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Perrie Lectures 2017:
Can any good come of segregation?

Is there a GOoD justification for the segregation of young people?

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Young Offender Institutions (YOIs) in the United Kingdom cannot use solitary confinement as punishment for bad behaviour. Children and young people can, however, be held in solitary confinement in segregation units for the maintenance of good order or discipline (GOoD). As Rule 49(1) of The Young Offender Institution Rules 2000 states, prison governors may authorise a young person's 'removal from association' where it is desirable for 'the maintenance of good order or discipline, or in his own interests'.[1]

On 4 July 2017, Justice Ouseley of the High Court ruled that aspects of the 'prolonged solitary confinement' of a sixteen year old boy housed at Feltham Young Offender Institution under rule 49(1) amounted to a breach of the boy's human rights. Justice Ouseley found that the institution's failure to follow the relevant prison rules and provide the boy, known as AB, with sufficient educational provision or association with others breached his right to private and family life under Article 8 of the European Convention on Human Rights. The Court found that there was a period where AB spent over 22 hours a day in his cell, for more than 15 days at a time, and that at many points he was only allowed to leave his cell for half an hour a day. Despite these circumstances, the Court stopped short of finding that AB's treatment amounted to torture or was inhumane within Article 3 of the European Convention on Human Rights.[2]

The AB case has shone a light on the use of 'solitary confinement', as a tool to tackle the challenging behaviour of children in Young Offender Institutions in the United Kingdom. Growing evidence demonstrates that solitary confinement has an adverse impact on mental health, particularly for those with pre-existing conditions.[3] This was the case for AB who is described in the judgement as 'challenging', with a history of violent conduct toward staff and other prisoners, and as having diagnoses of post-traumatic stress disorder, conduct disorder and attention deficit hyperactivity disorder.[4]

The Howard League has argued that 'the UK is out of step with a growing international consensus that children should never be placed in solitary confinement.'[5] Pointing to recent legal challenges, including AB's case, they argue that the judiciary has fallen short of bringing the United Kingdom in line with the growing international consensus that the segregation of children is an unconscionable practice. This paper first assesses the current use of segregation of young people in the UK, analysing the policy arguments in favour of segregation. It then focuses on the practice of segregation and the consequential risks to the mental health of young people that are posed by the practice, analysing the effectiveness of the safeguards available to segregated young people. The final section of this paper considers how effective legal recourse is as a final safeguard against misuse of solitary confinement and the extent to which the law can be considered an effective means by which to challenge its use.

Young People and Solitary Confinement: Current Policy and Practice

> *I remember nodding approvingly when I was told as a Governor that all seg prisoners had had their 'regime' for the day. What that actually meant was a shower, 20 minutes walking round a yard (if it wasn't raining), walking 10 yards to collect two meals, and making a phone call if they had any phone credit left (not likely when they had no means to earn it)'* — Peter Dawson, Prison Reform Trust.[6]

1. The Young Offender Institution Rules. (2000). Rule 49(1)
2. R (AB) v Secretary of State for Justice [2017] EWHC 1694.
3. Shalev, S. (2008). A sourcebook on solitary confinement. London: Mannheim Centre for Criminology, London School of Economics and Political Science.
4. Ibid, pg. 1 para 3.
5. The Howard League. (2017). Feltham Solitary Confinement High Court Judgement. Retrieved from Howardleague.org/news/felthamsolitaryconfinementhighcourtjudgement.
6. Peter Dawson. (2015). Solitary Confinement and Avoidable Harm. Retrieved from https://www.opendemocracy.net/shinealight/peter-dawson/solitary-confinement-and-avoidable-harm.

This section addresses the policy arguments in favour of segregation and illustrates what segregation for young people looks, and feels, like in practice.

The practice of solitary confinement was originally based in Quaker ideology and was intended as a reflecting experience where prisoners were left in isolation with a copy of the Bible for the purpose of reflecting upon their crimes and repenting.[7] As Jeffreys explains, historians have long documented that solitary confinement caused psychological problems and 'turn[ed] inmates mad'. The resurgence of the practice during the punitive turn of the 1970s, Jeffreys claims, has resulted in psychologists and psychiatrists re-learning what was learned by our ancestors through hard experience.[8] Although solitary confinement, segregation and removal from association are distinct terms there is a degree of overlap in their definitions. In the youth estate the practice is referred to as 'removal from association', however this can amount to both segregation and solitary confinement

Young offenders can be removed from association for 'maintenance of good order or discipline' (GOoD) or 'in their own interests' under Young Offender Institution Rule 49(1), for which detailed guidance is published in Prison Service Order 1700. Segregation for GOoD is discussed later, as it has the capacity to be used as punishment by proxy, despite the PSO (Prison Service Order) stating that it should only be used 'when there are reasonable grounds for believing that a prisoner's behaviour is likely to be so disruptive or cause disruption that keeping the prisoner on ordinary location is unsafe'. AB's case provides valuable insight into the contemporary segregation regime as it was and has been experienced within HMYOI Feltham. Justice Ouseley gives a detailed description of AB's removal from association in his judgement. In the case, noting that while there were some variations in the regime during AB's time in Feltham, AB was at times spending only a half an hour out of his cell each day. This practice lasted for a period of longer than 15 days, due to AB being on single unlock (meaning that he was not allowed out when other prisoners were out of their cells) and on three officer unlock (meaning that three officers were required to be present for him to be out of his room.)

Whether this experience is typical for those under similar regimes in other YOIs is not easy to determine. Justice Ouseley refused to comment on the assertion of AB's counsel, Dan Squires QC, that the position the claimant found himself in is not uncommon. In its 2015-2016 report, Her Majesty's Inspectorate of Prisons described finding that 38 per cent of prisoners in YOIs spent less than two hours out of their cell each day.[9] Reduction in prison and other public service budgets may go some way to explaining the prevalence of prisoners being confined to their cell for long periods. The same Inspectorate report described that HMP Bullingdon had been operating a restricted regime for the previous 12 months, owing to staff shortages.[10] In September 2017, The Children's Commissioner published a report in which it was accepted that staff-child ratio was a determining factor in the use of isolation as a means to maintain order or control. The report also raised concerns about the conditions in many YOIs for children in segregation. These concerns included deficient access to education and exercise, cells that were too small with limited access to light, lack of facilities for maintaining personal hygiene, and lack of professional support for mental welfare issues.[11] Had AB been given the fifteen hours a week education to which he was entitled then, on the basis of the judgement, his solitary confinement would not have been found to violate Article 8 of the European Convention on Human Rights. The real question that the AB judgement raises therefore, is when and how it is (and ought to be) considered appropriate and acceptable to keep children in conditions of solitary confinement.

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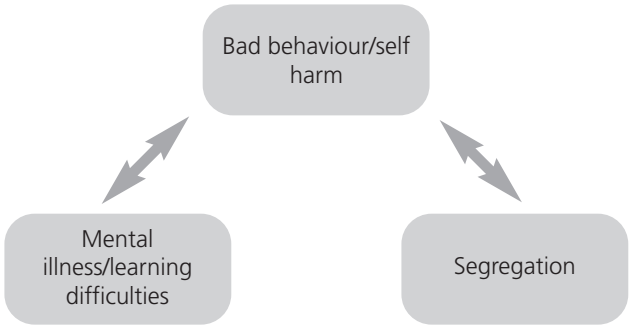
Mental Health and the Cycle of Segregation

This section questions whether segregation of young people within the current regulatory framework can be considered an effective tool for managing the difficulties that young people face in custody. Although segregation for punishment is not authorized in the

7. Lee, J. (2016). Lonely Too Long – Redefining and Reforming Juvenile Solitary Confinement. Fordham Law Review, 85(2), pp.845–876.
8. Jeffreys, D. (2016). Segregation and Supermax Confinement, an Ethical Evaluation. In Y. Jewkes, B. Crewe, & J. Bennett, 2 eds. Handbook on Prisons.
9. HM Chief Inspectorate of Prisons, (2016). HM Chief Inspector of Prisons for England and Wales Annual Report 2015-16, London.pg.41.
10. Ibid.
11. Children's Commissioner. (2015). Isolation and Solitary Confinement of Children in the English Youth Justice Secure Estate, Sheffield.

youth estate, the difference between segregation for punishment and segregation for Good Order or Discipline (GOoD) often appears immaterial in practice.[12]

A 2015 report by the Children's Commissioner's estimated that one third of children in the youth justice estate are isolated at some point during their sentence, and that once they have been isolated they are likely to be isolated at least once more. The evidence shows that solitary confinement increases the likelihood of young people developing mental health problems. In addition, young people suffering from mental health problems, including those that are more difficult to manage as a result, are more likely to be segregated. These mental health problems, made worse by, or developed during the experience of solitary confinement, can then cause problems such as poor behaviour, self-harm, aggression toward staff, or dirty protest. There is a sense in which following the current rules (segregation for GOoD) can perpetuate behaviour that manifests distress and the cycle of segregation.



A review of the evidence of the mental health effects of segregation makes for troubling reading. The effects of segregation are arguably amplified for young people because their brains are still developing, Lee claims that studies have shown the developmental process to continue up until the age of twenty five.[13] Shalev argues that there is 'unequivocal evidence that solitary confinement has a profound impact on health and wellbeing, particularly for those with pre-existing mental health disorders, and that it may also actively cause mental illness.'[14] This analysis is supported by Scharff-Smith who conducted a review of the evidence, finding that different studies have found that between one third and over 90 per cent of people in prison experience negative effects of solitary confinement, and that a significant amount of these effects caused or worsened by solitary confinement. Scharff-Smith also notes that the reduction of meaningful social contact in prison is its central harmful and damaging feature.[15] Even outside of a prison environment, isolation has been shown to lead to significant problems. In 2015 Holt-Lunstad et al. published a paper which found that from 70 independent studies, with 3,407,134 participants, for non-prisoners the increased likelihood of death due to social isolation was 29 per cent, making the heightened risk of mortality from lack of social relationships greater than that of obesity. The acknowledgement of the risk of psychological harm posed by segregation is not limited to academic literature, the Istanbul Statement recognises that: 'the central harmful feature… is that it reduces meaningful social contact to a level of social and psychological stimulus that many will experience as insufficient to sustain health and well-being.'[16] If we accept the premise that segregation has a considerable propensity to worsen and potentially cause mental illness, the relevant policy, procedures and safeguards for its use must be examined further.

Whilst safeguards to limit the use of segregation exist, they are arguably of limited effectiveness. One safeguard against segregation is the requirement of oversight by trained health professionals under rule 28 of the Young Offender Institution Rules 2000. Prison Service Order 1700 explains that the outcome of health assessments is to 'ensure that there is no reason why prisoners should be removed from segregation on either physical or mental health grounds'.[17] There is a question as to whether the oversight of health professionals is adequate in light of the interplay between segregation and mental health. Shalev and Edgar's 2015 study 'Deep Custody' found that many healthcare professionals conducted screens in a 'tick-box' fashion, and misconstrued their role, understanding themselves as there to pass people as 'fit' for segregation.[18] Shalev and Edgar also found ethical issues that complicated the ability of health professionals to provide adequate oversight when assessing young persons in segregation because of the duty of loyalty that they owe to residents which means that they must act in their best interests at all times.[19] The wording of PSO 1700, such as the requirement 'to ensure that there is **no** reason why prisoners should be removed from segregation' (emphasis added), seems to subordinate the duties of health professionals in favour of the prison's power to

12. R (On the Application of SP) v Secretary of State for the Home Department, [2004] EWCA Civ 750.
13. Lee, J. (2016). Lonely Too Long – Redefining and Reforming Juvenile Solitary Confinement. Fordham Law Review, 85(2), pp.845–876.
14. Shalev, S. (2008). Sourcebook on Solitary confinement, London: Mannheim Centre for Criminology. Pg. 10.
15. Scharff-Smith, P. (2006). The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature. Crime and Justice, 34(1), pp.441–528. Retrieved from: http://www.journals.uchicago.edu/doi/10.1086/500626.
16. International Psychological Trauma Symposium. (2007). The Istanbul statement on the use and effects of solitary confinement.
17. HM Prison and Probation Service. (2009). Prison Service Order 1700.
18. Shalev, S. & Edgar, K. (2015). Deep Custody: Segregation Units and Close Supervision Centres in England and Wales, Prison Reform Trust.
19. Shalev, S. (2008). Sourcebook on Solitary confinement, London: Mannheim Centre for Criminology.

segregate, which Shalev argues is inconsistent with international standards of medical ethics which she says clearly state that health professionals should never certify someone as 'fit for punishment'.[20] The fact that health professionals in prisons rarely oppose segregation of young people, despite unequivocal evidence that prolonged segregation can have significant permanent effects on mental health might suggest they do not feel empowered to do so.

Another procedural safeguard which exists in order to provide a check on the segregation of young people requires staff to maintain ongoing assessments of prisoners, in order to apply the lowest level of control necessary. There is a danger of YOIs 'warehousing' the most troublesome individuals away from general population as a long-term tool to maintain order, as was argued in AB's case. Shalev and Edgar (2015) claim that adherence to this requirement was not always evident.[21] The danger of failing to reduce the security level of prisoners when appropriate was raised by the judge in the SP case, another legal challenge to segregation, when he claimed that 'if you don't reduce the unlock level when you have the opportunity you'll miss it and create a monster. It's a narrow window of opportunity — you shouldn't miss it'.[22] The irony being, that if the prison misses the opportunity and a 'monster' is created, then the GOoD guidance suggests it is defensible to continue to segregate that 'monster' for the benefit of maintaining good order and discipline. This was the fate of AB. The assaults on staff were described by the judge as a 'pattern of behaviour when faced with a confrontational situation'. However, earlier in the judgement it is accepted that AB had previously been abused by officers and that his history of physically and verbally aggressive behaviour indicated a child who was likely to have experienced significant harm. AB's history suggests the cyclical nature of the lives of many of those segregated in the youth estate. This cycle reduces young people to 'problems' and 'operational concerns', which in turn risks robbing them of their dignity, agency, and capacity to change. So, if children can be segregated in ways that are legally compliant, but still harmful, are there effective mechanisms to challenge the use of segregation?

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Resistance or last resort: challenging segregation in court

This section discusses the role of law in challenging the use of segregation. It also considers whether there are aspects of the use of segregation for young people that the legal safeguards available are unable to address. The lack of cases where young people have challenged the use of segregation in the courts may be indicative of incomplete legal protection, or, it could indicate insufficient provision of legal aid for young people in custody coupled with a lack of understanding of avenues for recourse among a vulnerable population with minimal contact with the outside world.

The first significant legal challenge to the segregation of young people was the case of *R (Howard League for Penal Reform) v Secretary of State for the Home Department in 2002*.[23] This case saw The Children's Act extended to young people being held in prisons and young offender institutions, whereas previously it was generally believed that children's rights stopped at the prison gates. It was also held in this case that children's rights to both ordinary and physical education should be protected. The procedural rules breached in the AB case also concerned the provision of education. Justice Ouseley made it clear that these rules could not be breached for reasons of discipline or order, children have a right to education and it is the prison's duty to ensure this despite trying circumstances and limited resources.[24] It seems where the use of segregation is in direct challenge to the fundamental right to education, the courts may provide an effective safeguard, but it is arguable whether this is a safeguard against segregation or a protection for education.

Another case which acknowledged the special importance of safeguarding children in prison from segregation was *R (on the application of SP) v Secretary of State for the Home Department [2004]*[25] where the

20. Ibid.
21. Shalev, S. & Edgar, K. (2015). Deep Custody: Segregation Units and Close Supervision Centres in England and Wales, Prison Reform Trust.
22. R (On the Application of SP) v Secretary of State for the Home Department, [2004] EWCA Civ 750.
23. [2002] EWHC 2497.
24. The judgement in AB's case contains reference to cuts to staffing levels in the youth justice estate, it may be possible that government cuts have left prisons needing to make difficult decisions about where they focus their resources, and increased use of segregation as a result.
25. EWCA Civ 750.

judge ruled that children facing segregation for reasons of good order or discipline must be given the opportunity to make representations on the tentative reasons for their segregation. The judge made it clear in this instance that part of the justification for finding in their favour was that once the decision to segregate had been taken it was particularly difficult to reverse, which highlights the importance of providing adequate safeguards. This case creates no precedent for inmates to challenge their segregation itself, but simply to challenge the charge for which they have been segregated. In addition, this judgement simply provides an opportunity for representation and not a direct right of recourse against the use of segregation, if it is used as a tool to control challenging behaviour that threatens GOoD.

The courts have yet to find an instance where the segregation of children has breached Article 3 of the European Convention of Human Rights, the freedom from torture, inhuman or degrading treatment. In the case of *R (on the Application of Munjaz) v Mersey NHS Care Trust*[26] the judge stated that such a circumstance would have to be extreme, but the vulnerability of a prisoner will be relevant as to whether there will be a breach. This is an important decision particularly when taking into account the prevalence of vulnerable children in the prison system. The statistics on the vulnerability of young people in custody suggest that a significant proportion of cases are likely to concern vulnerable children. The Barrow Cadbury trust estimate that 40-49 per cent of young men in custody between 18 and 21 have been in care, 25 per cent have suffered violence at home, and young adults account for 20 per cent of people in prison who self-harm which is disproportionate to their percentage of the overall prison population.[27] In addition, being placed in custody, and particularly solitary confinement, may risk contributing to a child's vulnerability irrespective of their previous circumstances.

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In the case of *R (Bourgass and Another)* the judge again emphasised the need for an 'extremely fact sensitive inquiry' in assessing whether the minimum level of severity is reached to engage a child's Article 3 rights under the convention. It seems that despite the declarations in *R (Bourgass and Another) and R (on the application of Munjaz)*, the courts take a very narrow approach that is inadequate for challenging the practice of segregation. AB had suffered a difficult childhood, experienced abuse, witnessed domestic violence, seen his father take an overdose, seen an uncle die from a drug overdose, been on the child protection register, and been in care. The case recorded that he suffered from from post-traumatic stress disorder, conduct disorder, and attention deficit hyperactivity disorder, had been abused by officers in detention and had been restrained by staff on a number of occasions. He also had considerable learning difficulties, was in his GCSE year and was effectively removed from association, unlawfully, for five months during which time it had not been possible to comply with the educational requirement for children in custody (fifteen hours a week). These individual factors, in a fact sensitive inquiry, would contribute to a classification of AB as extremely vulnerable. In spite of this, the court believed that the treatment described was not sufficient to reach the minimum standard of severity to engage article 3. It seems, therefore, that the courts are an insufficient avenue to challenge the use of segregation more broadly on the basis of the pains that it causes to vulnerable young people.

The court found that AB was unlawfully removed from association between December 2016 and April 2017. The proceedings were brought before the court in February 2017. Although procedural safeguards are in place to challenge segregation, the fact that an individual can be unlawfully segregated for so long indicates that the safeguards are inadequate to prevent the pains that long-term segregation of children and young people can cause. The judge presiding in *(R on the application of SP)* accepted that 'it is often the case in any decision of an authority that once a decision has been made, it is difficult to change it', and 'inevitably the decision maker will be reluctant to conclude that the decision was wrong.'[28] The Howard League, who are involved in many of the cases involving solitary confinement of children, are the only frontline national legal team specialising in the legal rights of children in custody. In an underfunded prison system, accompanied by a skeleton legal aid system (and one in which aid has been withdrawn from convicted offenders), there are few avenues for children to challenge their segregation.

26. [2005] UKHL 58.
27. Barrow Cadbury Trust. (2005). Lost in Translation: A report of the Barrow Cadbury Commission on Young Adults in the Criminal Justice System, London.
28. R (On the Application of SP) v Secretary of State for the Home Department, [2004] EWCA Civ 750.

Where these challenges have been made, the court appears reluctant to enter a dialogue about the risk of abject harm to vulnerable young people inherent in the use of solitary confinement. This disregard for the welfare of the most vulnerable children and young people in society should not only be out of step with the 'international consensus' but with our shared values as a society.

Conclusion

YOIs are permitted to segregate young people to maintain Good Order or Discipline, but this article has argued that even when used for these purposes, segregation is unlikely to be GOoD. The pressures currently facing our prison system are widespread and well publicised; problems of order, safety, cleanliness and staffing are frequently discussed in the news.[29] A recent report by Her Majesty's Inspectorate of Prisons was claimed by Peter Dawson of the Prison Reform Trust to describe 'a stain on our national reputation,'[30] and the same report cited time unlocked and out of cell as 'perhaps the biggest influence on how prisoners view the time they spend in it.'[31] It is important that these issues are understood away from their political implications and academic perspectives and considered in light of the lived experiences for the individuals living within these institutions. This article has considered the lived experience of young people in segregation alongside policy arguments for the practice, and presented a counter argument based on the substantial consequences to the mental health of young people of removing them from human contact for up to 23.5 hours of the day during crucial stages in their development. It has also discussed the available safeguards, procedural and legal, and highlighted their inadequacies. Segregating 'difficult to manage' young people as a result of their challenging behaviour, which is often caused by vulnerability as a result of histories of abuse coupled with mental health problems and learning difficulties, only serves to exacerbate these issues and perpetuate a cycle of segregation. It is also troubling that the system allows for the use of segregation for GOoD as a response to the staffing pressures that some prisons find themselves subject. Prisons have the potential to be places of rehabilitation, however, supporting a practice which removes our most vulnerable prisons access to transformative activities such as education and training and into an environment shown to further intensify their existing vulnerabilities is unlikely to contribute to making prisons sites of rehabilitation. The practice is especially troubling precisely because it happens in isolation and there are inadequate safeguards and largely inaccessible avenues for legal recourse.

In the United States a man called Kalief Browder has become a household name. Kalief was arrested at the age of fifteen for stealing a backpack. He was subsequently imprisoned on Rikers Island. Due to the violence he was subjected to as a result of not surrendering his belongings to the older inmates in the jail he was placed in solitary confinement for hundreds of days, where he continued to be subject to violence at the hands of the guards. Kalief was left on Rikers Island for years in the hope that he would accept a plea bargain, in the face of which he maintained his innocence. Kalief was later released without charge. Upon returning home he began to display symptoms of post-traumatic stress disorder and found it difficult to adjust back to life in the Bronx. Kalief committed suicide in his home at the age of 22.[32] Kalief's story has become a catalyst for reform in the US with the former president Barack Obama vowing to reform the law on segregation of minors, a six part documentary was also made about his ordeal.[33] In the United Kingdom 25 per cent of people in our YOI's are on remand awaiting trial.

The damaging effects of segregation on people in prison, especially young people, are well known and widely documented. This begs the question why the United Kingdom continues the practice of segregating children, and why the courts have been reluctant to find a violation of Article 3 of the European Convention regarding this practice. The risks of self-harm and suicide whilst in segregation are well known. One hopes that it does not take a repeat of the tragic fate of Kalief Browder in the United Kingdom for those in authority, the public, and the courts to finally condemn the practice of putting vulnerable children as deep as possible behind bars without meaningful contact for all but an hour of the day, and in so doing risking them turning into even more vulnerable adults.

29. See: https://www.theguardian.com/society/2016/nov/12/staff-shortages-british-prisons-bedford-pentonville-truss
30. http://www.prisonreformtrust.org.uk/PressPolicy/News/vw/1/ItemID/479
31. HM Inspectorate of Prisons. (2017). Life in Prison: Living Conditions. A findings Paper by Her Majesty's Inspectorate of Prisons.
32. Lee, J. (2016). Lonely Too Long – Redefining and Reforming Juvenile Solitary Confinement. Fordham Law Review, 85(2), pp.845–876.
33. Obama, B. (2016). Barack Obama: Why we must rethink solitary confinement. The Washington Post.