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# Restrictive Housing in the U.S.

Issues, Challenges, and Future Directions

## CHAPTER 10

Restricted Housing and Legal Issues

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## CHAPTER 10

# Restricted Housing and Legal Issues

Fred Cohen, LL.B., LL.M.

### Introduction

The conviction of a crime is the legal gateway to punishment by government officials. Even the accusation of crime may result in punishment-like incidents in jail for the many who cannot obtain release on bail. As pretrial detainees, the accused may lawfully be incarcerated and therefore subject to the rules of the confining facility.

The convicted felon sentenced to prison receives a measure of protection from the U.S. Constitution's Eighth Amendment, which prohibits cruel and unusual punishment. The pretrial detainee is similarly protected by the 14th Amendment's due process clause, which prohibits punishment simpliciter. For example, in *Bell v. Wolfish* the Court held that absent conviction, detainees might not be punished at all. They are, however, subject to rules and regulations required to maintain the security and good order of the jail. We must distinguish incarceration-as-punishment from punishment for rule infraction while incarcerated.

The convicted and merely accused share the same affirmative rights as prisoners: the right to adequate food, shelter, and clothing; medical care; and a safe, life-sustaining environment. In *Kingsley v. Hendrickson*, the Supreme Court drew a distinction on the use of force against prisoners favorable to the claims of pretrial detainees. A detainee need only show that the force objected to was unreasonable

vis-à-vis also showing that the officer was aware that the force applied was unreasonable. In the management of a prison or jail, corrections officials are extended a variety of tools with which to create an orderly and safe environment.

The use of extended restrictive housing to separate and isolate inmates is among the most extreme measures (short of deadly force) available to prison and jail officials. The use of physical force is a singular event, and it may be used only in response to the use or imminent threat of force or to prevent an escape.<sup>1</sup> Incarceration in restrictive housing may, and often does, go on for years and may not be commensurate with the original rationale for its use.<sup>2</sup>

This white paper focuses on the legal issues surrounding restrictive housing, a practice that is known by a variety of names and imposed for a variety of purposes. It may range from what is termed “keeplock” in New York State (a type of in-cell, pretrial detention pending a disciplinary hearing) to the long-term incarceration of federal prisoners such as Thomas Silverstein, who has spent more than 28 years in the deepest form of restrictive housing available in the federal prison system. Thus, we have a range of prisoners being kept in their own cells for a few days to a week to those spending 28 years (or far more) —

*[in a] cell so small that I could stand in one place and touch both walls simultaneously. The ceiling was so low I could reach up and touch the hot light fixture. My bed took up the length of the cell, and there was no other furniture ... . The walls were solid steel and painted all white. I was permitted to wear underwear but I was given no other clothing. I was completely isolated from the outside world and had no way to occupy my time. I was not allowed to have any social visits, telephone privileges, or reading materials except a bible. I was not allowed to have a television, radio, or tape player. I could speak to no one and there was virtually nothing on which to focus my attention (Casella & Ridgeway, 2011).<sup>3</sup>*

A recent study of segregated housing in the Federal Bureau of Prisons (2014) offered the following six categories of segregation:

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<sup>1</sup> Corporal punishment may not be used, per *Jackson v. Bishop*. Force, including deadly force, may be used to prevent an escape, quell a riot, or as an act of self-defense; *Whitley v. Albers* and *Kingsley v. Hendrickson* held that the use of force by officials against a pretrial detainee is subject only to an objectively unreasonable test and not an additional requirement that the officer was also subjectively aware that the force complained about was unreasonable. The Court left open whether convicted prisoners might benefit from this new rule on staff use of force.

<sup>2</sup> Albert Woodfox was held in solitary confinement for 43 years in Louisiana’s Angola prison. He was recently released.

<sup>3</sup> Silverstein committed three murders in prison and is, or certainly was, one of the most feared and dangerous inmates in the federal system.

1. **Protective custody** protects an inmate from threats of violence and extortion from other inmates. The inmate remains in this status until the threats have been removed or the inmate is released from prison.
2. **Segregation due to acute or serious mental health needs** provides intensive mental health treatment to inmates with serious mental illness. The placement of an inmate and the treatment plan are determined by the mental health team.
3. **Segregation due to acute medical needs** provides intensive medical care to inmates with life-threatening medical conditions or physical disabilities. The placement of an inmate and the treatment plan are determined by medical health professionals, including a psychiatrist or a physician.
4. **Investigative segregation** temporally segregates an inmate until serious allegations of misconduct or the need for protective custody are investigated. Once the investigative process is completed, the inmate can be assigned to restrictive housing or returned to the general population.
5. **Disciplinary segregation** is placement to punish an inmate for a violation of a major disciplinary rule. The inmate is released into the general population once the period of disciplinary segregation has been served.
6. **Administrative segregation** incapacitates an inmate whose presence in the general population would pose an ongoing threat to inmates and staff. The placement of an inmate in administrative segregation is determined by a limited set of criteria established by correctional administrators.

The three most enduring and legally troublesome categories (or types) of segregation are administrative segregation, disciplinary segregation, and protective custody, which will be addressed later in this paper. Investigative separation, particularly when served in one's cell or dorm and for only a brief period, does not raise the nagging legal or policy issues presented by disciplinary and administrative segregation. Placement in administrative segregation does not require proof of an infraction; it is essentially an administrative decision with some nominal due process and typically has no durational limits. Disciplinary segregation, on the other hand, results from a finding — by plea or hearing — based on “some evidence” (the constitutional evidentiary requirement) of rule violation. A specific term of “solitary” may be imposed and may then be extended in the event of additional violations.

As the fixed term nears its end, it is not uncommon for a committee to inform the inmate that a term of administrative segregation has been imposed. There is no judicially enforced requirement of proportionality for placement in disciplinary segregation, although virtually every correctional system has a schedule of sanctions as a matter of policy and procedure. These schedules tend

to follow a felony–misdemeanor–violation approach linking the most serious offenses to the most onerous sanction.

The author of this paper has written elsewhere, “Let me begin with the obvious: The very nature of our prisons [or jails] means we must have some means by which to separate prisoners on the basis of those who are at risk from those who create those risks” (Cohen, 2008). Indeed, that statement of the obvious translates into a constitutional duty imposed on prison and jail officials to provide for the “reasonable safety” of prisoners.<sup>4</sup>

The preservation of life is the most fundamental obligation of prison and jail officials. The provision of food, clothing, exercise, medical care, and shelter share the common objectives of the preservation of life and the avoidance of needless pain and suffering. The Eighth Amendment’s prohibition of cruel and unusual punishment serves as the guardian of those obligations, though it is not a particularly zealous guardian. The Eighth Amendment is not used as a vehicle for mandating best practices in correctional settings, nor was it intended to be. The operative words of the amendment are “cruel” and “punishment.” Thus, “cruel punishment” does not encompass discomfort or even every harm, nor does every pain equate with punishment. The U.S. Supreme Court’s interpretation of the Eighth Amendment has been quite conservative and cautious over the years, addressing conduct only at the edge of civilized decency in *Rhodes v. Chapman* as antithetical to human decency. On the other hand, the Court held in *Helling v. McKinney* that a remedy for patently unsafe conditions need not await a tragic outcome. On multiple occasions, the Court has affirmed the individual belief of a number of justices that the right to basic human dignity is at the core of cruel and unusual punishment and due process in this context.<sup>5</sup> This discussion leads us to the door of segregated housing and an important general statement of the law on point: No federal court, certainly not the Supreme Court, has found it unconstitutional to confine inmates in long-term administrative or disciplinary segregation. Where there has been a finding of unconstitutionality, there has also been a finding of special vulnerability related to the class of inmate or an individual inmate.

In *Madrid v. Gomez*, the lower court inveighed against an unconstitutional pattern of excessive force and a shockingly deficient system for medical and mental health care at California’s Pelican Bay supermax prison. The court did not, however, find the overall isolation and idleness of prisoners held at this facility to be constitutionally deficient. Indeed, the judge posited that the conditions (including isolation) at Pelican Bay will likely inflict some degree of psychological trauma upon most of the inmates so confined, but he was

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<sup>4</sup> *Farmer v. Brennan* reiterates that constitutional obligation while expanding on the meaning of deliberate indifference (or reckless disregard) by officials for the safety of inmates.

<sup>5</sup> *Hope v. Pelzer*, *Trop v. Dulles*, and *Brown v. Plata* (citing *Atkins v. Virginia*) are among these decisions.

not persuaded that the risk of developing an impairment to mental health was sufficiently serious for the special housing unit (SHU) population as a whole to find that the conditions per se violate the Eighth Amendment.

However, in *Brown v. Plata*, the Court found that severe overcrowding in California's prisons was the primary factor in the unconstitutional provision of medical and mental health care. The Court upheld a mandated reduction in the prison population as the means by which to facilitate acceptable health care. The decision, however, is not precedent for ruling that overcrowded jail or prison conditions per se are unconstitutional. There must be a connection to a specific constitutional right that is severely diminished.

## Early Solitary Confinement

Philadelphia's Eastern State Penitentiary opened in 1829. Eastern, with its Quaker heritage, was designed to create a humane opportunity for reformatory penitence. Its key innovation was solitary confinement — prisoners could work alone in their 16-foot cells (Benforado, 2016). The silence of such confinement and the provision of in-cell work reflected the view that crime was caused primarily by the noisy, disorderly outside world and that silence, industry, and reflection were the best reformatory measures. If inmates experienced pain, it was not the pain caused by punishment; it was the pain associated with treatment and the pursuit of a reformatory ideal.

Today's use of extended isolation in restrictive housing settings reflects no theory of crime causation, and the absence of industry, recreation, and reformatory programs reflects no valid theory of reformation. Today, extended isolation is a management tool, designed to attain order and security. However misguided the 19th-century prison reform-through-isolation concept turned out to be, it reflected a crime theory and reformatory spirit. Today, restrictive housing is used for a variety of purposes, from punishment, to protection, to a type of social defense associated with administrative segregation. There is no unifying behavioral theory of use or outcome, and yet the consequences are devastating for so many inmates.

## The Litigation Highway

Restrictive housing reform is in the air, but it has not as yet happened. Hundreds of articles on the topic are being written. Senate hearings have been held. Important professional organizations have issued standards and practices that would limit and sanitize restrictive housing. Some have called for a total ban, in the nature of the capital punishment reform agenda.

The Mandela Rules were adopted on May 22, 2015, by the United Nations Commission on Crime Prevention and Criminal Justice.<sup>6</sup> The rules forbid solitary confinement in excess of 15 consecutive days. The practice is viewed as a last resort and there are limits on the conditions of cell lighting, diet, and drinking water. While these rules are not binding on U.S. corrections facilities or practice, they may have a persuasive impact on national reform efforts.

Federal litigation continues. Any reforms achieved to date have primarily been attained through federal court intervention. This is not to say that judicially stimulated reform is the most desirable vehicle, but rather that the judiciary, as opposed to the executive or legislative branches of government, has conducted hearings, issued rulings (including declaratory and injunctive relief), and supervised consent decrees or stipulations that bring incremental measures of reform to this practice.

## The Vulnerables: Juvenile and Mentally Ill Inmates

Judicially stimulated reform of restrictive housing began almost a half-century ago with juveniles confined in custodial settings in the juvenile system. Young inmates treated as adults for the purpose of criminal responsibility and confined in adult correctional settings should maintain their adolescent status for purposes of restrictive housing.

This paper focuses considerable attention on juvenile justice, as it was the early predicate for contemporary judicially imposed reform. This offers the opportunity to discern the early analysis of what constitutes a special vulnerability to extended isolation and the initial reformatory measures imposed by the federal courts.

In *Lollis v. N.Y. State Department of Social Services*, the Federal District Court voided the two-week room confinement of a 14-year-old girl in a stripped room with no recreational outlets or reading material. The court also found it legally impermissible to use shackles on a young male inmate held in isolation for periods of 40 minutes to two hours.

The expert consensus of the 1960s and 1970s was that young people did not experience time in the same manner as adults. It was argued that to an adolescent, two weeks in social isolation could seem like years. Two weeks is, in fact, a much greater percentage of the life of a 14-year-old than, say, that of a 35-year-old adult. What exactly should follow from the “youth experience time differently” paradigm was never clarified. It served as a self-justifying statement

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<sup>6</sup> This is a revision of the influential 1955 *United Nations Standard Minimum Rules on the Treatment of Prisoners*.

of belief with policy attached. However, developmental psychologists have since changed this perspective, and a clear shift has occurred.

Scott and Steinberg (2010) make the case that young people are less competent decision-makers than adults. Cognitive maturity approaches adult levels by age 16, while emotional and psychosocial development lags. Adolescents tend to be risk-takers and open to peer influence. Their identities are fluid and not yet fully formed. Many consequences follow from debunking the experience assertion, including criminal responsibility norms and limits on how a juvenile inmate may be subject to control or punished.

The adjudication of a young person as delinquent is not the equivalent of a criminal conviction. A youth held in custody pending an adjudicatory outcome is not the equivalent of a pretrial detainee awaiting the outcome of a criminal charge. A delinquency proceeding is civil in nature, is based on the best interests of the young person, and is premised — although not necessarily functioning — on reformative ideals. Thus, for young detainees, there is a complex set of new developments in the realm of psychology, with an existing, often inconsistent, legal framework that considers them to be entitled to rehabilitation and protected from the harsher measures of control that are imposed on adults in adult prison settings. If extended restrictive housing is considered the most extreme control measure for adults in adult prisons, it follows with even greater force that similar measures employed with young inmates would have at least the same ranking.

Given the psychological plasticity of adolescents, the case against long-term restrictive confinement appears even stronger. Thus, young people are considered a vulnerable population whose characteristics make them particularly susceptible to the rigors of prolonged physical and social isolation. Whereas an adult in restrictive housing might retreat into himself and even re-invent himself with a trauma-informed identity, the young inmate is more likely to become angry, physically violent, and increasingly resistant to educational and reformative efforts. Some jurisdictions employ time-out rooms to which a young inmate may go for solitude or even to scream, punch pillows, or otherwise let off steam.

In *R.G. v. Koller*, three young inmates confined at a state juvenile facility brought claims against the facility for a variety of grievances. The detainees' sexual orientation (lesbian, gay, bisexual, or transgender) formed an important backdrop to the decision. The state conceded that it used isolation as a means to protect the plaintiffs from abusive conditions. The court held, "The expert evidence before the court uniformly indicates that long-term segregation or isolation of youth is inherently punitive and is well outside the range of accepted professional practices." There may be some ambiguity in the holding because the ruling addresses a type of protective custody while suggesting that the

approach to punishing a rule violation might bring a different result. The court notes that social isolation is inherently punishing and that punishing young inmates to protect them from others is not legally acceptable. Other courts have also concluded that the use of isolation with young people, except in extreme circumstances, is a violation of due process (see *H.C. by Hewett v. Jarrard*).

As early as the 1970s, the Institute of Judicial Administration–American Bar Association (ABA) Juvenile Justice Standards Project<sup>7</sup> took what was then a relatively extreme approach to the isolation of juvenile inmates. In Standards Relating to Corrections Administration, 10 days of room confinement was the maximum allowed for even a serious infraction.<sup>8</sup>

The American Correctional Association (ACA) has taken some relatively strong stands on the use of room isolation with juveniles (ACA, 2009). In Standard 4-JCF-3B-06, time-out or room restriction may be used for minor violations or a cooling-off period, but only while the negative behavior is not controlled. Standard 4-JCF-3C-04 limits confinement in a “security room” to five days — with living conditions and privileges that are available in general population — for any offense. It is important to note that this is a representative, not comprehensive, picture of the ABA standards. A state’s mandatory education laws must be observed, even during brief periods of room confinement.

President Obama recently announced a ban on holding young inmates in solitary confinement in federal prisons, saying that the practice could lead to “devastating lasting psychological consequences” (Shear, 2016). The President relied on research that focused on the psychological harm and risks of mental illness that support the ban. The ban is further evidence of the movement from conceptualizing young people as mini-adults who experience time differently to the newer evidence of psychological trauma associated with social isolation.

Dimon (2014) writes:

*One of the reasons that solitary is particularly harmful to youth is that during adolescence, the brain undergoes major structural growth. Particularly important is the still-developing frontal lobe, the region of the brain responsible for cognitive processing such as planning, strategizing, and organizing thoughts or actions. One section of the frontal lobe, the dorsolateral prefrontal cortex, continues to develop into a person’s mid-20s. It is linked to the inhibition of impulses and the consideration of consequences.*

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<sup>7</sup> The 23 original volumes are condensed in *Juvenile Justice Standards Annotated: A Balanced Approach*.

<sup>8</sup> Standard 8.7 (B). The author of this paper is the co-author of this volume of standards.

Social isolation soon became the major premise for explaining the harm caused by extended isolation on adult prisoners. Constitutional litigation in this area for juvenile inmates utilizes the 14th Amendment's due process clause. In decisions involving the death penalty for juvenile inmates sentenced to life without parole and the safeguards used during custodial interrogation, the Supreme Court has unhesitatingly taken a "kids are different" approach, holding that the state has a legitimate interest in detaining young people prior to delinquency proceedings, but their conditions of confinement must not amount to punishment (see *Roper v. Simmons*; *Graham v. Florida*; *Miller v. Alabama*; *J.D.B. v. North Carolina*; *Schall v. Martin*; *Morgan v. Sproat*). Some courts apply both the substantive due process protections and the prohibition against cruel and unusual punishment to conditions claims of post-adjudication youth. Vulnerability to harm and overreaching (as with custodial interrogations) are the common denominators in those decisions.

There are generally two pathways to follow on the road to legal reform of isolation for juveniles: the empirical pathway, which is strewn with empirical evidence (or assertions) of harm, and a human rights approach, which is not dependent on (but is receptive to) empirical assertions. Human rights law exists as something of a metaphor in our legal structure and, more concretely, at the level of international law. As noted earlier, the Supreme Court has interpreted the Eighth Amendment's cruel and unusual punishment clause as safeguarding no less than the dignity of man. That interpretation is not likely intended to serve as a bridge to the creation of new constitutional rights — rather, it has been used to strengthen an existing right, a prohibition against torture. In *Hope v. Pelzer*, Justice John Paul Stevens' opinion for the majority alludes to the Eighth Amendment as a repository for rights associated with the dignity of man. The actual holding found that on these facts there was a needless infliction of pain. Although this finding is important, it merely added a new set of facts to the prison-torture menu (as opposed, for example, to finding that a corrections officer's verbal abuse of a prisoner is such an affront to human dignity as to constitute cruel and unusual punishment).

A report by the American Civil Liberties Union (ACLU, 2014, p. 10) speaks to human rights law and practice. The extended quote on the next page illustrates this.<sup>9</sup>

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<sup>9</sup> The extended quotation on the next page includes the text of the original footnotes.

U.S. courts, including the Supreme Court, have repeatedly relied on international law and practice on children's rights to affirm their reasoning that certain domestic practices violate the Constitution.<sup>1</sup> International human rights law, which identifies anyone below the age of 18 years as a child, recognizes that "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth."<sup>2</sup> The International Covenant on Civil and Political Rights (ICCPR), a treaty ratified by the United States, acknowledges the need for special treatment of children in the criminal justice system and emphasizes the importance of their rehabilitation.<sup>3</sup> The Convention on the Rights of the Child (CRC), a treaty signed by the United States, also addresses the particular rights and needs of children who come into conflict with the law.<sup>4</sup>

A number of international instruments and human rights organizations have declared that the solitary confinement of children violates human rights laws and standards prohibiting cruel, inhuman or degrading treatment and called for the practice to be banned, including: the United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines),<sup>5</sup> the Committee on the Rights of the Child,<sup>6</sup> the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (the Beijing Rules),<sup>7</sup> and the Inter-American Commission on Human Rights.<sup>8</sup> Based on the harmful physical and psychological effects of solitary confinement and the particular vulnerability of children, the Office of the U.N. Special Rapporteur on Torture has repeatedly called for the abolition of solitary confinement of persons under age 18.<sup>9</sup>

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<sup>1</sup> *Graham v. Florida*, 130 S. Ct. at 2034; *Roper v. Simmons*, 543 U.S. at 575 (citing *Trop v. Dulles*, 356 U.S. 86, 102-103 (1958)). These cases start from the supposition that, whether a punishment is "cruel and unusual" is a determination informed by "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

<sup>2</sup> *United Nations Declaration on the Rights of the Child*, G.A. Res. 1386 (XIV), U.N. Doc. A/4354 (Nov. 20, 1959). Similarly, *The American Convention on Human Rights* ("Pact of San José, Costa Rica"), Article 19, states, "Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state." *Organization of American States, American Convention on Human Rights*, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (entered into force July 18, 1978), reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System*, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992).

<sup>3</sup> *International Covenant on Civil and Political Rights*, Arts. 10, 14(4), opened for signature Dec. 16, 1966, S. Exec. Rep. 102-23, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) (ratified by U.S. June 8, 1992) ("ICCPR"). The Human Rights Committee has interpreted the ICCPR's provisions on child offenders to apply to all persons under the age of 18. *UN Human Rights Comm.*, 44th Sess., General Comment No. 1, U.N. Doc. HRI/GEN/1/Rev.1 at 155 (1994), available at <http://www1.umn.edu/humanrts/gencomm/hrcoim20.htm>. Treaties signed and ratified by the United States are the "supreme Law of the Land." U.S. CONST. art. VI cl. 2.

<sup>4</sup> *Convention on the Rights of the Child (CRC)*, opened for signature Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990) (“CRC”). The United States signed the CRC in 1995 but has not ratified.

<sup>5</sup> *U.N. Guidelines for the Prevention of Juvenile Delinquency*, G.A. Res. 45/112, Annex, 45 U.N. GAOR Supp. (No. 49A), U.N. Doc. A/45/49, at 201 (Dec. 14, 1990) (“The Riyadh Guidelines”).

<sup>6</sup> *U.N. Comm. on the Rights of the Child*, 44th Sess., General Comment No. 10, *Children’s rights in juvenile justice*, U.N. Doc. CRC/C/GC/10 (2007).

<sup>7</sup> *U.N. Rules for the Protection of Juveniles Deprived of their Liberty*, G.A. Res. 45/113, Annex, 45 U.N. GAOR Supp. (No. 49A), U.N. Doc. A/45/49, ¶ 67 (Dec. 14, 1990) (“The Beijing Rules”).

<sup>8</sup> Press Release, Annex to the Press Release Issued at the Close of the 147th Session (Apr. 5, 2013), available at [http://www.oas.org/en/iachr/media\\_center/PReleases/2013/023A.asp](http://www.oas.org/en/iachr/media_center/PReleases/2013/023A.asp) (incorporating the definition of the United Nations Special Rapporteur on Torture, Mr. Juan Mendez, into the IACHR corpus juris).

<sup>9</sup> *Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Interim Rep. of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ¶¶ 78-85, Annex (Istanbul Statement on the Use and Effects of Solitary Confinement), U.N. Doc A/63/175 (July 28, 2008) (by Manfred Nowak), available at <http://www.unhcr.org/refworld/pdfid/48db99e82.pdf>; *Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Interim Rep. of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ¶ 77, U.N. Doc. A/66/268 (Aug. 5, 2011) (by Juan Mendez), available at <http://solitaryconfinement.org/uploads/SpecRapTortureAug2011.pdf>.

What lessons learned from juvenile justice can be applied to the restrictive housing of inmates with mental illness? Adolescent inmates and adult inmates with serious mental illness share some characteristics. The available scientific and psychological research shows that the psychological impact of social isolation on members of both groups is often grave. The causative harm factor for an adolescent is the plasticity of the brain: Its normal development is altered by the lack of social interaction. The causative harm factor for an adult inmate with serious mental illness (or an adult who is at risk of developing serious mental illness) is the devastating psychological impact of social isolation, particularly of the extreme sort described earlier by federal prisoner Thomas Silverstein. Where mental illness is at issue, the focus is not the interruption of human development but on the serious impairment or destruction of the psyche: loss of reality, delusions, or treatment-resistant depression.

Deprivation may be deemed an unconstitutional condition of confinement — whether for adults or adolescents — when it is sufficiently serious and imposed with “deliberate indifference” to the inmate’s health and safety. In *Farmer v. Brennan*, the Court interpreted deliberate indifference as a form of subjective recklessness where the standard of “should have known of the risks” is not sufficient for liability. Officials must be shown to have actual knowledge of the serious risks and fail to mitigate or eliminate those risks.

It is important to note that this paper’s designation of young people and adults with mental illness as vulnerable populations is a *categorical* legal exemption as well as an exemption in an individual case of an extended term of isolation.

A categorical exemption means that a litigant need show only forbidden extended isolation and membership in the particular class. A categorical exemption flows most often from a successful class action, whereas individual exemption claims are usually characterized as — “I am a juvenile or have a mental illness. I was held in isolation for X months and, as a result, have suffered severe harm and seek monetary damages.”

This paper turns now to the second important group of vulnerable inmates: persons with mental illness. Changes in correctional institutions’ dealings with this population will have a broader impact on corrections operations.

## Isolation and Mental Illness

The plight of prisoners with mental illness who are placed in various forms of restrictive housing has had more impact on legal reform than the similar treatment afforded juveniles.<sup>10</sup> The data on the number of adults held in such housing vary, with estimates ranging from 80,000 to 100,000 per day.

Although the number of young people held in custodial settings has decreased dramatically in the past 10 years, those numbers — even at their peak — never approached the millions of adults held daily in jails and prisons. The juvenile justice system has language for addressing limited (e.g., “time-out,” “room confinement”) isolation, along with a culture that is less accepting of the practice and has not used the extraordinarily long terms imposed in the adult system.<sup>11</sup> The Department of Justice estimates, based on survey data from 2003, that 35 percent of youth in custody (approximately 35,000 young people between 10 years old and 20 years old) at that time had been held in isolation with no contact with other residents. The vast majority (87 percent) were held for more than two hours, and more than half (55 percent) were held for more than 24 hours. More than 17,000 of the approximately 100,000 incarcerated young people have been subjected to solitary confinement.

Data gathered from a group of 162 voluntarily participating juvenile detention facilities in 29 states in 2012 by the Performance-Based Standards Initiative of the Council of Juvenile Corrections Administrators suggest that the average duration of isolation was slightly more than 14 hours. The group also reports that although the number of children held in solitary confinement for one to five days increased between 2010 and 2012, the number of youth who reported being held in solitary confinement for more than 11 days and from six to 10 days decreased.

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<sup>10</sup>For a compelling overview of correctional mental illness issues, see Human Rights Watch (2003). For a detailed treatment of correctional mental health law and policy, see Cohen and Knoll (2011).

<sup>11</sup>See Department of Justice Office of Juvenile Justice and Delinquency Prevention (2010); PbS Learning Institute (2012a, 2012b).

## A Court Monitor's View From the Inside

Imagine that you are walking through a prison's restrictive housing facilities. You experience two starkly different phenomena. In one scenario, the unit is distressingly loud — inmates are banging or kicking at their unyielding steel doors, screaming, or hysterically laughing. The other unit is deathly silent. You hear your own footsteps on the always surgically clean, concrete floor. Peering into the silent cells, you see blankets pulled up over bodies; a vagrant hand or visible foot. The cell is utterly disorganized, littered with untouched food and scoops of paper. The mattress is on the floor.

As the federal court monitor for five years in *Dunn v. Voinovich*, I visited many a segregation unit in Ohio. My task during a site visit was to first screen inmates who might be mentally ill and then, with my clinical crew, determine the level of mental health care they were receiving and needed.

A mental health caseload chart was always available to me, but I employed a different and, for me, more effective approach. I would tell the sergeant in charge that as a lawyer, I was not an expert in diagnosing mental illness and could sympathize with his challenges in that regard. I would then ask, “Based on what you see on your shift, who are the four or five sickest inmates in the unit?” The officer would reply, for example, “Oh, that’s easy. That would be Jones, Smith, Terry, and Loomis.” I’d thank him, enter the unit, approach a cell in which an inmate was awake (or just not screaming), and introduce myself as the federal court monitor. I asked the inmates to tell me who they thought were the “craziest” inmates in the unit. A typical reply: “Oh, that’s easy. That’s Jones, Smith, Terry and Loomis.”

The officers and inmates almost always agreed with each other as to who was mentally ill and who was the sickest of the lot. They could also tell me what kind of treatment they may have observed. More often than not, the story was of treatment not received. I learned that rounds designed to identify inmates who were not on the caseload were conducted so quickly that we called them “drive-bys.” I also learned that rounds were conflated to include a brief “how are you feeling?” contact with a caseload inmate, which defeated the purpose of rounds.

Wherever I either monitored or conducted a study of correctional mental health care, I learned that restrictive housing units by any name were packed with inmates with mental illness. Their untreated illness often made them the most difficult and disruptive inmates in the facility. They were placed in restrictive housing for a reason, and that reason was not treatment — it was to assert control in lieu of providing treatment to these often difficult-to-manage inmates. A cell-side treatment session in restrictive housing invariably was a medication-management contact conducted on the fly; treatment (if any) was medication.

If it is accurate to call prisons the new asylums, it is just as accurate to call restrictive housing the new asylum lock-down wards. Litigation that addresses confinement in correctional lock-down units is, however, bringing change on behalf of inmates with mental illness.

## Legal Framework

*Estelle v. Gamble* established that prisoners have a constitutional right to adequate health care for serious health needs. There is unanimity in the courts and among experts that there is no constitutional distinction between inmates' right to treatment for serious medical and for mental health conditions. The threshold factors for mandated mental health care are seriousness and the standard of care as measured by the awkward term "deliberate indifference."

There are two distinct sets of challenges associated with inmates with mental illness. First, as illustrated by the sidebar, "A Court Monitor's View From the Inside," are inmates diagnosed with severe mental illness who are confined in restrictive housing. Second is the more fluid challenge posed by inmates who appear to function normally but then either begin the long slide or fall quickly into mental illness. Prison is a hostile environment for an inmate with mental illness. How much more hostile, then, is the imposition of additional social isolation on an inmate already struggling with hallucinations, voices in his head, a belief that the staff is trying to poison him, alternating between bursts of manic conduct and the quiet despair of depression?

There is an inherent challenge rooted in the constitutional right to treatment for severe mental illness: Extended confinement in isolation is argued to be so pervasively destructive that extended confinement per se establishes cruel and unusual punishment. Extended social isolation, it could be argued, is as much a barrier to meaningful treatment as is the withholding of prescribed medication.

*Jones-El v. Berge* is a good example of a judge clearly differentiating inmates with existing serious mental illness from those who may be at risk. Judge Barbara Crabb banned the housing of inmates with serious mental illness at Boscobel, Wisconsin's supermax prison. Judge Thelton Henderson determined that the SHU at California's Pelican Bay prison violated the Eighth Amendment by housing inmates who were already mentally ill. However, he declined to reach a similar conclusion for inmates who were at an unreasonably high risk of developing serious mental illness as a result of the conditions in the SHU.

The second challenge relates to inmates who are at risk of developing serious mental illness, as described by Judge Henderson. Whereas the first challenge invites questions related to diagnostic accuracy and to determining a duration of confinement that constitutes "extended," the second at-risk category raises a multilayered question involving prevention as a viable aspect of the constitutional duty to treat.<sup>12</sup>

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<sup>12</sup>During the author's tenure as monitor in Ohio, a policy was developed that banned the transfer of inmates with serious mental illness and those who were at risk to the Ohio State Penitentiary (OSP), Ohio's supermax facility. There was a file review for at-risk inmates at the transferring facility and again at OSP reception that helped identify the more vulnerable inmates.

In addition to the duty to treat serious illness, correctional officials have a constitutional duty to provide a reasonably safe environment, which includes protecting inmates from assaults by other inmates (see *Helling v. McKinney*). Environmental hazards include fire and exposure to asbestos, toxic fumes, polluted water, and environmental tobacco smoke.

It may reasonably be argued that extended solitary confinement for a cognitively impaired or paranoid-type inmate is so likely to cause needless pain and suffering that it is deliberately indifferent per se to isolate such a person. By analogy, an inmate with asthma who seeks separation from tobacco-smoking cellmates will (likely successfully) argue that he or she is especially vulnerable and will likely suffer grave harm (see *Talal v. White*; *Kelley v. Hicks*).

In 2011, the U.N. special rapporteur on torture warned that solitary confinement of inmates with mental illness and young inmates can constitute torture or cruel, inhuman, or degrading treatment or punishment when used indefinitely or for a prolonged period. Torture is a more exquisite form of forbidden punishment. The literature is replete with assertions by individuals and organizations (including the American Friends Services Committee and the Center for Constitutional Rights) that extended isolation constitutes torture.

The constitutional duty to treat and to provide a reasonably safe environment is based on the cruel and unusual punishment clause in the Eighth Amendment. Lobel (2016) notes that the presence or absence of alternatives or legitimate penological interests should not be relevant to determining whether the knowing infliction of pain is punishment — cruel or otherwise — under the Eighth Amendment.

Under the reasonableness test in *Turner v. Safley*, which calls for the judicial balancing of competing interests and the weighing of alternatives, the discretion of corrections officials is at its zenith.<sup>13</sup> Under the Eighth Amendment, then, corrections officials have considerable discretion, but the weighing of alternatives when mental illness is a factor is not part of the legal calculus.

Eighth Amendment jurisprudence goes to the heart of the human condition, from assuring necessary health care to safe and tolerable conditions of confinement. Dolovich (2009) writes, “If the prohibition on cruel punishment is to mean anything in a society where incarceration is the most common penalty for criminal acts, it must also limit what the staff can do to prisoners over the course of their incarceration.” The long-term isolation of an inmate with serious mental illness would seem to be a clear example of the knowing infliction of needless pain and suffering — cruel punishment. The consensus on the harm

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<sup>13</sup>See Mushlin (2009) for a comprehensive discussion of the extensive boundaries of the *Turner* test, including First Amendment issues, marriage, and opening attorney mail. The *Turner* test ends at the door of the Eighth Amendment, which encompasses use of force, treatment, and conditions of confinement.

caused by such confinement is so great that a court may well take judicial notice of the fact.<sup>14</sup>

There are many questions residing just under the surface of labeling a unit as “long-term restrictive housing.” There is no obvious point of certainty beyond which the duration and conditions of confinement becomes unconstitutional. The polar extremes are relatively simple: at one end of the spectrum might be the 24-hour observational hold in a stripped cell of a psychiatric inmate in crisis, while at the other end is a two-year hold in that same cell without access to reading material or television. Another example of polar extremes might be hours of weekly out-of-cell time versus no access to programs or congregate activity, and treatment consisting only of medication management and documentation of a worsening mental condition. The latter would seem to be extreme punishment. The former, with its limited duration and an observation-protection motive, may be a poor option, but it is not the intentional infliction of needless pain as punishment.

Glidden and Rovner (2012) note that courts too often credit a prison’s proffered “legitimate penological interest” in rejecting Eighth Amendment claims, including prolonged penal isolation. Relying on the Americans with Disabilities Act (ADA) and Sec. 504 of the older Rehabilitation Act (RA) (511 at 837), Glidden and Rovner note that where inmates have a mental illness that rises to the level of a disability, ADA and RA section 504 invite challenges to each of the defining characteristics of supermax (or solitary) confinement: limited access to education, telephone calls, programs, exercise, and books; mobility restraints, and so on.

The tactical advantage for inmates using these disability statutes is that the burden is on prison officials to justify the denials. That is difficult to do for books, television, education, and real outdoor exercise. In a constitutional challenge, the plaintiff (inmate) must show the seriousness of the condition, harm, and deliberate indifference in the denial or harsh conditions of confinement. As noted, “cruelty amounting to punishment as a result of deliberate indifference” ultimately are the key operative words in a constitutional challenge. In *Farmer*, where the Court attempted to clarify the meaning of deliberate indifference, the holding stressed that the Eighth Amendment is concerned with cruelty that amounts to punishment. “Cruel” here modifies “punishment.” Not all cruelty imposed on jail and prison inmates amounts to punishment. If that were not the case, then *Bell v. Wolfish*, which forbids any punishment of a pretrial detainee, would make no sense.

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<sup>14</sup>A rule of evidence that allows a fact to be introduced into evidence if the truth thereof is so notorious or well known or authoritatively accepted that it cannot reasonably be doubted.

If the Eighth Amendment was intended to outlaw the most barbarous, the most uncivilized of punishments, then the Supreme Court's proper role is to patrol the outer boundaries of decency — the point at which the culture and ethics of our society dictate that government practices must stop. Critics of this viewpoint argue that it is far too subjective and gives unelected jurists who are appointed for life a power unmatched by any other branch of government. The late Justice Antonin Scalia and Justice Clarence Thomas, both self-proclaimed literalists and originalists, took this view, looking for the meaning of constitutional provisions at the time of the document's adoption.

The great majority of Supreme Court Justices accept the Eighth Amendment as subject to interpretation in light of evolving standards of decency. What constitutes uncivilized conduct is not frozen in time: It is to be given a contemporary meaning. This approach to judicial decision-making is hardly crystal clear. It does, however, allow for a discussion of some of the extreme — now rejected — tortures of the past: the public whippings and humiliation, branding, cutting off one or both ears, the ducking stool (Hatfield, 1990). These relics become points of departure for a contemporary analysis of a challenged punishment or “control” mechanism. The Court's search, then, is for what is tolerable today but not necessarily desirable. Desirability as a stand-in for good public policy is the purview of the legislative branch of government. As discussed earlier, our 19th-century experiment with solitude and penitence was based on the then-popular theory of crime causation. Inmates held at Pennsylvania's Eastern State Penitentiary, for example, could work and produce goods in their cells. The concepts of interrupted adolescence and the destructiveness caused by lack of social intercourse obviously had not yet emerged.

The highly regarded National Commission on Correctional Health Care (NCCHC) issued a position statement in April 2016 saying that prolonged (more than 15 consecutive days) solitary confinement is cruel, inhumane, and harmful to an individual's health (NCCHC, 2016). Juvenile inmates and adults with mental illness are categorically excluded for any duration. Prolonged isolation should be eliminated as punishment, according to NCCHC. This position places NCCHC at the forefront of progressive reform in this area. The organization also takes the position that correctional health care professionals should not be involved in deciding whether adults or young inmates are physically or psychologically eligible to be placed in isolation. The health care professional's role is to treat, not to participate in a practice that is now viewed as so damaging that its prolonged use is condemned.

## **Beyond Vulnerable Inmates**

The movement to reform the use of restrictive housing in jails and prisons is occurring within the larger movement to undo the largely failed program of mass

incarceration that began in the 1970s. Michelle Alexander's *The New Jim Crow* (2010), with its emphasis on the racial inequities of the justice system, has been a rallying cry for decarceration. Alexander's argument is that mass incarceration in the United States has served as racialized social control in a manner strikingly similar to that of Jim Crow. Black men, for example, are admitted to prison on drug charges at rates 20 to 50 times greater than those of white men. Once in prison, black inmates constitute a greater percentage of inmates held in administrative segregation than the total administrative segregation population (Liman Program & ASCA, 2015).

In a metaphorical sense, restrictive housing resembles the use of small boxes for confinement in a system where confinement begins in a larger box. In *Meachum v. Fano*, the Supreme Court ruled that a conviction has sufficiently extinguished an inmate's liberty interest to allow authorities to confine him in any prison. Thus, a transfer from a minimum-security prison close to an inmate's home to a maximum-security prison hundreds of miles away evokes no procedural or substantive protections. *Vitek v. Jones* imposes some due process requirements on a prison-to-mental hospital transfer. *Wilkinson v. Austin* upheld some nominal, internal paper review as all the due process needed for a transfer to Ohio's supermax prison. The minimum-to-maximum-security prison transfer is likely to inflict substantial hardship and suffering on the inmate, yet correctional discretion is at its peak.

Moving an inmate from the "big box" of a prison to that prison's much smaller box, whether for disciplinary or administrative purposes, is the focus of today's restrictive housing reform.

Why is there no such outcry (young people and the mentally ill aside) when conviction and a lawful sentence allow wholly discretionary placement of an inmate in any prison chosen by the proper authority? Is there any difference between ending one's freedom at the perimeter wall and the encasement of the four walls of a restrictive housing cell? Is this not simply a tweak and not an incision or surgical excision?

In *Sandin v. Conner*, the Supreme Court indicated that where prison authorities impose an additional restraint on an inmate's limited freedom, and where such restraint is an "atypical and significant hardship in relation to the ordinary incidents of prison life," then some due process must be afforded. The compound of "atypical and significant" hardship has triggered hundreds of appellate decisions in search of its meaning. The case initiated a new era for liberty interests and the right to some procedural due process. A finding of atypical and significant hardship does not relieve an inmate from the deprivation. Rather, a small dose of procedural due process on a par with disciplinary proceedings for major infractions is available: written notice in advance of a hearing; the right to be heard; a limited right to witnesses; confrontation, cross-examination, and assistance (not by counsel) in certain instances; and a right of internal appeal. The source of these rights is *Wolff v. McDonnell*. It is important to note that the

Court in *Wolff* did not require that the decision-makers be truly independent, nor did it provide for personnel who are trained in the law to assist an inmate.

*Sandin* initially raised the question of whether atypical and significant means that conditions must be so severe, so close to life-threatening, that the line into forbidden cruel and unusual punishment would be crossed. That said, there is no procedural solution — cruel and unusual punishment cannot be imposed. The case has caused more confusion than anything else. It did not slow down the use of prolonged inmate isolation. Had the procedural bar been set sufficiently high that corrections officials would pause before seeking extended or open-ended periods of isolation, *Sandin* could have been more than an irritant to academics and corrections officials.<sup>15</sup> Keep in mind that *Sandin* does not preclude an atypical and significant hardship — it requires extra procedural steps before imposing that hardship.

There comes a point where a quantitative difference becomes qualitative. A fall while standing on a chair and a fall from the top of the Empire State Building are different in degree and category, but the loss of balance, the unsecured flight through space, and a sudden termination describe both events. The consequences, however, are so obviously different that the distinction becomes qualitative. With duration and the conditions of confinement the key variables, restrictive housing is open to sufficiently severe empirical and humanistic challenges as to be under considerable legal stress. California recently settled *Ashker v. Governor*, in which the plaintiff originally offered the promise of a broad judicial ruling on the use of extended SHU confinement for inmates other than adolescents and the mentally ill. Once again, the settlement stopped short of forbidding extended isolation for inmates who are not juveniles or who have serious mental illness.

Some new version of *Ashker*, then, would seem inevitable. Such a lawsuit would have plaintiffs who are not mentally ill or juveniles; rather, they will be relatively normal adults who will liken an extended stay in isolation to housing an asthmatic with a smoker and will argue that extended isolation is an unsafe condition of confinement precluded by the Eight Amendment.

This country is on the cusp of significant restrictive housing reform, and federal litigation has been the significant catalyst. It is in the very nature of social policy reform via the courts that change is incremental. Even the most history-changing U.S. Supreme Court decisions — *Brown v. Board of Education*, *Roe v. Wade*, *Mapp v. Ohio* — did not suddenly appear on the Supreme Court docket. A series of lower-court decisions on racial segregation in education, the privacy rights of women to contraception and abortion, and the exclusion of illegally seized evidence laid the foundation for *Brown*, *Roe*, and *Mapp*. The judiciary inherently

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<sup>15</sup>See *Wilkinson v. Austin*, which accepted an internal prison paper review as the due process required for transfer to Ohio's supermax prison. The Ohio Attorney General conceded the existence of the requisite liberty interest.

moves cautiously: Only after testing the water and evaluating the impact of the first few steps forward might the all-encompassing issue be dealt with head-on. The Supreme Court will observe the reception of the incremental steps. Where lower courts and state legislatures have fallen in line, the ultimate result is more predictable. The march to abolish the death penalty is an example. *Obergefell v. Hodges*, which validated gay marriage, is an even better example.

Does it violate the Eighth Amendment's cruel and unusual punishment clause to subject any pretrial detainee or convicted prisoner to an extended term of extreme isolation? This is the case now waiting in the wings.

The issues surrounding isolation as cruel and unusual punishment require further elucidation. For example, what is meant by "an extended term"? What are the conditions that constitute extreme isolation? This paper considers extended term to be 15 to 30 consecutive days. The conditions that ultimately may be constitutionally prohibited coalesce around the degree of social isolation experienced by an inmate. An earlier work by this paper's author described the "dark cells" of the past, in which inmates were completely deprived of access to light, sound, fresh air, or congregate activity (Cohen, 2006). A somewhat less rigorous form of isolation (restrictive housing), which this author refers to as second-degree isolation, is used today. This form of isolation typically houses inmates in single cells for 23 hours per day. Inmates have limited access to outside light and air, yet are able to hear some movements outside their cells and may even yell or tap (in code) as communication. Meals are taken alone in the cell; exercise is indoors and highly restricted; and access to programs, visits, telephones, radio, television, showers, and reading material is substantially limited. These restrictions are characteristic of the isolation or segregation units in typical supermax facilities.

Second-degree isolation conveys a set of circumstances beyond life in a single, quiet cell. It includes deprivation of many of the most basic elements that link one to social interaction, the rudimentary sights and sounds of life, and basic decision-making. As one moves from such isolation to the still-deprived world of ordinary prison conditions, an uncertain line divides prohibited isolation from the "mere" harsh conditions of penal confinement. The critical factors in this environment are out-of-cell time, congregate activity, exercise or "yard time," and access to work and programming. Put another way, the greater the social isolation and sensory deprivation, the more a unit qualifies as penal isolation.

Without regard to the harm of social isolation over time, the vulnerability of certain groups, or affronts to human dignity, a prison (or a unit thereof) may lack basic shelter, present serious fire hazards, and have health and sanitation deficits. Confinement of inmates — of human beings — even for the briefest interludes in such circumstances should and would be prohibited as cruel and unusual punishment (see *Carty v. Farrelly*; *Johnson v. Lewis*). The attachment of a rigorous form of isolation to such conditions should be absolutely prohibited, with severe penalties available for its use.

Habitability is not a necessary part of the calculus on the constitutionality of restrictive housing. However, to the extent that prison conditions in restrictive housing may be so primitive as to be life-threatening, the case for unconstitutionality is enhanced.

## ***Cruel and Unusual Punishment Times Two***

Today, the average time between sentencing and execution is almost 18 years, up from 11 years a decade ago. In *Moore v. Texas*, the U.S. Supreme Court was asked to decide whether the execution of a Texas inmate three-and-a-half decades after imposition of the death sentence is cruel and unusual punishment. The durational question was underscored in Moore's petition for a writ of certiorari (p. 30) by the assertion that the excessive-duration claim is aggravated where a death row inmate is held alone in his cell for almost the entire day.

Justice Anthony Kennedy's impassioned plea condemning this "dual death sentence" in *Davis v. Ayala* is receiving much attention on the issue of placing death row inmates in solitary confinement, whether automatic or not, and counsel for Moore certainly relied on it.

If the federal courts and, ultimately, the Supreme Court, are to resolve essential reform questions, they must be willing to accept even more generously the findings of psychology and neuroscience research about the mental and emotional pain experienced during extended periods in restrictive housing. The Supreme Court has indeed, become increasingly receptive to such research as a basis for recognizing grave mental or emotional harm.<sup>16</sup> However, where the harm is not physical, the case may be quite difficult for the complainant inmate to prove. The overarching challenge may be to escape the reach of the ever-present mantra that prisons were not intended to be comfortable places. At what point is "discomfort" replaced by such suffering that an impermissible punishment has been inflicted? This is an area where additional empirical evidence would be very useful.

It is easy to accept that food, water, shelter, and clothing are essential for human survival and that restricting their availability in a correctional setting is a health- or life-threatening harm. The denial of socialization, however, may suggest that the demand for "mere" comfort is as profound a human need as any element of basic human sustenance. As Justice Kennedy recently wrote in *Davis v. Ayala*, "Years on end of near-total isolation exact a terrible price." He cites Grassian's (2006) seminal work on the common side effects of solitary confinement as including anxiety, panic, withdrawal, hallucinations, self-mutilation, and suicidal thoughts and behaviors.

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<sup>16</sup>See the excellent law review note, "The Psychology of Cruelty: Recognizing Grave Mental Harm in America's Prisons." (2015). *Harvard Law Review*, 128, 1250, 1255-1257.

More recently, prominent psychiatrist Terry A. Kupers (2016) reported on his discovery of what he terms “SHU post-release syndrome”: disorientation; anxiety in unfamiliar places; retreat to small, circumscribed spaces; limitations in social interaction; hyperawareness of surroundings; suspicion of others; difficulty expressing feelings or trusting others; a belief that one’s personality has changed; and substance abuse.

Not all former SHU inmates experience all of these symptoms, just as not every soldier who experiences the horror of the battlefield will experience post-traumatic stress disorder. The syndrome itself is not (yet) linked to anything other than profound isolation and the denial of the normal attributes of human interaction.

## Moving Forward

Although the federal judiciary has served as a catalyst for reforms currently in place, there is no reason to abandon the legislative process as a change agent. Legislative action is less expensive than litigation — the hearing and legislative development phases are not constrained by rules of evidence, nor do they require a parade of competing experts — and the opportunity for many voices to be heard is an attractive benefit.

It is likely that in a given state system, or even in a jail that is comparable in size to the Los Angeles County, Cook County, and Rikers Island facilities, we will not know precisely how many inmates are held in isolation, for how long, for what reasons, and with what outcomes. Where such doubt exists, consideration should be given to retaining outside experts to conduct an independent investigation. A study could be ordered by the appropriate legal counsel and be protected from unwarranted dissemination by privilege, if desired. It should concentrate on the young inmates and inmates with mental illness, and should describe those who are outside those areas of vulnerability. Any report should offer conclusions that address whether there is deliberate indifference to the safety and health of inmates held in extended isolation.

The *ABA Standards for Criminal Justices: Treatment of Prisoners* (2011), for which this paper’s author served as a member of the drafting task force, are arguably the best guidelines and standards in both concept and likelihood of adoption. Standard 23-3.8: Segregated Housing is the central standard on point:

- (a) *Correctional authorities should be permitted to physically separate prisoners in segregated housing from other prisoners but should not deprive them of those items or services necessary for the maintenance of psychological and physical wellbeing.*
- (b) *Conditions of extreme isolation should not be allowed regardless of the reasons for a prisoner’s separation from the general population. Conditions of extreme*

*isolation generally include a combination of sensory deprivation, lack of contact with other persons, enforced idleness, minimal out-of-cell time, and lack of outdoor recreation.*

- (c) *All prisoners placed in segregated housing should be provided with meaningful forms of mental, physical, and social stimulation. Depending upon individual assessments of risks, needs, and the reasons for placement in the segregated setting, those forms of stimulation should include:*
- (i) *in-cell programming, which should be developed for prisoners who are not permitted to leave their cells;*
  - (ii) *additional out-of-cell time, taking into account the size of the prisoner's cell and the length of time the prisoner has been housed in this setting;*
  - (iii) *opportunities to exercise in the presence of other prisoners, although, if necessary, separated by security barriers;*
  - (iv) *daily face-to-face interaction with both uniformed and civilian staff; and*
  - (v) *access to radio or television for programming or mental stimulation, although such access should not substitute for human contact described in subdivisions (i) to (iv).*
- (d) *Prisoners placed in segregated housing for reasons other than discipline should be allowed as much out-of-cell time and programming participation as practicable, consistent with security.*
- (e) *No cell used to house prisoners in segregated housing should be smaller than 80 square feet, and cells should be designed to permit prisoners assigned to them to converse with and be observed by staff. Physical features that facilitate suicide attempts should be eliminated in all segregation cells. Except if required for security or safety reasons for a particular prisoner, segregation cells should be equipped in compliance with Standard 23-3.3(b).*
- (f) *Correctional staff should monitor and assess any health or safety concerns related to the refusal of a prisoner in segregated housing to eat or drink, or to participate in programming, recreation, or out-of-cell activity.<sup>17</sup>*

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<sup>17</sup>For other relevant standards see ABA, Treatment of Prisoner Standards, 23-2.6 (rationales for segregated housing), 23-2.7 (rationales for long-term segregated housing), 23-2.8 (segregated housing and mental health), 23-2.9 (procedures for placement and retention in long-term segregated housing), 23-3.3 (housing areas), 23-3.6 (recreation and out-of-cell time), 23-3.7 (restrictions relating to programming and privileges), 23-4.3 (disciplinary sanctions), 23-5.4 (self-harm and suicide prevention), 23-5.5 (protection of vulnerable prisoners), and 23-8.4 (work programs).

Standard 23-2.8: Segregated Housing and Mental Health states “No prisoner diagnosed with serious mental illness should be placed in long-term segregated housing” and requires mental health screening and subsequent monitoring. It is important to note the use of “serious” to modify “mental illness” as a basis for preclusion.

The ABA concept of segregated housing is to allow the separation of inmates from each other while retaining their well-being. Even the most dangerous inmates are human beings with the inherent dignity of that status. Extreme isolation is banned even for the most dangerous inmates, although appropriate, regularly reviewed, and higher degrees of security are accommodated.

The ABA standards may be compared with the Association of State Correctional Administrators (ASCA) Restrictive Status Housing Policy Guidelines (2013):

*The following guiding principles for the operation of restrictive status housing are recommended for consideration by correctional agencies for inclusion in agency policy. They are to:*

- *Provide a process, a separate review for decisions to place an offender in restrictive status housing;*
- *Provide periodic classification reviews of offenders in restrictive status housing every 180 days or less;*
- *Provide in-person mental health assessments, by trained personnel within 72 hours of an offender being placed in restrictive status housing and periodic mental health assessments thereafter including an appropriate mental health treatment plan;*
- *Provide structured and progressive levels that include increased privileges as an incentive for positive behavior and/or program participation;*
- *Determine an offender’s length of stay in restrictive status housing on the nature and level of threat to the safe and orderly operation of general population as well as program participation, rule compliance and the recommendation of the person[s] assigned to conduct the classification review as opposed to strictly held time periods;*
- *Provide appropriate access to medical and mental health staff and services;*
- *Provide access to visiting opportunities;*
- *Provide appropriate exercise opportunities;*
- *Provide the ability to maintain proper hygiene;*

- *Provide program opportunities appropriate to support transition back to a general population setting or to the community;*
- *Collect sufficient data to assess the effectiveness of implementation of these guiding principles;*
- *Conduct an objective review of all offenders in restrictive status housing by persons independent of the placement authority to determine the offenders' need for continued placement in restrictive status housing; and*
- *Require all staff assigned to work in restrictive status housing units receive appropriate training in managing offenders on restrictive status housing status.*

Although ASCA offers “guiding principles,” it provides neither categorical exemptions nor principles that address when restrictive housing should or should not be used, and no delineation of acceptable physical conditions for restrictive housing. That said, ASCA’s members are state correctional directors — such movement as there is by the organization on this issue is movement in the right direction.

## **The Path Going Forward**

The current era of solitary confinement appears to be winding down. What many have termed torture has existed for decades and has been charged with causing immeasurable harm not only to many of the inmates so confined but also to the corrections sector itself due to its reflexive reliance on this primitive tool. The adoption of procedural solutions for a substantive problem is too often a beguiling reform option. Examples of such measures relating to restrictive housing include regular review, imposing durational limits without a stringent cap on duration, and offering an inmate an explanation of the rationale for confinement without providing an opportunity to challenge the rationale.

Some reforms that should be implemented only as interim or transitional measures can become embedded in perpetuity. Examples include a reduction in the grounds for imposing restrictive housing, adding limited opportunities for structured and unstructured out-of-cell time, and greater certainty of release time.

Any of these changes, be they procedural, interim, or terminal, will provide some measure of relief to inmates who have been confined in tiny cells for 23 hours per day (with perhaps an hour of out-of-cell time) five days per week. The critical restrictive housing reform measure might be to abandon the use of extended periods of isolation, either as punishment or to enhance security. There are many options short of “you are going to the hole” that may be less harmful and more successful in curbing misconduct in its various guises.

The addition of minimal, haphazard staff training may appear reformatory, but it is likely insufficient. Toch (2014) speaks to the essence of the issue in addressing the “we versus they” culture of prison. In his experiment at Scotland’s Penninghame Open Prison, he brought inmates and staff together in a model in which inmates were considered service consumers and staff were service providers. The critical focus of this type of deep reform is the corrections officers: who they are and how they see themselves. Toch’s message to them was, “You are not working for FedEx (or Amazon) in the delivery of merchandise. You are not patrolling a border to keep some in and others out. You are not a night club bouncer or personal security guard. You are a provider of services within a human services model.” The inmate becomes a consumer who has a voice not only in the quality of health care or conditions of confinement but also in what should be available. What do inmates want and need in the way of treatment and reformatory opportunities? The greater the availability of desired amenities, the less need there is to consider the use of solitary confinement. For many inmates, the loss of some visiting time, access to television or the yard, clothing options, and other consequences are powerful inducements to avoid misconduct. Moving toward changes in prison culture while simultaneously reducing the worst aspects of extended isolation also seems realistic.

There are, and will be, inmates who are driven by mental illness and act out in a dangerous fashion. If residential treatment is the best option for curtailing that behavior, the current use of restrictive housing is perhaps the worst. A therapeutic, high-to-moderate-security, well-staffed, and well-administered unit is the ultimate solution.

Some inmates, few in number, are predatory, perhaps sociopathic, filled with rage, and highly dangerous. These inmates require safe separation from fellow inmates and staff. These inmates’ movement and congregate activity should be severely restricted and their behavior monitored, but they should also be offered every therapeutic opportunity to change.

It is critical that the system not continue to craft prison or jail isolation responses based only on the most dangerous inmates. Of course, there must be a safe solution for those inmates, but the overall system of correctional services must reflect the vast majority of inmates who will give respect in return for respect, who are often self-loathing because of addiction or other conditions, and who need therapeutic opportunities.

The limited scope of this paper precludes the full development of an individual empowerment model such as that developed by Toch (2014). In the context of the legal issues surrounding restrictive housing, the reform takeaway is that the roots of reform will not grow deep without first addressing the organizational and cultural issues of jails and prisons and how the staff view themselves vis-à-vis those in their charge.

The recruitment, training, and supervision of the line officer is a good place to start as we simultaneously peel back the multilayer issues of restrictive housing. Abolition, or even the drastic changes promoted by the ABA standards and the NCCCHC position statement, will not be achieved with the immediate stroke of a jurist's pen or a progressive governor. Rick Raemisich, director of the Colorado Department of Corrections, appears to have embarked on the nation's most ambitious, administratively driven reform in the nation. His Open the Door program rolls back the use of solitary confinement by dramatically reducing the number of inmates placed in that environment and employing a sensible use of transition both to the general prison population and, ultimately, the community. His critics say that the residential treatment programs are run so poorly and are seen as of such little utility that many prisoners avoid them (Casella & Stahl, 2016). This situation can and must be altered.

Authentic efforts to reform penal isolation should at least review the Colorado program first, cherry-pick what works, and never confuse an interim measure designed to relieve the harm of restrictive housing from the ultimate goal of its disappearance.

## Conclusion

This country is in the midst of intense dialog and calls for reform in our criminal sentencing laws and practices as well as our corrections systems (see Silber, Subramanian, & Spotts, 2016). The United States comprises 5 percent of the world's population but holds 25 percent of the world's prisoners. The enhanced use of restrictive housing is a significant artifact of this mass incarceration.

As the proceedings from the John Jay Colloquium on extreme isolation in prisons notes, mass incarceration places extreme stress on corrections systems (Horn & Jacobs, 2015). Absent adequate resources or political support for rehabilitative environments, the increased use of restrictive housing became the default solution for many of the complex problems that evolved: inmates with mental illness acting out, adolescents who are difficult to control, and the nonconforming "regular" inmate. Our early use of solitary confinement attracted worldwide attention. The solitude of an Eastern State Penitentiary was near total but not viewed as punishment or a management tool. It was meant to free inmates from the disorder and temptations of open society and lead to redemption through isolation (which included in-cell work opportunities).

Today's use of correctional isolation is not based on any theory of crime causation or viable theory of reform. It is based on perceived management needs and used as a punishment for rule violation. The duration of an inmate's placement in administrative segregation is usually based on an assessment of the individual, particularly on an estimate of dangerousness. Some inmates have been held in administrative segregation has been known to last for as long as 43

years. Stays in disciplinary segregation are generally much shorter and should be proportional to the seriousness of the proven infraction.

The movement to reform the use of extreme isolation has centered on the federal courts. The Eighth Amendment to the U.S. Constitution, which prohibits cruel and unusual punishment, has been the primary constitutional change vehicle for those convicted of crimes. The 14th Amendment applies to pre-trial detainees and to young people held in the “rehabilitative” confines of the juvenile justice system.

In contrast to detainees (and young people) who will not be subject to punishment, convicted inmates may, indeed, be punished but not in a cruel fashion. The legal charges leveled at extended isolation, by whatever name, is that it is forbidden punishment. Some refer to extended isolation — beyond 30 days — as a form of torture. Torture, of course, is punishment taken to its most extreme limits.

No federal court, including the U.S. Supreme Court, has held extended isolation per se to be unconstitutional. The earliest federal decisions focused on young people and considered their youth as creating a highly vulnerable status. Even 14 days of room confinement was found to be a due process violation.

Inmates with serious mental illness were the next to be addressed. This class of vulnerable inmates has recorded notable federal court victories. The psychological plasticity of youth and the very nature of serious mental illness created two groups that are considered by the courts to be particularly vulnerable to the harmful effects of enforced, deadening, extended isolation.

While the courts have been the conspicuous forum for change, professional organizations and advocacy groups have been busily at work as well. A legislative approach to reform would be more desirable for all of the reasons discussed in this paper. The likelihood of such broad legislative reform, however, is not very high.

The most important — and most realistic — next step would be a well-brought constitutional challenge that urges a finding that extended isolation (15 to 30 days) is an unconstitutional condition of confinement without regard to any individual’s or group’s vulnerability. Consider this analogy: If a hypothetical prison system were to consider the amputation of an arm as punishment, there would be no discussion of the punishment’s usefulness or of the adaptability of an inmate so sentenced. The practice would be viewed as a barbaric, medieval, unconstitutional punishment.

That analogy is the path forward.

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