



# Supermax Prisons and the Constitution

LIABILITY CONCERNS IN THE  
EXTENDED CONTROL UNIT

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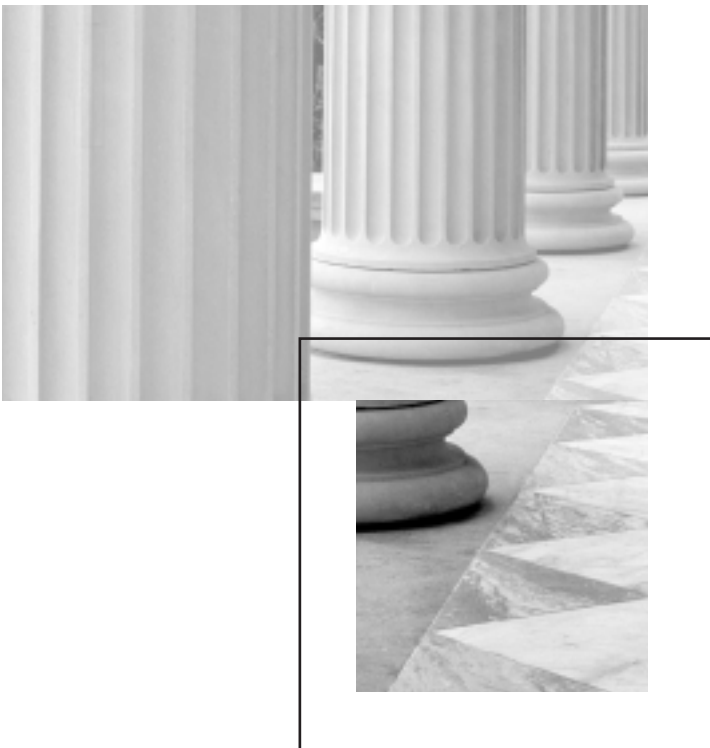
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Extended Control Unit**

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To the vision and memory of Susan Hunter.

# Abstract

**E**xtended control units (ECUs), or “supermax” prisons, house a prison system’s most dangerous inmates. Because of the restrictions that go with the extraordinarily high level of security such inmates require, these facilities sometimes function at the limits of what is constitutionally acceptable and are, therefore, frequent targets of inmate litigation. This monograph

is intended to help prisons operate ultra-high-security facilities in a way that minimizes liability in litigation. The monograph covers the background of supermax prisons and related litigation, and it takes a close look at case law, prison policies and practices, and “lessons learned” in operational areas that give rise to litigation.

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# Foreword

Controlling the most dangerous, recalcitrant, aggressive, and antagonistic inmates in a prison system is one of the greatest challenges men and women working in corrections face. These inmates require the highest levels of security and control a prison system can muster. Yet, they remain subject to the protections of the Constitution.

In years past, these inmates were locked in “segregation” or “administrative segregation” or, in the jargon of the Yard, “the hole.” These units sometimes were filthy, rundown, hellholes where brutality was common. Such conditions and practices made the units ripe for court intervention, which often occurred.

The “seg unit” that might have housed inmates classified as threats to the security of the institution next to other inmates serving disciplinary sanctions has, in many states, given way to a much more sophisticated type of facility: the extended control unit (ECU), a.k.a. the “supermax.” Still devoted to housing the most dangerous offenders, the ECU bears little physical resemblance to the “seg unit” of the past. It may be new,

clean, and brightly lit, with varying levels of structured programming intended to give the inmates a means of demonstrating they can be moved back to the general prison population. Nevertheless, the ECU remains a source of potentially serious litigation. The very strict controls and sterile living conditions that are inherent in the ECU concept give the administrator little constitutional margin of error.

This monograph highlights the major legal concerns associated with the ECU and offers some suggestions for addressing them. The intent of this monograph is to help “supermax” prisons operate in a way that minimizes liability in inmate litigation. However, it does not nor can it substitute for legal advice from an agency’s counsel who is familiar with both the prevailing law in a jurisdiction and the specific circumstances of the agency’s ECU that are critical to proper application of basic legal principles.

Morris L. Thigpen, Director  
National Institute of Corrections  
November 2004

# Acknowledgments

For various reasons, completing this monograph has not been an easy task. Several people deserve credit and thanks for carrying it through to completion. Chase Riveland began the effort when he asked me to contribute a legal issues chapter to his NIC monograph, *Supermax Prisons: Overview and General Considerations* (NIC, 1999). The late Susan Hunter's vision saw the need for the expanded product that you now hold.

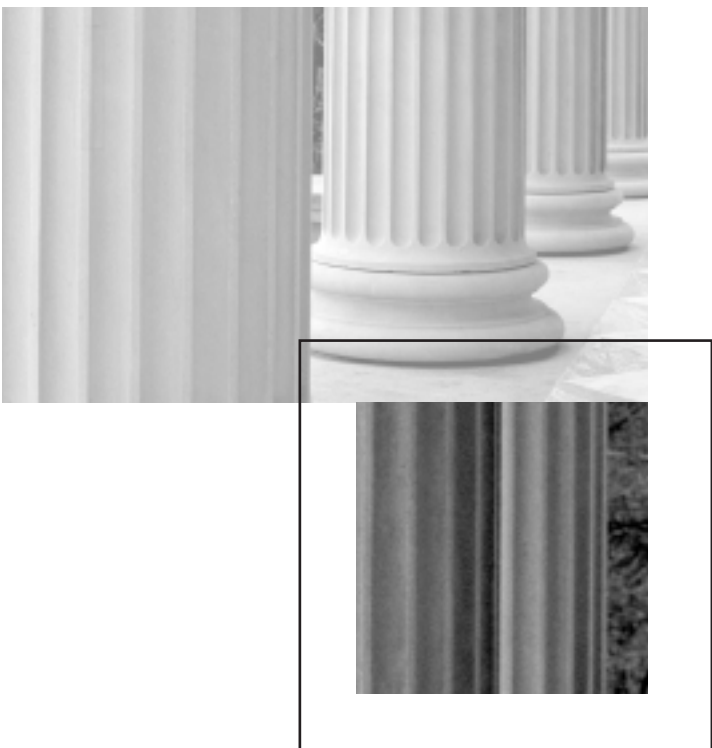
The project stumbled along the way, but Randy Corcoran at NIC invited me to pick it up again and supported the effort through to completion.

My editor, Lynn Marble, struggled to rearrange my garbled legalese into something more organized and readable.

While all of these people helped get the project through from beginning to end, any substantive errors in this work, any misstatements, any inaccurate legal analysis, remain entirely my responsibility.

Bill Collins  
November 2004

# Executive Summary



## Introduction

Extended control units (ECUs) house a prison system's most dangerous inmates. The extraordinarily high level of security in ECUs—and the restrictions that go with that security—mean that these facilities sometimes function at the limits of what is constitutionally acceptable. It is not surprising, therefore, that ECUs are the target of inmate litigation.

The purpose of this monograph is to help prisons operate ultra-high-security facilities in a way that minimizes liability in inmate litigation. The monograph covers the background of supermax prisons and related litigation, and it takes a close look at case law, prison policies and practices, and “lessons learned” in operational areas that give rise to litigation: mental health, delivery of medical services, other conditions of confinement, use of force, due process, access to the courts, and religious practices.

## Chapter 1. Background

Although known by various names, ECUs all perform essentially the same function: providing long-term segregated housing for inmates who pose the highest security risk. Placement in an ECU results from a classification decision, not a disciplinary violation, and that placement usually is for an extended period. Not all ECUs are the same, and conditions within an ECU may depend on an inmate's status in a level program for earning return to less restrictive housing. At the strictest level, ECU inmates typically live in near-total isolation and idleness. Because ECU conditions are extremely restrictive, these facilities operate on the edge of constitutionality and are, therefore, vulnerable to inmate lawsuits.

ECUs resemble traditional long-term administrative segregation units, which have been the subject of inmate litigation since the 1960s. ECU-specific case law to date is limited. The first case to capture national attention, *Madrid v. Gomez*, was a wide-ranging attack on operations at the Pelican Bay Special Housing Unit in California. In a 138-page opinion rendered in 1995, the trial judge in *Madrid* upheld the fundamental concept of the high-security unit but cataloged numerous constitutional violations and operational problems.

Case law trends suggest that mental health issues will pose the greatest legal challenges to ECUs. Other, more traditional issues include medical care, operational matters such as use of force and due process, and various conditions of confinement.

## Chapter 2. Mental Health

The prison's constitutional obligation (under the Eighth Amendment) to provide medical care—i.e., not to be deliberately indifferent to the serious medical needs of inmates—underlies the unique mental health-related issues confronting ECUs. At the heart of these issues is a basic dilemma: the level of security and control required to manage the behaviors that bring inmates to the ECU may be harmful to the mental condition of some inmates and, therefore, in violation of their constitutional rights.

Debate continues about the nature of “SHU [special housing unit] syndrome” and the extent to which conditions of isolation in the ECU may contribute to deterioration of inmates' mental health. However, there appears to be general agreement that ECUs are, to some extent, hazardous to the mental health of inmates with certain types of mental conditions. Some of these inmates should not be placed in an ECU at all, and others may require very careful monitoring in the ECU and may have to be removed from the ECU should their mental condition deteriorate. This concern suggests several preventive steps:

- **Screening criteria.** Develop criteria to screen out some inmates from admission to the ECU altogether.
- **Screening process.** Develop a process for effectively applying these screening criteria.
- **Monitoring.** Implement a process for constantly monitoring the mental status of ECU inmates and criteria for determining when transfer out of the unit is warranted.

- **Removal.** Implement a process for transferring inmates out of the ECU if they meet the monitoring system’s criteria for removal.
- **Quality assurance.** Consider developing a quality assurance system or audit process as a strategy for addressing legal challenges to screening and monitoring procedures.
- **Mental health care.** Provide ongoing diagnosis and treatment for mental health conditions. This is the “standard” level of service expected in any prison, and clearly a requirement in the ECU.
- **Staffing.** Maintain staffing levels in accordance with the services to be provided. Operating an ECU mental health program short-handed is an invitation to litigation and court intervention.
- **Medication.** Be aware of legal constraints concerning involuntary medication, and have procedures in place for medicating inmates whose serious mental illness presents a threat to themselves and others.

## Chapter 3. Medical Services

Providing medical care to ECU inmates involves operational challenges and legal concerns, although the constitutional issues are not as great as those associated with mental health. Staffing requirements for delivering medical services are likely to be greater in the ECU than in other units. Confidentiality of medical information is an issue in the ECU, especially when services are delivered at the cell front. ECUs need enough custody officers to avoid delays when inmates must be

escorted out of the unit to receive medical care. ECUs should also be aware of the custody officer’s role in the medical care delivery system and take steps to avoid inmate complaints related to that role. Finally, corrections agencies should determine how privacy regulations under the Health Insurance Portability and Accountability Act (HIPAA) may affect their ECU operations.

## Chapter 4. Other Conditions of Confinement

With regard to certain conditions of confinement (personal safety, food and clothing, shelter, sanitation, and exercise), issues in ECUs differ from issues in general population settings only as a matter of degree. The basic legal test is the same: do the conditions harm the inmate or present a serious risk of substantial harm, and are officials deliberately indifferent to that risk. The ECU’s very strict environment may increase the risk of harm to some inmates (especially the mentally ill) or for some conditions (e.g., exercise).

Intensity and duration of exposure may make defense of allegedly poor conditions more difficult in ECUs than in general prison settings. In general settings, the effects of poor conditions in cells may be mitigated if inmates are out of their cells most of the day to participate in programs, jobs, and other activities. The inmates may be exposed to the poor conditions only a few hours per day. But ECU inmates rarely leave their cells and never leave the unit; if poor conditions exist, the inmates’ exposure is constant. Whereas lack of exercise is rarely an issue for inmates in the general population, it is, to some extent, a fact of life for ECU inmates.

As noted in the *Madrid* case, conditions in modern ECUs, which remove so much of inmates' opportunity for human contact, "may press the outer bounds of what most humans can psychologically tolerate" and sometimes exceed those bounds for some inmates. This observation, and its implications for the conditions discussed in chapter 4, should be acknowledged by officials in planning and operating ECUs.

## Chapter 5. Use of Force

Use-of-force issues are bound to arise in facilities that house the most violent inmates in a prison system. Reliably detecting improper use of force and responding effectively when it occurs may be the greatest legal and management challenges in properly operating an ECU. If management lets use of force get out of hand, the consequences—patterns of abuse and a code of silence among staff—are difficult to correct.

Proactive management steps are required to ensure that ECUs avoid use of excessive force and meet the legal test courts use in evaluating force incidents. An institution should be able to defend its uses of force if it lays a proper foundation through policies, training, supervision, and documentation. Staff involved in force incidents must write accurate reports of what happened. Videotapes and post-incident medical examinations are also useful. Thorough documentation has management as well as evidentiary uses. If use of force is not properly controlled and a pattern of misuse develops—along with a code of silence among staff about incidents of abuse—management has failed.

## Chapter 6. The 14th Amendment: Due Process and Placement

Courts are uncertain as to whether placement in long-term confinement under the very restrictive conditions associated with the typical ECU imposes an atypical deprivation on an inmate and therefore requires due process protections. Until the courts speak more clearly on whether and what kind of due process is required in placement decisions, corrections agencies would be prudent to provide basic procedural protections that are likely to meet a court's requirements. Such protections also serve prison officials' own interests in having an effective placement decisionmaking process. These protections include the following:

- Notify the inmate of the proposed placement. In the notice, explain the reason for the placement.
- Give the inmate an opportunity to respond to the notice in an informal, nonadversarial meeting with officials.
- Base placement decisions on reliably determined facts. In the nonadversarial context of the placement decision, "reliably determined" focuses more on the institution's investigatory process than on resolution of factual disputes at the meeting with the inmate.
- Determine the reliability of informants and the information they provide.
- Conduct periodic reviews to determine the need for continued segregation. Give the inmate an opportunity to provide input for retention decisions.

If a corrections agency has such procedures in place, it has two choices in responding to lawsuits that claim deprivation of due process in segregation placement and retention decisions. It can argue, under the Supreme Court's 1995 decision in *Sandin v. Conner*, that no due process protections apply. Or it can point to its procedures as proof that protections were provided. Even if the courts finally agree that no due process requirements apply to these decisions, prisons will benefit from having a systematic, fair, fact-based decisionmaking process.

## Chapter 7. Access to the Courts

ECU inmates have the same fundamental right of access to the courts as other inmates. ECU inmates tend to be very litigious, and institutions should expect them to challenge any program that does not provide full access to a complete law library or extensive assistance from persons trained in the law. However, under the Supreme Court's 1996 decision in *Lewis v. Casey*, inmates must demonstrate actual injury before they can have standing to raise an access-to-courts claim.

The prison's affirmative duty is to provide some level and form of resources to support, in a meaningful way, inmates' right of access to the courts. Traditional paging systems (through which inmates request materials to be delivered to them), once generally found inadequate by the courts, may pass muster under *Lewis* if the institution can demonstrate that the system works properly. However, any library-based system does not meet the needs of inmates who cannot read English; these inmates require some form of legal advice.

In *Lewis*, the Supreme Court invites prison administrators to experiment with how they fulfill their duty to provide meaningful legal resources. Such experiments might include systems that use CD-ROM or Internet technology. Any system a prison uses to provide legal resources in the ECU is sure to be challenged at some point.

## Chapter 8. The First Amendment: Religion, Speech, and the Press

The restrictive environment of the ECU can raise First Amendment issues. In considering inmates' demands regarding religious and other types of activities, corrections officials should be aware of how the courts may review their response.

In the 1987 *Turner v. Safely* case, the Supreme Court defined a four-part test for evaluating whether a particular First Amendment restriction is justified. Institutions have not found it difficult to meet this test, which basically requires a reasonable connection between a restriction (e.g., not allowing ECU inmates to attend group religious services) and a legitimate penological interest (e.g., security). In 2000, Congress passed the Religious Land Use and Institutionalized Persons Act, which imposes a more stringent test with regard to restrictions on inmate religious practices: to justify such a restriction, an institution must show why a less restrictive alternative was not possible. In general, an institution's defense of a challenged restriction should not rely solely on an argument that a particular practice is not mandated by the inmate's faith or that the inmate's religious beliefs are not sincerely held.



## Closing Thoughts

The concept of the ECU—the “supermax prison”—is now embedded in American corrections. A major challenge for agencies that operate these facilities lies in recognizing just how many legal issues can arise and supervising operations accordingly.

The most significant issues concern inmates who are mentally ill (or whose behavior suggests they may be mentally ill). Should some inmates never be placed in an ECU? Does living in an ECU actually harm the mental status of some inmates? Where does a prison system place inmates who present a significant security risk but cannot live in an ECU?

Even setting these issues aside, ECUs may be the most difficult type of prison to operate, in that the inmates they house and the management strategies used to control them give rise to a prison system’s most concentrated, intense legal concerns. Services that are especially critical from a legal perspective—e.g., health care and access to the courts—are difficult to deliver in ECUs, and use of force is an ever-present issue.

The keys to avoiding legal pitfalls and reducing liability exposure are the same in the ECU as anywhere else in the prison system:

- An informed assessment of the needs and characteristics of the target population.
- A clearly defined mission and a comprehensive plan of operation.
- Careful development of policies and procedures, with a close eye to legal issues.
- Funding and staffing commensurate with the identified needs and mission.
- Training to promote a skillful and knowledgeable workforce.
- Perhaps most importantly: commitment on the part of supervisors and managers to ensuring humane and legal operations.

If these factors are ignored, the end result may well be intervention by the courts.

# Introduction

“Supermax” prisons—fad, trend, or wise investment?

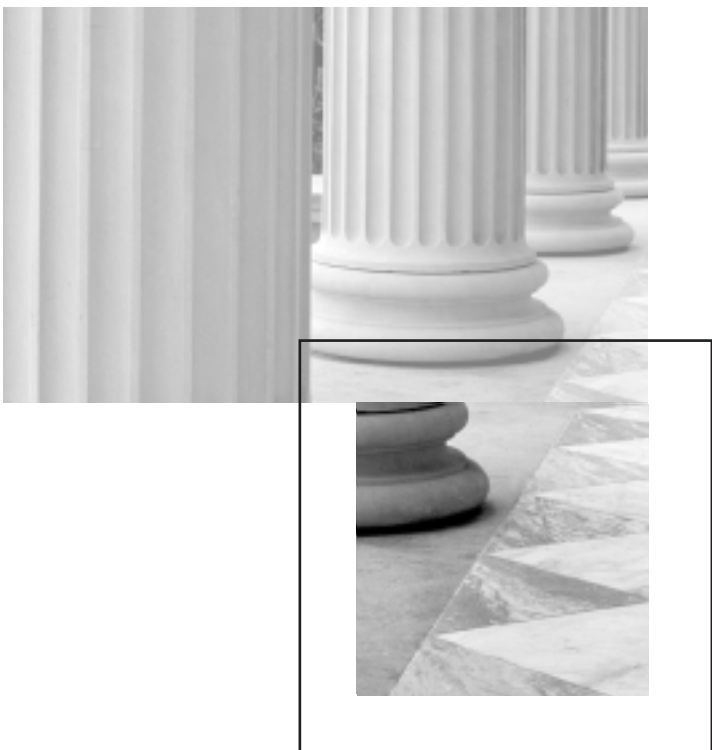
**T**hus began Chase Riveland’s earlier monograph on prisons intended to house inmates who pose a prison system’s highest security risks.<sup>1</sup>

To those words, one can add “source of litigation and controversy.”

Long before the name “supermax” was coined, prison systems maintained long-term, high-security segregation units to house inmates unsuitable for general population settings. Conditions and practices in those units have been the subject of litigation and occasionally substantial court involvement since the earliest days of the “inmate rights” movement in the late 1960s. Conditions have changed a great deal since these early cases were litigated. However, modern supermax prisons sometimes function at the limits of what is constitutionally acceptable.

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<sup>1</sup> Chase Riveland, *Supermax Prisons: Overview and General Considerations*, Washington, DC: U.S. Department of Justice, National Institute of Corrections, 1999.



Although operating models for supermax prisons vary, the extraordinarily high level of security required—and the restrictions that go with that security—mean that, even under the best of circumstances, these facilities operate very close to the edge of what the Constitution allows. Many inmates housed in supermax prisons have a volatile and dangerous nature, making violent confrontations with staff a common threat. Human rights organizations have been quick to criticize the very concept of the supermax prison.<sup>2</sup> Given these circumstances, it is not surprising that modern supermax prisons are the target of litigation, sometimes brought by one inmate over a single incident, sometimes brought by a class of inmates.

At the time of Riveland's monograph, only one major supermax case had been litigated to a conclusion. Another had been settled. As these words are written in 2004, still only a handful of major cases have been concluded, and the courts of appeal have provided virtually no direct guidance. However, it is apparent that the major issue emerging in supermax litigation relates to mental health: Are there categories of inmates who, because of their mental condition, cannot be housed in the supermax environment? Are conditions so restrictive and debilitating that they *cause* serious mental health problems for some inmates and necessitate removal from the supermax environment?

Two district court decisions discussed in the following pages have accepted both of these premises. The decisions impose screening requirements to prevent some inmates from being transferred to an ultra-high-security setting and monitoring requirements to allow for removal of

inmates whose mental state may deteriorate while they are in such a setting. Neither of these decisions has been reviewed by a court of appeals.

These holdings raise an obvious question: If some inmates who require housing at the highest level of security cannot be placed or retained in the typical supermax environment, what sort of setting can accommodate both the safety and security risks these inmates present and their serious mental health needs. The California Department of Corrections, currently under a “screening/monitoring” order because of litigation at the Pelican Bay Special Housing Unit (SHU), responded by creating psychiatric security units in its prison system.

Mental health issues aside, the volatile nature of supermax inmates and the very restrictive conditions of supermax facilities can lead to a variety of more “traditional” legal issues such as those related to delivery of basic medical care and use of force. Avoiding liability when these issues give rise to litigation requires a combination of carefully developed policies, adequate funding, and close, strong supervision of facility operations.

The purpose of this monograph is to help prisons operate ultra-high-security facilities in a way that minimizes liability in inmate litigation. The first chapter provides background information on supermax prisons and the history of litigation concerning them. Subsequent chapters take a close look at case law, prison policies and practices, and “lessons learned” in seven operational areas that raise constitutional issues for supermax facilities:

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<sup>2</sup> Roy D. King, “The Rise and Rise of Supermax: An American Solution in Search of a Problem,” *Punishment and Society* 1(2):163–184, 1999.

- Mental health.
- Delivery of medical services.
- Other conditions of confinement (personal safety, food and clothing, shelter, sanitation, and exercise).
- Use of force.
- Due process in placement/retention decisions.
- Inmate access to the courts.
- Religious practices.

# Background

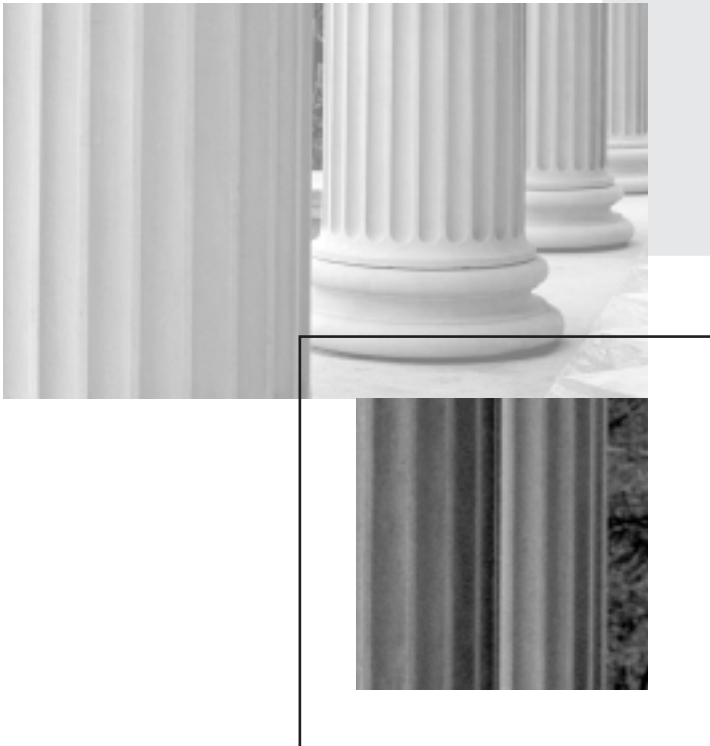
This chapter first outlines the defining characteristics of supermax facilities. It then traces the history of litigation involving long-term segregation of inmates generally and segregation in supermax facilities specifically.

## Defining the Supermax

What is a “supermax” prison? Riveland refers to the term as the “generic descriptor” for a relatively new type of maximum-security prison that is often freestanding.<sup>3</sup> The media, the public, and some corrections departments often use “supermax,” but these facilities are also known as special housing units (SHUs), special management units (SMUs), intensive management units (IMUs), or “maxi-maxis.” This monograph generally uses “extended control units” (ECUs), the name chosen by Riveland.

Regardless of what they are called, these units have basically the same function: to provide long-term, segregated housing for inmates classified as the highest security risks in a state’s prison

<sup>3</sup> Riveland, *Supermax Prisons: Overview and General Considerations*, p. 5.



system. The phrase “worst of the worst” has been used to characterize the ECU population.

In many respects, the ECU resembles the traditional long-term administrative segregation unit, which typically remains in a prison system when an ECU is introduced. The ECU takes the most challenging inmates from the administrative segregation unit. It is, in a sense, a “super” administrative segregation unit.

Placement of an inmate in an ECU generally results from a classification decision, not a disciplinary violation. The assumption underlying an ECU placement is that it will be for a relatively long time. Even in ECUs that include a program of levels or steps by which inmates can earn their way back to less restrictive housing, progress through most of the levels takes several months or longer. An inmate placed in an ECU is likely to remain there for at least 12–24 months, if not longer.

ECUs are intended to hold inmates who require the highest level of security, but the percentage of inmates who fit this category varies widely from state to state. A survey conducted by the National Institute of Corrections in 1996 found that 28 states and the Federal Bureau of Prisons had or were developing “supermax” housing as defined by the survey.<sup>4</sup> Of these 29 systems, 11 indicated that 1 percent or less of all inmates were in the supermax category, 7 indicated 5–8 percent, and 1 state said that 20 percent of its inmates required supermax housing. The survey findings raise the question of whether some jurisdictions may be

overclassifying inmates into very expensive prison beds.

All ECUs are not the same, and conditions for individual inmates within an ECU may depend on the inmate’s level of progress toward removal from the unit. Some common characteristics of ECUs at the strictest levels include the following:

- Inmates are locked up 22 to 23 hours per day.
- Inmates have very limited contact with other people—staff or other inmates.
- Exercise is limited to no more than 1 hour a day, 5 days a week.
- As few as three showers per week are allowed.
- Commissary, visiting, telephone, and library privileges are much more limited than those available to the general prison population.
- Inmates have little or no access to work, religious activity, rehabilitation, or other programs or activities to occupy time. Almost complete idleness is the norm. Any available programs or services are usually offered in the cell or at the cell front. Some facilities now offer limited programming via closed circuit TV.
- When inmates leave their cells, they are in restraints and usually are escorted by more than one officer. If an escort is unavailable, the out-of-cell opportunity may be lost.

<sup>4</sup> “. . . a free-standing facility or a distinct unit within a facility that provides for the management and secure control of inmates who have been officially designated as exhibiting violent or serious and disruptive behavior while incarcerated. Such inmates have been determined to be a threat to safety and security in traditional high-security facilities, and their behavior can be controlled only by separation, restricted movement, and limited direct access to staff and other inmates.” National Institute of Corrections (NIC), *Supermax Housing: A Survey of Current Practice*, Washington, DC: U.S. Department of Justice, NIC, 1997, p. 1.

- The opportunity to earn good time for work, program participation, or behavior is limited or eliminated.
- No TVs or radios are allowed.
- Strip searches are common.

In some ECUs, the cells have no windows. If the cell also has a solid front door, the inmate has little or no exposure to natural light. Some lighting in the cell may remain on all night. Any outdoor exercise usually takes place in a high-walled box with only the top open to the sky or in small chain-link enclosures sometimes referred to as “dog runs.” Inmates typically exercise alone, or perhaps with one other inmate.

Some ECUs now offer group therapy or discussion sessions. Each participant is placed in an individual holding unit (like a large telephone booth). The participants can talk directly to the group leader and each other without having physical access to anyone in the group.

In facilities with a level system, some restrictions may ease as an inmate progresses through the levels. Out-of-cell activities increase, and the inmate gains privileges. However, the inmate may not have to step far out of line to be returned to a lower level, and it typically takes a long time to move back up through the system’s levels.

Limitations on staff-inmate contact in ECUs vary from facility to facility, even for inmates at the most restrictive level. Some ECUs essentially isolate inmates (see sidebar, “Life at Pelican Bay”). Other ECUs, while keeping inmates locked in their cells most of the time, may encourage greater cell-front contact between staff and inmates.<sup>5</sup> As the discussion in chapter 2 demonstrates, the frequency and nature of staff contact may be an important consideration in evaluating the effect of ECU conditions on inmates’ mental health.

## Life at Pelican Bay

**P**elican Bay State Prison opened in 1989 to house California’s most serious criminal offenders. In a major case involving Pelican Bay’s SHU, the judge wrote about the extent of social isolation.<sup>a</sup> Inmates lived in single cells. Their cells had no windows, although skylights afforded some natural light. The interior was designed to reduce visual stimulation. Inmates exercised alone. Doors to the exercise area opened electronically, and inmates stripped naked in front of a control

booth. The defendants’ expert testified that the SHU “attempted to reduce physical contact between inmates and staff to the extent possible . . . .”<sup>b</sup> Another expert witness, a former federal warden, described the conditions as “virtual total deprivation, including, insofar as possible, deprivation of human contact.”<sup>c</sup>

<sup>a</sup> *Madrid v. Gomez*, 889 F. Supp. 1146 (N.D. Cal. 1995).

<sup>b</sup> *Id.* at 1229.

<sup>c</sup> *Id.* at 1230.

<sup>5</sup> NIC, *Supermax Housing: A Survey of Current Practice*, p. 4.

## Living on the Constitutional Edge: A Review of Case Law

The fact that an ECU's extremely restrictive conditions place it at the very edge of what is constitutionally permissible suggests that, with properly developed policies and procedures, it can function in a constitutionally acceptable fashion. However, if courts continue recent trends, today's ECU may inherently step over the constitutional edge with regard to mental health issues for some inmates.

### Early Litigation About Long-Term Segregated Housing

Before supermax prisons or extended control units were "invented," long-term administrative segregation units housed inmates who could not live safely in less restrictive settings. Conditions and practices in these units were the subject of some of the earliest "inmate rights" litigation.

One of the first examples of court intervention in prison operations came more than 35 years ago in a California federal district court. The 1966 case of *Jordan v. Fitzharris* arose from an inmate's confinement in a punitive segregation "strip cell"

Regardless of the name given to long-term segregation units, inmates placed in these units will challenge the living conditions and the limitations on rights and privileges.

in California's Soledad Prison.<sup>6</sup> The court summarized the conditions as being "of a shocking and debased nature [that required court intervention] to restore the primal rules of a civilized community...."<sup>7</sup> In this case, officials conceded that they disliked confining inmates in the conditions the court found shocking but did not know what else to do with inmates like the plaintiff.

Inmate litigation related to administrative segregation units continued in the 1970s and 1980s. During this period, the courts addressed issues such as religious observance, due process requirements, mental health services, and conditions of confinement.<sup>8</sup> During the 1990s, as state prison systems began to introduce ECUs, evolving case law regarding inmate rights may have changed the legal tests that courts apply in evaluating prison conditions or practices.<sup>9</sup>

Regardless of the name given to long-term segregation units, inmates placed in these units will challenge the living conditions and the limitations on rights and privileges. As the following review of ECU-specific litigation shows, the courts will intervene when they find violations of inmates' rights.

<sup>6</sup> *Jordan v. Fitzharris*, 257 F. Supp. 674 (N.D. Cal. 1966).

<sup>7</sup> *Id.* at 679.

<sup>8</sup> See *Giampetruzzi v. Malcom*, 406 F. Supp. 836 (S.D.N.Y. 1975), requiring that inmates be allowed to hold weekly religious services; *Wright v. Enomoto*, 462 F. Supp. 397 (N.D. Cal. 1976), dealing with due process requirements for placement; *Nelson v. Collins*, 455 F. Supp. 727 (M.D. Md. 1978), relating to mental health services; *Toussaint v. McCarthy*, 801 F.2d 1080 (9th Cir. 1986), dealing with due process requirements for placement and periodic review and limiting the prison master's role in overseeing placement decisions; and *Davenport v. DeRobertis*, 653 F. Supp. 649 (N.D. Ill. 1987), ordering that inmates be allowed three showers per week and 5 hours of exercise per week.

<sup>9</sup> See *Wilson v. Seiter*, 501 U.S. 294 (1991), ending the "totality of conditions" approach to analyzing conditions of confinement; and *Sandin v. Conner*, 515 U.S. 472 (1995), changing the method by which courts determine whether decisions relating to inmates are protected by due process.



## Litigation About ECUs

Reported decisions regarding conditions and practices in ECUs are few. The first case that received national attention was the 1995 *Madrid v. Gomez* decision involving the SHU at California's Pelican Bay State Prison.<sup>10</sup> In 2001, the Supermax Correctional Institution (renamed the Secure Program Facility in 2002) in Boscobel, Wisconsin, was the subject of a similar suit, *Jones'El v. Berge*.<sup>11</sup>

In mid-2003, the New Mexico Department of Corrections settled a lawsuit concerning solitary confinement for inmates at the highest custody levels. The inmates' lawyers said that the settlement "removes people with mental disorders (from solitary confinement), provides treatment and makes solitary confinement more tolerable."<sup>12</sup> The settlement also relaxed some of the stricter conditions of confinement.

Ohio litigated issues concerning its maximum-custody facility, the Ohio State Penitentiary, in a 2002 case, *Austin v. Wilkinson*.<sup>13</sup> In *Taifa v. Bayh*, litigation about conditions and practices in an Indiana extended control facility that opened in 1991 resulted in a consent decree.<sup>14</sup>

*Taifa* and *Madrid* are noteworthy in that both cases were filed within a year or so after the prisons opened, which means that the alleged problems were present in the facilities virtually from the day they opened. After a long and bitterly contested trial, the court in *Madrid* ordered relief regarding:

- Basic medical and mental health services.
- Use of force.
- Placement of certain groups of inmates in the ECU.

The court refused to grant relief regarding the procedures California used to place inmates in the facility or to remove them from it. Although the court held that conditions were constitutionally intolerable for some mentally ill inmates, it rejected plaintiffs' argument that the entire concept of the facility was inherently unconstitutional.

In *Taifa*, the defendants agreed to an order that addressed:

- Assignment to and transfer out of the unit.
- Expanded provisions for medical care.
- Mandatory psychiatric examinations for all incoming inmates.
- Policy regarding the use of force.

The *Taifa* order also dealt with other issues, including commissary privileges, access to radios and TVs, expanded visiting and phone privileges, additional reading materials and personal property, less night lighting in cells, improved bedding, increased educational opportunities, access to a substance abuse program, and improved grievance procedures.

<sup>10</sup> *Madrid v. Gomez*, 889 F. Supp. 1146 (N.D. Cal. 1995).

<sup>11</sup> *Jones'El v. Berge*, 164 F. Supp. 2d 1096 (W.D. Wisc. 2001).

<sup>12</sup> Steve Terrell, "Corrections Department Settles Prison Lawsuit," *The New Mexican*, May 22, 2003.

<sup>13</sup> *Austin v. Wilkinson*, 204 F. Supp. 2d 1024 (N.D. Ohio 2002), *affirmed in part, reversed in part*, 372 F.3d 346 (6th Cir. 2004).

<sup>14</sup> *Taifa v. Bayh*, 846 F. Supp. 723 (N.D. Ind. 1994). For a discussion of the litigation and the prison in question, see *Cold Storage: Super-Maximum Security Confinement in Indiana*, published in 1997 by Human Rights Watch, New York, NY.

*Madrid* was a sweeping attack on the operation of Pelican Bay. The complaint challenged everything from the fundamental concept of the ECU prison to a variety of operational concerns. The scope and seriousness of the lawsuit are reflected in the massive 138-page opinion the trial judge wrote. While upholding some aspects of the operation of Pelican Bay, including the fundamental concept of the unit's high-security nature, the judge commented that conditions in the facility "may press the outer bounds of what most humans can psychologically tolerate . . . ."<sup>15</sup>

Much of the *Madrid* opinion is a detailed catalog of what can go wrong with the operation of this type of prison. The opinion chronicles errors in planning, initial staffing, training, and supervision. It finds constitutional violations regarding excessive force, medical and mental health care, and conditions of confinement for some inmates.

The Wisconsin (*Jones'El*) and Ohio (*Austin*) decisions both touch on a variety of issues, but the Wisconsin case is particularly noteworthy because of its focus on problems with mentally ill inmates in ECUs—a major issue in *Madrid*. The Ohio case takes a controversial stand on the levels of due process that must be afforded inmates as part of the ECU admission process.

None of the reported decisions and settlements discussed above comes from a court of appeal. All are federal district court decisions. *Madrid*

was not appealed. (The *Austin* decision recently was largely affirmed on appeal; see discussion in chapter 6.) Given the general lack of appellate decisions, a definitive discussion of what courts

may require of ECUs is a bit speculative. However, trial court decisions to date show a trend indicative of issues likely to arise around ECUs, including the following:

- Whether inmates with certain mental illnesses must be excluded from ECU placement.
- The extent to which conditions in the ECU may cause mental illness in some inmates, and the ongoing screening

process that must exist to ensure that these inmates are removed if their mental condition deteriorates past a certain point.

- Adequacy of medical care.
- Operational issues, such as the use of force, that may be tied closely to the quality of staff training and supervision.
- Specific conditions in ECUs, such as cell lighting.

Of these issues, those regarding mental health are the most serious and are also unique to the ECU. The mental health issues raise the fundamental question of whether certain inmates can even be placed in an ECU and/or held there for an extended period of time. Other issues, such as medical care, use of force, and conditions of confinement,

Given the general lack of appellate decisions, a definitive discussion of what courts may require of ECUs is a bit speculative.

<sup>15</sup> *Madrid*, 889 F. Supp. at 1267.

are more “traditional,” in that they have long been common subjects of inmate litigation in general.

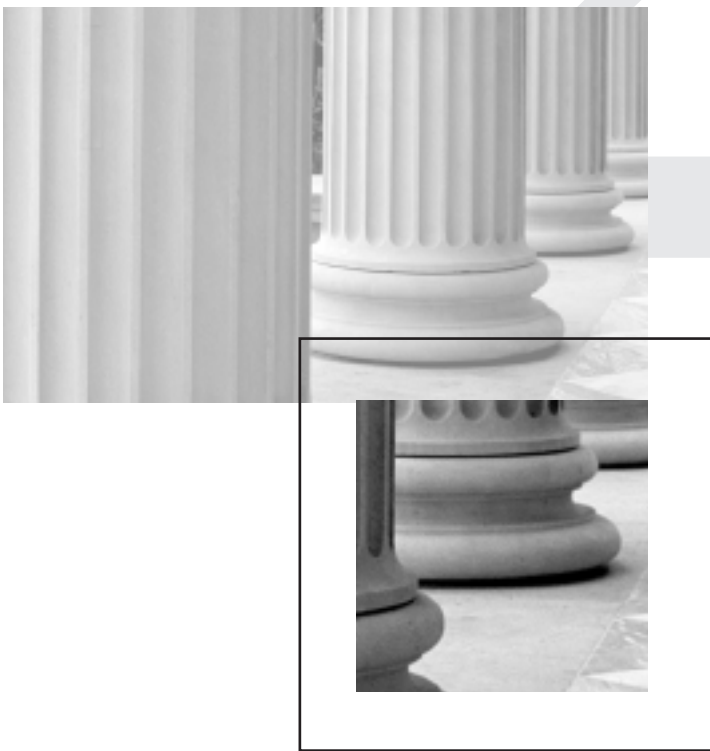

## Summary

Although known by various names, ECUs all perform essentially the same function: providing long-term segregated housing for inmates who pose the highest security risk. Placement in an ECU results from a classification decision, not a disciplinary violation, and that placement usually is for an extended period. Not all ECUs are the same, and conditions within an ECU may depend on an inmate’s status in a level program for earning return to less restrictive housing. At the strictest level, ECU inmates typically live in near-total isolation and idleness. Because ECU conditions are extremely restrictive, these facilities operate on the edge of constitutionality and are, therefore, vulnerable to inmate lawsuits.

ECUs resemble traditional long-term administrative segregation units, which have been the subject of inmate litigation since the 1960s. ECU-specific case law to date is limited. The first case to capture national attention, *Madrid v. Gomez*, was a wide-ranging attack on operations at the Pelican Bay SHU in California. In a 138-page opinion, the trial judge in *Madrid* upheld the fundamental concept of the high-security unit but cataloged numerous constitutional violations and operational problems.

Case law trends suggest that mental health issues will pose the greatest legal challenges to ECUs. Other, more traditional issues include medical care, operational matters such as use of force, and various conditions of confinement.

# Mental Health



**E**ighth Amendment issues related to mental health present unique challenges for ECUs. It may even be constitutionally impossible to keep certain inmates in the ECU, and it may not be enough for institutions simply to say “we deliver mental health care within our four walls.”

This chapter focuses on these issues. It considers the possibility that the ECU environment can actually cause an inmate’s mental health to deteriorate. It also looks at mental status as a factor in ECU placement and removal. Before turning to these specific issues, the chapter discusses general legal requirements for providing medical care to prison inmates.

## Providing Medical Care in Prisons: Guidance From the Courts

In 1976, in *Estelle v. Gamble*, the Supreme Court made it clear that the prison has a constitutional duty to provide medical care to inmates: “[O]fficials may not be deliberately indifferent to

[inmate] serious medical needs.”<sup>16</sup> This protection extends to ECU inmates. The duty from *Estelle* applies to mental health needs of inmates, as well as their physical health needs.<sup>17</sup> Although there is no unique legal test for assessing medical or mental health care in ECUs, these facilities can have unique problems in delivering adequate care.

### What Is a “Serious Medical Need”?

Courts use various definitions of “serious medical need.” These definitions are inherently subjective, and all are somewhat vague. Probably the clearest test says that a need is “serious” when a doctor or other medical professional has diagnosed a condition as “mandating treatment [or the condition is such that] even a lay person would easily recognize the necessity of a doctor’s attention.”<sup>18</sup>

But what if a medical professional has not seen an inmate to make a diagnosis, and the inmate’s condition is not obvious to a lay person? The Ninth Circuit has said a condition is serious if failure to treat it “could result in further significant injury or the unnecessary and wanton infliction of pain.”<sup>19</sup> The court elaborated:

the existence of an injury that a reasonable doctor or patient would feel important and worthy of comment or treatment, the presence of a medical condition that significantly affects an inmate’s daily activities, or the existence of chronic and substantial pain ...are examples of indications that a prisoner has a “serious” need for treatment.<sup>20</sup>

Thus, general factors relevant in defining serious medical need include the following:

- Presence of ongoing pain.
- Diagnosis by a competent medical professional.
- Threat that the condition will worsen if not treated.
- Problem obvious to a lay person.

Many physical conditions are easily categorized using one or more of these criteria. Anyone can see that a broken bone is serious. Medical professionals will usually agree on many, if not most, diagnoses. But when it comes to mental conditions, gray areas are more likely. In *The Mentally Disordered Inmate and the Law*, Fred Cohen acknowledges this and cites the following definition adopted by the Ohio Department of Corrections as part of a consent decree:

Serious mental illness means a substantial disorder of thought or mood which significantly impairs judgment, behavior, capacity to recognize reality or cope with the ordinary demands of life within the prison environment and is manifested by substantial pain or disability. Serious mental illness requires a mental diagnosis, prognosis, and treatment, as appropriate, by mental health staff.<sup>21</sup>

<sup>16</sup> *Estelle v. Gamble*, 429 U.S. 97 (1976).

<sup>17</sup> Fred Cohen, *The Mentally Disordered Inmate and the Law*, Kingston, NJ: Civic Research Institute, 1998, p. 4-3. This encyclopedic work is an excellent resource for use in analyzing legal requirements applicable to mentally ill inmates and the related practical demands on corrections agencies.

<sup>18</sup> *Hill v. DeKalb Regional Youth Detention Center*, 40 F.3d 1176 (11th Cir. 1994); *Gaudreault v. Municipality of Salem*, 923 F.2d 203 (1st Cir. 1990).

<sup>19</sup> *McGuckin v. Smith*, 974 F.2d 1050 (9th Cir. 1992).

<sup>20</sup> *Id.* at 1059–1060.

<sup>21</sup> Cohen, *The Mentally Disordered Inmate and the Law*, p. 2-6, n. 5.

Cohen also acknowledges that “there simply is not one clear definition or predictive certainty as to what is or is not a serious mental disorder...even [diagnoses like schizophrenia or bipolar disorders] are often in the eye of the beholder.”<sup>22</sup>

However, regardless of how a court chooses to define “serious,” it is safe to assume that at least some ECU inmates will have mental health problems that require professional attention.

### What Is “Deliberate Indifference”?

The concept of deliberate indifference, although somewhat vague, is clearer than the concept of serious medical need. In 1994, the Supreme Court defined “deliberate indifference” as an official’s actual knowledge of an excessive risk to the health or safety of an inmate, combined with the official’s disregard of that risk; i.e., the official fails to make some sort of reasonable response to the known risk.<sup>23</sup> Note that deliberate indifference embraces the risk of harm. Inmates need not have died or gotten sick for a court to find deliberate indifference if conditions create a substantial risk of serious harm.<sup>24</sup>

Prison officials have long recognized that physically ill or injured inmates sometimes must be treated in hospitals outside the prison. If an inmate needs treatment the prison cannot provide within its walls, not moving the inmate to the appropriate facility would clearly constitute

Not surprisingly, the types of behaviors that make placement in an ECU likely are commonly associated with mental illness.

deliberate indifference. ECU administrators might bemoan the cost of transporting an inmate to a hospital for necessary surgery and providing security while the inmate is hospitalized, but they would not argue that security concerns justify not providing the surgery or performing it in a makeshift facility in the ECU. It is becoming increasingly

clear that the same principle applies to some ECU inmates who are mentally ill: they cannot be cared for in the ECU and must be moved to an environment set up for mental health treatment.

## Mental Health Issues in the ECU

Not surprisingly, the types of behaviors that make placement in an ECU likely are commonly associated with mental illness. In the *Madrid* trial, the warden of Pelican Bay testified that “by virtue of its mission, Pelican Bay now houses most of the psychiatrically disabled inmates who have a history of violent and assaultive behavior.”<sup>25</sup> A mental health expert who testified on behalf of the defendants said that “inmates in an ECU include those with a borderline personality disorder, [who] when they’re locked up (in segregation) may have a tendency to experience some transient psychoses, which means just a brief psychosis that quickly resolves itself when they’re removed from the lockdown situation.”<sup>26</sup> A legislative audit of the Wisconsin supermax facility in Boscobel

<sup>22</sup> *Ibid.*, p. 4-33. The phrase “often in the eye of the beholder” has particular significance for litigation in which the result is heavily influenced by expert testimony.

<sup>23</sup> *Farmer v. Brennan*, 511 U.S. 825 (1994).

<sup>24</sup> *Helling v. McKinney*, 509 U.S. 2475 (1993).

<sup>25</sup> *Madrid*, 889 F. Supp. at 1215.

<sup>26</sup> *Id.* at 1216.



found that, in 2001, 15 percent of the facility's inmates suffered from mental illness, as indicated by their receiving psychotropic medications.<sup>27</sup>

An ECU is the predictable end-of-the-line setting for the inmate who acts out, creates disturbances, violates disciplinary rules, and constantly causes problems. Mental illness may contribute to this type of inappropriate, disruptive, and potentially dangerous behavior. Prisons will want to send such inmates elsewhere, to get rid of a source of trouble. This may be particularly true if the prison has limited mental health care resources and is not equipped to house inmates in segregated confinement for long periods of time. Absent some other alternative, strong pressures will develop in a prison system to transfer mentally troubled, acting-out inmates to increasingly secure facilities—a path leading inevitably to the supermax unit, if one exists.

This scenario contains a dilemma. The very environment that offers the security and control appropriate for dealing with the type of behavior such inmates exhibit may make their mental condition worse and may result in a violation of the Eighth Amendment.

### SHU Syndrome

“SHU syndrome” is a name given to what one of the concept's proponents describes as “a little known form of psychiatric decompensation” caused by conditions in the ECU unit.<sup>28</sup> The concept finds its origin in a 1983 article by Dr. Stuart Grassian, based on his examination of 14 inmates who had brought a class action regarding solitary confinement at Walpole State Prison in Massachusetts.<sup>29</sup>

In the Grassian study, each inmate was interviewed by one of two psychiatrists for approximately 30 minutes. The study included a review of the inmates' medical and confinement records but not a full clinical history. Dr. Grassian concluded that several inmates displayed one or more psychiatric symptoms. In a subsequent article,<sup>30</sup> he combined his observations at Walpole with a review of recent literature and earlier (late 19th and early 20th century) German reports on the effects of solitary confinement to define a syndrome associated with solitary confinement. This syndrome included the following symptoms:

- Massive, free-floating anxiety.
- Hyperresponsivity to external stimuli.
- Perceptual distortions and hallucinations in multiple spheres (auditory, visual, olfactory).
- Derealization experiences (surroundings seem unreal and unfamiliar).
- Difficulties with concentration and memory.
- Acute confusional states, at times associated with dissociative features, mutism, and subsequent partial amnesia for those events.
- Emergence of fantasies that are primitive, ego-dystonic (i.e., incompatible with one's self-concept), and aggressive.
- Ideas of reference (i.e., perceiving oneself as the center of attention) and persecutory ideation, at times reaching delusional proportions.

<sup>27</sup> *Jones'El*, 164 F. Supp. 2d at 1115.

<sup>28</sup> Terry A. Kupers, “The SHU Syndrome and Community Mental Health,” *Community Psychiatrist*, summer 1998.

<sup>29</sup> Stuart Grassian, “Psychopathological Effects of Solitary Confinement,” *American Journal of Psychiatry* 140:1450–1454, 1983.

<sup>30</sup> Stuart Grassian and Nancy Friedman, “Effects of Sensory Deprivation in Psychiatric Seclusion and Solitary Confinement,” *International Journal of Law and Psychiatry* 8:49–75, 1986.

- Motor excitement, often associated with sudden, violent, destructive, or self-mutilatory outbursts.
- Rapid subsidence of symptoms upon termination of isolation.

Although Grassian did not use the phrase, the syndrome he described has become known as “SHU syndrome.”<sup>31</sup>

The list of symptoms Grassian associated with the syndrome has expanded. “. . . [i]t is made up of official diagnoses such as paranoid delusional disorder, dissociative disorder, schizophrenia and panic disorder.”<sup>32</sup> “The list of the most common symptoms are the ones identified by Grassian, though Dr. Kupers [an expert on SHU syndrome] does not believe that someone with SHU syndrome must experience any of the Grassian symptoms and can experience others.”<sup>33</sup>

SHU syndrome has not been accepted in the American Psychiatric Association’s *Diagnostic and Statistical Manual of Mental Disorders—Fourth Edition (DSM–IV)*, and mental health professionals disagree as to whether it is an “accepted diagnostic classification [or] merely a

The important fact in a discussion of legal issues for ECUs is that at least two courts have specifically recognized that conditions of confinement in an ECU can lead to serious mental injury for some inmates.

concept...[, i.e.,] a set of symptoms and the existing diagnoses describe the phenomenon.”<sup>34</sup> Regardless of scientific or professional questions about SHU syndrome, however, the important fact in a discussion of legal issues for ECUs is that at least two courts have specifically recognized that conditions of confinement in an ECU can lead to serious mental injury for some inmates.

The judge in the *Madrid* case (involving the Pelican Bay SHU in California) noted the following:

Defendants’ expert Dr. Dvoskin agreed that segregation may exacerbate pre-existing mental illness and that inmates who are in acute psychiatric distress or suicidal depressions should not be placed in the SHU, absent a few “very, very rare exceptions.”

As defendants’ expert conceded, there are certain people who simply “can[no]t handle” a place like the Pelican Bay SHU. Persons at a higher risk of mentally deteriorating in the

<sup>31</sup> SHU syndrome has been the subject of a number of articles, primarily in law reviews or other law-related publications. A Google search of the Web did not reveal professional mental health literature on the topic. See Craig Haney and Mona Lynch, “Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement,” *NYU Review of Law and Social Change* 23:477, 1977; and *Comer v. Stewart*, 230 F. Supp. 2d 1016, 1025, n. 18 (D. Ariz. 2002)

<sup>32</sup> *Jones’El*, 164 F. Supp. 2d at 1096, 1101.

<sup>33</sup> *Comer*, 230 F. Supp. 2d at 1016, 1056. *Comer* involved litigation concerning an Arizona death-row inmate who wanted to abandon his legal appeals and face execution. His legal counsel challenged his competency to make this decision, arguing among other things that he was suffering from SHU syndrome. The court accepted that an inmate could suffer from the affliction, but after reviewing extensive expert testimony, decided that *Comer* did not.

<sup>34</sup> *Id.* at 1055, quoting a Federal Bureau of Prisons psychiatrist.



SHU are those who suffer from prior psychiatric problems, borderline personality disorder, brain damage or mental retardation, or an impulse-ridden personality.<sup>35</sup>

The judge in the *Jones'El* case (involving the Wisconsin SHU) was more specific:

Confinement in a supermaximum security prison such as Supermax *is known to cause severe psychiatric morbidity, disability, suffering and mortality.*

Prisoners in segregated housing units who have no history of serious mental illness and who are not prone to psychiatric decompensation (breakdown) often develop a constellation of symptoms known as “[Segregated Housing Unit] Syndrome.” Although SHU Syndrome is not an officially recognized diagnostic category, it is made up of official diagnoses such as paranoid delusional disorder, dissociative disorder, schizophrenia and panic disorder. The extremely isolating conditions in supermaximum confinement cause SHU Syndrome in relatively healthy prisoners who have histories of serious mental illness, as well as prisoners who have never suffered a breakdown in the past but are prone to break down when the stress and trauma become exceptionally severe. Many prisoners are not capable of maintaining their sanity in such an extreme and stressful environment; a high number attempt suicide.<sup>36</sup> (Emphasis added.)

Absent court decisions to the contrary, these findings in *Madrid* and *Jones'El* virtually compel the conclusion that corrections departments need effective screening procedures to prevent certain inmates from ever entering the ECU and equally effective monitoring procedures to identify ECU inmates whose mental state is deteriorating and then move them to a more appropriate environment. If a department is unwilling to accept this principle and finds itself the subject of litigation based on the concept of SHU syndrome, it must be prepared to convince the judge that its ECU environment does not have a negative impact on inmates’ mental health.

An alternative to focusing on legal defense strategies would, of course, be to design and operate the ECU in such a way as to minimize factors that arguably cause the mental deterioration that even the defendants’ expert in *Madrid* conceded took place for some inmates. This approach would require such things as reducing the level of physical and social isolation characteristic of the modern ECU—indeed perhaps restructuring the entire concept of the facility.

### Who Should Not Go to the ECU?

In *Madrid*, the court identified categories of mentally ill inmates who could not be placed in the Pelican Bay SHU. The list initially included inmates in the following categories:

- Already mentally ill.
- Borderline personality disorders.
- Brain damage.

<sup>35</sup> *Madrid*, 889 F. Supp. at 1235, 1236.

<sup>36</sup> *Jones'El*, 164 F. Supp. 2d at 1101, 1102.

- Mental retardation.
- Impulse-ridden personality.
- History of psychiatric problems or chronic depression.<sup>37</sup>

The court later modified this list after reviewing extensive work by Pelican Bay’s Special Master (court-appointed monitor) and his mental health expert, Dr. Jeffrey Metzner, who had not testified in the trial. The court deleted “borderline” and “impulse” personalities from the list and refined the remaining categories to include inmates diagnosed with:

- A mental disorder that includes being actively suicidal.
- A serious mental illness that is frequently characterized by breaks with, or perceptions of, reality that lead the individual to significant functional impairment.
- An organic brain syndrome that results in a significant functional impairment if not treated.
- A severe personality disorder that is manifested by frequent episodes of psychosis or depression and results in significant functional impairment.
- Mental retardation with significant functional impairment.<sup>38</sup>

The court later approved an “exception to the SHU exclusion process” by which an inmate with one or more exclusion factors could be returned to the SHU from a treatment unit if both of the following conditions are met:

- Clinicians provided documented evidence of repeated treatment failures, determined that further treatment would not improve the inmate’s mental health condition, and established an appropriate system for monitoring the inmate after return to the SHU.
- Corrections officials determined that security concerns precluded placement in a unit other than the SHU.

As of July 2003, Pelican Bay had not invoked this exception.<sup>39</sup>

One knowledgeable observer has defined a “Madrid Exclusion Standard” as follows:

Documented diagnosis of evidence of any of the following DSM–IV—Axis I conditions currently in existence or within the preceding three months:

1. Schizophrenia (all subtypes).
2. Delusional disorder.
3. Schizophreniform disorder.
4. Schizoaffective disorder.
5. Brief psychotic disorder.
6. Substance induced psychotic disorder (excluding intoxication and withdrawal).
7. Psychotic disorder [not otherwise specified].

<sup>37</sup> *Madrid*, 889 F. Supp. at 1265.

<sup>38</sup> *Madrid v. Gomez*, Remedial Order re: Exclusion From the Security Housing Unit, December 15, 1995, unreported.

<sup>39</sup> Author’s discussions with the Pelican Bay Special Master.

8. Major depressive disorder.
9. Bipolar disorder I or II.<sup>40</sup>

Although an ECU's particular circumstances may affect the categories or severity of problems that warrant an inmate's exclusion, the California and Wisconsin cases have two clear messages for all ECUs:

- Agencies need thoughtfully developed categories for presumptively excluding inmates from placement in the ECU on the basis of existing mental health conditions.
- Agencies need to carefully monitor the mental health condition of inmates in the ECU to determine whether the condition of a particular inmate has deteriorated to the point where the inmate must be moved to another setting.

If certain inmates' behavior warrants confinement in the ECU but their mental condition precludes placement in the ECU or demands removal from it, it stands to reason that corrections agencies will experience pressure to create psychiatric security units that can address both the security requirements and the treatment needs of these inmates. Following the *Madrid* decision, California developed such units. According to the judge in *Jones'El*, the Wisconsin Department of Corrections could transfer inmates from its

supermax prison to the Wisconsin Resource Center (operated by the Department of Health and Family Services) or to a mental health unit in

another state prison.<sup>41</sup> Inmates from the Colorado State Penitentiary (considered by the state's corrections department to be an ECU) can be transferred to a state mental hospital.<sup>42</sup> Details of what a "high-security mental health unit" should look like and how it should be operated are subjects for a future monograph.

### ECU Mental Health Lawsuits

As summarized in the sidebar "A Case Study in ECU Mental Health Litigation," the preliminary injunction hearing in the Wisconsin *Jones'El* case illus-

trates how a "typical" ECU mental health case is likely to unfold. Wisconsin had created screening and monitoring systems intended to divert mentally ill inmates from the supermax facility. Those systems were challenged, and their fate was largely determined by mental health experts who offered conflicting testimony in an adversary proceeding. Were Wisconsin's systems actually failing to operate as intended? The court clearly believed this to be the case. Or were the Wisconsin defendants simply unable to convince the court that the supermax facility was operating acceptably?

In cases such as *Jones'El*, the nature of the adversary process essentially requires the judge to

Agencies need thoughtfully developed categories for presumptively excluding inmates from placement in the ECU on the basis of existing mental health conditions.

<sup>40</sup> John Stoner, Ph.D., *Management of Violent, High Risk, and Supermax Offenders*, Washington, DC: U.S. Department of Justice, National Institute of Corrections, 2002.

<sup>41</sup> *Jones'El*, 164 F. Supp. 2d at 1102.

<sup>42</sup> Author's conversation with Dr. John Stoner, head psychologist at the Colorado State Prison.

## A Case Study in ECU Mental Health Litigation

This case study is derived from records of the preliminary injunction hearing in the Wisconsin *Jones'El* case, in which plaintiffs raised mental health-related issues about confinement in the state's supermax facility in Boscobel.<sup>a</sup>

**Screening.** The corrections department had set up a three-level mental health screening process for inmates referred to its supermax facility. The first screening took place at the sending institution, where each inmate considered for transfer to the supermax was examined by a psychologist or psychiatrist to determine whether the inmate could be safely transferred. The second screening was performed by a psychiatrist at the department level. Finally, when an inmate arrived at the supermax, he was screened again by facility mental health staff. The record indicated that some inmates had been screened out at each of the three levels.

Inmates new to the facility (and those who had failed a step of the facility's multistep program) were housed in a unit where security and restrictions were greater than in other units. These inmates were screened by a mental health specialist once a week. Other inmates were interviewed by the specialist at the cell front once a month. Mental health and unit staff reviewed inmates weekly in unit meetings. A psychologist was assigned to any inmate diagnosed as mentally ill, and the psychologist would see the inmate as often as deemed clinically necessary. Any inmate on mental health medications would also be seen by a psychiatrist and would be observed regularly by the nurse who delivered medication to the cell. Mental health staff could recommend transfer of an inmate to another facility.

This sounds like a prison system that is paying substantial attention to inmate mental health issues. But when the plaintiffs' mental health expert toured the supermax for 3 days and examined records of 20 inmates, he found that two records

lacked the initial screening report (i.e., the report that was supposed to be part of the initial referral process), one had the report completed a year after the inmate arrived at the supermax, and another had an incomplete report (it overlooked the inmate's several earlier hospitalizations for mental health reasons). These failings led the expert (and the court) to question the quality of the initial screening procedures. By contrast, however, the defendants' expert examined records of 100 supermax inmates and found the necessary screening report in all of them. He felt that the absence of reports noted by the plaintiffs' expert was not routine. The court did not accept this view.<sup>b</sup>

**Monitoring.** The monitoring program also came under severe criticism from the plaintiffs' expert, who interviewed 20 inmates as part of his 3-day tour (some chosen because they were taking psychotropic medication, some pointed out by other inmates as having mental health problems, and others selected at random) and another inmate on the telephone, after his tour. He concluded that 8 of these 21 inmates were suffering from psychiatric reactions to conditions in the supermax facility and that these 8 inmates reflected a larger, general problem throughout the facility. The court accepted his testimony over that of the defendants' expert, who offered contrary opinions, and ordered that five of the eight be transferred out of the supermax and that two others who had already been transferred not be returned to the supermax.

The court also ordered that all inmates currently in the supermax who met certain criteria be examined by mental health professionals not employed by the corrections department. If these examinations found an inmate to be seriously mentally ill, that inmate could not be housed in the supermax.

**Conflicting Diagnoses: An Example.** The plaintiffs' expert concluded that one inmate he had

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## A Case Study in ECU Mental Health Litigation (continued)

interviewed was suffering auditory hallucinations and “massive anxiety” despite strong psychiatric medication and that this inmate’s condition was attributable to the continuing stress of being in the supermax and to the facility’s lack of a mental health program.<sup>c</sup> In the interview with the expert, the inmate said he heard voices constantly commanding him to kill himself or hurt others, saw things (including demons), and thought the guards were out to get him. This inmate was taking 300 milligrams of Thorazine twice daily.

The prison’s mental health staff offered a different view. This inmate had been seen by the psychiatrist, who commented about the inmate’s “clear and crisp” thinking during an interview conducted about 4 months before the interview by the plaintiffs’ expert. Within 2 weeks of seeing the plaintiffs’ expert, the inmate told the psychiatrist that he was sleeping relatively well and that the Thorazine was helping to quiet the voices. A psychologist who had begun working with the inmate regarding the inmate’s auditory hallucinations saw

him 3 days after the expert’s interview and said the inmate told her the medication was helping him sleep.

In short, the court’s summary of testimony by the plaintiffs’ expert and the prison’s staff paints two different pictures of the same inmate. The court simply rejected the testimony from the prison staff and accepted the diagnosis of the plaintiffs’ expert, which was based on an interview (lasting no more than 75 minutes) and a review of the inmate’s chart.

This “dueling experts” process is likely to be followed in other cases and shows the importance of very credible expert testimony in this type of lawsuit. As noted earlier, psychiatric disorders are often in the eye of the beholder. Two experts examined the mental health issues at Wisconsin’s supermax facility and reached virtually opposite conclusions. The judge found the plaintiffs’ expert more convincing and adopted his opinions, which in turn determined the judge’s final decision.<sup>d</sup>

<sup>a</sup> *Jones’El v. Berge*, 164 F. Supp. 2d 1096 (W.D. Wisc. 2001).

<sup>b</sup> John W. Stoner, Ph.D., Analysis of Mental Health Services and Treatment of Mentally Ill Inmates at Supermax Correctional Institution (SMCI), Boscobel, Wisconsin (unpublished document submitted in litigation), p. 36.

<sup>c</sup> *Jones’El*, 164 F. Supp. 2d at 1109.

<sup>d</sup> A similar battle of experts was played out in *Comer v. Stewart*, 230 F. Supp. 2d 1016 (D. Ariz. 2002), but the issues focused on the mental status of just one inmate. In *Comer*, the judge was convinced by testimony that the inmate was not mentally ill, rejecting the opinions of the same expert whose testimony convinced the *Jones’El* judge to find in favor of the plaintiffs.

credit the testimony of one of two conflicting expert witnesses. Which one the judge chooses determines the result of the case. As the *Jones’El* case study shows, even occasional failures to comply with policy may be taken as indicative of chronic, systemic failures. Diagnoses and assessments of inmates by facility treatment staff, based on months or years of work with a patient, are likely to be contradicted by an expert who, based on a short interview and a review of patient

records, may characterize inmates as suffering from SHU syndrome caused by conditions of confinement.

Trying to determine very complicated, technical issues such as the mental health condition of large numbers of inmates and the causes of such conditions through “dueling experts” in the courtroom is a risky, uncertain business. It is not science. It

is not peer review or sophisticated quality assurance by a group of disinterested mental health professionals.

When it comes to ECU mental health issues, a corrections department may be in the strongest legal position if it incorporates some form of ongoing quality assurance reviews into its standard operating procedures. Such procedures become even more credible if they draw on professionals from outside the department. Quality assurance reviews can serve two purposes: (1) alerting the department to problems as they develop, so deficiencies can be corrected; and (2) providing a credible, nonadversarial-based source of information about the operation of the ECU.

### Transferring Inmates for Mental Health Treatment

Simply transferring a prison inmate to a mental health treatment facility triggers due process protections under a 1980 Supreme Court decision.<sup>43</sup>

In *Vitek v. Jones*, which concerned the transfer of a prisoner from a Nebraska state prison to a mental hospital, the Court said that as part of such a transfer decision, the inmate was entitled to a hearing that included more procedural protections than would be required in a disciplinary hearing. Notably, the inmate had a right to “qualified and independent assistance” (but not necessarily a lawyer) and the right to cross-examine witnesses. The model the Court adopted for the transfer hearing is similar to that

required for a parole revocation. The Court did not require a hearing in emergency situations or when a transfer is simply for a clinical evaluation.

Several factors were of significance to the Court in *Vitek*. The Court considered that the transfer under review was to an agency and institution outside the jurisdiction of the state department of corrections, that such a transfer imposed a stigma on the inmate, and that the transfer exposed the inmate to a mandatory program of behavior modification.

When it comes to ECU mental health issues, a corrections department may be in the strongest legal position if it incorporates some form of ongoing quality assurance reviews into its standard operating procedures.

The *Vitek* decision left several substantial questions unanswered. Unfortunately, relatively little litigation has come forth in the aftermath of *Vitek* to answer these questions.<sup>44</sup> The most obvious question is whether *Vitek* applies when the transfer is not to a mental hospital run by the state’s mental health agency but to a mental health treatment unit located in another institution run by the corrections department. What if the transfer is simply to a mental health unit in the same

prison? In *The Mentally Disordered Inmate and the Law*, Cohen argues that *Vitek* should apply under such circumstances but recognizes that, in practice, it frequently is not observed.<sup>45</sup> Among other questions Cohen notes are what criteria should be used in deciding to transfer an inmate for mental health treatment and what the burden of proof should be in the transfer hearing.

<sup>43</sup> *Vitek v. Jones*, 445 U.S. 480 (1980).

<sup>44</sup> For a lengthier discussion of *Vitek* and inmate mental health issues generally, see Cohen, *The Mentally Disordered Inmate and the Law*.

<sup>45</sup> *Ibid.*, p. 17-10



The implications and application of *Vitek* are complex, and a detailed discussion is beyond the scope of this monograph. Suffice it to say that corrections agencies operating ECUs should seek legal advice on the meaning of *Vitek* for mental health-based transfers.

### Involuntary Medication

The involuntary medication of inmates whose serious mental illness makes them a threat to themselves and others raises a different set of issues. Unless an ECU can very quickly transfer an inmate to a mental health treatment facility, it needs to have procedures in place that address these issues. Even if transfers are the primary means of dealing with serious mental illness, the ECU still may need to medicate an inmate if an emergency arises while a transfer request is in process.

Inmates have a constitutionally protected right to refuse treatment, but that right can be overcome when, because of a mental disorder, an inmate poses a danger to himself or others. The treatment decision must be made by a medical professional and must be in the inmate's best interest medically; except in emergency situations (i.e., the inmate poses an imminent threat), involuntary treatment can only be administered after a hearing, somewhat resembling a disciplinary hearing.<sup>46</sup>

Medication can never be given involuntarily for punishment. Absent the circumstances discussed in the previous paragraph, medication cannot be given involuntarily simply to control behavior.

Inmates have a constitutionally protected right to refuse treatment, but that right can be overcome when, because of a mental disorder, an inmate poses a danger to himself or others.

## Summary

The prison's constitutional obligation (under the Eighth Amendment) to provide medical care—i.e., not to be deliberately indifferent to the serious medical needs of inmates—underlies the unique mental health-related issues confronting ECUs. At the heart of these issues is a basic dilemma: the level of security and control required to manage the behaviors that bring inmates to the

ECU may be harmful to the mental condition of some inmates and, therefore, in violation of their constitutional rights.

Debate continues about the nature of “SHU syndrome” and the extent to which conditions of isolation in the ECU may contribute to deterioration of inmates' mental health. However, there appears to be general agreement that ECUs are, to some extent, hazardous to the mental health of inmates with certain types of mental conditions. Some of these inmates should not be placed in an ECU at all, and others may require very careful monitoring in the ECU and may have to be removed from the ECU should their mental condition deteriorate. This concern suggests several preventive steps:

- **Screening criteria.** Develop criteria to screen out some inmates from admission to the ECU altogether. The limited current case law suggests that such criteria should be somewhat similar to those in *Madrid*.
- **Screening process.** Develop a process for effectively applying these screening criteria.

<sup>46</sup> *Washington v. Harper*, 494 U.S. 210 (1990).

Wisconsin corrections officials had developed a screening tool, but the court was very critical of how the tool was applied. Should an agency attempt to rely entirely on a standardized screening instrument? Or should it combine standardized screening with professional examination, at one or more levels, of each inmate considered for transfer to the ECU, together with a final examination at admission? The best approach has yet to be defined.

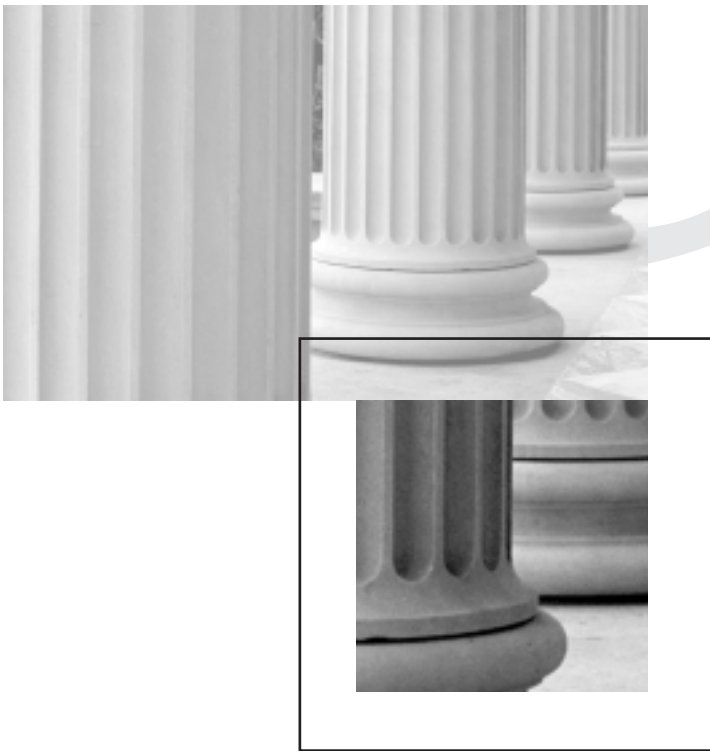
- **Monitoring.** Implement a process for constantly monitoring the mental status of ECU inmates and criteria for determining when transfer out of the unit is warranted. Wisconsin attempted to do this, but the court characterized its efforts as “little more than band-aids to the potentially detrimental conditions to which defendants are subjecting mentally ill inmates.”<sup>47</sup>
- **Removal.** Implement a process for transferring inmates out of the ECU if they meet the monitoring system’s criteria for removal. This requires, among other things, a place to send such inmates. Agencies should seek legal advice on whether a *Vitek* hearing must accompany such transfer decisions.
- **Quality assurance.** Consider developing a quality assurance system or audit process as a strategy for addressing legal challenges to screening and monitoring procedures. Wisconsin’s litigation experience suggests the wisdom of this approach. A reviewing court may find such efforts more credible if they involve persons from outside the corrections department.
- **Mental health care.** Provide ongoing diagnosis and treatment for mental health conditions. This is the “standard” level of service expected in any prison, and clearly a requirement in the ECU.
- **Staffing.** Maintain staffing levels in accordance with the services to be provided. Operating an ECU mental health program short-handed is an invitation to litigation and court intervention.
- **Medication.** Be aware of legal constraints concerning involuntary medication, and have procedures in place for medicating inmates whose serious mental illness presents a threat to themselves and others.

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<sup>47</sup> *Jones’El*, 164 F. Supp. 2d at 1122.



# Medical Services



**P**roviding medical services to ECU inmates does not involve issues comparable to the unique mental health-related concerns discussed in chapter 2. However, operational and legal problems certainly come up. The extreme security requirements of the ECU can make delivery of medical services cumbersome and may lead to delays in providing care. Moreover, some ECU inmates are likely to demand medical attention because, if nothing else, sick call gives them someone to talk to. Some inmates in long-term segregation are likely to be very litigious, and they may include medical care in their complaints.

This chapter discusses the challenges of delivering medical services in the ECU environment, with emphasis on aspects of medical care likely to be challenged in inmate lawsuits. The context for the discussion is the traditional “deliberate indifference to serious medical needs” test, reviewed at the beginning of chapter 2.

## Staffing

This consideration is an obvious one. Because delivering medical services is more cumbersome in ECUs than in units with less stringent security, it simply may take more people to provide a comparable level of service. Thus, the number of qualified medical personnel in the ECU is a potentially serious issue.

A three-step analysis can help institutions address confidentiality issues that arise in interviewing, diagnosing, and treating ECU inmate patients.

Concerns about the confidentiality of medical information arise as services are delivered at the cell front. The *Doe* case, cited in footnote 49, indicates how a right to privacy could be violated. An HIV-positive inmate alleged that medical staff told escort staff that the inmate was HIV-positive; that discussions in the doctor's office took place with the office door open, so officers and inmates could hear what was said; and that nurses

administering medications spoke loudly enough that others could hear what medication the inmate was getting and infer that he was HIV-positive.

## Confidentiality Issues

By delivering medical services at the cell, ECUs can reduce costs and security concerns associated with moving inmates to see medical providers. As Riveland notes, most ECUs provide triage medical services either at the cell front or in exam rooms within the unit; additional services might be provided through telemedicine (using telecommunications technology).<sup>48</sup> The more services the ECU provides at the cell front or within the living unit, the greater the importance of ensuring not only that proper equipment and necessary medical records are available but also that adequate precautions exist to protect the privacy of inmate patients. Although courts disagree about the existence of a constitutionally based right to privacy that protects inmate medical records and information, the trend indicates that such a right exists.<sup>49</sup>

The court held that the allegations in *Doe* were sufficient to state a claim but that further proceedings were necessary to determine whether the institution could defend any of the practices in question (assuming that the allegations about them were proven) by showing they were justified by a legitimate penological interest.<sup>50</sup> For instance, did security concerns justify conducting medical interviews between doctor and patient in rooms with the doors open?

Situations similar to those alleged in *Doe* could easily arise in an ECU unit. A medical provider conducting sick call or other interviews at the cell front might have to speak so loudly that custody staff or other inmates could hear the conversation.

<sup>48</sup> Riveland, *Supermax Prisons: Overview and General Considerations*, p. 11.

<sup>49</sup> *Doe v. Wigginton*, 21 F.3d 733 (6th Cir. 1994), holds that no right to privacy exists regarding disclosure of an inmate's HIV status. However, see *Doe v. Delie*, 257 F.3d 309 (3d Cir. 2001), which finds a right to privacy subject to limitation based on conflicting legitimate penological interests and reviews court decisions on the question; and *Powell v. Schriver*, 175 F.3d 107 (2d Cir. 1999).

<sup>50</sup> The court applied the test for evaluating conflicts between inmate rights and competing institutional interests that comes from *Turner v. Safely*, 482 U.S. 78 (1987). The test is commonly used in a variety of situations and is generally not difficult for institution officials to meet. See chapter 8 for details of the *Turner* test.

The doors of the ECU's medical exam room might be left open because of security concerns, allowing persons outside the room to hear what would otherwise be confidential discussions.

A three-step analysis can help institutions address confidentiality issues that arise in interviewing, diagnosing, and treating ECU inmate patients:

(1) with the assistance of counsel, determine

whether inmates have a protected legal right with regard to traditionally confidential medical information; (2) if they do, then determine ways in which that right may be breached in the actual delivery of medical services to ECU inmates; and (3) decide whether such breaches are justified by legitimate penological interests.

## Service Delays

Only limited medical diagnosis and treatment can be performed at the cell front or in the living unit. Inmates often have to be moved either to a clinic in the prison or to an offsite medical provider. These moves require two or three staff to escort the shackled inmate to the medical provider. Sometimes escorts can be scheduled in advance, but situations requiring escorts may arise with little or no notice.

Although prisons have some leeway in scheduling medical care, delays can become the subject of a "deliberate indifference to serious medical need" claim. The key question in such cases is what *effects* the delay had on the inmate. If a condition gets worse or the inmate is in prolonged pain

because of the delay, the institution is more vulnerable to liability.

Delays based on a desire to save money can be questionable.<sup>51</sup> Funding shortages can mean staffing shortages, which in turn can lead to chronic delays in providing escorts for medical visits. Custody staffing needs to be sufficient to handle routine, scheduled visits as well as emer-

gencies. Staff shortages would not justify neglecting the prison's duty to provide medical care, when those shortages result in adverse effects on inmates' medical condition.

## Role of the Custody Officer

ECUs should not overlook the custody officer's role in the unit's system for delivering medical care. Access to the medical system often begins when the inmate gives a request (a "kite") to the officer.

Inmates commonly claim, correctly or not, that officers intentionally lose or delay kites as a means of harassment or that officers read medical kites and breach confidentiality (see confidentiality discussion earlier in this chapter). Allowing inmates to drop medical kites into a locked box where they will be collected by medical staff can eliminate most arguments over confidentiality and "lost" kites.

ECU medical staff can take further steps to reduce concerns that custody officers are impeding access to medical care. Medical staff can make and document routine rounds within the

Staff shortages would not justify neglecting the prison's duty to provide medical care, when those shortages result in adverse effects on inmates' medical condition.

<sup>51</sup> *Taylor v. Barnett*, 104 F. Supp. 2d 483 (E.D. Va. 2000).

living unit, check with inmates who have known medical problems, and give other inmates opportunities to discuss medical concerns.

Custody officers can provide valuable feedback to medical and mental health providers regarding the condition of inmates. By including custody officers in periodic medical/mental health staff reviews of inmate/patient progress, health-care providers can gain valuable information they might not otherwise have. Such communication with custody staff may be an example of how sharing some otherwise confidential information about an inmate's medical or mental health condition with nonmedical staff may be justified by a legitimate penological interest.

## Health Insurance Portability and Accountability Act (HIPAA)

The provisions of HIPAA have resulted in three sets of regulations from the U.S. Department of Health and Human Services. The first set<sup>52</sup> deals with transactions, code sets, and identifiers, i.e., standardized means of identifying such things as diagnostic information and health-care providers. The second set<sup>53</sup> covers privacy of medical information. The third set<sup>54</sup> deals with security of protected health-care information. The second set of regulations, relating to privacy, promises to be the most problematic for ECUs.

The critical threshold question with the HIPAA privacy regulations is whether they even apply to corrections agencies. Because this question

concerns the entire agency, not just a single institution or unit within the agency, it is outside the scope of this monograph. Suffice it to say that the rules apply to a health-care provider (and other types of health organizations) engaging in the electronic transmission of certain types of "transaction" information.<sup>55</sup> Note that two requirements must be met: the "health care provider" criteria and engaging in the electronic transmission of transaction information. "Transactions" relate primarily to financial matters, such as payment and remittance.

### Permission To Share Medical Information

If a corrections agency and an ECU within it are "covered entities," the HIPAA privacy regulations impose several requirements. The most significant pertain to circumstances under which "protected health-care information" (which is not limited to electronically transmitted information) can be shared. The general rule is that, except for limited purposes, such information cannot be shared without the patient's specific permission.

A major exception to the disclosure permission rule exempts corrections agencies from the rule when they certify that disclosure is necessary for providing health care to the inmate, for ensuring the health and safety of other inmates and staff, and for other similar reasons.<sup>56</sup> This general exception also applies to covered entities that provide medical care to inmates but are not part of the corrections agency or institution, such as outside hospitals.

Because a hospital outside the prison system focuses on HIPAA requirements for the general

<sup>52</sup> 45 C.F.R. § 162.1000.

<sup>53</sup> *Id.* Parts 160 and 164.

<sup>54</sup> *Id.* Parts 160, 162, 164.

<sup>55</sup> *Id.* § 160.103.

<sup>56</sup> *Id.* § 164.512(k)(5).

public, it may overlook the disclosure permission exception for corrections facilities. Thus, prisons should clarify HIPAA requirements with outside providers. Otherwise, if the prison calls the hospital to check on the status of “Inmate Jones,” the hospital may respond that “we cannot confirm the presence of an ‘Inmate Jones’ in our hospital.”

In general, the HIPAA privacy regulations are complicated and have been the source of substantial uncertainty and confusion.

### Implications for ECUs

In general, the HIPAA privacy regulations are complicated and have been the source of substantial uncertainty and confusion. ECU inmates may or may not discover the regulations and, for example, begin to demand access to their medical records. Regardless, corrections agencies need to examine the HIPAA regulations; determine the extent to

which they apply to agency operations in general and the ECU in particular; and, if the regulations apply, determine what policies and procedures are needed to ensure compliance.

### Access to Medical Records

The HIPAA privacy regulations contain other provisions that are not subject to such a broad exception. For example, the subject of a medical record has a right under the regulations to examine the record and request corrections. (This right does not apply to psychotherapy notes.<sup>57</sup>) Such requests can be denied if disclosure of the record would jeopardize “the health, safety, security, custody or rehabilitation of the individual or of other inmates, or the safety of any officer....”<sup>58</sup> Prisons probably must make these denials on a case-by-case basis, as blanket denial of all requests would be inconsistent with the intent of the regulation.

Under the HIPAA regulations, an inmate whose request for access to records is denied must have the opportunity to have that decision reviewed. However, no such right exists for inmates if “obtaining [a] copy would jeopardize the health, safety, security, custody, or rehabilitation of the inmate or other inmates, or the safety of any officer, employee, or other person at the correctional institution or responsible for the transporting of the inmate.”<sup>59</sup>

## Summary

Providing medical care to ECU inmates involves operational challenges and legal concerns, although the constitutional issues are not as great as those associated with mental health. Staffing requirements for delivering medical services are likely to be greater in the ECU than in other units. Confidentiality of medical information is an issue in the ECU, especially when services are delivered at the cell front. ECUs need enough custody officers to avoid delays when inmates must be escorted out of the unit to receive medical care. ECUs should also be aware of the custody officer’s role in the medical care delivery system and take steps to avoid inmate complaints related to that role. Finally, corrections agencies should determine how privacy regulations under HIPAA may affect their ECU operations.

<sup>57</sup> *Id.* § 164.524(a)(1)(ii).

<sup>58</sup> *Id.* § 164.524(a)(2)(ii).

<sup>59</sup> *Id.*

# 4 Other Conditions of Confinement

**C**onstitutional requirements regarding conditions of confinement apply, of course, to living conditions in ECUs. As noted earlier, litigation about conditions of confinement in long-term segregation units is nothing new.

This chapter first discusses how the courts analyze conditions of confinement. It then looks at operational and legal aspects of specific conditions: personal safety, food, clothing, shelter, sanitation, and exercise. (Mental and medical health care are discussed separately, in chapters 2 and 3.)

## How Courts Analyze Conditions of Confinement

Courts analyze conditions of confinement under the cruel and unusual punishment clause of the Eighth Amendment. In this context, the Eighth Amendment has two prongs: (1) objective (the adequacy of conditions that affect inmates' basic human needs) and (2) subjective (the defendant administrators' state of mind—are they “deliberately indifferent” to problems regarding inmates' basic human needs?).<sup>60</sup> To find an Eighth

<sup>60</sup> *Wilson*, 501 U.S. 294.





Amendment violation, the court must decide against the defendant on both prongs.

### Objective Analysis

How serious must a condition affecting a basic human need be before it runs afoul of the objective prong of the Eighth Amendment? In reviewing a particular condition, a court will ask whether the condition is actually harming inmates or presents a substantial risk of serious harm.<sup>61</sup>

The basic human needs issues most commonly subjected to judicial scrutiny relate to the following:

- Medical and mental health care (discussed in chapters 2 and 3).
- Personal safety.
- Food (the general adequacy of the diet and whether food is served in a way that does not pose a risk to inmate health).
- Clothing.
- Shelter (the overall living environment, including heating, cooling, ventilation, lighting, noise levels, and other factors).
- Sanitation.
- Exercise, including outdoor exercise.

### Subjective Analysis

In deciding whether officials have been deliberately indifferent to a particular problem or set of problems, a court must determine whether the

officials knew of the problem and the risk it presented and disregarded that risk by failing to take reasonable measures to abate it.<sup>62</sup> It is no longer sufficient for plaintiffs to show that officials “should have known” about a risk—actual knowledge is required. Actual knowledge can be inferred from circumstantial evidence.

The actual knowledge inquiry is probably less important in a class action case involving conditions than in a lawsuit brought by an individual inmate complaining of a particular incident or situation. Prison administrators are far more likely to be aware of general problems targeted in a class action than the problems of an individual inmate.

### No “Totality of Conditions” Test

In the past, courts reviewed the “totality” of conditions when considering cases that claimed Eighth Amendment violations. However, the totality approach was rejected in 1991 by the Supreme Court in *Wilson v. Seiter*,<sup>63</sup> which concerned conditions in an Ohio prison. Although earlier Supreme Court case law could be read as approving a totality approach, *Wilson* flatly rejected this approach, saying instead that conditions relating to basic human needs (the list above) should generally be analyzed independently of one another.

*Wilson* does permit conditions to be analyzed together if together they relate to a single basic human need. Thus, inadequate clothing and poor heating might properly be considered together, as could poor sanitation practices and the preparation of food.

<sup>61</sup> *Helling* at 25.

<sup>62</sup> *Farmer*, 511 U.S. 825.

<sup>63</sup> *Wilson*, 501 U.S. 294.

## Basic Human Needs

### Personal Safety

Personal safety normally should not be a major concern in the ECU, where inmates are locked down almost constantly and kept under very close supervision at other times. However, the “by definition” high risk attributed to inmates in the ECU means that when inmate-on-inmate assaults take place, litigation and perhaps liability may not be far behind.

**The courts speak.** In one case, an inmate in a high-security unit got out of his cell and assaulted other inmates who were watching television in the unit’s dayroom. Notably, the court deferred to the prison officials’ decision to place the assailant in the unit as evidence that he presented an excessive risk to other inmates. This satisfied the first (objective) prong of the Eighth Amendment; in other words, placement in the high-security unit defined the inmate as dangerous. As to the subjective (deliberate indifference) prong, the court found that a corrections officer, by actions that allowed the inmate to get out of the cell, showed reckless disregard for the risk posed by the inmate. Result: judgment for the plaintiffs, the injured inmates.<sup>64</sup>

A somewhat similar case had a different result. A dangerous inmate in a special management unit assaulted another inmate in the unit. Evidence at trial showed that a corrections sergeant failed to follow various security policies in the unit and knew that the assailant was dangerous and did not

Double-celling in an ECU compromises the security that otherwise defines the unit’s operation and may be difficult to justify if it leads to an inmate assault.

like the victim. The corrections department subsequently fired the sergeant for gross negligence. The district court was extremely critical of the sergeant’s actions. However, on appeal, a \$40,000 judgment for the injured inmate was reversed because the court held that the sergeant did not have actual knowledge that the assailant posed a serious risk of harm *to the victim*. A general knowledge of the assailant’s

dangerous propensities was not enough.<sup>65</sup>

Although these conflicting decisions from appellate courts deliver an uncertain message, some conclusions seem warranted:

- The courts may regard inmates in ECUs as presumptively dangerous.
- Inmate-on-inmate assaults in ECUs, where inmates have virtually no direct contact with one another, strongly indicate that a breach of procedure occurred and will be the springboard for victims to argue that staff were deliberately indifferent to the risk presented by inmates. (Note that this argument could be made if members of rival gangs known to be at odds with one another were allowed contact in the ECU.)

**Double-celling.** Double-celling inmates in an ECU because of crowding or other factors creates potential problems. If an inmate is assaulted by a cellmate, the victim could argue that (1) only high-risk inmates are placed in the unit and (2) if these inmates are so dangerous that they cannot

<sup>64</sup> *Newman v. Holmes*, 122 F.3d 650 (8th Cir. 1997).

<sup>65</sup> *Rich v. Bruce*, 129 F.3d 336 (4th Cir. 1997).



exercise together, must be in restraints outside the cell, and must generally be kept separate from one another, *any* double-celling creates a serious risk. Various rebuttals are possible, notably that officials' careful screening indicated that the two specific inmates involved in the case were compatible and could be double celled. The inquiry might then focus on how carefully cell assignments were actually made or on whether staff failed to monitor the two cellmates well enough to notice they were not getting along.

Double-celling in an ECU compromises the security that otherwise defines the unit's operation and may be difficult to justify if it leads to an inmate assault. If double-celling is routine in the ECU, prisons must carefully select cell partners and monitor how well they get along.

### Food and Clothing

Food and clothing should not present major problems for ECUs. In general, units must provide a nutritionally adequate diet, prepared and served in a manner that does not present serious health risks. Clothing should be generally adequate to maintain the inmate's privacy and appropriate to temperature conditions in the unit.

**Nutraloaf.** One food-related issue that may arise more in the ECU than in the general population relates to the use of "nutraloaf," a food loaf prepared from a variety of nutritionally balanced ingredients and served without utensils. Nutraloaf is unappetizing and unattractive, but courts have generally upheld its use—at least in response to food-related misbehavior, such as throwing food at officers or refusing to return trays or utensils. In *LeMaire v. Maass*,<sup>66</sup> an exceptionally notorious and dangerous inmate housed for years in the

segregation unit of the Oregon State Penitentiary sued over several issues, including nutraloaf. The court of appeals noted that the loaf actually provided an excess of nutritional requirements (LeMaire had gained weight on it), precluding a finding that feeding it to inmates violated the objective prong of the Eighth Amendment.

In *LeMaire*, the court did issue an injunction directing officials to follow their own rules that said nutraloaf could be used only as a response to inmate abuse of food and could be fed to an inmate for no more than 7 days at a time. (Because the court found that nutraloaf did not deprive the inmate of an adequate diet, the legal basis for the injunction was not clear.)

A nutraloaf that does not provide adequate nutrition could raise a possible Eighth Amendment issue, perhaps depending in part on how long an inmate had to eat it. The injunction in the Oregon case suggests that a court may have concerns if the loaf is served for punitive reasons unrelated to abuse of food. A nutraloaf might raise First Amendment (freedom of religion) issues if, for example, it contains pork and is served to inmates who do not eat pork because of their religious beliefs.

**Warm clothing.** In *Davidson v. Scully*, an inmate plaintiff housed in an upstate New York ECU alleged that inmates were issued only summer-weight clothing and shared lightweight jackets. In granting a preliminary injunction requiring prison officials to provide warmer clothing, the judge found that by providing only light clothing, officials were effectively denying inmates outdoor exercise during the winter.<sup>67</sup>

<sup>66</sup> *LeMaire v. Maass*, 12 F.3d 1444 (9th Cir. 1993).

<sup>67</sup> *Davidson v. Scully*, 914 F. Supp. 1011 (S.D.N.Y. 1996).

## Shelter

Shelter issues may arise in the ECU, depending largely on the age of the facility. Shelter encompasses the overall physical environment of the unit, including lighting, heating, cooling, ventilation, noise, fire safety, and access to hygiene materials (e.g., toilet paper) and hot and cold running water. Examples of shelter-related litigation are highlighted below.

**Lighting.** The usual claim has to do with inadequate lighting or natural light in the cell. A different issue can arise in ECUs that leave some light on in the cell all night to facilitate security checks. Inmates claim that the constant light disturbs their sleep.

Lighting was an issue in the Wisconsin case (*Jones'El v. Berge*) discussed in the chapter on mental health issues. Inmates could turn their cell lights from high to low, but not off. Even at low, the light was bright enough to read by. Testimony convinced the court that the constant lighting was particularly disorienting to inmates with serious mental illness.<sup>68</sup> In the settlement that followed the court's preliminary injunction, the defendants agreed to lower the nighttime lighting levels in the cells.<sup>69</sup>

The obvious lesson from *Jones'El* is that officials should examine (1) whether constant nighttime lighting is needed in the ECU and (2) how intense the lighting must be to serve its purpose. Are sleeping inmates less disturbed by nightlights or

by a flashlight occasionally shining on them as officers make rounds?

**Severe deprivation.** In another case, concerning the conditions of confinement at Oklahoma State Penitentiary, an ECU inmate alleged that he was stripped of his clothing and placed in a cell without a mattress, blankets, or bedding and with minimal toilet paper, no hot water, and inadequate ventilation. Nighttime temperatures in the cell dropped to the mid-50s. The inmate alleged that these conditions lasted perhaps weeks or months. The allegations were serious enough to warrant a full trial.<sup>70</sup>

Conditions that threaten the health of inmates can be the basis for a finding of cruel and unusual punishment.

**Multiple issues.** In 1996, an inmate at the Cook County Jail in Illinois alleged chronic pest infestations in his living unit—claiming that roaches were everywhere and that roaches and mice frequently ran across him at night—and stated a claim under the Eighth Amendment.<sup>71</sup> This case also included allegations that lighting in the inmate's living unit was so weak that reading hurt

his eyes; the court said that the lighting problem was sufficient to preclude dismissal of the issue and warrant further factual inquiry into the allegations.

## Sanitation

Often closely related to shelter and/or food, sanitation issues are fairly straightforward. Conditions that threaten the health of inmates can be the basis for a finding of cruel and unusual punishment.

<sup>68</sup> *Jones'El*, 164 F. Supp. 2d at 1118.

<sup>69</sup> *Freeman v. Berge*, 68 Fed. Appx. 738, 2003 WL 21462603 (7th Cir. 2003).

<sup>70</sup> *Mitchell v. Maynard*, 80 F.3d 1433 (10th Cir. 1996).

<sup>71</sup> *Antonelli v. Sheahan*, 81 F.3d 1422 (7th Cir. 1996).

A dilemma may arise for prison administrators in dealing with inmates who “foul their own nest” by smearing feces on walls, throwing urine, stopping up toilets to flood cell blocks, etc., and then refuse to clean the mess they have created. Officials may feel that cleaning up behind the inmates in such cases means giving up power to the inmates. If the dispute that led to the disruptive behavior is not resolved, the inmates may repeat the behavior as soon as the first mess has been cleaned up. That said, the thought of leaving an inmate in a feces-smear cell for a prolonged time, even if the inmate was responsible for the mess, is troublesome. The inmate’s mental status would certainly be relevant in considering how long such a standoff could be acceptable.

In general, courts will consider exposure to human waste to be a major deprivation of a basic human need and will not tolerate such exposure for long.<sup>72</sup> Offering cleaning supplies to an inmate who has soiled his own cell may defeat an Eighth Amendment claim.<sup>73</sup>

When the unsanitary condition threatens the health of inmates not directly involved in creation of the condition, clearly some sort of early remedial intervention is appropriate, at least on behalf of the noninvolved inmates. When the risk extends only to the inmate(s) who created the problem, greater leeway may be permitted. In the *LeMaire* case discussed earlier in this chapter (see “Food and Clothing”), the inmate who protested

Courts have discussed exercise-related issues for years, but the case law is unclear.

the use of nutraloaf in his diet also protested officials’ denying him out-of-cell exercise for years. The court said that officials, who denied the inmate exercise on the basis of his dangerous behavior, were not deliberately indifferent to his exercise needs and that the inmate held the key to his cell through his own behavior.

Prudence suggests that at some point, regardless of inmate behavior, officials should intervene to correct sanitation hazards, even though inmates may recreate the problem almost immediately. Close monitoring of the situation, ongoing risk assessments with input from medical and mental health experts, attempts to limit the inmate’s ability to create the problem (see earlier discussion of nutraloaf), and periodic cleanup will help officials show that they were not deliberately indifferent to the problem, should it arise in litigation.

### Exercise

Inmate exercise presents unique concerns for ECUs. In the general prison environment, where inmates are out of their cells for substantial periods during the day and typically have frequent access to exercise areas (if not to the latest equipment), concerns about exercise virtually never reach constitutional significance (there is no right to free weights). By contrast, in a unit where inmates have very limited opportunities to exercise outside the cells, the lack of exercise—and sometimes the lack of outdoor exercise specifically—can become of constitutional significance.

<sup>72</sup> *DeSpain v. Uphoff*, 264 F.3d 965, 974 (10th Cir. 2001); in *Johnson v. Pelker*, 891 F.2d 136, 139 (7th Cir. 1989), the court found that 3 days in a cell with feces smeared on walls was not within “civilized standards, humanity, and decency”).

<sup>73</sup> *McBride v. Deer*, 240 F.3d 1287 (10th Cir. (Okla.) 2001); *Chambers v. Riveland*, 189 F.3d 472, 1999 WL 595366 (9th Cir. 1999, unpublished).

Courts have discussed exercise-related issues for years, but the case law is unclear. Two 1997 decisions from appellate courts—*Thomas v. Ramos* and *May v. Baldwin*—indicate the vague parameters of the right to exercise:

Lack of exercise may rise to a constitutional violation in certain limited circumstances “where movement is denied and muscles are allowed to atrophy [and] the health of the individual is threatened.”<sup>74</sup>

Although exercise is “one of the basic human necessities protected by the Eighth Amendment” a temporary denial of outdoor exercise with no medical effects is not a substantial deprivation . . . a long-term deprivation of exercise is a denial of a basic human need in violation of the Eighth Amendment . . . the deprivation of outdoor exercise for a “period of years” contravenes the Eighth Amendment.<sup>75</sup>

These decisions suggest that a lack-of-exercise claim depends on the facts and requires the inmate to show some injury or substantial threat of harm from what probably would have to be an extended denial of exercise. Other courts have not been so demanding. For example, in the 1996 *Davidson v. Scully* case (discussed in the section on clothing), the court’s preliminary injunction required officials to provide inmates with heavy coats lest they be denied the right of outdoor exercise during the upstate New York winter; however, the case does not address how long the inmates were likely to go without outdoor

exercise if they lacked heavy coats, the effects of not being able to exercise outdoors, or whether the inmates could exercise indoors.

Earlier decisions from the Seventh Circuit indicate that short-term denial of exercise does not constitute a violation of the Eighth Amendment. In *Harris v. Fleming*, the court found no violation because an inmate who was denied yard time for 4 weeks could exercise in his cell for that brief period.<sup>76</sup> In *Caldwell v. Miller*, the court found no violation where an inmate was confined to his cell 24 hours a day and denied all outside and indoor exercise privileges for a month, followed by a 6-month confinement for 23 hours a day with 1 hour of daily indoor exercise.<sup>77</sup>

In extreme circumstances, courts have approved even relatively long deprivations of exercise. In *LeMaire*, the inmate had been denied exercise outside his cell (and hence outdoors) for most of a 5-year period. Prison officials could show that the inmate abused outdoor exercise opportunities when they were granted and that he was a very serious security/assault risk any time he was out of his cell. (For example, he once engaged in an armed attack on two correctional officers as he was leaving the outdoor exercise area.) The court found that, under these circumstances, the officials were not deliberately indifferent to the inmate’s exercise needs. Although the inmate arguably won the objective prong of his Eighth Amendment claim, he lost on the subjective “state of mind” prong and hence lost the overall claim.

In *LeMaire*, it was important to the Ninth Circuit that the inmate controlled his own destiny. If he demonstrated a willingness to follow the prison’s

<sup>74</sup> *Thomas v. Ramos*, 130 F.3d 754 (7th Cir. 1997), internal citations omitted.

<sup>75</sup> *May v. Baldwin*, 109 F.3d 557 (9th Cir. 1997), internal citations omitted.

<sup>76</sup> *Harris v. Fleming*, 39 F.2d 1232 (7th Cir. 1988).

<sup>77</sup> *Caldwell v. Miller*, 790 F.2d 589, 601 (7th Cir. 1986).

rules, he would regain access to exercise and other privileges he had lost because of his violent and threatening behavior.<sup>78</sup>

Whereas courts over the years have been reluctant to find that in-cell exercise is sufficient, *LeMaire* notes favorably that the inmate could exercise in his cell, as do *Harris* and, more recently, *Thomas*. However, these cases should not be interpreted to mean that the courts generally approved denying inmates regular out-of-cell exercise because they can do situps and pushups in their cells.

The courts have hedged somewhat with regard to the right to exercise and the specific right to exercise outdoors a certain number of hours per day and days per week. Although denial of all out-of-cell exercise for days or weeks (or even years in the most extreme circumstances) may be defensible, the presumption in designing and operating ECUs should be that inmates will be allowed to exercise outside their cells several hours per week and that some exercise will take place outdoors. If these privileges are suspended, documenting the reasons may prove important. (As noted in footnote 78, officials in *LeMaire* thoroughly documented the inmate's behavior and their response over the years, and the documentation played an important role in winning the case.)

## Summary

With regard to certain conditions of confinement (personal safety, food and clothing, shelter, sanitation, and exercise), issues in ECUs differ from

issues in general population settings only as a matter of degree. The basic legal test is the same: do the conditions harm the inmate or present a serious risk of substantial harm, and are officials deliberately indifferent to that risk. The ECU's very strict environment may increase the risk of harm to some inmates (especially the mentally ill) or for some conditions (e.g., exercise).

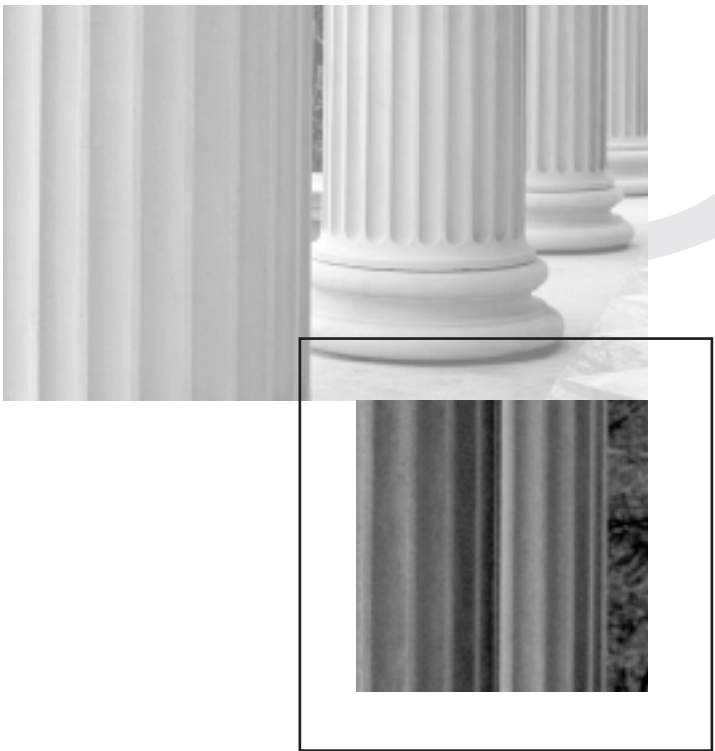
Intensity and duration of exposure may make defense of allegedly poor conditions more difficult in ECUs than in general prison settings. In general settings, the effects of poor conditions in cells may be mitigated if inmates are out of their cells most of the day to participate in programs, jobs, and other activities. The inmates may be exposed to the poor conditions only a few hours per day. But ECU inmates rarely leave their cells and never leave the unit; if poor conditions exist, the inmates' exposure is constant. Whereas lack of exercise is rarely an issue for inmates in the general population, it is, to some extent, a fact of life for ECU inmates.

As noted in the *Madrid* case, conditions in modern ECUs, which remove so much of inmates' opportunity for human contact, "may press the outer bounds of what most humans can psychologically tolerate" and sometimes exceed those bounds for some inmates.<sup>79</sup> This observation, and its implications for the conditions discussed in this chapter, should be acknowledged by officials in planning and operating ECUs.

<sup>78</sup> A major caveat about *LeMaire*: Inmate LeMaire's behavior showed him to be *extremely* dangerous, and corrections officials carefully documented his behavior and their responses to it. The holdings in the case should not be read as applying to all inmates in long-term segregation.

<sup>79</sup> *Madrid*, 889 F. Supp. at 1267.

# 5 Use of Force



**B**ecause the ECU holds the most violent inmates in a prison system, use of force will be common. The high level of security in the ECU demands that officers have physical contact with inmates—conducting pat or strip searches and applying restraints—virtually every time the inmates leave their cells. In some jurisdictions, all escorts are done “hands on.”<sup>80</sup>

In addition, the volatile nature of the ECU population means that corrections staff will need to perform cell extractions, address self-destructive behavior, and deal with combative, resistive inmates. Some inmates may try to instigate incidents just to relieve the tedium of their environment. All of these situations may require the use of force, sometimes at high levels, usually involving specially trained response teams. Depending on agency policy, officers may have access to batons, chemical agents, tasers, stun guns, and other weapons up to and including firearms.

This chapter examines use of force in the unique context of the ECU. It discusses factors that may contribute to use of excessive force, reviews legal

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<sup>80</sup> Riveland, *Supermax Prisons: Overview and General Considerations*, p. 15.



tests for evaluating force incidents, and suggests ways of avoiding improper use of force.

## Excessive Force: Some Contributing Factors

In the author's opinion and experience, the ECU environment can create pressures that push officers to use more force than is needed to manage an immediate threat. Some inmates taunt officers verbally and may actually assault officers, spit on them, or throw feces, urine, or other substances on them. The frequency of officers' necessary hands-on contact with inmates, the combative nature of at least some inmates, and the offensive behavior to which officers are subjected can create a climate for retaliatory use of excessive force.

Officers may feel that very swift, harsh use of force demonstrates their power, underscores their control of the unit, and deters any forceful reaction by inmates.

Proper supervision can prevent abusive use of force. Without a firm supervisory presence, use of excessive force can become the accepted, "normal" way of doing business—the "culture" of the facility or unit. This culture of excessive force at California's Pelican Bay facility—and attempts to cover up the related practices—were important elements of the *Madrid* case.<sup>81</sup>

Ironically, an institution's formal disciplinary system may be another factor contributing to the use

of excessive force in the ECU. Available sanctions typically include loss of privileges, placement in segregation, or removal/denial of good time credits. ECU inmates have few privileges to lose and are already locked in the most secure facility available (making segregation a largely moot point). Many have little or no good time credits to remove or are serving such long sentences that tinkering with a release date is of little immediate importance. Thus, staff may see traditional disciplinary actions as not providing

an adequate response or an effective deterrent to serious misbehavior in the ECU. If correctional officers perceive the formal disciplinary system to be ineffective, they may be more inclined to take matters into their own hands and feel justified in doing so.

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## Use of Force: The Legal Test and Its Application in *Madrid*

In *Hudson v. McMillian*, concerning correctional officers' use of force at the Louisiana State Penitentiary at Angola, the Supreme Court defined the legal standard for evaluating use of force in a corrections context: "whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm."<sup>82</sup> The courts apply the same standard for ECUs as for any other corrections setting. *Hudson* requires the courts to consider five factors:

<sup>81</sup> See *Madrid*, 889 F. Supp. at 1159–2000 and 1247–1255. The court found that a "pattern of needless and officially sanctioned brutality had invaded operations at Pelican Bay" (889 F. Supp. at 1255).

<sup>82</sup> *Hudson v. McMillian*, 503 U.S. 1 (1992).

- The need for the use of force.
- The amount of force used, in relation to the need.
- The extent of any injuries.
- Whether the threat was reasonable, as perceived by responsible corrections officials.
- Whether any efforts were made to temper the severity of a forceful response.

*Madrid* provides an example of the kinds of force conditions the courts will not tolerate under this test. The court found that Pelican Bay ECU staff were using abusive, unconstitutional levels of force against inmates and that a code of silence made it very difficult for a staff member to report an improper use of force or for the agency to hold officers accountable. Examples of excessive force included staff assaults on inmates; frequent use of “fetal restraints” (hog-tying), often for essentially punitive purposes; and frequent use of lethal force (i.e., firearms). Excessive force in cell extractions was common.

The *Madrid* opinion shows that fundamental management problems lay beneath the abusive uses of force at Pelican Bay. Policies were not clear and consistent enough to provide meaningful guidance to staff. The absence of clear written guidelines led to different interpretations and statements of policy by midlevel supervisors. Training at times was inconsistent with policies.

Pelican Bay also lacked active supervision and review of force incidents. Written reports tended to be very general and were routinely accepted.

The court found that officials would “turn a blind eye” when reports suggested the need for more followup.<sup>83</sup> Some force incidents led to internal affairs investigations, but the court found “that while the Internal Affairs Division goes through the necessary motions, it is invariably a counterfeited investigation pursued with one outcome in mind: to avoid finding officer misconduct as often as possible.”<sup>84</sup> The court also criticized the lack of supervision in the common use of lethal force (firearms). The *Madrid* court eventually concluded that not only were officials deliberately indifferent to use-of-force problems, but there was “an affirmative management strategy to permit the use of excessive force for the purposes of punishment and deterrence.”<sup>85</sup>

## Avoiding Use of Excessive Force

It is tempting to dismiss *Madrid* as an isolated situation—“that wouldn’t happen here.” However, the author’s experience has shown that the conditions present in many segregation units (inmate behavioral disorders, limitation of inmates’ personal freedoms, and antagonistic relationships between staff and inmates, etc.) are fertile ground for such outcomes. Rather than saying “that wouldn’t happen here,” perhaps the better approach is to assume that “it can easily happen here, unless we take proactive steps to prevent it.”

The problems agencies experience in dealing with high-risk inmates make it obvious that managing these inmates requires comprehensive needs assessment, thorough planning, and funding commensurate with staffing and training requirements. But the best planning and preparation are

<sup>83</sup> *Madrid*, 889 F. Supp. at 1187.

<sup>84</sup> *Id.* at 1192.

<sup>85</sup> *Id.* at 1187.



wasted without firm and consistent supervision of operations. Correctional officers assigned to the most dangerous group of inmates in a prison system are unlikely to treat them with kid gloves.

Even if a facility requires training in subject control, monitoring, and accountability, the benefits of that training can be lost if the “culture” of the facility embraces force as a tool for punishment.

Once abuse of inmates and a code of silence become part of the ECU staff culture, they are difficult to eradicate. Strong supervision—beginning at the first-level supervisor and extending to the warden—is required to prevent unconstitutional levels of force in the ECU. The sidebar “Basic Requirements for Avoiding Use of Excessive Force” summarizes important considerations for administrators and managers in developing an ECU operation that meets constitutional standards with regard to use of force.

In considering use-of-force policies and practices, officials should keep in mind that inmate plaintiffs may not even have to show extreme levels of excessive force to win a class action suit. The Eighth Amendment also requires prison officials to protect inmates from violence at the hands of other inmates. In a case that involved inmate-on-inmate violence at a Wyoming State Penitentiary, the plaintiffs won simply by showing that officials (including the warden and the agency director) consistently failed to review incidents to determine causes and consider corrective action. These failures led the court to conclude that officials

were deliberately indifferent to safety risks, and the court found an Eighth Amendment violation.<sup>86</sup> Similar reasoning could be applied in litigation about improper use of force.

Once abuse of inmates and a code of silence become part of the ECU staff culture, they are difficult to eradicate.

## Tools for Control, Oversight, and Documentation

The “malicious and sadistic” legal test that courts use in evaluating force claims is not a difficult one for institution officials to meet. It tends to give the benefit of the doubt to officials. However, absent a relatively incontrovertible record of what took place in a force incident, the trier of fact must

decide what actually happened on subjective grounds. Who should be believed—the officers (“only necessary force was used”) or the inmate (“I hadn’t done anything, and they hit me and kicked me coming back from my medical visit”)? It is especially troubling for defendants to lose a use-of-force case because a jury concludes that officers were lying when in fact they were not. The more objective evidence an institution can produce to show what happened, the less the case may turn on “he said—they said” evidentiary conflicts and the less likely a force claim will be lost simply because a jury chose to believe the inmate instead of the officers.

Two simple steps can produce objective evidence for defending force claims: videotaping incidents and conducting post-incident medical examinations. Both steps serve other important purposes as well.

<sup>86</sup> *Skinner v. Uphoff*, 234 F. Supp. 2d 1208 (D. Wy. 2002).

## Basic Requirements for Avoiding Use of Excessive Force

- Clear, comprehensive policies governing the use of force, including alternatives to use of force, when force is appropriate, required warnings, proper types of force, when special weapons may be used, and required reports.
- Training for officers and supervisors about what is expected of them with regard to use of force. Training should include interpersonal skills and verbal strategies for managing difficult inmates; without these elements, it may be difficult to show “efforts to temper” use of force, as required in *Hudson*. Training that is limited to special weapons, chemicals, and equipment sends a strong message to staff, inmates, and the courts about how the agency intends to manage difficult inmates.
- Reporting requirements. Written reports for each use-of-force incident must be clear and accurate. Reports that use boilerplate language or just state conclusions (“only necessary force was used”) do not describe what happened and may imply that officers collaborated to “cover their tracks.”
- Active, aggressive review of use-of-force incidents. Reviews should involve all levels of supervision, including the central office, and should ensure that policies were followed, the use of force was justified, the circumstances necessitating force were beyond the staff’s ability to control or avoid, and the level of force was appropriate. The review should also ensure that immediate remedial action is taken if problems are noted. Feedback should be provided to staff by conducting incident debriefings, identifying areas for improvement, and providing training as needed.

### Videotaping

Because an ECU is such a controlled environment, most force incidents will develop slowly, allowing for a controlled response. For example, a cell extraction in the ECU is a much more controllable event than a spontaneous riot in the general population dining hall. The relatively controlled environment in the ECU should make it possible to videotape most force incidents, providing a clear record of what took place. Videotaping can also deter the inmate who wants to provoke a violent confrontation and the staff member who tends to use excessive force when the opportunity presents itself.

In a cell extraction situation, a handheld video-camera can be used to record officers’ warnings and the inmate’s response. In some types of force

incidents, however, it may not be possible to bring a handheld camera to record what happens. By equipping an ECU with general security cameras that operate constantly and tape common areas, spontaneously developing force incidents can be captured on tape. Such cameras may not provide the detailed record that could be obtained with a handheld camera, but they can at least record some visual evidence of what took place.

Videotapes of force incidents also provide administrators with a clear record of what happened, facilitating evaluation for management purposes. In addition, videotaping also makes it more difficult for officers to whitewash improper use of force by falsifying reports and covering for one another.

### Post-Incident Medical Examinations

Conducting a medical examination promptly after a force incident provides another useful evaluative tool for managers and the courts. The examination should be conducted by someone who was not directly involved in the incident and is not a member of the custody staff. Examination results can provide reliable documentation as to the extent of injuries sustained by inmates and staff. (If injuries are minor or absent, courts tend to excuse other problems with a use of force.)


### Summary

Use-of-force issues are bound to arise in facilities that house the most violent inmates in a prison system. Reliably detecting improper use of force and responding effectively when it occurs may be the greatest legal and management challenges in properly operating an ECU. If management lets

use of force get out of hand, the consequences—patterns of abuse and a code of silence among staff—are difficult to correct.

Proactive management steps are required to ensure that ECUs avoid use of excessive force and meet the legal test courts use in evaluating force incidents. An institution should be able to defend its uses of force if it lays a proper foundation through policies, training, supervision, and documentation. Staff involved in force incidents must write accurate reports of what happened. Videotapes and post-incident medical examinations are also useful. Thorough documentation has both management and evidentiary uses. If use of force is not properly controlled and a pattern of misuse develops—along with a code of silence among staff about incidents of abuse—management has failed.

# The 14th Amendment: Due Process and Placement



The due process clause of the 14th Amendment presents four of the most basic legal issues affecting operations of ECUs:

- Must some form of procedural due process accompany the decision to place an inmate in the ECU?
- If so, what form of process is due?
- Must periodic status reviews be conducted to validate an inmate's continued retention in the ECU?
- If so, what form should these reviews take?

This chapter reviews case law related to due process requirements for ECUs and considers both legal and policy implications associated with due process procedures. The review indicates judicial uncertainty about whether due process applies to the initial placement decision but general agreement that some form of periodic review is necessary, although the courts have provided little guidance about what form the review should take. Note that the discussion focuses on *process*,

i.e., what *procedures* must be followed in making placement and retention decisions. Before turning to the legal issues, however, the chapter addresses some basic operational concerns.

## Operational Concerns

Legal considerations aside, corrections managers have strong interests in how decisions about admission, review, and release are made. To the extent that placement or release decisions rely on inaccurate facts or poor judgment, inmates will be incorrectly classified into or out of an ECU. Thus, the process for making these decisions must be grounded in reliable factual information as the basis for sound predictive judgments. In his monograph on supermax prisons, Riveland recommends that placement decisions be an “integral part of the agency’s classification process” and based on criteria that are “clearly articulated [and] non-ambiguous.”<sup>87</sup>

Pressures will always exist to send troublesome inmates to an ECU and keep them there. Unless the keepers of the keys to both the front and back doors of the ECU make their decisions carefully, the unit can quickly fill to capacity, with very little turnover. When this happens, the unit becomes less useful to the prison system, and pressures build to create additional (expensive) ECU bed space. Riveland again:

It would be prudent to have the final authority for approving admission to, retention in, and release from an extended control unit rest at the highest levels of the organization. This would preclude—or minimize—potential

abuse of the policy criteria for admission and release . . . .<sup>88</sup>

An ECU may bring with it a sort of *Field of Dreams* prophecy: “If you build it, they will come.” Unless officials design a careful screening process, this prophecy is likely to come true as the ECU quickly fills to and beyond capacity with inmates other institutions want to get rid of. The goals of such a screening process and the concerns the goals address are very similar to those of procedural due process (see sidebar “Avoiding Arbitrary Decisions”). However, a court’s approach to addressing these concerns may differ from the process a corrections manager might select.

### Avoiding Arbitrary Decisions

The goal of procedural due process is to ensure that decisions affecting the life, liberty, or property of an individual are made fairly, on a sound factual basis “to protect the individual against the arbitrary actions of government.”\*

\**Wolff v. McDonnell*, 418 U.S. 539 (1974).

### Due Process, Segregation, and ECU Placement

Due process issues are not new for segregation units. More than 20 years ago, due process issues were addressed at the Pennsylvania State Correctional Institution at Huntingdon. The Supreme Court said in *Hewitt v. Helms* that the language of regulations and policies governing the placement decision could create a “liberty interest” triggering minimal due process protections around the placement of an inmate in administrative

<sup>87</sup> Riveland, *Supermax Prisons: Overview and General Considerations*, p. 8.

<sup>88</sup> *Ibid.*, p. 9.

segregation, even though the 14th Amendment itself does not inherently provide any protections.<sup>89</sup> The Court also said that the 14th Amendment requires periodic reviews of segregation status, although the Court did not indicate how frequently such reviews should take place.

What is new in the due process arena is the question of *what* process is due an inmate who is proposed for ECU placement. Highlighting the newness of this issue is the 2004 decision from the Sixth Circuit Court of Appeals in *Austin v. Wilkinson*.<sup>90</sup> Many thought that two earlier Supreme Court decisions had answered the “what process is due” question—and the answer was either “none” or “very little.” *Austin* instead finds that inmates proposed for ECU placement are due a process similar to that followed for a major disciplinary hearing.

The Sixth Circuit’s 2004 decision distinguishes the facts in *Austin* from those in the Supreme Court’s 1983 decision in *Hewitt v. Helms*<sup>91</sup> and its 1995 decision in *Sandin v. Conner*.<sup>92</sup> Together, these two cases suggested that no due process protections might apply to the ECU placement decisions but, if they did, they would be truly minimal (e.g., notice of the proposed decision and an opportunity for the inmate to respond to the decisionmaker either in person or via a written statement).

*Hewitt* dealt with the decision to place an inmate in administrative segregation. Although the facts of the case involved a placement of relatively short duration, the decision in no way suggests that the length of time an inmate might spend in

administrative segregation determined the Court’s holding. In *Hewitt*, the Court said that the 14th Amendment does not provide any inherent protections for inmates with regard to placement decisions. The Court also said, however, that this finding did not end the question of whether any due process protections applied. The state could create “liberty interests” by adopting rules and regulations that placed “substantive limitations” on the otherwise unlimited discretionary powers of the official making the decision. If such limitations existed, the Court said, they resulted in a “state created liberty interest.”

The Court went on in *Hewitt* to find that the administrative segregation placement rules the Pennsylvania Department of Corrections had adopted did create a liberty interest around the placement decision. Therefore, said the Court, the inmate

must merely receive some notice of the charges against him and an opportunity to present his views to the prison official charged with deciding whether to transfer him to administrative segregation. Ordinarily, a written statement by the inmate will accomplish this purpose, although prison administrators may find it more useful to permit oral presentations in cases where they believe a written statement will be ineffective.”<sup>93</sup>

In *Hewitt*, the Court refused to apply the due process rules it had applied a few years earlier (in *Wolff v. McDonnell*) for inmate disciplinary

<sup>89</sup> *Hewitt v. Helms*, 459 U.S. 460 (1983).

<sup>90</sup> *Austin v. Wilkinson*, 372 F.3d 346 (6th Cir. 2004).

<sup>91</sup> *Hewitt v. Helms*, 459 U.S. 460 (1983).

<sup>92</sup> *Sandin v. Conner*, 515 U.S. 472 (1995).

<sup>93</sup> *Hewitt*, 459 U.S. at 476.



hearings,<sup>94</sup> despite the similarities between disciplinary and administrative segregation. The Court felt the administrative segregation decision was predictive and very judgmental, in contrast to a disciplinary hearing decision, and that the administrative segregation decisionmaking process might even be “hindered” by proceedings that are more elaborate.<sup>95</sup>

A dozen years after *Hewitt*, the Court reexamined in *Sandin* its language-focused “state created liberty interests” test and decided the test was ill advised because, among other things, it might actually discourage officials from adopting rules to guide and structure discretionary judgments. In place of the state-created liberty interest rule, the Court adopted a new test that said due process protections would apply to a particular decision if the decision resulted in an “atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.”<sup>96</sup> Looking at the facts in the *Sandin* case, the Court said that placing an inmate in disciplinary segregation for 30 days did not impose an atypical hardship, so no due process protections were required for such a decision.

Does placing an inmate in an ECU—a prison system’s most restrictive housing environment—impose an atypical hardship where a 30-day placement in disciplinary segregation does not? The Sixth Circuit’s 2004 *Austin* decision says that it does. In reaching this conclusion, the court compared conditions in the Ohio State Penitentiary ECU to those in Ohio’s general prison

population settings and/or to conditions in the state’s administrative segregation units. Under either comparison, the court decided, the ECU conditions met the “atypical” test. The court also decided that because such a small percentage of the total Ohio prison population ever lived in the ECU, conditions there were virtually by definition not “ordinary” under the *Sandin* test.

The 2004 *Austin* decision is not the only time a court of appeals considered whether long-term segregation crosses over into “atypical” country—although it may be the first time the question has been considered in the specific context of an ECU, as opposed to more traditional long-term administrative segregation. Some results from other courts differ from those in *Austin*. Some courts have said that if an inmate is in a status that is within the legal range of custodial confinement allowed under state laws, the status cannot be atypical.<sup>97</sup> Under this approach, ECU placement would not trigger due process protections as state law typically gives the department of corrections complete discretion to place inmates in any institution under its control, be it honor camp or ECU.

Other courts have taken the same general approach taken by the *Austin* court in that they compared conditions in the ECU with other, more common conditions in the prison system and also considered duration of the ECU placement.<sup>98</sup> Most recently, the court in *Colon v. Howard* (a 2000 case cited in footnote 98) used this approach and ruled that 305 days in ECU segregation at an

<sup>94</sup> *Wolff v. McDonnell*, 418 U.S. 539 (1974).

<sup>95</sup> *Hewitt*, 459 U.S. at 474, n. 7.

<sup>96</sup> *Sandin*, 515 U.S. at 472, 484.

<sup>97</sup> Cases that at least appear to embrace this approach include *Luken v. Scott*, 71 F.3d 192 (5th Cir. 1995); *Talley v. Hesse*, 91 F.3d 1411 (10th Cir. 1996); *Griffin v. Vaughn*, 112 F.3d 703 (3d Cir. 1997); and *Fraise v. Terhune*, 283 F.3d 506 (3d Cir. 2002).

<sup>98</sup> *Gotcher v. Woods*, 66 F.3d 1097 (9th Cir. 1995), *vacated on other grounds*, 117 S. Ct. 1840 (1997); *Hemphill v. Delo*, 105 F.3d 391 (8th Cir. 1997); *Sealey v. Geltner*, 116 F.3d 47 (2d Cir. 1997); and *Colon v. Howard*, 215 F.3d 227 (2d Cir. 2000).

upstate New York correctional facility amounted to an atypical deprivation.

It is not surprising that courts would regard ECU placement—with its typically long duration, very strict conditions, and limited privileges—as an atypical deprivation, compared to the ordinary conditions of prison life. The ECU environment is certainly much harsher than the setting in which the general prison population lives. Not all courts have taken this position, however; eventually, the Supreme Court is likely to

decide the question. Meanwhile, agencies with ECUs should pay close attention to legal developments in this area of due process so they will be aware of any new constitutional mandates that affect their operations.

### **Summary: Assume due process protections**

**apply.** From a national perspective, there is no clear position on whether placement in an ECU imposes an atypical deprivation. Given this uncertainty—and given the 2004 *Austin* decision, which specifically addresses this point—corrections agencies would be prudent to assume that some level of due process protections will apply in ECU placement decisions and should structure their admission decision process accordingly. A placement process that includes due process procedures not only facilitates a defense should due process litigation arise, it furthers the

It is not surprising that courts would regard ECU placement—with its typically long duration, very strict conditions, and limited privileges—as an atypical deprivation, compared to the ordinary conditions of prison life.

agency’s goal of basing ECU placements on reliable information and sound judgment.

## **What Process Might Be Due?**

Assuming that placement in an ECU for a period likely to exceed a year will be found to be an atypical deprivation that triggers due process protections, the question then becomes what form those protections must take. With the *Austin* case being the notable exception, the courts are nearly unanimous in hold-

ing that those protections are the minimal ones defined by the Supreme Court in *Hewitt* and not the Court’s more adversarial, disciplinary-type procedures in *Wolff*.<sup>99</sup> (The “Comparing *Wolff* and *Hewitt*” sidebar later in this chapter summarizes these two approaches to due process.)

### **The Traditional View**

For many years, courts took what now may be considered the “traditional” view that said if due process protections applied to an inmate going into long-term segregation, then *Hewitt* defined the amount of process due. Giving the inmate notice of the proposed placement and an opportunity to respond would satisfy *Hewitt*.

A 1986 decision from the Ninth Circuit Court of Appeals in California, *Toussaint v. McCarthy*, is

<sup>99</sup> Both *Madrid* in 1995 and, later, *Koch v. Lewis* (216 F. Supp. 2d 994 (D. Ariz. 2001)) held that *Hewitt* defines the process due. *Koch* has language indicating concerns that greater procedural protections should apply, given the severity of long-time SHU placement; however, the court stopped short of saying that *Wolff* procedures were required. The *Koch* decision focuses more on evidentiary questions and is discussed elsewhere in the text.



perhaps the most noteworthy of due process-related decisions concerning administrative segregation.<sup>100</sup> Although *Toussaint* dealt with long-term segregation units in an era before the term “supermax” had been coined, the segregated lock-up units at San Quentin, Folsom, Soledad, and Deuel Vocational Institute under review in the case served the same function that ECUs serve for many jurisdictions today: to house inmates thought to be the most dangerous in the prison system.

While the segregation placements in *Toussaint* may not have been as isolating as placement in a modern ECU unit can be, the units served the same function, and conditions in the units were onerous by any measure. Instead of the isolation of the modern ECU, inmates were exposed to the constant din of multilevel tiers of cells, where they were housed 23 hours per day. Placement was often measured in years. The district court that originally heard the case found conditions to be unconstitutional in several respects, including double-celling and inadequate heating and ventilation, plumbing, lighting, sanitation, exercise, and food.<sup>101</sup>

In ordering the corrections agency to conduct a *Wolff*-based, disciplinary-type hearing as a condition to placing inmates in these segregation units, the district court had relied largely on a conclusion that placement prevented the inmate from earning good time credits. This decision was reversed on appeal. However, the appellate court found that language in various state regulations combined to create a due process-protected liberty interest under the *Hewitt* test. The appellate court rejected the lower court’s requirement of a disciplinary-type hearing, for two reasons: (1) the state had a very strong interest in maintaining

security and safety, and that interest could be compromised through more complicated due process proceedings; and, even more significantly, (2) a disciplinary-type hearing would be of little value given the reasons inmates are placed in long-term segregation. The Ninth Circuit’s reasoning in this case contains important insights for prison administrators:

Given the disruptive propensities of the inmate population, we are especially sensitive to the Supreme Court’s [*Hewitt*] admonition that “[t]he safety of the institution’s guards and inmates is perhaps the most fundamental responsibility of the prison administration.” *The state’s interest in maintaining safety and security weighs heavily in favor of avoiding prolonged and cumbersome administrative proceedings.*

Finally, the value of *Wolff*-type procedures was minimal in the context of the decision to segregate a prisoner for administrative reasons. When determining whether the prisoner was guilty of misconduct, as was the case in *Wolff*, the inquiry is essentially factual. The prison administrator seeks to determine whether the prisoner committed the alleged offense. When deciding whether administrative segregation is needed, however, the administrator relies largely on subjective factors:

In assessing the seriousness of a threat to institutional security, prison administrators necessarily draw on more than specific facts surrounding a particular

<sup>100</sup> *Toussaint v. McCarthy*, 801 F.2d 1080 (9th Cir. 1986).

<sup>101</sup> *Toussaint v. McCarthy*, 597 F. Supp. 1388 (D.C. Cal. 1984).

incident; instead, they must consider the character of the inmates confined in the institution, recent and longstanding relations between prisoners and guards, prisoners *inter se*, and the like. In the volatile atmosphere of a prison, an inmate easily may constitute an unacceptable threat to the safety of other prisoners and guards even if he himself has committed no misconduct; rumor, reputation, and even more imponderable factors may suffice to spark potentially disastrous incidents. *The judgment of prison officials in this context, like that of those making parole decisions, turns largely on purely subjective evaluations and on predictions of future behavior; indeed, the administrators must predict not just one inmate's future actions, as in parole, but those of an entire institution.* A trial-like proceeding is unlikely to inform a prison administrator regarding such subjective considerations.<sup>102</sup>

Relying on *Hewitt*, the Ninth Circuit said that prison officials had to “hold an informal nonadversary hearing within a reasonable time after the prisoner is segregated” and had to inform the prisoner of the “reasons for considering segregation” and that the inmate had to be “allowed to present his views.”<sup>103</sup> The court specified that due process *did not* require any of the following:

- Written notice of charges.
- Representation by counsel or counsel substitute.
- Opportunity to present witnesses.
- Written decision describing the reasons for placing the inmate in administrative segregation.
- Disclosure of the identity of any person providing information about the proposed placement.<sup>104</sup>

In *Madrid* (the Pelican Bay case), the court found that due process protections were necessary for placement in California’s highly restrictive SHU and that the *Hewitt*-type process was sufficient.<sup>105</sup> In *McClary v. Kelly*,<sup>106</sup> the court also held that *Hewitt* defined the amount of process due for placement in an ECU.<sup>107</sup>

### A Contrary View

But what about *Austin*? In considering the Ohio Department of Corrections’ procedures for ECU placement decisions, the *Austin* district court (in 2002) and appeals court (in 2004) noted that the Supreme Court’s 1995 *Sandin* decision so undermined its earlier *Hewitt* decision that severity of deprivation had to be considered in determining how much process was due inmates in ECU placement decisions.

<sup>102</sup> *Toussaint*, 801 F.2d at 1100 (emphasis added, internal citations omitted).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 1101.

<sup>105</sup> *Madrid*, 889 F. Supp. at 1274.

<sup>106</sup> *McClary v. Kelly*, 4 F. Supp. 2d 195 (W.D.N.Y. 1998).

<sup>107</sup> Note that the *Madrid* decision came before the Supreme Court’s 1995 *Sandin* decision that made atypical hardship a condition for due process protections; *McClary* came after *Sandin*.

Using a *Hewitt*-based process, the Ohio Department of Corrections had been giving inmates 48-hour notice of classification committee reviews for possible ECU placement. Inmates could appear before the committee and make oral and written presentations. Both the district court and the court of appeals felt that even though placement in Ohio's ECU was a forward-looking, predictive decision, the loss the inmate faced—combined with the risk of error in the Department's simple hearing process—meant that due process required a more adversarial, *Wolff*-type procedure.

The court of appeals approved the district court's order in most respects. Most notably, the order required the Department to give the inmate written notice of all the grounds being used to justify placement in "high maximum custody" status *plus* a summary of the evidence prison officials would rely on for placement. (Under the Department's rules, placement can occur only if certain historical, factual "predicates" exist. Placement cannot occur unless the inmate meets one or more specified criteria; however, meeting one or more criteria does not mandate placement.) Interestingly, the Department's policy required 48-hour notice, but the district court, which found that policy constitutionally deficient, only required 24-hour notice (as called for under *Wolff*).<sup>108</sup> The appellate court did not change the 24-hour notice aspect of the lower court decision.

The court order also specified the following:

- Inmates can call witnesses and present documentary information, unless doing so would be unduly hazardous.

- The Department must make a record of all classification committee proceedings.
- Special precautions are necessary if the Department wants to rely on information from confidential informants in making a placement decision.
- If an official above the classification committee considers information that the classification committee has not considered, the inmate must receive notice of this fact, a summary of the evidence involved, and an opportunity to respond in writing.

## Due Process and the Quality of Placement Decisions

Does more due process enhance placement decisions? In other words, will a proceeding that resembles a disciplinary hearing lead to more appropriate decisions regarding the prolonged confinement of inmates in ECUs than are possible with a classification-type process? The sidebar "Comparing *Wolff* and *Hewitt*" addresses this question.

### Meaningful Notice

The notice in an ECU placement proceeding is likely to be quite different from the notice in a disciplinary hearing. The latter can and should be quite specific: "You are charged with violating Rule 06: assaulting an officer. The incident took place on January 27 at approximately 2 p.m. in the dining hall. You struck Officer Jones with your fist." Time, place, and quite specific facts are included in the formal notice or in an officer's report attached to the formal charging document.

<sup>108</sup> *Austin v. Wilkinson*, 189 F. Supp. 2d 719, 747 (N.D. Ohio 2002).

## Comparing *Wolff* and *Hewitt*

This summary compares two approaches to due process: (1) a disciplinary-type hearing, as defined by the Supreme Court in 1974 (*Wolff v. McDonnell*); and (2) a classification-type process for placing inmates in long-term segregation, as defined by the Court in 1983 (*Hewitt v. Helms*).

### Purpose

*Wolff*: Determine after the fact whether the inmate violated a specific disciplinary rule; if so, impose a sanction.

*Hewitt*: Make a more general evaluation of inmate's behavior, associations, and attitude; then predict the inmate's threat to safety and security. New factual determinations may or may not be associated with the decision.

Comment—*Hewitt* discusses the nature of the segregation decision. ECU placements may be predictably longer than what the Supreme Court envisioned in *Hewitt*, but the nature of the decision is the same.

### Notice

*Wolff*: Notice of charges at least 24 hours before hearing.

*Hewitt*: Notice of reasons for proposed placement.

Comment—No real difference, assuming the inmate receives the *Hewitt* notice before the placement decision is made. However, a *Hewitt* notice is likely to be more wide ranging and somewhat vaguer than a notice of charges in a disciplinary hearing.

### Hearing

*Wolff*: Adversary-type hearing.

*Hewitt*: Nonadversarial hearing; the inmate has an opportunity to present views. The institution decides whether the inmate's presentation is oral or in writing.

Comment—A *Hewitt* "hearing" could perhaps be more accurately described as a "meeting."

### Witnesses

*Wolff*: Right to call witnesses, unless a particular witness would present a security or safety risk.

*Hewitt*: No right to call witnesses.

Comment—The biggest area of difference. For example, if the placement decision involves new factual determinations, such as the nature and extent of an inmate's gang associations, an inmate with no right to call witnesses will find it difficult to rebut any allegations. However, as a practical matter, could the inmate rebut these allegations in a *Wolff*-type hearing? Probably not. This is why factual determinations should be based on fair, thorough, and accurate investigations by the institution.

### Decisionmaker

*Wolff*: Neutral decisionmaker.

*Hewitt*: Not addressed.

Comment—The classification process is presumably neutral.

### Representation

*Wolff*: Right to assistance if the inmate is illiterate or otherwise unable to prepare and present the case.

*Hewitt*: Not addressed.

Comment—Assistance could be provided to inmates in the classification process.

### Informants

*Wolff*: Protections to ensure that confidential informants are reliable and credible. (This requirement actually comes from post-*Wolff* decisions.)

*Hewitt*: Not addressed.

Comment—The institution has its own interest in ensuring the reliability and credibility of informants.

### Written Decision

*Wolff*: Written decision, indicating the evidence relied on and reasons for the sanction.

*Hewitt*: Not addressed.

Comment—A properly developed administrative process should generate a written decision, indicating the basis for the decision. A written decision is important because it will be the basis for any appeal by the inmate, an element in any audit of the placement process, and, probably, the starting point for any future reviews of the inmate's status.

In contrast, an ECU placement notice starts with an assertion such as “you are considered to be a threat to the security of the institution.” It then gives the reason(s) for the assertion, such as “your long, assaultive disciplinary record, and your association with gang activity.”

Information about the inmate’s attitude and adjustment problems may also be included. In short, the notice covers relatively large areas of concern, some quite specific (disciplinary record), others less so (e.g., gang affiliation and activity may be less clear and/or based on informant information), and some quite subjective (adjustment, attitude).

Even though an ECU placement notice is likely to be less specific than a disciplinary hearing notice, it should try to fairly explain what will be considered in the placement decisionmaking process. Simply notifying the inmate that “we think you are a security threat” does not suffice. The 2004 *Austin* decision helps to clarify what is required: not only a notice, but summaries of the evidence prison officials plan to rely on in the placement process.

### Calling Witnesses

The inmate’s limited right to call witnesses in an ECU placement process is probably the most significant difference between this process and the disciplinary hearing. However, the author agrees with the *Toussaint* decision that a *Wolff*-based, disciplinary-like model will not improve the quality of decisionmaking in the context of ECU placement. (This view is based on the

Simply notifying the inmate that “we think you are a security threat” does not suffice.

author’s 30 years of experience in writing and reviewing disciplinary rules and prison disciplinary processes.<sup>109</sup>)

The factual basis of a long-term segregation decision may be clearly established (e.g., an inmate’s history of serious disciplinary infractions), but it is likely to be more complicated,

involving factors such as intelligence information about gang activity or other illicit behavior that indicates a threat but has not yet manifested itself in disciplinary infractions. The factual basis may be in the “suspicion” stage. If the institution has strong indications that an inmate is a danger to security, does it wait until the suspicions are proven as fact, or does it segregate the inmate on the basis of the suspicions? Suspicion-based decisions are at least a possibility.

The “facts” are only part of the placement decision. The other, arguably more important part is a predictive judgment, made in light of whatever information the institution has, about whether the inmate is enough of a threat to security (or whatever other criteria are being considered) to warrant placement in the prison’s highest security classification.

How much impact will an inmate’s ability to call witnesses have on this decision? In the author’s opinion, little or none on the second part (the judgment) and probably relatively little on the first part (the facts). For example, a witness saying the inmate is not an active gang member or involved in strong-arming activities is not likely

<sup>109</sup> See William C. Collins, *A Practical Guide to Inmate Discipline*, 2d ed., Kingston, NJ: Civic Research Institute, 1997.

to sway decisionmakers who have information to the contrary from a thorough institutional investigation in which the decisionmakers have confidence.

A related consideration is that even a *Wolff*-type hearing provides very limited protections for the inmate with regard to information from anonymous informants. Due process may require the decisionmaker to assess the credibility of these informants, but the inmate is not privy to the information the assessment relies on and has virtually no way to rebut any allegations.<sup>110</sup>

Perhaps if inmates had investigative resources comparable to the prison's and were fully represented in the process, they could develop information with enough credibility to stand equally with the information developed by the institution. However, not even *Wolff* requires that level of assistance.

Should such assistance be provided, the decision process surely would become adversarial.

Comparison to the parole decision provides another useful perspective. As serious as a decision to place an inmate in long-term segregated confinement is, is it more serious than the decision to deny an inmate parole? The Supreme Court has said that the parole consideration process satisfies due process if it only "affords an opportunity to be heard, and when parole is

denied it informs the inmate in what respects he falls short of qualifying for parole."<sup>111</sup>

### Thorough Investigation: The Key to Fair Decisions

Modeling procedural protections after *Wolff* is likely to provide only illusory safeguards for inmates in the ECU placement decisionmaking process. What is critical to a fair and appropriate result in this process is the quality of the investi-

gation that provides information for decisionmakers. The quality of the investigation is critical because the decision to classify an inmate into an ECU is based on subjective information as well as historic fact, because the judgment is inherently predictive, and because the decisionmaker often must consider substantial amounts of information compiled from a variety of sources.

The appropriate model for ECU placement decisions is an

administrative one in which decisions are based only on complete, reliable information about the inmate. An adversarial model is not appropriate. To some extent, the debate about procedural protections (see sidebar "The Due Process Debate") misses the mark if it tries to choose between *Hewitt* and *Wolff*. Neither of these cases addresses the quality of information the institution develops to support reclassification. The *Wolff* adversarial process and right to call witnesses address the "quality of information" issue in theory, but the

What is critical to a fair and appropriate result in this process is the quality of the investigation that provides information for decisionmakers.

<sup>110</sup> *McCollum v. Miller*, 695 F.2d 1044 (7th Cir. 1982).

<sup>111</sup> *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 16 (1979).



## The Due Process Debate

The debate about what process is due an inmate facing possible ECU placement has three branches:

1. No process is due. This is the ultimate argument under *Sandin v. Conner*.
2. Placement in an ECU amounts to atypical deprivation under *Sandin* and thus invokes due process protections. The required protections are defined by *Hewitt v. Helms* and take the form of notifying the inmate and providing the inmate with an opportunity to respond. This can be described as the *Sandin/Hewitt* position.
3. Placement is such a serious deprivation under *Sandin* that the more expansive due process protections in *Wolff v. McDonnell* are required. This is the *Sandin/Austin* position.

Given that the goal of due process in any context is to enhance the fairness of the decisionmaking process and to guard against arbitrary actions on the part of the government, none of these three options addresses the most important aspect of the ECU placement decision: the quality of the information on which the decision is based.

theory is a long way from reality. An inmate is unlikely to be able to undercut the institution's factual assertions or demonstrate that those assertions are based on sloppy investigatory work and should not be credited.

The largely administrative process that California followed in its segregation decisionmaking was approved by the courts in the 1995 *Madrid* finding. That process, which provided inmates with two opportunities for input, is discussed later in this chapter.

## Evidentiary Tests

Placement decisions are judgmental and predictive, but they are not made on a whim. Officials must weigh the individual inmate's interests in not being confined in an ECU against the larger interests of safety and security of inmates, staff, and the institution in general. In such cases, there is pressure on officials to weigh the larger interests more heavily, i.e., to err on the side of

caution for the larger prison community. However, placement decisions ultimately rest on a factual foundation. How "sound" must that foundation be? How much evidence is required to conclude that an inmate presents such a serious threat that ECU placement is necessary?

Ironically, the *Austin* decision, which imposes relatively stringent requirements for ECU placement decisions, does not address questions about the quality or quantity of evidence necessary to support such decisions. However, the courts have provided some guidance in earlier decisions.

Even in regard to traditional inmate disciplinary proceedings, the due process clause barely touches on the question of the amount of evidence required. Years ago, the Supreme Court held that a finding of guilt in a disciplinary hearing that involves deprivation of a liberty interest must be supported by "some evidence in the record."<sup>112</sup> To a court reviewing the evidence in a disciplinary

<sup>112</sup> *Superintendent, Massachusetts Correctional Institution, Walpole v. Hill*, 472 U.S. 445, 454 (1985).



hearing under this test, “the relevant inquiry is whether there is any evidence in the record that could support the conclusion reached by the prison decision makers.”<sup>113</sup> This is a very low level of judicial scrutiny. The court cannot substitute its judgment for the prison official’s as to the weight of the evidence. It can only determine whether the record contains any evidence that could have supported the finding.

Courts apply the “some evidence” rule in the context of administrative segregation placements.<sup>114</sup> If a court finds that the decision to place an inmate in an ECU involves a protected liberty interest under *Sandin*, it probably will apply the “some evidence” rule in reviewing that decision.<sup>115</sup> As part of the “some evidence” review, a court is also likely to consider whether the evidence bears some “indicia of reliability.”<sup>116</sup>

In *Madrid*, the court said that placement of inmates in the Pelican Bay SHU because of gang affiliation had to be based on information with “some indicia of reliability.” This meant that there had to be some factual information “from which the IGI [Institutional Gang Investigator] and the classification committee ‘can reasonably conclude that the information was reliable.’”<sup>117</sup> The sidebar “Applying Evidentiary Tests: A Case Study” describes now one court applied both the “some evidence” and “some indicia of reliability” tests.

## Applying Evidentiary Tests: A Case Study

In a 2001 case, *Koch v. Lewis*, the district court applied the “some evidence” and “indicia of reliability” tests in a case involving an inmate who was placed indefinitely in a special management unit (SMU) after the prison validated his membership in a security threat group, the Aryan Brotherhood (AB). This placement was likely to last for the rest of the inmate’s prison term, because gang members who entered the unit rarely left it.

The validation, which took place in 1998, was based on the following: a 1981 group photo in which the inmate posed with known AB members; testimony that AB members never pose for photos with nonmembers; information that the inmate had been seen in the company of four AB members (although no information about what they discussed); and two lists of AB members, seized from members, on which the inmate’s name appeared.<sup>a</sup>

The court accepted that this information established gang membership. However, the court went on to conclude that membership alone would not support placement in the SMU, citing a combination of conditions in the SMU and the fact that it was virtually impossible for inmates to get out of the SMU if they were placed there because they were gang members.<sup>b</sup>

<sup>a</sup>For an informative discussion of the Aryan Brotherhood, see David Grann, “The Brand,” *The New Yorker*, February 16, 2003, p. 157.

<sup>b</sup>*Koch v. Lewis*, 216 F. Supp. 2d 994 (D. Ariz. 2001).

<sup>113</sup> *Madrid*, 889 F. Supp. at 1273, citing *Cato v. Rushen*, 824 F.2d 703, 705 (9th Cir. 1987).

<sup>114</sup> *Taylor v. Rodriguez*, 238 F.3d 188, 194 (2d Cir. 2001).

<sup>115</sup> A court has accepted results from properly performed polygraph tests under the “some evidence” rule (*Toussaint v. McCarthy*, 926 F.2d 800 (9th Cir. 1990)).

<sup>116</sup> *Madrid*, 889 F. Supp. at 1274.

<sup>117</sup> *Id.*

## Quality of Information: The Institution's Responsibility

Assuming that an inmate receives notice of potential placement in the ECU, that the notice explains the reasons for the placement, and that the inmate has an opportunity to respond, a fundamental concern—with clear due process implications—remains: Is there a sound basis for the decision? In other words, does the decision-maker have information that reasonably supports a conclusion that the inmate fits one or more of the agency's criteria for ECU placement?

As a determinant of the placement decision, the quality of the information before the decisionmakers is more important than the inmate's opportunity to appear before them. Yet the due process protections considered by the courts do not seriously address quality of information. Therefore, institution officials must establish their own investigative processes to produce reliable information. They then must be prepared to demonstrate to a court that the process is designed to produce reliable information and that, in fact, it does so.<sup>118</sup>

With periodic reviews, as with the initial ECU placement decision, the management-related interests of the institution and the concerns of the courts coincide.

## Workload Considerations

A certain workload burden is imposed by notifying inmates of proposed ECU placement and giving them opportunities for input, but the burden is relatively insignificant. The most

workload-intensive element of the initial placement decision is the investigative process that produces the package of accurate and reliable information that officials will consider in making the placement decision.

## Periodic Reviews

In *Hewitt*, the Supreme Court said in a footnote that periodic reviews of placements were required, lest administrative segregation “be used as a pretext for indefinite confinement of an inmate.”<sup>119</sup> The Court did not prescribe the form such a review should take, how often it should take place, or even what role the inmate should have in the review, if any. In the *Toussaint* case, the Ninth Circuit said that annual reviews were too infrequent but did not say what frequency would be appropriate.

To some extent, the frequency of reviews will depend on the circumstances surrounding an inmate's placement in segregated confinement. If the initial placement is presumptively for an extended period, as is the case in the typical ECU placement, very frequent reviews appear to have no productive purpose.

With periodic reviews, as with the initial ECU placement decision, the management-related interests of the institution and the concerns of the courts coincide. The prison has no interest in keeping someone in an ECU without good reason. If the concern that prompted the initial placement

<sup>118</sup> The discussion of *Jones'El* in the chapter on mental health issues noted that shortcomings in a mental health screening process (an expert pointed out errors in 4 of 20 files reviewed) contributed to the court's finding that some inmates had been improperly placed in the Wisconsin supermax facility. Officials should expect similar scrutiny of other aspects of the placement process.

<sup>119</sup> *Hewitt*, 459 U.S. at 477, n. 9.

no longer exists and no other has arisen to take its place, there is no reason to keep the inmate in the unit.

Periodic reviews were an issue in *Madrid*, and the court approved California's practice of reviewing confinement in Pelican Bay's SHU every 120 days. (The court did not indicate whether a longer review period would be acceptable.) *Madrid* did insist that officials record any evidence rejected in the initial placement decision, to prevent the discredited information from being considered later to support retention in the ECU.

The courts have generally been very reluctant to impose demands on the review process (other than saying there must be one). In *Hewitt*, the Supreme Court said that new factual information was not necessarily required as part of the process. As discussed in the next section on gangs, the court in *Madrid* approved the practice of holding inmate gang members in segregation until they renounced membership, disclosed names of other members, and revealed information about gang activities—even if an inmate's behavior in the ECU had been exemplary and even though this “debriefing” would label the inmate as a snitch.

## Gang Membership as Grounds for ECU Placement and Retention

A much more specific issue than the fundamental due process issues discussed above is the question of whether gang membership alone can support placement and retention of inmates in ECU units. Two district courts have considered this question, and the two courts disagree.

The *Koch* decision, discussed earlier in this chapter, found that gang membership alone could support a short-term placement (the term was not defined) but that long-term placement (years or possibly for life) could not be justified without some indication of an overt act of misconduct. The program under review in *Koch* allowed inmates to get out of the ECU only if they renounced gang membership and named other gang members in a “debriefing.” If they did so, they were moved to another highly secure segregation facility to avoid repercussions associated with being a “snitch.” No one who had been debriefed had ever returned to the prison general population. Thus, it appeared that once segregated, a gang member would always live under some form of highly restrictive, segregated confinement.

Defendants in *Koch* argued that inmates held the key to release from ECU segregation through renouncing and debriefing, but then conceded that release back to a normal prison existence was virtually impossible. Would the court have been as concerned about prolonged segregation if these inmates actually could control their return to the general prison population?

In *Madrid*, the court was also concerned about the indeterminate placement of inmates in segregation based solely on gang membership. As in *Koch*, a gang member's only way out of the SHU at Pelican Bay was through renunciation and debriefing. California officials also conceded that debriefing would cause an inmate to be labeled as a snitch. Noting credible evidence from prison officials that inmates joined gangs “for life,” the *Madrid* judge did not find that the policy of requiring debriefing for transfer out of the SHU violated the constitution.<sup>120</sup>

<sup>120</sup> *Madrid*, 889 F. Supp. 2d at 1278.

California followed a careful process for determining gang membership, although the process gave the inmate a relatively limited role. Information on gang membership was gathered by the Institutional Gang Investigator (IGI). Before recommending validation of an inmate as a gang member, the IGI met with the inmate to discuss the investigation results and hear the inmate's views. The final decision on gang membership was made by a central office committee, which did not meet with the inmate. The final decision to transfer the inmate to the SHU was made by a classification committee; at this point, the inmate again had the opportunity to present his views.

This process, said the district court in *Madrid*, met the requirements of *Hewitt* and provided a reasonable factual basis for decisions. The inmate had the required opportunity to present his views to the official making the gang membership determination at the institution level. As noted earlier, the court also required that the placement decision rest on an evidentiary basis that has "some indicia of reliability."<sup>121</sup> At Pelican Bay, if informant information was considered in either the gang membership validation process or the SHU placement process, the record included information showing the informant's reliability.

Following a process similar to Pelican Bay's can protect inmates from arbitrary placement in an ECU. Such a process can also help the institution ensure that scarce and expensive ECU housing is not wasted on inmates who do not need it.

Other jurisdictions take a less dramatic approach to gang membership and activity. In Ohio, for example, being a leader in a gang or other "secu-

rity threat" group is grounds for ECU placement, but mere membership in such a group is not.<sup>122</sup> A gang member may be watched more closely than other inmates, but he will not be placed in the ECU unless he engages in overt gang activity. An inmate who has been placed in the ECU because of gang activity can gain release from the ECU by demonstrating through word and deed over time that he has dropped out of the gang; a debriefing (naming other gang members) may not be required. Once released, if he again demonstrates gang membership, he may be returned to the ECU.

The approach a department of corrections takes to gang membership and ECU placement and retention is a matter of agency policy. At this point, *Koch* is the only authority saying that membership alone, without overt misconduct, will not support essentially permanent placement in ECU status. *Madrid* accepts that an initial gang membership validation, properly done, can justify a very long ECU placement. Taking the tough approach followed by Arizona (*Koch*) and California (*Madrid*) means an agency may face some difficult litigation. Taking a more flexible approach may allow the agency to say more convincingly that the inmate, through behavior he can control, truly holds the key to moving out of the ECU environment and back into the prison mainstream.

## Summary

Courts are uncertain as to whether placement in long-term confinement under the very restrictive conditions associated with the typical ECU imposes an atypical deprivation on an inmate and

<sup>121</sup> *Id.* at 1273.

<sup>122</sup> *Austin*, 372 F.3d at 351.

therefore requires due process protections. Until the courts speak more clearly on whether and what kind of due process is required in placement decisions, corrections agencies would be prudent to provide basic procedural protections that are likely to meet a court's requirements. Such protections also serve prison officials' own interests in having an effective placement decisionmaking process. These protections include the following:

- Notify the inmate of the proposed placement. In the notice, explain the reason for the placement.
- Give the inmate an opportunity to respond to the notice in an informal, non-adversarial meeting with officials.
- Base placement decisions on reliably determined facts. In the nonadversarial context of the placement decision, "reliably determined" focuses more on the institution's investigatory process than on res-

olution of factual disputes at the meeting with the inmate.


Until the courts speak more clearly on whether and what kind of due process is required in placement decisions, corrections agencies would be prudent to provide basic procedural protections that are likely to meet a court's requirements.

- Determine the reliability of informants and the information they provide.
- Conduct periodic reviews to determine the need for continued segregation. Give the inmate an opportunity to provide input for retention decisions.

If a corrections agency has such procedures in place, it has two choices in responding to lawsuits that claim deprivation of due process in segregation placement and retention decisions. It can argue, under *Sandin*, that no due process protections apply. Or it can point to its procedures as proof that protections were provided. Even if the courts finally agree

that no due process requirements apply to these decisions, prisons will benefit from having a systematic, fair, fact-based decisionmaking process.

# 7 Access to the Courts



**T**he ECU population includes the most violent inmates in the prison system. It may also include the most litigious. Every aspect of the ECU's operations may be targeted in lawsuits filed by inmates, without the aid of a lawyer. One issue ECU inmates are likely to raise is whether available resources give them meaningful access to the courts. This chapter reviews Supreme Court decisions concerning inmate access to the courts, how those decisions have affected inmate litigation, and implications for ECU operations (including book paging/delivery systems).

## Supreme Court Rulings

In 1977, the Supreme Court said in *Bounds v. Smith* that prison officials have an affirmative duty to provide inmates, including those in segregation, with resources to allow them “a reliably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts.”<sup>123</sup> The Court reaffirmed this principle in 1996, in *Lewis v. Casey*.<sup>124</sup>

<sup>123</sup> *Bounds v. Smith*, 430 U.S. 817 (1977).

<sup>124</sup> *Lewis v. Casey*, 518 U.S. 343 (1996).



*Bounds* spoke of officials meeting their obligations by providing inmates with adequate law libraries or assistance from persons trained in the law. Over the years, most prisons opted to meet the *Bounds* duty by providing law libraries. As a result, the right of access to the courts has come to mean, in day-to-day practice, the right to a law library.

The 1996 *Lewis* decision emphasized that the right of access to the courts *is not* a right to a law library and that an institution does not necessarily need a library to meet its duties under *Bounds*. In an aside not essential to its holding, the Court also noted that for inmates who cannot read, a library alone does not meet the *Bounds-Lewis* obligations.

Providing adequate access to the courts for inmates in long-term segregation is particularly problematic. These inmates cannot congregate in a library. Book delivery systems are cumbersome and have been criticized by courts in a number of pre-*Lewis* decisions.

Providing assistance from “persons trained in the law” also is problematic in ECUs. Allowing other inmates to assist ECU inmates presents potential security problems and may not be feasible if the ECU is a free-standing unit. Hiring lawyers, law students, or lawyers to provide assistance may be expensive and presents a variety of problems.

## The Institution’s Obligations Under *Lewis*

The rules governing inmate access to the courts changed somewhat with the Supreme Court’s 1996 decision in *Lewis*. Although *Lewis* reaffirmed the basic principle the Court stated 19

years earlier in *Bounds*—that prison officials have an affirmative duty to provide some form of assistance to inmates—*Lewis* also limited the scope of topics for which assistance must be given. *Lewis* encouraged prison officials to experiment with different ways of assisting inmates and made it more difficult for inmates to win cases based on access issues.

### Limits on the Scope of Legal Assistance

Under *Lewis*, the inmate’s right extends only to assistance in direct or collateral attacks on convictions (criminal appeals and habeas corpus petitions) and challenges to conditions of confinement (traditional “inmate rights” issues). The right does not extend to other types of legal proceedings, such as family law issues. The right applies only to nonfrivolous claims, although the Court does not suggest how a prison might determine whether a claim is legally frivolous. (For this reason, it is very risky for an institution to attempt to evaluate the potential merits of an inmate’s claim in determining whether to provide assistance.)

Language in the *Lewis* opinion suggests that institutions need provide assistance only in the initial phase of litigation (presenting the claim to the court), not necessarily in subsequent phases (trial, appeal, etc.) of litigating a claim to its conclusion. Because this is a very conservative reading of the opinion, it may not be prudent for institutions to base their access policy on the assumption that their duty ends once an inmate successfully files a complaint.

However, in one pre-*Lewis* case, the court approved an access plan in which the corrections department contracted with a lawyer to represent inmates and specified in the contract that the



lawyer could not represent inmates beyond the filing of the complaint. In that case, inmates did not have access to a law library.<sup>125</sup> A post-*Lewis* decision from the Seventh Circuit includes language that suggests a similarly narrow reading of access rights.<sup>126</sup>

### “Actual-Injury” Requirement for Access Litigation

Under *Lewis*, it is difficult for inmates to successfully pursue access claims because to have standing to raise such claims in court, they must demonstrate that they were prejudiced in some way by the alleged lack of legal resources. An inmate must show that deficiencies in legal resources either (1) caused dismissal of a claim on technical grounds or (2) made it impossible even to file a claim. Many post-*Lewis* cases have

been dismissed because the inmate could not meet the actual-injury requirement; in these cases, the courts never actually assessed the adequacy of the prison’s legal resources. Two case studies illustrate the effects of the *Lewis* actual-injury requirement on access litigation (see sidebar “Effects of the Actual-Injury Requirements: Case Studies”).

Although the actual-injury requirement may make it more difficult for inmates to win access claims, that alone is not justification for institutions to reduce legal assistance. The dismissals of major lawsuits such as *Klinger* and *Walters* may have been primarily a matter of timing; i.e., the new *Lewis* actual-injury rule was applied to facts developed in trials that took place prior to *Lewis*, when lawyers were not attempting to prove that

## Effects of the Actual-Injury Requirement: Case Studies

***Walters v. Edgar.*** In this classic pre-*Lewis* access-to-courts claim, a class of inmates in long-term segregation in an Illinois prison alleged inadequate access to legal materials. The prison used a paging system, in which the inmates could request materials from a central library. The district court found the legal resources inadequate under the traditional *Bounds* test.<sup>a</sup> However, knowing that *Lewis* was pending in the Supreme Court, the district court postponed its final order. After *Lewis* was issued, the court decided that none of the named plaintiffs met the actual injury test and dismissed the case, despite the inadequacies it had found in the prison’s paging system. The dismissal was

upheld on appeal. These results do not constitute a judicial seal of approval for paging systems; they mean only that the named plaintiffs could not show injury.

***Klinger v. Department of Corrections.*** In this case, which involved inmates at a women’s prison in Nebraska, the actual-injury requirement under *Lewis* produced even more dramatic results. The court found a “complete and systemic denial of access to a law library or legal assistance prior to January 1989” but dismissed the inmates’ claim “because none of the inmates suffered actual injury or prejudice as a result of that denial of access.”<sup>b</sup>

<sup>a</sup>*Walters v. Edgar*, 900 F. Supp. 197 (N.D. Ill. 1995).

<sup>b</sup>*Klinger v. Department of Corrections*, 107 F.3d 609, 617 (8th Cir. 1997).

<sup>125</sup> *Carper v. Deland*, 54 F.3d 613 (10th Cir. 1995).

<sup>126</sup> *Walters v. Edgar*, 163 F.3d 430 (7th Cir. 1998).

specific inmates suffered from inadequate legal resources. Proof of actual injury in such cases, although perhaps difficult to come by, at least theoretically exists.<sup>127</sup>

### Experimenting With Alternative Legal Resource Programs

In both *Bounds* and *Lewis*, the Supreme Court encourages corrections agencies to experiment with different ways of providing access to the courts that would be valid unless an inmate proved the system was frustrating or impeded a nonfrivolous claim. Portions of *Lewis* suggest that the traditional, large law library may not be required: “One such experiment, for example, might replace libraries with some minimal access to legal advice and a system of court-provided forms...forms that asked the inmates to provide only the facts and not to attempt any legal analysis.”<sup>128</sup>

Another experiment might include building a system of legal resources for inmates around CD-ROMs or Internet-based computer technology. As with any approach that assumes an inmate can read, a computer-based system will not serve those who cannot. Whether inmates have the knowledge and skill to use the technology might also be an issue. Of course, any process that involves the Internet requires safeguards to ensure that inmates cannot roam the Internet freely.

### Paging Systems

Historically, the paging system was probably the most common approach to providing segregated

inmates with access to the courts. Inmates requested limited amounts of materials from a large law library. If available, the materials or copies were delivered, and when those were returned, the inmate could make another request. Even when paging systems worked as designed, they made major legal research a long, tedious effort.

Many pre-*Lewis* access-to-courts cases examined paging systems and, in general, found them unconstitutional. *Walters v. Edgar*, discussed earlier, is typical of these cases.<sup>129</sup> (In *Walters*, the court found the paging system inadequate before ultimately dismissing the case under the *Lewis* actual-injury requirement.)

Problems with paging/book delivery systems for segregation units include the following:

- Inmates do not know what is available in the main library.
- Inmates cannot get enough books at one time to research an issue.
- The system fails to work as designed (e.g., requests are lost, deliveries are late, materials are unavailable).
- Literacy or language barriers prevent some inmates from using lawbooks.

In light of the *Lewis* actual-injury requirement and the Supreme Court’s encouragement of experimentation (see earlier discussions in this chapter), the courts may have to take a second

<sup>127</sup> On the other hand, the author knows of one long-running access-to-courts class action that plaintiffs voluntarily dismissed because they found no inmates who had suffered an actual injury and could, therefore, represent the class of inmates.

<sup>128</sup> *Lewis*, 518 U.S. at 352.

<sup>129</sup> *Walters*, 900 F. Supp. 197, reversed on other grounds, *Walters*, 163 F.3d 430. See also *Abdul-Akbar v. Watson*, 4 F.3d 195 (3d Cir. 1993), which held that the adequacy of a satellite library depends on other factors such as paralegal services; and *Wood v. Housewright*, 900 F.2d 1332 (9th Cir. 1990), which held that a combination of satellite libraries and inmate law clerks provides adequate access to courts.

look at paging/delivery systems for inmates housed in segregated units. In one post-*Lewis* decision, a district court flatly rejected the claim that an inmate had a right of physical access to the library; the court noted that the inmate could obtain extensive materials and that his well-drawn complaint and various other motions indicated that the paging/delivery system caused no actual injury.<sup>130</sup>

One lesson to be learned from early litigation involving paging/delivery systems is that institutions must be able to demonstrate that the systems work. They must show that inmates can make requests, receive materials in a timely fashion, and get enough material to conduct a reasonable level of research.

## Inmates Who Are Unable To Use Legal Materials

An effective paging/delivery system may suffice for inmates who can read and understand library materials. However, exclusive reliance on any form of library system, which ultimately depends on the inmate's ability to read and understand relatively complicated material, remains problematic for illiterate inmates, inmates who cannot read English, and inmates who have very limited intellectual capacity. Sooner or later, an ECU inmate will have a valid, nonfrivolous claim but will be

unable to pursue it for lack of ability to use available legal materials. The solution is some form of assistance from persons trained in the law.

One lesson to be learned from early litigation involving paging/delivery systems is that institutions must be able to demonstrate that the systems work.

In the general prison population, an inmate who is unable to use available legal materials may be able to get help from another inmate, either a "jailhouse lawyer" or, in some jurisdictions, a trained inmate law clerk. However, in an ECU setting, these forms of inmate-to-inmate assistance could raise serious security concerns and may not be feasible. Allowing one ECU inmate to assist another may also raise concerns for the administrator.

The "cleanest" way of delivering legal services for inmates unable to use written legal materials is through lawyers or paralegals.<sup>131</sup> The important point is that some form of assistance from persons trained in the law will be necessary for at least some inmates housed in ECUs.

## Summary

ECU inmates have the same fundamental right of access to the courts as other inmates. ECU inmates tend to be very litigious, and institutions should expect them to challenge any program that does not provide full access to a complete law library or extensive assistance from persons trained in the law. However, under the Supreme Court's 1996 decision in *Lewis v. Casey*, inmates

<sup>130</sup> *Dodson v. Reno*, 958 F. Supp. 49 (D. Puerto Rico 1997). See also *Jones-Bey v. Wright*, 944 F. Supp. 723, 731 (N.D. Ind. 1996): "Standing alone, delay and inconvenience do not rise to the level of a constitutional deficiency."

<sup>131</sup> See *Carper*, 54F. 3d 613.


must demonstrate actual injury before they can have standing to raise an access-to-courts claim.

The prison's affirmative duty is to provide some level and form of resources to support, in a meaningful way, inmates' right of access to the courts. Traditional paging systems, once generally found inadequate by the courts, may pass muster under *Lewis* if the institution can demonstrate that the system works properly. However, any library-based system does not meet the needs of inmates

who cannot read English; these inmates require some form of legal advice.

In *Lewis*, the Supreme Court invites prison administrators to experiment with how they fulfill their duty to provide meaningful legal resources. Such experiments might include systems that use CD-ROM or Internet technology. Any system a prison uses to provide legal resources in the ECU is sure to be challenged at some point.

# The First Amendment: Religion, Speech, and the Press



Among the losses inmates face when they enter an ECU are those associated with reduced opportunities to engage in religious practices and reduced access to mail and publications. At least to some degree, such reductions raise questions under the First Amendment. This chapter looks at the Supreme Court's test for evaluating restrictions of First Amendment rights and then focuses on legal considerations related to inmates' religious practices.

## Supreme Court Test for Evaluating First Amendment Restrictions

In the 1987 case *Turner v. Safely*, the Supreme Court held that prison officials can restrict an inmate's First Amendment rights if the restriction is reasonably related to a legitimate penological interest, such as security, order, safety, or rehabilitation.<sup>132</sup> *Turner* requires the courts to ask four questions when evaluating a restriction of a First Amendment right:

<sup>132</sup> *Turner v. Safely*, 482 U.S. 78 (1987).

1. Is there a valid, rational connection between the restriction and a legitimate penological interest? Example: Does not allowing ECU inmates to attend group religious services further a security interest of the prison?
2. Does the inmate have alternative ways to exercise the right in question? Example: Can inmates who may not attend group religious services exercise their religious beliefs in their cells?
3. If the inmate's request were accommodated, what would be the impact on staff, inmates, and institution resources. Example: Would allowing an ECU inmate to attend group religious services create security problems because the inmate would need to be moved and because of the group setting?
4. Is there an obvious, readily available alternative to restricting the First Amendment right in question? (If the answer is yes, the institution's action probably is not reasonable but is in fact an exaggerated response to a concern.) Courts rarely strike down a restriction on First Amendment-protected activity on this ground.

In applying this four-part test, courts are expected to show substantial deference to the judgment calls of prison officials, especially in regard to items 1 and 3. So, for example, if an official says that lack of a particular restriction "might" create a security problem, a court will generally defer to that judgment and uphold the challenged restriction under the *Turner* test.

Meeting the demands of the *Turner* test is not difficult, especially when dealing with inmates who are the highest security risks in a prison system. However, if administrators impose a First Amendment restriction, the institution bears the burden of justifying the restriction under the four-part *Turner* test.

Applying the *Turner* test, the Eighth Circuit found no First Amendment violation in prohibiting a Native American inmate from having ceremonial pipes, medicine bags, eagle claws, and altar stones in administrative segregation.<sup>133</sup> In a similar case, a district court upheld a rule that prohibited inmates in segregation from attending group religious services.<sup>134</sup> Both of these cases involved clear security concerns.

In the absence of clear security concerns, however, First Amendment restrictions may be more difficult to defend. For example, courts recently found that denial of a Kosher diet to Jewish inmates is not justifiable under the *Turner* test.<sup>135</sup> These cases dealt with general population inmates and considered only Kosher diets (not religious diets in general). Two of the cases (*Johnson v. Horn* and *Ashelman v. Wawrzasek*) acknowledge that a prison has a legitimate interest in a simplified food service system. Although it could be argued that the impact of these cases will be limited and should not affect ECU inmates, a better reading is that the cases constitute a forewarning about restrictions on religious diets. Corrections officials should examine their policies in the context of this growing body of case law to determine what, if any, changes should be made with regard to ECU inmates' religious diets.

<sup>133</sup> *Bettis v. Delo*, 14 F.3d 22 (8th Cir. 1994).

<sup>134</sup> *Germunde v. Cook*, 684 F. Supp. 255 (D. Utah 1988).

<sup>135</sup> *Johnson v. Horn*, 150 F.3d 276 (3d Cir. 1998), in which prison officials conceded that inmates were entitled to some form of Kosher diet; *Ashelman v. Wawrzasek*, 111 F.3d 647 (9th Cir. 1997); and *Bass v. Coughlin*, 976 F.3d 98 (2d Cir. 1992). However see *Martinelli v. Dugger*, 817 F.2d 1499 (11th Cir. 1987), which held that a pork-free diet sufficiently met a Muslim inmate's dietary concerns.



## The Religious Land Use and Institutionalized Persons Act

In the summer of 2000, Congress passed the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc-1. This statute, which for corrections purposes is essentially the same as the Religious Freedom Restoration Act of 1993, attempts to replace the institution-friendly *Turner* test for evaluating restrictions on First Amendment religious rights with a more demanding test for evaluating restrictions on religious practices specifically. The provisions of RLUIPA apply to a prison if it or the corrections department of which it is a part receives any federal funding, which means it will apply to virtually all ECUs.

Under RLUIPA, any “substantial burden” on an inmate’s practice of religion must further a “compelling governmental interest” and be the “least restrictive” means of doing so. Although courts will generally accept security as a compelling governmental interest for a restriction, the “least restrictive” test invites a court to second-guess a particular restriction and ask why some other alternative was not chosen.

Restrictions on religious practices in high-security units are commonplace. Perhaps because these restrictions could easily be defended under the *Turner* test, their validity has almost become taken for granted. RLUIPA may force reexamination of many of these restrictions.

In RLUIPA, Congress attempted to avoid the flaw the Supreme Court found in the Religious Freedom Restoration Act when it declared that statute

unconstitutional as applied to state and local governments.<sup>136</sup> At the time this monograph was written, federal appeals courts disagreed as to whether RLUIPA violates the establishment clause of the First Amendment.<sup>137</sup>

## Inmate Religious Practices Not Mandated by Faith

Faced with an inmate request for some type of special privilege related to a religious practice, corrections officials naturally tend to ask leaders of the inmate’s faith whether the faith requires believers to engage in that practice. If the answer is no, that the practice is left to the individual, officials are likely to deny the request.

Some courts have overruled such denials, saying that First Amendment protections do not hinge on whether a particular practice is mandated by the inmate’s faith.<sup>138</sup> *Levitan v. Ashcroft*, cited in footnote 138, provides a good example. An inmate at the Federal Prison Camp in Pensacola, Florida, wanted to have wine as part of the Catholic sacrament of communion. However, a change in the Federal Bureau of Prisons policy forbade inmates’ use of wine in communion. The district court upheld the no-wine policy, saying that wine was not required by the Catholic Church. The court of appeals reversed the decision, saying that if the inmate’s belief (in the importance of having wine, not just grape juice) was sincere and based on his religious convictions, that was enough to trigger First Amendment protections.

The *Levitan* decision does not say that inmates have a constitutional right to have wine with

<sup>136</sup> *City of Boerne v. Flores*, 521 U.S. 507 (1997).

<sup>137</sup> Decisions supporting the law include *Charles v. Verhagen*, 348 F.3d 610 (7th Cir. 2003) and *Madison v. Riter*, 355 F.3d 310 (4th Cir. 2003). Taking the opposite view is *Cutter v. Wilkinson*, 349 F.3d 257 (6th Cir. 2003). More decisions about the law probably will have been reached by the time this monograph is published, and a Supreme Court review seems both inevitable and necessary.

<sup>138</sup> *Levitan v. Ashcroft*, 281 F.3d 1313 (D.C. Cir. 2002); *LaFevers v. Saffle*, 936 F.3d 1117 (10th Cir. 1991).



communion. It says that although the Bureau's reason for denying the wine request was not valid, the restriction still might be defensible under the *Turner* test (i.e., whether the restriction is reasonably related to a legitimate penological interest). If the inmate were to raise a RLUIPA issue (see previous section), the restriction would be analyzed under the RLUIPA test, which is more demanding than the *Turner* test.

The point of this discussion is not whether inmates have a right to wine with communion. The point is that if a practice has even the slightest support from an inmate's faith, courts may extend First Amendment protections to the practice and require officials to justify restricting or banning it, through either the *Turner* test or the RLUIPA test. Knee-jerk denials of requests simply because they are not required by the inmate's faith may find little favor with a reviewing court. If officials want to raise the "it isn't required" argument when an inmate challenges their denial of a request, they should also present arguments based on the *Turner* and/or RLUIPA tests, indicating, for example, how the restriction addresses legitimate security concerns and why a less restrictive option is not viable. Because of the ECU's very substantial security concerns, such arguments have a better chance of success than an "it isn't required" defense.

Only in the clearest circumstances should prison officials deny a request on the basis that an inmate's beliefs are insincere.

## Sincerity of Beliefs

The First Amendment extends protections only to sincerely held religious beliefs. If the inmate is not sincere about his religious beliefs and practices, then the institution has no duty to accommodate them, and a court will not ask the institution to show a legitimate reason for imposing bans or restrictions on them.

It is, however, difficult to mount a successful defense based on the premise that an inmate's religious beliefs are not sincerely held. Neither a long criminal history nor a notorious institutional record shows insincerity, although both could be relevant to the inquiry. That an inmate does not follow every tenet of a faith does not necessarily show insincerity.<sup>139</sup>

In assessing an inmate's sincerity, officials should keep in mind that the seclusion and idleness of the ECU may lead some inmates to examine and renew their religious beliefs or embrace new belief systems. Others may simply want to participate in one of the few programs the ECU offers, to fill time. Some may look at religious issues as fodder for litigation.

Convincing a court that an inmate's religious beliefs are not sincere probably will require a relatively complicated showing of facts. The burden

<sup>139</sup> *Reed v. Falkner*, 842 F.2d 960 (7th Cir. 1988).

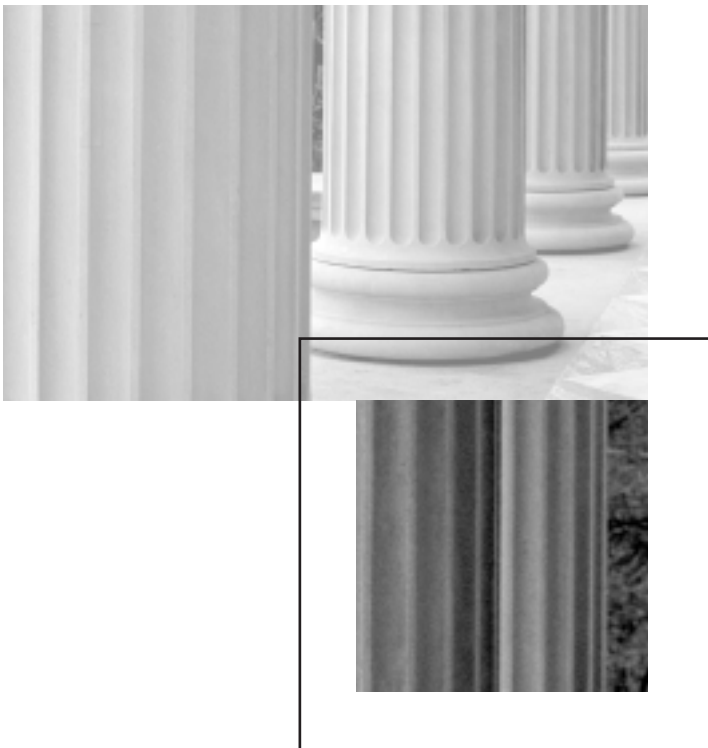
will be on the prison officials to convince the court that the inmate is not sincere in his beliefs. Only in the clearest circumstances should prison officials deny a request on the basis that an inmate's beliefs are insincere. As with the "it isn't required" defense discussed above, the "lack of sincerity" defense should, if possible, be accompanied by arguments based on the *Turner* and/or RLUIPA tests.

## Summary

The restrictive environment of the ECU can raise First Amendment issues. In considering inmates' demands regarding religious and other types of activities, corrections officials should be aware of how the courts may review their response.

The Supreme Court, in *Turner v. Safely*, defined a four-part test for evaluating whether a particular First Amendment restriction is justified. Institutions have not found it difficult to meet this test, which basically requires a reasonable connection between a restriction (e.g., not allowing ECU inmates to attend group religious services) and a legitimate penological interest (e.g., security). When restrictions on religious practices are at issue, institutions may also need to show why a less restrictive alternative was not possible. In general, an institution's defense of a challenged restriction should not rely solely on an argument that a particular practice is not mandated by the inmate's faith or that the inmate's religious beliefs are not sincerely held.

# Closing Thoughts



The concept of an extended control unit—the “supermax prison”—is now embedded in American corrections. Planning for the creation of an ECU is an experience that still awaits many agency officials. But for those currently responsible for operating ECUs, a major challenge lies in recognizing just how many legal issues can arise and supervising operations accordingly.

Based on a limited body of case law, it can be concluded that the most significant legal issues facing ECUs are those concerning inmates who are mentally ill or whose behavior suggests they may be mentally ill. Are there some inmates who should not be placed in an ECU? If so, who are they and how can they be screened out? Are there others whose mental status is harmed by living in the ECU? If so, how can they be identified and moved elsewhere?

The issue then moves beyond the scope of this monograph. Where does a prison system place inmates who (1) present a high security risk but

(2) cannot be placed or held in an ECU? Must a new type of high-security mental health unit be developed? Can ECU operations be modified to accommodate some or all of this (as yet somewhat vaguely defined) group of inmates?

Even setting these issues aside, ECUs may be the most difficult type of prison to operate, given the nature of the inmates typically placed in them. Certainly ECU inmates and the management strategies used to control them give rise to a prison system's most concentrated, intense legal concerns.

Services that are especially critical from a legal perspective—such as those related to medical and mental health care and access to the courts—are difficult to deliver in ECUs. Use of force is an ever-present issue in the ECU, where inmate behaviors test officers' professionalism. In the absence of close supervision and review, use of force can deteriorate into endemic abuse of force.

The keys to avoiding legal pitfalls and reducing liability exposure are the same in the ECU as anywhere else in the prison system:

- An informed assessment of the needs and characteristics of the target population.
- A clearly defined mission and a comprehensive plan of operation.

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- Careful development of policies and procedures, with a close eye to legal issues.
- Funding and staffing commensurate with the identified needs and mission.
- Training to promote a skillful and knowledgeable workforce.
- Perhaps most importantly: commitment on the part of

supervisors and managers—from sergeant to warden to agency head—to ensuring humane and legal operations.

If these factors are ignored—especially if supervision and management are lax—the ECU can become fertile ground for destructive interactions between staff and inmates. The result will be intervention by the courts.

In seeking to minimize exposure to liability, should corrections agencies look beyond these traditional, internal approaches and consider external sources of assistance? One possibility would be to solicit an outside review—perhaps from professionals who operate what the field recognizes to be top-notch ECUs—that asks “how are we doing?” Another would be to invite mental health experts into the facility to evaluate critical inmate mental health issues and perhaps to conduct formal peer reviews of mental health-related decisions.

Periodic external reviews of ECU operations offer an important advantage: perspective. Problems can develop slowly and incrementally. What someone looking at the facility for the first time identifies as a fairly obvious problem may be essentially invisible to those who work there

because the problem crept insidiously into operations and became part of the institutional culture. The external review may be able to identify “problem creep” and give ECU managers important feedback in time to address potential constitutional issues before they reach litigation.

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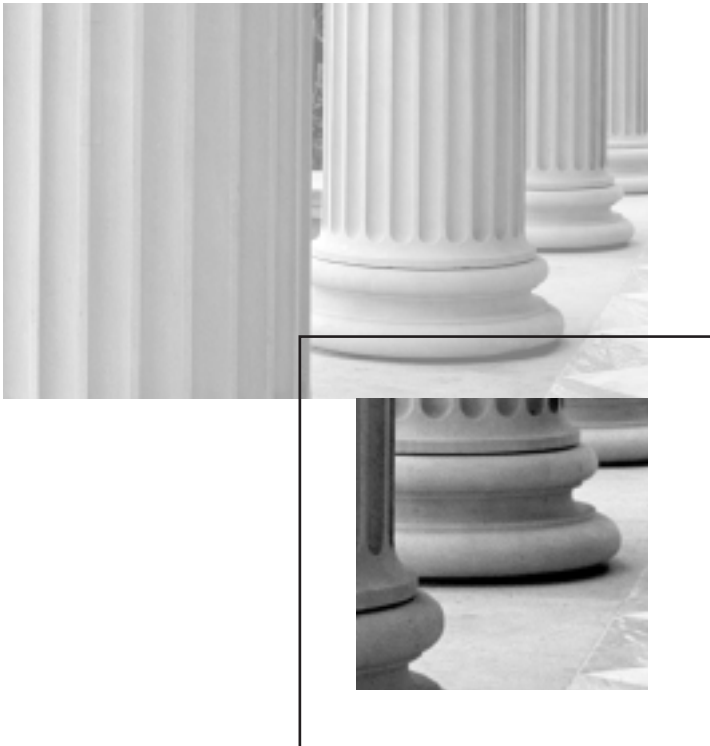
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