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Criminal Justice and Behavior 2008 35: 1017

DOI: 10.1177/0093854808317569

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PENAL ISOLATION

Beyond the Seriously Mentally Ill

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The duration and conditions of penal confinement (i.e., segregation) in use by our prisons, and regularly upheld by the courts, are so extreme and so harmful that ultimately such confinement should be prohibited as a matter of law and policy. Correctional officials, and the courts, tend to conflate the need to insulate some inmates from each other with the use of a 23/7 regimen of segregation, devoid of social interaction. Inmates suffering with mental illness or who are at risk from such confinement and juveniles are the exceptions, and they have had some success in the courts. This article reviews the relevant history of penal isolation, Supreme Court decisions and other case law, and the evidence of harm caused by extreme penal isolation. It is proposed that the law relating to the acceptable uses of mechanical restraints serve as an analogy for the basic reform in the use of penal isolation.

Keywords: confinement, penal isolation, mental illness

Let me begin with the obvious: The very nature of our prisons means we must have some means by which to separate prisoners on the basis of those who are at risk from those who create those risks. There are any number of other possible reasons for separation: age, gender, and infection control are some examples. Those bases for separation are not within the primary focus of this article.

Less obvious than the risk of harm rationale but equally compelling based on policy and practice is the separation of inmates from each other based on punishment for disciplinary infractions. I say “less obvious” because there are a variety of punishments available to prison authorities—for example, loss of amenities, loss of good time, restriction of visiting privileges, transfers, and the like—short of the separation of inmates from each other. Where there is a genuine concern about the safety of staff and fellow inmates, and depending on the degree of risk, I stipulate the legitimate need for separation—for *insulation*—without also conceding the legitimacy of the extreme conditions often tied to such separation or insulation.

Penal environments, then, separate—segregate—inmates involuntarily based on risk and as punishment for a prison infraction, a decision not overtly concerned with risk.¹ When that separation takes the form of segregated housing with varying degrees of limitation on movement, interaction with staff and other inmates, on exercise, visits, reading material, and access to programs, I will refer to that as penal isolation.

There are, then, multiple avenues leading to various degrees of penal isolation. Why a given avenue is taken and by what procedural format are independent and fundamental

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CRIMINAL JUSTICE AND BEHAVIOR, Vol. 35 No. 8, August 2008 1017-1047

DOI: 10.1177/0093854808317569

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questions, but not within the primary scope of this article. The concern here is with the conditions and duration of penal isolation whether for punishment or in response to risk assessment (administrative segregation or classification).

My thesis is that there are conditions of extended penal confinement that are now imposed and frequently judicially upheld that should be prohibited as a matter of policy and law. As will be seen, the courts are somewhat receptive to the elimination of extreme penal isolation on behalf of those inmates suffering with a serious mental illness or at risk for developing such illness.

Juveniles have long received a judicial, categorical immunity from extended penal isolation. Juveniles, not as litigious as their adult counterparts, often are isolated under sterile, deprivational conditions in the name of Behavioral Management Plans or the euphemistic "time out." Thus, there is often a dichotomy between juveniles' rights and practices that go unchallenged.² The mentally ill and juveniles are judicially immunized based on beliefs or evidence linking their condition with a special susceptibility to the pain and suffering associated with penal isolation. To the extent that the seriously mentally ill and juveniles in custody also share a right to treatment, penal isolation should be seen as antithetical to that right.

My hope is to extend the general immunity of juveniles and the emerging immunity of mentally ill inmates to various degrees of penal isolation to all persons in penal confinement. Along the way, I shall contrast the laudable, legal concern for limiting the use of mechanical restraints with the often shockingly permissive approach taken to penal isolation.

PENAL ISOLATION: CASE LAW REVIEW

A cursory review of some 40 or 50 years of litigation challenging both the use and conditions of penal isolation is a sobering reminder of just how base and how unendingly lengthy such conditions may be and still escape successful constitutional challenge. To begin, consider *Ruark v. Schooley* (1962), where detainees' complaints about being confined in an isolation cell in a county jail without food, water, and toilet paper for 52 hours were held not to state a claim upon which relief could be granted. More recently, in *Platt v. Brockenbrough* (2007), the Federal District Court reviewed a litany of a Pennsylvania inmate's complaints:

- His numerous grievances were never even acknowledged.
- He was placed in segregation for 37 days.
- He was allowed to exercise only twice in a month for 1-hour periods.
- He was denied the means to clean his cell, not allowed to shower regularly, and was shackled everywhere he went.

First, let me emphasize that these introductory cases are not some worst-case scenarios presented for inherent shock value. Far from it. Platt's contemporary complaints fall on the mild side of the dozens upon dozens of cases I have reviewed.

Judge Anita Brody found that Platt had no constitutional right to a response to his grievances. If he has exhausted the administrative review process, then the prison's silence allows him to file suit in federal court. So much for that.

Using the mystical test formulated in *Sandin v. Conner* (1995), Judge Brody then found that the inmate had no right to procedural due process prior to his placement in segregation and the brief duration involved does not approximate *Sandin's* requirement of an "atypical

and significant hardship” in relation to the ordinary incidents of prison life. Indeed, a 15-month stay in administrative segregation has previously been found to fall within the parameters of the sentence judicially imposed on the inmate.³ Thus, Platt’s rather brief stay makes his complaint appear to be almost frivolous.

As for Platt’s claim regarding the conditions of confinement and his persistent shackling, Judge Brody waived off the cleanliness and shower complaints with the general response that, “These conditions are undesirable but the Constitution does not mandate comfortable prisons.”⁴

Finally, the judge notes, correctly, that the law is reasonably clear that lack of exercise may pose a significant threat to an inmate’s physical and mental well-being. For example, if muscles are allowed to atrophy, Judge Brody sagely observes, this may constitute cruel and unusual punishment.⁵ One might hope that an inmate’s right to exercise would be found impaired even before his or her muscles experience atrophy.

In any event, the exercise claim is the only one to escape dismissal and this *pro se* plaintiff is given an opportunity to plead and show the extent of his alleged injuries. He does appear to suffer with some form of mental illness for which he now receives medication and perhaps he can convert the physical injury into a causally related psychological harm.

The *Platt* decision takes us into the contemporary legal world of penal isolation, but just part of the way. The Supreme Court decision in *Sandin* addressed conditions of confinement in isolation or segregated settings but only to determine if a pre-deprivation disciplinary (i.e., due process) hearing is required. I presume that conditions may be atypical and significant hardships but not also the conditions forbidden by the Eighth Amendment’s Cruel and Unusual Punishment Clause.

By that I mean only that cruel and unusual conditions are not ever constitutionally permissible. The *Sandin* “atypical and significant” hardship is allowed—perhaps merely tolerated—but requires a so-called *Wolff* procedural format. Thus, one set of conditions is not allowed whereas the other—the *Sandin* situation—requires a procedural minuet on the way to, say, 15 months in penal isolation.⁶

As for the constitutional standard used to determine cruel and unusual punishment, Judge Brody rules

Conditions of confinement may violate the Eighth Amendment if they satisfy two criteria. *Farmer v. Brennan*, 511 U.S. 825, 834, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994). First, the conditions alleged must be sufficiently serious such that the official’s act or omission results in the denial of “the minimal civilized measure of life’s necessities.” *Id.* [citation omitted]. Second, the officials responsible for these conditions must exhibit “deliberate indifference” to the inmate’s health and safety. *Id.* They must act with a state of mind “more blameworthy than mere negligence.” *Id.* at 835.⁷

As the legal decisions morphed from the 1960s to the present, it has become possible to paint a reasonably clear picture of the permissible and impermissible with regard to penal isolation. For example, in *Wright v. McMann* (1967), the court determined that a constitutional violation would exist on proof that a prisoner could be physically punished for failure to remain at military attention in front of his cell door each time an officer appeared from 7:30 a.m. until 10:00 p.m. every day with sleep not permitted during those hours, on pain of being beaten.

Prison officials were rather hard put to find penal justification for this practice. In *Jackson v. Bishop* (1968), an influential Eighth Circuit opinion penned by Harry Blackmun

prior to his ascension to the Supreme Court, categorically ruled out corporal punishment as a cruel and unusual punishment. Corporal punishment, of course, is not a practice limited to penal isolation, although inmates so confined always were, and perhaps remain, prime candidates for beatings. As litigation proceeded from the 1960s to the present, we may detect the evolution of a couple of general principles, and some secondary rules on point.

After describing both the popularity and destructiveness of current penal isolation, Professor Michael Mushlin writes that

Virtually every court which has considered the issue has held that the imposition of solitary confinement, without more, does not violate the Eighth Amendment. Arguments that isolation offends evolving standards of decency, that it constitutes psychological torture, and that it is excessive because less severe sanctions would be equally efficacious, have routinely failed.⁸

The general legal acceptance of penal isolation/segregation, then, surely is one of the emergent general principles. Professor Mushlin's "without more" hedge is the location for much of the legal action in the area of isolation. For example, there is a line of cases where unsanitary conditions—of the health and life-threatening variety—are condemned.

In some cases, insufficient or terribly objectionable food is an inmate winner. Insufficient clothing, insufficient heat, no furniture or window, no lighting, at times alone but usually in some combination, may qualify as cruel and unusual punishment.⁹ Again, the basic concept of prolonged isolation, of very restricted social contacts, sensory stimulation, and even exercise is not itself challenged. The successful challenges relate to conditions clearly threatening to health and life itself, and they would be judicially condemned for general population areas as well as penal isolation areas.

Another general principle, one that is only now emerging and not fully shaped, relates to the isolation of prisoners suffering with mental illness (see Cohen, 2006, pp. 295, 315). A number of courts have shown little tolerance for the penal isolation of prisoners suffering from serious mental illness. A series of recent decisions from California, Texas, and Wisconsin dealing with the isolation, or segregation, of such prisoners resulted in the near total exclusion of inmates with serious mental illness and those inmates who are in some fashion psychologically "at risk" from prolonged isolation.¹⁰ The heightened vulnerability of the mentally ill to the risk of harms associated with isolation allows the courts to treat excessive isolation either as a treatment failure or, more basically, an unreasonable condition of confinement in relation to the attributes of mental illness.

Years before the mental illness exclusion from isolation surfaced, and based also on categorical vulnerability, juveniles prevailed in challenging the imposition of seclusion and isolation where adults would not have prevailed then or now.¹¹ Although the then prevailing views on the psychology of adolescence may have been different in the 1970s, the result likely would be the same.

The expert chatter in the 1960s and 1970s was that juveniles simply experienced time differently. Two weeks in isolation, it was speculated, would seem like years to an adolescent. Indeed, getting into the mix, I even proposed altering the units of time for delinquency dispositions from years or months to minutes. Imagine a newspaper headline: "Youth sentenced to 43,200 minutes."¹²

That, of course, is just a 30-day month but an increasingly punitive public might be satisfied along with those of us seeking to dramatically reduce the number of juveniles in

secure custody and their length of stay. Today's developmental psychology encompasses the earlier concern for moral development—majority patterns of behavior, cognition, and emotion in a given age range—while expanding to include normal, individual differences in development (Steinberg & Schwartz, 2000).

Franklin Zimring, Elizabeth Scott, and others rely on developmental evidence to support their diminished-responsibility standard for juvenile culpability (Scott, 2000). A scaled down responsibility model should also logically support a scaled down disciplinary or administrative control model within the juvenile custodial system. Impulsivity, short-term, temporal perspective, boundary testing, and reduced risk perception are the hallmarks of today's developmental psychology.

A juvenile system's disciplinary system is primarily a punishment system, so the same thinking on the adjudicatory-dispositional stage will support a "less is better" model here as well. Where any form of isolation or seclusion is for purely protective reasons, then the rationale for the intervention itself dictates brevity. Humane conditions are yet another matter, but sanitary and safe conditions for however brief the duration are a *sine qua non*.

The Institute on Judicial Administration—American Bar Association, Juvenile Justice Standards allow for emergency isolation for up to 8 hours, preferably in the juvenile's own room with no dietary restrictions, reading material available, and exercise allowed.¹³ These recommended standards would appear to be in another world from the world of prisons for adults.

The American Correctional Association Standards wisely counsel a room restriction for minor misbehavior as a "cooling off" period, with a 15- to 60-minute duration.¹⁴ Disciplinary misconduct is divided into major and minor events with a major charge allowing for up to 24 hours, prehearing room confinement with additional 24-hour segments, apparently not limited, and subject to administrative review.¹⁵

THE WORLD ACCORDING TO THE SUPREME COURT

Contemporary decisions by the Supreme Court are almost nonchalant and consistently out of touch with reality, in constitutionally accepting the most fundamental deprivations imposed on inmates as legitimate consequences of conviction and imprisonment.¹⁶ *Turner v. Safely* (1987) forms part of the contemporary, constitutional foundation for determining inmate claims to fundamental rights, including First Amendment claims. *Turner* has evolved into a so-called rule of reasonableness that consistently limits inmate claims ranging from visits to access to reading material. The flipside of severe judicial limits on inmate condition claims is the expansion of deference to the opinions—and not necessarily opinions supported by evidence—of prison officials.

Turner involved challenges lodged against two Missouri prison regulations, one relating to inmate marriages and the other relating to inmate-to-inmate correspondence. The correspondence issue in *Turner* is grounded in the First Amendment. The Missouri marriage rule was characterized by the Court as a fundamental right that actually does accompany any inmate to prison.¹⁷ Such a right will usually be traced to the Due Process Clause and characterized as substantive due process in contrast to the procedural due process (e.g., notice, hearing, burden of proof, etc.) we normally associate with that clause. The right to marry also might be grounded in the First Amendment as an aspect of the "free exercise clause."

The Court did not further expand on the constitutional basis for its view of marriage as a fundamental right. Because *Turner* applied the same analysis to inmate-inmate correspondence and marriage, we may safely assume that the Court did not view either of these rights as weightier than the other.

The Court did elaborate on the analytical framework to be used in measuring “reasonableness.” A four-prong test was announced:

1. Is there a valid, rational connection between the prison regulation and the government’s legitimate interest?
2. Are there alternative means open to the inmate to exercise that right?
3. What impact will accommodation of the asserted right have on other inmates and prison personnel?
4. The absence of ready alternative will be taken as evidence of reasonableness.¹⁸

The Court’s decision in *Turner* to uphold the inmate-to-inmate correspondence ban sets the tone for the other inmates’ claims. Subject to a couple of narrow exceptions, Missouri inmates could correspond with other inmates only when prison personnel deemed it in the best interest of the parties involved.¹⁹ According to the trial court, the practice was that inmates simply did not write to nonfamily inmates (*Safely v. Turner*, 1984).

Under the *Turner* reasonableness test, the proffered governmental interest need only be legitimate (as opposed to important or substantial as required by earlier caselaw) and the regulation need only be reasonably related to that legitimate interest (as opposed to the earlier requirement of the least intrusive means available).

Turning to the actual decision in *Turner*, we can demonstrate how the competing tests produce quite different outcomes. The inmates claimed, and the lower courts accepted, that the monitoring of inmate correspondence would be sufficient to satisfy the prison’s undoubtedly valid security interests. A majority of the Court, however, found that monitoring was an unduly burdensome alternative not required by the Constitution, and that it would tax limited prison resources and still not be wholly effective. Thus, a total prohibition of all correspondence with a limited class of persons (other than Missouri prisoners) was upheld as reasonable.²⁰

The Missouri marriage rule also at issue in *Turner* prohibited inmates from marrying inmates or civilians unless the prison superintendent found “compelling reasons” for allowing the marriage. Generally, only pregnancy or the birth of a child were considered to be compelling reasons.²¹ After determining that marriage is a fundamental constitutional right that inmates do not fully surrender, the Court next determined that the Missouri rule swept too broadly for rehabilitative purposes and was an exaggerated response to valid security objectives.²²

In addition to *Turner*, two additional Supreme Court decisions, one involving visits and the other reading material available in isolation, provide additional framework for the specific discussion of penal isolation.

Overton v. Bazzetta (2003) reviewed various limitations on prison visiting imposed by the Michigan Department of Corrections. There were severe limitations placed on visits by minor children and former inmates. Inmates complained that the limits on escorts for children and those with criminal records served to deprive some of them of the fundamental constitutional right of association. The Court did not directly answer the claim of inmates’ right of association but unanimously upheld the regulations as reasonable under

Turner. There is a hint in *Bazzetta* that a blanket denial of visits from those outside the prison milieu might not be upheld.²³

More recently, the Court decided *Beard v. Banks* (2006) upholding Pennsylvania's ban on newspapers, magazines, and personal photographs for inmates confined in their Long Term Segregation Units (LTSU). The LTSU is the most restrictive of the three special units that Pennsylvania maintains for difficult prisoners. The first such unit, the "Restricted Housing Unit" (RHU), is designed for prisoners who are under disciplinary sanction or who are assigned to administrative segregation. The second such unit, the "Special Management Unit" (SMU), is intended for prisoners who "exhibit behavior that is continually disruptive, violent, dangerous or a threat to the orderly operation of their assigned facility." The third such unit, the LTSU, is reserved for the Commonwealth's "most incorrigible, recalcitrant inmates." The LTSU itself has two levels, with Level 2 the most restrictive. All inmates are assigned to Level 2 for at least 90 days and then may graduate to Level 1. Most never do.

The RHU, SMU, and LTSU all severely restrict inmates' ordinary prison amenities. At all three units, residents are typically confined to cells for 23 hours a day, have limited access to the commissary or outside visitors, and (with the exception of some phases of the SMU) may not watch television or listen to the radio.

Prisoners at Level 2 of the LTSU face the most severe form of the restrictions listed above. They have no access to the commissary, they may have only one visitor per month (an immediate family member), and they are not allowed phone calls except in emergencies. In addition, they (unlike all other prisoners in the Commonwealth) are restricted in the manner at issue here: no access to newspapers, magazines, or personal photographs. These severely restricted inmates are nonetheless permitted legal and personal correspondence, religious and legal materials, two library books, and writing paper. If an inmate progresses to Level 1, he enjoys somewhat less severe restrictions, including the right to receive one newspaper and five magazines. The ban on photographs is not lifted unless a prisoner progresses out of the LTSU altogether.

Level 2 inmate Banks sued in federal court claiming that the Level 2 policy forbidding access to newspapers, magazines, and photographs bears no reasonable relationship to any legitimate penal objective and thus violates the *Turner* formula. Banks actually prevailed in the Third Circuit with soon-to-be Justice Alito dissenting.²⁴

The panel majority (2 to 1 decision) found that the challenged deprivations could not be supported by evidence of rehabilitation and that the claimed security objectives simply fell apart on even cursory examination. The case was decided on competing motions for summary judgment, meaning that the limited trial record is in the form of sparse written material. Where the majority in the Third Circuit refused to blindly accept the opinions of correctional officials, then Judge Alito reflexively accepted the mere assertions of corrections officials.

Justice Souter for the Supreme Court plurality found that the prison's desire to motivate better behavior by the "worst of the worst" was itself enough to satisfy *Turner*'s requirement of a valid rational connection between policy and legitimate penological objectives.²⁵ Justice Stevens, in dissent, cleverly characterized this as a deprivation theory of rehabilitation that has no principal of limitation.²⁶ Justice Stevens obviously is correct in that one could also argue that 24 hours a day, 7 days a week with no durational limits in a dark cell is intended to induce good behavior in order to attain minimal lighting. Without some principled basis for "deprivational rehabilitation," the courts likely will accept the inherent, inhumane cruelty of such techniques.

Indeed, it is not hyperbole to suggest that the dark cell example just posed is a form of torture.²⁷ Justice Stevens argued that the actual practices in Pennsylvania, including indefinite stays on Level 2, and the other fundamental deprivations come perilously close to what he termed state-sponsored mind control.²⁸ This is strong language even from the Court's most consistent liberal in prisoner cases.

Justice Stevens argued that the state may not constitutionally invade the sphere of the intellect. He stated that

In this case, the complete prohibition on secular, nonlegal newspapers, newsletters, and magazines prevents prisoners from "receiv[ing] suitable access to social, political, esthetic, moral, and other ideas," which are central to the development and preservation of individual identity, and are clearly protected by the First Amendment, *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969). Similarly, the ban on personal photographs, for at least some inmates, interferes with the capacity to remember loved ones, which is undoubtedly a core part of a person's "sphere of intellect and spirit." Moreover, it is difficult to imagine a context in which these First Amendment infringements could be more severe; LTSU-2 inmates are in solitary confinement for 23 hours a day with no access to radio or television, are not permitted to make phone calls except in cases of emergency, and may only have one visitor per month. They are essentially isolated from any meaningful contact with the outside world. The severity of the constitutional deprivations at issue in this case should give us serious pause before concluding, as a matter of law, that the challenged regulation is consistent with the sovereign's duty to treat prisoners in accordance with "the ethical tradition that accords respect to the dignity and worth of every individual."²⁹

Until the *Turner* decision leveled all prisoner claims to a bland requirement of reasonableness, First Amendment claims were viewed by some as of a different order—as a preferred set of rights among our most fundamental rights.³⁰ The claimed right to visits in *Bazzetta* was fashioned from the constitutional right to association, which is among the constitutional rights least compatible with incarceration. The hypothetical extension of a right to free association ultimately is an unsustainable attack on penal incarceration itself.

The Stevens concept of enforced mind control, through the deprivation of ideas and images of persons closest to us, goes to the heart of personhood and is in the realm of penal isolation that is at the core of my concern. Although the right of association is inherently limited by the essence of imprisonment, it does not also follow that the interior of a prisoner—the mind and intellect—is subject to any similar limitation. There should be no debate on the acceptability of various degrees of mind control.

AMENITY, PRIVILEGE, AND PENALTY

The nine justices composing the Supreme Court are hardly monolithic in their thinking. Justices Thomas, Scalia, and Alito's views of prisons and prisoners are radically different from that of Justice Stevens. I do not propose to develop that contrast much beyond the following point: The more conservative justices have a very circumscribed and, in my view, wholly naive and flawed view of the meaning of various aspects of prison life.

Justice O'Connor's conservative pitch was never as fixed as that of Justices Scalia and Thomas, but her conservative credentials never were in doubt. Justice O'Connor's views as expressed in *McKune v. Lile* (2002) are telling and representative of the Court's majority

view. In this decision, the Court reversed the Tenth Circuit, which held that a Kansas rule that did not grant immunity from prosecution while requiring that inmates admit to all past sex offenses as a condition of treatment violated the Fifth Amendment.

In this context, the Fifth Amendment is activated only after there is a finding of compulsion leading to jeopardy. The two previous federal courts that had ruled in *McKune* found compulsion in the automatic transfer of the plaintiff from a medium to a maximum security facility, limited access to the gym and yard, dramatic reduction in pay, substantial restrictions on visitation, and similar deprivations.

The judgment of the Court was delivered by Justice Kennedy in a plurality opinion, with Justice O'Connor filing a separate opinion concurring in the judgment but disagreeing on the test adopted by the plurality for determining compulsion in a prison setting. Three justices along with Justice Stevens, authoring a stinging rebuke to the five who joined in the judgment of the Court.

Whatever else we now need to know about prison sex offender treatment and the requirement of a full admissions as to "priors" without immunity from prosecution, it is legally safe for clinicians and administrators to insist on such admission; it is safe even to report such admissions to a prosecutor, and safe to automatically penalize the nonadmitting inmate with discharge from the program along with changes as severe as transfer to a maximum security prison. Whether this legally protected maneuver also is good policy is yet another question.

Penalties, like beauty, are in the eye of the beholder. Where some see penalty, others see withdrawal of opportunity. When a court unearths a penalty it wishes to deconstruct, it may begin by calling it a loss of privilege or perhaps an expectation or a desire, but not a reasonable one. A prisoner's right to tolerable living conditions is so circumscribed that what might be a serious loss to "real people," in Justice O'Connor's words, are "changes in living conditions [which] seem to me minor."³¹

In other words, the plurality—joined by O'Connor—is of the view that if one already has lost a good many of the amenities of ordinary life, the loss of a few more on the way to the amenity basement is minor. Pennsylvania's LTSUs and other jurisdictions' supermaxes clearly qualify as the amenity basement.

Actually the reverse of the O'Connor thinking is far more likely to be true; small things (to us) become more valuable to prisoners. The size of a window, an extra hour in the yard, access to commissary, a single cell, access to regular showers, group activities, visits, reading material, pictures, and the like become precious to inmates, and the threat of their loss might easily be seen as the type of compulsion lying at the core of the Fifth Amendment. Not after *McKune*, however, which allows treatment termination and all of the types of losses just described if an inmate in treatment refuses to admit—and face the consequences of—guilt to all prior sexual misconduct.

With *Bazetta's* acceptance of serious limits on visits, and its refusal to characterize a visit as a human right, and *Beard's* implicit tolerance for extremely severe conditions for penal isolation, it seems rather quixotic for me to move forward and propose radical limits on isolation/segregation practices and conditions. I will do so after one further brief excursion into the world of prison according to the Supreme Court.

THE "CONDITIONS" DECISIONS

Coexisting with such decisions as *Bazzetta* and *Beard* is the foundational decision in *Rhodes v. Chapman* (1981). *Rhodes* was decided 6 years before *Turner* and held that it was not unconstitutional to house two inmates in cells designed for single occupancy.³² The federal district court found that the prison's food was adequate as was the ventilation system. Noise was not excessive. Dayroom and visiting space were deemed adequate, and violence was not disproportionate. The ratio of security staff was found sufficient for control purposes.

The district court, upheld by the Sixth Circuit, went on to stress the long terms that inmates were serving, the severe limitations on movement, and the physical and mental injury experienced from long exposure to these conditions. According to the lower federal courts, the sharing of 63 square feet of living space, even with substantial out-of-cell time, created unacceptable cruel and unusual conditions.

In reversing, Justice Powell noted that prison conditions must not involve the wanton and unnecessary infliction of pain nor be grossly disproportionate to the severity of the underlying crime. Onerous conditions alone or in combination may deprive inmates of the minimal civilized measure of basic needs.³³ On the other hand, opined Justice Powell, conditions that are restrictive, even harsh, are part of the penalty offenders pay for their crimes.³⁴ *Rhodes* thus sets some general boundaries for the constitutional and the unconstitutional conditions of penal confinement. Somewhere between the wanton and needless infliction of pain and merely harsh conditions is that place where inmates may be required to live.

The majority found that the district court's own findings refute its conclusion: There is no basis for finding pain, let alone the needless and wanton infliction of pain. Thus, double-celling alone, failure to follow design capacity, even violation of industry standards for acceptable space, do not themselves create cruel and unusual punishment.

Only Justice Marshall dissented in *Rhodes*, finding that the limited, shared cell space itself created cruel and unusual punishment.³⁵ The district court's surmise that living for so long in such small space invariably causes future harm ultimately was not enough to support his conclusion of unconstitutionality. Thus, the space between wanton and needless suffering and the merely harsh is, indeed, wide.

In *Wilson v. Seiter* (1991), the Supreme Court took yet another step to enhance the power of corrections officials and also to reduce the prospects for successful inmate claims regarding conditions of confinement. The Supreme Court held that even if conditions of confinement deprive inmates of a basic human need, this alone may not be cruel and unusual punishment unless the infliction of pain is wanton, that is, done deliberately, knowingly, and with the very objective of causing harm.

This deliberate indifference standard is borrowed from the medical, mental health, and dental care cases and originated in *Estelle v. Gamble* (1976). *Farmer v. Brennan* (1994),³⁶ a "duty to protect" decision, further developed the meaning of deliberate indifference, emphasizing the need for actual knowledge of the relevant facts related to the creation of the duty, the violation of which led to the harm suffered.

Thus, whereas overcrowding may violate the Eighth Amendment, double celling in a cell designed for one without more does not.³⁷ Even if conditions of confinement are unconstitutional, inmates must also show a culpable mental state on the part of the custodians. Parenthetically, the worse the conditions and the longer they have existed, the easier it is to show an official's deliberate indifference.

Turner, Bazzetta, and Beard demonstrate how First Amendment and other fundamental constitutional rights for inmates are now placed on an equal plane and that visits from outsiders, along with access to reading material, are not viewed as fundamental human rights. Rather, they are “amenities” that may be deprived on the mere assertion by prison officials of a penological or behavioral need.

THE ISOLATION-RESTRAINT PARADIGM³⁸

Having painted myself into the dark corner of judicial precedent, I here attempt to escape by crafting a novel approach to challenging extreme penal isolation. Penal isolation, I suggest, should be analyzed constitutionally much as physical restraints are now. Recent Supreme Court case law and longstanding lower court precedent have insisted that prisons and jails limit their use of physical restraints to situations in which those restraints are necessary for contemporaneous control and security—not as deterrents or punishment.

It is my belief that isolation and use of mechanical restraints should, as a matter of law and policy, be treated as almost identical interventions in terms of rationale, duration, and monitoring.³⁹ Isolation units are not a fixed, invariable condition of penal confinement. Penal isolation is variable in its extremes of duration and deprivation. At its most contemporary extreme, the Pennsylvania LTSUs for example, it should simply be banned; in its less onerous forms, isolation should be sharply limited, closely monitored, and very closely regulated.⁴⁰ This proposed reform may well require abandonment of the supermax along with the even more restrictive, primitive “dark cell.”

I want to emphasize that I am not railing against some ancient practice or one confined to “plantation mentality” states. Consider Seventh Circuit Court of Appeals’ Judge Evans opening description of conditions in 2002 at Wisconsin’s Secure Program Facility, formerly Boscobel Prison.

Stripped naked in a small prison cell with nothing except a toilet; forced to sleep on a concrete floor or slab; denied any human contact; fed nothing but “nutri-loaf”; and given just a modicum of toilet paper—four squares—only a few times. Although this might sound like a stay at a Soviet gulag in the 1930s, it is, according to the claims in this case, Wisconsin in 2002. Whether these conditions are, as a matter of law, only “uncomfortable, but not unconstitutional” as the State contends, is the issue we consider in this case.⁴¹

These conditions are part of the prison’s Behavioral Management Program, and according to prison officials, the varying degrees of restrictions are not intended as punishment, merely an effort to achieve rule compliance. Prison officials are learning that far more restrictions—indeed, the infliction of pain—can be done in the name of behavioral change than punishment.⁴²

What I will term *first-degree isolation*, at times referred to as “dark cells,” consists of inmates held in solitary confinement subject to near social isolation and near total sensory deprivation by lack of access to light, sound, or fresh air. The only human contact is with staff and that would be only when required (e.g., escort, delivery of food) and then nominal. By first-degree isolation, I mean to describe conditions that exceed even Level 2 of Pennsylvania’s LTSU system. I have in mind the early conditions and practices in Pennsylvania’s Eastern Penitentiary.⁴³

Second-degree isolation, which also has its roots in the early history of American corrections, is far more common today than the “dark holes” and penitential silence of the eighteenth century. This form of isolation more nearly resembles the RHUs, SMUs, and Level 1 of the current Pennsylvania segregation system and the Wisconsin Behavior Management Program just described.

Inmates are housed typically in single cells with solid doors for 23 hours a day, with limited access to outside light and air, yet able to hear some movements outside their cell, and even yell or “tap” (in code) as communication. Meals are taken alone in the cell; exercise is indoors, solitary, and highly restricted; and access to programs, visits, telephone, radio, television, showers, and reading material is substantially limited. This is characteristic of segregation units and the typical so-called supermax.

“Second-degree” isolation or solitary confinement, then, conveys a set of circumstances beyond life in a single, quiet cell. By definition, it includes deprivation of many of life’s most basic components that link one to social intercourse, the rudimentary sights and sounds of life, and basic decision-making on life’s most mundane choices. As one moves from such isolation to the still deprived world of ordinary prison conditions, we pass an uncertain line that divides isolation from what Justice Powell in *Rhodes v. Chapman* would describe as the acceptably harsh conditions of penal confinement. The critical factors in this divide would be out-of-cell time, congregate activity, exercise or “yard time,” and access to work and available programs. Put another way, the greater the social isolation and sensory deprivation, and the longer the duration of confinement, the more eligible the unit is to be labeled and condemned as penal isolation.

Calling for a legal and policy ban on first-degree isolation while refining and circumscribing second-degree isolation does require some line drawing and further distinguishing of the various forms of custodial arrangements that fit one or the other. First, I shall attempt to describe the various forms of security arrangements currently in use in this country.

Except for the true supermax facility—the federal prison at Florence, Colorado, for example—the penal isolation that concerns me is distinguishable from the security level assigned a particular prison. Prisons generally are classified as maximum, close, medium, minimum, or a camp (although there is no assurance that prisons in different jurisdictions use these security terms in precisely the same fashion) (Levinson & Gerard, 1986, p. 291). In general, however, security levels of prisons will turn on such factors as perimeter barriers, detection devices, mobile patrol, gun towers, internal architectural features, housing, and staff-inmate ratios (Levinson & Gerard, 1986, pp. 295-296). Within any given prison (certainly the maximum, close, and medium prisons), an inmate will likely be assigned a custody level that addresses such items as out-of-cell time, need for restraints and escorts, visits, searches, and other similar issues (Cooksey, 1999). In general, except in supermaxes, ordinary confinement—even of maximum security inmates—allows them some access to congregate dining, outdoor exercise, and out-of-cell programming, and therefore does not approach the level of social and sensory deprivation necessary for inclusion in the category of “isolation.”

There are, however, a variety of nonordinary confinement settings that are indeed isolatory. The segregation units within a particular facility to which an inmate may be assigned as discipline or for administrative reasons (“disciplinary segregation” and “administrative segregation” units) are typically characterized by the kind of extreme deprivation with which I am concerned. In addition, protective custody units present a variety of issues, some of which are pertinent here—like the degree of permissible “consensual” isolation—and many that would take us too far astray.⁴⁴

Prison administrative codes, some prison officials, and the courts to a certain extent attempt to draw a bright line between disciplinary and administrative segregation or isolation. For example, in New York, placement in a SHU (security housing unit) will be categorized as administrative segregation if the facility has determined that the “inmates’ presence in general population would pose a threat to the safety and security of the facility” (NYCRR, 2002). Administrative segregation may be imposed for extraordinarily long terms and generally without a pre-deprivation, due process-type hearing.⁴⁵ Administrative segregation terms generally are indefinite, although some administrative review process may be required.⁴⁶ On the other hand, although disciplinary segregation terms tend to be definite and, according to one corrections expert,⁴⁷ often in the 15- to 30-day range, these distinctions are often more formal than real.

Corrections officials may move “short-term” disciplinary segregation inmates to administrative segregation by the simple process of reclassification if the disciplinary term is deemed too brief.⁴⁸ As for conditions of confinement, disciplinary and administrative isolation are very similar in prisons across the nation.⁴⁹

The harm of extended isolation does not correlate with intent to punish versus intent to preserve security. Furthermore, the harm caused by extended isolation under the most straightened or barbaric conditions is not related to any rationale for the isolation. The virtually unregulated and unreviewable opportunities for crossovers between disciplinary and administrative segregation provide strong support for acknowledging the conceptual differences while focusing reform efforts on pragmatic grounds.⁵⁰

HISTORY AS A GUIDE

Pennsylvania’s Eastern Penitentiary, which opened in 1829 and was intended to confine inmates while shepherding them to reformative penitence, is eerily similar to contemporary supermaxes and LTSUs.⁵¹ Eastern’s benighted inmates, however, could work (weave, make shoes) in their cells, and there was, however misguided, a reformative ideal upon which the practice was predicated.⁵² The imposing 16-foot-high cells were part of a regimen of silence, physical separation, discipline, regimentation, and industry designed to achieve human change. Penal isolation today offers no pretense of reformation and provides no vocational options, although, as noted earlier, some isolation facilities or units use a level system that allows for enhanced amenities—for example, television sets and radios and additional out-of-cell time—thus somewhat reducing the sensory and social isolation.

Tocqueville and Beaumont and the aspiring novelist Charles Dickens were among Eastern’s early visitors.⁵³ Tocqueville and Beaumont were impressed.⁵⁴ Dickens, in contrast, found

this slow and daily tampering with the mysteries of the brain, to be immeasurably worse than any torture of the body, and because its ghastly signs and tokens are not so palpable to the eye and sense of touch as scars upon the flesh because its wounds are not upon the surface, and it exhorts few cries that human ears can hear; therefore I the more denounce it, as a secret punishment which slumbering humanity is not roused up to stay.⁵⁵

In the 19th century, theories of crime causation led inexorably to theories and practices of crime control.⁵⁶ The temptations and confusion of the outer world were believed to have

led the godless and morally weak to succumb to temptation. The well-ordered and isolated confines of the penitentiary, along with required work, would lead to penance, reform, and a newly acquired work ethic. Or it just might lead to self-mutilation, suicide, or a lifetime of despair.

When the ideas of isolation and silence as penance and the prison as monastery ultimately succumbed, what followed was a pernicious system of leasing inmates, typified by the Elmira, New York, reformatory system, which quickly deteriorated into a brutal, overcrowded school-for-crime phenomenon.⁵⁷ Zebulon Brockway, Elmira's first superintendent, came to view his prisoners as degenerates, and the whippings and other physical assaults he authorized were pursued as reformative, not punishment.⁵⁸ Reform rarely has been kind to the inmates.

Curiously, today's binge with multimillion-dollar supermaxes and the increasing reliance on extended isolation in various special management units rests on no theory of criminal, or even serious rule-violation, behavior. It is a management decision that is purely reactive, rarely reformative, and rarely reviewed or rethought. Corrections expert Chase Riveland points out that the proliferation of supermax housing is based partly on the symbolism of showing how tough a jurisdiction is with the motive force emanating more often from governors and legislators than corrections officials.⁵⁹

Returning more closely to the historical context, there is, of course, a long history of other failures in the use of harsh measures of imprisonment in the almost 200 years since Eastern opened its doors. Although the line from these early experiments to our current excessive use of penal isolation is not unbroken, the heritage is clear, even if the genetic structure is a bit diluted.

THE PROBLEM WITH EXTENDED PENAL ISOLATION

One may approach "the problem" in a distinctly rights-oriented fashion, in an empirical manner, or attempt to blend values with data. The human rights approach, of course, requires no validation, no debate about the efficacy of this or that study.

Justice Stevens's observed in *Overton v. Bazzetta*, "It remains true that the restraints and the punishment which a criminal conviction entails do not place the citizen beyond the ethical tradition that accords respect to the dignity and intrinsic worth of every individual"⁶⁰ Of course, our ethical tradition may have slipped a bit when the former Attorney General of the United States recently argued essentially that torture should be defined as a near death experience and the neo-torture, "rights-oriented" position was that torture may, indeed, fall short of provoking excruciating and agonizing pain but may include physical suffering and lasting mental anguish (Smith & Egger, 2004).

Justice Stevens's approach to the Eighth Amendment is not unique. It is his conclusions on dignitarian values, civilized standards of decency in a maturing society, that often put him at odds with his judicial colleagues. Where Justices Thomas, Scalia, and Alito would not blink at long-term penal isolation under the most straightened of circumstances, Justice Stevens likely would place a human rights shield around such an inmate and create constitutional insulation.

As for the empirical approach to extended penal isolation, lawyer-psychologist Craig Haney writes,

There is not a single published study of solitary or supermax-like confinement in which non-voluntary confinement lasting for longer than 10 days, where participants were unable to terminate their isolation at will, that failed to result in negative psychological effects. The damaging effects ranged in severity and included such clinically significant symptoms as hypertension, uncontrollable anger, hallucinations, emotional breakdowns, chronic depression, and suicidal thoughts and behavior. Of course, it is important to emphasize that not all supermax prisons are created equal, and not all of them have the same capacity to produce the same number and degree of negative psychological effects.⁶¹

Psychiatrist Jeffrey Metzner and psychologist Joel Dvoskin recently asserted that most claims that long-term segregation necessarily causes particular kinds of psychological harm overstate what actually is known (Metzner & Dvoskin, 2006, pp. 761, 765). The authors, highly visible experts in the field of correctional mental health, appear to concede there is, indeed, harm; observable harm, but the harm tends to be overstated.

On the other hand, their flat statement that “no one knows the long-term psychological effects of segregation on inmates, especially those with no pre-existing serious mental illness” (Metzner & Dvoskin, 2006, p. 767) will undoubtedly provide fuel for the “segregation is good” crowd. What the authors never discuss is the issue of how much of what degree of scientific acceptability needs to be available to condemn a policy and practice that challenges our basic notions of civilized decency. I would argue that the stronger the case for condemnation based on ethical considerations, the less need there is for perfect, or even near perfect, research on point.

If, for example, the conditions I describe as first-degree isolation were found to exist, or about to be resurrected, would Metzner and Dvoskin call for research? Might they describe the suicides and insanity reportedly rampant at Auburn in 1823 as merely anecdotal?⁶² They view supermax prisons as “an unfortunate and unpleasant necessity in modern corrections” (Metzner & Dvoskin, 2006, note 83 *supra* at 70). Others, myself included, view them as sterile, human wastebins mixing the “worst of the worst” with political prisoners, suspected gang members, high-profile prisoners, and the inept or incautious.

There is also a burden of persuasion issue here. I would assert that those who propose or support prolonged penal isolation must show that the psychological harm asserted is negligible, human values are safeguarded, and the gains realized likely exceed any harm. I do not believe that showing can be made.

I have visited any number of penal isolation units and interviewed many of their occupants. I have spent considerable time at the Ohio State Penitentiary (OSP), Ohio’s supermax. I visited OSP before inmates actually arrived, after their initial arrival, and years later when OSP *de facto* became a maximum-security prison with a small number of inmates believed to be highly dangerous kept in very close confinement.

During the early, experimental, rigidly harsh days of OSP, inmates chafed at the sterility and isolation of the place, at the highly restricted and fully restrained movement to see a doctor, the limited exercise, and the like. OSP was deemed to be so potentially psychologically destructive that an agreement was reached that no inmate with a serious mental illness or at risk for developing such illness could be transferred or remain there.⁶³

This was an agreement reached by class counsel, the Attorney General’s office, and myself, acting as court-appointed monitor in the case of *Dunn v. Voinovich* (1993). We did not debate the niceties of existing research in reaching this exclusionary policy. It rested on

our shared experience, the available evidence, and the desire of Ohio's correctional leadership to "do the right thing."

MECHANICAL RESTRAINTS⁶⁴

Putting aside potential legal arguments seeking to prohibit penal isolation based on empirical evidence of harm and human rights values, there is the previously unexplored analogical argument comparing mechanical restraints with physical isolation.⁶⁵ When mechanical restraints are legally challenged, it is most often within the framework of the Eighth Amendment's ban on cruel and unusual punishment.

Isolation, you will recall, may be challenged on the basis of a First Amendment claim, a *Turner* reasonableness claim, or, most likely, as Eighth Amendment, cruel and unusual punishment claim. The restraint argument developed here is analogical. Thus, it does not have the independent status of the Eighth Amendment claims. The mechanical restraint argument, at bottom, asks that we examine the law and policy on point and ask if the use of mechanical restraints is sufficiently similar to the use of isolation that the radically different results are unjustified.⁶⁶

Mechanical restraints include any means of restricting an inmate's or detainee's ability to react physically. They usually involve the use of such devices as leather straps, cuffs, braces, and most recently, a specially designed chair to which the person is strapped.⁶⁷

The American Correctional Association rules out mechanical restraints for punishment and requires warden (or designee) approval, early medical involvement and monitoring, and other precautionary measures when restraints are utilized.⁶⁸ The use of restraints is to be purely preventive (for example, to prevent escape, self-harm, injury to others) and applied for no more time than is absolutely necessary.⁶⁹ Many systems require that a cell extraction leading to restraint, as well as the actual application, be videotaped; such videos (and I have seen hundreds) are invaluable monitoring and training resources.

Correctional law mirrors correctional practice in this area. In 2002, the Supreme Court issued its first ruling on the use of mechanical restraints in corrections. The Court held in *Hope v. Pelzer* that Alabama's use of a "hitching post" was clearly unconstitutional.⁷⁰ The opinion is awash with concern for dignitarian values. Hope was punished for refusal to work and made to remove his shirt; he was attached to a crossbar-type post, which held his arms above shoulder height, and then was forced to remain standing in the sun with no bathroom breaks and little water.⁷¹

Although Justice Stevens discussed the dehydration and burned skin that shackled inmates experienced, this transient harm was not central to the decision.⁷² What he wrote for the majority is

As the facts are alleged by Hope, the Eighth Amendment violation is obvious. Any safety concerns had long since abated by the time petitioner was handcuffed to the hitching post because Hope had already been subdued, handcuffed, placed in leg irons, and transported back to the prison. He was separated from his work squad and not given the opportunity to return to work. Despite the clear lack of an emergency situation, the respondents knowingly subjected him to a substantial risk of physical harm, to unnecessary pain caused by the handcuffs and the restricted position of confinement for a 7-hour period, to unnecessary exposure to the heat of the sun, to prolonged thirst and taunting, and to a deprivation of bathroom breaks that created

a risk of particular discomfort and humiliation. The use of the hitching post under these circumstances violated the “basic concept underlying the Eighth Amendment, which is nothing less than the dignity of man.” This punitive treatment amounts to gratuitous infliction of “wanton and unnecessary” pain that our precedent clearly prohibits.⁷³

Hope accords with longstanding law in the Federal Courts of Appeal and District Courts. Although mechanical restraints may be employed as an aspect of the legitimate use of force to prevent violence or property destruction and as a means to temporarily restrain a mentally ill inmate who is acting out, they may not be used for punishment alone.⁷⁴ For example, in *Spain v. Proconier*, in 1979, the Ninth Circuit condemned the excessive use of neck chains (*Spain v. Proconier*, 1979, at 197). In *Stewart v. Rhodes* (1979), four-point restraint shackling an inmate to a metal bed frame was condemned. When mechanical restraints are judicially upheld, it is not for punishment but to prevent physical harm to the inmate or others; the duration is relatively brief (measured in hours), there is clinical and security monitoring, and meals and bathroom breaks are provided.⁷⁵

Accordingly, the inappropriate use of mechanical restraints, even for a relatively brief period, may result in the award of damages.⁷⁶ The condemnation of such restraint may be based on an excessive use of force analysis or a failure to provide a due process hearing for the interference with a protected liberty interest.

Sadler v. Young, a modest federal district court decision, has wonderful didactic qualities related to the use of mechanical restraints on inmates. Sadler, a Connecticut inmate farmed out to the stern Virginia prison system, apparently slapped a food tray from the hands of a guard and was then immobilized for about 48 hours in five-point restraints.⁷⁷ He was dressed in undershorts, was uncovered, and was released without incident six times for about 15 minutes each to use the toilet and eat.⁷⁸

In Sadler’s action for damages, the jury found for the defendants, but in the instant decision, Chief Judge James P. Jones ruled as a matter of law that although the initial restraint could be found constitutional, the continued restraint was not.⁷⁹ A new trial was ordered on the issue of damages alone.⁸⁰

At the time of the incident, Sadler was in 23-hour-a-day lockdown and, thus, received his meals on a tray through a slot in the door.⁸¹ He did not want his tray on this particular day and so informed the officer who brought it to him, Officer S. K. Young. Young continued to slide the tray, and when Sadler blocked it or shoved it (depending on the testimony), the tray spilled and some of the contents got on Young.⁸² There was a dispute as to the time lapse between the tray incident and the eight officers extracting and then restraining Sadler.⁸³ It could have been as much as an hour or as brief as 40 minutes.⁸⁴ In either case, the argument for a white-hot emergency is cooled. In any event, Sadler was entirely compliant with the cell removal and the application of the five-point restraints.⁸⁵ This, of course, is crucial if the objective of the restraint is to prevent damage or injury or, as the court finds, it was to impose needless punishment and an “atypical and significant” hardship requiring due process.⁸⁶

The court initially found a violation of Virginia’s policy on restraint, which calls for removal of restraints when inmates’ dangerous or disruptive behavior has subsided and no threat exists.⁸⁷ This is relevant to “state of mind” considerations as opposed to establishing a federal violation. The defendants could not provide any satisfactory answers concerning just what the danger was, why it was decided that the supposed danger continued, why other options (of which there were five) were not used, or even why Sadler ultimately was released.⁸⁸

Sadler, on the other hand, showed convincingly that even the initial restraint was punitive; that he suffered greatly during the 2-day ordeal, including physical and mental pain, hallucinations, and lack of sleep; and that he was required to lie in his own bodily waste.⁸⁹ These, of course, parallel the type of complaints made by many inmates in penal isolation.

Chief Judge Jones treated the constitutional basis of the major claim as one of excessive force under the Eighth Amendment.⁹⁰ This required a showing that the force was applied maliciously and sadistically to cause harm and that the wrongdoing was objectively harmful enough to reach constitutional proportions.⁹¹ The court found it reasonable that the officers initially believed that Sadler presented a danger, that he slapped a tray at the officer versus merely blocking it, and that other available options might not work.⁹² Thus, the judge found that there was no showing of initial malice.⁹³ What sort of danger Sadler initially posed, locked in his segregation cell with the food slot closed, was never described. There exists the possibility that Sadler was yelling, but that hardly poses the sort of danger calling for almost 2 full days of five-point restraints.

This is an important matter in that although the initial, and in my view highly dubious, decision to extract and restrain Sadler does not necessarily show malice, any reasonable basis loses force as the restraint is prolonged. Parenthetically, isolation should be viewed the same if it is permissible only as a temporary measure to be utilized so long as the concern giving rise to its application continues to exist.

In *Sadler*, the judge confidently found that no reasonable jury could have determined that the force applied needed to be continued after the first 3 hours when the inmate supposedly stopped yelling.⁹⁴ This would mean that Sadler was unlawfully restrained for some 45 hours, an obviously relevant point on damages. At another point, the judge somewhat undermines this finding by stating that it is only necessary to decide that nearly 48 hours is too long and not whether release should have occurred when the yelling stopped or the uneventful first, second, or third temporary releases.⁹⁵

THE LONG ROAD HOME: ISOLATION TO RESTRAINTS TO REFORM

Again, it is interesting to contrast the Supreme Court's concern for a 7-hour outdoor shackling with the dozens of decisions blindly accepting, if not actually endorsing, prolonged and terrible conditions with terrible consequences. Let me add a few more examples to those provided earlier.

Although the Court of Appeals for the Seventh Circuit has recently confirmed the view that the Eighth Amendment prohibits wanton infliction of psychological as well as physical pain (*Calhoun v. Detella*, 2003), it has not expressly held that social isolation and sensory deprivation may serve as bases for a claim under the Eighth Amendment. Rather, in *Bono v. Saxbe* (1980), the court held: "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."⁹⁶

In *Wilkinson v. Austin*, the Court dealt with procedural due process issues related to confinement in the Ohio State Penitentiary (OSP).⁹⁷ After Ohio inexplicably conceded the existence of a liberty interest in avoiding assignment to OSP, the unanimous Court easily found

a liberty interest and required a featherweight type of procedural due process incident to a transfer to OSP.⁹⁸

Any Eighth Amendment claims incident to the *Austin* litigation previously were resolved. However, one can detect a sense of substantive acceptance by the Court in some of its discussion:

For an inmate placed in OSP, almost all human contact is prohibited, even to the point that conversation is not permitted from cell to cell; the light, though it may be dimmed, is on for 24 hours; exercise is for 1 hour per day, but only in a small indoor room. Save perhaps for the especially severe limitations on all human contact, these conditions likely would apply to most solitary confinement facilities, but here there are two added components. First is the duration. Unlike the 30-day placement in *Sandin*, placement at OSP is indefinite and, after an initial 30-day review, is reviewed just annually. Second is that placement disqualifies an otherwise eligible inmate for parole consideration. Although 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. It follows that respondents have a liberty interest in avoiding assignment to OSP.⁹⁹

Justice Kennedy, writing for the Court, goes on to note that “OSP’s harsh conditions may be required in light of the danger that high-risk prisoners pose to prison officials and other prisoners.”¹⁰⁰ Thus, the curiously unanimous Court in *Austin* accepts the onerous conditions then extant at OSP as part of the *Sandin* “atypical and significant” analysis.¹⁰¹ However, as I earlier noted, there is not a hint of even mild concern about the components and consequences of such confinement.¹⁰²

Some might suggest that the long road home should begin with *In re Medley*, a 117-year-old Supreme Court decision.¹⁰³ *Medley* involved a state inmate with a death sentence who successfully argued that a change in the law after his offense that required that the warden keep such convicts in solitary confinement was a prohibited *ex post facto* law. The majority opinion found that solitary confinement, defined as exclusion from human associations and its terrible psychological impact on prisoners so confined, was an additional punishment not authorized by law at the time of the inmate’s offense.¹⁰⁴ The Court was constrained to order the release of the prisoner because it had no other remedial options.

Medley, however, takes us only a little way in our contemporary concern about isolation. Why? The use of penal isolation was *not* condemned in general; it was merely found to be sufficiently harsh to be an *ex post facto*—that is, not then authorized—punishment. The majority’s reliance on the much older Philadelphia system of silence and the mental suffering it caused seems quite misplaced where a death sentenced inmate was to be kept in mandatory solitary confinement for only about 4 weeks, with guaranteed access by various visitors, and with no mention whatsoever of the particular conditions of confinement.¹⁰⁵

In sum, with the notable exception of housing inmates with mental illness in isolation, the courts have not been receptive to adult inmate, isolation-related claims for damages or injunctive relief. The restraint cases, however, may serve as a foundation for my argument that penal isolation and use of restraints are far more alike than different and that the same principles for use should apply.

AND NOW?

What follows is a straightforward pitch for reform, for what I think should be done with the abhorrent practice of long-term penal isolation. First, the use of the “dark cell,” of the most extreme forms of social and sensory penal isolation or segregation as described earlier, should be totally banned from our penal facilities as an affront to the most basic notions of civilized decency and, therefore, a violation of the Eighth Amendment. The type of penal isolation characterized here as “second degree” may be permitted but only on the model of the permissible use of mechanical restraints. As with restraints, extended isolation—the purposeful deprivation of basic human needs for sensory and social stimulation—should never be used for punishment, only for control and only for very limited periods.

As with restraints, two types of uses should be anticipated: security related and therapeutic. Relying on the restraint model in either situation, use of isolation should be based on an immediate need, and only after other, less deprivational alternatives have been considered, recorded, and rejected. The rationale or trigger for any isolation determines the permissible duration of the stay with a relatively brief (measured in days) limit on consecutive days. Medical and security monitoring must be required. Where the inmate appears to remain “dangerous,” after the lapse of a specified time, a committee of security and program/treatment staff, presumably already in place, should meet to devise a plan to achieve both security and behavioral changes in the inmate. Where the isolation imposed is part of an ongoing treatment regimen, then, of course, the treatment team would be monitoring these events and altering the treatment as needed.

Although the reflexive and prolonged use of isolation for an acting-out prisoner may produce short-term gains, such use likely will replicate and reinforce the basis for the offending behavior over time (Coltman, 2004, pp. 143, 144). Thus, the best practice would be to use limited isolation only in conjunction with an overall treatment or behavior modification plan. More generally, however, therapeutic seclusion also may be used to contain a clinical situation (agitation, assaultive behavior) by providing a safe environment. There is no clean line between a clinical situation and one that is not. However, when the inmate is known to have a diagnosis of mental illness and is in a treatment unit, it is easy to deal with the control problem as part of the treatment regimen. In so doing, any complaints about the isolation may then be dealt with under *Estelle v. Gamble* (1976), which concerned a deliberate indifference to proper medical care claim. An *Estelle* claim, although still difficult, may be a bit easier for an inmate to prevail upon than a “malicious and sadistic” use of force claim.

To the extent that the use of prolonged penal isolation is reformed on the model of the acceptable use of mechanical restraints and as part of a treatment or behavior modification program, there is not only a paradigm shift but also a cultural and linguistic shift. Disruptive behavior does not become a violation and a disciplinary event; it is “acting out” and is dealt with as part of treatment or behavioral modification protocol.

The niceties of the therapeutic versus security distinction need not detain us here. My point is to emphasize that, whether isolation is viewed as therapeutic or purely for security, there must be urgency in the application, a very limited duration, and a concern for oversight and medical monitoring. The current uses of extended penal isolation are more often than not confessions of failure by corrections, a reflexive get-rid-of-the-person rather than an attempt to get-rid-of-the-problem. In so doing, of course, many inmates are made far worse.¹⁰⁶

CRITIQUE AND CHANGE

For me to critique the current uses of isolation does not actually create a concomitant obligation to present a blueprint, complete or otherwise, for change. I realize that there are some inmates who are dangerous and disruptive and who may remain so despite the best efforts of staff. On the other hand, we should ask what are our “best efforts?”¹⁰⁷ Is it basically and simply to impose segregation as a discrete punishment or to reclassify a troublesome inmate and order transfer to a maximum or supermax prison? Regrettably, for the most part, those are the best efforts.

I certainly need not mediate between the cognitive-behavioral approach to treatment so popular here and the psychotherapy approach more popular in Great Britain, and especially so at the Grendon Prison in the operation of its therapeutic community for well over 40 years (Jones, 2004). There are, however, a number of possible approaches well described by this nation’s leading expert, Hans Toch.¹⁰⁸

I fully understand that my reform proposal calls for a major revision of prison disciplinary codes. Extended isolation of the second-degree variety for disciplinary purposes simply would no longer be available. However, I would raise no objection, for example, to what is termed “keeplock” in New York where an inmate is given a limited, 23-hour-a-day confinement to the inmate’s own living area while awaiting a disciplinary hearing or a 10-day disposition on a finding of guilty.¹⁰⁹ This is not unlike a denial of bail for an outside criminal charge.

Where a keeplock-like disposition is not feasible because the inmate so sentenced disturbs or threatens other inmates or staff, then perhaps there should be a relatively small unit designed to house such inmates. The critical point to absorb is that with a disturbed-disruptive inmate, a form of *insulation*, not penal isolation, may be required. Thus, access to sensory and social stimulation must be provided along with such “amenities” as exercise, reading material, telephone access, and such restorative programs as are compatible with the inmate’s behavior. Such a unit should be used as a last resort requiring a supportive record and having only the function of separating (i.e., insulating) the inmate from others and not imposing the destructive isolation previously described.¹¹⁰

For the chronic and disruptive violator, then, the approach would have to include a restorative-reformative program. For the “acute” violator, there remains referral for criminal prosecution, loss of good time and a variety of privileges, loss of work, and transfer. I also understand the difficulty of reducing sanctions in a world where very severe sanctions are routinely imposed and expected.¹¹¹ The problem, however, is not beyond resolution, a resolution that must be found given the profound harm and value disruption caused by extended penal isolation.

My primary concern here has been the imposition of extended terms of penal isolation under conditions that impose extreme measures of social and sensory deprivation. Of course, when the conditions of confinement also involve lack of sanitation, poor ventilation, extraordinary levels of noise, risks of physical harm, inadequate food, and the like, the case against such isolation becomes even clearer (Collins, 2004). Indeed, assuming that the conditions of isolated confinement are in some fashion onerous but marginally, constitutionally acceptable, the harsher the conditions, the less time legally available for the use of such isolated confinement (see, e.g., *Mitchell v. Maynard*, 1996).

Thus, I have elected to approach extended penal isolation somewhat apart from the type of add-on, inhumane conditions discussed earlier. One may, then, envision a hygienic,

sterile physical environment, with adequate food and water, some opportunity for large muscle activity (if only in-cell exercise), acceptable levels of heat and cold, a decent diet, and the like, but with the basic conditions of second-degree isolation previously described.

I am far from alone in my concern about isolation. The UN's Standard Minimum Rules for the Treatment of Prisoner calls for the complete prohibition of punishment by placement in a dark cell.¹¹² Andrew Coyle, head of Great Britain's International Center for Prison Studies, considers it a basic principle of reform that efforts should be made to abolish solitary confinement as a punishment or certainly to restrict its use (Coyle, 2002, p. 80). Professor Mushlin notes that a number of respectable professional groups, largely to no avail, have called for the curtailment of second-degree penal isolation.¹¹³

Finally, a proposed Third Edition to the ABA Criminal Justice Standards on the Legal Treatment of Prisoners has offered standards on point that if adopted would be quite progressive:

Standard 23-2.7 Cell restriction and segregated housing

(a) Prisoners restricted to their assigned living quarters or placed in segregated housing pursuant to disciplinary, administrative, or classification action may be physically separated from other prisoners, but should not be deprived of those items or services necessary for the maintenance of psychological and physical well-being. If services and programming restrictions are imposed, they should not extend to light and dark, ventilation, regular meals, medical and mental health care, items of personal care and hygiene, and regular showers, or to elimination of visiting, physical exercise, oral communication opportunities with other persons, religious observance, mail, books or other reading material. A prisoner so confined should not be subjected to conditions that cause physical or mental deterioration, including conditions of extreme isolation as described in section (d). Vulnerable prisoners housed separately for protective purposes should be treated in accordance with the provisions of Standard 23-4.5(b).

(b) Correctional agencies should develop and deliver programs and services that can be brought directly to prisoners who are not permitted to leave their cells. Correctional staff should monitor and assess any health or safety concerns related to refusals to recreate by prisoners on cell restriction or held in segregated housing. Prisoners separated from the general population for reasons other than disciplinary purposes should be allowed as much out-of-cell time as possible, and the amount of out-of-cell time provided should increase the longer a prisoner is housed in this setting and the smaller the size of the cell.

(c) Cells used to house prisoners in segregated housing should provide space commensurate with the amount of time the prisoner is required to spend in the cell. Physical features such as protrusions that facilitate suicide attempts should be eliminated. No segregation cell should be smaller than 80 square feet, and cells should be designed to permit prisoners assigned to them to converse with and be observed by staff. Absent an individualized determination that a particular furniture feature presents a legitimate and significant security risk, segregation cells should be equipped in compliance with Standard 23-2.3(b).

(d) Conditions of extreme isolation should not be allowed regardless of the cause for the prisoner's separation from the general population. Conditions of extreme isolation generally include a combination of sensory deprivation, lack of contact with other prisoners, only limited contact with staff, enforced idleness, minimal out-of-cell time, and lack of outdoor recreation. To ameliorate the risk of physical and mental deterioration, all prisoners housed in segregated housing should be provided with meaningful forms of mental, physical, and

social stimulation. Depending upon individual assessments of risks, needs, and the reasons for placement in the segregated setting, those forms of stimulation may include:

- (i) in-cell programming;
 - (ii) more than one hour a day of out-of-cell time;
 - (iii) opportunities to exercise in the presence of other prisoners;
 - (iv) daily face-to-face interaction with both uniformed and civilian staff; and
 - (v) access to radio or television for programming or mental stimulation, as long as these are not provided to the exclusion of human contact described in (i) to (iv).
- (e) Correctional staff, including medical and mental health personnel, should conduct regular mental health inspections of prisoners on cell restriction or housed in segregated housing areas as set forth in Standard 23-3.3 (e) and (f).¹¹⁴

I would have preferred some specified durational limits, a mandate to prepare and implement a behavioral plan responsive to the unruly or dangerous inmate's isolation precipitating behavior, and even an invitation to create human living space that insulates those inmates from other inmates where there is a likelihood of harm.

Inmates with serious mental illness, or at risk for becoming ill, surprisingly are not specifically excluded in this section, although Standard 23-5.13 refers to the avoidance of housing that may exacerbate their mental illness. Juveniles also are not specifically excluded from penal isolation. Still, for those looking for achievable reform, the Proposed Standards certainly are a good start.

NOTES

1. Prison and jail inmates also may be placed in protective custody, often at the request of the individual. Inmates in protective custody have the strongest case for humane and minimally deprivational settings of the three bases just noted for inmate separation. There is, of course, a risk factor, but the "PC" inmate is only at risk, not others, and the potential for victim status creates the high eligibility for decent treatment.
2. In my work as court-appointed principal investigator in the class action, *S.H. v. Stickrath* (2007), I have uncovered juveniles in "24/7" isolation, confined in cells more restricted than those in use at the Ohio State Penitentiary, the State's supermax facility.
3. *Griffin v. Vaughn* (1997). Use of the phrase "parameters of the sentence judicially imposed" is a veiled way of describing an incident of incarceration as "typical."
4. *Platt*, 476 F.Supp.2d at 471. The judicial concept of a desirability scale is never classified. It tends to be a view of prison life from one who has never experienced and likely never made even a tour of a prison. When pushed, a court might speak of uncivilized, health-threatening conditions and a willingness to patrol the outer fringes of civilized decency.
5. *Id.*
6. See *Shoats v. Horn* (2000), upholding 8 years of administrative segregation.
7. *Id.*
8. Mushlin (2002, pp. 92-93) (citations omitted). See *Hoptowitz v. Ray* (1982) (finding "[t]he deprivation of nearly all fresh air and light, particularly when coupled with the guard's control over the window and the electric light, creates an extreme hazard to the physical and mental well-being of the prisoner in violation of the Eighth Amendment."); *Ruiz v. Johnson* (1999) (finding that prison officials violated the Eighth Amendment when they subjected inmates to "extreme social isolation and reduced environmental stimulation"); *Madrid v. Gomez* (1995) (finding that placement of mentally ill inmates in segregation is cruel and unusual punishment); see also Fred Cohen (2004, pp. 17, 28, 29) (discussing *Freeman v. Berge*, 164 F. Supp. 2d 1096 (W.D. Wis. 2003)).

9. See *Imprisoned Citizens Union v. Shapp* (1978). In *Hutto v. Finney* (1978), the Supreme Court held that the district court did not err, concluding that as a whole, conditions in isolation cells violate cruel and unusual punishment where such conditions relate to diet, overcrowding, violence, vandalized cells, and lack of correctional professionalism.
10. See Cohen (1998, chap. 11) (discussing in detail the cases and issues related to isolation and mentally ill inmates). In some jurisdictions, policy and procedure forbid housing inmates with serious mental illness, or who are psychologically vulnerable, in their supermax facility. See, for example, Ohio Bureau of Mental Health Services, Standard Operating Procedure #2 (2001): OSP Exclusion Criteria: Inmates assessed and diagnosed with the following conditions are excluded from transfer to OSP:
 1. Serious mental illness (categorized as C-1 on the Mental Health Level of Care Determination, DRC form 5268)
 2. Mental Retardation (categorized as MR/DD on the Mental Health Level of Care Determination, DRC form 5268)
 3. Mental disorder that includes:
 - a. Being actively suicidal
 - b. Severe cognitive disorder (organic mental disorder) that results in significant functional impairment
 - c. Severe personality disorder that is manifested by frequent episodes of psychosis, depression or self-injurious behavior, and results in significant functional impairment
11. See *Lollis v. N.Y. State Department of Social Services* (S.D.N.Y. 1971) (Voiding the 2-week confinement of a 14-year-old girl in a stripped room with no recreational outlets or reading and also finding impermissible the use of shackles on a male juvenile in isolation for periods ranging from 40 minutes to 2 hours.) Isolation practices in juvenile facilities regularly engender issues not encountered with adults. In addition to the belief that juveniles suffer in distinctive ways, there is the very practical problem of complying with compulsory school mandates. The more extended a juvenile's isolation, the more difficult it is to comply with a 6-hour school day, for example.
12. I do understand my headline hyperbole would violate the usual confidentiality of juvenile proceedings, but I ask your indulgence of this small dramatic breach.
13. IJA-ABA, *Juvenile Justice Standards: Standards Relating to Corrections Administration*, Part VII, Sec. 7.00 (H)(1996). In Part VII, the Disciplinary System, which proposes an elaborate procedural system where major infractions may be punished with up to 10 days room confinement; minor infractions, up to 5 days room confinement; and petty infractions with reprimand, warning, or loss of such privileges as access to movies, TV, some recreation, and the like. The 10- and 5-day limitations were bracketed indicating some willingness to allow local options. I served as coreporter for this volume along with Andrew Rutherford.
14. American Correctional Association Standards for Juvenile Training School, Section C (3-JTS-3C-08)(3rd ed. 1991).
15. *Id.* (3-JTS-3C-12). I could not locate any limitation on room confinement as a disposition or the conditions for such confinement or punishment.
16. In Cohen (1998, chap. 3), I summarized the legal identity of prisoners touching on all of the Supreme Court's key decisions in such areas as access to courts, tort claims, transfers, medical care, dental care, mental health care, discipline, religion, and classification.
17. *Turner v. Safely* (1987), at 94.
18. *Id.* at 89-90.
19. The exceptions allowed inmates to correspond with other inmates who are also relatives and to correspond over legal matters. See *id.* at 91-93.
20. *Id.* at 93-94.
21. *Id.* at 96.
22. Justice O'Connor made it clear that an official's claim that security interests were involved in a marriage decision would end an inmate's right to marriage. Although marriage surprisingly was recognized as a fundamental right of inmates, the normal incidents of marriage—cohabitation, procreation, regular shouting matches—have not been accorded constitutional

- protections. Marriage, then, as a fundamental right retained by inmates plainly is far more symbolic than applied. See, for example, *Gerber v. Hickman* (2002), finding an inmate had no right to require the warden to accommodate the inmate's request to provide his nonconfined wife a sperm specimen for artificial insemination. The right to marry did not include this right, and denial also was not cruel and unusual punishment.
23. In Cohen (2003b), I discussed the Justice Thomas and Scalia view that states are free to define and redefine punishment, including imprisonment and its incidents, subject only to the Eighth Amendment. The constitutionality of a penal deprivation should be measured by deciding if the state sentence included that deprivation. Inasmuch as state sentences will not expressly deny or limit visits, the anachronistic Thomas-Scalia position is one of almost total deference to state officials.
 24. *Banks v. Beard*, 399 F.3d 134 (3rd Cir. 2005).
 25. *Beard v. Banks* (2006), at 2579.
 26. *Id.* at 2588 (dissent). Justice Stevens also noted that inasmuch as Level 2 inmates have a copy of the prison handbook, writing paper, envelopes, religious newspapers, bibles, and the like, it is simply fallacious to argue that what is denied represents a new threat of setting a fire or throwing waste at officers.
 27. A rather standard definition of torture is an act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person, for a purpose such as obtaining information or a confession, punishment, intimidation or coercion, or for any reason based on discrimination of any kind (www.medterms.com). The Department of Justice (DOJ) infamously argued that torture was limited to organ failure, impairment of bodily function, or even death. The DOJ then retreated to defining torture as mere physical suffering or lasting mental anguish. See Smith and Eggen (2004).
 28. *Beard v. Banks* (2006), at 2591.
 29. *Id.*
 30. See, for example, Smolla (1992), suggesting that the preferred position of freedom of speech is buttressed by multiple rationales. Although the First Amendment is viewed as contextual despite its (Congress shall make no law . . .) absolutism, the prison context is a rational basis for some limitations not permitted in the outside world. The question, of course, is what limits and for what reasons. As it has developed, prison is viewed as such a dangerous place and prisoners viewed as so dangerous that the most severe forms of censorship and denial of access to print material are upheld.
 31. *McKune v. Lile* (2002), at 51.
 32. The underlying challenge to conditions at the Southern Ohio Correctional Facility (SOCF) actually was the racial tension created by the racial mixing of such inmates. A bloody riot ensued in 1993 leading to a settlement that included single bunking.
 33. *Rhodes v. Chapman* (1981), at 347.
 34. *Id.*
 35. *Id.* at 375.
 36. See also *Bell v. Wolfish* (1979), rejecting the claim of pretrial detainees to single-celling. Chief Justice Rehnquist pithily rejected any notion of a "one man, one cell" constitutional principle.
 37. See *Carty v. Farrelly* (1997), where four to six inmates slept in a 72-square-foot cell and suffered a variety of other debasing conditions, found to be unconstitutional. In *Pugh v. Locke* (1976), *aff'd*, 559 F.2d 283 (5th Cir. 1977), *rev'd*, in part on other grounds *sub nom.*, *Alabama v. Pugh* (1978), there were mattresses in hallways and next to urinals; one toilet for over 200 men in one part of the prison; broken and unscreened windows; food infested with insects; inmates in wheelchairs left unsupervised in areas only accessible by stairway; up to six inmates housed in each "isolation cell" with 32 square feet of living space, no beds, no lights, no running water, and a hole in the floor for a toilet, fed only once a day and often given no utensils, and permitted to shower only every 11 days. Although these conditions were pronounced unconstitutional in 1976, I toured the Alabama prison system a few years ago and found similar conditions.
 38. Much of the material in this section is drawn from Cohen (2006). That article, in turn, was developed from testimony I presented to the Commission on Safety & Abuse in Prisons

- (2005). Such material is used with the kind permission of the Editor of the *Washington University Journal of Law and Policy*.
39. See, for example, Zusman (1997) (discussing the use of a common practice when dealing with hospital settings or juveniles in custody by treating restraint and seclusion as cut from the same cloth). Dr. Zusman does present some dubious distinctions suggesting negative effects of seclusion may be less damaging than restraints. *Id.* at 37. Of course, he would not likely have been thinking of long-term penal isolation.
 40. See Coyle (2002, pp. 80-81) (describing various forms of penal isolation).
 41. *Gillis v. Litscher* (2006), other decisions array “merely harsh” against unconstitutionally severe.
 42. The trial court granted Summary Judgment for defendants, and in reversing, the Seventh Circuit gave Gillis the opportunity on remand to show the denial of the minimal conditions of life’s necessities was done with disregard of a substantial risk of harm to him. Gillis alleged a variety of psychiatric suffering as a consequence of his treatment.
 43. See Christianson (1998, pp. 133-138) (describing Eastern and New York State’s Auburn prison and their reliance on silence, separation, discipline, regimentation, and industry).
 44. See Angelone (1999). As improbable as it may seem, California prisons are converting entire yards into protective custody areas termed sensitive-needs yards (SNY). There are now some 13,000 inmates, about 9% of the total male population, renouncing gang memberships and asking for a sensitive-needs placement. See Quinones (2005).
 45. *Jones v. Baker* (1998) (finding that 2.5 years in such segregation during an investigation into the inmate’s role in a prison riot did not create a protected liberty interest implicating the need for a hearing). In *Shoats v. Horn* (2000), the court upheld 8 years of administrative segregation where the inmate was celled for 23 hours a day for 5 days and 24 hours for 2 days. He eats alone, cannot participate in any programs and activities, is allowed no family visits, is prohibited from visiting the library, has no radio or TV, and is allowed very limited property (e.g., writing materials, legal material, and a religious book). See Cohen (2001, p. 92) (describing the opinion as “muddled”).
 46. American Correctional Association (2003, §4-4249 cmts.) (allowing administrative segregation to be for “relatively extensive periods of time”). Curiously, the standard states, “Total isolation as punishment for a rule violation is not an acceptable practice.” There is no similar injunction against “total isolation” while in administrative segregation.
 47. Telephone interview with Steve Martin, Attorney/Consultant, in Austin, Tex. (September 30, 2005).
 48. Telephone interview with William C. Collins, Attorney, in Olympia, Wash. (September 30, 2005).
 49. Goldman (2004). Even the amenities or privileges of disciplinary and administrative isolation tend to be similar.
 50. Jackson (2002, p. 287) (“The very term ‘administrative segregation’ provides apparently benign semantic camouflage for the most intensive form of imprisonment.”).
 51. See Christianson (1998, note 59 *supra* at 132-138) (brilliantly describing that era).
 52. *Id.* at 134-135.
 53. *Id.* at 135-137. Tocqueville and Beaumont visited Eastern in October of 1831, whereas Dickens visited the institution in March of 1842. *Id.*
 54. *Id.* at 135.
 55. *Id.* at 138 (quoting Charles Dickens, *American Notes for General Circulation*, 1842, p. 148). Dickens, not Tocqueville, got it right. See Levy (2005) (describing Tocqueville’s error of observation concerning Eastern Penitentiary by emphasizing the power given to the guards to see the inmates without being seen as a power that could cause inmates a deeper terror than chains and blows).
 56. Rothman (1971, 1980) demonstrates how the prevailing experts located the causes of crime, as well as the causes of mental illness, in the community. Cause would be linked to cure and the well-ordered and isolating prison and then the “insane asylum” was born. Rothman details the terrible harms inflicted on prisoners and patients alike, and how isolation from the

- community contributed to inflated claims of success and ultimately a series of brutal practices all in the name of providing care and help.
57. *Id.* at 33-36. *The Discovery of the Asylum*, Aldine Transaction-Revised Edition 2002.
 58. *Id.* at 36. *The Discovery of the Asylum*, Aldine Transaction-Revised Edition 2002.
 59. Riveland (1999). Thus, any charismatic wardens or theoretically inclined academic reformers are mainly off the hook for our experiments with extended isolation.
 60. *Overton v. Bazzetta* (2003, at 138) (quoting *United States ex rel. Miller v. Twomey*, 479 F.2d 701, 712 (7th Cir. 1973)). See also Provost (2002, pp. 7-10) (discussing human rights and humanitarian law). Whether viewed as an enforceable claim or a required standard of conduct, prolonged penal isolation is an aspect of human rights.
 61. See Haney (2003, pp. 124, 132). Professor Haney refers to some 46 studies supportive of his views on harm. See also Grassian (2006, p. 325).
 62. See Christianson (1998, note 59 *supra* at 114, 184) (the latter describing a Sing Sing inmate going mad after being chained on a stone floor for 10 months).
 63. See Ohio Bureau of Mental Health Services, Standard Operating Procedure #2 (2001) at note 15.
 64. The material in this section is virtually verbatim from Cohen (2006), note 13, with permission.
 65. By “previously unexplored,” I mean, to my knowledge, by other writers. Once again, I rely very heavily on my article (see Cohen, 2006, note 14, *supra*) for the material dealing with restraints.
 66. Obviously, I will not suggest that the acceptable uses of mechanical restraints be expanded.
 67. More particularly, the reference is to a device designed to interfere with the free movement of one’s arms and legs or which totally immobilizes the person (for example, the four-point restraint) and which device must be modified or discontinued by a third person. Analytically, one may approach the use of mechanical restraints in three different circumstances: (1) point-to-point movement within a facility; (2) movement outside the perimeter of a facility, typically to another destination (hospital, court, prison, etc.); and (3) immobilization within the facility. Various forms of mechanical restraints—cuffs and leg irons are the most common—are used when transporting certain inmates, during visits, or when simply moving about the facility. This type of restraint when limited to the type of specified activity just described is not within the scope of this article. See *Cameron v. Tomes* (1993) (interestingly discussing the transport issue).
 68. See Am. Corr. Ass’n at 4-4190 to -91. The American Bar Association’s. Standards for prisoners does not address isolation or segregation. Currently, the ABA has convened a task force, cochaired by Alvin J. Bronstein and Margaret C. Love, to address the legal status of prisoners and revise and expand the 20-year-old existing standards. Isolation and supermax prisons will be dealt with. I am serving as a task force member.
 69. *Id.*
 70. *Hope v. Pelzer* (2002). See Cohen (2003a, chap. 11), where I describe Alabama as the worst system for prison mental health I had ever seen. I observed, *inter alia*, floridly mentally ill inmates locked in metal shipping container-like cells, with an uncovered, dangling light bulb the only light available to the hapless inmates. This surely is the point where isolation crossed the border into torture, at least as broadly defined.
 71. *Hope v. Pelzer* (2002), at 734-735.
 72. *Id.* at 743-744.
 73. *Id.* at 738 (footnotes and citations omitted) (quoting *Trop v. Dolles*, 356 U.S. 86, 100 (1958)).
 74. See *Ferola v. Moran* (1985); *Stewart v. Rhodes* (1986). There is no standard on point that would permit restraints as punishment, or for the mentally ill, for “mere convenience” as well. But see *Murphy v. Walker* (1995) (“Whether using bodily restraints as punishment violates the Eighth Amendment is an open question in this circuit.”). Murphy also suggests that as to restraints detainees have greater protection than convicts.
 75. In *Deck v. Missouri* (2005), the Court held that the Due Process Clause prohibits the routine use of physical restraints visible to the jury during the punishment phase of a capital case. The majority noted that judicial hostility to shackling earlier may have turned on the suffering, even torture, involved, but today’s concerns relate to the perception of guilt (or aggravation) and interference with the presentation of the defense or mitigation.

76. See *Sadler v. Young* (2004) (ordering a jury trial on damages where an inmate was undeservedly placed in five-point restraints for almost 2 full days), *rev'd and remanded*, 118 F. App'x 762 (4th Cir. 2005). I should note that when the use of a restraint goes bad, the impact on the restrained person is swift and more than occasionally deadly.
77. *Sadler v. Young*, 325 F.Supp.2d, at 690.
78. *Id.*
79. *Id.* at 704.
80. *Id.* at 709.
81. *Id.* at 692.
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.* at 705-707.
87. The policy required official approval of restraint beyond 48 hours, which accounts for the 47-plus hours of actual restraint. In my experience, restraints are invariably applied for the maximum time permitted without further approval of a ranking official. Warden Young's response to interrogatories indicated eight incidents of restraint in a 4-month period where inmates did not engage in dangerous behavior during restraint or the temporary release. Verbal abuse is not cause in Virginia to initially place an inmate in restraint and should not then be a basis for continuing. *Id.* at 694-695.
88. *Id.* at 695-698.
89. *Id.* at 693, 698-699.
90. *Id.* at 700.
91. *Whitley v. Albers* (1986) (involving a small-scale riot); *Hudson v. McMillian* (1992) (involving an individual officer punching a shackled inmate). The Supreme Court relies on *Whitley* and *Hudson* as the leading precedents on use of force.
92. *Sadler v. Young*, 325 F.Supp.2d, at 702.
93. *Id.*
94. *Id.* at 704.
95. *Id.* at 704. The court also determined that there is a liberty interest in the avoidance of restraint and *Sadler* at some point, although not necessarily at initiation, had a right to a due process hearing presumably on rationale and need for continuity.
96. See also, *Newman v. State of Alabama* (1977) (rejecting an argument that deterioration of mental health implicates Eighth Amendment concerns); *Everson v. Nelson* (1996), (holding that "retrogression of human development" does not state claim under the Eighth Amendment); see also Strassburger (2001, p. 199) ("No state or federal court has ever held that isolation for prolonged period of time is a constitutional violation per se.").
97. *Wilkinson v. Austin*, 125 S.Ct. 2384 (2005).
98. *Id.* at 2398. See Cohen (2005, pp. 17, 27), where I describe this due process as essentially an internal, paper-review process. I also suggested that the Court while referring to OSP inmates as the "worst of the worst" did not require that a supermax house only such inmates. Indeed, I playfully suggested using supermax prisons to house the "best of the best" as a means to protect them from the criminogenic affect of more open prisons.
99. *Wilkinson v. Austin*, 125 S.Ct. at 2394-95 (citations omitted).
100. *Id.* at 2395.
101. *Id.*
102. In the text, I used the term "then extant" at OSP to reflect my personal knowledge of conditions there. I have visited and inspected that facility four times, initially just before the inmates were actually housed there and most recently in June 2005. The change in that brief time is dramatic: There is now a level system, some inmates are out of their cells jogging on the cell block or playing handball against the walls, there is outdoor recreation, and

there is in-cell and some congregate programming. There were about 300 inmates housed at the Southern Ohio Correctional Facility who requested transfers from that maximum security facility to the OSP supermax. OSP currently is a supermax in name only and now houses Ohio's death row population who are guaranteed, *inter alia*, at least 35 hours a week out-of-cell time. Whether OSP ever housed the "worst of the worst" exclusively or even importantly remains a somewhat open question. In my view, it did not and will not.

103. *In re Medley*, 134 U.S. 160 (1890).
104. *Id.* at 174.
105. *Id.* at 168-169. I suspect that if the Supreme Court directly faces a condition of confinement in isolation claim, *Medley* will be quickly buried.
106. Hans Toch, who long has labored in this field, writes, "Disturbed-disruptive offenders frequently become more disturbed when they are dealt with as disruptive offenders, and are liable to become more disruptive when they become more disturbed" Toch (2004, pp. 9, 11).
107. See Beven and Cohen (2005, p. 3), describing a special program at the Southern Ohio Correctional Facility and a training session for security and mental health staff on the law and clinical-security issues.
108. See Toch and Adams (2002), including the therapeutic community approach, pattern-thinking approach, violence prevention approach used in Canada, self-management programs, and the like. Whatever the approach, the point is to work with the maladaptive behavior and work to change it, not simply isolate it.
109. See *Lee v. Coughlin* (1998), noting that about 90% of confinement-type sentences in New York prisons were to keep lock (one's own cell) or "cube" (one's own area in a dormitory setting).
110. Does this proposal, or concession if you will, sow the seeds of its own destruction in that it may easily grow to become like the present-day SHUs? That, of course, is possible but not probable if there is oversight and the threat of litigation. The critical factor is to keep the objective clear: limited use and duration, the function is one of insulation not isolation, and the unit should have very few cells.
111. Alvin J. Bronstein, one of our most successful prison litigators and reform advocates, writes that incarceration itself is a complete failure; that all prisons cause harm, some more than others; and that the best prison he ever visited is in Ringe, Denmark. It is coed, all inmates are recidivists, there are productive jobs, and staff work with inmates, not simply keeping order. On congratulating the prison governor, he was told, "Remember, Al, all prisons damage people" (Bronstein, 2005, p. 13).
112. Standard Minimum rules for Treatment of prisoners, Rule 31.
113. Professor Mushlin refers to the National Sheriffs' Assn, *Inmates' Legal Rights* (1987, p. 47) (noting that "the practice [of solitary confinement] is condemned by many groups with correctional interests"). See also National Advisory Comm'n on Criminal Justice Standards & Goals, *Corrections Standard 2.4* (1973) (isolation should be punishment of last resort and then should not extend beyond 10 days); American Correctional Assn, *Standards for Adult Correctional Institutions Standard 3-4243* (1990) (outside limit should be set on duration of disciplinary detention; 30 days sufficient for most cases; all cases in which sanction is extended over 60 days require the provision of the same services and privileges as are available to persons in protective custody and administrative segregation); Model Sentencing and Corrections Act § 4-502 (1983) (limited confinement to solitary confinement to no more than 90 days). But see ABA, *Standards for Criminal Justice Standard 23-6.13(d)* (1986) (refusing to adopt the recommendation of the drafting committee that solitary confinement be abolished but decreeing that the conditions must not deprive the inmates of "items necessary for the maintenance of psychological and physical well-being"). Mushlin (2002, p. 92 n. 30).
114. Draft, October 2007. These standards have been endorsed only by the drafting task force, of which I served as a member, and have yet to receive any of the multiple reviews and endorsements required for ABA Standards.

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