

February 20, 2014

Senator Durbin and Honorable Members of the Senate:

I have studied indefinite solitary and supermax confinement since 1996 when I began writing about the Arizona state prison system. My last book, *The Law is a White Dog: How Legal Rituals Make and Unmake Persons* (Princeton, 2011), deals with the suffering of prisoners and the questions of cruel and unusual punishment and due process in such “special management” or “special housing” units (<http://press.princeton.edu/titles/9450.html>).

Relevant recent articles of mine deal with the legal evasion of obvious Eighth Amendment violations (<http://bostonreview.net/BR29.5/dayan.php>) and the remarkable curtailing of the First Amendment in a case about a Pennsylvania super-max unit (<http://bostonreview.net/BR32.6/dayan.php>).

In summer June 2011, when the more than 2,000 prisoners in California—some of whom had been in solitary confinement for over 20 years without hope of redress—went on hunger strike, I wrote an op-ed for the NY Times, called “Barbarous Confinement” (<http://www.nytimes.com/2011/07/18/opinion/18dayan.html>). As I have argued over the years, no matter what claims we make of humane treatment and evolving standards of decency, we are guilty as a nation of the most horrific treatment of prisoners in the civilized world.

And, again, last summer 30,000 inmates in California prisons stopped eating to publicize their demands for decent treatment. Internal complaints, appeals, even court orders had all failed in their purpose. Their demands were simple. Roughly 4,000 inmates in California prisons—that is to say, three in every hundred—are in solitary, many in Security Housing Units (SHUs), often indefinitely. They sit there for no penal reason, though prison officials offer all kinds of different justifications. Solitary forms no part of any legally mandated punishment. Indeed if it did, it would be actionable under the Eighth Amendment prohibition on “cruel and unusual punishment.” Instead it is defined, by a legally untouchable and elegantly beastly linguistic sleight of hand that has become fashionable in this country since the presidency of Ronald Reagan, as “administrative segregation.”

What the striking prisoners are asking for is incredibly little: putting an end to administratively (and arbitrarily) imposed long-term solitary confinement; ending collective punishment for individual violations of rules; modifying the validation process for active/inactive gang status and abolishing de-briefing; implementing the findings of the 2006 US Commission on Safety and Abuse in prisons; providing adequate, nutritious food and suitable health care; and, finally, expanding programs and privileges for those held in indefinite solitary. None of these presents the slightest form of security risk. All of them belong to what the meanest person among us would regard as the most fundamental elements of human decency.

Supermax detention is the harshest weapon in the American punitive armory. The severe sensory deprivations of the supermax have been repeatedly condemned since the 1980s by the

United Nations Committee Against Torture, Human Rights Watch, Amnesty International, the American Civil Liberties Union, and the Center for Constitutional Rights. The UN Convention Against Torture (May 2006) and the UN Human Rights Committee (July 2006) documented in detail the torturous psychological effects of this practice. In 2006, as one of its primary recommendations, the bipartisan [US Commission on Safety and Abuse in Prisons](#) called for substantial reforms to the practice of solitary confinement. Segregation from the general prison population, it said, should be “a last resort.”

Once, solitary confinement affected few prisoners for relatively short periods of time. Today, most prisoners can expect to face solitary, for longer periods than before, and under conditions that make old-time solitary seem almost attractive. The contemporary state-of-the-art supermax is a clean, well-lighted place. There is no decay or dirt. And there is often no way out. Prisons in the United States have always contained harsh solitary punishment cells where prisoners are sent for breaking rules. But what distinguishes the new generation of supermaxes are the increasingly long time prisoners spend in them, their use as a management tool rather than just for disciplinary purposes, and their sophisticated technology for enforcing isolation and control.

This is not the “hole” portrayed in movies like *Murder in the First* or *The Shawshank Redemption*. Under the sign of professionalism and advanced technology, extreme isolation and sensory deprivation constitute the “treatment” in these units. As early as 1995, a federal judge, Thelton E. Henderson, writing about the Special Housing Unit in Pelican Bay, California, conceded that

“supermax” confinement “may well hover on the edge of what is humanly tolerable.” It is now over that edge. Supermaxes more generally substantially modify inmates’ spatial and temporal framework, severely damaging their sense of themselves: a terrible violence against the spirit and a betrayal of our constitutional and moral responsibility to ourselves as a nation and as human beings.

How much can you take away from a prisoner without running afoul of the law? Solitary confinement has now been transmuted from an occasional tool of discipline into a widespread form of preventive detention. For more than two decades, the Supreme Court has whittled steadily away at the rights of inmates, surrendering to prison administrators virtually all control over what is done to those held in “secure segregation.” Since this is not defined as punishment for a crime, it does not fall under “cruel and unusual punishment,” the reasoning goes.

Officials claim that those incarcerated in these 23-hour lockdown units are “the worst of the worst.” But it is often the most vulnerable, especially the mentally ill, not the most violent, who end up in indefinite isolation. Those who are not mentally ill going in can hardly avoid being mentally destroyed once there. Placement is haphazard and arbitrary; it focuses on those perceived as troublemakers or simply disliked by correctional officers and, most of all, alleged gang members. Often, the decisions are not based on evidence. And before the inmates are released from isolation into normal prison conditions, they are expected to “debrief,” or spill the beans on other gang members.

But how can a prisoner debrief if he is not a gang member? Those in isolation can get out by naming names, but if they do so they will likely be killed when returned to a normal facility. To “debrief” is to be targeted for death by gang members, so the prisoners are moved to “protective custody”—that is, another form of solitary confinement.

More seriously still, though, many of these prisoners have been sent to virtually total isolation and enforced idleness for no crime, not even for alleged infractions of prison regulations. Their isolation, which can last for decades, is often not explicitly disciplinary and therefore not subject to court oversight. Their treatment is merely a matter of administrative convenience.

In the summer of 1996, I visited two “special management units” at the Arizona State Prison Complex in Florence, Arizona. Escorted by deputy wardens, I completed a series of interviews in an attempt to understand this new version of solitary confinement. There, prisoners are locked alone in their cells for twenty-three hours a day. They eat alone. Their food is delivered through a food slot in the door of their eighty square foot cell. They stare at the unpainted concrete, the windowless walls onto which nothing can be put. They look through doors of perforated steel, what one officer described to me as “irregular-shaped swiss cheese.” Except for the occasional touch of a guard’s hand as they are handcuffed and chained when they leave their cells, they have no contact with another human being.

In this condition of enforced idleness, prisoners are not eligible for vocational programs. They have no educational opportunities, and books and newspapers are severely limited, post and telephone communication virtually non-existent. Locked in their cells for as many as 161 of the 168 hours in a week, they spend most of the brief time out of their cells in shackles, with perhaps as much as eight minutes to shower. An empty exercise room (twelve feet by twenty feet)—a high-walled cage with a mesh screening overhead, also known as the “dog pen”—is available for “recreation.” As an inmate later wrote me, “People go crazy here in lockdown. People who weren’t violent become violent and do strange things. This is a city within a city, another world inside of a larger one where people could care less about what goes on in here. This is an alternate world of hate, pain, and mistreatment.”

Special Management Unit 1 in Arizona was surpassed by Special Management Unit 2 (SMU 2), completed in 1996. A 768-bed unit, it cost taxpayers \$40 million. Given the cost of building supermaxes, one official in Arizona suggested: ‘Why don’t we just freeze-dry ’em?’ In a Special Security Unit there, another officer showed me a sign set above photos of prisoners who had mutilated themselves – row after row of slit wrists, first-degree burns, punctured faces, bodies smeared with faeces, eyes pouring blood. It read: ‘Idle Minds Make for Busy Hands.’

Situated on forty acres of desert, SMU 2 is surrounded by two rings of twenty-foot-high fence topped with razor wire, like a nuclear waste storage facility. During my visits there, I learned that those who have *not* violated prison rules—often jailhouse lawyers or political activists—find

themselves placed apart from other prisoners, sometimes for what is claimed their own protection, sometimes for what is alleged to be the administrative convenience of prison officials, sometimes for baseless, unproven, and generally unprovable, claims of gang membership.

In choosing to focus on supermax confinement as a punishment worse than death, my argument is against the tendency in our courts and in our prisons to reduce constitutional claims to the most basic terms: bodies emptied of minds, destruction of will, removal of responsibility, and of everything that defines persons as social beings. Designed for basic needs and nothing more, the structure of supermaxes dramatizes the minimal requirements of the courts. Awash in natural light, everything in these units—what can be seen and how, its location and design—coerces in the most unremitting and damaging way possible. These are locales for perpetual incapacitation, where obligations to society, the duties of husband, father, or lover are no longer recognized.

We are proud of our history as citizens of the United States. We are a nation of laws. But what kind of laws? Laws that permit solitary confinement, with cell doors, unit doors, and shower doors operated remotely from a control center, with severely limited and often abusive physical contact. Inmates have described life in the massive, windowless supermax prison as akin to “living in a tomb,” “circling in space,” or “being freeze-dried.” Has the current attention to the death penalty allowed us to forget the gradual destruction of mind and loss of personal dignity in solitary confinement, including such symptoms as hallucinations, paranoia, and delusions? It is

to the mind-destroying settings of the supermax penitentiary that I draw your attention, to the “cruel, inhuman, and degrading” treatment that most often bears no relation to crime. I recall the words of former Supreme Court Justice Sandra Day O’Connor warning that prisoners’ rights must be considered: “Prison walls do not form a barrier separating prison inmates from the protections of the Constitution.” Justice William Douglas put it more starkly: “Prisoners are still ‘persons’.”

Two centuries ago, Jeremy Bentham came to believe that solitude was “torture in effect.” Other nineteenth-century observers, including Charles Dickens and Alexis de Tocqueville, used images of premature burial, the tomb and the shroud to represent the death-in-life of solitary confinement. There are now some 25,000 inmates in long-term isolation in America’s supermax prisons and as many as 80,000 more in solitary confinement in other facilities.

We need to ask not only why this torture continues, but how it has been normalized for an ever-larger group of prisoners.

Sincerely,

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