The Constitutional Law of Isolated Confinement:

A Quick and Dirty Review

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Prisoners and their advocates have been litigating about isolated confinement[1] as long as there has been prison litigation.[2] They have had considerable success in mitigating the worst excesses of such confinement: filthy conditions, lack of lighting and ventilation, deprivation of medical care, routine use of "strip cells," etc. They have been far less successful in challenging the core of such confinement: the deprivation of human contact and other sensory and intellectual stimulation.

There is a certain irony to this result, since the disastrous consequences of the Nineteenth Century solitary confinement regimes were so well known and so uncontroversial as to be treated as common knowledge by the Supreme Court:

> A considerable number of prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community.[3]

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[1] I use this term to refer to confinement that involves both separation from the general prison population (i.e., segregation) and a substantial degree of restriction of contact even with other separated prisoners (though not necessarily as rigorous as the Nineteenth Century regimes of solitary confinement).

[2] See, e.g., Hancock v. Avery, 301 F.Supp. 786, 791-92 (M.D.Tenn. 1969) (condemning confinement in cell without light or ventilation).

[3] In re Medley, 134 U.S. 160, 168 (1890) (striking down a statute retroactively imposing solitary confinement as an ex post facto law).

Modern courts have not denied these consequences. One relatively recent decision observed that "the record shows, what anyway seems pretty obvious, that isolating a human being from other human beings year after year or even month after month can cause substantial psychological damage, even if the isolation is not total."[4] The court added that "there is plenty of medical and psychological literature concerning the ill effects of solitary confinement (of which segregation is a variant). . . ."[5] Other courts have made similar observations.[6] More recently, the district court in the Pelican Bay SHU litigation concluded after hearing testimony from experts in corrections and mental health, that "many, if not most, inmates in the SHU experience some degree of psychological trauma in reaction to their extreme social isolation and the severely restricted environmental stimulation in SHU."[7] I know of no decision that has rejected this conclusion.

The legal significance of this psychological harm is a different question. In Davenport v. Derobertis, immediately after acknowledging the "literature concerning the ill effects of solitary confinement," the court (per Judge Posner, well-known for applying economic analyses to legal questions) proceeded to minimize it: "Of course, it is highly probable that the experience of being imprisoned inflicts psychological damage whether or not the prisoner is isolated, so it is only the marginal psychological damage from segregation that is relevant. And the infliction of disutility,

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[4] Davenport v. DeRobertis, 844 F.2d 1310, 1313 (7th Cir. 1988), cert. denied, 488 U.S. 908 (1989).

[5] Id. at 1316, citing Grassian, Psychopathological Effects of Solitary Confinement, 140 Am.J.Psychiatry 1450 (1983).

[6] See Langley v. Coughlin, 715 F.Supp. 522, 540 (S.D.N.Y. 1989) (citing Dr. Grassian's affidavit re effects of SHU placement on disordered individuals); Baraldini v. Meese, 691 F.Supp. 432, 446-47 (D.D.C. 1988) (citing Dr. Grassian's testimony re sensory disturbance, perceptual distortions, and other psychological effects of segregation), rev'd on other grounds, 884 F.2d 615 (D.C.Cir. 1989); Bono v. Saxbe, 450 F.Supp. 934, 946 ("[p]laintiffs' uncontroverted evidence showed the debilitating mental effect on those inmates confined to the control unit."), aff'd in part and remanded in part on other grounds, 620 F.2d 609 (7th Cir. 1980).

[7] Madrid v. Gomez, 889 F.Supp. 1146, 1235 (N.D.Cal. 1995).

to borrow a convenient economic term, is one of the objectives of criminal punishment. . . ."[8] An even more dismissive attitude is displayed in a recent decision of the Massachusetts Supreme Judicial Court, which held that evidence that isolated confinement can cause "serious psychiatric harm" did not raise an issue of disputed fact requiring a trial. Rather, the court simply observed that prior federal court decisions evinced a "widely shared disinclination" or a "reluctan[ce]" to strike down isolated confinement, and that one of its own older decisions upheld confinement in somewhat harsher conditions. It viewed these decisions as sufficiently authoritative to obviate the need even to consider the proffered evidence of psychological harm.[9]

The result in Torres is consistent with the general refusal of courts to find isolated confinement unconstitutional absent aggravating circumstances. In this regard, the high-water mark for prisoner advocates was the Supreme Court's decision in the Arkansas prison litigation, which upheld the lower court's placement of a 30-day limit on punitive segregation, but did so only in light of the inadequate diet, overcrowding, and misconduct by prison staff demonstrated by the record in that case.[10] Any hope that this decision might ultimately lead to a constitutional limit on the use or duration of isolated confinement per se was quickly disappointed. This point is best illustrated by the decision in the Pelican Bay litigation, which represents both the most thorough examination of

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[8] Id.
The bottom line in the Davenport case is that the appeals court upheld the lower court's requirement that prisoners in a segregation unit receive a minimum of five hours of out-of-cell recreation a week, but held that the requirement of a minimum of three showers a week (the prisoners received one a week) lacked support either in the record or in law. 844 F.2d at 1314-16.

[9] Torres v. Commissioner of Correction, 427 Mass. 611, 614-15, 695 N.E.2d 200, 203-04 (1998), quoting Jackson v. Meachum, 699 F.2d 578, 583 (1st Cir. 1983), and Santana v. Collazo, 714 F.2d 1172, 1179 (1st Cir. 1983), cert. denied, 466 U.S. 974 (1984). The court's reference to its own earlier decision is a bit disingenuous. That case held only that the Eighth Amendment does not forbid confinement behind a solid door for no more than 15 days as punishment for disciplinary offenses by prisoners already in segregation. (By contrast, prisoners could be sentenced to the unit at issue in Torres for up to ten years.) The trial court judge had held that the degree of sensory deprivation at issue did not cause psychological harm. Libby v. Commissioner of Correction, 385 Mass. 421, 432 N.E.2d 486, 493-94 (1982).

[10] Hutto v. Finney, 437 U.S. 678, 686-87 (1978).

these issues, and the one most sympathetic to prisoners:

> Here, the record demonstrates that the conditions of extreme social isolation and reduced environmental stimulation found in the Pelican Bay SHU will likely inflict some degree of psychological trauma upon most inmates confined there for more than brief periods. Clearly, this impact is not to be trivialized; however, for many inmates, it does not appear that the degree of mental injury suffered significantly exceeds the kind of generalized psychological pain that courts have found compatible with Eighth Amendment standards. While a risk of a more serious injury is not non-existent, we are not persuaded . . . that the risk of developing an injury to mental health of sufficiently serious magnitude . . . is high enough for the SHU population as a whole, to find that current conditions in the SHU are per se violative of the Eighth Amendment with respect to all potential inmates.[11]

As this passage suggests, success in challenging isolated confinement has generally occurred at the margins. These decisions fall into three broad categories.

1. Vulnerable populations

The potential mental health consequences of isolated confinement have been recognized at least to the extent that courts have excluded persons with pre-existing psychiatric illness or vulnerability from such confinement. The leading case again is the Pelican Bay decision, which upheld SHU confinement for most prisoners, but excepted

> those who the record demonstrates are at a particularly high risk for suffering very serious or severe injury to their mental health, including overt paranoia, psychotic breaks with reality, or massive exacerbations of existing mental illness as a result of the conditions in the SHU. Such inmates consist of the already mentally ill, as well as persons with borderline personality disordered, brain damage or mental retardation, impulse-ridden personalities, or a history of prior psychiatric problems or chronic depression. For these inmates, placing them in the SHU is the mental equivalent of putting an asthmatic in a place with little air to breathe.[12]

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[11] Madrid v. Gomez, 889 F.Supp. 1146, 1265 (N.D.Cal. 1995) (emphasis in original).

[12] Madrid v. Gomez, 889 F.Supp. at 1265; see also Casey v. Lewis, 834 F.Supp. 1447, 1548-49 (D.Ariz. 1993) (condemning placement and retention of mentally ill prisoners in lockdown status); Langley v. Coughlin, 715 F.Supp. 522, 540 (S.D.N.Y. 1988) (holding that psychiatric evidence that prison officials fail to screen out from SHU "those individuals who, by virtue of their mental condition, are likely to be severely and adversely affected by placement there" raises a triable Eighth Amendment issue); Inmates of Occoquan v. Barry, 717 F.Supp. 854, 868 (D.D.C. 1989) (holding that inmates with mental health problems must be placed in a separate area or a hospital and not in administrative/punitive segregation area).

Thus, the risk that the court found too diffuse to be actionable as applied to the prison population as a whole was found to constitute an Eighth Amendment violation as applied to populations who could be shown to have identifiable pre-existing risk factors.

As a practical matter, of course, enforcing such a view requires adequate and unbiased mental health screening, which is not guaranteed in a prison environment. Indeed, there may be powerful institutional factors militating against identifying persons at particular risk from isolated confinement.[13]

2. Due process concerns

In upholding isolated confinement notwithstanding the potential injury it may cause, courts give weight to prison officials' legitimate interest in disciplining prisoners who have broken prison rules and in preventing disruptive or assaultive actions by prisoners who present risk of such behavior.[14] The obvious next question is whether prison officials are under any constitutional obligation of care to make sure that the prisoners they place in isolation actually merit such treatment. That is, are prisoners entitled to procedural protections in connection with placement in isolated confinement?

Before 1995, the law in most jurisdictions was that punitive segregation of any substantial duration required a Wolff[15] hearing, but that administrative segregation required due process protections only if state rules or regulations created a "liberty interest" by imposing substantive limits

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[13] See Madrid, 889 F.Supp. at 1225 (citing evidence of prison staff's concern--described by one expert witness as "an almost obsessive preoccupation"--that prisoners are malingering or manipulating in their dealings with the medical and mental health system).

[14] See, e.g., Madrid, 889 F.Supp. at 1263. A leading statement of this view appears in a decision concerning conditions at the high-security federal penitentiary in Marion, Illinois: "The current conditions, ghastly as they are, testify in a weird way to our nation's aspirations to a humane criminal justice system, for they result from forbidding murderous inmates to be executed or to be killed or beat senseless by outraged guards; no inmate has been killed at Marion save by another inmate." Bruscino v. Carlson, 854 F.2d 162, 166 (7th Cir. 1988).

[15] Wolff v. McDonnell,

on prison officials' discretion.[16] However, in 1995 the Supreme Court decided Sandin v. Conner,[17] which held that 30 days of punitive segregation did not call for due process protections because it did not constitute "atypical and significant hardship . . . in relation to the ordinary incidents of prison life."[18] Sandin overturned both the law of disciplinary due process and liberty interest analysis generally as applied to prisoners. It has been followed by a large number of decisions holding that prisoners are not entitled to due process protections in connection with placement in isolated confinement even for long periods of time.[19]

In several New York cases prisoners with counsel have cited evidence on the consequences of isolated confinement in arguing successfully that isolated confinement of sufficient duration is sufficiently "significant" under Sandin to call for due process protections, irrespective of whether it violates the Eighth Amendment. In Lee v. Coughlin,[20] the court found that 376 days served in punitive segregation was atypical and significant. It emphasized the atypicality of segregated confinement of that duration and the harshness of the segregation regime cmpared with the treatment of prisoners generally in New York. However, it also observed that "[t]he effect of prolonged isolation on inmates has been repeatedly confirmed in medical and scientific studies."[21] In McClary v. Kelly,[22] where the plaintiff complained of being held for four years in administrative segregation on a pretext, the court held that evidence of psychological harm (both expert evidence and the

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[16] Hewitt v. Helms, 459 U.S. 460, 468 (1983).

[17] 515 U.S. 472 (1995).

[18] 515 U.S. at 484.

[19] See, e.g., Jones v. Baker, 155 F.3d 810 (6th Cir. 1998) (holding that two-year placement in segregation pending investigation did not require due process protections); Bonner v. Parke, 918 F.Supp. 1264, 1269-70 (N.D.Ind. 1996) (holding three years in segregation was not atypical and significant).

[20] 26 F.Supp.2d 615 (S.D.N.Y. 1998).

[21] 26 F.Supp.2d at 637.

[22] 4 F.Supp.2d 195 (W.D.N.Y. 1998).

plaintiff's own testimony) created a triable issue under the Sandin atypical and significant standard.[23]

Whether such victories have any substantial consequences for prison officials' use of isolated confinement is debatable. The standard to which prison officials are held in prison disciplinary hearings is minimal,[24] and trumped-up charges do not state a constitutional claim as long as the procedural rituals are observed.[25] The due process standard in connection with administrative segregation is even less demanding.[26]

3. Aggravating circumstances

Isolated confinement is often associated with other forms of abusive treatment, including physical abuse, deprivation of clothing, deprivation of medical care, unsanitary conditions, lack of opportunity for personal hygiene, etc. In such instances courts have generally responded by striking down the extreme practices,[27] since they appear to be unnecessary to and readily separable from the isolation regime itself. The Hutto v. Finney device of restricting the use of segregation itself has rarely been employed.

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[23] Id. at 205-07. Mr. McClary was eventually awarded a substantial sum in damages by a jury, an award that I believe is presently being appealed.

[24] See Superintendent v. Hill, 472 U.S. 445, 457 (1988) (holding that disciplinary conviction need be supported only by "some evidence"); Wolff v. McDonnell, 418 U.S. 539, 563-71 (1974) (holding due process requires only notice, a written statement of the evidence behind a decision and the reasons for the punishment imposed, a limited right to call witnesses and present documentary evidence at a hearing, and in certain cases the assistance of a counsel substitute); People ex rel. Vega v. Smith, 66 N.Y.2d 130, 495 N.Y.S.2d 332, 485 N.E.2d 997, 1002-04 (N.Y. 1985) (holding that a staff member's written report alone can be sufficient to support a disciplinary conviction).

[25] See, e.g., Freeman v. Rideout, 808 F.2d 949, 951-53 (2d Cir. 1986), cert. denied, 485 U.S. 982 (1988).

[26] Hewitt v. Helms, 459 U.S. 460, 472, 474 (1983) (requiring only "an informal nonadversary review of the information supporting [the prisoner's] administrative confinement"; noting that decisions may be based on "rumor, reputation, and even more imponderable factors . . . 'purely subjective evaluations' . . . intuitive judgments.")

[27] Thus, in the Pelican Bay litigation, the court held that plaintiffs were entitled to injunctive relief against excessive force, denial of medical and mental health care, while declining to enjoin the overall regime of isolation and idleness. Madrid v. Gomez, 889 F.Supp. at 1279-82.

In some cases, the aggravating circumstance is an extreme of isolation. The use of solid or "boxcar" doors that interfere with ventilation and with prisoners' ability to communicate with staff in emergencies has been held unconstitutional in some cases.[28] A particularly interesting decision is United States v. Koch,[29] a criminal case in which the court held that a mere six hours of confinement in a boxcar cell to obtain confession was unconstitutionally coercive, and suppressed the confession.[30] Other courts have not followed suit. In Tyler v. Black,[31] the Eighth Circuit initially held that the use of boxcar doors by itself did not violate the Eighth Amendment, it concluded that in the totality of the circumstances (the fact that the doors were closed at all times, prisoners spent 23 hours a day in the cells for several months, and prisoners were double celled).[32] On rehearing en banc, however, the author of the opinion backed down from that holding, stating that double celling had been ended after the previous opinion and other conditions had changed, mooting the claim.[33]

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[28] Hoptowit v. Ray, 682 F.2d 1237, 1257-58 (9th Cir. 1982) (affirming finding that solid doors that excluded nearly all fresh air and light, limited access to medical care, and caused sanitary problems violated the Eighth Amendment); LeMaire v. Maass, 745 F.Supp. 623, 636 (D.Or. 1990) (holding "quiet cells" with steel doors were unconstitutional because they made it impossible to call for medical attention), vacated and remanded on other grounds, 12 F.3d 1444 (9th Cir. 1993); Toussaint v. McCarthy, 597 F.Supp. 1388, 1408 (N.D.Cal. 1984) (holding "quiet cells" with closed solid doors were unconstitutional), aff'd in part and rev'd in part on other grounds, 801 F.2d 1080, 1106-07 (9th Cir. 1986), cert. denied, 481 U.S. 1069 (1987); Bono v. Saxbe, 527 F.Supp. 1187 (S.D.Ill. 1981); Bono v. Saxbe, 450 F.Supp. 934, 946-48 (E.D.Ill. 1978), aff'd in part and remanded in part on other grounds, 620 F.2d 609 (7th Cir. 1980); Berch v. Stahl, 373 F.Supp. 412, 421 (E.D.N.C. 1974) (limiting solid-door confinement to 15 days).

[29] 552 F.2d 1216 (7th Cir. 1977).

[30] Id. at 1218-19.

[31] 811 F.2d 424 (8th Cir. 1987), withdrawn, 865 F.2d 181 (8th Cir. 1989).

[32] Id. at 434-35.

[33] Tyler v. Black, 865 F.2d 181, 183-84 (8th Cir. 1989) (en banc).