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The Liman Report and Alternatives to Prolonged Solitary Confinement

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INTRODUCTION

Our nation's prisons and jails are often shrouded in secrecy. Media access to prisoners, particularly those in solitary, is limited or non-existent, and many states do not provide adequate data on how their penal systems actually operate.[1] As Justice Kennedy recently put it, "[p]risoners are shut away—out of sight, out of mind."[2]

In two important ways, the ASCA-Liman Report[3] has deepened and sharpened the national dialogue on the use of prolonged solitary confinement. First, it provides data on the number of people held in restrictive housing (or "administrative segregation"), the conditions they face, and the duration of their confinement. More prisoners are held in solitary than commonly assumed. Their conditions of confinement generally allow little out-of-cell time and few privileges. And it is easy to get in and hard to get out. These findings illuminate a practice that often occurs in the shadows, promotes transparency of prison policies and practices, and supports ongoing efforts to understand the impact of solitary confinement and re-evaluate its use.

Yet the Report's most important contribution lies not in its useful data, but in the commitment that the Association of State Correctional Administrators (ASCA), a national organization of prison directors and administrators, has

1. Andrea C. Armstrong, *No Prisoner Left Behind? Enhancing Public Transparency of Penal Institutions*, 25 STAN. L. & POL'Y REV. 435, 462 (2014); David C. Fathi, *The Challenge of Prison Oversight*, 47 AM. CRIM. L. REV. 1453, 1453-54 (2010).

2. Davis v. Ayala, 135 S. Ct. 2187, 2209 (2015) (Kennedy, J., concurring).

3. THE ARTHUR LIMAN PUB. INTEREST PROGRAM & ASS'N. OF STATE CORR. ADM'RS, TIME-IN-CELL: THE ASCA-LIMAN 2014 NATIONAL SURVEY OF ADMINISTRATIVE SEGREGATION IN PRISON (2015) [hereinafter TIME-IN-CELL], http://www.law.yale.edu/system/files/area/center/liman/document/asca-liman_administrativesegregationreport.pdf [http://perma.cc/3ME8-TK8F].

made to "limit or end extended isolation" in American prisons.[4] The *New York Times* front-page story on the Report focused not on its empirical study, but on ASCA's statement that prolonged isolation "is a grave problem in the United States," the use of which should be restricted or eliminated.[5] The *Times* termed ASCA's statement "its most forceful to date on the practice."[6] That the nation's prison and jail administrators are now calling to curb the use of extended isolation both reflects the changing national consensus and provides a powerful impetus for more reform. It is one thing for human rights activists, litigators, or politicians to advocate against solitary; it is quite another for the people actually responsible for running the prisons to do so.

As the Report notes, the harm prisoners suffer from prolonged isolation is well known.[7] The main obstacle to ending the practice is not a lack of awareness, but a perceived lack of alternatives. Those supporting an end to solitary confinement should therefore follow the suggestion of Rick Raemisch—who, as executive director of Colorado's correction department, has substantially reduced the practice in that state—by helping to develop other ways to handle inmates who pose a danger of violence.[8]

Developing workable alternatives is critical because, despite the serious, documented harms that prolonged isolation inflicts on prisoners, it is hard to conceive of prison officials ending the practice—or a court holding it unconstitutional—if the consequence would be to impose a substantial risk of harm on other prisoners or staff. For example, the Tenth Circuit recently upheld the continuation of more than three decades of solitary confinement for a federal prisoner who had committed three murders while in prison. The court deferred to prison officials' determination that the prisoner could not be removed from isolation without jeopardizing the safety of other prisoners, staff, and of the prisoner himself.[9] Thus, developing alternative mechanisms of controlling disruptive and dangerous prisoners is essential if ASCA is to make

4. TIME-IN-CELL, *supra* note 3, at iii.

5. Timothy Williams, *Prison Officials Join Movement To Curb Solitary Confinement*, N.Y. TIMES (Sept. 2, 2015), http://www.nytimes.com/2015/09/03/us/prison-directors-group-calls-for-limiting-solitary-confinement.html [http://perma.cc/P5Q9-8G6V].

6. *Id.*

7. TIME-IN-CELL, *supra* note 3, at 2, 7.

8. Peter Baker & Erica Goode, *Critics of Solitary Confinement Are Buoyed as Obama Embraces Their Cause*, N.Y. TIMES (July 21, 2015), http://www.nytimes.com/2015/07/22/us/politics/critics-of-solitary-confinement-buoyed-as-obama-embraces-cause.html [http://perma.cc/6VG6-H9BL].

9. Silverstein v. Fed. Bureau of Prisons, 559 F. App'x. 739, 762-63 (10th Cir. 2014). *See also* Brittany Glidden, *Necessary Suffering?: Weighing Government and Prisoner Interests in Determining What Is Cruel and Unusual*, 49 AM. CRIM. L. REV. 1815, 1831-833 (2012) (cataloguing cases in which courts deferred to prison officials' judgments to decide Eighth Amendment claims).

good on its commitment to limit—and ultimately to end—prolonged isolation. And as the ASCA-Liman Report suggests, even in the most difficult cases, alternatives to prolonged solitary do exist.

I. LEGAL DOCTRINE AND THE RELEVANCE OF ALTERNATIVES

Justice Anthony Kennedy's recent concurring opinion in *Davis v. Ayala* also focused on workable alternatives as important to the judicial inquiry.[10] In a prisoner's challenge to his death sentence not directly implicating prolonged isolation, Kennedy invited a future Eighth Amendment attack on the practice, writing that "the judiciary may be required . . . to determine whether workable alternative systems for long-term confinement exist, and, if so, whether a correctional system should be required to adopt them."[11]

But despite Justice Kennedy's focus on workable alternatives, it remains unclear how courts must take those alternatives into account when deciding whether solitary confinement conditions violate the Eighth Amendment prohibition against cruel and unusual punishment.

The current, well-established Eighth Amendment test asks only two questions. First, is the practice or condition causing the prisoner serious harm or denying a basic human need? And second, are the prison officials deliberately indifferent to that harm?[12] The state's justifications or the existence of alternatives are absent from the legal test.

This absence comports with the normative judgment that the state must not deliberately deprive people in its custody of basic human needs or cause them serious harm. Torture is prohibited irrespective of the state's justifications and regardless of alternatives. Starving or deliberately denying a prisoner medical care is forbidden even if the state could proffer some justification. And to the extent that spending years in solitary is akin to torture, why should it matter to the Constitution whether there are alternatives for housing disruptive prisoners?

Indeed, the Supreme Court has rejected the use of the *Turner v. Safley* reasonableness test[13]—used to determine whether prison conditions or policies violate other, external constitutional rights—in the Eighth Amendment analysis.[14] The *Turner* test requires that the challenged practice have a reasonable relationship to a legitimate penological interest and analyzes possible alternatives. The Court declined to import the Turner test into the

10. Davis v. Ayala, 135 S. Ct. 2187, 2208-10 (2015) (Kennedy, J., concurring).

11. *Id.* at 2210.

12. *See* Wilson v. Seiter, 501 U.S. 294 (1991).

13. Turner v. Safley, 482 U.S. 78, 89-90 (1987).

14. Johnson v. California, 543 U.S. 499, 511 (2005).

Eighth Amendment analysis "because the integrity of the criminal justice system depends on full compliance with the Eighth Amendment."[15]

Under the current test, therefore, Justice Kennedy's question of alternatives is important not to whether a practice violates the Eighth Amendment, but rather to the appropriate remedy to cure that violation. The state must come up with a workable alternative to avoid a practice that causes serious harm to those held in its custody.

Nonetheless, some lower federal courts have expressed confusion about the role of government justification and possible alternatives in Eighth Amendment analysis.[16] And the Supreme Court's Eighth Amendment prison-condition cases contain language suggesting that deliberately causing "unnecessary and wanton" pain, or imposing conditions that can result in pain "without any penological purpose," is prohibited.[17] These statements could imply that conditions or actions that are sufficiently gratuitous—in other words, unjustifiable—constitute punishment for Eighth Amendment purposes.[18] The justifiability of any imposed condition that imposes pain is often related to whether prison officials could use alternatives that would achieve the same penological purpose without causing the prisoner serious harm; if alternatives exist, the imposition of pain is unjustified. The Court appears to treat such questions under the rubric of prison officials' "deliberate indifference" to serious harm, which the Eight Amendment proscribes.[19]

Yet the presence or absence of alternatives or legitimate penological interests ought not be relevant to whether intentionally inflicted pain constitutes *punishment* under the Eighth Amendment. Punishment is generally based on some legitimate government interest. Moreover, the existence of

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15. *Id.* (citation omitted).

16. *See, e.g.*, Grenning v. Miller-Stout, 739 F.3d 1235, 1240 (9th Cir. 2014) ("The precise role of legitimate penological interests is not entirely clear in the context of an Eighth Amendment challenge to conditions of confinement.").

17. Rhodes v. Chapman, 452 U.S. 337, 345, 347 (1981) (quoting Gregg v. Georgia, 428 U.S. 153, 173, 183).

18. *See, e.g.*, *Grenning*, 739 F.3d at 1240 ("The existence of a legitimate penological justification has . . . been used in considering whether adverse treatment is sufficiently gratuitous to constitute punishment for Eighth Amendment purposes." (citing *Rhodes*, 452 U.S. at 356")).

19. *See, e.g.*, Hope v. Pelzer 536 U.S. 730, 737-38 (2002) (tying the issue of unnecessary and wanton infliction of pain that is without justification to the determination of deliberate indifference); Wilson v. Seiter, 501 U.S. 294, 297-300 (1991) (only unnecessary and wanton pain amounts to deliberate indifference, which is required before the serious harm can constitute punishment under the Eighth Amendment); Rhodes v. Chapman, 452 U.S. 337, 346 (1981) ("Among 'unnecessary and wanton' inflictions of pain are those that are 'totally without penological justification.'") (quoting Gregg v. Georgia, 428 U.S. 153, 171 (1976)); Estelle v. Gamble, 429 U.S. 97, 104 (1976) (deliberate indifference to prisoner's medical needs constitutes the "unnecessary and wanton infliction of pain" proscribed by the Eighth Amendment).

workable alternatives is an objective question. If we want the law to make prison officials take alternatives into account, then a test that inquires into their subjective mental states and knowledge seems an odd and ill-fitting vehicle to use.

Rather, the issues of justification and alternatives arguably better fit within the question of *cruelty*. While cruelty is ordinarily thought to simply involve the imposition of harsh treatment, some commentators claim that "in its most basic sense, to be cruel is to inflict unjustified suffering."[20]

Yet even if the Court were to hold that a practice that inflicts serious pain or denies a basic human need can nonetheless survive Eighth Amendment scrutiny where it is justified, that justification cannot simply be reasonable. Instead, the State must demonstrate that no workable alternative exists to reduce or eliminate the suffering without causing greater harm to other prisoners, staff, or the prisoner. That may be the ultimate import of Justice Kennedy's formulation in *Davis v. Ayala*.

This approach is different from the traditional balancing—or "reasonableness"—test of *Turner v. Safley*, which the Supreme Court has rejected for Eighth Amendment claims, but which some lower courts seem to be covertly using to reject prisoner claims of cruel treatment.[21] Where the Court determines that a practice or condition deliberately denies a basic human need or inflicts serious pain on prisoners, the State should have the burden of showing that the deprivation is necessary because no workable alternatives exist. And where an alternative exists that would prevent serious harm, it would be unjustified for the State to refuse to employ it. Generally, once a denial of a basic human need is shown, the presumption is that the State can figure out another mechanism to address the problem. This analysis is akin to strict scrutiny, which, unlike the *Turner* analysis, requires that the government demonstrate that its policy is the "least restrictive alternative."[22]

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20. Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 884 (2009); *see also* John Kekes, *Cruelty and Liberalism*, 106 ETHICS 834, 838-39 (1996) (arguing that to be cruel—and therefore morally unacceptable—the pain inflicted on the victim must be unjustified).

21. *See* Silverstein v. Fed. Bureau of Prisons, 559 F. App'x. 739, 762-63 (10th Cir. 2014); Chappell v. Mandeville, 706 F.3d 1052, 1058-59 (9th Cir. 2013) (suggesting that twenty-four-hour illumination might not be unconstitutional if justified by a legitimate penological purpose and holding that qualified immunity applied because no court had ruled on whether a contraband watch constitutes a legitimate penological purpose that would justify continuous lighting); Bass v. Perrin, 170 F.3d 1312, 1316-18 (11th Cir. 1999) (holding that a complete denial of outdoor exercise was not an Eighth Amendment violation because it was not "totally without penological justification").

22. Turner v. Safley, 482 U.S. 78, 90-91 (1987) (explicitly rejecting the "least restrictive alternative" test). Indeed, this "strict scrutiny" test should lead to similar practical results as the current Eighth Amendment analysis: under both formulations, once serious harm is

In the context of solitary confinement, therefore, prison officials should be required to house prisoners in the least restrictive workable environment. Since it is well known that prolonged isolation causes most prisoners serious harm or denies them the basic human need for social interaction, officials must show that solitary confinement is that least restrictive option. Indeed, then-Judge Kennedy employed a similar approach in the 1979 case of *Spain v. Procunier*—perhaps foreshadowing his *Davis* concurrence. He held that outdoor exercise is a basic human need for prisoners held in prolonged segregation, and that prison officials' safety concerns—that allowing such prisoners to exercise with the general prison population could be dangerous—did not justify deprivation of that need absent a showing that alternate outdoor exercise arrangements could not be made.[23] For Kennedy, "the cost or inconvenience of providing adequate facilities is not a defense to the imposition of a cruel punishment."[24]

II. ALTERNATIVES TO PROLONGED ISOLATION

The ASCA-Liman Report strongly suggests that workable alternatives to prolonged isolation do in fact exist. Solitary confinement has been greatly overused in this country. It unnecessarily isolates, for extended periods, prisoners who, for example, have committed minor disciplinary infractions, are mentally ill, or are affiliated with a gang despite having committed no serious violence. My own experience with Ohio and California prisons supports the conclusion that an overwhelming majority of the thousands of people warehoused in administrative segregation could be safely released to the general population. In fact, that is exactly what those two states have done.

While there is undoubtedly a small core of violent prisoners who, for the protection of the general population, should be separated from them, such separation does not require social isolation. The experience of several states' prison systems suggests as much. For example, Ohio has kept the four prisoners it considers most dangerous in its supermax for the past fifteen years and intends to keep them there indefinitely. Properly understood, that permanent segregation should violate both Eighth Amendment and due process protections, since every prisoner—even the most dangerous—should be accorded a meaningful way to get out of segregation through good behavior.[25] Nonetheless, after a hunger strike in 2011, Ohio prison officials

proven, the State must either come up with a workable alternative or demonstrate that no such alternative exists.

23. Spain v. Procunier, 600 F.2d 189, 200 (9th Cir. 1979).

24. *Id.*

25. I was one of the lawyers who brought a class action challenge in 2001 to Ohio's placement and retention of prisoners in its supermax prison, and I argued for the plaintiffs in the United States Supreme Court. *See* Wilkinson v. Austin, 545 U.S. 209 (2005). After the

provided these men with significantly increased opportunities for social interaction, including daily phone calls, numerous contact visits, and small group recreation with one other prisoner. Thus far, the arrangement has worked without any serious incident.[26]

So too, some European nations have developed alternatives that segregate high-risk prisoners without the harsh social isolation found in American supermax prisons. In Scotland, England, and Wales, for example, dangerous prisoners are confined away from the general population, but in small groups rather than total isolation, and they are provided family and legal contact visits, telephone calls, access to education, gym facilities, payment for work, association with other prisoners, and in-cell activities. In short, these prisoners are provided far more human contact and stimulation than those under the typical American administrative-segregation regime documented in the ASCA-Liman report.[27] Perhaps even more striking is the prison at Grendon in England, which houses some of the most "damaged, disturbed and dangerous" prisoners in the English prison system.[28] Despite its difficult population, Grendon provides small group therapy and daily community meetings and has produced, in the words of its Governor, "extraordinary outcomes."[29]

Yet another example of possible alternatives comes from the recent settlement in a class action lawsuit that challenged prolonged solitary confinement at Pelican Bay State Prison.[30] California prison officials agreed to set up a restrictive but non-isolating population unit to house prisoners who could not be released to the general population due to safety or security concerns. The state also agreed to double the out-of-cell recreation and programming time for the handful of prisoners who remain in long-term

plaintiffs won in the District Court, Ohio reviewed the almost five hundred prisoners it had placed in the supermax and determined that over eighty percent could be safely removed from supermax confinement. The plaintiffs also challenged Ohio's determination to keep the four so-called long-termers in the supermax permanently, but were unable to prevail in the District Court.

26. *See* Expert Report of Terry Collins at 6, Ashker v. Brown (N.D. Cal. Mar. 3, 2015) (No. C 09-05796 CW), http://ccrjustice.org/expert-reports-ashker-v-brown [http://perma.cc/L246-RGF8].

27. *See* Expert Report of Andrew Coyle at ¶¶ 37, 44 & ex. 2, Ashker v. Brown (N.D. Cal. Mar. 3, 2015) (No. C 09-05796 CW), http://ccrjustice.org/sites/default/files/attach/2015/07/Coyle%20Expert%20Report.pdf [http://perma.cc/P7WJ-DRVG].

28. Peter Bennett & Jamie Bennett, Resisting Supermax: Rediscovering a Humane Approach to Management of High Risk Prisoners 9 (2015) (unpublished manuscript) (on file with author).

29. *Id.* at 11.

30. Settlement Agreement, Ashker v. Brown (N.D. Cal. Aug. 31, 2015) (No. C 09-05796 CW), http://ccrjustice.org/sites/default/files/attach/2015/09/2015-09-01-ashker-Settlement_Agreement.pdf [http://perma.cc/TG5Z-7DR8]. I was lead counsel for the plaintiffs in *Ashker v. Brown*.

administrative segregation, providing them three hours per day outside their cells plus additional programming.

Notably, states should also recognize that they have financial incentives to limit the use of solitary confinement: It costs far more to hold a prisoner in solitary than to house that same prisoner in the general population. Thus, removing the enormous numbers of prisoners that the ASCA-Liman Report demonstrates have been held in solitary for lengthy periods of time at tremendous cost and expense should free up resources to provide humane conditions for the few who truly require separation from the general population.

CONCLUSION

The ASCA-Liman Report has done a tremendous public service in demonstrating the vast numbers of prisoners held for lengthy periods of time in harsh solitary confinement, and even more of a service in calling for limits on—and an eventual end to—this practice. Justice Kennedy's *Davis v. Ayala* concurrence has provided a potential legal framework to do so, and alternatives to prolonged isolation are increasingly available for study and emulation. The Report should provide momentum to actualize these alternatives, and to convince prison officials, the public, and the courts that prolonged solitary confinement is no longer morally or legally acceptable. It should be prohibited as a form of torture.

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