

## Worse than Death

*Alex Kozinski*

For decades, lawyers and activists have questioned the constitutionality of our criminal justice system's most severe punishments. Is lethal injection okay?<sup>1</sup> What about a firing squad?<sup>2</sup> How about life sentences for pirates<sup>3</sup> or drug possessors<sup>4</sup> or people who pass rubber checks?<sup>5</sup> But we hear remarkably little about what may be the most severe punishment of all: solitary confinement. Lurking in the shadows of the conversation about inhumane punishments are some 100,000 souls who spend 23 hours a day alone in a cell the size of a parking space. In a world where making a rap video can earn you three years in the box,<sup>6</sup> we should all be asking more questions about how prisoners get into solitary confinement, what "life" is like once they get there, and how they can get out.

The Liman Program's *Time-In-Cell Report* begins this important conversation. The Report's shuddersome findings confirm what I have long suspected: Solitary confinement is just as bad as the death penalty, if not worse.

There is a growing consensus that criminal justice reform is desperately needed.<sup>7</sup> The difficult question is how best to allocate the scarce resources of

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1. See *Glossip v. Gross*, 135 S. Ct. 2726, 2739–40 (2015).
  2. See *Wood v. Ryan*, 759 F.3d 1076, 1103 (9th Cir. 2014) (Kozinski, J., dissenting from denial of rehearing en banc), *vacated*, 135 S. Ct. 21 (2014).
  3. Yep. See *United States v. Said*, 798 F.3d 182, 185 (4th Cir. 2015).
  4. Yep. See *Harmelin v. Michigan*, 501 U.S. 957, 961, 996 (1991).
  5. Nope – whew! See *Solem v. Helm*, 463 U.S. 277, 281, 284 (1983).
  6. See Alfred Ng, *South Carolina Inmates Collectively Get Almost 20 Years of Solitary Confinement for Rap Video*, N.Y. DAILY NEWS (Oct. 21, 2015), <http://www.nydailynews.com/news/crime/rapper-inmates-solitary-confinement-20-years-article-1.2406526> [http://perma.cc/74LD-FGJ7].
  7. See Alex Kozinski, *Criminal Law 2.0*, 44 GEO. L.J. ANN. REV. CRIM. PROC., at iii (2015); Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. OF BOOKS (Nov. 20, 2014), <http://www.nybooks.com/articles/archives/2014/nov/20/why-innocent-people-plead-guilty> [http://perma.cc/8TZC-77YF]; see also *New Legislation Just the Beginning of Comprehensive*

lawyers, activists, and academics. I argue here that society should shift some resources and attention away from the death penalty and towards the problem of solitary confinement. If such a shift is not made, death penalty abolitionists may succeed in their campaign only to discover that they have won a Pyrrhic victory. Sending hardened criminals from death row to solitary confinement is no triumph. It merely swaps one type of death for another.

## I. CONDITIONS IN THE BOX

Many death penalty abolitionists argue that sentencing murderers to life in prison without the possibility of parole (LWOP) is a preferred alternative.<sup>8</sup> It's better, they say, to put murderers in a place where they'll never be able to hurt anyone ever again. But to accomplish that, LWOP isn't enough. The murderer will have to be sent to solitary, or else he'll be able to injure guards or other inmates.<sup>9</sup> If we abandon the death penalty, most murderers who would otherwise have gotten the needle will instead spend the rest of their lives in the box.<sup>10</sup>

When informed of this alternative, people generally become less supportive of the death penalty. Numerous opinion polls “confirm that abstract support for the death penalty drops significantly when respondents are given a choice between capital punishment and sentences which assure lengthy incarceration

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*Criminal Justice Reform*, 98 CRIM. L. REP. 124, 124–25 (2015) (discussing Republican Senator Mike Lee's recent comments on the need for criminal justice reform); *Does the American Criminal Justice System Need an Overhaul?*, CATO INST. (Nov. 16, 2015), <http://www.cato.org/events/does-american-criminal-justice-system-need-overhaul> [<http://perma.cc/JL4S-ZE6N>] (providing video of recent debate on criminal justice reform between the author and Judge J. Harvie Wilkinson).

8. See, e.g., Mario Cuomo, *New York State Shouldn't Kill People*, N.Y. TIMES (June 17, 1999), <http://www.nytimes.com/1989/06/17/opinion/new-york-state-shouldn-t-kill-people.html> [<http://perma.cc/VB2Z-PGW2>]; *The Facts: 13 Reasons to Oppose the Death Penalty*, OREGONIANS FOR ALTERNATIVES TO THE DEATH PENALTY, <http://www.oadp.org/facts/13-reasons> [<http://perma.cc/X7K2-X92G>].
9. See, e.g., Don Terry, *Jeffrey Dahmer, Multiple Killer, Is Bludgeoned to Death in Prison*, N.Y. TIMES (Nov. 29, 1994), <http://www.nytimes.com/1994/11/29/us/jeffrey-dahmer-multiple-killer-is-bludgeoned-to-death-in-prison.html> [<http://perma.cc/E87Q-AFL6>] (discussing the death of cannibal Jeffrey Dahmer, who was killed in prison by another inmate who was himself serving life in a state that didn't have capital punishment). While sitting as a district judge, I recently imposed a life sentence on an inmate who, while serving a life sentence for a previous murder, shanked a prison guard to death. *United States v. Sablan*, No. 2:14-cv-00738-AK (C.D. Cal. Oct. 5, 2015).
10. James Ridgeway & Jean Casella, *What Death Penalty Opponents Don't Get: There Are Fates Worse than Death*, THE MARSHALL PROJECT (Nov. 30, 2014), <http://www.themarshallproject.org/2014/11/30/what-death-penalty-opponents-don-t-get> [<http://perma.cc/HB92-QK8G>] (“Though the requirement that life/LWOP sentences be served in solitary confinement is codified into law only in Connecticut, it exists in practice throughout the nation.”).

and compensation for the family of the victim.”<sup>11</sup> Defense lawyers in several recent high-profile murder cases have tried to convince jurors not to impose the death penalty by arguing that life in solitary confinement may be just as bad. Take, for example, the recent trial of Dzhokar Tsarnaev, one of the Boston Marathon bombers. During closing arguments, Tsarnaev’s lawyer argued that the jury should let him live because he was “still going to be in isolation for the rest of his life” at ADX Florence.<sup>12</sup> That super-maximum security (“supermax”) prison is the stuff of nightmares. Many inmates at ADX Florence spend twenty-three hours a day alone in an eighty-seven-square-foot cell.<sup>13</sup> Part Alcatraz and part Overlook Hotel,<sup>14</sup> Tsarnaev’s lawyer described ADX Florence as a place where “29 men vie for the privilege of cleaning the showers, and two get the job.”<sup>15</sup> “This isn’t a resort,” she told the jury. “A sentence of life [at ADX] is not a lesser sentence than death; it is a sentence other than death.”<sup>16</sup>

Placing an inmate in the box for the rest of his life will no doubt prevent him from doing any further harm. But man is a social animal. The human mind craves interaction with other people, and being deprived of human companionship is as damaging to the psyche as deprivation of food and water is to the body. Psychologists now understand that “much of who we are depends on our contact with other people, the social context in which we function, and when you remove people from that context, they begin to lose their very sense of self.”<sup>17</sup>

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11. Richard C. Dieter, *Sentencing for Life: Americans Embrace Alternatives to the Death Penalty*, DEATH PENALTY INFO. CTR. (Apr. 1993), <http://www.deathpenaltyinfo.org/sentencing-life-americans-embrace-alternatives-death-penalty> [<http://perma.cc/7M4M-P6FG>].
  12. Closing Argument of Judy Clarke at 133, *United States v. Tsarnaev*, No. 13-10200 (D. Mass. May 13, 2015).
  13. Hilary Sargent & Dialynn Dwyer, *Tsarnaev Moved to Supermax Prison. Here’s How He’ll Live*, BOSTON.COM (July 17, 2015, 9:44 PM), <http://www.boston.com/news/local/2015/07/17/tsarnaev-moved-supermax-prison-here-how-live/pgzDWNrA8zk4bX7qhuSLoL/story.html> [<http://perma.cc/2XL4-WMPW>].
  14. See *THE SHINING* (Warner Bros. 1980).
  15. Closing Argument of Judy Clarke, *supra* note 12, at 133.
  16. *Id.* at 135. Lawyers for James Holmes—who killed twelve people at a movie theater in Aurora, Colorado—pursued a similar strategy. In hopes of dissuading the jurors from sentencing Holmes to die, the lawyers sought permission to give the jury a tour of several Colorado prisons. They hoped to make the jurors “understand the reality of a sentence of a life without the possibility of parole.” Jennifer Levitz, *Boston Bombing Jurors To Decide Between Life Sentence and Death*, WALL ST. J. (Apr. 20, 2015), <http://www.wsj.com/articles/boston-bombing-jurors-to-decide-between-life-sentence-and-death-1429524324> [<http://perma.cc/A6CX-CNW4>].
  17. Maclyn Willigan, *What Solitary Confinement Does to the Human Brain*, SOLITARY WATCH (Aug. 4, 2014), <http://solitarywatch.com/2014/08/04/what-solitary-confinement-does-to-the-human-brain> [<http://perma.cc/B5MB-F4LC>] (quoting Craig Haney, a psychologist who has studied solitary confinement for thirty years).

In his recent concurrence in *Davis v. Ayala*, Justice Anthony Kennedy noted that, “despite scholarly discussion and some commentary from other sources, the condition in which prisoners are kept simply has not been a matter of sufficient public inquiry or interest.”<sup>18</sup> He emphasized that “consideration of these issues is needed” because “so stark an outcome [as solitary confinement] ought not to be the result of society’s simple unawareness or indifference.”<sup>19</sup>

Before we decide to swap the death penalty for solitary confinement, we should think long and hard about what we are inflicting on those whose lives we spare. Taking prisoners off death row and putting them in supermax prisons may soothe our collective conscience, but we may be condemning those inmates to decades-long torture that may make a swift execution look like an act of grace.

Many people believe the death penalty is cruel, and it surely is. But the devastating psychological toll of solitary confinement is a beast of its own. The *Time-In-Cell Report* demonstrates that prisoners subjected to solitary confinement may spend as few as three hours a week outside their cells. And on weekends, they are seldom released at all.<sup>20</sup> The Report also shows us that prisoners confined to the box have limited access to personal property, support services, family visits, and telephone calls.<sup>21</sup> Some of their cells are as small as forty-five square-feet.<sup>22</sup> Others—including many in the Deep South—lack air conditioning.<sup>23</sup> In Missouri, inmates are allotted one shower every three days.<sup>24</sup> Some states prohibit inmates in solitary confinement from keeping photographs of their loved ones.<sup>25</sup>

Given these conditions, it should come as no surprise that “incarceration in solitary cause[s] either severe exacerbation or recurrence of preexisting illness, or the appearance of an acute mental illness in individuals who had previously been free of any such illness.”<sup>26</sup> The empirical literature on the effects of

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18. 135 S. Ct. 2187, 2209 (2015) (Kennedy, J., concurring).

19. *Id.* at 2209–10.

20. THE ARTHUR LIMAN PUB. INTEREST PROGRAM & ASS’N. OF STATE CORR. ADM’RS, *TIME-IN-CELL: THE ASCA-LIMAN 2014 NATIONAL SURVEY OF ADMINISTRATIVE SEGREGATION IN PRISON 2* (2015) [hereinafter *TIME-IN-CELL*], [http://www.law.yale.edu/system/files/area/center/liman/document/asca-liman\\_administrativesegregationreport.pdf](http://www.law.yale.edu/system/files/area/center/liman/document/asca-liman_administrativesegregationreport.pdf) [http://perma.cc/3ME8-TK8F].

21. *Id.* at 40–41, 44–48.

22. *Id.* at 39.

23. *Id.*

24. *Id.* at 41.

25. *Id.* (Missouri, New Hampshire, and Virginia prohibit photos in cells).

26. Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J.L. & POL’Y 325, 333 (2006).

solitary confinement is horrifying.<sup>27</sup> It shows that prisoners exposed to solitary confinement become verbally and physically aggressive;<sup>28</sup> develop fantasy worlds and other paranoid psychoses;<sup>29</sup> and grow anxious, withdrawn, and hopeless.<sup>30</sup> As Justice Kennedy wrote in *Ayala*, “[y]ears on end of near-total isolation exact a terrible price.”<sup>31</sup> One early study found that nearly all of the prisoners in Maine’s isolation unit had either contemplated or attempted suicide.<sup>32</sup> One attempted to swallow the glass from the light bulb in his cell.<sup>33</sup> Another tried twice to hang himself with a sheet.<sup>34</sup> More recent data suggests that prisoners in solitary are five times more likely to kill themselves than those in the general population.<sup>35</sup> “The disparity exists despite the fact that it’s never simple to commit suicide in a bare cell: Some prisoners have resorted to jumping head-first off their bunks; others have bitten through the veins in their arms.”<sup>36</sup>

Given the conditions in solitary confinement and in supermax facilities more generally, it comes as no surprise that some prisoners prefer to die. Timothy McVeigh, who bombed the federal building in Oklahoma City, decided not to seek clemency. McVeigh’s lawyer reported that “[h]aving nothing to look forward to but solitary confinement in a federal penitentiary does not appeal to him.”<sup>37</sup> I encountered a similar prisoner in 1990. Thomas Baal waived his right to appeal his death sentence and asked the district judge

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27. See generally Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. REV. L. & SOC. CHANGE 477 (1997) (reviewing empirical literature).
  28. See Bruno M. Cormier & Paul J. Williams, *Excessive Deprivation of Liberty*, 11 CAN. PSYCHIATRIC ASS’N J. 470 (1966).
  29. See Stuart Grassian & Nancy Friedman, *Effects of Sensory Deprivation in Psychiatric Seclusion and Solitary Confinement*, 8 INT’L J. L. & PSYCHIATRY 49 (1986).
  30. See Stanley L. Brodsky & Forrest R. Scogin, *Inmates in Protective Custody: First Data on Emotional Effects*, 1 FORENSIC REP. 267 (1988); Thomas O. Hilliard, *The Black Psychologist in Action: A Psychological Evaluation of the Adjustment Center Environment at San Quentin Prison*, 2 J. BLACK PSYCH. 75 (1976).
  31. *Davis v. Ayala*, 135 S. Ct. 2187, 2210 (2015) (Kennedy, J., concurring).
  32. Thomas B. Benjamin & Kenneth Lux, *Constitutional and Psychological Implications of the Use of Solitary Confinement: Experience at the Maine State Prison*, 9 CLEARINGHOUSE REV. 83, 84 (1975).
  33. *Id.*
  34. *Id.*
  35. Ridgeway & Casella, *supra* note 10.
  36. *Id.*
  37. Louis Romano, *McVeigh Will Forgo Clemency Plea to Bush*, WASH. POST (Feb. 17, 2001), <http://www.washingtonpost.com/archive/politics/2001/02/17/mcveigh-will-forgo-clemency-plea-to-bush/f3e03b22-675c-4c46-a1fa-43e006f9bcd2> [http://perma.cc/2C33-FWFH].

to go ahead and “get the ball rolling” on his execution.<sup>38</sup> His parents, claiming their son was incompetent to waive his appeal, sought a stay of the execution from our court. The stay was granted over my dissent. “When we say that a man . . . is not free to choose,” I wrote, “we take away his dignity just as surely as we do when we kill him.”<sup>39</sup> Later that same evening, the Supreme Court lifted the stay.<sup>40</sup> In an essay later published in *The New Yorker*,<sup>41</sup> I described my fitful sleep that night—knowing that I had helped send a man to die. By the time I woke up the next morning, Baal was dead.<sup>42</sup>

## II. A SHIFT IN PRIORITIES

I don’t mean to short-sell the many problems plaguing our current system of capital punishment.<sup>43</sup> But many more Americans are directly affected by solitary confinement than by the death penalty. There are currently 3,000 prisoners on death row,<sup>44</sup> but as many as 100,000 prisoners are in some form of so-called “administrative segregation,” including at least 25,000 in long-term solitary confinement within supermax prisons.<sup>45</sup> And while the number on death row is shrinking,<sup>46</sup> the number in solitary confinement is expanding.<sup>47</sup> Furthermore, solitary confinement is often imposed on juveniles and the mentally ill—two groups constitutionally immune from capital punishment.<sup>48</sup>

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38. See Alex Kozinski, *Tinkering with Death*, NEW YORKER, Feb. 10, 1997, at 48, 50.

39. Order at 3, *Baal v. Godinez*, No. 90-157161 (9th Cir. June 2, 1990) (Kozinski, J., dissenting).

40. *Demosthenes v. Baal*, 495 U.S. 731, 734 (1990).

41. See Kozinski, *Tinkering with Death*, *supra* note 38.

42. *Nevada Murderer Is Put to Death*, ASSOCIATED PRESS (June 4, 1990), <http://www.nytimes.com/1990/06/04/us/nevada-murderer-is-put-to-death.html> [<http://perma.cc/KDC6-FY72>].

43. See, e.g., David Grann, *Trial by Fire*, NEW YORKER (Sept. 7, 2009), <http://www.newyorker.com/magazine/2009/09/07/trial-by-fire> [<http://perma.cc/69PA-L4QM>] (discussing the troubling case of Cameron Todd Willingham).

44. *Death Row Inmates by State*, DEATH PENALTY INFO. CTR. (July 1, 2015), <http://www.deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year> [<http://perma.cc/2LR8-UVJS>].

45. TIME-IN-CELL, *supra* note 20, at 2.

46. *Death Row Inmates by State*, *supra* note 44.

47. See Shira E. Gordon, Note, *Solitary Confinement, Public Safety, and Recidivism*, 47 U. MICH. J.L. REFORM 495, 496 (2014).

48. See *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (holding that capital punishment is constitutionally impermissible for juveniles); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding that capital punishment is constitutionally impermissible for mentally ill persons).

Eighth Amendment challenges to solitary confinement have largely fallen on deaf ears.<sup>49</sup> And due process challenges have fared no better. Although prisoners placed into solitary confinement are entitled to “some kind of hearing,”<sup>50</sup> the Supreme Court has indicated that due process is satisfied so long as prison officials justify their use of solitary confinement through “informal, nonadversary procedures.”<sup>51</sup> Prisoners in long-term solitary confinement will no doubt be thrilled to learn that they too are entitled to “some sort of periodic review.”<sup>52</sup> When compared with the decades-long, multijurisdictional tango that precedes most executions, the “process” afforded to those in solitary confinement seems paltry indeed.

Instead of spending so much time focusing on death penalty litigation, activists might spend some energy agitating for reform in this dank corner of our criminal justice system.<sup>53</sup> There is much low-hanging fruit. The *Time-In-Cell Report* notes, for example, that legislation limiting the scope and duration of solitary confinement is now pending in many states.<sup>54</sup> The State of New York recently settled a major suit challenging its solitary confinement practices by agreeing to provide better training for officers and educational materials for inmates.<sup>55</sup> Others have pushed different reforms, such as making solitary sentences determinate, limiting the ability to place someone in solitary confinement on the basis of a gang affiliation, and not releasing prisoners directly from solitary into the real world.<sup>56</sup>

The most important contribution of the *Time-In-Cell Report* may be its finding that prison administrators have breathtaking latitude in imposing housing restrictions.<sup>57</sup> What type of notice and hearing is provided varies from jurisdiction to jurisdiction, but the general story is about what you’d expect: It’s easy to get into solitary and hard to get out.<sup>58</sup> In response, some legislators

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49. See, e.g., *Madrid v. Gomez*, 889 F. Supp. 1146, 1265, 1267 (N.D. Cal. 1995); see also Jules Lobel, *Prolonged Solitary Confinement and the Constitution*, 11 U. PA. J. CONST. L. 115, 119-22 (2008) (discussing case law in this area).

50. See Henry J. Friendly, “Some Kind of Hearing,” 123 U. PA. L. REV. 1267, 1267 (1975).

51. *Wilkinson v. Austin*, 545 U.S. 209, 228-29 (2005); see *Sandin v. Conner*, 515 U.S. 472, 485-86 (1995).

52. *Hewitt v. Helms*, 459 U.S. 460, 490 & n.19 (1983), *overruled on other grounds by Sandin*, 515 U.S. at 483.

53. See Mariam Hinds & John Butler, Note, *Solitary Confinement: Can the Courts Get Inmates out of the Hole?*, 11 STAN. J. C.R. & C.L. 331, 333 (2015).

54. TIME-IN-CELL, *supra* note 20, at 5-7.

55. Stipulation for a Stay with Conditions at 5-6, *Peoples v. Fischer*, No. 11-CV-2694 (S.D.N.Y. Feb. 19, 2014).

56. Hinds & Butler, *supra* note 53, at 369-71.

57. TIME-IN-CELL, *supra* note 20, at 8-9.

58. See COOL HAND LUKE (Warner Bros. 1967) (Officer Carr: “Any man forgets his [laundry] number spends a night in the box. . . . [A]ny man loses his spoon spends a night in the

have recently called for the U.S. Department of Justice to promulgate national standards for the placement of prisoners into solitary confinement.<sup>59</sup> This reform—like all of those discussed above—strikes me as decent, sensible, and long overdue.

## CONCLUSION

Reforming the criminal justice system will require us to face its deficiencies head-on. I have written elsewhere that, if we choose to retain the death penalty, we should drop the sanitized ruse of lethal injection and instead face the spatter of executions with open eyes.<sup>60</sup> If we cannot stomach that much, then we shouldn't be in the business of killing folks at all.

So too with solitary confinement. You can call it administrative segregation or special housing or a long walk on a sandy beach. But it will always be the box.

*Alex Kozinski is a judge on the United States Court of Appeals for the Ninth Circuit. He acknowledges the nonpareil help of his law clerk, James Dawson.*

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box . . . Any man playing grab-ass or fighting in the building spends a night in the box. . . . Any man not in his bunk at eight will spend a night in the box . . . . Anyone caught smoking in prone position will spend a night in the box . . . . Any man who turns in the wrong sheet spends a night in the box . . . . Any man sitting on a bunk with dirty pants will spend a night in the box. Any man who don't bring back his empty pop bottles spends a night in the box. Any man loud-talking spends a night in the box.”).

59. Cedric Richmond, *Toward a More Constitutional Approach to Solitary Confinement: The Case for Reform*, 52 HARV. J. ON LEGIS. 1, 16 (2015) (discussing Solitary Confinement Study and Reform Act of 2014, H.R. 4618, 113th Cong. § 4(a)(1) (2014)).

60. See *Wood v. Ryan*, 759 F.3d 1076, 1103 (9th Cir. 2014) (Kozinski, J., dissenting from denial of rehearing en banc), *vacated*, 135 S. Ct. 21 (2014).