

## Total Incarceration

### Solitary Confinement in the United States in the Age of Mass Imprisonment

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**There are currently two million prisoners in the USA, and the use of high security solitary confinement is on the increase. The violence of this procedure and its dramatic effects, in particular on the youngest inmates or those suffering from psychiatric conditions, has now sparked a public debate.**

One evening in the spring of 2010, as he was going home after a party, Kalief Browder was stopped in the street by the police. He was accused of having stolen a rucksack. He swore he hadn't done anything. They searched his pockets, but found nothing. He was taken to the police station. Kalief was black, he was poor, he was seventeen years old – he was sent to prison while he awaited trial. By the time a judge decided to release him due to a lack of evidence, he was twenty years old.

Kalief Browder's story is an extreme example of the dysfunction of the American judiciary system, but it says a lot about how easy it is to get thrown into prison in the United States. Kalief Browder's detention pending trial was exceptionally long: unlike the majority of defendants, he refused to plead guilty, continually reasserting his innocence, and continually seeing the date of his trial be put back. But after his release, the scandal would also centre on the conditions in which he was held on remand: of the three years he spent in the Rikers Island remand centre, he spent over two years in the "Bing", the building reserved for solitary confinement, in which prisoners are on their own for 23 hours out of 24.

A devastating report by the United States Attorney General and the United States Attorney for the Southern District of New York, which was made public in the summer of 2014, condemned the endemic violence of the Rikers Island prisons<sup>1</sup>, and in particular the excessive use of high security solitary confinement quarters, in which teenagers are subjected to a regime of forced inactivity and deprived of any human contact for periods of several months. During his detention and following his release, Kalief Browder suffered from panic attacks and made several suicide attempts. He had just turned twenty-two when he killed himself on 6 June 2015. His death did not trigger any immediate

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<sup>1</sup> C.f.: <http://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-finds-pattern-and-practice-excessive-force-and-violence-nyc-jails>

popular mobilisation, unlike recent cases of black people killed by the police. He has however become a symbol of the dramatic effects of solitary confinement, at a time when a public debate is emerging to condemn the American addiction to this extreme mode of imprisonment.

### **Mass Incarceration**

The increasingly common practice of placing prisoners in solitary confinement may come as a surprise at a time when prisons are being run on an increasingly massive scale. American prisons have in fact been equipped with specific installations for the purpose of solitary confinement at a time when their population has undergone an unprecedented expansion. In the 1970s, levels of incarceration in the United States were still comparable to those in other Western democracies; by the 2000s, with one adult out of a hundred in prison, the United States were at a level between five and ten times above European levels. This explosion of incarceration is absolutely unique. In 2015, American prisons hold over two million people, almost a quarter of the total prisoner population of the world.

This “punitive turn” can be observed at every level of the penitentiary system, despite its heterogeneity and its fragmentation: federal prisons, state prisons and county jails have all seen their numbers increase at an unprecedented rate. This mass incarceration is a real paradox in a country that claims to be the leading example of democracy in the world, and has given rise to numerous studies seeking to explain its genesis. A recent report issued by the Academy of Sciences, which was written by the leading experts on this issue, presents a summary of this research<sup>2</sup>: while criminality has been declining since the early 1980s, the number of people being imprisoned increased exponentially through to the middle of the 2000s, when a slight decrease could be observed following legislative changes in some states (including California) and at the federal level. Penal policies are mainly held responsible for this development, and more particularly the conjunction of a set of decisions leading to more severe sentences over the course of the 1970s. “Tough on crime” has become the main argument during electoral campaigns: meaning that dissuasion and neutralisation have become the main aims of the penal system, a formula that is sharply encapsulated in the slogan “lock’em up and throw away the key”.

While the United States had historically been at the forefront of the rehabilitation of prisoners, through measures such as release on parole or furloughs, these measures tended to disappear, both at the federal and state level, on the grounds that they were supposedly too favourable to the criminals, and were exposing citizens to intolerable dangers. They were replaced by general laws on sentencing, which imposed mandatory minimum sentencing, the most spectacular of which were probably the “three strikes” laws that ordered life imprisonment for criminals on their third repeat offence. A less visible development was the increased severity of measures applied to probationers, i.e. people who had committed minor offences and who were sentenced to sanctions outside

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<sup>2</sup> *The Growth of Incarceration in the United States*, Jeremy Travis, Bruce Western, Steve Redburn (ed.), National Research Council, 2014 <http://www.nap.edu/catalog/18613/the-growth-of-incarceration-in-the-united-states-exploring-causes>

of prison subject to certain conditions, and which sometimes led to making this kind of alternative sentence the main purveyor of new incarcerations. In California, for example, in 2011, over half of new entrants to prison were individuals who had been sentenced for violating the conditions of their probation, before recent laws inverted this trend<sup>3</sup>.

The adoption of particularly repressive penal practices has been interpreted in various ways: as a backlash following the era of civil rights<sup>4</sup>; as an effect of the political and media culture<sup>5</sup>; as influenced by the role of the private interests of players in the security sector<sup>6</sup>. Among these causes, people often highlight the racial history of the United States, in which prison is supposed to have metaphorically replaced slavery and the segregationist regime known as the Jim Crow laws<sup>7</sup>. The excessive incarceration of the black minority is such that, according to demographers' estimates, one Afro-American out of three is at risk of being imprisoned at some stage of his/her life; the figure rises to two out of three if we consider young people without formal qualifications<sup>8</sup>.

The developments of the penal system are equally spectacular if we look at people with mental illnesses. These people are often neglected in studies because, in this case, it is paradoxically progressive ideas that have indirectly contributed to a massive incarceration of insane individuals. During the 1960s, psychiatric hospitals were the targets of virulent criticism in the name of the rights of patients. The criticism of institutional psychiatry condemned the life imprisonment in authoritarian institutions of people who had committed crimes for which they had been judged to be irresponsible from a penal perspective. Outpatient treatment or treatment in community centres were favoured instead and, simultaneously, the number of beds available in the psychiatric departments of hospitals dwindled due to cost-cutting measures. The cuts that Reagan decided to make at the beginning of the 1980s were radical, and the austerity measures following the 2008 crisis completed this dismantling of the system. Where did the madmen wandering the streets end up? In prison. We estimate that, in 2014, American prisons were holding over 356,000 people suffering from a severe psychiatric condition<sup>9</sup> while, in the same period, only 35,000 beds remained in public psychiatric hospitals, compared to over half a million in the 1970s. This data reveals that there was a genuine transfer of the handling of mentally ill individuals from hospitals over to prisons,

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<sup>3</sup> *Prisoners in 2012*, Bureau of Justice Statistics, 2013.

<sup>4</sup> Marie Gottschalk, *The Prison and the Gallows: The Politics of Mass Incarceration in America*, New York; Cambridge, Cambridge University Press, 2006.

<sup>5</sup> Katherine Beckett, *Making crime pay: law and order in contemporary American politics*, New York: Oxford University Press, 1997.

<sup>6</sup> Tara Herivel and Paul Wright, *Prison Profiteers: Who Makes Money from Mass Incarceration*, New York, New Press, 2008.

<sup>7</sup> Michelle Alexander, *The New Jim Crow: mass incarceration in the age of colorblindness*, New York, New Press, 2010.

<sup>8</sup> See in this volume the review by Nicolas Sallée of Alice Goffman's book *On the run*. For a statistical approach to this phenomenon, see Becky Pettit, *Invisible Men: Mass incarceration and the myth of Black progress*, New York: Russel Sage Foundation, 2012.

<sup>9</sup> Source: Treatment Advocacy Center, 2014.

or rather an extension of the penal net to forms of deviance that would previously have been treated in a medical environment.

### **Supermax, or Generalised Extreme Coercion**

The massification of imprisonment has led to situations of prison overpopulation, of promiscuity, at times even of inmates being piled on top of each other in crudely refitted sports halls. It has also coincided with the development of a rationalised management of incarceration, based on risk scores that are associated with differentiated prison structures<sup>10</sup>. In order to maintain order in such an overstretched system, it has become necessary to be able to put troublemakers to one side. The regime of solitary confinement has paradoxically become more and more common the more prison has become massified<sup>11</sup>.

We estimate that, in 2014, over one hundred thousand people were being held in isolation in American prisons<sup>12</sup>. It is not easy to carry out a census of inmates placed in solitary confinement, since this measure has several different names and motivations. All penitentiary institutions are equipped with some structure for setting aside certain prisoners, and these are used, broadly, to punish disciplinary violations (disciplinary segregation), to protect vulnerable inmates due to their profile or notoriety (protective custody), or to neutralise a risk to the smooth running of the institution (administrative segregation).

While they may differ from each other in terms of their official aims, these types of solitary confinement are barely distinguishable in practice: they translate into similar recourses to ultra-secure and extremely restrictive prison structures, often for indefinite amounts of time, ranging from a few days to a few months, and sometimes even up to several years. The inmate is placed, alone, in a cell of a size that does not usually exceed that of a parking space; according to regulations, he/she has a right to an hour of walking a day, in solitary confinement, in an open-top cell (or a cell that has at least one opening letting through air and sunlight). This confinement is not tempered by any social activity (work, training), nor by any contact with prison staff, who, for reasons of security, do nothing more than pass meal trays through a slot in the cell door. Visits are highly regulated, and take place in cabins equipped with dividing panes, in which people talk to each other using a telephone. The average duration of detention in solitary confinement in the prisons of the State of Washington was 11 months in 2011, and almost 4 years in Texas in 2013<sup>13</sup>.

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<sup>10</sup> Regarding the tools for evaluating “dangerousness” and for classification, see the interview with Marion Vacheret and Gaëtan Cliquennois.

<sup>11</sup> Shalev, Sharon. *Supermax: Controlling Risk Through Solitary Confinement*. Cullompton, Royaume-Uni: Willan, 2009.

<sup>12</sup> *Time-In-Cell: The Liman-ASCA 2014 National Survey of Administrative Segregation in Prison*, The Liman Program, Yale Law School / the Association of State correctional administrators, 2015. <https://www.law.yale.edu/yls-today/news/liman-program-releases-new-report> (link active on 17/11/2015).

<sup>13</sup> <http://www.vera.org/pubs/solitary-confinement-misconceptions-safe-alternatives>

The solitary confinement of prisoners was not invented at the end of the 20<sup>th</sup> century: Bentham already viewed it as a way of promoting the redemption of the criminal who, left alone with his conscience, would be able to return to the straight and narrow. The prisons of Philadelphia implemented this project, which for a while was expanded, but then fell into disuse due to its high material and human costs: the inmates would go insane and let themselves waste away – Dickens paints a striking portrait of this in his *American Notes*. Solitary confinement was only kept on as an exceptional measure, to be used for punitive purposes (the “prison within the prison” of the disciplinary quarter) or for inmates who were viewed as particularly dangerous by the prison administration – which included political activists, whose numbers in prisons increased in the 1970s. In the following decades, American prisons were equipped with an increased number of high security isolation facilities: administrative segregation quarters were added to the disciplinary quarters, and then came entire buildings, and even entire prisons devoted to solitary confinement. According to a report by the *Commission on Safety and Abuse in America’s Prisons*, between 1995 and 2000, the prison population of the United States increased by 28 %, while the population held in solitary confinement (administrative, “protective” or disciplinary) increased by 40 %.

Chronologically, it was following violent incidents in penitentiary institutions, the most famous of which was the riot in Attica prison in 1971, that the question of the internal security of prisons became a political issue. On the one hand, staff trade unions demanded the means to control the inmate population, through additional means for segregating violent or disruptive inmates. On the other hand, the courts, which at the time were drawing up some major jurisprudence in terms of prisoners’ rights, were establishing the principle of a right to security for inmates. The conjunction of these two movements allowed the prisons to take a turn towards more heavy-handed security measures, which led to the development of a new type of institution, designed to allow for a regime of permanent lockdown: total confinement in cells, which up until then had been used exceptionally in critical situations such as riots, became an institutionalised regime for categorising the prison population. This marked the birth of “Supermax” facilities, which quickly spread throughout the country against the backdrop of highly-mediated gang wars.

“Supermax” is just the popular nickname given to a bureaucratic category: a level of security beyond maximum security. On the ground, the terminology is varied: Administrative Segregation; Control Unit or Special Management Unit (in the federal system); Special Housing Unit (known as “SHU”, in California); Intensive Management Unit (IMU, in the State of Washington). These are institutions in their own right, or specialised units within an institution, like the “Bing” on Rikers Island, which has almost a thousand cells. Unlike ordinary detention, which is very influenced by local cultures in the United States, the reality of high-security incarceration is relatively standardised. The standard model of Supermax that spread to all of the United States during the 1980s and 1990s is that of a concrete building, lit up by neon lights, equipped with automatic openings and surveillance cameras, and implementing the most restrictive legally

acceptable treatment<sup>14</sup> – except when overly flagrant abuses lead to sentences, which are immediately translated into recommendations by the *American Correctional Association*, an organisation that has less in common with a regulatory body than it does with the business of security<sup>15</sup>.

### **Prison for the Crazies**

A punitive rationality dominates the discourse justifying these types of institutions. Supermax is officially designed to set apart the “worst of the worst”, psychopaths, terrorists, gang leaders who order killings from the inside of their cells or fight with their rivals in the yard. However, the “control unit” has progressively become a favoured tool for managing the internal risks of incarceration. It is not used just to lock up people who are considered to be “dangerous”, but also people who are deemed to be too vulnerable to be in the company of other inmates (because they have committed a crime that is particularly stigmatised, for example), and others, finally, whose behaviour is too strange and unpredictable, of whom it is hard to tell whether they are being insubordinate, provocative or pathological, and who are designated as having “behavioural troubles”. It is these latter individuals who spend the most time in solitary confinement on average. Research has shown that most of them display serious psychiatric disorders. In total, we estimate that one third of Supermax inmates suffer from mental illness<sup>16</sup>. Incidentally, the boundaries between different categories are not always clear-cut; even the “hardest” inmates describe being completely “destroyed” by solitary confinement. In prison jargon, drawing an analogy with the *shell shock* suffered by veterans of the Great War who had been exposed to shelling, the term *cell shock* is used to refer to the trauma caused by solitary confinement.

When one is allowed to enter these concrete cubes, one discovers pallid men who are losing their eyesight from being locked up in less than 9m<sup>2</sup>, who are losing their sense of time from being in cells that are lit by neon lights day and night, and who are losing their sense of reality from being deprived of any social interaction. As one Supreme Court Judge put it, this is a “regime that will bring you to the edge of madness, perhaps to madness itself”<sup>17</sup>. Yet the violence of this regime goes relatively unnoticed in the packaging of bureaucratic procedures that accompany it. Inmates who are sent to Supermax have gone through an administrative process of “classification”, bringing into play a set of documents about their past, their behaviour, their medical history, and applicable regulations. The decisions are sometimes arbitrary, there is often no effective mode of review, and yet the administration scrupulously respects the formality of the official notification. Bundles of documents and regulations provide for and regulate the

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<sup>14</sup> Keramet Reiter, 2012. “The Most Restrictive Alternative: A Litigation History of Solitary Confinement in US Prisons, 1960–2006.” *Studies in Law, Politics, and Society* 57.

<sup>15</sup> Founded as a reformist association in 1870 (under the name of National Prison Association), the American Correctional Association has become a professional association connecting private companies and public stakeholders; it also offers legal consultancy services, approves establishments, and publishes guides which integrate any provisions arising out of court judgements.

<sup>16</sup> Human Rights Watch, *Ill equipped: prisons and offenders with mental illness*, 2003.

<https://www.hrw.org/report/2003/10/21/ill-equipped/us-prisons-and-offenders-mental-illness> (lien valide le 17/11/2015).

<sup>17</sup> Judge Anthony Kennedy, additional Opinion, *Davis v. Ayala*, 576 U. S. (2015).

use of deprivations and coercion: dangerousness scores are connected to “security levels” that attribute rights, in different stages, to access books, radio, and television. This gradual regime for micro-managing the conditions of an inmate’s existence is supposed to encourage good behaviour in prisoners. Since they are supposed to be making rational calculations, the administration’s control of their immediate environment and of their most basic living conditions must allow them to direct these “choices”, to recognise their “thinking mistakes” and to correct themselves.

Extreme confinement and deprivation must act as effective conditioning in order to produce a change in people that are deemed incorrigible. The Supermax system is based on a penological concept inspired by behavioural psychology, freely retranslated to the security-focussed apparatus of the prison<sup>18</sup>. This cognitive-behavioural programme lends a veneer of rehabilitation to a system that is solely geared towards neutralisation. In the absence of any staff devoted to the implementation of the therapeutic techniques known as CBT (cognitive-behavioural therapy), it is the guards who determine the daily life of incarceration. In the sterile environment of the Supermax, dominated by the smell of detergent, social relationships are defined by brute violence. They reproduce, on a vast scale, the famous Stanford experiment in which Philippe Zimbardo, a social psychology professor, simulated a prison situation with his students: those who played the role of guards (and had all the power) became so violent towards their inmates (who, for their part, had no power whatsoever) that the experiment had to be terminated earlier than originally planned. In solitary confinement units, the inmates’ radical dependence on their guards promotes this kind of abuse, all the more so given that the supposedly dangerous character of these prisoners has justified a renewed use of physical restraints, weapons, and force: straightjackets and tear gas are part of the supervisors’ ordinary toolkit, as are stun guns.

In the absence of any effective monitoring or of independent inspection bodies of the type imposed by the Convention for the Prevention of Torture, abuses are common. As early as the 1990s, a major court case sparked a debate about solitary confinement conditions: in a class action, three thousand five hundred inmates of Pelican Bay prison challenged the state administration<sup>19</sup>. This case highlighted the excessive use of physical coercion and degrading treatments. Psychiatric assessments described the damaging effects of isolation itself: sensorial hypersensitivity, hallucinations, panic attacks, paranoia... The judges then condemned the use of solitary confinement for inmates suffering from mental illness. Nevertheless, solitary confinement continued to be used in Pelican Bay, and was challenged by some inmates who were held in this way for periods of up to twenty years. In 2013, they managed the *tour de force* of organising the largest coordinated hunger strike in history, when, on the same day, thirty thousand inmates throughout the state refused to eat as a show of support for those held in solitary confinement. In 2015, the State of California finally announced it was reforming the solitary confinement regime.

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<sup>18</sup> Lorna A. Rhodes, *Total confinement: Madness and Reason in the Maximum Security Prison*. Berkeley, University of California Press, 2004.

<sup>19</sup> *Madrid v. Gomez*, US 9th Circuit Court of Appeals (ND CA 1995).

## A Nascent Debate?

Human rights campaigners and academics have for many years been sounding the alarm about the abusive use of prison in general, and of solitary confinement in particular. However, it is only in the past five years that it has been possible to observe a change in repressive practices. The financial crisis of 2008 brought to the public's attention what a large portion of state budgets was earmarked for prison-related spending. The election of Barack Obama may not have brought about a penal revolution, but it did allow for a renewal of the public debate and for the review of certain policies. Federal drug laws, which were at the origin of the massive increase in the prison population of the federal system, were reviewed in 2013 at the instigation of Eric Holder, who was then Attorney General. As early as 2014, a significant decrease in the number of prisoners could be observed, the first in thirty years. Obama's prison visit in July 2015 symbolically demonstrated his desire to continue this attempt to reform criminal justice, and to moderate this repression-based system by supporting rehabilitation programmes.

The question of how solitary confinement is used in high-security units is starting to emerge as a problem: due to its financial cost, which is three times above that of ordinary detention; due to the extremely high level of re-offence among prisoners who have been released after having been held in solitary confinement; and finally due to the increase in cases of abuse, of bad treatment, and of suicide, which have made this form of incarceration seem like a kind of white torture. Several reports in major media outlets have shown how the treatment of common law prisoners is reminiscent of that meted out to the enemy combatants locked up in Guantanamo, right down to the orange pyjamas – and in fact, when the time came to put a stop to the use of open-air cages, wardens of American civil prisons were called upon to help reproduce the ultra secure management of Supermax on the island.

The overrepresentation of individuals suffering from mental disease in prisons, which has grown worse since drastic cuts were made to the budgets of psychiatric hospitals over the past five years, could well become a lever for a wider challenge to what prisons inflict on their inmates, and call into question the use of these security apparatuses on vulnerable populations. At the same time as the Attorney General's report on the abuses committed in Rikers Island was published, the *New York Times* published a long series of investigations into these prisons, and in particular into what happened to inmates suffering from mental illness. They were hit, deprived of treatment, treated so badly that several of them died: their behavioural problems were too often mistaken for insubordination, which would lead to brutal punishments<sup>20</sup>. Yet in the official texts and jurisprudence, American legislation protects the rights of individuals suffering from a handicap or mental illness. A Supreme Court ruling from 1976 (*Estelle v. Gamble*) recognised their constitutional right to receive treatment – as a result of which, prisons are legally obliged to provide psychiatric treatment to those individuals who need it. In 2014, around ten states passed reforms to the solitary confinement regime, in particular to

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<sup>20</sup> C.f.: <https://www.hrw.org/report/2015/05/12/callous-and-cruel/use-force-against-inmates-mental-disabilities-us-jails-and> (link active on 17/11/2015).

ensure it excluded juveniles and mentally ill inmates, and to promote rehabilitation measures in these units.

Such “transitional” measures have already been tested in different environments, on the initiative of professionals who were faced with the limitations of the treatment they were inflicting on incarcerated individuals, in whom they were observing mental degradation and an increase in violent acts. The State of Washington, for example, which was one of the first to build Supermax units in the 1980s, launched some programmes aimed at resocialising isolated inmates in the 2000s: based on the same cognitive-behavioural framework that had been used to justify the deprivations, the supporters of reform organised activities that allowed small groups of selected inmates to engage in social interactions with others, and to form a plan for their rehabilitation. These small pockets of resistance are now increasingly being echoed elsewhere. The fact that the United States signed up in 2015 to the “Mandela Rules”, a new incarnation of the UN standards for the treatment of prisoners, supports these approaches: these rules forbid solitary confinement and the deprivation of human contact, arguing that they constitute cruel and inhuman treatment.

The American prison system has come to embody a fascinating counter-model for European common sense. However, it is also a model that, while it does not export its penal philosophy, does export its techniques and architectural systems, which in turn shape practices on the ground. The high security isolation unit is remarkably successful internationally, in spite of its high cost<sup>21</sup>: the opening of new high-security institutions in France, in Condé-sur-Sarthe and Vendin-le-Vieil illustrate this trend, but also the spreading of the problems engendered by this kind of institution. While high-security incarceration regimes in France currently seem less drastic than they are in the United States, witness statements highlight an increase in tension and violence in this kind of institution. The fact that the task of dealing with mentally ill individuals is increasingly delegated to the penal system<sup>22</sup> is leading to similar problems in France as in the United States in terms of prison safety, while the one-upmanship in terms of technical security systems is justified by the threats of organised crime or terrorism. In Europe, we often wonder whether the United States will manage to break with these extremely violent practices of incarceration. But it would be appropriate to turn this question round and ask ourselves how, in France, we will manage to avoid them.

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<sup>21</sup> C.f. Jeffrey Ian Ross *The Globalization of Supermax prison*, New Brunswick, New Jersey: Rutgers University Press, 2013.

<sup>22</sup> <http://www.laviedesidees.fr/Les-fous-en-prison.html>