

Isolation in Penal Settings: The Isolation-Restraint Paradigm

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I. INTRODUCTION

On any given day, of the two-plus million people in American jails and prisons, a significant percentage are serving time in some sort of isolation¹—in facilities or units variously termed supermaxes, control units, special management units (SMUs), security (or special) housing units (SHUs), high-security units, intensive management units (IMUs), and special control units (SCUs).² A developed literature describes these isolation units and facilities at length, and establishes the psychological damage they impose on their inhabitants. They are, to quote corrections expert Chase Riveland, “sterile, austere, arbitrary, and . . . [generally without] correctional objective.”³ There are those inmates who need to be placed under

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1. The Bureau of Justice Statistics does not have data on the number of inmates in solitary confinement. Letter from Jennifer Karberg, Statistician, Bureau of Justice Statistics, to Fred Cohen (Sept. 22, 2005) (on file with author).

2. See Craig Haney, *Mental Health Issues in Long-Term Solitary and “Supermax” Confinement*, 49 CRIME & DELINQ. 124, 151 (2003). The supermax prison, of course, is not an internal unit but an entire facility devoted to an extraordinary degree of sensory and social isolation. *Id.* at 124–25. Some jurisdictions have used the term “isolation” informally, as a subset of segregation and particularly to indicate the use of a solid (or boxcar) front door.

3. Report of Plaintiffs Expert, Chase Riveland at 14, *Osterback v. Moore*, No. 97-2806-CIV-HUCK (S.D. Fla. Dec. 22, 2003) (describing isolation units in Florida’s prisons).

stringent control to protect staff and other inmates, prevent escapes, and preserve the order of the facility, but the number of such inmates is very small—far smaller than the number in isolation.

Riveland advocates such isolation units be used only for inmates presenting an imminent threat and only for as long as the threat exists.⁴ His proposal for change is to reduce the number of inmates in penal isolation and at least to pause before plunging ahead with expensive and problematic supermax facilities.⁵ While my comments and proposals for change are based on similar views of the problem, I take a somewhat more sweeping approach to its solution, proposing a true paradigm shift. Isolation, I suggest, should be analyzed constitutionally, much as physical restraints are now. As I describe in detail below, recent Supreme Court case law and longstanding lower court precedent has 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 deterrent or punishment.

This Article asserts that isolation and the use of mechanical restraints should be treated as almost identical interventions in terms of rationale, duration, monitoring, and creation of law and policy.⁶ Isolation units are not a fixed, invariable condition of penal confinement. Penal isolation is variable in its extremes of deprivation. At its most extreme, it should simply be banned; in its less onerous forms, isolation should be sharply limited, closely monitored, and very closely regulated.⁷ This reform may well require abandonment of supermax confinement as well as the even more restrictive, primitive “dark cell.”

4. *Id.* at 11.

5. *Id.*

6. *See, e.g.,* JACK ZUSMAN, RESTRAINT AND SECLUSION: IMPROVING PRACTICE AND CONQUERING THE JCAHO STANDARDS (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.

7. *See* ANDREW COYLE, INT’L CTR. FOR PRISON STUDIES, A HUMAN RIGHTS APPROACH TO PRISON MANAGEMENT: HANDBOOK FOR PRISON STAFF 80–81 (2002) (describing various forms of solitary confinement).

II. DEGREES OF ISOLATION

A. *What is Isolation?*

The most extreme form of isolation, at times referred to as “dark cells,” consists of inmates held in solitary confinement and subject to social isolation and near total “sensory deprivation by lack of access to light, sound[,], or fresh air.”⁸

There was a time when such conditions were, if not routine, at least common.⁹ This is no longer the case, but such “first degree isolation” remains in scattered instances.¹⁰ What I will call “second degree isolation,” similarly having roots in the early history of American corrections,¹¹ is far more common. This form of isolation (often called “segregation”) has inmates housed typically in single cells for twenty-three 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 and highly restricted, and access to programs, visits, telephone, radio, television, showers, and reading material is substantially limited. This is characteristic of the isolation or segregation units noted above and the typical supermax units.

“Second degree” isolation or solitary confinement thus conveys a set of circumstances beyond life in a single, quiet cell. It definitionally 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 in 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 the mere harsh conditions of penal confinement. The critical factors in this divide would be out-of-cell time, congregate

8. *Id.* at 80.

9. See SCOTT CHRISTIANSON, *WITH LIBERTY FOR SOME: 500 YEARS OF IMPRISONMENT IN AMERICA* 133–38 (1998) (describing conditions and practices at Pennsylvania’s Eastern Penitentiary).

10. I personally observed such conditions in the Alabama prison system during a tour given when I was an expert witness.

11. CHRISTIANSON, *supra* note 9, at 134–35 (describing New York State’s Auburn prison and the Philadelphia system as relying on silence, separation, discipline, regimentation, and industry).

activity, exercise or “yard time,” and access to work and available programs. Put another way, the greater the social isolation and sensory deprivation, the more eligible the unit is to be labeled as penal isolation.

B. How Custody Levels Can or Cannot Be Classified as “Isolation”?

For the approach I propose to be adopted it would be necessary to decide which of the many types of custodial arrangements and settings counts as “isolation.” This is a complex question, but not an impossible one. Except in the case of the true supermax facility, the penal isolation that is the subject of this Article is distinguishable from the security level assigned a particular prison. Prisons are generally 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 fashion¹²). 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.¹³ 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 escorts, visits, searches, and other similar issues.¹⁴ In general, except in supermaxes, ordinary confinement of even 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 non-ordinary confinement settings which 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

12. See Robert B. Levinson & Roy E. Gerard, *Classifying Institutions*, 32 CRIME & DELINQ. 291, 294 (1986).

13. *Id.* at 295–96.

14. See Michael B. Cooksey, *Custody and Security*, in PRISON AND JAIL ADMINISTRATION: PRACTICE AND THEORY, at ch. 10 (Peter M. Carlson & Judith Simon Garrett eds., 1999).

“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.¹⁵

Prison administrative codes, some prison officials, and the courts (to a certain extent) attempt to draw a bright line between disciplinary and administrative segregation and isolation. For example, in New York, placement in a SHU 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.”¹⁶ Administrative segregation may be imposed for extraordinarily long terms and generally without a pre-deprivation, due process-type of hearing.¹⁷

Administrative segregation terms generally are indefinite, although some administrative review process may be required.¹⁸ On the other hand, while disciplinary segregation terms tend to be

15. See Ron Angelone, *Protective Custody Inmates*, in PRISON AND JAIL ADMINISTRATION: PRACTICE AND THEORY, at ch. 31 (Peter M. Carlson & Judith Simon Garrett eds., 1999). As improbable as it may seem, California prisons are “converting entire yards into protective custody” areas termed sensitive-needs yards (SNY). See Sam Quinones, *Easing the Hard Time*, L.A. TIMES, Sept. 16, 2005, at A1. There are some 13,000 inmates, about 9% of the total adult male inmate population, renouncing gang memberships and asking for a sensitive-needs placement. *Id.* Protective custody issues not pertinent to this discussion include the legal duty to protect inmates and the problem of inmates faking to gain entry into the isolation units.

16. N.Y. COMP. CODES R. & REGS. tit. 7, § 301.4(b) (2002).

17. *Jones v. Baker*, 155 F.3d 810, 816 (6th Cir. 1998) (finding that two and one-half years, *id.* at 812, 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*, 213 F.3d 140 (3d Cir. 2000), the court upheld eight years of administrative segregation where the inmate was celled for twenty-three hours a day for five days out of the week and for twenty-four hours during the remaining two days per week. *Id.* at 144. The inmate ate alone, could not participate in any programs and activities, was allowed no family visits, and was prohibited from visiting the library. *Id.*; see *Eight Years of Solitary Confinement Upheld*, CORRECTIONAL MENTAL HEALTH REP., Mar.–Apr. 2001, at 92, 92 (describing the opinion as “muddled”).

18. See AM. CORR. ASS’N, STANDARDS FOR ADULT CORRECTIONAL INSTITUTIONS § 4-4249 cmts. (4th ed. 2003) (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 . . .” *Id.* There is no similar injunction against “total isolation” while in administrative segregation. *Id.*

definite and, according to one corrections expert, in the fifteen- to thirty-day range,¹⁹ 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 for some reason the disciplinary term is deemed too brief.²⁰ As for conditions of confinement, disciplinary and administrative isolation are very similar in prisons across the nation.²¹

Thus, I recognize that while the general term “penal isolation” may mask some distinctions between disciplinary and administrative segregation (or isolation) it serves my purposes here to use the generic term. The harm of extended isolation does not correlate with intent to punish versus intent to preserve security. Further, 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 provides strong support for recognizing the conceptual differences while focusing reform efforts on pragmatic grounds.²²

In Part VI of this Article I make allowances for short terms of disciplinary confinement, albeit under humane conditions. It is the extended terms of penal isolation, whether labeled disciplinary segregation or, more likely, administrative segregation, that engages me and leads to the proposal that isolation and mechanical restraints should be recognized as having a shared heritage and common basis for use.

19. Telephone interview with Steve Martin, Attorney/Consultant, in Austin, Tex. (Sept. 30, 2005).

20. Telephone interview with William C. Collins, Attorney, in Olympia, Wash. (Sept. 30, 2005).

21. See Michael Z. Goldman, *Sandin v. Conner and Intraprison Confinement: Ten Years of Confusion and Harm in Prisoner Litigation*, 45 B.C. L. REV. 423, 461 (2004). Even the amenities or privileges of disciplinary and administrative isolation tend to be similar. *Id.*

22. See MICHAEL JACKSON, *JUSTICE BEHIND THE WALLS: HUMAN RIGHTS IN CANADIAN PRISONS* 287 (2002) (“The very term ‘administrative segregation’ provides apparently benign semantic camouflage for the most intensive form of imprisonment.”).

III. HISTORICAL CONTEXT

Before I discuss some of the legal issues involved and then develop the isolation-mechanical restraint paradigm, a brief word on historical context. In Scott Christianson's brilliant book *With Liberty for Some: 500 Years of Imprisonment in America*, the author describes Pennsylvania's Eastern Penitentiary, opened in 1829 and intended to keep convicts apart—even as they worked.²³ Eastern is eerily similar to the modern supermax or the "SHUs" in use today, except inmates could work (weave, make shoes) in their cells and there was, however misguided, a reformatory ideal upon which the practice was predicated.²⁴ The imposing sixteen-foot-high cells were part of a regimen of "silence, separation, discipline, regimentation, and industry [designed] to achieve positive human change."²⁵ Penal isolation today offers no pretense of reformation and provides no vocational options, although I am aware that 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.

Alexis de Tocqueville, Gustave de Beaumont, and the aspiring novelist Charles Dickens were among Eastern's early visitors.²⁶ Tocqueville and Beaumont were impressed.²⁷ Dickens, in contrast, found:

[T]his 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

23. CHRISTIANSON, *supra* note 9, at 132–38.

24. *Id.* at 134–35.

25. *Id.*

26. *Id.* at 135–37. Tocqueville and Beaumont visited Eastern in October of 1831 while Dickens visited the institution in March of 1842. *Id.*

27. *Id.* at 135.

secret punishment which slumbering humanity is not roused up to stay.²⁸

In the nineteenth century theories of crime causation led inexorably to theories and practices of crime control.²⁹ The temptations and confusion of the outer world were believed to have led the godless and morally weak to succumb to the temptations. The well-ordered and isolated confines of the penitentiary, along with required work, would lead to penance, reform, and the acquisition of work ethic. Or, it just might lead to self-mutilation, suicide, or a lifetime of despair.

Indeed, 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.³⁰ 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 reformatory, not punishment.³¹ Reform rarely has been kind to the inmates.

Curiously, today's binge with multi-million 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 reformatory, reviewed, or rethought.³² Chase Riveland

28. *Id.* at 138 (quoting CHARLES DICKENS, AMERICAN NOTES FOR GENERAL CIRCULATION 148 (N.Y. 1972) (1842)). Dickens, not Tocqueville, got it right. See Bernard-Henri Lévy, *In The Footsteps of Tocqueville (Part V)*, ATLANTIC MONTHLY, Nov. 2005, at 110–12 (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).

29. See, e.g., DAVID J. ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA (1980) [hereinafter ROTHMAN, CONSCIENCE]; DAVID J. ROTHMAN, THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC (2d ed. 1990) [hereinafter ROTHMAN, DISCOVERY]. Rothman demonstrates how the prevailing experts located the causes of crime and mental illness in the community. Both the well-ordered and isolating prison and the "insane asylum" were born from a desire to cure these causes of crime and mental illness. ROTHMAN, CONSCIENCE, *supra* at 117–18, 123.

30. ROTHMAN, CONSCIENCE, *supra* note 29, at 33–36.

31. *Id.* at 36.

32. Haney, *supra* note 2, at 126 (writing that supermax confinement is part of a long-term

points out that the proliferation of supermax housing is based partly on the symbolism of showing how tough a jurisdiction is with the motivating force emanating more often from governors and legislators than corrections officials.³³ Governors are caricatured as leaning back in their office chairs and petulantly mumbling, “Hey, they have a supermax right next door, why don’t we have one!?” Contracting and construction would soon follow.

Getting tough, of course, was much easier when the federal and state governments were running surpluses. With record deficits and calls for fiscal austerity, one now hears rallying cries for “smart” corrections. Smart corrections, in turn, appear to include rethinking the supermax prison—perhaps the most expensive-to-run facility in any jurisdiction—however not necessarily getting “soft” with regard to the isolation units within less-than-supermax facilities.³⁴ “Smart” corrections, then, is much more about saving money than saving souls. Diversion, sentencing reform, and discharge planning as “smart” corrections have no lofty ideological foundation within the smart corrections crowd. Reform is driven by fiscal considerations with perhaps some post-hoc remedial rationalizations.

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 181 years since Eastern opened its doors. While 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.

management and control strategy and not an “immediate sanction for discrete rule infractions”).

33. CHASE RIVELAND, U.S. DEP’T OF JUSTICE, NAT’L INST. OF CORR., SUPERMAX PRISONS: OVERVIEW AND GENERAL CONSIDERATIONS 5 (1999). Thus, any charismatic wardens or theoretically inclined academic reformers are off the hook for our experiments with extended isolation.

34. See Wiley Hall, *States Rethinking the Purpose of Prisons*, ASSOCIATED PRESS, Nov. 7, 2003, http://www.cjcb.org/press/prison_purpose.html. States were expected to experience combined deficits of \$78.4 billion in 2004. *Id.* “Steve Crawford, a corrections expert with the National Governors Association” uses the ‘get smart’ approach to crime” as a way to critique supermax prisons and support diversion and rehabilitation efforts. *Id.*

IV. WHAT IS WRONG WITH PENAL ISOLATION?

There are two distinct ways to analyze and assess the negative consequences associated with penal isolation. First, there is the human rights approach, an approach that has support in the Eighth Amendment's proscription of cruel and unusual punishment. For example, Justice Stevens observed in *Overton v. Bazzetta*, "[i]t 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.'"³⁵

The original concern of the drafters of the Constitution may have been limited to the proscription of torture and other barbarous forms of physical punishment. More recent Supreme Court decisions, however, rely on evolving standards of decency associated with a maturing society which encompasses broad and idealistic concepts of dignity and civilized standards of humanity and dignity.³⁶ Thus, these dignitarian values form a protective shield around even those convicted of a crime and when violated do not require empirical evidence of harm. Extended penal isolation is violative of the most basic of dignitarian and humanistic values and comfortably fits within the Supreme Court's current human rights approach under Eighth Amendment standards.

Second, there is the empirical approach which focuses on the needless harm caused inmates by extreme social and sensory deprivation. An entire literature exists documenting that harm. For example, Jennifer Wynn's study of lockdown facilities in New York

35. 539 U.S. 126, 138 (2003) (Stevens, J., concurring) (quoting *United States ex rel. Miller v. Twomey*, 479 F.2d 701, 712 (7th Cir. 1973)). Incidentally, Justices Thomas and Scalia, concurring, restate their view that a prisoner's punishment is the sentence imposed, and prison officials are delegated the power to discipline a subject only regarding whether they act within the boundaries of the rather limitless discretion contained in the judicial sentence. *Id.* at 140 (Thomas, J., concurring).

36. See *Estelle v. Gamble*, 429 U.S. 97 (1976), which is the seminal decision constitutionally requiring that state prisoners receive adequate medical care for their serious ailments. *Id.* at 104-05; see also RENÉ PROVOST, INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW 7-10 (2002) (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. PROVOST, *supra* at 33.

found some five thousand state inmates in twenty-three-hour disciplinary lockdown.³⁷ New York has eleven high-tech lockdown facilities and units.³⁸ Wynn found that some 23% of these inmates are on the mental health caseload.³⁹ Within these prisons suicide rates are high, fecal misuse and self-mutilation are common,⁴⁰ and there are no meaningful programs, jobs, or group activities—only isolation and despair.⁴¹ Jamie Fellner, writing for Human Rights Watch, found much the same destructiveness in her study of the use of lockdown in Indiana's prisons.⁴² Her work also emphasized the particularly acute destructive potential of such settings for the mentally ill.

In summary, Professor Craig Haney writes,

[T]here is not a single published study of solitary or supermax-like confinement in which nonvoluntary 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.⁴³

37. Jennifer R. Wynn & Alisa Szatrowski, *Hidden Prisons: Twenty-Three-Hour Lockdown Units in New York State Correctional Facilities*, 24 PACE L. REV. 497, 502 (2004). See HANS TOCH & KENNETH ADAMS, ACTING OUT: MALADAPTIVE BEHAVIOR IN CONFINEMENT 23 (2002) (finding about 8% of New York's prisoners segregated or locked down for disciplinary reasons).

38. Wynn & Szatrowski, *supra* note 37, at 502.

39. *Id.* at 510.

40. *Id.* at 511, 518.

41. *Id.* at 522.

42. See JAMIE FELLNER, HUMAN RIGHTS WATCH, COLD STORAGE: SUPER-MAXIMUM SECURITY CONFINEMENT IN INDIANA (1997), available at <http://www.hrw.org/reports/1997/usind/>.

43. Haney, *supra* note 2, at 132. Professor Haney refers to some forty-six studies supportive of his views on harm. *Id.* at 130–32; see also, e.g., Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J.L. POL'Y 325 (2006).

The studies referred to describe loss of appetite, sleep disturbances, anxiety, panic, rage, loss of control, hallucinations, self-mutilation, suicide ideation, hopelessness, fecal misuse, and more. In addition, studies support a high degree of prevalence rates on these destructive factors.⁴⁴

Admittedly, a case might be made that for a select few prisoners even rather prolonged penal isolation is a desired experience.⁴⁵ The modern dungeon does provide relative safety and predictability. I have had some inmates tell me that going into “seg,” at least for a relatively brief, determinate time, is a welcome time-out. For inmates who cannot pay their debts or resist sexual predation it may be a welcome form of de facto protective custody.

These persons are the extraordinary exceptions, and while there must be protocols in place to deal with them, the outliers cannot serve as the basis for a general rule. Only if an advocate of prolonged isolation can show that psychological destruction is negligible and human values are basically maintained is my call for basic reform impaired. I do not believe that such a showing can be made.

V. LEGAL FRAMEWORK

A. *The Use of Mechanical Restraints*

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.⁴⁶

44. See Haney, *supra* note 2, at 132–37.

45. See, e.g., TOCH & ADAMS, *supra* note 37, at 414–15 (describing Scottish prisoner Jimmy Boyle, arguably the most violent prisoner in Scotland, asking for solitary confinement as a way to find peace of mind; he later became an established sculptor and writer).

46. 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 (such as to the hospital, court, prison); 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.

The American Correctional Association rules out mechanical restraints for punishment, requires warden (or designee) approval for use, early medical involvement and monitoring, and other precautionary measures when restraints are utilized.⁴⁷ The use of restraints is to be purely preventive (for example, to prevent escape, self-harm, or injury to others) and applied for no more time than is absolutely necessary.⁴⁸ 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.⁴⁹ 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 cross-bar 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.⁵⁰

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*, 990 F.2d 14 (1st Cir. 1993) (interestingly discussing the transport issue).

47. See AM. CORR. ASS'N, *supra* note 18, 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 to address the legal status of prisoners, co-chaired by Alvin J. Bronstein and Margaret C. Love, is revising and expanding the twenty-year-old existing standards. I expect isolation and supermax prisons to be touched upon. I am serving as a member of the task force.

48. AM. CORR. ASS'N, *supra* note 18, at 4-4190 to -91.

49. 536 U.S. 730, 737 (2002). See SASHA ABRAMSKY & JAMIE FELLNER, HUMAN RIGHTS WATCH, ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS, at ch. XI (Joseph Saunders & James Ross eds., 2003) (relaying my belief that Alabama is the worst system for prison mental health, according to what I have seen in observing 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).

Under international law, torture is defined as any act by which severe pain or suffering, physical or mental, is intentionally inflicted on a person, other than the pain or suffering inherent in penal confinement. See COYLE, *supra* note 7, at 34. The more common domestic definition of torture is "[t]he infliction of intense pain . . . to punish, to extract a confession or information, or to obtain sadistic pleasure." BLACK'S LAW DICTIONARY 1528 (8th ed. 2004).

50. *Hope*, 536 U.S. at 734-35.

Although Justice Stevens discussed the dehydration and burned skin shackled inmates experienced, this transient harm was not central to the decision.⁵¹ He wrote for the majority:

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.⁵²

Hope accords with longstanding law in the courts of appeal and district courts. While 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.⁵³ For example, in *Spain v. Procnier*, in 1979, the Ninth

51. *See id.* at 743–44.

52. *Id.* at 738 (footnotes and citations omitted) (quoting *Trop v. Dolles*, 356 U.S. 86, 100 (1958)).

53. *See Ferola v. Moran*, 622 F. Supp. 814, 821 (D.R.I. 1985). There is no standard on point that would permit restraints as punishment; or, for the mentally ill, for “mere convenience” as well. *Id.* at 824–25 (describing the criteria for the use of restraints). *But see* *Murphy v. Walker*, 51 F.3d 714, 718 n.6 (7th Cir. 1995) (“Whether using bodily restraints as punishment violates the Eighth Amendment is an open question in this circuit.”). *Murphy* also suggests that detainees have greater protection than convicts as to restraints. *See id.* at 717.

Circuit condemned the excessive use of neck chains.⁵⁴ In *Stewart v. Rhodes* the four-point restraint shackling of an inmate to a metal bed frame was condemned.⁵⁵ When mechanical restraints are judicially upheld it is because they are not used for punishment but to prevent physical harm to the inmate or others; further, the duration is relatively brief (measured in hours), there is monitoring, and meals and bathroom breaks are provided.⁵⁶

Accordingly, the use of mechanical restraints, even for a relatively brief period of time, may result in the award of damages.⁵⁷ 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 subsequently immobilized for about forty-eight hours in five-point restraints.⁵⁸ He was dressed in undershorts, uncovered, and released without incident six times, for about fifteen minutes each time, to use the toilet and eat.⁵⁹

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

54. 600 F.2d 189, 197 (9th Cir. 1979).

55. 473 F. Supp. 1185, 1193 (S.D. Ohio 1979) (also recognizing that use of restraints can be permissible where injury to self or others is to be prevented and there is monitoring); see also *Laws v. Cleaver*, 140 F. Supp. 2d 145, 151 (D. Conn. 2001) (upholding a four-hour restraint following an altercation).

56. In *Deck v. Missouri*, 544 U.S. 622 (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. *Id.* at 633. The majority noted that earlier judicial hostility to shackling 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. *Id.* at 630–31.

57. See *Sadler v. Young*, 325 F. Supp. 2d 689 (W.D. Va. 2004) (ordering a jury trial on damages where an inmate was undeservedly placed in five-point restraints for almost two full days), *rev'd and remanded by* 118 F. App'x 762 (4th Cir. 2005). See *infra* notes 59–77 and accompanying text.

I should note that when the use of a restraint goes bad, the impact on the restrained person is swift and often deadly.

58. *Sadler*, 325 F. Supp. 2d at 690.

59. *Id.*

matter of law that while the initial restraint could be found constitutional, the continued restraint was not.⁶⁰ A new trial was ordered on the issue of damages alone.⁶¹

At the time of the incident, Sadler was in twenty-three-hour-a-day lockdown and, thus, received his meals on a tray through a slot in the door.⁶² Sadler did not want his tray on this particular day and so informed the officer who brought it to him, Officer S.K. Young.⁶³ 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.⁶⁴ There was a dispute as to the time lapse between the tray incident and the eight officers extracting and then restraining Sadler.⁶⁵ It could have been as much as an hour or as brief as forty minutes.⁶⁶ 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.⁶⁷ This, of course, is crucial if the objective of the restraint is to prevent damage or injury, or if, as the court finds, it was to impose needless punishment and an “atypical and significant” hardship requiring due process.⁶⁸

The court initially found a violation of Virginia’s policy on restraint, which calls for the removal of restraints when inmates’ dangerous or disruptive behavior has subsided and no threat exists.⁶⁹ This is relevant to “state of mind” considerations as opposed to establishing a federal violation. The defendants could not provide any

60. *Id.* at 704.

61. *Id.* at 709.

62. *Id.* at 692.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 705–07.

69. The policy required official approval of restraint beyond forty-eight hours, which accounts for the forty-seven-plus hours of actual restraint. *Id.* at 694. 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 four-month period where inmates did not engage in dangerous behavior during restraint or the temporary release. *Id.* at 695. 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 694–95.

satisfactory answers concerning just what the danger was, why they decided the supposed danger continued, why other options (of which there were five) were not used, or even why Sadler was ultimately released.⁷⁰

Sadler, on the other hand, showed convincingly that even the initial restraint was punitive; that he suffered greatly during the two-day ordeal, including physical and mental pain, hallucinations, and lack of sleep; and that he was required to lie in his own bodily waste.⁷¹ These, of course, parallel the type of complaints made by many in penal isolation.

Chief Judge Jones treated the constitutional basis of the major claim as one of excessive force under the Eighth Amendment.⁷² 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.⁷³ 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.⁷⁴ Thus, the judge found that there was no showing of initial malice.⁷⁵ 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 two full days of five-point restraints.

This is an important matter in that while 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.

70. *Id.* at 695–98.

71. *Id.* at 693, 698–99.

72. *Id.* at 700.

73. *Id.* See *Hudson v. McMillian*, 503 U.S. 1 (1992) (involving an individual officer punching a shackled inmate); *Whitley v. Albers*, 475 U.S. 312 (1986) (involving a small scale riot). The Supreme Court relies on *Whitley* and *Hudson* as the leading precedent on use of force.

74. *Sadler*, 325 F. Supp. 2d at 702.

75. *Id.*

In *Sadler*, the judge confidently found that no reasonable jury could have determined that the force applied needed to be continued after the first three hours when the inmate supposedly stopped yelling.⁷⁶ This would mean that *Sadler* was unlawfully restrained for some forty-five 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 forty-eight hours is too long and not whether release should have occurred when the yelling stopped or at the uneventful first, second, or third temporary release.⁷⁷

B. The Current State of the Law on Isolation

Curiously, while there is pervasive evidence of widespread and serious harm from extended isolation, I am aware of little or no parallel evidence regarding mechanical restraints except for very serious harm, even death, from the improper use of the restraint chair, asphyxiation from the “kick-stop restraint,”⁷⁸ and a series of other injuries related to the improper or prolonged use of restraints.⁷⁹

76. *Id.* at 704.

77. *Id.* at 704. The court also determined that individuals have a liberty interest in the avoidance of restraint, and that *Sadler* at some point, although not necessarily at initiation, had a right to a due process hearing to discuss the rationale of applying the restraints and the need for continuity. *Id.*

78. This means restraining a prisoner with legs and arms tied to a strap behind the prisoner’s back. If the person so restrained is then placed face down the risk of asphyxiation is high. *See Swans v. City of Lansing*, 65 F. Supp. 2d 625 (W.D. Mich. 1998) (explaining the circumstances giving rise to well-known attorney Geoffrey Feiger’s \$12.9 million verdict for a death that occurred using the “kick-stop restraint”); *see also Campbell v. Sikes*, 169 F.3d 1353 (11th Cir. 1999) (discussing use of straight-jackets and “hog-tying,” euphemistically referred to as an “L” shape restraint).

79. *See Pracy P.Y. Cheung & Bernard M.C. Yam, Patient Autonomy in Physical Restraint*, 14 J. CLINICAL NURSING 34, 35 (2005) (describing the use of restraints on frail or elderly patients and reporting on a variety of physical harms, including nerve damage and ischaemic injury; and psychological harms, including anger, fear, denial, demoralization, and humiliation); *see also Paul S. Applebaum, Seclusion and Restraint: Congress Reacts to Reports of Abuse*, 50 PSYCHIATRIC SERVICES 881, 881 (1999) (discussing the *Hartford Courant*’s study of patients’ deaths due to undifferentiated use of seclusion and restraints). From 1988 to 1998 in psychiatric wards, group homes, residential facilities for troubled youth, and residential facilities for persons with mental retardation, 142 deaths were identified. *Id.* Sixty-four persons died in New York facilities alone from 1988 to 1997, leading the *Courant* reporters to estimate a range of annual deaths at between 50 and 150 for the entire country. *Id.* The harm endemic to extended penal isolation does not result from some error in its application, as is often the case

I do not write in support of the hitching post but one should contrast the judicial concern expressed for a seven-hour outdoor shackling with the absence of concern expressed by the Supreme Court about prolonged confinement in penal isolation. In *Wilkinson v. Austin*, the Court dealt with procedural due process issues related to confinement in the Ohio State Penitentiary (OSP), a supermax facility.⁸⁰ 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.⁸¹

Any Eighth Amendment claims incident to the *Austin* litigation previously were resolved. However, one can detect a sense of substantive acceptance of the deprivations of confinement 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. While any of these conditions standing alone might not be sufficient to create a liberty interest, taken together they impose an atypical and significant hardship

where there is harm in penal settings with restraints, but it is inherent in its extended application.

80. 125 S. Ct. 2384 (2005).

81. *Id.* at 2398. See Fred Cohen, *Wilkinson v. Austin: Through a Glass Darkly*, XVII CORRECTIONAL LAW REP. 17, 27 (2005), 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.

within the correctional context. It follows that respondents have a liberty interest in avoiding assignment to OSP.⁸²

Justice Kennedy, writing for the Court, goes on to note that “OSP’s harsh conditions may well be necessary and appropriate in light of the danger that high-risk prisoners pose both to prison officials and other prisoners.”⁸³ Thus, the curiously unanimous Court in *Austin* accepts the onerous conditions then extant at OSP as part of the *Sandin* “atypical and significant” analysis.⁸⁴ However, as I earlier noted, there is not a hint of even mild concern about the components and consequences of such confinement.⁸⁵

Like its concern about restraints, the Supreme Court’s relative lack of concern about isolation is typical of the views of federal courts more generally. After describing both the popularity and destructiveness of current penal isolation, Professor Michael Mushlin writes:

[V]irtually 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.⁸⁶

82. *Austin*, 125 S. Ct. at 2394–95 (citations omitted).

83. *Id.* at 2395.

84. *Id.*

85. *Id.* 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 period 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 is now a supermax in name only and now houses Ohio’s death row population, guaranteeing them, *inter alia*, at least thirty-five hours a week out-of-cell time. See *Austin v. Wilkinson*, No. 4:01-CV-071, 5 (N.D. Ohio Oct. 3, 2005). 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.

86. MICHAEL B. MUSHLIN, RIGHTS OF PRISONERS 92–93 (3d ed. 2002) (citations omitted). See *Hoptowitz v. Ray*, 682 F.2d 1237, 1257–58 (9th Cir. 1982) (finding “[t]he deprivation of

The exception to courts' tolerance of isolation is for 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 illnesses and those inmates who are in some fashion psychologically "at risk" from prolonged isolation.⁸⁷ 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.⁸⁸

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."); *Ruiz v. Johnson*, 37 F. Supp. 2d 855, 915 (S.D. Tex. 1999) (finding that prison officials violated Eighth Amendment when they subjected inmates to "extreme social isolation and reduced environmental stimulation"), *rev'd by* 178 F.3d 385 (5th Cir. 1999); *Madrid v. Gomez*, 889 F. Supp. 1146, 1264 (N.D. Cal. 1995) (finding that placement of mentally ill inmates in segregation is cruel and unusual punishment), *rev'd and remanded by* 150 F.3d 1030 (9th Cir. 1998); *see also* Fred Cohen, *The Law of Isolation in Brief*, CORRECTIONAL MENTAL HEALTH REP., July–Aug. 2004, at 17, 28–29 (discussing *Freeman v. Berge*, 164 F. Supp. 2d 1096 (W.D. Wis. 2003)).

87. *See* FRED COHEN, *THE MENTALLY DISORDERED INMATE AND THE LAW*, at ch. 11 (1999 & Supp. 2003) (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 a supermax facility. *See, e.g.*, OHIO BUREAU OF MENTAL HEALTH SERVS., *STANDARD OPERATING PROCEDURE* no. 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

Id.

88. Based on their categorical vulnerability, juveniles have prevailed on isolation claims where adults would not have. *See Lollis v. N.Y. State Dep't of Soc. Servs.*, 322 F. Supp. 473, 482, 484 (S.D.N.Y. 1970) (voiding the two-week confinement of a fourteen-year-old girl in a

In addition, current doctrine does provide safeguards against protracted use of isolation when it is for therapeutic purposes. Where a “safe room” is used for therapeutic isolation and protection, the courts have applied rules that are virtually identical to those governing therapeutic restraints.

Nonetheless, Professor Mushlin’s observation about the general legal acceptability of even prolonged isolation remains accurate.⁸⁹ Except for “safe rooms” and in some jurisdictions, prolonged isolation of inmates with serious mental illnesses is often used for punishment, without medical or psychological monitoring, and is not dependent on a present or continuing threat. Only where penal isolation is for punishment or administrative reasons, even for extraordinarily long periods of time, is there currently no need for protection, rationale, and monitoring requirement. Thus, when the prospects of serious harm are the greatest, legal and policy concerns are at their lowest. The legal case against prolonged isolation simply has not been made on either humane or dignitarian grounds and courts have been reluctant to rely on empirical findings as a basis for legal condemnation.

stripped room with no recreational outlets or reading and finding the use of shackles on a male juvenile in isolation for period of time ranging from forty minutes to two hours was impermissible); *see also* Nelson v. Heyne, 355 F. Supp. 451 (D. Ind. 1972) (discussing a possible right to treatment in conjunction with the use of solitary confinement at the Indiana Boys School), *aff’d* 491 F.2d 352 (7th Cir. 1994), *disapproved by* Santana v. Collazo, 714 F.2d 1172 (1st Cir. 1983).

As recently as August 5, 2004, California announced it would abandon near-round-the-clock confinement (twenty-three hours) of juveniles in 6’ x 8’ cells. *California to Halt Extended Isolation of Juveniles*, JUV. CORRECTIONAL MENTAL HEALTH REP., Nov.–Dec. 2004, at 1, 12.

89. *See* Sandin v. Conner, 515 U.S. 472, 484 (1995) (holding that Due Process required a prison disciplinary hearing only if the punishment imposed an “atypical and significant” hardship on the inmate in relation to the ordinary incidents of prison life). Lengthy terms of solitary confinement have been found not to require a hearing. *See* Colon v. Howard, 215 F.3d 227, 231 (2d Cir. 2000) (finding that 305 days duration was atypical, but conditions in the SHU were not).

The important factor is that the “atypical and significant” test, however muddled, is linked only with the possible requirement of procedural due process and not the more basic Eighth Amendment question of whether isolation *per se* or for a given time under particular circumstances is permitted at all.

C. The Doctrinal Avenues for Reform

The courts' nonchalance about the pain imposed by isolation has not always been so uniform. One precedent to the contrary has surfaced recently in some literature.⁹⁰ *In re Medley*, a 115-year-old Supreme Court decision, involved a state inmate with a death sentence who successfully argued that a change in the law after his offense, requiring that the warden keep such convicts in solitary confinement, was a prohibited *ex post facto* law.⁹¹ The majority opinion found that solitary confinement, defined as exclusion from human associations, and its terrible psychological impact on prisoners was an additional punishment not authorized by law at the time of the inmate's offense.⁹² The Court was constrained to order the release of the prisoner since it had no other remedial options.

Medley, however, will take 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 for about four weeks, with guaranteed access by various visitors, and with no mention whatsoever of the particular conditions of confinement.⁹³

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 uses of restraints are far more alike than different, and that the same principles should apply.

90. See, e.g., MUSHLIN, *supra* note 86, at 90 n.22.

91. 134 U.S. 160 (1890)

92. *Id.* at 174.

93. *Id.* at 168-69. I suspect that if the Supreme Court directly faces a condition of confinement in isolation claim, *Medley* will be quickly buried.

VI. WHAT TO DO

The text that precedes this part may be seen as a somewhat lengthy prologue to what is, after all, a rather brief, straightforward call for reform. That is, the use of the “dark cell,” of the most extreme forms of social and sensory penal isolation or segregation, 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 according to the model of the permissible use of mechanical restraints. As with restraints, extended isolation—the purposeful deprivation of serious human needs for sensory and social stimulation—should never be used for punishment, only for control. As with restraints, two types of uses should be anticipated: security related and therapeutic. As with restraints, in either situation, use of isolation should be based on an immediate need, and only after other, less deprivational alternatives have been considered 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 a specified time, a committee of security and program/treatment staff 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.

While 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.⁹⁴ 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 or assaultive behavior)

94. See Jane Coltman, *Working at the Coalface*, in *WORKING WITH DANGEROUS PEOPLE: THE PSYCHOTHERAPY OF VIOLENCE* 143, 144 (David Jones ed., 2004).

by providing a safe environment.⁹⁵ 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 be dealt with as in *Estelle v. Gamble*,⁹⁶ which concerned the deliberate indifference to proper mental health care claim. An *Estelle* claim may be a bit easier for an inmate to prevail upon than the *Whitley-McMillian*⁹⁷ “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 a cultural and linguistic shift. Disruptive behavior does not become a violation and a disciplinary event; it is “acting out” and dealt with as part of the treatment protocol.

The niceties of the therapeutic versus security distinction need not detain us here since my point is to emphasize that regardless of whether isolation is viewed as therapeutic or purely for security, there must be an urgency in the application, a limited duration, a concern for oversight and medical monitoring.

The current uses of extended penal isolation are more often than not a confession of failure by corrections a reflexive get-rid-of-the-person rather than an attempt to get-rid-of-the-problem. In so doing many inmates are made far worse.⁹⁸

95. See COHEN, *supra* note 87, at 12–16 (referring to the standards issued by the National Commission on Correctional Health Care).

96. 429 U.S. 97 (1976).

97. See *supra* note 73.

98. 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.” Hans Toch, *The Disturbed Disruptive*, in WORKING WITH DANGEROUS PEOPLE: THE PSYCHOTHERAPY OF VIOLENCE 9, 11 (David Jones ed., 2004).

A. What to Do When the Inmate Requiring Isolation is a Gang Member

Prison systems regularly seek to identify and then isolate various gang members. Membership in a prison gang clearly is not an associational right protected by the First Amendment.⁹⁹ The explicit predicate for separating and isolating gang members is a prediction of future violence and the need for preventive action. Reducing the appeal of gang membership and encouraging a ritual of renunciation are often unexpressed goals, implicit in the harshness of the imposed penal isolation.

Recognizing that “gang” is a rather loose term encompassing just about any group whose members commit crimes, we can stipulate to the existence of gangs in prison and their dangerousness.¹⁰⁰ However, it does not follow that separation is the only viable control strategy¹⁰¹ and, more importantly, where separation is used, it also does not follow that it must be under the more stringent conditions of penal isolation.

However, the law does not always mandate “best practices” and does allow for confinement of gang members in a supermax-type of environment.¹⁰² *Wilkinson v. Austin* accepted the stringent conditions of confinement said to exist at OSP and required only a nominal form

99. See *Westefer v. Snyder*, 422 F.3d 570, 575 (7th Cir. 2005) (emphatically rejecting such claim of right when prison officials determine that such membership is detrimental to the prison’s legitimate penological goals); see also *Jones v. N.C. Prisoners’ Labor Union, Inc.*, 433 U.S. 119 (1977) (rejecting the right to engage in labor union-type activities).

In Texas some 7400 inmates were reported to be in long-term lockdown; many due to membership in two warring gangs. Mike Ward, *Inmates Isolated for Fear of Gangs*, AUSTIN AM. STATESMAN, Dec. 11, 2005, <http://www.statesman.com/metrostate/content/metro/stories/12/11lockdown.html>.

100. See Mark S. Fleisher & Richard H. Rison, *Gang Management in Corrections*, in PRISON AND JAIL ADMINISTRATION: PRACTICE AND THEORY, at ch. 32 (Peter M. Carlson & Judith Simon Garrett eds., 1999).

101. Fleisher and Rison argue that a comprehensive program of prison management—including inmate cooperation, participation in programs, and good staff rapport—is ultimately far more productive than removing privileges and extended lockdown. *Id.* at 235–36.

102. See *Wilkinson v. Austin*, 125 S. Ct. 2384 (2005); see also *Dawson v. Delaware*, 503 U.S. 159, 164 (1992) (finding the introduction of a capital defendant’s gang membership at sentencing violated his constitutional rights); *Lira v. Herrera*, 427 F.3d 1164 (9th Cir. 2005) (illustrating the potential injustice of using gang affiliation as a basis for extended administrative segregation, while ultimately decided on the basis of exhaustion of administrative remedies).

of procedural due process that included notice of the factual basis for the classification and a fair opportunity for rebuttal.¹⁰³

Thus, while it may be constitutional to isolate an inmate based on gang membership, it is just as objectionable to impose extended penal isolation on gang members under the conditions of sensory deprivation discussed earlier as with any other inmate. With gang members, the perceived need for separation simply cannot be equated with long-term isolation designed to emasculate the person.

B. A Critique and Change

For me to critique the current uses of isolation does not actually create a concomitant obligation to present a blueprint 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 those “best efforts” are in this country.¹⁰⁴ Is it 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 in the United States 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 forty years).¹⁰⁵ There are, however, a number of possible approaches well described by this nation’s leading expert, Hans Toch.¹⁰⁶

103. *Wilkinson*, 125 S. Ct. at 2398.

104. See Gary Beven & Fred Cohen, *The Disruptive or Violent Residential Treatment Unit Inmate: A Multidisciplinary Training Session on the Usage of Segregation for Mentally Ill Offenders*, CORRECTIONAL MENTAL HEALTH REP., May–June 2005, at 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).

105. David Jones, *Introduction to WORKING WITH DANGEROUS PEOPLE: THE PSYCHOTHERAPY OF VIOLENCE* 5 (David Jones ed., 2004).

106. See TOCH & ADAMS, *supra* note 37, at 395–424 (including the therapeutic community approach, pattern-thinking approach, violence prevention approach used in Canada, and self-management programs). Whatever the approach, the point is to work with the maladaptive behavior and work to change it, not simply isolate it.

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, twenty-three-hour-a-day confinement to the inmate’s own living area while awaiting a disciplinary hearing or a ten-day disposition on a finding of guilty.¹⁰⁷

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 or disruptive inmate a form of insulation, not 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. This type of unit should be used only as a last resort, requiring a supportive record and functioning to separate or insulate the inmate from others, and not imposing the isolation previously described.¹⁰⁸

For the chronic and disruptive violator the approach would have to include a restorative and 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.¹⁰⁹ The problem,

107. See *Lee v. Coughlin*, 26 F. Supp. 2d 615, 620 (S.D.N.Y. 1998) (noting that about 90% of confinement-type sentences in New York prisons were to keeplock (confinement in one’s own cell) or to “cube confinement” (confinement to one’s own area in a dormitory setting)).

108. 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.

109. 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, least destructive, prison he ever visited is in Ringe, Denmark. Alvin J. Bronstein, *Incarceration as a Failed Policy*, CORRECTIONS TODAY, Aug. 2003, at 6, 13. It is co-ed, all inmates are recidivists, there are productive jobs, and staff work with inmates, not

however, is not beyond resolution. Resolution must be found given the profound harm 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.¹¹⁰ Indeed, assuming that the conditions of isolated confinement are in some fashion onerous but marginally constitutionally acceptable, the harsher the conditions, the shorter the period of duration legally available for the use of such isolated confinement.¹¹¹

Thus, I have elected to approach extended penal isolation somewhat apart from the type of add-on, inhuman conditions noted above. One may 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, and a decent diet, but with the basic conditions of second degree isolation previously described.¹¹²

I am far from alone in my concern about isolation. The United Nation's Standard Minimum Rules for the Treatment of Prisoners calls for the complete prohibition of punishment by placement in a dark cell.¹¹³ 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 at least to restrict its use.¹¹⁴ Professor Mushlin notes

simply keeping order. *Id.* On congratulating the prison governor, he was told, "[R]emember, AI, all prisons damage people." *Id.*

110. WILLIAM C. COLLINS, NAT'L INST. OF CORR., U.S. DEP'T OF JUSTICE, SUPERMAX PRISONS AND THE CONSTITUTION: LIABILITY CONCERNS IN THE EXTENDED CONTROL UNIT, 33-40 (2004), available at <http://nicic.org/library/019835>.

111. See, e.g., *Mitchell v. Maynard*, 80 F.3d 1433 (10th Cir. 1996).

112. See *supra* note 6 and accompanying text.

113. Standard Minimum Rules for Treatment of Prisoners, Rule 31, available at http://www.unhchr.ch/html/menu3/b/h_comp34.htm.

114. COYLE, *supra* note 7, at 80.

that a number of respectable professional groups, largely to no avail, have called for the curtailment of second degree penal isolation.¹¹⁵

Preparing this paper originally as a presentation before the Commission on Safety and Abuse in Prisons, my hope was to plant the seeds for reform in a recommendation the Commission might decide to take. I also hope to convince the American Bar Association's Committee on the Legal Status of Prisoners Task Force in its revision of standards to view mechanical restraints and penal isolation as deserving similar treatment. If judges are persuaded by my approach, that too, would be welcome.

Foundations with money to spend in this area should consider funding prison systems willing to create a new paradigm by changing policy and procedure along the lines suggested here. I would agree that virtually all correctional reform has come through judicial activism and, of course, I would offer no objection to that occurring. However, based on the case law discussed earlier, and the continued movement of the federal judiciary toward a non-interventionist posture, I suspect we need to look elsewhere for the required changes.

115. MUSHLIN, *supra* note 86, at 92 n.30. In this footnote, Mushlin directs the reader to:

See National Sheriffs' Assn, *Inmates' Legal Rights* 47 (1987) (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 requires 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").

Id. The ABA Standards on point are currently under revision and as a member of the revising group, I plan to put forward a plan for abolition of the first degree of isolation and a severe curtailment of the second degree of isolation.