234 (S. Afr. Jun. 15, 2009) (unreported) (acknowledging that "[b]eing in solitary confinement and with restricted access to family and media would affect [the] mental state" of an inmate), *available at* http://www.saflii.org/za/cases/ZAGPPHC/2009/234.pdf; *Kruger v. Minister of Corr. Servs.*, Case No. 7117/2002, ZAGPHC 24 (S. Afr. Mar. 2, 2005) ("The keeping of the plaintiff in solitary confinement for 23 hours per day in my view did not accord with the principle of decency and may have infringed the plaintiff's fundamental rights to be treated like any other citizen except those rights taken by law expressly or by implication or those necessarily inconsistent with the circumstances in which the plaintiff as a prisoner was held."), *available at* http://www.saflii.org/za/cases/ZAGPHC/2005/24.pdf.

reading materials, and radio broadcasts, taken together, "constitute[] an infraction of [a plaintiff's] basic rights and, in particular, of his right to bodily integrity."[66] In 1996, the Constitutional Court took prisoner protection a step further in *State v. Makwanyane* by abolishing the death penalty in South Africa, basing its decision on the fact that "[i]t has not been shown that the death sentence would be materially more effective to deter or prevent murder than the alternative sentence of life imprisonment would be," while taking into account the risk of arbitrariness and error in enforcing the penalty.[67]

With the abolition of the death penalty in South Africa came the introduction of supermaximum security facilities, modeled in part on those in the United States.[68] The rationale given for the new facilities was twofold: (1) in the absence of the death penalty, there were more prisoners serving life sentences, and (2) prison violence, gang activity, and escapes were threatening to get out of control.[69] In both scenarios, prison officials needed a way to remove prisoners from the general population if they were particularly dangerous or causing particular trouble.[70] In 1997, the former death row in Pretoria Central Prison was transformed into C-Max, a supermaximum security unit whose operating procedures include, among other measures, isolation of prisoners.[71] Contact with other inmates in C-Max is allowed only as a privilege through good behavior.[72] In 2002, a second supermaximum unit, Ebongweni, opened in Kokstad in KwaZulu-Natal.[73] Inmate complaints soon followed, ranging from initiation rituals in which guards electrically shocked inmates[74] to suspicious deaths in supermaximum

---

[66] *Minister of Justice v. Hofmyer* 1993 (3) SA 131 (A) at 64 (S. Afr.), *available at* http://www.saflii.org/za/cases/ZASCA/1993/40.pdf. *See also Attorney-General Transvaal v. Kader* 1991 (4) SA 757 (A) at 5, 8 (finding that a witness who had previously been placed in solitary and interrogated, which "caused great stress and led to his being hospitalized in a psychiatric ward" temporarily, had a "just excuse" not to be compelled to testify later because additional psychological stress "would have been humanly intolerable"), *available at* http://www.saflii.org/za/cases/ZASCA/1991/135.pdf; *S. v. Francis and Another* 1990 (2) SA 9 (A) (explaining a discrepancy in a witness's testimony by noting that "[t]he fact that he had been kept in solitary confinement for some time could also have had some effect on his memory"), *available at* http://www.saflii.org/za/cases/ZASCA/1990/141.pdf.

[67] *S. v Makwanyane* 1995 (3) SA 391 (CC) at 93 para. 146 (S. Afr.), *available at* http://www.saflii.org/za/cases/ZACC/1995/3.pdf.

[68] *Buntman & Muntingh*, *supra* note 58, at 88.

[69] *Id.* at 84-85.

[70] *Id.* at 80.

[71] *Id.* at 81.

[72] *Id.* at 84.

[73] *Id.* at 86. In 1998, during an address to the National Council of Provinces, Minister of Corrections Ngconde Balfour described Ebongweni's role in the corrections system as follows:

> [W]e are not soft on criminals. When you do something wrong, we will send you away for a long time. If there is a chance that you can be rehabilitated, please participate in the programmes. In Kokstad we don't have programmes. In Kokstad you are just put there to rot until you realise the folly of your ways. You are alone in a cell. We don't play games there. We don't send you there for rehabilitation. We are sending you there because you need to be put away. It is as simple as that.

Minister of Corrections Ngconde Balfour, Address to National Council of Provinces (Mar. 5, 2008) [hereinafter *Balfour Address*] (transcript available at http://www.parliament.gov.za/live/commonrepository/Processed/20110729/210702_1.doc).

[74] *Buntman & Muntingh*, *supra* note 58, at 84. *See also* U.S. STATE DEP'T, South Africa 2012 Human Rights Report 5-6 ("In July 2011 six prison officials allegedly used an electrified riot shield to torture Jonas Makhufola to ascertain the location of a cell phone. The incident came to light after an audio recording was released to the media. There were reports that the practice 'had been going on for some time.'")

security.[75] In 2005, the top official at C-Max was murdered during a failed escape attempt.[76]

Against this backdrop, President Thabo Mbeki established the Jali Commission in 2001 to investigate abuses by corrections officials at C-Max.[77] In its report, made public in 2006, the Jali Commission found that rehabilitation in supermaximum facilities was impossible because the prisons were "merely institutions of solitary confinement."[78] The commission rejected official explanations for imposition of supermaximum security and alleged that the "likelihood is that the C-Max Prison is being used as a form of punishment for those who attack officials . . . [rather than to] correct general bad behavior within our prisons."[79] The report concluded, "These prisoners are not treated with dignity. . . . [T]he members of the Department have no respect for prisoners' human rights."[80]

The Department countered in 2005 with the adoption of a new White Paper that shifted the core mission of corrections from "safe custody and humane treatment" to "correction within a safe, secure and humane environment, in order to achieve the desired outcome of rehabilitation."[81] The White Paper describes rehabilitation as "a holistic phenomenon"[82] that "engages the offenders at all levels—social, moral, spiritual, physical, work, educational/intellectual and mental."[83] Such rehabilitation "is premised on the approach that every human being is capable of change and transformation if offered the opportunity and resources."[84] At the core of the new regimen is "needs-based rehabilitation," whose aim "is to influence the offender to adopt a positive and appropriate norms and value system, alternative social interaction options, to develop life-skills, social and employment-related skills, in order to equip him/her holistically and thus eliminate the tendency to return to crime."[85]

---

[75] *Buntman & Muntingh*, *supra* note 58, at 89.
[76] *Id.* at 84.
[77] *Id.* at 86 n.3.
[78] *Id.* at 92.
[79] *Id.*
[80] *Id.* at 89.
[81] DEP'T OF CORRECTIONAL SERVICES, White Paper on Corrections in South Africa § 1.1.12 (S. Afr. 2005) [hereinafter *White Paper*]. The White Paper further explained:

> The responsibility of the Department of Correctional Services is not merely to keep individuals out of circulation in society, nor to merely enforce a punishment meted out by the court. The responsibility of the Department of Correctional Services is first and foremost to correct offending behaviour, in a secure, safe and humane environment, in order to facilitate the achievement of rehabilitation, and avoidance of recidivism.

Id. § 4.1.2.
[82] *Id.* § 4.2.2.
[83] *Id.* § 4.2.4.
[84] *Id.* The Department further elaborates on this view in a section of the White Paper titled "People under correction are human beings," which calls for "separat[ing] the person of the offender from the offending behaviour and . . . enabl[ing] both the offender and his/her family to perceive this separation." *Id.* § 7.4.3.
[85] *Id.* at 12.

During this time, the Department also began to acknowledge the danger incarceration poses to mental health,[86] recognizing its obligations under Article 12 of the International Covenant on Economic, Social and Cultural Rights[87] and announcing "strict orders to immediately report to the Head of the Correctional Centre should an offender appear to be mentally ill."[88]

Despite the progress that has been made both legislatively and through the judicial system, "the practical (rather than legal) constraints on inmates in South Africa, in and beyond supermaximum facilities, are . . . significant."[89] Implementation of the Department's new approach has been shaky, in part because of chronic overcrowding,[90] corruption,[91] and maladministration.[92] Since the use of solitary was abolished, 8,078 segregations have been reported annually, and investigations and anecdotal evidence suggest that even more incidences go unreported.[93] In the same reporting period, an average of just twenty-eight inmates annually appealed the decision to put or keep them in segregated housing.[94] Meanwhile, inmates have been "subjected to . . . a lack of medical care, and torture."[95] Many deaths in custody have gone uninvestigated because of a lack of doctors,[96] and mentally ill prisoners have sometimes failed to receive psychiatric attention.[97]

---

[86] *Id.* § 10.5.3 ("By its very nature, incarceration can have a damaging effect on both the physical and mental well-being of inmates and the Department is thus obliged to provide for these special health needs. . . . The responsibility of the Department is not just to provide health care, but also to provide conditions that promote the well-being of inmates and correctional officials.).
[87] *Id.* § 10.7.5.
[88] *Id.* § 11.7.2.
[89] *Buntman & Muntingh*, *supra* note 58, at 94.
[90] U.S. STATE DEP'T, South Africa 2013 Human Rights Report 5 (128% occupancy in 2012-13); *Buntman & Muntingh*, *supra* note 58, at 82 (136.7% occupancy in 2010).
[91] U.S. STATE DEP'T, South Africa 2012 Human Rights Report 22 (In 2012-13, "the department conducted 3,101 misconduct and disciplinary hearings for various offences and dismissed 121 staff members," and "there were 1,460 complaints of corruption."). The year before, there were 3,627 disciplinary hearings and 183 dismissals, with 1,544 complaints of corruption. *Id*. at 21.
[92] *White Paper*, § 56. Additionally, there has been consistent turnover at the top of the Department and in the Office of the Judicial Inspectorate for Correctional Services, which is charged with monitoring conditions at facilities run by the Department of which it is a part. DCS has had four different ministers since 2008. **Add authority.** JICS has had six different inspecting judges since 1998, **add authority**, to inspect 243 correctional centers, JUD. INSPECTORATE FOR CORR. SERVS., Annual Report for 2012-2013 [hereinafter *JICS 2012-13 Report*], *available at* http://judicialinsp.dcs.gov.za/Annualreports/ANNUAL%20REPORT%202012%20-%202013.pdf. In 2011-12, JICS expanded from two offices in Cape Town and Centurion to five offices, with new regional offices in George, Bloemfontein, and Durban. *Id*. Still, JICS suffers from underfunding; for example, in 2012-13, its entire budget was R31m, compared with the DCS budget of R26m for catering alone. *Id.* In the same year, DCS told JICS there was no more money available but returned R300m to the fiscus. *Id.*
[93] *JICS 2012-13 Report*, *supra* note 92; JUD. INSPECTORATE FOR CORR. SERVS., Annual Report for 2011-2012, *available at* http://judicialinsp.dcs.gov.za/Annualreports/Annual%20Report%202011-2012.pdf; JUD. INSPECTORATE FOR CORR. SERVS., Annual Report for 2010-2011, *available at* http://judicialinsp.dcs.gov.za/Annualreports/JUDICIAL_INSPECTORATE_ANNUAL%20%20REPORT_2010-2011.pdf. In the most recent reporting year, close to five percent of the inmate population was placed in segregation. *JICS 2012-13 Report*, *supra* note 92.
[94] *Id.*
[95] U.S. STATE DEP'T, South Africa 2012 Human Rights Report 5.
[96] *Id.* at 7.
[97] *Id.* at 8-9. A study on the prevalence of psychiatric disorders in Durban prisons published in the January 2012 *African Journal of Psychiatry* (the first of its kind in South Africa) found that eight of nine prisoners with psychiatric disorders claimed during interviews to have received no psychiatric care in prison. *Id.*

To combat these problems, the Department has announced plans to increase education of inmates on their right to appeal imposition of segregation, along with plans to request independent correctional center visitors to monitor whether correctional officials are giving inmates the right to appeal.[98] Additionally, the Department plans to increase hiring of staff, including "scarce professionals like psychologists, . . . social workers, [and] healthcare workers,"[99] while reducing the number of assaults and unnatural deaths in custody by five percent in five years.[100] By 2017, the Department plans to increase the percentage of enrolled offenders who participate annually in education programs,[101] skills training,[102] and psychological services,[103] while reducing the percentage involved in social work[104] and spiritual services.[105]

2. United States

Segregated confinement in the United States traces back to 1790 with the construction of the Walnut Street Jail in Philadelphia, Pennsylvania, followed by Eastern State Penitentiary, built in Philadelphia in 1829.[106] What began there as a rehabilitative measure would become a disciplinary one.[107]

Under the "silent but separate"[108] or "Pennsylvania system," inmates in Eastern State Penitentiary "lived separately in a facility designed so that they 'ate, slept, read their Bibles, received moral instruction, and worked in their cells' with limited interaction with each other, prison employees, or members of the public."[109] A competing philosophy, the "'silent but congregate' system"[110] or Auburn plan,

---

[98] *JICS 2012-13 Report*, *supra* note 92.
[99] S. AFR. DEP'T CORR. SERVS., *Annual Performance Plan 2014/2015* § 1 (2013).
[100] *Id.* § 5.1. In 2012-13, 4.5 percent of inmates were allegedly assaulted, and fifty-four people died unnaturally in custody. *Id.*
[101] *Id.* § 6 (from 56.8% to 80%).
[102] *Id.* (from 50.25% to 80%).
[103] *Id.* (from 13% to 16%).
[104] *Id.* (from 99% to 67%).
[105] *Id.* (from 70.38% to 57%).
[106] *Ross*, supra note 57, at 12; Sara A. Rodriguez, *The Impotence of Being Earnest: Status of the United Nations Standard Minimum Rules for the Treatment of Prisoners in Europe and the United States*, 33 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 61, 68-69 (2007) [hereinafter *Rodriguez*].
[107] Jeffrey Smith McLeod, *Anxiety, Despair, and the Maddening Isolation of Solitary Confinement: Invoking the First Amendment's Protection Against State Action That Invades the Sphere of the Intellect and Spirit*, 70 U. PITT. L. REV. 647, 654 (2009). *See also Ross*, *supra* note 57, at 13.
[108] *Ross*, *supra* note 57, at 12.
[109] *Rodriguez*, *supra* note 106, at 69. The penological theory behind the silent system was rehabilitative. *Ross*, *supra* note 57, at 68-69; Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 CRIME & JUST. 441, 456-57 (2006). Other states implemented similar systems,

> [b]ut experience demonstrated serious objections to it. A considerable number of prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and other became violently insane; others still, 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.

In re Medley, 134 U.S. 160, 168 (1890) (referencing American Encyclopedia, vol. 13, "Prison").
[110] *Ross*, *supra* note 57, at 12.

developed at Auburn Prison in New York in 1821.[111] Considering the prolonged isolation of the Pennsylvania system cruel, the Auburn plan segregated inmates at night, required them to work together by day, and "employed a rigidly enforced rule of silence to prevent inmates from 'corrupting each other or plotting escapes and riots.'"[112]

Although by the 1860s, "a skeptical attitude evolved toward 'rehabilitation through isolation,'" "the practice persisted as a form of short-term punishment in most U.S. prisons."[113] The "dispersal model" came into fashion, and problem inmates were spread among many prisons to dilute their influence.[114] One notable exception was the United States government's acquisition of Alcatraz, where escape risks, gangsters, and spies could be managed through segregated confinement.[115] While most inmates at Alcatraz "spent time outside in the yard or on work details, . . . a few dozen occupied 'D Block,' the prison's solitary confinement hallway, where prisoners were rarely let out of their cells and had very limited contact with each other."[116]

When Alcatraz closed in 1963, the United States built a maximum security prison at Marion, Illinois.[117] In 1983, it went on twenty-three-hour-a-day lockdown following a riot and the deaths of two guards.[118] This lockdown transformed into indefinite segregated confinement for Marion's inmates as "[t]he institution slowly changed its policies and practices and was retrofitted to become what is now considered a supermax prison."[119] Other states modeled new facilities on this regime.[120] In 1994, the United States likewise "opened its first specially designed supermax prison in Florence, Colorado," known as ADX.[121]

Solitary confinement has been noted as "one of the fastest growing forms of punishment imposed by prison administration" in the United States prison system.[122] While determining the number of inmates held in segregated housing in the United States is difficult given the variation in its definition and practice by the state and federal governments, an estimated 80,000 inmates are held in "restricted

[111] *Rodriguez*, *supra* note 106, at 70-71.
[112] *Rodriguez*, *supra* note 106, at 71 (quoting Ira J. Silverman, CORRECTIONS: A COMPREHENSIVE VIEW 70-74 (2d ed. 2001)).
[113] McLeod, *supra* note 107, at 652.
[114] *Id.* at 653-54.
[115] *Ross*, *supra* note 57, at 14.
[116] McLeod, *supra* note 107, at 652. Inmates were housed naked in one D Block cell, known as "The Hole," which had bare concrete walls, a hole in the floor, no light, and a small opening in the door where through which inmates were provided just bread and water. *Id.*
[117] *Ross*, *supra* note 57, at 14.
[118] McLeod, *supra* note 107, at 654; *Ross*, *supra* note 57, at 13.
[119] *Ross*, *supra* note 57, at 13. *See also* McLeod, *supra* note 107, at 654;
[120] McLeod, *supra* note 107, at 654.
[121] *Ross*, *supra* note 57, at 13.
[122] Alexa T. Steinbuch, Note, *The Movement Away from Solitary Confinement in the United States*, 40 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 499, 500-01 (2014).

housing" across the country.[123] "As of February 2013, BOP confined approximately 12,460 federal inmates – or about 7 percent of inmates in BOP-operated facilities – in segregated housing units," and "[a]pproximately 435 individuals in ADX [were] held in what is commonly referred to as solitary confinement, or single cells alone, for about 23 hours a day."[124] The duration of an inmate's stay in BOP-operated segregated housing varies.[125] The BOP does not track an inmate's total length of stay or establish a maximum length of stay for inmates in any type of segregated housing unit.[126]

The use of segregated housing in the United States has been a topic of recent study and dialogue. The Government Accounting Office published a report in May 2013 observing that BOP had evaluated neither the extent to which segregated housing impacts institutional safety nor the impact of long-term segregation on inmates.[127] "While most BOP officials told [GAO] there was little or no clear evidence of mental health impacts from long-term segregation," GAO noted that BOP's *Psychology Services Manual* explicitly acknowledges the potential mental health risks of inmates placed in long-term segregation.[128] In order "to ensure that BOP's use of segregated housing furthers BOP's goal to confine inmates in a humane manner and contributes to institutional safety without having a detrimental impact on inmates held there for long periods of time," GAO recommended that BOP include in any current study of segregated housing units "an assessment of the extent that segregated housing contributes to institutional safety, and consider key practices that include local and state efforts to reduce reliance on and the number of inmates held in segregated housing."[129] GAO further recommended that BOP "assess the impact of long-term segregation on inmates."[130]

A Senate subcommittee held hearings on reassessing solitary confinement in June 2012 and February 2014. During the 2014 hearing, BOP Director Charles Samuels reported that the BOP "ha[d] accomplished a great deal in terms of reviewing, assessing, and refining [its] approach to restrictive housing."[131] Accomplishments included a decrease in the restrictive housing population attributed to "nationwide discussions with wardens and other senior managers about restrictive housing, the mental health of inmates, the discipline process and

[123] *Id.* ("The Federal Bureau of Justice estimated that today over 80,000 prisoners are held in 'restricted housing,' including prisoners held in administrative segregation, disciplinary segregation, and protective custody -- all forms of housing inmates in solitary confinement or segregated housing units.").
[124] GAO-13-429 at 2. GAO noted that "[a]ccording to BOP officials, BOP does not hold anyone in solitary confinement because BOP staff interacts with inmates who are held in single cells alone." *Id.* at 2 n.2.
[125] *Id.* at 59.
[126] *Id*.
[127] *Id.* at 33, 38.
[128] *Id.* at 38.
[129] *Id.* at 42.
[130] *Id.*
[131] *Sen. Richard J. Durbin Holds a Hearing on Reassessing Solitary Confinement*, *Before the S. Subcomm. on Constitution, Civil Rights and Human Rights* (2014) (statement of Charles Samuels, Director Federal Bureau of Prisons), *available at* http://congressional.proquest.com/congressional/docreview/t65.d40.02250003.s06?accountid=10730.

other related issues and with respect to specialized mental health treatment."[132] The BOP recently activated a secure mental health step-down unit, a re-integration unit to help inmates transition to general population, a gang-free institution for inmates seeking to safely leave gangs.[133] In addition, by the end of 2014, the BOP expects a report from its comprehensive review of its use of restrictive housing and will "consider making additional enhancements to [its] operation."[134] With regard to "reform for [the] disciplinary process for those placed in restrictive housing," the BOP flagged "providing more access for frequency" of telephone calls and visits as a point it is "willing to continue to look at."[135]

In addition to these hearings, legislation has been introduced with an eye toward identifying alternatives to the use of solitary confinement.[136] The Solitary Confinement Study and Reform Act of 2014 (H.R. 4618) was introduced in the House in 2014.[137] The purposes of H.R. 4618 include to

> (1) develop and implement national standards for the use of solitary confinement to ensure that it is used infrequently and only under extreme circumstances; (2) establish a more humane and constitutionally sound practice of segregated detention or solitary confinement in the Nation's prisons; (3) accelerate the development of best practices and make reforming solitary confinement a top priority . . .; (7) protect the Eighth Amendment rights of Federal, State, and local prisoners and juvenile detainees.[138]

Of note, H.R. 4618 defines "solitary confinement" as "confinement of a prisoner or juvenile detainee in a cell or other place, alone or with other persons, for approximately 22 hours or more per day with severely restricted activity, movement, and social interaction."[139]

To achieve its purposes, H.R. 4618 would establish the National Solitary Confinement Study and Reform Commission to conduct a "comprehensive legal and factual study of the penological, physical, mental, medical, social, fiscal, and

---

[132] *Id.*
[133] *Id.*
[134] *Id.*
[135] *Id.*
[136] H.R. 4618, 113th Cong. (2014); H.R. 401, 113th Cong. § 2(c)(iii) (2013); S. 162, 113th Cong. § 2(c)(iii) (as reported by S. Comm. on the Judiciary Jun. 20, 2013). H.R. 401 and S. 162 would authorize the Attorney General to "award grants to applicants to enhance the capabilities of a correctional facility to develop, implement, and enhance alternatives to solitary confinement and segregated housing and mental health screening and treatment for inmates placed in solitary confinement or segregated housing." H.R. 401 § 2(c)(iii); S. 162 §2(c)(iii).
[137] H.R. 4618.
[138] H.R. 4618 § 2. Other purposes include increasing available data on the incidence of solitary confinement, standardizing the definition of solitary confinement to facilitate data collection, increasing accountability for officials who do not implement humane and constitutional practice, and reducing costs. *Id.* § 2(4)-(6), (8).
[139] *Id.* § 5(6).

economic impacts of solitary confinement in the United States on Federal, State, and local governments; and communities and social institutions generally, including individuals, families, and businesses."[140] Among other matters, the study would include "an assessment of the general relationship between solitary confinement and mental illness."[141] The Commission will recommend standards including methods to limit solitary confinement to "fewer than 30 days in any 45-day period," unless the facility head "makes an individualized determination that prolonged solitary confinement of the prisoner for a serious disciplinary infraction is necessary for the order or security of the institution or a prisoner requests such placement."[142] Recommended standards must also include methods to prohibit indefinite sentencing to long-term solitary confinement and meaningful review at least once every thirty days.[143]

The present discourse regarding the use of segregation in South African and United States prisons is better understood when situated in the broad legal landscape identifying the nature and bounds of inmates' rights and how those rights find expression under modern legal standards.

III. Modern Approaches to the Use of Disciplinary Segregation

Current standards for prison practices in international, South African, and United States law tend to be aspirational, while the conditions of confinement themselves struggle to measure up to what segregated inmates are promised under the law. The following analysis suggests that notwithstanding the ideals of human dignity and decency underpinning the legal standards for the use of segregation in South Africa and the United States, the related guidelines for conditions of confinement may permit solitary confinement, as defined by Dr. Grassian.

A. Standards for the Use of Segregation

Under United Nations, South African, and United States law, all prison practices are measured against broad standards of dignity or decency.

1. United Nations: Standard of Humanity and Respect for the Inherent Dignity of the Human Person

In 1957, the United Nations Economic and Social Council adopted the Standard Minimum Rules for the Treatment of Prisoners ("SMRTPs"), which "represent, as a whole, the minimum conditions which are accepted as suitable by

[140] *Id.*§ 3(a), (d)(1).
[141] *Id.* § 3(d)(2)(F).
[142] *Id.* § 3(e)(2)(B).
[143] *Id.* § 3(e)(2)(C).

the United Nations."[144] While acknowledging that "the rules cover a field in which thought is constantly developing" and should thus serve as guidelines rather than strict requirements,[145] the United Nations envisioned the SMRTPs as "set[ting] out what is generally accepted as being good principle and practice in the treatment of prisoners and the management of institutions."[146] Following adoption of the SMRTPs,[147] the United Nations introduced the International Covenant on Civil and Political Rights in 1966[148] and the Convention Against Torture in 1984.[149]

a. General Treatment of Prisoners

Under the International Covenant on Civil and Political Rights, "[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."[150] Particularly, prisoners may not be "subjected to torture or to cruel, inhuman or degrading treatment or punishment."[151] Under the Convention Against Torture, in all prison facilities within their jurisdiction, states are required to take steps to prevent torture and cruel, inhuman, or degrading treatment of prisoners that is administered by or with the acquiescence of a public official.[152] As part of their prevention programs, states are further required to systematically review their interrogation and custodial practices.[153] All treatment of prisoners within the penitentiary system must be in accordance with the "essential aim" of "reformation and social rehabilitation."[154]

b. Imposition of Segregation

---

[144] Standard Minimum Rules for the Treatment of Prisoners, E.S.C. Res. 663C, U.N. Doc. E/3048, at Rule 2 (Jul. 31, 1957) [hereinafter *SMRTP*].
[145] *Id.* at Rule 3.
[146] *Id.* at Rule 1.
[147] *SMRTP*, *supra* note 144.
[148] International Covenant on Civil & Political Rights, G.A. Res. 2200A, UN Doc. A/6316 (Dec. 19, 1966) [hereinafter *Civil & Political Rights*], *available at* https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en. South Africa and the United States are both signatories to the Covenant. *Id.*
[149] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, UN Doc. A/RES/39/46 (Dec. 10, 1984) [hereinafter *CAT*], *available at* https://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-9&chapter=4&lang=en#12. South Africa and the United States are both signatories to the CAT. *Id.* The United States signed with the caveat that "nothing in this Convention requires or authorizes legislation, or other action, by the United States of America prohibited by the Constitution of the United States as interpreted by the United States." *Id.*
[150] *Civil & Political Rights*, *supra* note 148, art. 10(1).
[151] *Id.* art. 7 (explicitly prohibiting medical and scientific experimentation on prisoners). The United Nations defines torture as:

> 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. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

CAT, supra note 149, art. 1(1).
[152] *CAT, supra* note 149, art. 11, 16(1).
[153] *Id.* art. 11.
[154] *Civil & Political Rights*, *supra* note 148, art. 10(3).

All prisoners must be classified to separate prisoners who "are likely to exercise a bad influence" because of their criminal records or "bad characters," and to facilitate treatment of prisoners "with a view to their social rehabilitation."[155] Accordingly, prisoners must be separated into basic categories based on "their sex, age, criminal record, the legal reason for their detention and the necessities of their treatment."[156] After separation occurs, prisons must implement systems of privileges "appropriate for the different classes of prisoners and the different methods of treatment" "in order to encourage good conduct, develop a sense of responsibility and secure the interest and co-operation of the prisoners in their treatment."[157]

Discipline, while firm, should impose "no more restriction than is necessary for safe custody and well-ordered community life."[158] In particular, Standard Minimum Rule 31 provides that "[c]orporal punishment, punishment by placing in a dark cell, and all cruel, inhuman or degrading punishments shall be completely prohibited as punishments for disciplinary offences."[159] Within those bounds, under Standard Minimum Rule 32, certain punishments may be inflicted only with advance examination and written approval from a medical officer affirming that the prisoner is "fit to sustain" the punishment: close confinement,[160] reduction of diet,[161] and "any other punishment that may be prejudicial to the physical or mental health of a prisoner."[162] If such a punishment is inflicted, the medical officer must visit the affected prisoner daily and "advise the director if he considers the termination or alteration of the punishment necessary on grounds of physical or mental health."[163]

The theme of human dignity set forth in the SMRTPs, International Covenant on Civil and Political Rights, and Convention Against Torture is reflected in prison policy in South Africa and the United States, which have established respective standards of dignity and decency for the treatment of prisoners.

2. South Africa: Standard of Human Dignity

[155] *SMRTP*, *supra* note 144, at Rule 67.
[156] *Id.* at Rule 8. The International Covenant on Civil and Political Rights further emphasizes that accused prisoners must be segregated from convicted prisoners, and juveniles must be segregated from adults. *Civil & Political Rights*, *supra* note 148, art. 10. On admission, prisoners must be informed in writing of all regulations governing treatment of prisoners in their category, disciplinary requirements, methods for seeking information and making complaints, and any other information pertaining to a prisoner's rights or obligations. *SMRTP*, *supra* note 144, at Rule 35(1). This information must be orally provided to illiterate prisoners. *Id.* at Rule 35(2).
[157] *SMRTP*, *supra* note 144, at Rule 70.
[158] *Id.* at Rule 27.
[159] *Id.* at Rule 31.
[160] *Id.* at Rule 32(1).
[161] *Id.* at Rule 32(1).
[162] *Id.* at Rule 32(2).
[163] *Id.* at Rule 32(3).

At the end of apartheid, South Africa transitioned to constitutional democracy with an Interim Constitution in 1994[164] that paved the way for the country's current Constitution, adopted in 1996.[165] Under the Constitution, Parliament introduced a comprehensive set of prison guidelines in the Correctional Services Act of 1998, which was amended in 2001, 2008, and 2011.[166] In 2004, the Department of Correctional Services supplemented the Act with the Correctional Services Regulations, most recently amended in April 2012.[167] This framework of prison regulations is based on a standard of human dignity,[168] which is reflected throughout South Africa's extensive requirements for conditions of confinement.[169]

a. General Treatment of Prisoners

Under the South African Constitution, every person "has inherent dignity and the right to have their dignity respected and protected."[170] Human dignity is one of the central tenets of South African constitutionalism, making its first of many appearances in the Constitution as the very first value listed under "founding provisions" in section 1,[171] and appearing again at the beginning of the Bill of Rights, where it is again described as a "democratic value" on par with equality and freedom.[172] In accordance with the foundational right to human dignity in South Africa, every person has the right to "freedom and security of the person," including the right "not to be tortured in any way [and] not to be treated or punished in a cruel, inhuman, or degrading way"[173]; and to "bodily and psychological integrity, which includes the right . . . to security in and control over their body."[174]

In the prison context, the Constitution expressly provides that inmates have the right "to conditions of confinement that are consistent with human dignity, including at least exercise and the provision at state expense, of adequate accommodation, nutrition, reading material and medical treatment."[175] Each inmate also has a constitutional right "to communicate with, and be visited by, that person's (i) spouse or partner; (ii) next of kin; (iii) chosen religious counselor; and (iv) chosen medical practitioner."[176] In addition to these minimum guarantees, the Correctional Services Act requires the Department of Correctional Services to seek

[164] S. AFR. (INTERIM) CONST., 1993.
[165] S. AFR. CONST., 1996.
[166] Correctional Services Act 111 of 1998 § 25 (S. Afr.).
[167] Government Notice (GN) R323/2012 (S. Afr.).
[168] S. AFR. CONST. § 10.
[169] *See infra* Part III.C.2.
[170] S. AFR. CONST. § 10
[171] *Id.* § 1.
[172] *Id.* § 7
[173] *Id.* § 12(1)(d)-(e).
[174] *Id.* § 12(2)(b).
[175] *Id.* § 35(2)(e).
[176] *Id.* § 35(2)(f).

to provide further amenities that "create an environment in which sentenced offenders will be able to live with dignity."[177]

The Correctional Services Act additionally reflects the constitutional commitment to human dignity when it identifies the objective of imprisonment not as punishment, but instead as "enabling the sentenced offender to lead a socially responsible and crime-free life in the future."[178] The Act describes the correctional system's purpose as contributing to society not just by enforcing sentences handed down by the courts, but also by "detaining all inmates in safe custody whilst ensuring their human dignity," and "promoting the social responsibility and human development of all sentenced offenders."[179] The Department deliberately moved to use of the terms "inmate" and "sentenced offender" instead of "prisoner" in 2008.[180] At the time, the Minister of Correctional Services addressed the National Council of Provinces and explained that "[h]uman development and a human rights approach to the treatment of offenders is needed," with the caveat that "when I say 'humane' treatment, it just means that they need to be treated humanely but it does not mean that they have to live luxuriously. There is a difference there."[181]

The Constitution provides for limitations of rights in the Bill of Rights "only in terms of a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom."[182] Under the Correctional Services Act, an inmate's right to personal integrity and privacy may be limited only to the extent "reasonably

---

[177] Correctional Services Act 111 of 1998 § 37(2). "All such amenities must be prescribed by regulation and as far as possible be available to all sentenced offenders unless, for economic or other practical reasons, some amenities can be introduced in some correctional centres only, in which case, their partial introduction should be on a non-discriminatory basis." *Id.* § 37(3).

[178] *Id.* § 36.

[179] *Id.* § 2. The Act defines "correction" as "provision of service and programmes aimed at correcting the offending behavior of sentenced offenders in order to rehabilitate them." *Id.* § 1. It further defines "development" as "the provision of services and programmes aimed at developing and enhancing competencies and skills that will enable the sentenced offender to re-integrate into the community. *Id.*

[180] *Id.* at General Note.

[181] *Balfour Address*, *supra* note 73. On the abolition of solitary confinement, which was accomplished concurrently, the Minister told members of Parliament:

> As part of this transformation, we have made sentence planning for particularly sentenced offenders serving more than 24 months compulsory, replaced solitary confinement — and a number of you do know what it is like to be in solitary confinement — with segregation of ill-disciplined inmates. About those who are ill-disciplined and cannot look after themselves, we need to do something about them. We put them in correction programs and we instil correct behaviour in them. This will be coupled with a loss of gratuity — again, those of you who were detained will know that they take some of your gratuities and rights away. We have coupled that with the loss of gratuity and restrictions of amenities for those who are ill-disciplined, who don't acknowledge that they have done wrong. This corrective sanction, together with any use of mechanical restraint, must be reported to the National Commissioner and to the Judicial Inspectorate for Correctional Services immediately to ensure full accountability and no abuse of these measures.

Id.

[182] S. AFR. CONST. § 36. "[A]ll relevant factors" must be taken into account before a right in the Bill of Rights may be limited under section 36, "including (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose." *Id.*

necessary to ensure the security of the community, the safety of correctional officials and the safe custody of all inmates."[183] South African courts are also constitutionally required to interpret legislation and develop law in a way that "promote[s] the spirit, purport and objects of the Bill of Rights."[184] A South African inmate's rights are further governed by international law, which courts are bound to consider under the Constitution.[185]

In making regulations for conditions of confinement, the Minister of Correctional Services may vary requirements based on "the circumstances of a particular correctional centre."[186] All proposed regulations must be referred to committees in both houses of Parliament for approval.[187] Additionally, the National Commissioner of Correctional Services may issue orders not inconsistent with correctional regulations, providing binding direction to correctional officials on matters including environmental health conditions, health-related issues, recreational activities, and provision of amenities.[188]

b. Imposition of Segregation

To ensure their own safety and that of correctional officials and the community,[189] inmates must be separated into basic categories based on their sex,[190] age,[191] security classification,[192] and whether they have been sentenced.[193] Additionally, inmates must be detained separately "[w]here there is a danger of persons awaiting trial or sentence defeating the ends of justice by their association with each other."[194] Inmates may be separated based on health categories at the National Commissioner's discretion,[195] and based on mental or physical health risk on request of a Correctional Medical Practitioner or registered nurse.[196]

---

[183] Correctional Services Act 111 of 1998 § 26.
[184] S. AFR. CONST. § 39(2). "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights." *Id.*
[185] *Id.* § 39(1). "When interpreting the Bill of Rights, a court, tribunal or forum (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law." *Id.*
[186] Correctional Services Act 111 of 1998 § 134.
[187] *Id.*
[188] Correctional Services Act 111 of 1998 § 134(2).
[189] *Id.* § 26(1) (noting that "[t]he right of every inmate to personal integrity and privacy is subject to the limitations reasonably necessary" to achieve these ends).
[190] *Id.* § 7(2)(b); CSR Chapter II, Section 3(2)(h)
[191] Correctional Services Act 111 of 1998 § 7(2)(c).
[192] Government Notice (GN) R323/2012 § 3(2)(g).
[193] Correctional Services Act 111 of 1998 § 7(2)(a).
[194] *Id.* § 7(f).
[195] *Id.* § 7(d).
[196] Government Notice (GN) R323/2012 § 3(2)(i); *see also* text accompanying note 89 *supra*. An inmate who is detained for retrieval of a foreign object swallowed or inserted into a bodily orifice must be detained in a single cell and must be visited daily by the Head of the Correctional Centre and at least every four hours by a registered nurse. Government Notice (GN) R323/2012 § 16(2)(a)-(b).

Security classifications are made by the National Commissioner,[197] who must take into account the security risk posed by the inmate and his "suitability for treatment and training."[198] An inmate must be provided with written information about his administrative and security classification upon admission, including the applicable rules, disciplinary requirements, and methods of filing complaints or requests for inmates in his category.[199]

To "ensure safe custody by maintaining security and good order," special duties and restrictions may be imposed on inmates, provided that such restrictions are "applied in a manner which conforms with their purpose and which does not affect the inmate to a greater degree or for a longer period than necessary."[200] An inmate's minimum rights, entrenched in the Constitution and the Correctional Services Act, may not be restricted "for disciplinary or other purposes."[201] However, mere amenities for inmates of different categories may be restricted, suspended, or revised at the National Commissioner's discretion.[202]

Segregation is permissible in only the following six circumstances:

> (a) upon the written request of an inmate;
> (b) to give effect to the penalty of the restriction of the amenities imposed [for a disciplinary violation] to the extent necessary to achieve this objective;
> (c) if such detention is prescribed by the correctional medical practitioner on medical grounds;
> (d) when an inmate displays violence or is threatened with violence;
> (e) if an inmate has been recaptured after escape and there is a reasonable suspicion that such inmate will again escape or attempt to escape; and

[197] Government Notice (GN) R323/2012 § 15(1)
[198] *Id.* § 22(1). Security classification should be individual where the duration of sentence permits, and should include "an analysis and assessment or the offender's previous record, aptitude, qualification or previous training, ability and other personal factors." *Id.* § 22(2)(a). Classification should promote contact with the inmate's family and "the application of progressive and flexible reclassification." *Id.* § 22(2)(b)-(c).
[199] Correctional Services Act 111 of 1998 § 6(a). The information must be provided in a language the inmate understands, and the inmate must confirm that he has understood. *Id.* §§ 6(a), (c). Illiterate inmates must receive the information orally, through an interpreter if necessary. *Id.* § 6(b).
[200] *Id.* § 4(b). The inmate privilege system, which is unrelated to the security classification system, assigns inmates to alphabetical categories, with Category A receiving the most privileges. *Buntman & Muntingh*, *supra* note 58, at 81 n.2.
[201] Correctional Services Act 111 of 1998 § 4(c).
[202] *Id.* "'[A]menities' means recreational and other activities, diversions or privileges which are granted to inmates in addition to what they are entitled to of right and in terms of this Act, and includes (a) exercise; (b) contact with the community; (c) reading material; (d) recreation; and (e) incentive schemes." *Id.* § 1. However, this definition leaves some ambiguity as to the extent to which it would permit limitations of inmates' express statutory rights under the Correctional Services Act to exercise, contact with the community, reading material, and recreation, and their express constitutional rights to exercise, contact with the community, and reading material. *See* S. AFR. CONST. § 35(2)(e) (exercise and reading material); *id.* § 35(2)(f) (contact with the community); Government Notice (GN) R323/2012 § 11 (recreation); Government Notice (GN) R323/2012 § 13(1) (reading material); Correctional Services Act 111 of 1998 § 11 (exercise); *id.* § 13(1) (contact with the community). Elsewhere, the Correctional Services Act expressly provides that an inmate's minimum rights may not be restricted. *Id.* § 4(c).

> (f) if at the request of the South African Police Service, the Head of the Correctional Centre considers that it is in the interests of the administration of justice.[203]

Segregation "may be for part of or the whole day and . . . may include detention in a single cell, other than normal accommodation in a single cell."[204] Use of segregation "must be for the minimum period, and place the minimum restrictions on the inmate, compatible with the purpose for which the inmate is being segregated."[205] Imposition of segregation and extension of segregation beyond the initial period must be immediately reported by correctional officials,[206] and an inmate placed in segregation has a right to appeal and receive a decision within 72 hours.[207]

Segregation may be imposed for disciplinary purposes only after (1) an inmate is found guilty "on a balance of probabilities" in a hearing before a disciplinary official,[208] and (2) the inmate has committed "serious or repeated infringements."[209] Under those conditions, segregation may be imposed so that the inmate may "undergo specific programmes aimed at correcting his or her behaviour."[210] Segregation for disciplinary purposes involves "a loss of gratuity for a period not exceeding two months" and "restriction of amenities not exceeding 42 days."[211]

---

[203] Correctional Services Act 111 of 1998 § 30(1). In correctional centers run by contractors rather than the Department, the Controller of the center may order his employees to separately detain one or more sentenced offenders in the six circumstances in which segregation is permissible. *Id.* § 106(2)(b). "[I]n case of urgency," the Director of such a center may act under the Controller's power and authorize "temporary application" of segregation if he "reasonably believes that delay in obtaining such authorisation would defeat the object" of the Controller's power to order segregation. *Id.* § 108(c). In such a case, the Director "must report as soon as possible to the Controller." *Id.* § 108(d).

[204] *Id.* § 30(1).

[205] *Id.* § 30(8).

[206] *Id.* § 30(6) ("All instances of segregation and extended segregation must be reported immediately by the Head of the Correctional Centre to the National Commissioner and to the Inspecting Judge.").

[207] Correctional Services Act 111 of 1998 § 30(7) ("An inmate who is subjected to segregation may refer the matter to the Inspecting Judge who must decide thereon within 72 hours after receipt thereof.").

[208] *Id.* § 24(5). The hearing must be conducted fairly, Government Notice (GN) R323/2012 § 14(2)(b), on the record, *id.* § 14(1)(d), and "as soon as possible," *id.* § 14(1)(a). However, the hearing must be at least six days after the inmate is informed of the charges against him. *Id.* At the hearing, the inmate must be given a chance to submit evidence, and speak on the merits of the case and the appropriate penalty. *Id.* §§ 14(1)(c), (f), (h).

[209] *Id.* § 24(5)(d). *See also id.* § 30(9) (providing that segregation "may never be ordered as a form of punishment or disciplinary measure" except when imposed as a penalty under section 24(5)(d)). It should be noted that in general, discipline of sentenced offenders must "have the particular aim of promoting self-respect and responsibility on the part of such offenders." *Id.* § 37(4)(4). Such discipline "must be maintained with firmness but in no greater measure than is necessary for security purposes and good order." *Id.* § 22(1). Where a correctional center is run by a contractor rather than the Department, the contractor is permitted to make rules "only with the prior permission of the National Commissioner," *id.* § 104(3), and may not "take disciplinary action against offenders or impose penalties on them," *id.* § 104(4)(a). Contractors must "contribute to maintaining and protecting a just, peaceful and safe society" by adhering to the law, ensuring inmates' human dignity, and "promoting the social responsibility and the human development of all sentenced offenders." *Id.* § 104(1).

[210] *Id.*

[211] *Id.* §§ 24(5)(b)-(d); *see also* note 172 *supra*. By contrast, solitary confinement, which has been outlawed in South Africa, involves "being held in a single cell with loss of all amenities." Correctional Services Act 111 of 1998 § 1.

3. United States: The Eighth Amendment's Evolving Standards of Decency

While both the South African and United States constitutions limit the bounds of punishment,[212] the United States Constitution does not explicitly protect a positive right to human dignity, nor does it explicitly address conditions of confinement.[213] Rather, the Eighth Amendment to the United States Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted*."[214] Nonetheless, the United States Supreme Court recognizes that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man."[215] Observing that "[p]risoners retain the essence of human dignity inherent in all persons," the Supreme Court in *Brown v. Plata* found that "[r]espect for that dignity animates the Eighth Amendment prohibition against cruel and unusual punishment."[216]

In *Trop v. Dulles*, the Supreme Court traced the Eighth Amendment's essential principle back to the Magna Carta, noting that "[w]hile the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards."[217] Historically, the Supreme Court struggled to establish the standard by which to draw the line separating a prisoner's human dignity from the reach of the government's power to punish.[218] The Amendment's drafters were primarily concerned with "proscrib[ing] 'torture(s)' and other 'barbar(ous)' methods of punishment,"[219] and the Supreme Court initially "applied the Eighth Amendment by comparing challenged methods of execution to concededly inhuman techniques of punishment."[220]

However, consistent with the broad principle of human dignity underlying the Amendment, the Supreme Court has not limited the Amendment's reach to "'barbarous' methods that were generally outlawed in the 18th century. Instead, the Amendment has been interpreted in a flexible and dynamic manner. The Supreme Court early recognized that 'a principle to be vital, must be capable of

---

[212] *Compare* S. AFR. CONST. § 12(1)(e) (prohibiting "cruel, inhuman, or degrading" treatment or punishment) *with* U.S. CONST. amend. VIII (prohibiting the infliction of "cruel and unusual punishments.").
[213] *See* U.S. CONST. amend. VIII (emphasis added).
[214] U.S. CONST. amend. VIII. In 1962, the United States Supreme Court found that the Eighth Amendment proscription extends to state governments by incorporation through the Fourteenth Amendment. *See* Robinson v. Dulles, 370 U.S. 660, 666 (1962), *cited in* Wilson v. Seiter, 501 U.S. 294, 297-98 (1991) (noting the Eighth Amendment's application to the States).
[215] Brown v. Plata, 131 S. Ct. 1910, 1928 (2011) (quoting Atkins v. Virginia, 536 U.S. 304 (2002)). *See also* Estelle v. Gamble, 429 U.S. 97, 102 (1976) (quoting Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968)) ("The Amendment embodies 'broad and idealistic concepts of dignity, civilized standards, humanity, and decency . . . .'").
[216] *Brown*, 131 S. Ct. at 1928.
[217] Trop v. Dulles, 356 U.S. 86, 100 (1958) (plurality opinion).
[218] *See, e.g., id.* at 100-01 (construing Weems v. United States, 217 U.S. 349 (1910) (noting "that the words of the Amendment are not preceise, and that their scope is not static."); Wilkerson v. Utah, 99 U.S. 130, 136 (1878) (admitting that "[d]ifficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted"); *Id.*
[219] *Estelle*, 429 U.S. at 102 (quoting Anthony F. Granucci, *Nor Cruel and Unusual Punishment Inflicted: The Original Meaning*, 57 CAL. L. REV. 839 (1969)).
[220] *Id.*

wider application than the mischief which gave it birth.'"[221] Thus, the Supreme Court in *Gregg v. Georgia* concluded that the prohibition on cruel and unusual punishment "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice."[222] Accordingly, the Eighth Amendment has come to be understood to reach conditions of confinement.[223]

a. General Treatment of Prisoners

In 1976, the Supreme Court addressed the depth of the Eighth Amendment's reach when it considered whether a prisoner could state an Eighth Amendment claim based on inadequate medical care in *Estelle v. Gamble*.[224] In this precursor to its conditions of confinement decisions, the Supreme Court noted that it had found "repugnant to the Eighth Amendment punishments which are incompatible with 'the evolving standards of decency that mark the progress of a maturing society,' or 'which involve the unnecessary and wanton infliction of pain.'"[225] Because the prisoner was forced to rely on the government for his medical care, the Supreme Court concluded that the government had an obligation to provide for those needs and that its failure to do so could constitute a punishment.[226] The Supreme Court reasoned that "such a failure may actually produce physical 'torture or a lingering death.'"[227] Even short of that, the Court found

> denial of medical care may result in pain and suffering which no one suggests would serve any penological purpose. The infliction of such unnecessary suffering is inconsistent with contemporary standards of decency as manifested in modern legislation codifying the common-law view that "it is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself."[228]

The Supreme Court held that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain,' proscribed by

[221] Gregg v. Georgia, 428 U.S. 153, 171 (1976) (quoting Weems v. United States, 217 U.S. 349, 373 (1910)).
[222] *Id.* (quoting *Weems*, 217 U.S. at 378).
[223] Hutto v. Finney, 437 U.S. 678, 685 (1978).
[224] *Estelle*, 429 U.S. at 102-04.
[225] *Id.* at 102 (citations omitted) (quoting *Trop*, 356 U.S. at 101 (considering whether denationalization of wartime deserter constituted cruel and unusual punishment); Gregg v. Georgia, 428 U.S. 153, 173 (considering whether capital punishment constituted cruel and unusual punishment)). The Court also noted that the Eighth Amendment "proscribe[d] punishments grossly disproportionate to the severity of the crime, and [that] it impose[d] substantive limits on what can be made criminal and punished," but found neither principle applicable to the prisoner's complaint about his medical care. *Id.* at 103 n.7 (citations omitted).
[226] *Id.* at 103.
[227] *Id.* (quoting In re Kemmler, 136 U.S. 436, 447 (1890)).
[228] *Id.*

the Eighth Amendment."[229] Thus, the Court considered both the defendants' state of mind and the seriousness of the prisoner's condition.[230]

On the heels of *Estelle*, the Supreme Court did not hesitate to accept that "[c]onfinement in a prison or in an isolation cell is a form of punishment subject to scrutiny under Eighth Amendment standards."[231] Paralleling the reasoning in *Estelle*, the Court has subsequently found "[t]he Amendment . . . imposes duties on . . . officials, who must provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must 'take reasonable measures to guarantee the safety of inmates.'"[232] When considering whether a challenged condition constitutes a violation of the Eighth Amendment, the Court has applied principles articulated in *Estelle*.[233]

Thus, when weighing a prisoner's condition of confinement, a two-part inquiry demarks the line between a prisoner's human dignity and the government's power to punish.[234] First, "[w]as the deprivation sufficiently serious?"[235] Second, "[d]id the officials act with a sufficiently culpable state of mind?"[236] The first component is objective, while the second is subjective.[237] The components are independent, and each must be answered "yes" for a prisoner to successfully challenge the conditions of confinement.[238]

When determining whether a condition constitutes a sufficiently serious deprivation as required by the first component, consideration is given to "the evolving standards of decency that mark the progress of a maturing society."[239] To sustain a claim, "a prison official's act or omission must result in denial of 'the minimal civilized measure of life's necessities.'"[240] The Court has held that there is no constitutional mandate for comfortable prisons.[241] Rather, to the extent that conditions fall short of comfortable and "are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society."[242] It follows that the prisoner must prove not only the seriousness of the harm, but the sufficiency of that seriousness by comparison to societal standards.[243] When a

[229] *Id.* at 104 (quoting *Gregg*, 428 U.S. at 173).
[230] *See id.*
[231] Hutto, 437 U.S. at 685. The parties in *Hutto* did not dispute that the petitioner prisoners' confinement in isolation constituted cruel and unusual punishment. *Id.* In the first case to consider whether particular conditions of confinement violated the Eighth Amendment, the Court easily held that conditions of confinement present a form of punishment subject to the Amendment's limitations. Rhodes v. Chapman, 452 U.S. 337, 345 (1981) (quoting Hutto, 437 U.S. at 685).
[232] Farmer v. Brennan, 511 U.S. 825, 832 (1994) (quoting Hudson v. Palmer, 468 U.S. 517, 526-27 (1984)).
[233] *Id.* at 835, 837.
[234] *Wilson*, 501 U.S. at 298.
[235] *Id.*
[236] *Id.*
[237] *Id.*
[238] *Id.*
[239] *See Rhodes*, 452 U.S. at 346 (quoting *Trop*, 356 U.S. at 101).
[240] *Farmer*, 511 U.S. at 834.
[241] *Wilson*, 501 U.S. at 298 (quoting *Rhodes*, 452 U.S. at 349).
[242] *Rhodes*, 452 U.S. at 347.
[243] *See Helling*, 509 U.S. at 36.

condition threatens, but has not yet harmed, a prisoner, the prisoner must establish that "society considers the risk . . . to be so grave that it violates contemporary standards of decency to expose *anyone* unwillingly to such a risk. In other words, the prisoner must show that the risk . . . is not one that today's society chooses to tolerate." [244]

When making its first decision in a dispute over particular conditions of confinement, the Supreme Court observed that conditions "alone or in combination . . . may deprive inmates of the minimal civilized measure of life's necessities."[245] Since then, however, the Supreme Court has clarified that "[n]othing so amorphous as 'overall conditions' can rise to the level of cruel and unusual punishment when no specific deprivation of a single human need exists."[246] The Supreme Court acknowledged that "[*s*]*ome* conditions of confinement may establish an Eighth Amendment violation 'in combination' when each would not do so alone, but only when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth or exercise – for example, a low cell temperature at night combined with a failure to issue blankets."[247]

When judging whether the conditions, alone or in combination, harm or pose a risk of harm sufficient to violate the evolving standards of decency, courts look to a variety of evidence.[248] In *Estelle*, the Court looked to "modern legislation," citing state statutes and state regulations.[249] The Court also noted that "[m]odel correctional legislation and proposed minimum standards are all in accord."[250] Among the minimum standards cited, the Court included the Standard Minimum Rules.[251]

Turning to the subjective component, the Supreme Court's culpable state of mind or deliberate indifference requirement derives from the text of the Eighth Amendment, which proscribes "punishments" rather than "conditions."[252] In

---

[244] Helling v. McKinney, 509 U.S. 25, 33-34 (1993) (finding "[i]t would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them."). In cases alleging future harm, the seriousness of the potential harm and likelihood of the harm must be considered. *Id.* at 36.

[245] *Rhodes*, 452 U.S. at 347.

[246] *Wilson*, 501 U.S. at 305. The Supreme Court rejected petitioner's contention that "a court cannot dismiss any challenged condition, . . . as long as other conditions remain in dispute" so that all challenged conditions may be "'considered as part of the overall conditions challenged.'" *Id.*at 304.

[247] *Id.*

[248] *See Estelle*, 429 U.S. at 103.

[249] *Estelle*, 429 U.S. at 103 n.8 (citing statutes from twenty-two states).

[250] *Id.*

[251] *Id.*

[252] *Farmer*, 511 U.S. at 837. In *Wilson*, Justice Scalia reasoned that

> [t]he source of the intent requirement is not the predilections of this Court, but the Eighth Amendment itself, which bans only cruel and unusual *punishment*. If the pain inflicted is not formally meted out *as punishment* by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify.

Wilson, 501 U.S. at 300. This understanding of "punishment" was not without controversy. *Id.* at 306 (White, J., dissenting) (finding precedent held that "conditions are themselves *part of the punishment* even though not specifically 'meted out'"). In his concurrence in *Farmer*, Justice Blackmun characterized the majority's view as "fundamentally misguided" and "def[ying]

Farmer v. Brennan, the Court reasoned that "an official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot . . . be condemned as the infliction of punishment."[253] Deliberate indifference lies "somewhere between the poles of negligence at one end and purpose or knowledge at the other."[254] It occupies that space where "the official knows of and disregards an excessive risk to inmate health or safety."[255]

First, "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference."[256] Although the standard is a subjective one, the official's knowledge "is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence, and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious."[257] Of course, the factfinder is not obliged to draw this conclusion.[258] Despite the obviousness of the risk, "officials . . . might show . . . that they did not know of the underlying facts indicating a sufficiently substantial danger and that they were therefore unaware of a danger."[259] Alternatively, they could show "they knew of the underlying facts but believed (albeit unsoundly) that the risk to which the facts gave rise was insubstantial or nonexistent."[260]

Second, the official must not only be aware but also disregard the risk.[261] An official who perceives the risk does not cross the line protecting a prisoner's human dignity unless the official also fails to "respond reasonably to the risk."[262] With the subjective state of mind as a defining characteristic of the "punishments" proscribed by the Eighth Amendment, an official's reasonable response will shield him from liability "even if the harm ultimately was not averted."[263]

Against this constitutional landscape, the literature speaks to the limited success of prisoners seeking to challenge the conditions of their confinement in

---

common sense." *Farmer*, 511 U.S. at 854 (Blackmun, J. concurring). Justice Blackmun, relying on dictionary definitions of punishment, argued "'[p]unishment' does not necessarily imply a culpable state of mind on the part of an identifiable punisher. A prisoner may experience punishment when he suffers 'severe, rough, or disastrous treatment,' regardless of whether a state actor intended the cruel treatment to chastise or deter." *Id.* at 554-55 (internal citation omitted).

[253] *Farmer*, 511 U.S. at 838.

[254] *Id.* at 836.

[255] *Id.* at 837. Although the official need not believe harm would actually occur, the official must have "acted or failed to act despite his knowledge of a substantial risk of harm." *Id.* at 842. The risk, however, need not be personal to a particular prisoner. *Id.* at 843. Rather, it may be one shared by all prisoners in the prisoner's situation. *Id.*

[256] *Id.* at 837.

[257] *Id.* at 842.

[258] *Id.* at 844.

[259] *Id.* Officials "would not escape liability if the evidence showed [they] merely refused to verify underlying facts that [they] strongly suspected to be true. *Id.* at 843 n.8.

[260] *Id.* at 844. Officials "would not escape liability if the evidence showed . . . [they] declined to confirm inferences of risk that [they] strongly suspected to exist."

[261] *Id.* at 837.

[262] *Id.*

[263] *Id.*

segregated housing.[264] While noting the seriousness of the trauma experienced in isolation, courts have generally not found that solitary confinement violates the Eighth Amendment.[265] For example, while recognizing "that the conditions of extreme social isolation and reduced environmental stimulation found in Pelican Bay SHU will likely inflict some degree of psychological trauma upon most inmates confined there for more than brief periods," the court in *Madrid v. Gomez* did not find "the risk of developing an injury to mental health of *sufficiently serious magnitude* due to current conditions in the SHU [was] high enough for the SHU population as a whole" to warrant finding the "conditions . . . [were] *per se* violative of the Eighth Amendment with respect to all potential inmates."[266] On the other hand, the court in *Madrid* did find that the risk for "those who the record demonstrates are at a particularly high risk for suffering very serious or severe injury to their mental health, including overt paranoia, psychotic breaks with reality, or massive exacerbations of existing mental illness as a result of the conditions in the SHU" were entitled to relief under the Eighth Amendment.[267]

Though courts do assert their role as the arbiter of the constitutional safeguards for a prisoner's human dignity,[268] they have also made clear their reluctance to interfere with the judgment of the government as it exercises its power to punish.[269] Accordingly, the more specific protections for the human dignity of prisoners in segregated housing come from the administrative regulations adopted by the executive branch as discussed in the following sections.

b. Imposition of Segregation

Rather than delineate specific requirements for conditions of confinement in its constitution or by legislation, Congress entrusted the BOP with "the management and regulation of all Federal penal and correctional institutions." [270] Congress further charged the BOP with "provid[ing] suitable quarters and

---

[264] *See, e.g.*, Shireen A. Barday, PRISON CONDITIONS AND INMATE COMPETENCY TO WAIVE CONSTITUTIONAL RIGHTS, 111 W. VA. L. REV. 831, 840-42 (2009); Jules Lobel, PROLONGED SOLITARY CONFINEMENT AND THE CONSTITUTION, 11 U. PA. J. CONST. L. 115. 119-22 (2008).

[265] Barday*, supra* note 264, at 841 (noting the courts' "ready acknowledgement of the potential negative effects of prison conditions"); Lobel*, supra* note 264, at 199-20 (discussing the "extensive historical evidence, social science and clinical research, and empirical and 'obvious' observations that prolonged solitary confinement causes substantial psychological harm to a significant percentage of prisoners exposed to such conditions" weighed by courts). *But see* Ruiz v. Johnson 37 F. Supp. 2d 855, 914-15 (S.D. Tex. 1999) (finding deliberate indifference "to a systemic pattern of extreme social isolation and reduced environmental stimulation" in violation of the Eighth Amendment by the Texas Department of Correctional Justice), *rev'd sub nom.* in part on other grounds, Ruiz v. United States, 243 F.3d 941 (5th Cir. 2001).

[266] Madrid v. Gomez, 889 F. Supp. 1146, 1265 (N.D. Cal. 1995).

[267] *Id.*

[268] Brown v. Plata, 131 S. Ct. 1910, 1928-29 (2011). Justice Kennedy wrote that "courts . . . must not shrink from their obligation to "enforce the constitutional rights of all 'persons,' including prisoners." *Id.* at 1928 (quoting *Cruz v. Beto,* 405 U.S. 319, 321 (1972) *(per curiam*)). He continued, adding that "[c]ourts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration. *Id.* at 1928-29.

[269] *Id.* at 1928 ("Courts must be sensitive to the State's interest in punishment, deterrence, and rehabilitation, as well as the need for deference to experienced and expert prison administrators faced with the difficult and dangerous task of housing large numbers of convicted criminals.")

[270] 18 U.S.C. § 4042(a)(1).

provid[ing] for the safekeeping, care, and subsistence of all persons . . . convicted of offenses against the United States."[271] Finally, the legislature directed prisons be planned in a way that facilitated the classification and segregation of prisoners based on their offenses, their character and mental condition, "and such other factors as should be considered in providing an individualized system of discipline, care, and treatment of the persons committed to such institutions."[272] Thus, specific requirements for conditions of confinement and the imposition of segregated housing are a matter of federal administrative law and BOP policy.[273]

BOP operates a variety of segregated housing units, including SHUs,[274] which "help ensure the safety, security, and orderly operation of correctional facilities, and protect the public by providing alternative housing assignments for inmates removed from the general population."[275] SHUs house prisoners in administrative detention status and disciplinary segregation status.[276] As prisoners experience some variation in restrictions based on their status,[277] a brief discussion of the statuses places the discussion of the guidelines for conditions of confinement that follows in context. Also, the number of reasons for placement in the SHU and variation in the duration of placements provides a sense of the mixed SHU population.

In addition to reasons related to classification or holdover status, prisoners may be administratively removed from general population when (1) under investigation for or waiting for hearing on a possible BOP regulation or criminal law violation, (2) pending transfer, (3) for protection at the prisoner's request or following staff determination, and (4) after disciplinary segregation if "return to general population would threaten the safety, security, and orderly operation of a correctional facility, or public safety."[278] Prisoners "may be placed in disciplinary segregation status only by the [Discipline Hearing Officer] as a disciplinary

---

[271] 18 U.S.C. § 4042(a)(2).
[272] 18 U.S. C. § 4081.
[273] *See, e.g.*, 28 C.F.R. § 541.31 (outlining regulations for conditions of confinement in the SHU); U.S. DEPT. JUSTICE, BUREAU OF PRISONS, PROGRAM STATEMENT 5270.10, SPECIAL HOUSING UNITS (Jul. 29.2011). The BOP's policies are used to provide an initial comparison point with South African policies. Some form of segregation from the general population is used in every jurisdiction in the United States. Hope Metcalf et al., LIMAN PUBLIC INTEREST PROGRAM AT YALE LAW SCHOOL, ADMINISTRATIVE SEGREGATION, DEGREES OF ISOLATION, AND INCARCERATION: A NATIONAL OVERVIEW OF STATE AND FEDERAL CORRECTIONAL POLICIES 1 (Jun. 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2286861. Metcalf's review of policies from forty-six states and the federal government revealed wide variation in the degree of detail concerning requirements for administrative segregated housing conditions of confinement. *Id.* at 17. Among other research agendas, Metcalf urges case studies concerning actual conditions of confinement. *Id.* at 22.
[274] GAO-13-429 at 2, 9. provides some detail for additional programs including Special Management Units and programs operated by the Administrative Maximum (ADX) facility in Florence, Colorado such as Control Unit, Special Security Unit, Step Down Units, and General Population Units each of which involve some degree of separation from other prisoners. *Id. See also* C.F.R. §§ 541.40-.50 (providing regulations related to Control Unit Programs); BOP PROGRAM STATEMENT P5217.01, SPECIAL MANAGEMENT UNITS (Nov. 19, 2008); BOP PROGRAM STATEMENT 5212.07, CONTROL UNIT PROGRAMS (Feb. 20, 2001).
[275] 28 C.F.R. §§ 541.20-.33; BOP PROGRAM STATEMENT P5270.10 ¶ 2, SPECIAL HOUSING UNITS (Aug. 1, 2011) [hereinafter *BOP PS P5270.10*]. BOP program statements or policies restate federal regulations verbatim adding BOP policy notes.
[276] 28 C.F.R. § 541.22; *BOP PS P5270.10*, *supra* note 275, ¶ 3.
[277] 28 C.F.R. § 541.31; *BOP PS P5270.10*, *supra* note 275, ¶ 12.
[278] 18 C.F.R. § 541.23; *BOP PS P5270.10*, *supra* note 275, ¶ 4.

sanction."[279] Within seven continuous calendar days of placement in the SHU, a status review hearing is held.[280] Thereafter, the prisoner's records are reviewed, without hearing, every seven continuous calendar days.[281] Prisoners receive formal hearings after every thirty continuous calendar days.[282]

Duration of a prisoner's SHU placement can vary widely. Prisoners are "released from administrative detention status when the reasons for [their] placement no longer exist."[283] By contrast, disciplinary segregation status ends once the imposed sanction, which could range from three months for a moderate-level offense to eighteen months for a second greatest-severity-level offense within twenty-four months, is complete.[284]

Federal regulation and BOP policy promise prisoners "[y]our living conditions in the SHU will meet or exceed standards for healthy and humane treatment" and delineate specific conditions, some of which depend on the prisoners' status.[285] The requirements for living quarters, clothing, hygiene, food service, exercise, medical and mental health care, correspondence, telephone use, and visiting apply equally to prisoners in administrative detention and disciplinary segregation. On the other hand, the requirements for personal property and programming activities vary.

4. Comparison of Standards for the Use of Segregation

While there are some differences, the international, South African, and United States standards for the use of segregation reflect respect for human dignity. The international standards set the tone, calling for prisoners to be "treated with humanity and with respect for the inherent dignity of the human person,"[286] and prohibiting "cruel, inhuman or degrading treatment or punishment."[287] Likewise, section 10 of the South African Constitution secures every person's "inherent

---

[279] 18 C.F.R. § 541.24; *BOP PS P5270.10*, *supra* note 275, ¶ 5. Although not considered disciplinary segregation status, a prisoner in administrative detention might be further restricted, including removal to an area set aside to disciplinary segregation pending hearing before a DHO if the Warden determines the prisoner is causing a serious disruption, cannot be controlled in administrative detention, or requires mental or physical treatment but, on the advice of health personnel, does not require hospitalization or cannot be hospitalized due to security concerns. *BOP PS P5270.10*, *supra* note 275, ¶ 3. Such status is reviewed every five days. *Id.*

[280] 28 C.F.R. § 541.26(b); *BOP PS P5270.10*, *supra* note 275, ¶ 7. Administrative detention status also receives earlier review within three workdays of admission. 28 C.F.R. § 541.26(a); *BOP PS P5270.10*, *supra* note 275, ¶ 7. Protection cases receive a staff investigation and hearing within seven calendar days. 28 C.F.R. § 541.28(a)-(b); *BOP PS P5270.10*, *supra* note 275, ¶ 9. Prisoners placed as a protected case can also request a hearing at any time. 28 C.F.R. § 541.28(b); *BOP PS P5270.10*, *supra* note 275, ¶ 9.

[281] 28 C.F.R. § 541.26(b); *BOP PS P5270.10*, *supra* note 275, ¶ 7.

[282] 28 C.F.R. § 541.26(c); *BOP PS P5270.10*, *supra* note 275, ¶ 7. Prisoners may also challenge their placement by submitting a grievance through the Administrative Remedy Program. 28 C.F.R. § 541.26(d); *BOP PS P5270.10*, *supra* note 275, ¶ 7.

[283] 28 C.F.R. § 541.33(a); *BOP PS P5270.10*, *supra* note 275, ¶ 14.

[284] 28 C.F.R. § 541.3, Table 1, 2; 28 C.F.R. § 541.33(b); BOP PROGRAM STATEMENT P5217.0, SPECIAL MANAGEMENT UNITS Table 1, 2 (Nov. 19, 2008) [hereinafter *BOP P5217.0*].

[285] 28 C.F.R. § 541.31; *BOP PS P5270.10*, *supra* note 275, ¶ 12.

[286] *Civil & Political Rights*, *supra* note 148, art. 10(1).

[287] *Id.* art 7.

dignity and the right to have their dignity respected and protected."[288] Section 12 further secures every person's right "not to be treated or punished in a cruel, inhuman, or degrading way."[289] While the United States Constitution does not expressly protect human dignity, the United States Supreme Court has recognized that human dignity is the basic concept[290] underlying the Eighth Amendment's prohibition against "cruel and unusual punishments."[291]

Although international standards and section 10 speak directly to the *treatment* of prisoners, the Eighth Amendment speaks only to punishment. The United States Supreme Court has, nonetheless, interpreted the Eighth Amendment to require the government to require "humane conditions of confinement."[292] Both South Africa and the United States have recognized that while conditions must be humane, they need not be lux.[293] Segregated housing must comply with the rights provided in Section 35(2)(e) in South Africa and the Eighth Amendment's prohibition on the "denial of 'the minimal civilized measure of life's necessities'"[294] in the United States. According to the United States Supreme Court, those life necessities include accommodation, nutrition, and medical care, which are also explicitly enumerated in section 35(2)(e).[295]

The South African Constitution expressly provides for reading material,[296] and communication and visits with spouses, next of kin, religious advisors, and medical providers.[297] Although in the United States interference with such rights would typically be considered under the First Amendment's prohibition against "abridging the freedom of speech,"[298] a prisoner might raise a claim under the Eighth Amendment if the extent and duration of the restriction sufficiently impacted the conditions of confinement.[299]

---

[288] S. AFR. CONST. § 10.
[289] *Id.* § 12(1)(e).
[290] *Brown*, 131 S. Ct. at 1928.
[291] U.S. CONST. amend. VIII.
[292] *Farmer*, 511 U.S. at 832.
[293] *Compare Balfour Address*, *supra* note 73, *with Rhodes*, 452 U.S. at 347.
[294] *Farmer*, 511 U.S. at 834 (quoting *Rhodes*, 452 U.S. at 347).
[295] *Id.* at 832; S. AFR. CONST. § 35(2)(e).
[296] S. AFR. CONST. § 35(2)(e).
[297] *Id.* § 35(2)(f).
[298] U.S. CONST. amend. I. Reconciling the First Amendment rights retained by a prisoner with the deference owed the judgment of corrections officials charged with administering prisons, the United States Supreme Court has found that regulations and practices that burden a prisoner's freedom of speech are nonetheless permissible if they are "'reasonably related' to legitimate penological interests." Beard v. Banks, 548 U.S. 521, 528 (2006) (quoting Turner v. Safley 482 U.S. 78, 93 (1987)). When determining reasonableness, the courts consider four factors identified in *Turner*. *Id.* "First, is there a 'valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it?'" *Id.* at 529 (quoting *Turner*, 482 U.S. at 89). "Second, are there 'alternative means of exercising the right that remain open to prison inmates?'" *Id.* (quoting *Turner*, 482 U.S. at 90). "Third, what 'impact' will 'accommodation of the asserted constitutional right . . . have on guards and other inmates, and on the allocation of prison resources generally?'" *Id.* (quoting *Turner*, 482 U.S. at 90). "And, fourth, are 'ready alternatives' for furthering the governmental interest available?" *Id.* (quoting *Turner*, 482 U.S. at 90).
[299] Overton v. Bazzetta, 539 U.S. 126, 136-37 (2003) (finding a two-year disciplinary restriction on visitation, except by legal counsel or clergy, insufficient to support an Eighth Amendment claim, but noting permanent, longer, or indefinite duration "would present different considerations").

Two differences in the South African and United States standards bear consideration. First, the United States Supreme Court has interpreted the Eighth Amendment's use of the word "punishments" to require consideration of the mental state of the party responsible for a prison condition and that the mental state rise to the level of "deliberate indifference."[300] South Africa's Constitution, on the other hand, extends to treatment and requires no inquiry into subjective mental state.[301] As a result, violations may be easier to establish in South Africa. Second, section 36 permits limitation of entrenched rights "in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors."[302] In the United States, a prisoners' Eighth Amendment right is not subject to a reasonableness limitation.[303] However, the requirement that the limitation be justifiable based on human dignity suggests that such limitations may be narrowly construed.[304]

Against the backdrop of the commitment to human dignity found in these general standards, guidelines in South Africa, the United States, and internationally permit the use of segregated housing. While the SMRTPs expressly prohibit disciplinary use of confinement in a dark cell, they permit disciplinary use of close or solitary confinement or "any other punishment that may be prejudicial to the physical or mental health of a prisoner" upon medical examination and finding that a prisoner is fit to withstand it.[305] While the SMRTPs provide that disciplinary measures should impose "no more restriction than is necessary for safe custody and well-ordered community life,"[306] they do not establish a limit on the duration of solitary confinement.[307]

By comparison, South Africa has abolished "solitary confinement" but continues to permit the disciplinary use of segregation.[308] Consistent with the SMRTPs, South Africa limits the duration of segregation to "the minimum period . . . compatible with the purpose for which the inmate is segregated."[309] Loss of gratuity is limited to no more than two months, and restriction of amenities is limited to no more than forty-two days.[310] Likewise, the United States continues to

[300] *Farmer*, 511 U.S. at 838.
[301] *See* S. AFR. CONST. §§ 10, 12(1)(d)-(e), 35(2).
[302] *Id.* § 36(1). The relevant factors include "(a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose." *Id*.
[303] Johnson v. California, 543 U.S. 499, 511 (2005). Section 36(1) factors bear some similarity to the factors used to weigh a prisoner's claims under the First Amendment. *See supra* note 302. The United States Supreme Court has not used those factors in its Eighth Amendment analysis, "judg[ing] violations of that Amendment under the 'deliberate indifference' standard, rather than *Turner's* "reasonably related" standard." *Id.*
[304] *See* S. AFR. CONST. § 36(1).
[305] *SMRTP*, *supra* note 144, at Rules 31, 32.
[306] *SMRTP*, *supra* note 144, at Rule 70.
[307] *See SMRTP*, *supra* note 144, at Rule 32.
[308] *See* Correctional Services Act 111 of 1998 §§ 24(5)(d), 25.
[309] *Id.* § 30(8).
[310] Correctional Services Act 111 of 1998 §§ 24(5)(b)-(d).

permit the use of disciplinary segregation, and an inmate may be segregated for three to twenty-four months at a time.[311]

Given this ongoing use of disciplinary segregation, the respect for human dignity demonstrated by the guidelines for its use bears examination.

B. Guidelines for Conditions of Confinement in Segregation

Building on their respective standards of dignity and decency, the SMRTPs, South African law, and United States law have outlined detailed policies and regulations governing segregated inmates' (I) general accommodations and (II) contact with the community. Unless otherwise noted, these guidelines and regulations set the minimum standards for treatment of inmates, whether in segregation or the general population. Based on their classification, inmates may receive amenities and gratuities beyond what the regulations require. When placed in disciplinary segregation, these amenities and gratuities may be limited or withheld, but not beyond the minimums set by regulation. The following comparison suggests that compliance with these minimums could still produce solitary conditions of confinement.

Table: Requirements for Conditions of Confinement in Segregated Housing		
I. Accommodations		
A. Housing		
1. General Environmental Requirements		
a. SMRTP	b. South Africa	c. United States
Prisoners must be housed in quarters that meet health requirements[312] and provide both natural and artificial light.[313]	Cells must be large enough "to enable the inmate to move freely and sleep comfortably."[314] Cells must be ventilated in accordance with the National Building Regulations,[315] and must provide sufficient natural and artificial light for reading and writing.[316]	All SHU prisoners are to be provided "well-ventilated, adequately lighted, and appropriately heated" living quarters.[317]
2. Occupancy		
a. SMRTP	b. South Africa	c. United States

[311] 28 C.F.R. § 541.3, Table 1, 2; 28 C.F.R. § 541.33(b); *BOP P5217.0*, *supra* note 284, at Table 1, 2.
[312] *SMRTP*, *supra* note 144, at Rule 10. Accommodation must meet all health requirements, "due regard being paid to climatic conditions and particularly to cubic content of air, minimum floor space, lighting, heating and ventilation." *Id.* Additionally, sanitary facilities must allow prisoners to take care of needs when necessary and "in a clean and decent manner," *id.* at Rule 12, and each prisoner is entitled to a bath or shower at least once a week, or more frequently as appropriate for the climate, *id.* at Rule 13.
[313] *Id.* at Rule 11. All living quarters must have windows large enough to allow reading or work by natural light, and artificial light must be provided to allow reading and work to occur without damage to eyesight. *Id.*
[314] Government Notice (GN) R323/2012 § 3(2)(a).
[315] *Id.* § 3(2)(b).
[316] *Id.* § 3(2)(c). Once a month, a Correctional Medical Practitioner, environmental health officer, or registered nurse must inspect the correctional center and report any "problems concerning environmental health conditions and health related issues." *Id.* § 7(11).
[317] 28 C.F.R. § 541.31(a); *BOP PS P5270.10*, *supra* note 275, ¶ 12.

Prisoners must sleep in single cells where possible.[318]	Inmates may be housed in single or communal cells at the National Commissioner's discretion, depending on availability.[319]	Although the number of occupants for which a cell is designed is ordinarily not to be exceeded, the Warden can add "occupants so long as adequate standards can be maintained."[320]
3. Sanitation		
a. SMRTP	b. South Africa	c. United States
Inmates must be able "to comply with the needs of nature when necessary and in a clean and decent manner."[321] Bathing or showering at a temperature appropriate to the climate and as often "as necessary for general hygiene" given the season and region, "but at least once a week in a temperate climate."[322]	Sanitary facilities must be sufficient and accessible, and must include access to both hot and cold water.[323]	Living quarters must be "maintained in a sanitary condition."[324] SHU prisoners should "ordinarily have an opportunity to shower and shave at least three times per week [and] have access to hair care services as necessary."[325]
B. Clothing and Bedding		
a. SMRTP	b. South Africa	c. United States
Prisoners must be provided an outfit appropriate to the climate and good health.[326] Clothing shall be clean and in proper condition, and underclothing shall be	Inmates must be provided with a complete outfit of clothing,[329] and with a separate bed and bedding that meets hygienic requirements and is appropriate for climatic	SHU prisoners are to "receive adequate institution clothing, including footwear, . . . [and] necessary opportunities to exchange clothing and/or have it

[318] *SMRTP*, *supra* note 144, at Rule 9.
[319] Correctional Services Act 111 of 1998 § 7(2)(e). Correctional centers must offer in-patient hospital accommodation separately from general accommodation. Government Notice (GN) R323/2012 § 3(1). Hospital accommodation may be in single or communal cells. *Id.* If an inmate is hospitalized or removed to an institution for mental health treatment, the Head of the Correctional Centre must notify the inmate's next of kin. *Id.* § 7(6).
[320] 28 C.F.R. § 541.31(b); *BOP PS P5270.10*, *supra* note 275, ¶ 12. The United States Government Accounting Office (GAO) found that SHUs were mostly double-bunked, GAO-13-429, Figure 1, though at the Administrative Maximum facility (ADX) in Florence, Colorado SHU cells appear to be single-bed, *see* GAO-13-429, Figure 2 n.c.
[321] *SMRTP*, *supra* note 144, at Rule 12.
[322] *Id.* at Rule 13.
[323] Government Notice (GN) R323/2012 §§ 3(2)(d)(i)-(ii).
[324] 28 C.F.R. § 541.31(a); *BOP PS P5270.10*, *supra* note 275, ¶ 12.
[325] 28 C.F.R. § 541.31(f); *BOP PS P5270.10*, *supra* note 275, ¶ 12. The federal regulation relevant to bathing by the general population merely requires prisoners to adhere to institutional standards. 28 C.F.R. § 551.7. In addition, SHU inmates should "receive personal items necessary to maintain an acceptable level of personal hygiene, for example, toilet tissue, soap, toothbrush and cleanser, shaving utensils, etc." 28 C.F.R. § 541.31(f); *BOP PS P5270.10*, *supra* note 275, ¶ 12. As a general matter, federal regulation simply requires the Warden to make "those articles necessary for maintaining personal hygiene" available to prisoners. 28 C.F.R. § 551.6. According to regulation and policy, personal property for prisoners may limited, regardless of status, due to fire safety or sanitation. 28 C.F.R. § 541.31(h); *BOP PS P5270.10*, *supra* note 275, ¶ 12. Prisoners in administrative detention are "ordinarily permitted a reasonable amount of personal property and access to the commissary." 28 C.F.R. § 541.31(h)(1); *BOP PS P5270.10*, *supra* note 275, ¶ 12. BOP policy suggests the following property, not otherwise posing a security threat, is permitted:

> Bible, Koran, or other scriptures(1); Books, paperback(5); Eyeglasses, prescription(2); Legal material . . .; Magazine(3); Mail(10); Newspaper (1); Personal hygiene items(1 of each type) (no dental floss or razors); Photo album(25 photos); Authorized religious medals/headgear (e.g., kufi); Shoes, shower(1); Shoes, other (1); Snack foods without aluminum foil wrappers(5 individual packs); Soft drinks, powdered (1 container); Stationery/stamps (20 each); Wedding band (1); Radio with ear plugs (1); Watch(1).

[326] *SMRTP*, *supra* note 144, at Rule 17(1).

changed or washed as necessary for hygiene.[327] Each prisoner must be provided a separate bed, according to local or national standards, with bedding changed as necessary for cleanliness.[328]	conditions.[330]	washed."[331] Likewise, they are to be provided "a mattress, blankets, a pillow and linens," as well as "necessary opportunities to exchange linens."[332]
C. Food		
1. Nutritional Content of Meals		
a. SMRTP	b. South Africa	c. United States
Prisoners must be provided "with food of nutritional value adequate for health and strength, of wholesome quality and well prepared and served."[333]	Meals must be nutritionally balanced and contain a "minimum protein and energy content" based on the inmate's age and sex.[334]	Federal regulations provide that SHU prisoners "will receive nutritionally adequate meals."[335]
2. Frequency of Meals		
1. SMRTP	2. South Africa	3. United States
Meals must be provided at "the usual hours."[336] A prisoner must have access to drinking water "whenever he needs it."[337]	Meals must be provided every 4.5 to 6.5 hours, or at an interval of no more than fourteen hours between dinner and breakfast.[338]	BOP policy indicates that prisoners are normally served three meals corresponding to breakfast, lunch, and dinner times.[339] According to GAO, SHU prisoners eat each meal inside their cells.[340]
II. Contact with Community		
A. Exercise		
1. Frequency of Exercise		
a. SMRTP	b. South Africa	c. United States
At least one hour of daily exercise is required, and for those who do not	Inmates must be provided with a minimum of one hour of daily	All SHU prisoners are to "receive the opportunity to exercise

[329] Government Notice (GN) R323/2012 § 5(1).
[327] *Id.* at Rule 17(2).
[328] *Id.* at Rule 17(3).
[330] *Id.* § 3(2)(e)(i).
[331] 28 C.F.R. § 541.31(c); *BOP PS P5270.10*, *supra* note 275, ¶ 12.
[332] 28 C.F.R. § 541.31(d); *BOP PS P5270.10*, *supra* note 275, ¶ 12.
[333] *SMRTP*, *supra* note 144, at Rule 20(1).
[334] Correctional Services Act 111 of 1998 § 8(5); Government Notice (GN) R323/2012 §§ 4(1)-(2). The Correctional Medical Practitioner may vary the content of an inmate's meals "when such a variation is required for medical reasons." Correctional Services Act 111 of 1998 § 8(4).
[335] 28 C.F.R. § 541.31(e). BOP policy explicitly provides that "[f]ood will not be withheld, or the standard menu varied, as a disciplinary measure." BOP PROGRAM STATEMENT P4700.06, FOOD SERVICE MANUAL 30 (Sept. 13, 2011) [hereinafter *BOP P4700.06*]. Alternate menus may be served upon written explanation and authorization to prisoners who "use[] food products, Food Service items, or the feeding process itself in a manner that poses a threat to the safety, security, or good order of the institution, or to the inmate him/herself, other inmates, or staff." *Id.* Alternative meal service is discontinued after seven days unless new authorization is generated. *Id.*
[336] *SMRTP*, *supra* note 144, at Rule 20(1).
[337] *Id.* at Rule 20(2).
[338] Correctional Services Act 111 of 1998 § 8(5); Government Notice (GN) R323/2012 §§ 4(1)-(2). The Correctional Medical Practitioner may vary the frequency of an inmate's meals "when such a variation is required for medical reasons." Correctional Services Act 111 of 1998 § 8(4).
[339] *See BOP P4700.06*, supra note 335, at 29. The policy also affords SHU prisoner non-pork or no-flesh trays. *Id.* BOP policy explicitly provides that "[f]ood will not be withheld . . . as a disciplinary measure." *Id.* at 30.
[340] GAO-13-429, Figure 1.

work outdoors the exercise must be "in the open air."[341]	exercise, in the open air if the weather permits, and "must be given the opportunity to exercise sufficiently in order to remain healthy."[342]	outside [their] individual quarters at least five hours per week, ordinarily on different days in one-hour periods."[343] BOP policy provides outdoor exercise to the extent that weather and resources permit.[344]
2. Recreational Programs		
a. SMRTP	b. South Africa	b. United States
Access must be provided to "recreational and cultural activities for the benefit of the prisoners' health."[345]	Recreational activities must be provided "for the benefit of the mental and physical health of all inmates."[346]	"Loss of recreation privileges (exercise periods) may not be imposed" on SHU inmates.[347]
B. Work		
1. SMRTP	2. South Africa	3. United States
Prisoners who are able must work during the day.[348]	Inmates must also be employed in jobs that, as far as is practicable, "keep them active for a normal working day"[349] of no more than eight hours.[350]	Prisoners in the general population have the opportunity to work for pay.[351]

[341] *SMRTP*, *supra* note 144, at Rule 21.
[342] Correctional Services Act 111 of 1998 § 11. The Correctional Medical Practitioner must evaluate whether inmates who have requested or are receiving medical treatment are fit to exercise. Government Notice (GN) R323/2012 § 6(1). Other inmates may be deemed unfit to exercise at the discretion of the Correctional Medical Practitioner or a registered nurse. *Id.* § 6(2).
[343] 28 C.F.R. § 541.31(g); *BOP PS P5270.10*, *supra* note 275, ¶ 12.
[344] *BOP PS P5270.10*, *supra* note 275, ¶ 12. While "restriction or denial of exercise is not used as punishment," *id.* ¶ 12, the Warden can deny exercise for a week at a time to a prisoner whose exercise "threatens safety, security, and orderly operation of a correctional facility, or public safety." 28 C.F.R. § 541.31(g); *BOP PS P5270.10*, *supra* note 275, ¶ 12. According to BOP policy, staff members recommend restrictions to a supervisor who makes a written recommendation, including reasons for and a proposed extent of the restriction, to the Warden who makes the final decision. *Id.* ¶ 12.
[345] *SMRTP*, *supra* note 144, at Rule 78.
[346] Government Notice (GN) R323/2012 § 11.
[347] BOP PROGRAM STATEMENT 5270.09, INMATE DISCIPLINE PROGRAM (Aug. 1, 2011).
[348] *SMRTP*, *supra* note 144, at Rule 71. All physically and mentally fit prisoners must be required to work in a job in which they are actively employed for a normal working day, and where possible prisoners should be able to choose the type of work they would like to do. *Id.*
[349] Correctional Services Act 111 of 1998 § 40(1)(a). Inmates may be exempted from a day of work upon the order of the National Commissioner, Government Notice (GN) R323/2012 § 23(4), or may be excused from employment entirely if "the correctional medical practitioner or psychologist certifies in writing that he or she is physically or mentally unfit to perform such labour," Correctional Services Act 111 of 1998 § 37(1)(b). The employment should, as far as is practicable, be designed to provide inmates with skills for gainful employment on release, *id.* § 40(1)(b), "foster habits of industry," and support existing correctional development programs. *Id.* § 37(1)(b). To this end, corrections managers

> must, as far as it is possible, apply a management regime which consists of (a) good communication between correctional officials and inmates, which is understood by everyone; (b) team work; (c) direct, interactive supervision of inmates; . . . (e) needs-driven programmes for sentenced offenders in a structured day and correctional sentence plan; . . . [and] (g) a restorative, developmental and human rights approach to sentenced offenders.

Id. § 37(1A).
[350] Government Notice (GN) R323/2012 § 23(4).
[351] 28 C.F.R. 345.10 BOP policy is

> to provide work to all inmates . . . . Federal Prison Industries, Inc. (FPI) was established as a program to provide meaningful work for inmates. This work is designed to allow inmates the opportunity to acquire the knowledge, skills, and work habits which will be useful when released from the institution.

C. Educational Programs		
1. SMRTP	2. South Africa	3. United States
Access must be provided to continuing education.[352]	Inmates must receive access to educational and training programs[353] commensurate with their needs.	Prisoners in disciplinary segregation status may have their "participation in programming activities, e.g., educational programs . . . suspended."[354]
D. Access to Information		
1. SMRTP	2. South Africa	3. United States
Prisons must maintain a library stocked with instructional and recreational materials, and prisoners must be encouraged to make full use of it.[355] Additionally, prisoners must be kept informed of news via access to newspapers, radio, or similar means.[356]	Inmates must have access to reading material of their choice, whether from the correctional center library[357] or outside the correctional center,[358] unless the chosen material poses "a security risk or is not conducive to . . . rehabilitation."[359]	For prisoners in either administrative or disciplinary detention, the policy provides for "a reasonable amount of non-legal reading material, not to exceed five books per [prisoner] at any one time, on a circulating basis" and "the opportunity to possess religious scriptures of the inmates faith."[360]
E. Visitation		
1. In-Person Visits		
a. SMRTP	b. South Africa	c. United States
To "promote the best interests of his family and his own social rehabilitation," each prisoner must be "encouraged and assisted" to keep up and establish relationships with people or agencies outside the prison.[361] "Special attention" must be given to the "maintenance	To "encourage inmates to maintain contact with the community and enable them to stay abreast of current affairs,"[364] inmates must be allowed a minimum of one hour of supervised visitation a month, "in all circumstances."[365] Correctional officials must give "special	Regulation and policy generally "encourage[ ] visiting by family, friends, and community groups to maintain the morale of the inmate and to develop closer relationships between the inmate and family members of the community."[367] SHU prisoners retain visitation

Id.

[352] *SMRTP*, *supra* note 144, at Rule 77. All prisoners capable of profiting from further education must have access to further education. *Id.*

[353] Correctional Services Act 111 of 1998 § 41(1), (5); Government Notice (GN) R323/2012 §§ (2)(a), (f).

[354] 28 C.F.R. § 541.31(n); *BOP PS P5270.10*, *supra* note 275, ¶ 12. Prisoners in administrative detention status "will have access to programming activities to the extent safety, security, orderly operation of a correctional facility, or public safety are not jeopardized." *Id.* With regard to the general population, "[i]n consideration of inmate education, occupation, and leisure-time needs, the Bureau of Prisons affords inmates the opportunity to improve their knowledge and skills through academic, occupation and leisure-time activities." 28 C.F.R. 544.80. Prisoners have the opportunity to complete a variety of education programs including mandatory literacy and English as second language programs. *See generally* BOP PROGRAM STATEMENT 5300.21, EDUCATION, TRAINING, AND LEISURE TIME PROGRAM STANDARDS (Feb. 18 2002) (describing program objectives, standards, and characteristics); *see also* BOP PROGRAM STATEMENT 5350.28, LITERACY PROGRAM (GED STANDARD) (Dec. 1, 2003); BOP PROGRAM STATEMENT 5350.24, ENGLISH-AS-A-SECOND LANGUAGE PROGRAM (ESL) (Jul. 24, 1997).

[355] *SMRTP*, *supra* note 144, at Rule 40.

[356] *Id.* at Rule 39.

[357] Government Notice (GN) R323/2012 § 13(1).

[358] *Id.* § 13(2).

[359] Correctional Services Act 111 of 1998 § 18(1).

[360] *BOP PS P5270.10*, *supra* note 275, ¶ 12. Prisoners in disciplinary segregation will have their property impounded "with the exception of limited reading/writing materials, and religious articles. Also, [their] commissary privileges may be limited." 28 C.F.R. § 541.31(h)(2); *BOP PS P5270.10*, *supra* note 275, ¶ 12.

[361] *SMRTP*, *supra* note 144, at Rule 80.

and improvement" of prisoners' relationships with their family members.[362] Prisoners must be allowed to communicate with family and "reputable friends" at "regular intervals," under supervision, by either correspondence or in person.[363]	attention to the development and maintenance of good family relationships."[366]	rights unless they violate visiting guidelines or have acted in a way that would reasonably indicate a threat to the order or security of the visiting room.[368] Regulation and policy afford all prisoners "a minimum of four hours of visiting time per month" and allow the Warden discretion to establish guidelines.[369]
2. Telephone Contact		
a. SMRTP	b. South Africa	c. United States
No express provisions.	No express provisions.	Prisoners must have "the opportunity to maintain family and community contact via the telephone consistent with institution and community safety."[370] SHU prisoners, like all prisoners, are permitted to make at least one telephone call each month unless otherwise provided disciplinary sanction.[371]
3. Written Correspondence		
a. SMRTP	b. South Africa	c. United States
Prisoners must be allowed to communicate with family and "reputable friends" at "regular	No express provisions.	Segregated prisoners are to be afforded "full correspondence privileges unless placed on

[364] Correctional Services Act 111 of 1998 § 13(1).
[365] *Id.* § 13(3).
[367] 28 C.F.R. § 540.40; BOP PROGRAM STATEMENT P5267.08, VISITING REGULATIONS 2 (Jan. 24, 2008). Under BOP policy, in-person visits are merely supplemental to written correspondence: "Maintaining pro-social/legal contact with family and community ties is a valuable tool in the overall correctional process. With this objective in mind, the Bureau provides inmates with several means of maintaining such contacts. Primary among these is written correspondence, supplemented by telephone and visiting privileges." BOP PROGRAM STATEMENT P5264.08, INMATE TELEPHONE REGULATIONS 1-2 (Jan. 24, 2008) [hereinafter *BOP P5264.08*].
[362] *Id.* at Rule 79.
[363] *Id.* at Rule 37. During visits and generally, a prisoner must not be "subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation." *Civil & Political Rights*, *supra* note 148, art. 17. All prisoners have "the right to protection of the law against such interference or attacks." *Id.*
[366] Government Notice (GN) R323/2012 § 8(1). "[A]ny important information regarding [the] inmate's family, relatives, or friends" that comes to their attention must be conveyed to the inmate as quickly as is practicable. *Id*. § 8(2).
[368] 28 C.F.R. § 540.50(c); BOP PROGRAM STATEMENT P5267.08, VISITING REGULATIONS 11 (May 11, 2006) [hereinafter *BOP P5267.08*]. Loss of privileges for other reasons would require a hearing before the DHO. 28 C.F.R. § 540.50(c); P5267.08 at 11. The Warden may temporarily restrict or suspend privileges based on a "reasonable suspicion that the inmate has acted in a way that would indicate a threat to the institution's good order or security." P5267.08 at 1. The temporary loss of privilege should ordinarily last just long enough to investigate and begin the discipline process. *Id.*
[369] 28 C.F.R. § 540.43; *BOP P5267.08*, *supra* note 368, at 5. It appears that SHU prisoners at ADX are entitled to receive five visits per month with the maximum duration for one visit of seven hours. BOP Administrative Maximum Facility, INSTITUTIONAL SUPPLEMENT FLM 5267.08C, VISITING PROCEDURES 2 (May 7, 2014).
[370] *BOP P5264.08*, *supra* note 367, at 2.
[371] 28 C.F.R. § 540.100; *BOP P5264.08*, *supra* note 367, at 5. In addition, the Warden may temporarily restrict or suspend telephone privileges "when there is reasonable suspicion that the inmate has acted in a way that would indicate a threat to the institution's good order or security." *BOP P5264.08*, *supra* note 367, at 5.

intervals," under supervision, by correspondence.[372]		restricted general correspondence."[373]
F. Access to Religious Services		
1. SMRTP	2. South Africa	3. United States
Prisoners must not be refused access to a "qualified representative of any religion,"[374] and must be allowed to attend religious services within the prison, so far as practicable.[375]	An inmate may not be denied the right to possess religious literature or to attend religious services inside the corrections center.[376] An inmate must have "the opportunity, under such supervision as may be necessary, of communicating with and being visited by at least their . . . chosen religious counsellors."[377]	Inmates "have the right to freedom of religious affiliation and voluntary worship" and "the responsibility to recognize and respect the rights of others in this regard."[378] An inmate may request pastoral care or counseling from a prison chaplain "through group programs and individual services."[379]
G. Access to Legal Services		
1. SMRTP	2. South Africa	3. United States
No express provisions for sentenced prisoners.[380]	Social work[381] and legal[382] services must be made available to prisoners.	Inmates "have the right to legal counsel from an attorney of [their] choice by interviews and attorney correspondence," and "to participate in the use of law library reference materials to assist . . . in resolving legal problems."[383] Inmates "also have the right to receive help when it is available through a legal assistance program."[384]

[372] *SMRTP*, *supra* note 144, at Rule 37.
[373] 28 C.F.R. § 540.16(b); BOP PROGRAM STATEMENT P5265.14, CORRESPONDENCE 13 (Apr. 5, 2011). The procedure for restricted general correspondence applies to SHU and non-SHU prisoners. *See* 28 C.F.R. § 540.15; P5265.14 at 10-12. Among the factors considered is whether the prisoner is "a security risk." 28 C.F.R. § 540.15(a)(3); P5265.14 at 10-11. Even on restricted general correspondence, prisoners may still correspond with their spouses, parents, children and siblings, as well as former business associates, and request others be placed on their approved correspondence list. 28 C.F.R. § 540.15(d); P5265.14 at 12. This correspondence may be restricted to preserve security or order. 28 C.F.R. §§ 540.15(d)(1), (2); P5265.14 at 12. Correspondence with former business associates may also be restricted if it "could reasonably be expected to result in criminal activity." 28 C.F.R. § 540.15(d)(3); P5265.14 at 12.
[374] *SMRTP*, *supra* note 144, at Rule 41(3).
[375] *SMRTP*, *supra* note 144, at Rule 42. Prisoners also must be allowed to possess religious books when practicable. *Id.*
[376] Correctional Services Act 111 of 1998 § 14(2).
[377] Correctional Services Act 111 of 1998 § 13(2). Further, "[t]he National Commissioner may allow . . . religious denominations or organisations to interact with sentenced inmates in order to facilitate the rehabilitation and integration of the inmates into the community." *Id.* § 13(7)(a). These statutes accord with Constitutional section 35(2)(f), which generally provides for religious visitation for prisoners. *See* S. AFR. CONST. § 35(2)(f).
[378] BOP PROGRAM STATEMENT P5360.09, RELIGIOUS BELIEFS AND PRACTICES (Dec. 31, 2004) [hereinafter *BOP P5360.09*]. However, "[w]hen considered necessary for the security or good order of the institution, the warden may limit attendance at or discontinue a religious activity." *Id.* ¶ 7.
[379] *Id.* ¶ 10. "Pastoral care and counseling from representatives in the community are available" subject to certain limitations. *Id.*
[380] *See SMRTP*, *supra* note 144, at Rule 93 (providing prisoners under arrest or awaiting trial with visits with legal advisers).
[381] Government Notice (GN) R323/2012 §§ 10(1)(a)-(b); *see also* Correctional Services Act 111 of 1998 § 41(3).
[382] Government Notice (GN) R323/2012 § 12(1).
[383] BOP PROGRAM STATEMENT P1315.07, INMATE LEGAL ACTIVITIES (Mar. 21, 2010) [hereinafter *BOP P1315.07*].
[384] *Id.*

H. Access to Health Services		
1. General Health Care		
a. SMRTP	b. South Africa	c. United States
All prisons must make available a "qualified medical officer who should have some knowledge of psychiatry."[385]	Inmates are entitled to "adequate medical treatment"[386] and "primary healthcare . . . at least on the same level as that rendered by the State to members of the community."[387] Additionally, all inmates have the right to "social and psychological services [that] develop and support [them] by promoting their social functioning and mental health."[388]	Under BOP policy, health services units are required to "have procedures and control systems to ensure continuity of medical and psychiatric care and treatment for inmates housed in SHUs."[389] Emergency medical and mental health care are required to be made available at all times.[390]
2. Frequency of Evaluation		
a. SMRTP	b. South Africa	c. United States
The medical officer must visit all prisoners who are sick, complain of illness, or "to whom his attention is specially directed."[391]	All sick inmates, including those with mental illnesses, must receive attention from a registered nurse "as often as is necessary, but at least once a day."[392] An inmate who is segregated for disciplinary purposes must "have his or her health assessed by a registered nurse, psychologist or a correctional medical practitioner at least once a day."[393] Such an inmate also "must be visited by a correctional official at least once every four hours and by the Head of the Correctional Centre at least once a day."[394]	Regulation and policy require a health services staff member to visit prisoners in the SHU daily to provide necessary care.[395] In addition to these daily visits, prisoners receive an examination by mental health staff, including a personal interview, after every thirty calendar days of continuous housing in SHU.[396] Prison staff must visit SHU inmates daily, and "within a reasonable time" in the event of an inmate request.[397] Additionally, "[a] Lieutenant must visit the SHU during each shift to ensure all procedures are

[385] *SMRTP*, *supra* note 144, at Rule 22(1).
[386] Correctional Services Act 111 of 1998 § 12(2)(a).
[387] Government Notice (GN) R323/2012 § 7(1). Such health care must be provided "in order to allow every inmate to lead a healthy life." Correctional Services Act 111 of 1998 § 12(1). "'[C]are' means the provision of services and programmes aimed at enhancing and maintaining the social, mental, spiritual, health and physical well-being of inmates." *Id.* § 1. Medical and dental practitioners must be provided at every correctional center. Government Notice (GN) R323/2012 § 7(2).
[388] Correctional Services Act 111 of 1998 §§ 41(3), (5). The Head of the Correctional Centre must make psychological services available when the need for them arises, or an inmate may arrange to see the psychologist of his choice at his own expense. Government Notice (GN) R323/2012 § 10(3)(b).
[389] BOP PROGRAM STATEMENT P6031.04, PATIENT CARE 17 (Jun. 3, 2014). All prisoners, housed inside and outside the SHU, who receive a disciplinary "incident report and who are psychiatric inpatients, or whose mental status is questionable, will be referred to a psychiatrist or psychologist for an assessment regarding competency and responsibility." BOP PROGRAM STATEMENT P6340.01, PSYCHIATRIC SERVICES 10 (Jan. 14, 2005). BOP policy recommends that centers providing inpatient care establish separate SHUs for prisoners who have a mental illness or disorder. It also recommends that centers not providing psychiatric care "identify a specific area in SHU where inmates suffering from active symptoms of a mental illness and who require SHU placement can be housed." P6340.01 at 10. The policy notes that such prisoners "are at increased risk of behaviors of self-harm or harm towards others" and encourages selecting an area that "facilitate[s] frequent observation by and contact with staff." *Id.*
[390] 28 C.F.R. § 541.32(a)-(b); *BOP PS P5270.10*, *supra* note 275, ¶ 13.
[391] *SMRTP*, *supra* note 144, at Rule 25(1).
[392] Government Notice (GN) R323/2012 § 7(4).
[393] Correctional Services Act 111 of 1998 § 30(2)(a).
[394] *Id.*

		followed."[398]
3. Requirements for Reporting		
a. SMRTP	b. South Africa	c. United States
The medical officer must report to the prison director "whenever he considers that a prisoner's physical or mental health has been or will be injuriously affected by continued imprisonment or by any condition of imprisonment."[399]	If a medical official determines that segregation "poses a threat to the health of the inmate," its use must be discontinued.[400]	BOP policy requires notification to health services units when a prisoner is moved to SHU.[401] BOP policy further requires a written report addressing a prisoners' "adjustment to surroundings" and "threat the [prisoner] poses to self, staff, and other inmates."[402]

Although terminology varies, as discussed in Part II, it appears that minimums set by SMRTPs, South African law, and United States law could allow for segregated housing that falls within Dr. Grassian's definition of solitary confinement as "the confinement of a prisoner alone in a cell for all, or nearly all, of the day with minimal environmental stimulation and minimal opportunity for social interaction."[403] Single-celling is permissible under the SMRTPs, South African law, and United States law,[404] and housing compliant with the minimum requirements could provide for minimal stimulation and interaction.

For example, requirements for hygiene, nutrition, and exercise can be met with minimal out-of-cell time and little or no opportunity for interaction. The rules set some minimum frequency for bathing and for eating meals, but they do not require that inmates do so out of their cells or in ways that allow for social interaction.[405] With regard to exercise, Standard Minimum Rule 21 requires at least one hour of daily exercise, and that it be "in the open air" for those who do not work outdoors.[406] Standard Minimum Rule 21 does not require exercise with other

[395] 28 C.F.R. § 541.32(a); *BOP PS P5270.10*, *supra* note 275, ¶ 13. BOP policy also permits prisoners to continue to take prescribed medications. *BOP PS P5270.10*, *supra* note 275, ¶ 13.
[396] 28 C.F.R. § 541.32(b); *BOP PS P5270.10*, *supra* note 275, ¶ 13.
[397] *BOP PS P5270.10*, *supra* note 275, ¶ 12.
[398] *Id.*
[399] *SMRTP*, *supra* note 144, at Rule 25(2).
[400] Correctional Services Act 111 of 1998 § 30(2)(b).
[401] *Id.*
[402] *BOP PS P5270.10*, *supra* note 275, ¶ 13.
[403] *Grassian*, *supra* note 10, at 327.
[404] *See SMRTP*, *supra* note 144, at Rule 9; Correctional Services Act 111 of 1998 § 7(2)(e); 28 C.F.R. § 541.31(b); *BOP PS P5270.10*, *supra* note 275, ¶ 12.
[405] *SMRTP*, *supra* note 144, at Rule 13 (requiring bathing as appropriate given the climate with a minimum of one bath per week); Government Notice (GN) R323/2012 §§ 3(2)(d)(i)-(ii) (providing South African inmates with access to hot and cold water without setting a minimum frequency for bathing); 28 C.F.R. § 541.31(f) (providing that BOP SHU inmates ordinarily bathe at least three times per week) ; *BOP PS P5270.10*, *supra* note 275, ¶ 12 (same); *SMRTP*, *supra* note 144, at Rule 20(1) (requiring meals at "the usual hours"); Correctional Services Act 111 of 1998 § 8(5) (providing for meals at regular intervals); BOP PROGRAM STATEMENT P4700.06, FOOD SERVICE MANUAL 29 (Sept. 13, 2011) (providing for three meals served at breakfast, lunch, and dinner time).
[406] *SMRTP*, *supra* note 144, at Rule 21.

inmates.[407] While South Africa has the same requirement,[408] the United States' standard is lower, requiring just "five hours per week, ordinarily on different days in one-hour periods," and outdoors as weather and resources permit.[409] Neither South Africa nor the United States requires opportunities for social interaction as part of the provision of exercise.[410]

While the SMRTPs require recreational programs, work opportunities, and educational programs, they do not appear to require that those programs and opportunities be provided in a way that allows for social interaction.[411] South African law provides for programs and opportunities similar to those afforded by the SMRTPs without any requirement for social interaction.[412] Likewise, United States policy does not require social interaction.[413] United States policy further provides that inmates in disciplinary segregation may have their "participation in programing activities, e.g., educational programs . . . suspended."[414]

With regard to contact outside the prison, the SMRTPs provide that each prisoner must be "encouraged and assisted" to keep up and establish relationships with people or agencies outside the prison."[415] Similarly, South African law encourages contact, particularly the development and maintenance of family relationships.[416] Likewise, United States regulations and policy "encourage[] visiting by family, friends and community groups to maintain the morale of the inmate and to develop closer relationships between the inmate and family members of the community."[417] The SMRTPs require that prisoners be allowed to communicate with family and "reputable friends" at "regular intervals," under supervision, by either correspondence or in person.[418] The SMRTPs do not address telephone privileges.[419] South Africa sets one hour of supervised visitation per month as the minimum threshold, but has no express provisions regarding correspondence or telephone privileges.[420] The United States allows BOP inmates housed in SHUs four hours of supervised visitation per month.[421] However, their visitation privileges may be restricted for security reasons.[422] BOP inmates housed in SHUs have "full correspondence privileges unless placed on restricted general

[407] *Id.*
[408] Correctional Services Act 111 of 1998 § 11.
[409] 28 C.F.R. § 541.31(g); *BOP PS P5270.10*, *supra* note 275, ¶ 12.
[410] *See* Correctional Services Act 111 of 1998 § 11; 28 C.F.R. § 541.31(g); *BOP PS P5270.10*, *supra* note 275, ¶ 12.
[411] *See SMRTP*, *supra* note 144, at Rule 78 (providing for recreational and cultural activities); *id.* at Rule 71 (requiring prisoners to be actively employed for a normal working day); *id*. at Rule 77 (providing access to education).
[412] *See* Government Notice (GN) R323/2012 § 11 (recreation); *id.* § 40(1)(a) (work); *id.* §§ 41(1), (5) (education); *id.* §§ 2(a), (f) (same).
[413] *See BOP PS P5270.10*, *supra* note 275, ¶ 12; 28 C.F.R. 345.10 (providing for work opportunities for BOP inmates).
[414] 28 C.F.R. § 541.31(n); *BOP PS P5270.10*, *supra* note 275, ¶ 12.
[415] *SMRTP*, *supra* note 144, at Rule 80.
[416] Correctional Services Act 111 of 1998 § 13(1); Government Notice (GN) R323/2012 § 8(1).
[417] 28 C.F.R. § 540.40; *BOP P5267.08*, *supra* note 368.
[418] *SMRTP*, *supra* note 144, at Rule 37.
[419] *See SMRTP*, *supra* note 144.
[420] Correctional Services Act 111 of 1998 § 13(3).
[421] 28 C.F.R. § 540.50(c); *BOP P5267.08*, *supra* note 368, at 11; 28 C.F.R. § 540.43; *BOP P5267.08*, *supra* note 368, at 5.
[422] 28 C.F.R. § 540.50(c); *BOP P5267.08*, *supra* note 368, at 1, 11.

correspondence."[423] They are also permitted, like all inmates, at least one telephone call each month, though this can be further restricted by disciplinary sanction.[424]

In addition to general contacts with family and the community,[425] the SMRTPs prohibit denial of access to a "qualified representative of any religion."[426] In both South Africa and the United States, such a representative may be from either inside or outside the correctional center.[427] In South Africa, visitation with a religious representative may be generally limited to the extent justifiable under section 36 of the Constitution[428] or to the extent "reasonably necessary to ensure the security of the community, the safety of correctional officials and the safe custody of all inmates."[429] In the United States, attendance at religious services may be limited at a warden's discretion "[w]hen considered necessary for the security or good order of the institution."[430] Further, neither country's regulations specify whether religious visitation and services must occur in person or may instead take place via video conference or other technological means,[431] which would provide less social interaction than in-person visitation and fellowship.

Finally, the SMRTPs require access to medical attention for all prisoners and require the medical officer to notify the prison director when "a prisoner's physical or mental health has been or will be injuriously affected by continued imprisonment or by any condition of imprisonment.[432] Likewise, in both South Africa and the United States, segregated inmates are visited by medical providers at least once a day.[433] In addition, a correctional official must visit segregated prisoners in South Africa once every four hours, and the Head of the Correctional Centre must visit at least once a day.[434] Similarly, in the United States, BOP inmates held in the SHU are directly supervised by a unit officer, and visited each day by "one or more responsible officers the Warden designates."[435] The policies do not specify the duration or the extent of any interaction during these visits.[436]

In sum, the minimum requirements related to segregated housing conditions may permit such limited environmental stimulation and opportunity for social

---

[423] 28 C.F.R. § 540.16(b); BOP PROGRAM STATEMENT PS P5265.14, CORRESPONDENCE 13 (Apr. 5, 2011) [hereinafter *BOP P5265.14*].
[424] 28 C.F.R. § 540.16(b); *BOP P5265.14*, *supra* note 423.
[425] Of note, although the SMRTPs do not address access to legal services, both South Africa and the U.S. provide a right of access to prisoners, which might afford some limited opportunity for interaction. Government Notice (GN) R323/2012 § 12(1); *BOP P1315.07*, *supra* note 383.
[426] *SMRTP*, *supra* note 144, at Rule 41(3).
[427] Correctional Services Act 111 of 1998 § 13(2); *BOP P5360.09*, *supra* note 378, ¶ 10.
[428] S. AFR. CONST. § 36.
[429] Correctional Services Act 111 of 1998 § 26.
[430] *BOP P5360.09*, *supra* note 378, ¶ 7.
[431] *See* Correctional Services Act 111 of 1998 § 13(2); *BOP P5360.09*, *supra* note 378, ¶ 10.
[432] *SMRTP*, *supra* note 144, at Rule 25(1), (2).
[433] Correctional Services Act 111 of 1998 § 30(2)(a); 28 C.F.R. § 541.32(a); *BOP PS P5270.10*, *supra* note 275, ¶ 13.
[434] Correctional Services Act 111 of 1998 § 30(2)(a).
[435] *BOP PS P5270.10*, *supra* note 275.
[436] *See* Correctional Services Act 111 of 1998 § 30(2)(a); *BOP PS P5270.10*, *supra* note 275.

interaction that inmates are effectively held in solitary confinement. Under the SMRTPs, South African law, and United States law, inmates can be single-celled for up to twenty-three hours a day with just an hour of out-of-cell exercise. Inmates may have as few as four hours of visitation in a month in the United States or just one hour a month in South Africa. Although the SMRTPs, South African law, and United States law provide for recreational activities, work placements, educational programs, and religious worship, the rules do not specify whether these opportunities for contact must occur in person or may instead take place via video conference or other technological means, which would provide less social interaction. Given the degree of discretion in the implementation of the threshold requirements and the room allowed for the imposition of solitary confinement, the contemporary dialogue on best practices in corrections and alternatives to disciplinary segregation warrant examination.

IV. UN Inquiries and Opportunity for Reform in the Use of Segregation

To identify best practices and areas for improvement within corrections systems around the world, the United Nations has recently had an intergovernmental expert group and special rapporteur look into prison practices including the use of solitary confinement.

A. Intergovernmental Expert Group on Revision of the SMRTPs

In December 2010, the United Nations General Assembly requested that the Commission on Crime Prevention and Criminal Justice establish an open-ended intergovernmental expert group ("IEG") to "exchange information on best practices, as well as national and international law, and on the revision of [the SMRTPs] so that they reflect recent advances in correctional science and best practices, with a view to making recommendations to the Commission on possible next steps."[437] In notes and comments on the SMRTPs prepared in advance of the first IEG meeting, the Secretariat observed "the significant increase in the number of prisoners" who are "subject to 'special security features.'"[438] He noted that those prisoners must be treated in conformity with the SMRTPs.[439]

With regard to Standard Minimum Rule 31, which prohibits disciplinary punishment "by plac[ement] in a dark cell, and all cruel, and inhuman or degrading punishments," the Secretariat observed that "[p]rohibition of family contact, especially where children are involved, is liable to be detrimental to the mental

[437] G.A. Res. 65/230, ¶10, U.N. DOC. A/RES/65/230 (Dec. 21, 2010).
[438] Notes and Comments on the United Nations Standard Minimum Rules for the Treatment of Prisoners, 2, *available at* https://www.unodc.org/documents/justice-and-prison-reform/AGMs/Notes_and_comments-1250048-DMU_version.pdf.
[439] *Id.*

wellbeing and rehabilitation of all prisoners and should not be used as a punishment."[440]

The Secretariat also addressed Standard Minimum Rule 32, which prohibits the use of close confinement absent examination by a medical officer and certification of the prisoner's fitness to sustain it.[441] The Secretariat referred to close confinement alternatively as solitary confinement and observed that it "involves confining a prisoner in a closed cell on his or her own" and "generally involves extensive sensory deprivation."[442] He distinguished it from the prohibition of placement in a dark cell, noting that "solitary will often include deprivation of any human contact or stimulation."[443]

The Secretariat reported the United Nations Special Rapporteur on Torture's finding that "the longer the duration of solitary confinement or the greater the uncertainty regarding the length of time, the greater the risk of serious and irreparable harm to the inmate that may constitute inhuman or degrading treatment or punishment or even torture," and the Special Rapporteur's conclusion that, depending on the circumstances, solitary confinement for more than fifteen consecutive days "constitutes torture or cruel, inhuman or degrading treatment or punishment."[444]

During its first meeting, the IEG identified "[d]isciplinary action and punishment, including . . . solitary confinement" as an area to consider for revision.[445] Accordingly, the Secretariat identified several proposals, including a complete prohibition on using indefinite or prolonged solitary as punishment for disciplinary offences, for discussion during the second IEG meeting held in late 2012.[446] The Secretariat also suggested discussion of "limiting the imposition of punishment by close confinement to a disposition of last resort, to be applied in exceptional circumstances only and for as short a time as possible; to be further authorized by the competent authority and to be subject to judicial control."[447] Finally, the Secretariat proposed discussion about "encouraging efforts to increase the level of meaningful social contact for detainees while in solitary confinement."[448]

In keeping with the Secretariat's working paper, the IEG identified issues and revisions to Standard Minimum Rules 31 and 32 pertaining to the use of

[440] *Id.* at 22.
[441] *Id.*
[442] *Id.*
[443] *Id.*
[444] *Id.* at 24.
[445] Work of the Expert Group on the Standard Minimum Rules for the Treatment of Prisoners, Rep. ¶ 10(c), E/CN.15/2012/18 (Feb. 15, 2012).
[446] Working Paper Prepared by the Secretariat, at 12, UNODC/CCPCJ/EG.6/2012/2 (Nov. 6, 2012).
[447] *Id.* at 13.
[448] *Id.*

solitary during its second meeting.[449] With regard to Standard Minimum Rule 31, the IEG identified for consideration completely prohibiting "prolonged and indefinite solitary confinement, collective punishment and the suspension of family and intimate visits" as disciplinary measures.[450] With regard to Standard Minimum Rule 32(1), the IEG identified limitation of "the imposition of punishment by solitary confinement to a disposition of last resort to be authorized by the competent authority, to be applied in exceptional circumstances only and for as short a time as possible."[451] Also with regard to Rule 32(1), the IEG identified encouraging "efforts to increase the level of meaningful social contact for prisoners while in solitary confinement" for consideration.[452]

The experts of South Africa and the United States, in addition to several other nations, "prepared a first consolidated and revised version of the Rules, taking into account the changes agreed upon in principle,"[453] ("Joint Proposal") which the Secretariat consolidated with further input from the member states to facilitate consideration of proposed revisions at the third IEG meeting in March 2014.[454] The Joint Proposal added isolation to Standard Minimum Rule 31 as a practice to be completely prohibited as punishment.[455] The Joint Proposal added that "[r]estrictions on visitation as a punishment should only be used in exceptional circumstances."[456]

With regard to Rule 32, Brazil, South Africa, and the United States proposed the following bis:

> (1) The use of restricted living conditions and privileges shall be limited to situations of serious rule infractions, violent behaviour and cases of personal protection of self

[449] Work of the Expert Group on the Standard Minimum Rules for the Treatment of Prisoners, Rep. ¶ 15, E/CN.15/2013/23 (Feb. 4, 2013).
[450] *Id.* ¶ 15(d).
[451] *Id.* ¶ 15(f).
[452] *Id.*
[453] Report on the Meeting of the Expert Group on the Standard Minimum Rules for the Treatment of Prisoners Held in Buenos Aires from 11 to 13 December 2012, ¶ 34, UNDOC/CCPCJ/EG.6/2012/4 (Dec. 27, 2012).
[454] Working Paper Prepared by the Secretariat for the Open-Ended Intergovernmental Expert Group on the Standard Minimum Rules for the Treatment of Prisoners, Vienna, Austria, 25-28 March 2014, 2-3, 5 n.13, UNDOC/CCPCJ/EG.6/2014/CRP.1 (Nov. 29, 2013) [hereinafter *November 2013 Working Paper*]. In September 2013, South Africa submitted its preliminary views on revision of Rules 31 and 32, which were not incorporated into the IEG working paper in November. *See* South African Government's Preliminary Views on Revision of the UN Standard Minimum Rules for the Treatment of Prisoners (2013). South Africa had called for two revisions: (1) "a prohibition on imposing solitary confinement as a disciplinary punishment" for juveniles, new mothers or mothers-to-be, mentally disabled prisoners, and life-sentenced prisoners; and (2) limitation of "punishment by solitary confinement to a disposition of last resort . . . to be applied in exceptional circumstances only and for as short a time as possible, to encourage efforts to increase the level of meaningful social contact for prisoners while in solitary confinement." *Id.* South Africa also called for the amendment of Rule 6 to expressly include "treatment of prisoners with respect for the inherent dignity and value of the human person," ""prohibition of torture and other cruel, inhuman or degrading treatment or punishment," "retention of prisoners' human rights and fundamental freedoms except for those limitations demonstrably necessitated by the fact of incarceration," and "[c]onditions of imprisonment and treatment of prisoners to protect their personal safety." *Id.*
[455] *November 2013 Working Paper, supra* note 454, at 24-25.
[456] *Id.*

> or others. It shall never be used as punishment for a particular crime or discrimination in violation of Rule 6. All conditions associated with restricted living conditions shall comply with the standards for other prisoners, such as light, ventilation, heating, sanitation, water, and adequate personal space, including bedding and linens. At no time shall restricted living conditions involve isolation from human contact or interaction, including staff during any shift.
>
> (2) Admission to restricted living conditions shall only be imposed through a transparent administrative process and should be applied to ensure the safety, security and orderly operation of the facility or to protect the public.
>
> (3) Extended periods of restricted living conditions shall be regularly reviewed through an administrative process that includes an evaluation of the prisoner's medical and mental conditions, current behaviour, original reason for admission and other factors that may be relevant. The decisions of the administrative committee shall be reviewed by the appropriate higher authority. A reduction in diet shall never be inflicted. Absent security justifications, visitation shall not be restricted.
>
> (4) The physician or health care practitioner shall visit daily prisoners undergoing such punishments and shall advise the director if he considers the termination or alteration of the punishment necessary on grounds of physical or mental health.[457]

With regard to this bis, the Secretariat noted the undefined nature of the term "restricted living conditions."[458] The Secretariat observed that depending on the definition and whether it differed from solitary confinement, this provision could "risk lowering the existing standard" while the Basic Principles for the Treatment of Prisoners encouraged efforts to abolish or restrict the use of solitary as punishment.[459]

Although consideration of Standard Minimum Rules 31 and 32 appeared on the agenda for the third IEG meeting, revisions to those rules did not appear among those agreed upon nor among those discussed but not yet agreed upon.[460]

[457] *Id.* at 25-26. Brazil suggested deleting the prohibition on visitation in subsection 3 and the entire provision of subsection 4.
[458] *Id.* at 26 n.26.
[459] *Id.* (citing The Basic Principles for the Treatment of Prisoners, A/RES/45/111).
[460] *April 2014 IEG Report*, *supra* note 11, ¶¶ 19, 24.

B. Special Rapporteur's Call for an End to Disciplinary Solitary

In a second United Nations effort to address prison conditions, the Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment referred to the SMRTPs in his 2011 interim report in recommending "that States increase the level of psychological, meaningful social contact for detainees while in solitary confinement."[461] In keeping with the International Covenant on Civil and Political Rights,[462] the Special Rapporteur called upon states "to prohibit the imposition of solitary confinement as punishment—either as a part of a judicially imposed sentence or a disciplinary measure."[463]

Rather than impose solitary confinement, particularly on juveniles and the mentally ill, the Special Rapporteur suggested that states "develop and implement alternative disciplinary sanctions."[464] He called for abolition of indefinite solitary confinement, and "reiterate[d] that solitary confinement should be used in only very exceptional circumstances, as a last resort, for as short a time as possible."[465] Where solitary is imposed, the Special Rapporteur cautioned that inmates "must have free access to competent legal counsel" and an interpreter if needed, and "a documented system of regular monitoring and review of the inmate's physical and mental condition by qualified medical personnel."[466] Because "[i]t is clear that short-term solitary confinement can amount to torture or cruel, inhuman or degrading treatment or punishment," the Special Rapporteur concluded, "prolonged solitary confinement, in excess of 15 days, should be subject to an absolute prohibition."[467]

The Special Rapporteur has clarified that his call for a fifteen-day maximum duration applies to "conditions of extreme confinement: 24 hours per day in a cell without natural light, without reading or writing material, furniture, with no radio, etc."[468] He acknowledged that "[i]n cases of confinement providing one or two hours

---

[461] *Special Rapporteur*, *supra* note 10.
[462] *Id.* (citing *Civil & Political Rights*, *supra* note 148, art. 10 (calling for states "to ensure that all persons deprived of their liberty are treated with humanity and respect for the inherent dignity of the human person")).
[463] *Id.*
[464] *Id.*
[465] *Id.* "The physical conditions and prison regime of solitary confinement must be imposed only as a last resort where less restrictive measures could not achieve the intended disciplinary goals." *Id.*
[466] *Id.* In keeping with Standard Minimum Rule 32, this review should take place "both at the initiation of solitary confinement and on a daily basis throughout the period in which the detained person remains in solitary confinement," and in keeping with articles 1 and 16 of the Convention Against Torture, isolation "must never be imposed or allowed to continue except where there is an affirmative determination that it will not result in severe pain or suffering, whether physical or mental." *Id.* To that end, "[a]ny deterioration of the inmate's mental or physical condition should trigger a presumption that the conditions of confinement are excessive and activate an immediate review." *Id.* As part of their inspection and in keeping with Standard Minimum Rule 26, medical personnel should also "inspect the physical conditions of the inmate's confinement," considering hygiene, heating, light, ventilation, clothing and bedding, nutrition, and exercise. *Id.*
[467] *Id.*
[468] Sharon Shalev, *A Sourcebook on Solitary Confinement*, MANNHEIM CENTER FOR CRIMINOLOGY, LONDON SCH. ECON. (2008), available at http://solitaryconfinement.org/uploads/sourcebook_web.pdf.

of exercise outside one's cell per day, access to mail, radio or television, a longer time limit may be acceptable."[469] He recommended that the applicable time limit be established "on a case-by-case basis, and to institute an absolute prohibition on any confinement that exceeds it."[470]

V. Working Conclusions

The respect for human dignity evident in international law and the South African and United States constitutions demands careful attention to policies pertaining to the use of segregated housing. The social isolation permitted under the threshold requirements for conditions of confinement in segregated housing in the SMRTPs, South African law, and United States law may effectively result in solitary housing. Given the potential for irreversible psychological harm inherent in the social isolation of such housing practices, it behooves South Africa and the United States to continue to examine their use of disciplinary segregation.

It appears, first, that any potential reform considered must include efforts to standardize and define the term used to describe these conditions of confinement. Absent this clarity, the practices cannot be adequately or reliably studied, debated, and addressed.

Second, the trends in the current international dialogue include consideration of an absolute prohibition on the use of prolonged solitary confinement, to be established on a case-by-case basis. While such a prohibition may help safeguard inmates from the long-term psychological effects of prolonged social isolation, it highlights the tension between the government's obligation to secure dangerous inmates and the inmates' human rights.

Finally, that tension suggests that, to be successful, any efforts at reform must also include meaningful examination of the purpose of and effective alternatives to the use of disciplinary segregated housing.

[469] *Id.*
[470] *Id.*