The Constitutional Law of Isolated Confinement[1]

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Contents

1. Isolation and the Courts

Prisoners and their advocates have been litigating about isolated confinement[2] as long as there has been prison litigation.[3]

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[1] This article is expanded and updated from an earlier version prepared for the conference on Challenging Supermax Prisons hosted by the National Prison Project of the American Civil Liberties Union, February 23-24, 2000.

[2] I use this term to refer to confinement that involves both

The results have been mixed. There has been significant success in mitigating the worst excesses of such confinement: filthy and degrading conditions, lack of lighting and ventilation, deprivation of medical care, routine use of "strip cells," etc. Litigation has been far less successful in challenging the core concerns about isolated 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.[4]

Modern courts have not denied these consequences. One well-known 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."[5] The court added that "there is plenty of medical and

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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).

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

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

[5] Davenport v. DeRobertis, 844 F.2d 1310, 1313 (7th Cir. 1988),

psychological literature concerning the ill effects of solitary confinement (of which segregation is a variant). . . ."[6] Other courts have made similar observations.[7] The district court in the

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cert. denied, 488 U.S. 908 (1989).

[6] *Id*. at 1316 (citing Stuart Grassian, M.D., *Psychopathological Effects of Solitary Confinement*, 140 Am.J.Psychiatry 1450 (1983)). A number of courts have relied on this article and on Stuart Grassian and Nancy Friedman, *Effects of Sensory Deprivation in Psychiatric Seclusion and Solitary Confinement*, 8 Int'l J. of Law and Psychiatry 49 (1986). Additionally, Craig Haney, *Mental Health Issues in Long-term Solitary and "Supermax" Confinement*, 49 Crime & Delinq. 124, 130–141 (2003), and other testimony and work by Dr. Haney and associates, have also been repeatedly cited to the same effect.

[7] *See* Hutchinson v. Florida, ___ F.3d ___, 2012 WL 1345599, *7 (11th Cir., Apr. 19, 2012) (concurring opinion) (stating "the psychological effects of spending extended periods in solitary confinement—commonly known as SHU syndrome—may impair an inmate's mental capabilities to the extent that his active participation in litigation becomes impossible"; citing Dr. Grassian's and Dr. Haney's research); Miller ex. rel. Jones v. Stewart, 231 F.3d 1248, 1252 (9th Cir. 2000) (". . . [I]t is well accepted that conditions such as those present in [isolation in death row unit] can cause psychological decompensation to the point that individuals may become incompetent"; citing affidavits of psychiatric experts), *stay vacated*, 531 U.S. 986 (2000); U.S. v. Bout, ___ F.Supp.2d ___, 2012 WL 653882, *3 (S.D.N.Y., Feb. 24, 2012) ("[I]t is well documented that long periods of solitary confinement can have devastating effects on the mental well-being of a detainee.") (quoting U.S. v. Basciano, 369 F.Supp.2d 344, 352-53 (E.D.N.Y. 2005), which cites Dr. Haney's work); U.S. v. Corozzo, 256 F.R.D. 398, 401-02 (E.D.N.Y. 2009) ("Substantial research demonstrates the psychological harms of solitary confinement and segregation"; citing Dr. Grassian's and Dr. Haney's research in refusing to impose isolating sentencing conditions); Freeman v. Berge, 283 F.Supp.2d 1009, 1016 (W.D.Wis. 2003) ("Since the court of appeals decided *Bono [v. Saxbe]*, evidence has accumulated regarding the harm that

equally well-known 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."[8] I know of no decision that has rejected this conclusion—though some courts have denied or minimized its significance.

Thus, 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, to borrow a convenient economic term, is one of the objectives of criminal punishment. . . ."[9] An even more dismissive

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depriving inmates of social interaction and sensory stimulation can cause." (citing work of Grassian and Haney)), *reconsideration denied*, 2003 WL 23208945 (W.D.Wis., June 19, 2003); McClary v. Coughlin, 87 F.Supp.2d 205, 211 (W.D.N.Y. 2000) (relying on testimony of Dr. Grassian in upholding jury verdict for prolonged segregation without due process, though granting remittitur re amount of damages), *aff'd*, 237 F.3d 185 (2d Cir. 2001); 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).

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

[9] *Id*.

The bottom line in the *Davenport* case is that the appeals

attitude is displayed in a later 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.[10] It stated: ". . . [O]ther courts have concluded, and we agree that, whether prison conditions are sufficiently harmful to establish an Eighth Amendment violation, is a purely legal determination for the court to make."[11] This refusal to consider the facts has been justly criticized: "While the ultimate question of whether the conditions alleged in the case at bar and the harms that they bring about amount to an Eighth Amendment violation is a question of law (or more likely, a mixed question of law and fact), surely the data on

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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.

[10] Torres v. Commissioner of Correction, 427 Mass. 611, 614-15, 695 N.E.2d 200, 203-04 (1998), *cert. denied*, 525 U.S. 1017 (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).

[11] *Torres*, 427 Mass. at 614.

which that conclusion must be based is a factual question."[12]

The result in *Torres* is consistent with the general refusal of courts to find isolated confinement unconstitutional absent seriously aggravating circumstances.[13] In this regard, the high-water mark for prisoner advocates to date 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.[14] 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 presents both a thorough examination of the issues on a substantial record and a sympathetic perspective towards the affected 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

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[12] Chao v. Ballista, 772 F.Supp.2d 337, 357 (D.Mass. 2011).

[13] *See, e.g.*, In re Long Term Administrative Segregation, 174 F.3d 464, 471–72 (4th Cir. 1999) (administrative segregation with 23-hour lockup, no radio or TV, five hours of exercise a week, and exclusion from all programs did not violate the Eighth Amendment because it did not deny a "basic human need"; "A depressed mental state, without more, does not rise to the level of the 'serious or significant physical or emotional injury' that must be shown" under the Eighth Amendment.); Bruscino v. Carlson, 854 F.2d 162, 166–67 (7th Cir. 1988) (holding that conditions in Marion federal penitentiary "control unit" and "permanent lockdown" at Marion federal penitentiary, including long lock-in times, use of restraints when out of cell, restricted access to law libraries, and digital rectal searches were "sordid and horrible" but not unconstitutional).

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

> 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.[15]

Nor have courts been willing to impose any fixed time limits on isolated confinement as a constitutional matter,[16] though they will enforce statutory or regulatory limits.[17] Administrative segregation, which is supposed to be preventive and therefore forward-looking, has usually been held to be permissible for as long as the preventive justification exists,[18] though the Supreme Court has stated that "administrative segregation may not be used

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

[16] Torres v. Commissioner of Correction, 427 Mass. 611, 614–15, 695 N.E.2d 200 (1998).

[17] *See, e.g.*, Tate v. Carlson, 609 F. Supp. 7, 10 (S.D.N.Y. 1984) (13-month segregation confinement violated federal prison regulations requiring that prisoners be released to general population or transferred within 90 days); Libby v. Commissioner of Correction, 385 Mass. 421, 432 N.E.2d 486, 490 (Mass. 1982) (noting 15-day limit on "isolation time" for inmates committing further offenses in segregation).

[18] *See, e.g.*, In re Long Term Administrative Segregation, 174 F.3d 464, 471 (4th Cir. 1999) (Five Percenters, considered a "Security Threat Group" by officials, could be kept in segregation indefinitely or until they renounced their affiliation); Smith v. Shettle, 946 F.2d 1250, 1254 (7th Cir. 1991); Bono v. Saxbe, 620 F.2d 609, 614 (7th Cir. 1980); Todd v. Commissioner of Correction, 27 Mass.App. 1199, 543 N.E.2d 1152, 1153–54 (Mass.App. 1989).

as a pretext for indefinite confinement of an inmate."[19] Serious past misconduct has been held to justify continued administrative segregation for substantial periods,[20] but not indefinitely.[21] Yet I know only of a single case, and that an unusual one, in which a court has squarely held that segregation was unconstitutional because its duration outran the justification for it.[22]

Several recent decisions provide some hope for

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[19] Hewitt v. Helms, 459 U.S. 460, 477 n.9 (1983).

[20] Mims v. Shapp, 744 F.2d 946, 951–52 (3d Cir. 1984) (five-year confinement of a prisoner who had killed an officer did not deny due process).

[21] Sheley v. Dugger, 833 F.2d 1420, 1427 (11th Cir. 1987) (allegation of 10-year segregation after escape and weapons violations, with no further justification, stated a due process claim).

[22] In *Koch v. Lewis*, 216 F.Supp.2d 994, 1006-07 (D.Ariz. 2001), *vacated as moot*, 399 F.3d 1099 (9th Cir. 2005), the district court held that evidence of mere gang membership, without overt acts, admissions, or gang-related offenses, was too unreliable to justify indefinite confinement, though it might justify short period of confinement (the plaintiff had been segregated for five and a half years when he was ordered released).

In *Morris v. Travisono*, 549 F. Supp. 291, 295–96 (D.R.I. 1982), *aff'd*, 707 F.2d 28 (1st Cir. 1983), the court held that a prisoner who had murdered a correction officer eight and a half years previously could not be retained in segregation based on such conduct as refusing to stand up in court and sleeping at the wrong end of the bed (justifications the court found pretextual), but it did so under the terms of a previously entered consent judgment and not as a direct constitutional matter. In *U.S. v. Bout*, ___ F.Supp.2d ___, 2012 WL 653882 (S.D.N.Y., Feb. 24, 2012), discussed below in § 5, the court found that parts of the government's justification for potentially indefinite segregation that had already extended for 15 months was too attenuated in time, but did so as part of an overall finding that the government's various arguments did not provide a rational basis for the segregation.

meaningful limits on the use of isolated confinement. These are discussed at the end of this article. Meanwhile I will discuss areas in which narrower challenges to isolation have had greater success.

2. Aggravating Circumstances

Isolated confinement has often been 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,[23] since they appear to be unnecessary to and readily separable from the isolation regime itself, or are simply too inhumane or disgusting to be countenanced in civilized society. Thus numerous early prisoners' rights decisions—and some not so early—invalidated segregation conditions that were clearly intended to inflict the maximum degradation and deprivation on unruly prisoners.[24] Courts have also condemned gross lack of

[23] 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.

[24] *See, e.g.,* Surprenant v. Rivas, 424 F.3d 5, 19–20 (1st Cir. 2005) (upholding jury verdict for the plaintiff based on evidence that he was allowed only a five-minute shower every day, was denied all hygienic products, had access to water, including to flush his toilet, only at the guards' discretion, and was subjected daily to multiple strip searches that required him to place his unwashed fingers into his mouth); Mitchell v. Maynard, 80 F.3d 1434, 1442 (10th Cir. 1996) (allegations that plaintiff was stripped of his clothing, placed in a concrete cell with no heat, provided with no mattress, blankets, or bedding of any kind, deprived of his prescription eyeglasses, not allowed out-of-cell exercise, not provided with writing utensils, not provided adequate ventilation or hot water, and allowed minimal amounts of toilet paper supported a claim of Eighth Amendment violation); Blissett v. Coughlin, 66 F.3d 531, 537 (2d Cir. 1995) (jury verdict upheld for prisoner placed naked in a feces-smeared mental observation cell for eight days);

sanitation and oppressive physical conditions such as excessive heat, cold, lack of ventilation, etc., which may have resulted from neglect and indifference rather than malice.[25] Many serious

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Chandler v. Baird, 926 F.2d 1057, 1063 (11th Cir. 1991) (allegation of confinement in undershorts without bedding, toilet paper, running water, soap, and toothpaste in a cold and filthy cell stated an Eighth Amendment claim); Kirby v. Blackledge, 530 F.2d 583, 586–87 (4th Cir. 1976) (cell with no bedding, no light, and a hole in the floor for a toilet violated the Eighth Amendment); Kimbrough v. O'Neil, 523 F.2d 1057, 1059 (7th Cir. 1975) (alleged three-day confinement in a cell without toilet, water, bedding or mattress, soap or toilet paper stated an Eighth Amendment claim), *aff'd on other grounds*, 545 F.2d 1059 (7th Cir. 1976) (en banc); LaReau v. MacDougall, 473 F.2d 974, 978 n.2 (2d Cir. 1972) (five-day confinement with "Chinese toilet" [hole in the floor] flushed from outside and with no means of personal cleanliness violated the Eighth Amendment); Wright v. McMann, 460 F.2d 126, 129 (2d Cir. 1972) (11- and 21-day periods in unsanitary cell with no clothing, bedding, soap, toilet paper, or heat violated the Eighth Amendment).

[25] *See, e.g.*, Gates v. Cook, 376 F.3d 323, 338–44 (5th Cir. 2004) (affirming injunction requiring improved cell cleaning procedures, provision of fans, ice water, and daily showers during hot weather, added pest control measures including repairing window screens, correction of unsanitary "ping-pong toilets," improvement of lighting, and enhanced mental health services); Keenan v. Hall, 83 F.3d 1083, 1090 (9th Cir. 1996) (inadequate ventilation can violate the Eighth Amendment; "If the air was in fact saturated with the fumes of feces, urine, and vomit, it could undermine health and sanitation."), *amended on other grounds*, 135 F.3d 1318 (9th Cir. 1998); Williams v. Adams, 935 F.2d 960, 962 (8th Cir. 1991) (13-day confinement in a cell with a broken toilet leaking waste stated a constitutional claim); McCord v. Maggio, 927 F.2d 844, 848 (5th Cir. 1991) (confinement in a segregation cell flooded with sewage and foul water was a "clear violation of the Eighth Amendment"); Williams v. White, 897 F.2d 942, 944–45 (8th Cir. 1990) (allegation of lack of ventilation and mattress infested with bugs and insects stated an Eighth Amendment claim).

challenges to segregation conditions have been settled with significant mitigation of conditions, probably because defendants wish to avoid adverse adjudications and publicity.[26] The *Hutto v. Finney* device of restricting the use of segregation itself, discussed above, has rarely been employed.

The courts have been less willing to restrict oppressive practices in isolated confinement for which some specific correctional rationale is presented. Thus the complete or partial

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[26] Thus, in a challenge to conditions and practices in the Wisconsin supermax facility, defendants settled with regard to conditions of confinement, *see* Jones-El v. Berge, 374 F.3d 541, 543 (7th Cir. 2004) (describing history of case), after the grant of a preliminary injunction excluding persons with mental illness from the facility. Jones-El v. Berge, 164 F. Supp. 2d 1096, 1116–25 (W.D.Wis. 2001). In litigation about the Ohio supermax prison, the question of prisoners' due process rights went to the Supreme Court, but the challenges to conditions of confinement were settled without a court ruling on them. Wilkinson v. Austin, 545 U.S. 209, 218 (2005). A major challenge to supermax conditions in Indiana was also settled without any ruling on the legal challenge to supermax conditions or procedures. Isby v. Bayh, 75 F.3d 1191, 1195 (7th Cir. 1996) (settlement "provides for a commissary, expands access to radio and television, increases visitation and telephone rights, makes more reading materials available and expands recreational opportunities, allows prisoners to have more personal property and greater access to items of personal hygiene, improves the bedding material assigned to prisoners, decreases the intensity of twenty-four hour lights in the cells, limits the use of force by DOC personnel, expands medical care, provides a comprehensive law library with improved prisoner access, provides educational opportunities and substance abuse programs when necessary, and improves the prisoner grievance procedures"). The *Jones-El* and *Wilkinson* settlements are discussed in more detail, along with another settlement concerning the "Special Controls Facilities" in New Mexico, in David C. Fathi, *The Common Law of Supermax Litigation*, 24 Pace L.Rev. 675 (2004), available at http://digitalcommons.pace.edu/plr/vol24/iss2/13.

deprivation of clothing, a means of humiliation and intimidation, has been upheld in some cases where officials have argued it was necessary to control disruptive prisoners,[27] as have drastic restriction of out-of-cell exercise[28] and other significant deprivations.[29]

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[27] *See, e.g.*, Trammell v. Keane, 338 F.3d 155, 163, 165–66 (2d Cir. 2002) (upholding deprivation of clothing other than shorts for two weeks to prisoner who defied ordinary disciplinary sanctions); Williams v. Delo, 49 F.3d 442, 445–46 (8th Cir. 1995) (upholding placement of prisoner who got into an altercation in the visiting room and was placed for three or four days in "temporary administrative segregation on limited property, that is, a strip cell," deprived of clothing, with no mattress, toothbrush, or other hygiene items, and the water to his cell shut off. He got "three meals a day . . . and was sheltered from the elements. While he did not have any clothing or bedding, we have held there is no absolute Eighth Amendment right not to be put in a cell without clothes or bedding."); Hawkins v. Hall, 644 F.2d 914, 917–18 (1st Cir. 1981) (deprivation of clothing for less than 24 hours pending medical and mental examinations upheld where ventilation, lighting, and heat were adequate); McMahon v. Beard, 583 F.2d 172, 174–75 (5th Cir. 1978) (three-month nude confinement without mattress, sheet, or blankets did not violate the Eighth Amendment where the prisoner continued to present a suicide risk). *Compare* Rose v. Saginaw County, 353 F. Supp. 2d 900, 919–23 (E.D.Mich. 2005) (holding unconstitutional a policy of placing "uncooperative and disruptive" prisoners in administrative segregation naked).

[28] Bass v. Perrin, 170 F.3d 1312, 1316–17 (11th Cir. 1999) (terming the deprivation "a rational, albeit debatable, response to the substantial threat posed by the plaintiffs").

[29] *See, e.g.*, Rodriguez v. Briley, 403 F.3d 952, 952–53 (7th Cir. 2005) (holding that a rule requiring segregation prisoners to stow property in a box before leaving their cells could be enforced by refusing to let them leave their cells, even if the cost was missed meals and showers; the non-complying prisoner "punished himself").

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.[30] A particularly interesting decision is *U.S. v. Koch*,[31] a criminal case in which the court held that a mere six hours of confinement in a boxcar cell to obtain a confession was unconstitutionally coercive, and suppressed the confession.[32] Other courts have not followed suit. In *Tyler v. Black*,[33] the Eighth Circuit initially held that the use of boxcar doors by itself did not violate the Eighth Amendment, but it concluded that in the totality of the

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[30] 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); *see* Jones'El v. Berge, 164 F.Supp.2d 1096, 1018-19 (W.D. Wis. 2001) (citing boxcar doors in support of conclusion that supermax conditions were unconstitutional as to prisoners with mental illness); *see also* Rollie v. Kemna, 124 Fed.Appx. 471 (8th Cir., Feb. 25, 2005) (unpublished) (holding allegation that prison officials knew of assaults that went undetected because of double celling behind boxcar doors stated a deliberate indifference claim).

[31] 552 F.2d 1216 (7th Cir. 1977).

[32] *Id*. at 1218-19.

[33] 811 F.2d 424 (8th Cir. 1987), *withdrawn*, 865 F.2d 181 (8th Cir. 1989).

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).[34] 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.[35]

3. Vulnerable Prisoners

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.[36]

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[34] *Id.* at 434-35.

[35] Tyler v. Black, 865 F.2d 181, 183-84 (8th Cir. 1989) (en banc); *see also* Libby v. Commissioner of Correction, 385 Mass. 421, 432 N.E.2d 486, 493-94 (1982) (upholding up to 15 days behind boxcar doors for misconduct in segregation).

[36] 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); 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

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. Several post-*Madrid* decisions have held similarly concerning the housing of prisoners with mental illness in isolated confinement.[37]

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.[38]

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administrative/punitive segregation area); 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).

[37] Jones'El v. Berge, 164 F. Supp. 2d 1096, 1116–25 (W.D.Wis. 2001) (granting preliminary injunction requiring removal of seriously mentally ill from "supermax" prison); Ruiz v. Estelle, 37 F. Supp. 2d 855, 915 (S.D.Tex. 1999) (holding "administrative segregation is being utilized unconstitutionally to house mentally ill inmates—inmates whose illness can only be exacerbated by the depravity of their confinement"), *rev'd and remanded on other grounds*, 243 F.3d 941 (5th Cir. 2001), *adhered to on remand*, 154 F. Supp. 2d 975, 984–86 (S.D.Tex. 2001); Coleman v. Wilson, 912 F. Supp. 1282, 1320–21 (E.D.Cal. 1995) (inappropriate disciplinary treatment and placement in segregation units of prisoners with mental illness was unconstitutional).

[38] *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).

4. 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 a risk of such behavior.[39] 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, most courts held that punitive segregation of any substantial duration required a *Wolff*[40] hearing, but that administrative segregation required due process protections only if state rules or regulations created a "liberty interest" by imposing substantive limits on prison officials' discretion.[41] However, in 1995 the Supreme Court decided *Sandin v. Conner*,[42] 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."[43]

Sandin overturned both the law of disciplinary due process and liberty interest analysis generally as applied to prisoners.[44] It

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[39] *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).

[40] Wolff v. McDonnell, 418 U.S. 539 (1974).

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

[42] 515 U.S. 472 (1995).

[43] *Sandin*, 515 U.S. at 484.

[44] The second proposition has been a point of some confusion. Although *Sandin* forcefully disapproved the liberty interest

was promptly followed by numerous decisions holding that prisoners are not entitled to due process protections in connection with placement in isolated confinement even for long periods of time.[45] It was also followed ten years later by a second Supreme Court decision, which applied the *Sandin* holding to administrative confinement in a "Supermax" prison, but which did not much clarify the many questions that *Sandin* had left open because the conditions it addressed were so draconian as to shed little light on the boundaries of the "atypical and significant" standard: noting the disagreement over the proper "baseline from which to measure what is atypical and significant in any particular prison system," the Court said only that confinement in the subject facility "imposes an atypical and significant hardship under any plausible baseline."[46] Not only were prisoners locked in their cells for 23

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analysis of prison regulations, some courts understood the decision not to abolish it but to add a second hurdle for the plaintiff. That is, a prisoner was required to show both a state-created liberty interest *and* atypical and signiticant hardship to support a due process claim. *See, e.g.*, Frazier v. Coughlin, 81 F.3d 313, 317 (2d Cir. 1996). The later decision in *Wilkinson v. Austin*, 545 U.S. 209 (2005), stated that it had "abrogated" the parsing of regulatory language in search of liberty interests and that "[a]fter *Sandin*, it is clear that the touchstone of the inquiry into the existence of a protected, state-created liberty interest in avoiding restrictive conditions of confinement is not the language of regulations regarding those conditions but the nature of those conditions themselves 'in relation to the ordinary incidents of prison life.'" *Wilkinson*, 545 U.S. at 222-23 (quoting *Sandin*). Nonetheless the Second Circuit has adhered to its view that liberty interest analysis survives. Iqbal v. Hasty, 490 F.3d 143, 162 (2d Cir. 2007), *aff'd in part, rev'd in part, and remanded on other grounds sub nom.* Ashcroft v. Iqbal, 556 U.S. 662 (2009).

[45] *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).

[46] Wilkinson v. Austin, 545 U.S. 209, 223 (2005).

hours a day; they were also barred from conversing cell to cell, subjected to 24-hour illumination in their cells, and allowed exercise only in a small indoor room. Further, placement was indefinite, reviewed only annually, and prisoners held in the unit were disqualified from parole consideration. The Supreme Court stated: "While any of these conditions standing alone might not be sufficient to create a liberty interest, taken together they impose an atypical and significant hardship within the correctional context."[47]

In the absence of more useful guidance from the Supreme Court, the lower courts are all over the map in applying the *Sandin* atypical and significant standard. The most favorable outcomes for prisoners have been in the Second Circuit, which after a series of cases emphasizing the need for careful fact-finding concerning the conditions of confinement,[48] has held that "the normal conditions of SHU confinement in New York" are presumptively not atypical and significant for confinement of 101 days or less, but are atypical and significant if confinement extends to 305 days or more under "the normal conditions of SHU confinement in New York" and no aggravating factors are shown.[49] For periods

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[47] Wilkinson v. Austin, 545 U.S. 209, 224 (2005); *see* Iqbal v. Hasty, 400 F.3d 143, 163 (2d Cir. 2007) (holding that under *Wilkinson*, alleged conditions including "solitary confinement, repeated strip and body-cavity searches, beatings, exposure to excessive heat and cold, very limited exercise, ad almost constant lighting–as well as the initially indefinite duration of confinement" sufficiently pled atypical and significant hardship), *aff'd in part, rev'd in part, and remanded on other grounds sub nom.* Ashcroft v. Iqbal, 556 U.S. 662 (2009); Westefer v. Snyder, 422 F.3d 570, 590 (7th Cir. 2005) (stating that *Wilkinson*'s liberty interest turned exclusively on the absence of parole is "far too crabbed a reading of the decision"; plaintiffs' claim should not have been dismissed even though Illinois supermax cells have windows, the doors are mesh rather than solid steel, the exercise yard is partly outdoors, and visiting is not as limited as in *Wilkinson*).

[48] *See, e.g.*,, Wright v. Coughlin, 132 F.3d 133 (2d Cir. 1998); Giakoumelos v. Coughlin, 88 F.3d 56, 62 (2d Cir. 1996).

[49] Colon v. Howard, 215 F.3d 227, 232 (2d Cir. 2000). The court

between 101 and 305 days, the court prescribed "development of a detailed record," which might include "evidence of the psychological effects of prolonged confinement in isolation and the precise frequency of SHU confinements of varying durations," and which would be furthered by the appointment of counsel, "some latitude both in discovery and in presentation of pertinent evidence at trial," and particularized findings by the district court.[50] The court added that it did not exclude the possibility that SHU confinement of less than 101 days could be found atypical and significant based on an appropriate record,"[51] a view it has reaffirmed where prisoners have alleged worse conditions than "normal" SHU confinement.[52]

Other circuits have ruled in ways decidedly less favorable to prisoners. The Fifth Circuit held in a case involving prisoners confined in "extended lockdown" (23-hour lock-up in small cells, three hours solitary outdoor exercise a week, restricted property, reading materials, legal access, etc.) for about *thirty years* that if their placement resulted from their initial classification upon entering the prison, there was no due process claim because prisoners have no protectable liberty interest in classification; only

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said that "the duration of SHU confinement is a distinct factor bearing on atypicality and must be carefully considered." *Id.* at 231.

[50] *Colon*, 215 F.3d at 232.

[51] *Id.* at n. 5.

[52] *See* Ortiz v. McBride, 380 F.3d 649, 654-55 (2d Cir. 2004) (holding that 90-day confinement could be atypical and significant based on allegations *inter alia* of 24-hour confinement without exercise or showers during part of the period), *cert. denied*, 543 U.S. 1187 (2005); Palmer v. Richards, 364 F.3d 60, 66 (2d Cir. 2004) (holding that 77 days in SHU could be atypical and significant based on allegations of deprivation of personal clothing, grooming equipment, hygienic products and materials, reading and writing materials, family pictures, personal correspondence, and contact with family, and being mechanically restrained whenever out of cell, raised a material factual question under the atypical and significant standard).

if their confinement was for other reasons would even the atypical and significant standard apply to it.[53] The Third Circuit has found segregated confinement atypical and significant only in a case involving eight years' confinement under unusually harsh conditions.[54] Similarly, the Eighth Circuit has ruled for plaintiffs only in cases involving segregation of a decade or more.[55]

a. "Atypical." Underlying these divergent results are a number of unresolved questions about application of the atypical and significant standard. One is the meaning of "atypical," generally defined as "not conforming to type; UNUSUAL."[56] One would think that courts assessing whether certain conditions are atypical would want to know what proportion of prisoners are subjected to them. In fact, only a few courts have even asked this

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[53] Wilkerson v. Stalder, 329 F.3d 431, 435–36 (5th Cir. 2003).

[54] Shoats v. Horn, 213 F.3d 140, 144 (3d Cir. 2000). The plaintiff was subject to 23-hour lock-in and denied radio and TV, phone calls except in emergencies, books other than legal and religious, contact with his family, all program activities, and access to the library. *Compare* Young v. Beard, 227 Fed.Appx. 138 (3d Cir.2007) (unpublished) (930 days in segregation); Griffin v. Vaughn, 112 F.3d 703 (3d Cir. 1997) (15 months in administrative segregation).

[55] *See* Williams v. Norris, 277 Fed.Appx. 647, 648-49 (8th Cir. 2008) (unpublished) (12 years in administrative segregation held atypical and significant); Herron v. Wright, 116 F.3d 480 (8th Cir. 1997) (unpublished) (stating length of confinement is a "significant factor" in determining what is atypical and significant, and 10 years in administrative segregation appeared to be "beyond typical and insignificant," even though the initial placement in segregation was not). On remand, the district court agreed that the length of confinement—by then more than thirteen years—was atypical and significant, and the appeals court affirmed. Herron v. Schriro, 11 Fed. Appx. 659 (8th Cir. 2001) (unpublished). *Compare* Orr v. Larkins, 610 F.3d 1032, 1034 (8th Cir. 2010) (per curiam) (holding nine months in segregation was not atypical and significant).

[56] Webster's II New Riverside University Dictionary (1988).

question, and mostly not recently.[57]

Other decisions have taken a more qualitative approach. One court has cautioned that a disciplinary punishment can be atypical and significant, even if it is not unusual compared to other disciplinary punishments; the point of *Sandin*, it said, is that deprivations are not serious enough to require due process if they "are typically endured by other prisoners, not as a penalty for misbehavior, but simply as the result of ordinary prison administration."[58] One circuit has held that a punishment or

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[57] The Second Circuit and district courts within it have done so, though not recently. *See* Colon v. Howard, 215 F.3d 227, 232 (2d Cir. 2000) (stating courts might consider "the precise frequency of SHU confinements of varying durations" in the atypical and significant determination for confinement between 101 and 305 days); Scott v. Coughlin, 78 F. Supp. 2d 299, 311 n.12 (S.D.N.Y. 2000) (stating that data showing only 1.58% of the prison population were placed in administrative segregation or involuntary protective custody and only 0.55% stayed as long as 60 days would support plaintiff's claim that 60 days' confinement was atypical and significant); Lee v. Coughlin, 26 F. Supp. 2d 615, 635 (S.D.N.Y. 1998) (weighing fact that plaintiff's segregation sentence was longer than 99% of disciplinary confinement sentences); McClary v. Kelly, 4 F. Supp. 2d 195 (W.D.N.Y. 1998) (using similar analysis for prisoner held in administrative segregation for four years). In *Austin v. Wilkinson*, 372 F.3d 346, 355 (6th Cir. 2004), *aff'd in part and rev'd in part on other grounds*, 545 U.S. 209, 125 S. Ct. 2384 (2005), the court wrote: "Whatever the 'ordinary incidents of prison life' may encompass, they must be decided with reference to the particular prison system at issue, and can only be truly 'ordinary' when experienced by a significant proportion of the prison population." However, that court did not actually look at what proportion of the prison population experienced the conditions, and the Supreme Court, in reviewing the decision, did not address whether the proportion of prison population subject to the challenged conditions plays a part in the "atypical and significant" analysis.

[58] Welch v. Bartlett, 196 F.3d 389, 394 (2d Cir. 1999); *accord*,

restriction is not atypical if it is "routinely" imposed by prison officials—not that it is more likely than not to happen, but that there must be a "substantial chance" of its occurrence.[59] Other courts seem to assume that as long as whatever happens to the prisoner is authorized by prison rules, it is not atypical, without even asking how often it really happens,[60] though at least one court has explicitly rejected that view.[61]

b. "Significant." The meaning of "significant" is equally problematic. In *Sandin*, the Court dismissed the 30-day placement of a general population prisoner in 23-hour isolated lock-up, with restraints during the hour out of cell, as not atypical and significant. Some courts have dismissed much worse conditions as not atypical and significant even though they were imposed for much longer.[62] One circuit has framed the question as whether "the conditions of placement are extreme," but has held that even extreme conditions "do not, on their own" satisfy the atypical and significant standard[63]—a conclusion that seems difficult to square

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Kalwasinski v. Morse, 201 F.3d 103, 107 (2d Cir. 1999).

[59] Hatch v. District of Columbia, 184 F.3d 846, 857–58 (D.C. Cir. 1999).

[60] *See* Griffin v. Vaughn, 112 F.3d 703, 707–09 (3d Cir. 1997).

[61] Hatch v. District of Columbia, 184 F.3d at 857.

[62] *See* Fraise v. Terhune, 283 F.3d 506, 523 & n.1 (3d Cir. 2002) (holding that placement in "maximum custody" in "Security Threat Group Management Unit" did not deprive prisoners of liberty although prisoners received only five hours out of cell a week, shower or shave every third day, strip searches every time they left their cells, one non-contact visit a month, one monitored phone call a month, all meals in cells, denial of all regular programs); Beverati v. Smith, 120 F.3d 500, 504 (4th Cir. 1997) (holding that filthy, vermin-infested, and flooded conditions, with unbearably hot cells, cold food, and smaller portions, no clean clothing or bedding, no outdoor recreation, etc., for six months were not atypical and significant).

[63] Rezaq v. Nalley, ___ F.3d ___, 2012 WL 1372151, *8-9 (10th Cir., Apr. 20, 2012). This decision held that confinement in the federal Florence ADX facility, with 23-hour lock-in in small, stark

with the ordinary meaning of words. Other courts, however, consider "normal SHU conditions" atypical and significant if they last long enough.[64] One court in particular has held that courts must give suitable weight to the difference between being confined 23 hours a day and half the day,[65] even though the Supreme Court in *Sandin* seemed not to be impressed by that difference.[66] Several courts have held that "supermax" confinement conditions, characterized by even greater isolation, lock-in time, idleness, property restrictions, etc., than in the usual segregation units, are atypical and significant.[67] Especially unpleasant or oppressive

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cells (albeit equipped with televisions that aired black and white educational and religious programming), with outdoor recreation in fenced-in areas slightly larger than the cells, and with five non-contact visits and two 15-minute phone calls a month, was not extreme. *Id.* at *11.

[64] *See, e.g.*, Palmer v. Richards, 364 F.3d 60, 65 (2d Cir. 2004).

[65] *See* Kawalsinski v. Morse, 201 F.3d 103, 106 (2d Cir. 1999).

[66] One court has pointed out major differences between the Hawaii's prison system at issue in *Sandin* and the New York prison system which justify different results in applying the atypical and significant standard. Among other things, the difference between general population and segregation conditions appears to be larger in New York, and there is less discretion to place prisoners in segregation; though there is a catchall provision allowing segregation in circumstances not spelled out by the rules, that provision is limited to "emergency or unusual situations." Punitive segregation is significantly different from administrative segregation. For those reasons, punitive confinement in New York does impose a "major disruption" on the prisoner's environment. Lee v. Coughlin, 26 F. Supp. 2d 615, 633–35 (S.D.N.Y. 1998). Similar distinctions probably exist between Hawaii and other states as well.

[67] Wilkinson v. Austin, 545 U.S. 209, 223–24, 125 S. Ct. 2384 (2005); Gillis v. Litscher, 468 F.3d 495 (7th Cir. 2006); Westefer v. Snyder, 422 F.3d 570, 589–90 (7th Cir. 2005); Farmer v. Kavanagh, 494 F. Supp. 2d 345, 357 (D.Md. 2007); Koch v. Lewis, 216 F. Supp. 2d 994, 1000–01 (D.Ariz. 2001), *vacated as moot*, 399 F.3d 1099 (9th Cir. 2005); *see* U.S. Dep't of Justice,

conditions may be atypical and significant even for short periods of time.[68]

One issue that has not been explored very much is whether the recognized psychological impact of isolated confinement[69] makes it "significant" for due process purposes. These consequences of isolation are arguably comparable to other psychological impacts that the Supreme Court has held cognizable under the Due Process Clause based on the Constitution itself.[70] A few decisions have cited these effects as reasons for considering long terms in segregation as "significant" and therefore as calling for due process.[71]

National Institute of Corrections, Supermax Prisons: Overview and General Considerations (1999) (quoted in Michael B. Mushlin, 1 Rights of Prisoners § 2.3 at 87 (2002)) (defining a supermax facility as "a highly restrictive, high-custody housing unit within a secure facility, or an entire secure facility, that isolates inmates from the general population and from each other").

[68] In *Gillis v. Litscher*, 468 F.3d 495 (7th Cir. 2006), the court held that a plaintiff placed for 12 days in the extremely harsh conditions of a "Behavior Modification Program" within a "Supermax" prison raised a triable issue under the atypical and significant standard. In stage one of the program, the plaintiff had no property, no privileges (no mail, phone, visitors, canteen items, writing materials), and no clothing, slept on a concrete slab with no bedding, was provided very limited quantities of toilet paper, and was fed "nutri-loaf." Stage two was somewhat less harsh. *Gillis*, 468 F.3d at 490–91.

[69] *See* § 1, above.

[70] *See* Washington v. Harper, 494 U.S. 210, 221–22, 110 S. Ct. 1028 (1990) (holding that prisoners possess "a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs. . . ."); Vitek v. Jones, 445 U.S. 480, 492, 100 S. Ct. 1254 (1980) (citing exposure to "[c]ompelled treatment in the form of mandatory behavior modification programs" in holding that a prisoner's commitment to a mental hospital is a deprivation of liberty).

[71] *See* Colon v. Howard, 215 F.3d 227, 232 (2d Cir. 2000) (stating

c. Individuals' Circumstances—Do They Matter? A related question is whether the atypical and significant analysis must always be generic, or if circumstances may be atypical and significant for some prisoners and not others. There is some support for an individualized approach in the case law—*e.g.*, that placing a wheelchair-bound prisoner in a non-wheelchair-accessible SHU for a couple of months created an atypical and significant hardship for that person,[72] or that placing a prisoner in SHU who was so tall that the cramped quarters and short bed aggravated his medical problems could be atypical and significant.[73] A similar argument might be made about people with

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courts might consider "evidence of the psychological effects of prolonged confinement in isolation"); Shoats v. Horn, 213 F.3d 140, 144 (3d Cir. 2000) (citing evidence that prison officials would be concerned about psychological harm after 90 days of extreme isolation); Koch v. Lewis, 216 F. Supp. 2d 994, 1001 (D.Ariz. 2001) (citing "detrimental pathological effect" in finding extreme isolated confinement atypical and significant), *vacated as moot*, 399 F.3d 1099 (9th Cir. 2005); Lee v. Coughlin, 26 F. Supp. 2d 615, 637 (S.D.N.Y. 1998) (denying summary judgment in case involving 376 days of punitive segregation; "The effect of prolonged isolation on inmates has been repeatedly confirmed in medical and scientific studies."); McClary v. Kelly, 4 F. Supp. 2d 195, 205–09 (W.D.N.Y. 1998) (finding a triable issue of atypical and significant hardship in four years' administrative segregation on a record reflecting both expert evidence and the plaintiff's own testimony about psychological harm); Garcia v. Gomez, 1996 WL 390320, *3 (N.D.Cal., July 3, 1996) ("The SHU is stark to the point of being akin to a sensory deprivation tank. Almost exclusively, prisoners see nothing, do nothing and interact with no one, experiencing abject tedium"; finding a liberty interest in avoiding confinement in a particular SHU.), *vacated on other grounds*, 164 F.3d 630 (9th Cir. 1998).

[72] Serrano v. Francis, 345 F.3d 1071, 1079 (9th Cir. 2003) (stating "the conditions imposed on Serrano in the SHU, *by virtue of his disability*, constituted an atypical and significant hardship on him." (emphasis supplied)).

[73] Delany v. Selsky, 899 F. Supp. 923, 927–28 (N.D.N.Y. 1995).

mental illness. If placing such persons in segregation can violate the Eighth Amendment because of their special susceptibility to the psychological effects of isolation,[74] mightn't placement in segregation be atypical and significant for them, even if it would not be for a person without mental illness?

d. What's the Conditions Baseline? The case law is also muddled about the appropriate basis of comparison under *Sandin*, which said that to require due process, conditions must "impose[] atypical and significant hardship . . . in relation to the ordinary incidents of prison life."[75] What are those "ordinary incidents"? The Supreme Court has acknowledged this "baseline" question without answering it.[76] *Sandin* said that the prisoner plaintiff's disciplinary segregation, "with insignificant exceptions, mirrored those conditions imposed upon inmates in administrative segregation and protective custody. . . . Thus, [his] confinement did not exceed similar, but totally discretionary, confinement in either duration or degree of restriction."[77] Some courts have held that this means administrative segregation and conditions similar to administrative segregation are never atypical and significant.[78] One recent decision, after reviewing conditions at the federal Florence ADX facility, held them not atypical and significant because "they are substantially similar to conditions experienced in

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[74] *See* § 3, above.

[75] Sandin v. Conner, 515 U.S. 472, 484 (1995).

[76] Wilkinson v. Austin, 545 U.S. 209, 223 (2005) (stating that the "supermax" conditions before it were atypical and significant "under any plausible baseline").

[77] *Sandin*, 515 U.S. at 486 (footnote omitted). The difference between administrative and punitive segregation conditions amounted to one extra phone call and one extra visit. *Id.*, 515 U.S. at 476 n.2.

[78] *See* Hatch v. District of Columbia, 184 F.3d 846, 857–58 (D.C. Cir. 1999); Wagner v. Hanks, 128 F.3d 1173, 1174–75 (7th Cir. 1997) (holding that segregated confinement is atypical and significant only if it is substantially more restrictive than any non-punitive confinement in the state's prison system).

any solitary confinement setting."[79] Others have rejected this view, holding that if administrative segregation is *not* totally discretionary, it can be atypical and significant,[80] or simply that segregation conditions should be compared with general population conditions to decide if they are atypical and significant.[81]

e. Duration. *Sandin* said that the prisoner's 30-day confinement "did not exceed similar, but totally discretionary, confinement in either duration or degree of restriction."[82] That seems to imply that even ordinary segregation conditions can become atypical and significant if they go on long enough, as a number of courts have held.[83] Other courts appear not to think that

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[79] Rezaq v. Nalley, ___ F.3d ___, 2012 WL 1372151, *12 (10th Cir., Apr. 20, 2012).

[80] *See* Sealey v. Giltner, 197 F.3d 578, 585 (2d Cir. 1999).

[81] Palmer v. Richards, 364 F.3d 60, 65, 66 (2d Cir. 2004) (quoting Welch v. Bartlett, 196 F.3d 389, 393 (2d Cir. 1999)); Phillips v. Norris, 320 F.3d 844, 847 (8th Cir. 2003). *Contra*, Wagner v. Hanks, 128 F.3d at 1175; Griffin v. Vaughn, 112 F.3d 703, 706 n.2 (3d Cir. 1997) (rejecting the use of general population as a basis for comparison). In *Jackson v. Carey*, 353 F.3d 750, 755 (9th Cir. 2003), the court referred to comparisons with general population or administrative segregation, "whichever is applicable."

[82] Sandin v. Conner, 515 U.S. 472, 486, 115 S. Ct. 2293 (1995).

[83] *See* Harris v. Caruso, ___ Fed.Appx. ___, 2012 WL 661952, *2 (6th Cir., Feb. 29, 2012) (unpublished) (holding the "atypical duration" of plaintiff's eight-year confinement triggered his right to due process); Marion v. Columbia Correctional Institution, 559 F.3d 693, 697 (7th Cir. 2009); Palmer v. Richards, 364 F.3d 60, 64 (2d Cir. 2004); Mitchell v. Horn, 318 F.3d 523, 532 (3d Cir. 2003); Gaines v. Stenseng, 292 F.3d 1222, 1226 (10th Cir. 2002); Hatch v. District of Columbia, 184 F.3d 846, 858 (D.C. Cir. 1999).

There is sometimes a question of what the relevant duration is. The Second Circuit has held in a series of decisions that the relevant time period is the time actually served if the prisoner does not complete a segregation term, Hanrahan v. Doling, 331 F.3d 93, 97 (2d Cir. 2003); Colon v. Howard, 215

length of confinement matters.[84] Courts that do consider the length of confinement have come out very differently in deciding how much segregation time it takes to be atypical and significant.[85] Obviously, after *Sandin*, time periods less than or only slightly more than 30 days will not be considered atypical and significant unless the conditions are extreme.[86]

In administrative segregation cases, the Supreme Court has said that the potentially indefinite nature of the confinement weighs in favor of finding atypical and significant hardship.[87]

F.3d 227, 231 n.4 (2d Cir. 2000); that consecutive disciplinary sentences should be aggregated for the atypical and significant determination, Giano v. Selsky, 238 F.3d 223, 226 (2d Cir. 2001); Sims v. Artuz, 230 F.3d 14, 23–24 (2d Cir. 2000); and that pre-hearing segregation and post-hearing segregation should be aggregated. Sealey v. Giltner, 197 F.3d 578, 587 (2d Cir. 1999).

[84] As noted earlier, one circuit has said that "extended lockdown" for *30 years* would not be atypical and significant if it was imposed as part of initial classification into the prison, though it might if it was imposed for some other reason. Wilkerson v. Stalder, 329 F.3d 431, 435–36 (5th Cir. 2003).

[85] *See* cases cited in nn. 48-55, above.

[86] *See* Gillis v. Litscher, 468 F.3d 495, 490–91 (7th Cir. 2006) (holding 12 days in a "supermax" "Behavior Modification Program," with no property, no mail, phone, visitors, canteen items, writing materials, clothing, or bedding, limited toilet paper, and "nutri-loaf" for food, raised a jury question under the atypical and significant standard); Mitchell v. Horn, 318 F.3d 523, 527–28, 532 n.6 (3d Cir. 2003) (directing district court to consider whether four days confinement in a cell smeared with feces and infested with flies, in an area populated by mentally ill prisoners, was atypical and significant).

[87] Wilkinson v. Austin, 545 U.S. 209, 224, 125 S. Ct. 2384 (2005); *accord*, Harden-Bey v. Rutter, 524 F.3d 789 (6th Cir. 2008); Koch v. Lewis, 216 F. Supp. 2d 994, 1001–02 (D.Ariz. 2001), *vacated as moot*, 399 F.3d 1099 (9th Cir. 2005). *But see* Johnston v. Vaughn, 2000 WL 1694029, *2 (E.D.Pa., Nov. 3, 2000) (noting that any administrative segregation prisoner can claim potentially

One court has in effect redefined "indefinite," holding that the existence of periodic reviews "suggests that the confinement was not indefinite," although the reviews were at longer intervals than in *Wilkinson*, which described the plaintiffs' confinement as indefinite.[88]

f. Length of Sentence. *Sandin* said that a punishment of 30 days in 23-hour lock-up was "well within the range of confinement to be normally expected for one serving an indeterminate term of 30 years to life."[89] It is hard to know what the Supreme Court meant by that statement. Why would 30 days in punitive segregation be any more or less "expected" for someone doing 30 to life than for someone doing one year? Some courts have applied this statement in *Sandin* and have given the prisoner's criminal sentence weight in determining whether a segregation term was atypical and significant.[90] Most courts simply have not

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indefinite confinement, and actual time served must be the "threshold consideration" in deciding whether there is a liberty interest).

One court's statement that the decision in *Wilkinson* was based "*largely* on the fact that placement was indefinite and disqualified otherwise eligible inmates from consideration for parole," Townsend v. Fuchs, 522 F.3d 765, 772 (7th Cir. 2008) (emphasis supplied), minimizing the importance of conditions and time served in confinement, has apparently been superseded. *See* Marion v. Columbia Correctional Institution, 559 F.3d 693, 697-99 (7th Cir. 2009) (holding 240 days of segregation obliges the court to examine the conditions of confinement to make the atypical and significant judgment).

[88] Wilkinson v. Austin, 545 U.S. at 214-15 (stating "placement at OSP is for an indefinite period of time, limited only by an inmate's sentence," despite the existence of annual reviews).

[89] Sandin v. Conner, 515 U.S. 472, 487, 115 S. Ct. 2293 (1995).

[90] *See, e.g.*, Hatch v. District of Columbia, 184 F.3d 846, 856 (D.C. Cir. 1999); Thomas v. Ramos, 130 F.3d 754, 761 (7th Cir. 1997) (noting, in holding segregation time not atypical and significant, that 70 days segregation is relatively short compared to the plaintiff's 12-year prison sentence); Rimmer-Bey v. Brown, 62

mentioned the issue.

g. Purpose of Confinement. Two circuits have included in the *Sandin* analysis the question whether the confinement is for a legitimate purpose.[91] This is an odd holding in a procedural due process controversy; the purpose of requiring procedural protections is in large part to ensure that particular deprivations of liberty or property are for a legitimate purpose, and to adjudicate that question as a precondition for providing such process seems backwards. Certainly the kind of confinement at issue will always be for a legitimate purpose in the abstract, since isolated confinement is always justified in terms of the legitimate purposes of maintaining the security of the institution and the safety of prisoners and staff.

Finally, and appropriately in light of the disarray just described, at least one circuit seems to have rejected the idea of any discernible standard for finding a liberty interest. It has stated that

> [r]elevant factors might include whether (1) the segregation relates to and furthers a legitimate penological interest, such as safety or rehabilitation; (2) the conditions of placement are extreme; (3) the

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F.3d 789, 791 (6th Cir. 1995); Edmonson v. Coughlin, 21 F. Supp. 2d 242, 250 (W.D.N.Y. 1998) (noting that a prisoner with a longer sentence is more likely to have the chance to serve a longer segregation sentence, and therefore such a sentence is more typical and less significant than for someone with a shorter sentence).

[91] *See* Rezaq v. Nalley, ___ F.3d ___, 2012 WL 1372151, *8 (10th Cir., Apr. 20, 2012) ("[r]elevant factors might include whether (1) the segregation relates to and furthers a legitimate penological interest, such as safety or rehabilitation. . . .") (quoting Estate of DiMarco v. Wyoming Dep't of Corr., 473 F.3d 1334, 1342 (10th Cir. 2007)); Harden-Bey v. Rutter, 524 F.3d 789, 794 (6th Cir. 2008) (holding the existence of a liberty interest requiring due process protections is determined in part by whether the defendants had "good reason" for the confinement) (citing Jones v. Baker, 155 F.3d 810, 812 (6th Cir.1998)).

> placement increases the duration of confinement, as it did in *Wilkinson*; and (4) the placement is indeterminate (in *Wilkinson* the placement was reviewed only annually).[92]

However, it has gone on to say that "we have never suggested that the factors serve as a constitutional touchstone," and that a "fact-driven assessment that accounts for the totality of conditions presented by a given inmate's sentence and confinement" is called for.[93]

h. The Process Due. It is tempting to dismiss this disorderly controversy as of interest mainly to lawyers, with few real-world consequences.[94] After all, the standard to which prison

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[92] Rezaq v. Nalley, ___ F.3d ___, 2012 WL 1372151, *8 (10th Cir., Apr. 20, 2012) (quoting Estate of DiMarco v. Wyoming Dep't of Corr., 473 F.3d 1334, 1342 (10th Cir. 2007)).

[93] *Rezaq*, 2012 WL 1372151, *9.

[94] This temptation should be resisted. One striking counter-example is that of Mark Koch, serving a life sentence, who after a number of years of confinement was deemed a gang associate and was placed in a high-security segregation unit from which no one was paroled and no one could be released except by "debriefing," which would target him for execution and require his placement in an almost equally restrictive protective custody setting. As a result, he could expect to spend the rest of his life in solitary confinement. The district court held that the circumstances of his confinement created a liberty interest, and that there had to be some evidence of misconduct as well as his alleged status as gang member to justify indefinite confinement. Koch v. Lewis, 216 F.Supp.2d 994, 1006-07 (D.Ariz. 2001), *vacated as moot*, 399 F.3d 1099 (9th Cir. 2005). The case was held moot at the appellate stage because Mr. Koch, having been released to general population, had been released on parole. He remains free and at present is gainfully and legitimately employed in another state. (Personal communication from Mr. Koch's counsel.)

More generally, the practical experience of lawyers litigating extremes of duration or conditions of isolated confinement is that defendants tend to yield at least to some degree

officials are held in prison disciplinary hearings is minimal,[95] and trumped-up charges do not state a constitutional claim as long as the procedural rituals are observed.[96] The due process standard in connection with administrative segregation is even less demanding, requiring only "some notice of the charges" and "an informal nonadversary review of the information supporting [the prisoner's] administrative confinement" and noting that decisions may be based on "rumor, reputation, and even more imponderable factors . . . 'purely subjective evaluations' . . . [and] intuitive judgments."[97] (Some courts have mitigated this alarming proposition by requiring that information on which segregation is based have some indicia of reliability, as in disciplinary cases.[98])

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when egregious practices are challenged. *See, e.g.*, Rezaq v. Nalley, ___ F.3d ___, 2012 WL 1372151, *2-3 (10th Cir., Apr. 20, 2012) (noting the mitigation of the plaintiffs' confinement through transfers to other less oppressive units and the promulgation of revised hearing procedures during the pendency of litigation challenging confinement in federal ADX facility); *see also* David C. Fathi, *The Common Law of Supermax Litigation*, 24 Pace L.Rev. 675 (2004) (noting settlements, including substantial concessions, of challenges to "Supermax" conditions).

[95] *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).

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

[97] Hewitt v. Helms, 459 U.S. 460, 472, 474, 476 (1983)

[98] Taylor v. Rodriguez, 238 F.3d 188, 194 (2d Cir. 2001); Ryan v. Sargent, 969 F.2d 638, 640-41 (8th Cir. 1992), *cert. denied*, 506

Much recent due process litigation has focused not on placement in administrative segregation but on retention in segregation, focusing on the due process requirement of "some sort of periodic review" to determine if there is a need for continued segregation.[99] Such review need not involve new evidence or statements,[100] though notice should be provided if new material is to be presented.[101] Review must be meaningful; due process is not satisfied by perfunctory review and rote reiteration of stale justifications.[102] Some recent decisions arguably transform the procedural requirement of periodic review into a substantive requirement of meaningful criteria or instructions for prisoners to

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U.S. 1061 (1993); Koch v. Lewis, 216 F.Supp.2d 994, 1003 (D.Ariz. 2001), *appeal dismissed as moot*, 335 F.3d 993 (9th Cir. 2003).

[99] Hewitt v. Helms, 459 U.S. at 477 n.9.

[100] *Hewitt*, *id.*; Magluta v. Samples, 375 F.3d 1269, 1278–79 & n.7, 1283 (11th Cir. 2004).

[101] Clark v. Brewer, 776 F.2d 226, 234 (8th Cir. 1985).

[102] Sourbeer v. Robinson, 791 F.2d 1094, 1101 (3d Cir. 1986); McClary v. Kelly, 87 F. Supp. 2d 205, 214 (W.D.N.Y. 2000) (upholding damage verdict for sham review), *aff'd*, 237 F.3d 185 (2d Cir. 2001); Smart v. Goord, 441 F. Supp. 2d 631, 642 (S.D.N.Y. 2006) (allegation that review hearings were a "hollow formality" and officials did not actually consider releasing plaintiff stated a due process claim); Giano v. Kelly, 869 F. Supp. 143, 150 (W.D.N.Y. 1994); *see* Thompson-El v. Jones, 876 F.2d 66, 69 n.6 (8th Cir. 1989) (dictum) (a claim that there was an "ongoing investigation" might not justify six months' segregation when there was little or no actual investigation going on). *But see* Edmonson v. Coughlin, 21 F. Supp. 2d 242, 253–54 (W.D.N.Y. 1998) ("The fact that the ASRC repeated the same rationale each week, and did not enable Edmonson to submit information is not a basis for finding that the ASRC violated due process." Though the process should have been "better documented," it need not be "formalized."); Golub v. Coughlin, 885 F. Supp. 42, 45–46 (N.D.N.Y. 1995) (holding that review that cited nothing but the crime the prisoner had committed and the resulting publicity was adequate).

conform their behavior to in order to obtain release. These decisions are discussed in the next section.

5. Recent Developments

Several relatively recent decisions provide some basis for hope that the courts may place more meaningful substantive limits on the use of solitary confinement.

In *Wilkerson v. Stalder*, the well-known "Angola Three" litigation, the plaintiffs, who had been affiliated with the Black Panther Party, and two of whom had been convicted of murdering a prison guard, were held for 28 to 35 years in administrative segregation despite their lack of any continuing disciplinary record. The court denied summary judgment for prison officials, holding that a reasonable fact finder could "determine that the cumulative effect of over 28 years of confinement in lockdown at LSP constitutes a sufficiently serious deprivation of at least one basic human need, including but not limited to sleep, exercise, *social contact and environmental stimulation.* It is obvious that being housed in isolation in a tiny cell for 23 hours a day for over three decades results in serious deprivations of basic human needs."[103]

The court appropriately anchored this recognition of social interaction and environmental stimulation as basic human needs in the prior jurisprudence "recognizing mental health as worthy of Eighth Amendment protection, and the requirement that Eighth Amendment protections change to reflect 'evolving standards of decency that mark the progress of a maturing society.'"[104] Nonetheless it appears to be a holding of first impression, and an important one, since previous articulations of the "basic human

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[103] Wilkerson v. Stalder, 639 F. Supp. 2d 654, 680, 681-82 (M.D.La. 2007) (emphasis supplied). *Compare* Bono v. Saxbe, 620 F.2d 609, 614 (7th Cir. 1980) ("Inactivity, lack of companionship and a low level of intellectual stimulation do not constitute cruel and unusual punishment even if they continue for an indefinite period of time, although the duration 'is a factor to be considered, especially if the confinement is punitive.'").

[104] Wilkerson v. Stalder, 639 F. Supp. 2d at 678.

needs" principle have been considerably narrower and more oriented to physical survival. (Thus the Supreme Court has acknowledged "food, clothing, shelter, medical care and reasonable safety"[105] as well as "warmth [and] exercise"[106] as basic needs.) It should be noted that this *Wilkerson* summary judgment holding is now five years old, with no final resolution of the merits of the case. To date no other courts have adopted its holding that social contact and environmental stimulation are basic needs.

One of the elements of procedural due process, as noted above, is a requirement of meaningful period review of administrative confinement. A couple of recent decisions emphasize the substantive aspect of that requirement, *i.e.*, criteria by which the need for continuing confinement is judged. One court held that if segregation is imposed to encourage a prisoner to improve his behavior, "the review should provide a statement of reasons [for retention], which will often serve as a guide for future behavior (*i.e.*, by giving the prisoner some idea of how he might progress toward a more favorable placement)."[107] What is news here is the idea that there must *be* some idea of how the prisoner might progress towards release from segregation.[108]

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[105] Helling v. McKinney, 509 U.S. 25, 32, 113 S. Ct. 2475 (1993) (citing DeShaney v. Winnebago County Dep't of Social Services, 489 U.S. 189, 199–200, 109 S. Ct. 998 (1989)).

[106] Wilson v. Seiter, 501 U.S. at 304. "Shelter" includes various aspects of physical conditions including lighting, ventilation, and structural deterioration.

[107] Toevs v. Reid, ___ F.3d ___, 2012 WL 1085802, *6 (10th Cir., Apr. 2, 2012). The court cited *Wilkinson v. Austin*, 545 U.S. 209, 226 (2005), which noted that Ohio's requirement of a statement of reasons for retention in its Supermax facility "serves as a guide for future behavior," though the Court did not specifically state that due process requires a statement that serves that purpose.

[108] This holding is a departure from some earlier decisions that held that officials need not promulgate objective criteria for release from administrative segregation. Clark v. Brewer, 776 F.2d 226, 236 (8th Cir. 1985); Mims v. Shapp, 744 F.2d 946, 952–53 (3d Cir. 1984).

Another decision held that a prisoner who had murdered another prisoner in 1982, had spent many years in general population after a period of segregation, and then was returned to segregation in 1995 where he remained for 14 years, had not received meaningful review where defendants "failed to explain to [the prisoner], with any reasonable specificity, why he constituted a continuing threat to the security and good order of the institution."[109] The court explicitly excluded the possibility that prison officials could simply cite the commission of a prison murder as permanently disqualifying a prisoner for eventual release from segregation, citing both its own precedents and the Supreme Court's statement that "administrative segregation may not be used as a pretext for indefinite confinement of an inmate."[110] Thus this procedural requirement that prison officials state a current justification for ongoing confinement becomes a substantive requirement that they *have* a current justification and not just a long-past act, however heinous.

It remains to be seen whether courts will follow up on these encouraging proclamations and actually require prisoners' release where officials present only superannuated or trumped-up justifications for continuing segregation.

A quite different approach is taken in *U.S. v. Bout*,[111] in which a notorious international arms dealer who had been held in solitary confinement for 15 months, first in pre-trial detention and then after conviction at trial, complained by letter; after a hearing, the court ordered him released.[112] The court, unusually,

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[109] Williams v. Hobbs, 662 F.3d 994, 1008 (8th Cir. 2011).

[110] Williams v. Hobbs, 662 F.3d at 1007-08 (citing Hewitt v. Helms, 459 U.S. 460, 477 n. 9 (1983), and Kelly v. Brewer, 525 F.2d 394 (8th Cir.1975)).

[111] ___ F.Supp.2d ___, 2012 WL 653882, *3 (S.D.N.Y., Feb. 24, 2012).

[112] The letter was apparently construed as a motion, and the motion was then construed as a petition for habeas corpus under 28 U.S.C. § 2241, without objection by the government. U.S. v. Bout, 2012 WL 653882, *2 n.12. The Second Circuit is one of several circuits that allow prison segregation to be challenged via habeas corpus.

considered the matter under the standard of *Turner v. Safley*,[113] which governs challenges to regulations alleged to infringe upon prisoners' constitutional rights, and which requires a showing of a reasonable relationship to a legitimate governmental objective. To assess a claim under that standard, courts ask whether there is a "valid, rational connection" between prison officials' action and the legitimate interest cited to justify it; whether the prisoner has alternative means of exercising the right in question; whether accommodating the right will affect staff, other prisoners, and the allocation of prison resources; and whether there is a "ready" alternative that will serve both prisoner's and officials' at minimal cost.[114]

Since the court viewed *Turner* as a "rough fit" in certain respects to assessing the treatment of individuals rather than the validity of regulations, it also relied on decisions involving the permissibility of solitary confinement of pre-trial detainees in federal custody. The standard governing those decisions is also a reasonable relationship standard (never mind that the court refers to them both as "rational basis review"[115]), though considerations of rehabilitation and punishment do not play a part where detainees are concerned.

The court found no "valid, rational connection" between the petitioner's segregation and any legitimate governmental interests; the government asserted a series of rationales based on

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Abdul-Hakeem v. Koehler, 910 F.2d 66, 69–70 (2d Cir. 1990); *accord*, Medberry v. Crosby, 351 F.3d 1049, 1053 (11th Cir. 2003); Bostic v. Carlson, 884 F.2d 1267, 1269 (9th Cir. 1989); Krist v. Ricketts, 504 F.2d 887, 887–88 (5th Cir. 1974) (per curiam). Other circuits do not. Montgomery v. Anderson, 262 F.3d 641, 643–44 (7th Cir. 2001) ("Disciplinary segregation affects the severity rather than duration of custody. More-restrictive custody must be challenged under § 1983, in the uncommon circumstances when it can be challenged at all."); Brown v. Plaut, 131 F.3d 163, 167–68 (D.C. Cir. 1997).

[113] 482 U.S. 78 (1987).

[114] *Turner*, 482 U.S. at 89-91.

[115] *Bout*, *3.

his crime and on other factors related to his life before incarceration, and the court found them variously unsupported by evidence or having only an attenuated relationship to prison security.[116] The other *Turner* factors were quickly disposed of. There were no alternatives other than release from SHU for the prisoner to exercise his right. There would be no "ripple effect" on other prisoners or prison staff because the transfer of one individual from SHU to general population would not require additional resources from prison officials. The availability of alternative means for the prison to accommodate the prisoner's asserted right was not an issue since there was no alternative to release from solitary but release from solitary.

There are several reasons to question the analysis in *Bout*. The propriety of placing individual prisoners in segregation units is usually addressed as a matter of procedural due process and not substantive constitutional law, as discussed in § 4, above. There is

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[116] *Id.*

First, the Bureau of Prisons cited the petitioner's criminal charges, but the court looked at the evidence adduced at trial and noted that there was no evidence of actual connection to any terrorist organization within the previous 10 years, and no indication he had engaged in violence himself. The claim of "ability to acquire vast resources . . . and his connectivity to his associates" was also found to be unsupported, since he had been blacklisted by the Office of Foreign Assets Control and the United Nations, which impeded his ability to transfer assets, and there was no evidence of other resources available to him. His "alleged leadership" and ability to control and influence other prisoners were unsupported by the record. The publicity his case has received, cited by the government, is "a very weak and dangerous argument," since many defendants receive broad publicity but are released on bail or assigned to general population. Bout's involvement with former Liberian dictator Charles Taylor, incarcerated in the Hague since 2006, occurred a decade ago and there is no reason that they require solitary confinement now; the government's invocation of them suggests that it is punishing him for conduct that was not a basis for his conviction.

a reason for that. The *Bout* decision refers repeatedly—as it must in applying the *Turner* analysis—to the "right" of the prisoner that is being restricted. What is that right? The court does not identify it with specificity, but the question adjudicated is whether the petitioner must remain in SHU or is to be released to general population. It has been a commonplace for decades that prisoners have no constitutional entitlement to remain in the general prison population.[117] The *Bout* decision also invokes the principle of deference to the judgment of prison officials that is asserted in *Turner* and elsewhere by the Supreme Court, but its examination of the government's rationale is considerably more searching than usual in administrative segregation cases—especially those decided as matters of procedural due process, which enforce at best a "some evidence" standard[118] and often allow officials to rely on "rumor, reputation, and even more imponderable factors . . . 'purely subjective evaluations' . . . [and] intuitive judgments."[119] Arguably *Bout*'s approach was appropriate in that case, since the government relied largely on matters that the court was highly familiar with from presiding over the case through a jury trial. But that fact also limits the exemplary value of the *Bout* decision because there are not many cases in which the administrative segregation determination is based to such degree on matters canvassed in the criminal proceedings,[120] as contrasted with events or information developed in prison by prison officials.

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

[118] Bruce v. Ylst, 351 F.3d 1283, 1288 (9th Cir. 2003); Taylor v. Rodriguez, 238 F.3d 188, 194 (2d Cir. 2001) (both applying "some evidence" standard, though requiring some "indicia of reliability").

[119] Hewitt v. Helms, 459 U.S. 460, 474 (1983) (citations omitted).

[120] *U.S. v. Basciano*, 369 F.Supp.2d 344, 351-52 (E.D.N.Y. 2005), on which *Bout* relies, is another such case. The same is true of *Boudin v. Thomas*, 533 F.Supp. 786 (S.D.N.Y. 1982), which also predates *Hewitt v. Helms* and *Turner v Safley*.