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Analysis and Investigation of Solitary Confinement Reforms

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S.J.D. DISSERTATION

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Abbreviations

American Institute of Architects	AIA
Association of State Correctional Administrators	ASCA
Boston Prison Discipline Society	BPDS
California Correctional Peace Officers Association	CCPOA
California Department of Corrections and Rehabilitation	CDCR
Correctional Leaders Association	CLA
Diagnostic and Statistical Manual of Mental Disorders, 5th Edition	DSM-5
East Mississippi Correctional Facility	EMCF
Indiana Protection and Advocacy Services Commission	IPAS
Federal Bureau of Prisons	FBOP
Humane Alternatives to Long-Term Solitary Confinement	HALT
New York Department of Corrections and Community Supervision	DOCCS
New York State Correctional Officers and Police Benevolent Association	NYSCOPBA
Prison Litigation Reform Act	PLRA
Restrictive Custody General Population Unit	RCGP
Secured Housing Unit / Special Housing Unit	SHU
Shared Allied Management Unit	SAM
Special Management Unit	SMU
Texas Department of Criminal Justice	TDCJ

INTRODUCTION

Solitary confinement has a long and entrenched history in the United States. Estimates vary, but at the height of the coronavirus pandemic in 2020, one report suggested that up to 300,000 people were being held in isolated conditions in US prisons.[1]

Since the first use of solitary confinement in the US in the late 1700s, it has been clear that the practice of isolating people and subjecting them to sensory deprivation in conditions "perilously close to a penal tomb" exposes them to significant risks of serious harm.[2] Albert Woodfox, who was released from prison in 2016 after spending over four decades in solitary confinement in Louisiana, describes the practice as "a punishment for the specific purpose of breaking a prisoner." He urges people to "see solitary confinement for what it is, morally reprehensible."[3]

In recent decades, a robust body of scientific evidence has been developed that illustrates the many different forms of harm that solitary confinement can cause. Despite this literature and the harrowing accounts of people who have been held in solitary confinement for months, years, or decades, little has been done to improve conditions or reform the practice until very recently. The practice has been the subject of numerous court challenges, but only a few judicial decisions have resulted in meaningful change.

Some states and prisons have started to take proactive steps to reform the use of solitary confinement. These measures have been implemented through legislation, litigation, and administrative decisions. Some reforms are still in their infancy and many states are yet to even acknowledge the need for reform. In March 2021, the New York Times' Editorial Board observed that "[t]he horror of solitary is being addressed slowly, in bits and pieces."[4]

This dissertation examines the historic and current use of solitary confinement in the US and analyzes the different approaches taken to reform. It contributes to the body of legal scholarship

[1] UNLOCK THE BOX, SOLITARY CONFINEMENT IS NEVER THE ANSWER 3 (2020).
[2] Apodaca v. Raemisch, 139 S. Ct. 5, 10 (2018) (Sotomayor, J., statement respecting the denial of certiorari).
[3] ALBERT WOODFOX, SOLITARY: MY STORY OF TRANSFORMATION AND HOPE 175, 410 (2019).
[4] The Editorial Board, *Governor Cuomo, End Long-Term Solitary Confinement*, NEW YORK TIMES, (Mar. 25, 2021), https://www.nytimes.com/2021/03/25/opinion/cuomo-solitary-confinement.html.

on the topic of solitary confinement by situating the well-traversed federal jurisprudence in the context of the current reform efforts and identifying the issues that require further consideration if reform is to be truly successful. The dissertation explores not only the historical use of solitary confinement, but also the flaws in the oversight of the practice during that early period, the deference that was shown to penitentiary officials, and the circumstances that led to its demise in the early twentieth century. It also examines the role of state courts and the justifications for the development of state constitutional jurisprudence as an underexplored avenue for potential challenges of solitary confinement.

The structure of the dissertation is as follows. Chapter 1 discusses the historical use of solitary confinement as first introduced in Pennsylvania and New York and later copied by other states, examining official investigations into the practice and the reasons why it was eventually abandoned. Chapter 2 outlines the current use of solitary confinement today. Drawing on accounts from incarcerated people, it describes conditions in solitary confinement and their effects. It also provides an overview of the available demographic data about people held in solitary confinement in US prisons. Chapters 3 and 4 examine the respective federal and state constitutional jurisprudence relating to solitary confinement, including the various barriers to relief. Chapter 4 also includes analysis of the underexplored potential of bringing challenges in state courts. Chapters 5 and 6 discuss the recent and current reforms introduced and implemented through legislation and regulations, bills, settlement agreements and consent decrees, and administrative measures. It includes analysis of the different approaches to reform, as well as thematic issues that arise across all types of reform. Chapter 6 identifies issues that may impede successful reform and the areas where further attention is required for reform to be successful. Chapter 7 concludes and makes recommendations for future reforms.

CHAPTER 1. HISTORY OF EXPERIMENTS IN SOLITARY CONFINEMENT

Introduction

Solitary confinement was first introduced in the United States in jails and penitentiaries in New York and Pennsylvania in the late 1700s. While the concept of using isolation in prisons originated in Europe, it was the United States that developed it further once the European nations became preoccupied with the Napoleonic Wars.[1] This chapter focuses on the solitary confinement experiments of the pioneers in the area, Pennsylvania and New York, but interest in the practice was not confined to these states. It was copied in other prisons and jails, and by 1833, it was in use in Maine, New Hampshire, Vermont, Massachusetts, Connecticut, New Jersey, Maryland, the District of Columbia, Tennessee, Kentucky, Louisiana, Missouri, Illinois, and Ohio.[2] The practice continued to be adopted by even more states, although it was not uniformly imposed for the duration of a sentence; in some jurisdictions, the prison sentence might incorporate, for example, twenty days of solitary confinement with the remainder to be served at hard labor.[3]

This chapter contributes to the body of literature examining the early solitary confinement experiments by analyzing the legislative investigations into allegations of abuse, highlighting the discretion granted to penitentiary officials, and exploring the factors that led to the demise of the early use of solitary confinement. The issues of officials' discretion and limited oversight remain pertinent to current practice and reform efforts.

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[1] W. DAVID LEWIS, FROM NEWGATE TO DANNEMORA: THE RISE OF THE PENITENTIARY IN NEW YORK, 1796-1848, 27-28 (1965); MARK COLVIN, PENITENTIARIES, REFORMATORIES, AND CHAIN GANGS: SOCIAL THEORY AND THE HISTORY OF PUNISHMENT IN NINETEENTH-CENTURY AMERICA 49 (1997). *See also* Martin B. Miller, *Sinking Gradually into the Proletariat: The Emergence of the Penitentiary in the United States,* 14 CRIME & SOCIAL JUSTICE 37, 37 (1980) ("Not only does the State penitentiary not resemble a "reformative" institution, but it was not particularly American in origin …").

[2] BOSTON PRISON DISCIPLINE SOCIETY, EIGHTH ANNUAL REPORT 6 (1833).

[3] *See, e.g.,* Howell v. State, 1 Or. 241, 243 (1859) (describing Oregon's sentencing statute which provided that "in every case in which punishment in the penitentiary is awarded against any convict, the form of the sentence shall be that he be punished by confinement at hard labor; and he may also be sentenced to solitary confinement for such term as the court shall direct, not exceeding twenty days at one time …" (Statutes of Oregon, sec. 5, page 274)).

1.1 Origins of Solitary Confinement

The use of solitary confinement as a punitive measure is monastic in origin: a seventeenth-century Benedictine monk, Jean Mabillon, recommended that penitents choosing a life of "expiation and atonement"[4] be held in unbroken solitude in separate cells, to be allowed visits only from approved religious figures.[5] The purpose of solitude was principally to lead the penitents to reform through silence, work, and spiritual counsel.[6]

In 1775, the *Maison de Force*, a workhouse in Ghent, Belgium, was reorganized so people would work together by day and be confined in solitary confinement at night.[7] In 1771, an English clergyman, Samuel Denne, wrote to the Lord Mayor of London to advocate for the "confinement of criminals in separate apartments."[8] Denne proposed the placement of people into individual cells for two reasons: to improve hygiene and to force people to reflect upon their past actions. Denne was concerned about the spread of communicable diseases within London jails, and he believed that "rampant vapors" would be curtailed by keeping each person in their own separate space.[9] The English philosopher William Paley published a book in 1785 recommending solitary confinement with or without hard labor as a solution to "the cause from which half the vices of low life deduce their origin and countenance."[10]

In his writing about the English prison system, the penal reformer John Howard recommended the construction of new prisons designed to hold people in solitary confinement at night.[11] Howard advocated for solitary confinement as the primary means of preventing moral contamination among incarcerated people.[12] His recommendations were informed by his inspections of prisons and jails throughout Europe, as described by the Supreme Court of North Carolina in a 1914 decision:

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[4] W. DAVID LEWIS, *supra* note 1, at 8.
[5] NEGLEY K. TEETERS & JOHN D. SHEARER, THE PRISON AT PHILADELPHIA, CHERRY HILL: THE SEPARATE SYSTEM OF DISCIPLINE 1829-1913, 12-13 (1957).
[6] ANDREW SKOTNICKI, RELIGION AND THE DEVELOPMENT OF THE AMERICAN PENAL SYSTEM 8 (2000).
[7] M. COUSINS & A. HUSSAIN, MICHEL FOUCAULT 168 (1984).
[8] SAMUEL DENNE, A LETTER TO SIR ROBERT LADBROKE (1771).
[9] *Id.* at 7.
[10] Thorsten Sellin, *Paley on the Time Sentence*, 22 J. CRIM. L. & CRIMINOLOGY 264, 265 (1931).
[11] W. D. LEWIS, *supra* note 1, at 23.
[12] MARK COLVIN, *supra* note 1, at 49.

> "[Howard] found that the prisons were for the most part pestiferous dens, overcrowded, dark, foully dirty, not only ill-ventilated, but deprived altogether of fresh air. The wretched inmates were dependent for food upon the caprice of their jailers or the charity of the benevolent. Water was denied them except in the scantiest proportions. Their only bedding was putrid straw. Everyone in durance, whether tried or untried, was heavily ironed. All alike were subject to the rapacity of their jailers and the extortions of their fellows. Jail fees were levied ruthlessly. Also a contribution was paid by each individual to a common fund, to be spent by the whole body generally in drink. Idleness, drunkenness, vicious intercourse, sickness, starvation, squalor, cruelty, chains, awful depression, and everywhere culpable neglect. In these words may be summed up the state of the jails at the time of Howard's visitation."[13]

The court noted that the squalid conditions in European jails were born out of earlier forms of imprisonment:

> "Further back in the so-called days of chivalry, throughout Europe every baron and lordling had beneath the lower floor of his castle a cellar into which he cast without trial, and often without food, in the mire and ooze, any who displeased him. Their only avengers were the diseases which, rising from such pollution, often devastated the families of those on the upper floors, who spent their time dancing in revelry, while the unhappy victims, without light, often without food, were groaning in the underground receptacles, where amid pollution and filth they passed to a miserable death."[14]

Jonas Hanway, an English writer, was another enthusiastic supporter of solitary confinement, proposing a model prison which completely isolated people from one another.[15] Jeremy Bentham briefly joined proponents of solitary confinement in the 1780s, but he later turned his attention to the Panopticon prison design which allowed prison officers to see every cell from a single vantage point.[16]

In 1787, the prominent Pennsylvania physician Dr. Benjamin Rush published his views on punishment, which drew heavily on the work of John Howard and Jonas Hanway.[17] Like many others, Dr. Rush did not consider solitary confinement to be a "milder corrective" than other

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[13] State v. Nipper, 81 S.E. 164, 166 (N.C. 1914).
[14] *Id.*
[15] *Id.* at 25-26.
[16] W. DAVID LEWIS, *supra* note 1, at 26.
[17] MARK COLVIN, *supra* note 1, at 49.

forms of punishment.[18] He believed that corporal punishments were light when compared with "letting a man's conscience loose upon him in solitude."[19] In addition to being influenced by the European writers, Dr. Rush had experience with solitary confinement from his work at a psychiatric hospital in Philadelphia. He advocated for the establishment of a "house of repentance" in Pennsylvania that would lead people to salvation and reformation.[20]

In the US the term "penitentiary" came to be favored over "prison" since the latter term was associated with institutions of "promiscuity and debauchery."[21] The new penitentiaries where solitary confinement was introduced were regarded as fundamentally different in nature from the overcrowded, chaotic jails and prisons, where criminal activity flourished and people had little to no chance of reformation or rehabilitation.

Penitentiaries gained support as a more palatable form of punishment than the death penalty. In Pennsylvania, opposition to the death penalty was led by the Quakers, who came to have the greatest influence of any group in the state over the new penitentiaries. New York's penal code of 1796 had also abolished the death penalty for most offenses.[22] As a consequence, more offenses were punished with terms of imprisonment. The penitentiaries were also viewed as a civilized alternative to the spectacle of public punishments. Public convict labor, a common form of punishment before the movement favoring penitentiaries, came to be regarded as "debasing and humiliating" and as reflecting poorly on the larger community in which the labor was carried out.[23] Other public punishments, such as branding, whipping, and the pillory, were described by one Philadelphia philanthropist as "cruel and vindictive penalties which are in use in European countries."[24]

Solitary confinement was not necessarily destined to form the basis of the punishment regime during the eighteenth and nineteenth centuries. Other options were also considered by the

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[18] MICHAEL MERANZE, LABORATORIES OF VIRTUE: PUNISHMENT, REVOLUTION, AND AUTHORITY IN PHILADELPHIA, 1760-1835, 1 (1996).
[19] MARK COLVIN, *supra* note 1, at 52.
[20] TEETERS & SHEARER, *supra* note 5, at 224; MARK COLVIN, *supra* note 1, at 52.
[21] TEETERS & SHEARER, *supra* note 5, at 224.
[22] SCOTT CHRISTIANSON, WITH LIBERTY FOR SOME: 500 YEARS OF IMPRISONMENT IN AMERICA 94 (1998).
[23] TEETERS & SHEARER, *supra* note 5, at 6.; ROBERTS VAUX, NOTICES OF THE ORIGINAL AND SUCCESSIVE EFFORTS TO IMPROVE THE DISCIPLINE OF THE PRISON AT PHILADELPHIA, AND TO REFORM THE CRIMINAL CODE OF PENNSYLVANIA: WITH A FEW OBSERVATIONS ON THE PENITENTIARY SYSTEM, PHILADELPHIA 21 (1826).
[24] GEORGE WASHINGTON SMITH, DESCRIPTION OF THE EASTERN STATE PENITENTIARY OF PENNSYLVANIA 7 (1829).

Pennsylvania and New York legislatures. These included fines, public shaming, physical punishments, labor, banishment from the state, the establishment of a penal colony in the Pacific Northwest, and the death penalty.[25] Legislatures in other states considered abandoning the penitentiary system altogether.[26] Some favored the death penalty, while others preferred involuntary labor. However, proponents of penitentiaries claimed that they would obviate the need for physical punishment and promote reformation. They also pointed out that penitentiaries would remove the spectacle of punishment as public entertainment, remedying concerns about harm to the general population.

The Massachusetts Supreme Judicial Court has described a "radical" change that occurred in 1812 when punishments such as whipping, the pillory, and the gallows were replaced in the state by solitary confinement and hard labor.[27] The court remarked that this new approach "practically took away all the degrading and ignominious punishments formerly provided by law."[28] Nevertheless, the court considered that solitary confinement was an "infamous punishment," noting that people were:

> "subject[ed] to solitary imprisonment, to have [their] hair cropped, to be clothed in conspicuous prison dress, subjected to hard labor without pay, to hard fare, coarse and meagre food, and to severe discipline."[29]

Some people considered that the harshness of solitary confinement justified shorter sentences;[30] however, this view was not universally accepted. For example, an 1828 report by the commissioners charged with reviewing Pennsylvania's Penal Code considered that reducing sentences would "tend in a great measure to defeat the object of the law, and to destroy whatever hope might be entertained of the efficacy of the punishment."[31] Solitary confinement at the new penitentiaries in both New York and Pennsylvania had two distinct purposes: it was imposed en

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[25] REBECCA M. MCLENNAN, THE CRISIS OF IMPRISONMENT: PROTEST, POLITICS, AND THE MAKING OF THE AMERICAN PENAL STATE, 1776-1941, 51-52 (2008).
[26] *Id.*
[27] Jones v. Robbins, 8 Gray 329, 343 (Mass. 1857).
[28] *Id.* at 349.
[29] *Id.*
[30] GUSTAVE DE BEAUMONT & ALEXIS DE TOCQUEVILLE, ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION IN FRANCE 11 (Francis Lieber trans., Carey, Lea & Blanchard 1833).
[31] REP. OF THE COMM'RS ON THE PENAL CODE READ IN THE PA. SENATE 37 (JAN. 4, 1828).

masse on all incarcerated people in the normal operation of the penitentiary and it operated as a disciplinary measure, typically in combination with reduced food rations or a dark cell.

The decision to institute solitary confinement in Pennsylvania and New York reflected the reports and recommendations of influential figures such as John Howard and Benjamin Rush. Local religious and philanthropic organizations also supported solitary confinement and exerted considerable influence in shaping the states' punishment regimes.[32] In Pennsylvania, members of the Philadelphia Prison Society for Alleviating the Miseries of Public Prisons ("Philadelphia Prison Society") made thousands of visits to the Eastern State Penitentiary, and some were appointed to its board of inspectors. Penitentiaries operating under New York's model often received financial support from the Boston Prison Discipline Society ("BPDS"). Each group maintained its public presence by publishing official documents touting the virtues of its system and criticizing the other's.

Public interest in the solitary confinement experiments was enhanced by visits from notable foreigners. The French aristocrats Gustave de Beaumont and Alexis de Tocqueville toured the penitentiaries in the 1830s. While they expressed reservations about aspects of their regimes, they did not call into question the assertion that solitude exercised a "beneficial influence."[33] Charles Dickens visited Eastern State in 1842 and was much less impressed with solitary confinement than de Beaumont and de Tocqueville. He reported the system to be "cruel and wrong," and "immeasurably worse than any torture of the body," even though there could be no question of "the excellent motives of all who are immediately concerned in the administration of the system."[34] The Philadelphia Prison Society appointed the consul-general of Great Britain to pen a response to Dickens, which was published in the Society's journal in 1861.[35] Dickens' critics argued that he had exaggerated the severity of the conditions because in Pennsylvania, solitary confinement was not absolute since people received official visitors and could work, exercise, and read in their cells.[36]

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[32] MARK COLVIN, *supra* note 1, at 53.
[33] DE BEAUMONT & DE TOCQUEVILLE, *supra* note 30, at 6.
[34] CHARLES DICKENS, AMERICAN NOTES FOR GENERAL CIRCULATION 147 (1842).
[35] TEETERS & SHEARER, *supra* note 5, at 115.
[36] *Id.* at 113-115.

The many supporters of solitary confinement, and officials and visitors, produced reams of material about almost every aspect of the penitentiaries. Additionally, the public had the opportunity to visit some of these facilities through paid tours. However biased the reports and however sanitized the public tours, there was thus a considerable amount of public information available regarding solitary confinement.

The fact that penitentiaries came to be operated as sources of income undermined the stated purpose of reformation. Similarly, public morality was not enhanced when some facilities were opened to the public, who could tour the penitentiaries and observe incarcerated people "as if they were animals in a zoo."[37] Public visits, however, provided a valuable stream of revenue: the penitentiary at Charlestown, Massachusetts, charged visitors an entry fee of twenty-five cents and in 1845 some six thousand people visited.[38]

Despite the differing religious justifications for solitary confinement, the practical reality for incarcerated people – at best, the ability to communicate with a small number of official visitors, and at worst, total isolation – was much the same. Whatever the proponents' objectives, both New York and Pennsylvania's systems exposed people to physical abuse and neither achieved the stated goals of reformation, rehabilitation, or improvement of behavior. While some criticized the penitentiaries as "failed experiment[s]" and a tax on the public without its consent,[39] others regarded them with "a kind of quasi-mystical faith."[40]

1.2 Pennsylvania

Solitary confinement in Pennsylvania reflected the Quakers' objective of individual reformation. Unlike their counterparts in New York, Pennsylvania's prison reformers sought to accomplish the spiritual redemption of incarcerated people by separating them from the world, particularly the corrupting influence of others. The Quaker belief that everyone, including a person convicted of a crime, possessed a divine "inner light," was to be reflected in a model prison where people would be reformed through appropriate treatment.[41] As a result of endless hours of

[37] W. DAVID LEWIS, *supra* note 1, at 92.
[38] SAMUEL G. HOWE, AN ESSAY ON SEPARATE AND CONGREGATE SYSTEMS OF PRISON DISCIPLINE: A REPORT MADE TO THE BOSTON PRISON DISCIPLINE SOCIETY 46 (1846).
[39] REBECCA MCLENNAN, *supra* note 25, at 51.
[40] W. DAVID LEWIS, *supra* note 1, at 66.
[41] *Id.* at 3, 21.

isolation and with the assistance of a Bible, the person would ultimately embrace religion.[42] The Philadelphia Prison Society, a philanthropic group composed predominantly of Quakers, led the movement for the introduction of solitary confinement. The Society's goal was for penitentiaries to convert people into "model citizen[s]" who worked obediently as individuals.[43]

1.2.1 Walnut Street Jail

The first experiment with solitary confinement in Pennsylvania began in 1786 at the Walnut Street Jail. The jail was constructed in 1773 and people were "thrown together in one sordid mass of humanity" until 1786.[44] To the disapproval of the Philadelphia Prison Society, people in the jail were not separated by gender or by the type of offense of which they were accused or convicted. The jail's keeper extorted fees and supplemented his income by maintaining a bar within the jail.[45] There was no work or activity to occupy people.

The Philadelphia Prison Society sought to reform the jail by separating people by age and the offense they were alleged to have committed. To that end, in 1788, the Society petitioned the state legislature to implement "solitary labour [that] would more successfully tend to reclaim the unhappy objects" of the jail.[46] The legislature agreed to the proposal and in April 1790 passed legislation requiring the construction of solitary cells to hold a small number of people.[47] Under this statute, solitary confinement was authorized solely as a disciplinary measure. The Act provided for "unremitting solitude at hard labor,"[48] but only for a maximum of two days.[49] Any extension to this period required approval from the jail's inspectors and the mayor of Philadelphia.[50] One scholar has described the system as one of "sophisticated constraints" that limited the jailers' discretion to place people in solitary confinement for disciplinary reasons.[51] However, it may be too generous to characterize the restrictions on solitary confinement at

[42] ANDREW SKOTNICKI, *supra* note 6, at 57.
[43] MARK COLVIN, *supra* note 1, at 88.
[44] *Id.* at 9.
[45] TEETERS & SHEARER, *supra* note 5, at 8.
[46] *Id.* at 33, quoting THE PENNSYLVANIA JOURNAL, January 1845, at 3-4.
[47] Act of Apr. 5, 1790, ch. MDV (1790), *reprinted in 2* LAWS OF THE COMMONWEALTH OF PENNSYLVANIA, 1700-1810, § VIII, at 533.
[48] Act of April 5, 1790 (Section VIII), *quoted in* NEGLEY TEETERS, THE CRADLE OF THE PENITENTIARY: THE WALNUT STREET JAIL AT PHILADELPHIA, 1773-1835, 39-40 (1955).
[49] David M. Shapiro, *Solitary Confinement in the Young Republic*, 133 HARV. L. REV. 544, 562 (2019).
[50] *Id.*
[51] *Id.* at 574.

Walnut Street as sophisticated. Jail staff were not generally held in high regard[52] and it is not clear from the historical record whether they actually complied with the two-day limits on solitary confinement placements. In 1794, further legislation relating to the jail's operation was enacted which extended the length of solitary confinement allowed. Longer periods could be imposed by the courts at sentencing, but jailers were still restricted to imposing a maximum of two days.[53]

Any conclusions about the success of the Walnut Street Jail's solitary confinement experiment must also take into account its small size. Only thirty-six solitary confinement cells were constructed at the jail due to space constraints. Moreover, the courts exercised their power to sentence people to solitary confinement sparingly: in 1795, only four of the 117 people to arrive at Walnut Street were sentenced to spend a portion of their term in solitary confinement, and in 1796, only seven of 139 were so sentenced.[54] Between 1795 and 1800, only twenty-nine people were sentenced to solitary confinement out of a total 748 people committed to the jail.[55] Many commentators consider that the Walnut Street experiment was unsuccessful, due in part to the fact that people in the solitary cells could still communicate with other people.[56] Moreover, the cells reduced the space available for the remainder of the jail's population, exacerbating the problem of chronic overcrowding. It is not surprising in these circumstances that the few individuals held in solitary confinement were reportedly not reformed in any way by the end of their sentences.[57] Nevertheless, official observers in Pennsylvania were "quite satisfied" with the operation of the Walnut Street Jail during the period from 1790 to 1798.[58]

Despite the small size of the Walnut Street experiment, a number of other states copied its design, with Maryland, Massachusetts, Maine, New Jersey, and Virginia each implementing similar systems.[59] Walnut Street's solitary confinement cells also served as a model for New

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[52] *See, e.g.,* DE BEAUMONT & DE TOCQUEVILLE, *supra* note 30, at 29-30 ("For the position of jailor of a prison, vulgar people only could be found …").
[53] Act of Apr. 22, 1794, ch. MDCCLXVI (1794), *reprinted in* 3 LAWS OF THE COMMONWEALTH OF PENNSYLVANIA 1700-1810, 186 (Philadelphia, John Bioren 1810).
[54] Thorsten Sellin, *Philadelphia Prisons of the 18th Century*, 45 HISTORIC PHILADELPHIA 329 (1953).
[55] David M. Shapiro, *supra* note 49, at 567.
[56] MARK COLVIN, *supra* note 1, at 84.
[57] ANDREW SKOTNICKI, *supra* note 6, at 34.
[58] MARK COLVIN, *supra* note 1, at 56-57.
[59] DE BEAUMONT & DE TOCQUEVILLE, *supra* note 30, at 3.

York officials, who visited the jail to collect information which would inform their drafting of a new penal code.[60] The layout of the Walnut Street Jail was used as the basis for an early design of the Auburn Penitentiary in New York.[61]

1.2.2 Eastern State Penitentiary

Interest in solitary confinement was not diminished by the fact it could not be fully evaluated at the Walnut Street Jail. In 1821, the Philadelphia Prison Society petitioned the legislature to construct the Eastern State Penitentiary in Philadelphia. The objective was to build an institution where everyone would be held in solitary confinement for the entire duration of their sentence, regardless of the crime for which they had been convicted. An act of March 1821 directed the construction of the penitentiary using the same layout as the Western State Penitentiary in Pittsburgh, "provided always that the principle of the solitary confinement of the prisoners be preserved and maintained."[62] The Western State Penitentiary, which opened in 1826, was designed based on the ideas of the Panopticon and was later operated on a model of solitary confinement without labor.[63]

Unlike the statutory regime that had limited the imposition of solitary confinement at the Walnut Street Jail, legislation was enacted in 1829 which required solitary confinement for the total prison sentence.[64] Thus the courts no longer exercised discretion in deciding whether to impose solitary confinement, or the length of such a sentence.

The Eastern State Penitentiary opened in 1829. It initially consisted of two hundred and fifty individual cells measuring eight by twelve feet, each with an adjoining exercise yard measuring eight by twenty feet.[65] By way of comparison, the area of a solitary confinement cell in a modern prison is in the range of seventy-five to eighty-seven square feet.[66] In 1831, the legislature passed an act directing the construction of an additional four hundred cells at Eastern

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[60] SCOTT CHRISTIANSON, *supra* note 22, at 94.
[61] MARK COLVIN, *supra* note 1, at 84.
[62] Act of Mar. 20, 1821, § 3, *in* PURDON'S DIGEST OF THE LAWS OF PENNSYLVANIA FROM 1700-1846, 541 (7th ed. 1852).
[63] ANDREW SKOTNICKI, *supra* note 6, at 34-35.
[64] Act of Apr. 23, 1829, no. 204, 1828-29 Pa. Laws §§ 1-4, at 341-42, cited by David M. Shapiro, *supra* note 49, at 569.
[65] ANDREW SKOTNICKI, *supra* note 6, at 57.
[66] U.S. DEP'T OF JUST., REP. AND RECOMMENDATIONS CONCERNING THE USE OF RESTRICTIVE HOUSING, 41 (2016) [hereinafter *DOJ REPORT (2016)*].

State "suitable for the confinement of convicted criminals in solitary imprisonment at labour."[67] Part of the reason for expanding the penitentiary was to accommodate people from the Walnut Street Jail, which was to be closed.[68]

1.2.2.1 Conditions

Everyone at Eastern State was held in absolute solitary confinement and they could only leave their cells if they were unwell or when their sentences ended.[69] At the time Eastern State opened, Pennsylvania was the only state that did not have the death penalty for any offense, and life imprisonment was a rare sentence imposed only upon conviction of more than one murder charge.[70] Other serious crimes such as high treason, manslaughter, arson, rape, and burglary were all punishable by prison terms of between ten and fifteen years, while less serious crimes such as horse stealing and forgery resulted in shorter sentences (between one and four years). By 1840, the average length of a prison sentence in Pennsylvania was two years and five months.[71]

Mindful of the problems that arose when solitary confinement was first introduced at the Auburn penitentiary in New York in 1821 (discussed below), the commissioners at Eastern State emphasized that their penitentiary's regime was not one of solitary confinement, but rather of "separate confinement," designed for "the permanent moral benefit of the prisoner."[72] Under the separate system, people were isolated from one another, but received visits from prison officials and approved visitors.[73] The warden visited every person daily, and keepers were required to visit the people they supervised at least three times per day to ensure that their meals were delivered and to supervise their work.[74] Religious instructors, many from the Philadelphia Prison Society, made thousands of visits to the penitentiary each year. People at Eastern State thus tended to have more direct human contact than many people in solitary confinement have today.

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[67] Act of Mar. 28, 1831, § 1, *in* PURDON'S DIGEST OF THE LAWS OF PENNSYLVANIA, *supra* note 62, at 549.
[68] BOSTON PRISON DISCIPLINE SOCIETY, SIXTH ANNUAL REPORT 74 (1831).
[69] ANDREW SKOTNICKI, *supra* note 6, at 57.
[70] BOSTON PRISON DISCIPLINE SOCIETY, FOURTH ANNUAL REPORT 42 (1829).
[71] BOSTON PRISON DISCIPLINE SOCIETY, SIXTEENTH ANNUAL REPORT 46 (1841).
[72] IAN O'DONNELL, PRISONERS, SOLITUDE AND TIME 147 (2014) (citing REV. J FIELD, PRISON DISCIPLINE, AND THE ADVANTAGES OF THE SEPARATE SYSTEM OF IMPRISONMENT (1848)).
[73] MICHAEL MERANZE, *supra* note 18, at 259.
[74] Act of April 23, 1829, § 21 *in* PURDON'S DIGEST OF THE LAWS OF PENNSYLVANIA, *supra* note 62, at 544.

The Pennsylvania system incorporated prison labor as a subsidiary component. The purpose of labor was twofold: to provide people with a distraction from the endless hours of tedious isolation, and to generate income for the penitentiary. Legislation dating back to 1790 required incarcerated people to carry out labor "of the hardest and most servile kind."[75] At Eastern State, people worked individually in their cells. They performed tasks such as shoemaking and weaving, which could be carried out in complete isolation. This approach reflected Pennsylvania's artisan culture and avoided conflict with Philadelphia's labor movement which objected to industrial work in prison.[76] De Beaumont and de Tocqueville reported that

> "there was not a single one among [the people incarcerated at Eastern State] who did not speak of labour with a kind of gratitude and who did not express the idea that without the relief of constant occupation, life would be insufferable."[77]

The inspectors of Eastern State, who were appointed by the state supreme court to govern the penitentiary and provide reports to the legislature,[78] were clearly aware that total solitary confinement (that is, without labor or visitors) could be harmful. In their second annual report to the legislature, the inspectors emphasized that Eastern State's approach, which included "instruction in labor, morals and religion," did not result in "insanity [or] bodily infirmity." On the other hand, a regime without labor or moral and religious instruction would have been unacceptable to the inspectors and "they would feel little hesitation in recommending its repeal as cruel, because calculated to undermine the moral and physical powers of the prisoner."[79]

1.2.2.2 Legislative Investigation

Despite the many reports on the success of Pennsylvania's model of separate confinement at Eastern State, a legislative investigation in 1834 revealed significant problems at the penitentiary. A committee of the state legislature was convened to investigate allegations that penitentiary officials had misappropriated funds and labor and inflicted cruel and unusual

[75] Act of April 5, 1790, ch. MDV, § 13, *IN* LAWS OF THE COMMONWEALTH OF PENNSYLVANIA: May 24, 1781-Sep. 3, 1790, 535 (1810).
[76] MARK COLVIN, *supra* note 1, at 83.
[77] DE BEAUMONT & DE TOCQUEVILLE, *supra* note 30, at 33.
[78] Act of Apr. 23, 1829, § 4, *in* PURDON'S DIGEST OF THE LAWS OF PENNSYLVANIA, *supra* note 62, at 543.
[79] BOSTON PRISON DISCIPLINE SOCIETY, SIXTH ANNUAL REPORT, *supra* note 68, at 69-70.

punishment. The committee received written and oral evidence from sixty-six witnesses.[80] Though the investigation did not consider whether solitary confinement itself was cruel or unusual, the evidence pointed to mistreatment and abuse of incarcerated people. The investigation also showed how quickly one of Pennsylvania's fundamental justifications for solitary confinement – namely, to avoid the need for physical punishment – was frustrated by officials who had broad leeway to operate the penitentiary however they saw fit.

At the hearing, the witnesses who testified in defense of the warden Samuel Wood included members of the penitentiary board, administrators of other institutions, doctors, and prominent advocates of penal reform. These witnesses emphasized that Wood had the "personal credibility of a gentleman," and the committee readily accepted their views.[81] The investigation report noted, for instance, that Wood had for many years been devoted to the improvement of Pennsylvania's penitentiary system and that he had traveled abroad "like the celebrated [John] Howard" to acquire more information about prison discipline.[82]

The charges of cruel and unusual punishment arose from two instances of physical abuse. The first involved the death of a man who had been forced to wear an iron gag, a square inch piece of metal forced into the mouth and fastened in place by chains around the jaws to the back of the neck.[83] The iron gag has been described as "the most extreme of a series of measures prison officials employed to quiet noisy, or discipline refractory, inmates."[84] The committee found that the officials involved had tried to remove the gag shortly after it was put on, because the man was "becoming insensible," and efforts to revive him were unsuccessful. The post-mortem showed that he had died of a "disease of the brain," which it found to be a chronic, long-standing condition. Thus the committee concluded that this disease, and not the iron gag, had caused the death. The committee received evidence that the iron gag was used as a form of punishment in the US navy at the time, and it had also been used in the Walnut Street Jail, as well as on other

[80] REP. OF THE JOINT COMMITTEE OF THE LEG. OF PENNSYLVANIA, RELATIVE TO THE EASTERN STATE PENITENTIARY AT PHILADELPHIA 7 (1835) [hereinafter *REP. OF THE JOINT COMMITTEE (1835)*].
[81] *Id.* at 310.
[82] *Id.* at 8-9.
[83] THOMAS MCELWEE, A CONCISE HISTORY OF THE EASTERN PENITENTIARY OF PENNSYLVANIA: TOGETHER WITH A DETAILED STATEMENT OF THE PROCEEDINGS OF THE COMM. APPOINTED BY THE LEG. 18 (1835).
[84] MICHAEL MERANZE, *supra* note 18, at 312.

people at Eastern State. Therefore, it was not deemed an unusual punishment. The fact that it was not unusual, the committee concluded, also demonstrated that it was not cruel.

The second charge of cruel and unusual punishment alleged that a man became "incurably insane" after he was subjected to a "shower-bath," in which he was tied to an outside wall and buckets of icy water were thrown over him on a cold day in the middle of winter. The investigators accepted the officials' claim that this conduct also was not cruel or unusual because the same practice was used on mentally ill people at other institutions for disciplinary and curative purposes. They found that the man was mentally ill from the time he was committed to the penitentiary, and that his condition did not change while he was incarcerated.[85] While the shower bath may have been "indiscreet," the fact it was used in these other situations, the committee said, demonstrated a lack of intentional cruelty and therefore was not to be regarded as unusual.[86] Concluding that the people subject to these abuses were "refractory convicts," the committee dismissed the claims. The dismissal was based on supposed evidence adduced though no such evidence was described in the committee's report.[87]

Notably absent from the committee's report was any reference to evidence of other instances where people had been subject to extreme physical abuse. Such detail is only known because of a dissenting member of the investigating committee. Thomas McElwee was so frustrated by his colleagues' readiness to find in favor of the penitentiary officials that he published a separate report of the proceedings hoping to stir public outrage about conditions at the penitentiary.[88] McElwee's report referred to evidence that food was withheld from people, in one case for six successive days.[89] Other forms of punishment included straitjackets and a "mad-chair," where people were fastened by their limbs to a plank of wood and beaten.[90] McElwee also pointed to evidence that penitentiary officials were ignoring legislative provisions that limited the length of time for which disobedient people could be confined to dark cells on limited food rations to only

[85] REP. OF THE JOINT COMMITTEE (1835), *supra* note 80, at 13.
[86] *Id.* at 317.
[87] *Id.* at 12.
[88] THOMAS MCELWEE, *supra* note 83.
[89] *Id.* at 17.
[90] *Id.* at 17-18.

two days.[91] In contrast to McElwee, the committee majority accepted the argument advanced on behalf of Wood that none of these practices constituted cruel and unusual punishment.

Some of the arguments accepted by the committee are similar to those advanced today to defend conditions of confinement. The committee deferred to Wood's exercise of discretion in disciplining recalcitrant people, finding that the various punishments had been imposed out of necessity. Physical punishment was justified by the need for "great firmness and discretion" and to "produce obedience" that would lead people to reformation.[92] Therefore, the committee explained:

> "[I]t becomes necessary to adopt some punishment beyond that which is inflicted under the sentence of the convict, and which is essential to secure his quiet subjection to the sentence. To allow him a refractory disregard of the proper order of the institution, would be not only of great prejudice to himself, but would seriously affect those in whom a more proper frame of mind had been produced. Our system requires not only labor, but solitude, which combined are calculated to bring about reflection upon past misdeeds, and their evil consequences. It will not do to allow the convict to interrupt that solitude … or in any respect withhold the most implicit obedience to the order of the institution."[93]

The need to maintain order within the institution was a further basis for condoning the fact that some of the punishments inflicted were not part of the sentence. The committee noted that the penitentiary's board of inspectors was authorized, consistent with the principles of solitary confinement, to make rules for the internal government of Eastern State. Since the board had failed to make such rules, its discretion had devolved to Wood.[94]

1.2.3 The End of Pennsylvania's Solitary Confinement Experiment

By 1849, some Pennsylvania politicians apparently had misgivings about the harmful nature of solitary confinement. A report to the legislature contained the following statement from the Governor:

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[91] Act of April 5, 1790, ch. MDV, § 21, *in* LAWS OF THE COMMONWEALTH OF PENNSYLVANIA: MAY 24, 1781-SEP. 3, 1790, 537 (1810).
[92] REP. OF THE JOINT COMMITTEE (1835), *supra* note 80, at 12.
[93] *Id.*
[94] *Id.* at 13.

> "It is worthy of serious consideration, whether, by the adoption of a system of solitary confinement, the severity of the punishment authorized by law does not injuriously affect the mental and physical vigor of the prisoner; and the frequent recommendations to the executive for pardons of convicts afflicted with ill health and imbecility, would appear to require a modification of the present law."[95]

Though no change was made to the law and the regime of solitary confinement officially continued, in practice it became less common from the 1850s onward as the state's prison population increased. Due to overcrowding, people were forced to share cells. Financial pressure also played a part in the demise of large-scale solitary confinement because funds were not available to construct more cells. To help reduce the costs of operating the penitentiary, people were allowed out of their cells to carry out tasks such as cooking and building maintenance. Consequently, they were able to communicate with one another and with external contractors working at the site. They were also able to communicate by tapping out messages on the heating and plumbing pipes. The board of inspectors conceded defeat, noting that this open communication had frustrated "the purpose of the separate system."[96]

Subsequent legislation continued to erode the system of solitary confinement. A statute enacted in 1876 allowed people in prison to have access to newspapers, thereby removing the absolute ban on news from outside the penitentiary.[97] While the abuses revealed in the 1834 investigation did not appear to result in the kind of public outrage that McElwee had hoped for, his report may have contributed to a reduction in public support for the penitentiary, and with it the expense of maintaining the regime of solitary confinement.

In 1913, the Pennsylvania legislature passed a statute authorizing the congregate worship, labor, and recreation of incarcerated people.[98] Since, however, solitary confinement was not expressly

[95] ANNUAL REPORT TO THE LEGISLATURE, *quoted in* BOSTON PRISON DISCIPLINE SOCIETY, TWENTY-FIFTH ANNUAL REPORT 36 (1850).
[96] MARK COLVIN, *supra* note 1, at 106.
[97] Act of May 8, 1876, *in* LAWS RELATING TO THE EASTERN STATE PENITENTIARY OF PENNSYLVANIA1829-1903, 35 (1904).
[98] Act of July 7, 1913, § 1, *in* LAWS OF THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA, 708 (1913).

abolished, defendants continued to be sentenced pursuant to provisions that referred to imprisonment "by separate or solitary confinement at labor" until the 1970s.[99]

1.3 New York

Solitary confinement in New York was influenced by the early experiment at the Walnut Street Jail. However, the rationale for the practice in New York differed from the Quaker philosophy that influenced Pennsylvania. New York's solitary confinement regime, which reflected a combination of Calvinist beliefs of "order and financial stability,"[100] and military influence, resulted in operational differences from that of Pennsylvania. At the time, these differences were highly controversial between proponents of each states' approach to incarceration.

In 1796, legislation was enacted in New York directing the construction of two state prisons, one in New York City and one in Albany.[101] In the same year, the state enacted a comprehensive penal code which was modeled on Pennsylvania's legislation. New York's penal code abolished the death penalty for all but a small number of crimes. Judges were authorized to impose terms of imprisonment with hard labor or in solitude, and the code eliminated whipping as a punishment.[102]

1.3.1 Newgate Prison

The Newgate Prison in Greenwich Village in New York City was the first prison in the state where solitary confinement was introduced. The prison was designed by a Quaker merchant, Thomas Eddy, who had assisted with the drafting of the state's penal code. Newgate was modeled on the Walnut Street Jail, with solitary cells situated in wings that also contained larger

[99] *See, e.g.,* Commonwealth v. Carter, 64 Pa. D & C Cd. 711 (1973) (affirming conviction for burglary, punishable by five years "separate or solitary confinement at labor" pursuant to Act of June 24, 1939, P.L. 872, 18 P.S. § 4901); Commonwealth v. Brown, 229 Pa. Super. 67 (1974) (affirming conviction for conspiracy to violate narcotic laws, punishable by two years "separate or solitary confinement at labor" pursuant to Act of June 24, 1939, P.L. 872, 18 P.S. § 4308); Commonwealth v. White, 229 Pa. Super. 280 (1974) (affirming conviction of attempt to kill and firearms offenses, punishable by seven years separate or solitary confinement at labor pursuant to Act of June 24, 1939, 18 P.S. § 4711).

[100] DAVID ROTHMAN, THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC 39 (1971).

[101] Act of March 16, 1796, *in* A COMPILATION OF THE LAWS OF THE STATE OF NEW YORK, RELATING PARTICULARLY TO THE CITY OF NEW YORK 22 (1862).

[102] SCOTT CHRISTIANSON, *supra* note 22, at 94.

cells to house multiple people.[103] Most of the prison's cells were intended to hold up to eight people.[104]

Newgate opened in 1797 and was "doomed from the start."[105] Despite having read John Howard's writing on prisons that emphasized the need to separate people at night, Eddy designed Newgate Prison in a way which did not allow for such separation.[106] Much like the Walnut Street Jail, the limited solitary confinement experiment at Newgate could never properly be evaluated since only a small number of solitary cells were constructed and they were intended for punishment only. The prison was quickly beset by financial problems and overcrowding.[107] It was closed in 1828 and people incarcerated there were moved to Sing Sing Penitentiary.

1.3.2 Auburn Penitentiary

When Newgate's failings became clear, New York, like Pennsylvania, turned to larger penitentiaries as sites for a new regime where everyone could be held in solitary confinement. The Auburn Penitentiary opened in 1817. It was initially designed for congregate confinement, but criticism of the chaotic nature of Newgate Prison and concerns about people's ability to "corrupt one another" led the legislature to authorize a new solitary confinement regime in 1820.[108] Pursuant to that regime, most people imprisoned at Auburn continued to be housed in congregate cells, but eighty people were moved to new solitary cells in December 1821. This group was held in complete isolation and prevented from communicating with anyone except the chaplain. They did not work and were forbidden to lie down during the daytime.

This initial experiment with solitary confinement was disastrous: many of the people became mentally ill, with at least one person attempting suicide and another seriously injuring himself. The Governor of New York visited the penitentiary in 1823, whereupon he pardoned twenty-six people held in solitary immediately, partly out of concern for their health, and partly because he

[103] W. DAVID LEWIS, *supra* note 1, at 30.
[104] *Id.* at 31.
[105] ANDREW SKOTNICKI, *supra* note 6, at 39.
[106] W. DAVID LEWIS, *supra* note 1, at 31.
[107] *Id.* at 41.
[108] SCOTT CHRISTIANSON, *supra* note 22, at 113; W. DAVID LEWIS, *supra* note 1, at 66.

believed that punishment by solitary confinement did not conform to the conditions to which people had been sentenced.[109]

Despite the problems with the first attempt at solitary confinement at Auburn, officials did not abandon the practice. Instead, they changed the conditions and expanded the regime to subject everyone to it. The reluctance to abandon solitary confinement can be attributed to various factors, including that Auburn was a purpose-built penitentiary that could not easily be altered without considerable expense. Concerns about security are also likely to have influenced the decision to expand solitary confinement. In 1818, a prison in Virginia had been burned down by people imprisoned there, and there were reports of attempted uprisings at the Newgate Prison in the same year.[110] Some employees therefore believed that the congregate housing model made them vulnerable, and they advocated for the adoption of solitary confinement throughout the penitentiary.[111]

1.3.2.1 Conditions

As a result of these concerns, solitary cells were constructed at Auburn for everyone. The cells were significantly smaller than those at Eastern State, measuring only seven feet by three-and-a-half-feet.[112] However, unlike Eastern State, where the larger cell size was partly attributable to the fact that people rarely left them, Auburn was designed so that the people would spend their days working together in workshops under the supervision of keepers. The penitentiary was essentially organized as an industrial center that operated in a manner akin to military discipline: people marched to and from the workshops in lockstep and in single file, with each person's hand on the shoulder of the person in front, their eyes directed toward the keepers. People worked in silence during daylight hours and they were not permitted to rest until they received a signal to return to their cells.[113]

Unlike the Quaker emphasis on individual spiritual reformation, the Auburn experiment was grounded on the pessimistic Calvinist view of people's inevitable depravity and the devil's

[109] FRANCIS GRAY, PRISON DISCIPLINE IN AMERICA 40 (1847).
[110] SCOTT CHRISTIANSON, *supra* note 22, at 114.
[111] *Id.*
[112] ANDREW SKOTNICKI, *supra* note 6, at 57.
[113] *Id.* at 70.

irresistible "temptations to misconduct."[114] The Auburn Penitentiary emphasized obedience, discipline, and economic viability for the institution. The goal of the Auburn system was to "break the spirit of the prisoner and produce a mental state of complete submission."[115] The Calvinists were not unified in their belief as to what should happen once such a state of submission had been achieved. One group believed that incarcerated people were mere instruments to be used to maximize profit for the state through the performance of hard labor; the other considered that every incarcerated person should receive an education and religious instruction so that he would return to society "a better man."[116] The latter view, which bears a closer resemblance to the Quaker philosophy, did not dominate the New York experiment, particularly in the early decades. Some Calvinist clergy regarded the Quaker objective of reformation as blasphemous, holding that the sole authority to reform souls was reserved to God.[117]

New York officials were also more concerned with the profitability of the Auburn Penitentiary, in contrast to their counterparts in Pennsylvania. The New York legislature directed that the costs of the penitentiaries were to be "supported wholly, or as nearly as shall be practicable, by the labor of the prisoners."[118] New York's profit-oriented viewpoint was also reflected in the type of work assigned to people. The penitentiary entered into contracts with private manufacturers who paid fixed rates for labor. The factory-style workshops produced a wide range of objects, including cabinets, furniture, carpets, tools, and steam engines.[119]

Unlike Pennsylvania's claimed disavowal of the use of physical punishments, Auburn had no hesitancy in using corporal punishment to maintain order and discipline. In an interview with de Beaumont and de Tocqueville, Elam Lynds, the first warden at Auburn and later the warden at Sing Sing, described the need for physical punishment in the following terms:

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[114] *Id.* at 39; DAVID ROTHMAN, *supra* note 100, at 53.
[115] W. DAVID LEWIS, *supra* note 1, at 84.
[116] *Id.*
[117] REBECCA MCLENNAN, *supra* note 25, at 39-40.
[118] AN ACT CONCERNING THE STATE PRISONS, § 51, *in* JOURNAL OF THE ASSEMB. OF THE STATE OF NEW YORK, 48TH SESSION, APPENDIX C at 30 (1825).
[119] REP. OF THE MAJORITY OF THE COMM. APPOINTED UNDER A RESOLUTION OF THE SENATE TO INVESTIGATE THE AFFAIRS OF THE AUBURN AND MOUNT-PLEASANT STATE PRISONS, S. DOC. 37, 2 (N.Y. 1840).

> "chastisement by the whip [is] the most efficient, and at the same time, the most humane [punishment] which exists … Solitary confinement … is often insufficient, and always dangerous … I consider it impossible to govern a large prison without a whip."[120]

Lynds' view reflected the Calvinist-influenced belief that corporal punishment was necessary since people needed to "feel the wrath of God as a pretext for conversion."[121] It also reflected Lynds' background in the navy, where flogging had been a common form of punishment.[122]

The Auburn regime of solitary confinement found strong support in the influential BPDS. Established in 1825, BPDS advocated, among other things, for solitary confinement as well as Sunday Schools and religious instruction in prisons. Its secretary, Rev. Louis Dwight, published an annual report describing conditions in prisons, criticizing their flaws, and making recommendations for improvements. Much of his material was based on reports from prison officials to their respective state legislatures. In its early years, BPDS published thousands of copies of its annual report which was purchased by state legislatures and foreign governments.[123] BPDS was funded by donations and subscriptions from members of the public.

Dwight traveled throughout the US to gather information and extol the virtues of Auburn. An Auburn-style penitentiary was erected in Charlestown, Massachusetts in 1829, and by 1833 BPDS had made financial contributions toward the building of Auburn-style penitentiaries in Maine, New Hampshire, Vermont, Connecticut, the District of Columbia, Virginia, Tennessee, Louisiana, Missouri, Illinois, Ohio, and Canada.[124] Dwight's strong criticism of Pennsylvania's system of solitary confinement was often reflected in BPDS's annual reports. He particularly disapproved of the amount of money Pennsylvania had spent on the construction and maintenance of the Eastern State Penitentiary. However, parsimony did not stop Dwight and BPDS from paying the salaries of chaplains in penitentiaries constructed in accordance with the Auburn model.[125]

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[120] DE BEAUMONT & DE TOCQUEVILLE, *supra* note 30, at 206, 216.
[121] ANDREW SKOTNICKI, *supra* note 6, at 71.
[122] ORLANDO F. LEWIS, THE DEVELOPMENT OF AMERICAN PRISONS AND PRISON CUSTOMS 1776-1845: WITH SPECIAL REFERENCE TO EARLY INSTITUTIONS IN THE STATE OF NEW YORK 93 (1922).
[123] *See, e.g.,* BOSTON PRISON DISCIPLINE SOCIETY, FIFTH ANNUAL REPORT 35 (1830).
[124] ANDREW SKOTNICKI, *supra* note 6, at 6, 44.
[125] *Id.* at 47, 57.

1.3.2.2 1825 Investigation

In 1825, Lynds was appointed by the legislature to supervise the construction of the Sing Sing Penitentiary. He selected incarcerated people from Auburn to build the new institution. Shortly after he left Auburn, a scandal led to investigations by the local district attorney and the New York Senate. A woman incarcerated at Auburn had died in January 1826, only a few days after giving birth to a child which had reportedly been conceived while she was in solitary confinement. The autopsy revealed that the woman had been whipped, even though state law expressly forbade the whipping of females.[126] Investigation into the events leading to her death was hampered because incarcerated people were not regarded as competent to give evidence. The keeper responsible for supervising the woman was convicted of assault and battery and fined $25, but he was allowed to continue working in the same role.[127] Lynds was not prosecuted.[128]

1.3.3 Sing Sing Penitentiary

The Sing Sing Penitentiary opened in 1826 and by 1828, people previously incarcerated at Newgate had been relocated there. The penitentiary had eight hundred solitary cells and became fully operational in 1829. Another two hundred cells were added within several years.[129] De Beaumont and de Tocqueville visited Sing Sing in 1831 and found it was operating under the same strict discipline as Auburn. Their report to the French government expressed some reservations about the penitentiary's system:

> "[a]lthough the discipline is perfect, one feels it rests on fragile foundations: it is due to a tour de force which is reborn unceasingly and which has to be reproduced each day, under penalty of compromising the whole system of discipline."[130]

1.3.3.1 1828-1829 Investigation

Problems arose at Sing Sing shortly after it began operating. Two members of the three-person Board of Inspectors, Samuel Hopkins and George Tibbits, both former US Congressmen, "began

[126] SCOTT CHRISTIANSON, *supra* note 22, at 117.
[127] WILLIAM CRAWFORD, REP. ON THE PENITENTIARIES OF THE UNITED STATES, 18n (1839).
[128] W. DAVID LEWIS, *supra* note 1, at 95.
[129] ANDREW SKOTNICKI, *supra* note 6, at 73.
[130] DE BEAUMONT & DE TOCQUEVILLE, *supra* note 30, at 156.

to suspect [Lynds'] integrity, faithfulness, and humanity."[131] The inspectors were made aware of reports of cruelty and corruption at the penitentiary. In 1828, they sent written questions to Sing Sing officials, including Lynds, to obtain further information. They also visited the penitentiary twice to speak to officials and employees directly. The third inspector disapproved of his colleagues' inquiries and he did not participate in this "secret investigation."[132]

Based on the information they gathered, Hopkins and Tibbits believed that Lynds had embezzled prison funds, withheld food from incarcerated people, and tolerated severe and unwarranted punishments. Hopkins presented eleven allegations against Lynds to the legislature, and the Senate convened a select committee to investigate them.[133] The committee members spent a week at Sing Sing examining witnesses and interviewing the three inspectors. In March 1831, the committee produced a report which described Hopkins and Tibbits' earlier investigation as "ill-judged and unprofitable," finding "much to admire and approve, and little or nothing to censure."[134] The report concluded that "the whole moral aspect of the prison government [is] most happy; and … the more publicly its condition is known, the more creditable will it be to the State."[135] At pains to underscore the credibility of Lynds and his fellow officials, the report emphasized that Lynds had "in no way impaired his well-earned fame."[136]

1.3.3.2 1839 Investigation

In 1839, another select committee was appointed by the New York Senate to investigate allegations of abuse and financial impropriety at Sing Sing.[137] The Senate then broadened the investigation to include Auburn as well.[138] At Sing Sing, fifty-five allegations were made against the warden, officers, and employees, and included a wide range of financial improprieties, cruel treatment of incarcerated people, and burial of the deceased without coroners' inquests. The allegations relating to Auburn, where Lynds had resumed his role as

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[131] REP. OF THE SELECT COMM., ON THE COMMUNICATION OF SAMUEL M. HOPKINS, RELATIVE TO THE CONDUCT OF ELAM LYNDS, LATE KEEPER OF THE SING-SING PRISON, S. DOC. 60, 2 (N.Y. 1831) [hereinafter *REP. OF THE SELECT COMM. (1831)*].
[132] *Id.* at 6.
[133] S. RES. 412 (N.Y. 1830).
[134] REP. OF THE SELECT COMM. (1831), *supra* note 131, at 6.
[135] *Id.* at 34.
[136] *Id.* at 33.
[137] REP. OF THE MAJORITY OF THE COMM. TO INVESTIGATE THE AFFAIRS OF THE AUBURN AND MOUNT-PLEASANT STATE PRISONS, S. DOC. 37, 1 (N.Y. 1840) [hereinafter *REP. OF THE MAJORITY (1840)*].
[138] *Id.*

warden, included various forms of brutality, subjecting people to freezing temperatures, and withholding food (a repetition of a complaint against him at Sing Sing).

A majority of the three-person committee found that none of the allegations had been proved. The third member of the committee, Henry Livingston, filed a dissenting report criticizing his colleagues for having admitted the testimony of incarcerated people only when it tended to exculpate prison officials.[139] Like the dissenting report written by Thomas McElwee concerning the allegations of abuse at the Eastern State Penitentiary, Livingston's report sheds additional light on the nature of the committee's investigation, the abuses at the penitentiaries, and the extent to which legislators sought to conceal those matters from the public. For example, the majority's report refers to records of punishments inflicted on incarcerated people, but Livingston's report casts doubt on the completeness of those records. He referred to evidence that a prison official tore up a written punishment report after telling the employee who wrote it that it was of no use to him.[140] He also described many instances in which people were beaten repeatedly, sometimes to the point of unconsciousness or death.

Much like the majority report by the committee investigating the Eastern State allegations, this committee's majority report is also revealing in its inclination to find no fault on the part of prison officials, lest such a finding reflect badly on the state or undermine its whole system of punishment:

> "[H]owever invaluable the system [at the penitentiaries], it requires public opinion to sustain it. Every individual, therefore, who is solicitous for the welfare of society, cannot fail to feel the deepest interest in eliciting the truth upon this important subject, and of relying upon that as the polar star by which to direct his course. He who by misrepresentation excites a popular prejudice against our penitentiary system, aims a deadly blow at the most valuable institutions of our

[139] REP. OF THE MINORITY OF THE COMM. TO INVESTIGATE THE AFFAIRS OF THE AUBURN AND MOUNT-PLEASANT STATE PRISONS, S. DOC. 38, 8 (N.Y. 1840) [hereinafter *LIVINGSTON REPORT (1840)*] ("The majority of the committee were further and more palpably wrong in permitting the statements of prisoners or representatives of them to be given as evidence in exculpation of the conduct of the prison officers, while they refused to admit it against them. Such evidence would seem to be either admissible or inadmissible, not at the same time one or the other, according to its purport and effect.").
[140] *Id.* at 8.

country, which, if effectual, would again compel us to resume sanguinary punishments with all their horrid cruelty."[141]

Despite this statement, the majority conceded that there were cases where physical punishments had been too severe, and it recommended that the law be amended to limit officials' discretionary power.[142]

The treatment of mentally ill people also came under criticism in Livingston's report. Many, it appears, were frequently whipped. Livingston observed that "[i]t would appear in almost every instance to have been taken for granted, that the convict was feigning derangement, even when the absence of all possible motive would show the absurdity, or at least the unreasonableness of such a supposition."[143] He acknowledged that some people might feign insanity to avoid work, but considered it natural for someone who had been "plunged into the lowest depths of hopeless misery and degradation" to become mentally ill.[144]

By the time the committee's reports were filed, Lynds had resigned, and some other officials at both penitentiaries had left (whether voluntarily is not clear from the reports). Livingston recommended that the remaining officials at both Auburn and Sing Sing be removed and replaced by men who respected the laws relating to prison management and were less inclined to resort to physical punishment.[145]

When Rev. Dwight learned of possible abuses at Auburn and Sing Sing, he toured both institutions to determine the credibility of the allegations. His visits "left him horrified at the neglect of the reformative programs he had fought so hard to establish."[146] BPDS's annual report for 1839 expressed Dwight's consternation at the state of affairs at both institutions. He was troubled by Lynds' decision to disband the Auburn Sunday school in order to save money.[147] The BPDS report stated that the country had been shocked by the physical abuse at Auburn, which Dwight described as "alarming cruelty."[148] Writing about his visit to Sing Sing, Dwight

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[141] REP. OF THE MAJORITY (1840), *supra* note 137, at 90-91.
[142] *Id.* at 78.
[143] LIVINGSTON REPORT (1840), *supra* note 139, at 6.
[144] *Id.* at 9-10.
[145] *Id.* at 11-12.
[146] ANDREW SKOTNICKI, *supra* note 6, at 75.
[147] BOSTON PRISON DISCIPLINE SOCIETY, FOURTEENTH ANNUAL REPORT 39 (1839).
[148] *Id.*

described the physical punishments inflicted on people as "odious and detestable, both in manner and degree."[149] He also believed that people were not receiving enough food and that the penitentiary's hospital was not providing adequate care.[150] It was therefore not surprising to Dwight that the mortality rate at Sing Sing in the prior year was double that of Auburn's.[151]

1.3.4 The End of New York's Solitary Confinement Experiment

The demise of solitary confinement in New York can be attributed to overcrowding, as was the case in Pennsylvania. In addition, external opposition to prison work by organized labor undermined the penitentiaries' ability to remain self-supporting. In 1835, the New York legislature passed a statute which prohibited the training of incarcerated people in any mechanical trades except for those roles that produced articles which would otherwise be imported from overseas.[152] In 1842, the legislature forbade incarcerated people to work in any trade that they had not learned and practiced prior to their incarceration.[153]

As overcrowding became increasingly problematic, it was impossible for the penitentiary staff to enforce silence. In an effort to maintain order and encourage good behavior, the staff began allowing certain privileges, including reading and writing. This further undermined the principles of separation and silence.[154] By 1866, the New York penitentiaries had no choice but to confine more than one person to a cell.[155]

Opposition to the Auburn system grew throughout the 1840s. Interest in prison reform on the part of philanthropic groups waned, just as it had done in Pennsylvania. These groups' focus shifted to public schools as vehicles for moral reform.[156] BPDS disbanded after the death of Dwight in 1854, thus ending the annual reports touting the virtues of solitary confinement. The

[149] *Id.* at 42.
[150] *Id.* at 42-43.
[151] *Id.*
[152] Act of May 11, 1835, ch. 302, § 7 *in* LAWS OF THE STATE OF NEW YORK PASSED AT THE 58TH SESSION OF THE LEGISLATURE 342 (1835).
[153] Act of April 9, 1842, ch. 148, § 2 *in* LAWS OF THE STATE OF NEW YORK PASSED AT THE 65TH SESSION OF THE LEGISLATURE 182 (1842).
[154] REBECCA MCLENNAN, *supra* note 25, at 71.
[155] DAVID ROTHMAN, *supra* note 100, at 242.
[156] MARK COLVIN, *supra* note 1, at 106.

New York Prison Association, established in 1844 to advocate for the improvement of prisons, lacked the necessary public support and financial resources to take over the BPDS's role.[157]

Official statements and reports reflected the ebbing tide of support for solitary confinement. In 1852, a committee was appointed by New York's legislature to investigate the finances, management, and disciplinary practices of the state's prisons.[158] Its report acknowledged the important role of the penitentiaries in protecting the public through the removal of incarcerated people from society but noted that people were no safer to society upon re-entering it at the end of their sentences. The report conceded that Auburn's system of enforced silence was ineffective because people were able to speak while working in the congregate workshops.[159] The committee did not go so far as to recommend that solitary confinement be abolished, but it made various other suggestions to improve general conditions. These included substituting solitary confinement with hard labor for practices like the shower bath; and annual reports following inspections, in preference to reliance on accounts from the penitentiaries' boards of inspectors.[160] The committee also pointedly remarked that the community would no longer tolerate "that the report of an investigating committee be nothing more than an instrument for white-washing the public officers connected with [the penitentiary]."[161]

The Commissioner of Public Charities and Correction for New York echoed some of the concerns expressed by the committee of 1852 in its own statement some fourteen years later. In 1866, it described the state's system of prison discipline as defective and noted its tendency to increase the likelihood that people would reoffend once they had completed their sentence.[162]

1.4 Later Oversight

1.4.1 Judicial Oversight

The courts' role in relation to solitary confinement can be broadly grouped into four categories during the historical period from 1790 to the early 1900s: sentencing, ruling on the legality of

[157] W. DAVID LEWIS, *supra* note 1, at 257.
[158] REP. OF THE COMM. APPOINTED TO EXAMINE THE SEVERAL STATE PRISONS, ASSEMB. DOC. 20 at 14 (N.Y. 1852).
[159] *Id.* at 40.
[160] *Id.* at 65.
[161] *Id.* at 3.
[162] TEETERS & SHEARER, *supra* note 5, at 230.

solitary confinement legislation, defining the authority of penitentiary officials, and determining whether conditions were cruel or unusual.

The courts' practice of sentencing people to solitary confinement did not last long; it shifted to penitentiary officials in the nineteenth century. In 1882, the Supreme Judicial Court of Maine considered whether a court could impose a sentence of solitary confinement on a person who attempted to escape from prison.[163] It held that an 1872 statute wholly abolished the court's power to do so; only the warden could impose the punishment as a form of discipline.[164] In a 1904 case, the Superior Court of Pennsylvania held that the 1860 penal code specifically prescribed the form of punishment. Depending on the crime, a person would either be sentenced to imprisonment in a county jail, where he would not be subject to solitary confinement, or to imprisonment in a penitentiary, where the solitary confinement and labor regime was in operation.[165] In 1934, the Superior Court of Pennsylvania clarified that only a small number of statutes explicitly allowed the courts to choose whether to sentence a person to a county jail or a penitentiary.[166] The remaining statutes prescribed the type of sentence that the court was required to impose. In most cases, the court had no discretion.

In the case of *In Re Medley* in 1890, the Supreme Court described solitary confinement in a case concerning the retroactive application of a statute requiring that people sentenced to death be held in solitary confinement prior to execution.[167] Characterizing solitary confinement as "an additional punishment of the most important and painful character,"[168] the Court traced the development of the practice from its origins in Europe to its introduction at the Walnut Street Jail:

> "[E]xperience demonstrated that there were considerable objections to it. A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the

[163] State v. Haynes, 74 Me. 161 (1882).
[164] *Id.* at 162.
[165] Commonwealth v. Fetterman, 29 Pa. Super. 569 (1904).
[166] Commonwealth v. Arbach, 113 Pa. Super. 137 (1934).
[167] In Re Medley, 134 U.S. 160 (1890).
[168] *Id.* at 171.

> community. It became evident that some changes must be made in the system, and the separate system was originated by the Philadelphia Society for Ameliorating the Miseries of Public Prisons … it is within the memory of many persons interested in prison discipline that some 30 or 40 years ago the whole subject attracted the general public attention, and its main feature of solitary confinement was found to be too severe."[169]

By the early 1900s, the courts were becoming somewhat more willing to curtail the authority of prison officials, albeit only in extreme cases. In 1908, the Supreme Court of Michigan ordered a county sheriff to desist from keeping a man in conditions akin to solitary confinement for failure to pay a debt.[170] Reviewing those conditions, the court declared them to constitute solitary confinement as defined by the Supreme Court in *Medley,* observing that "prisoners charged with a crime in this jail were treated with less severity" than this debtor.[171] Recognizing that the sheriff had discretion in regard to the treatment of incarcerated people facing both criminal and civil processes, the court nevertheless held that that discretion was limited and could not be abused. In the instant case, the court found that the sheriff's treatment of the man was not only illegal, but "contrary to every sentiment of justice and humanity."[172] Particularly troubling to the court was the fact that the sheriff had imposed such conditions at the request of the lawyer for the creditor who was also the public prosecutor.[173]

In 1914, the Supreme Court of North Carolina dealt with the question of solitary confinement in a dictum. The court upheld a charge of assault against prison guards who whipped a man with a leather strap. Though the man died later that day, the county physician determined that the death was not attributable to the beating.[174] Holding that no law authorized the beating of incarcerated people, the court noted the provisions of the state's Constitution of 1888 that "death, imprisonment with or without hard labor, fines, removal from office, and disqualification to hold office" should be the only punishments in the state.[175] However, the court exempted from its ruling other forms of prison discipline, stating that the constitutional provision had

[169] *Id.* at 168.
[170] Leah v. Whitbeck, 151 Mich. 327, 333-34 (1908).
[171] *Id.* at 335.
[172] *Id.*
[173] *Id.* at 336.
[174] State v. Nipper, 81 S.E. 164 (N.C. 1914).
[175] *Id.* at 166.

> "no direct application to the discipline required in our jails and penitentiaries; for, if so, *it would prevent solitary confinement*, restriction of rations, and other reasonable punishments that are in customary use in prisons and penitentiaries."[176]

In 1925, the Supreme Court of Arizona held that the superintendent of the state prison had acted unlawfully by keeping a person in solitary confinement for five months, thirty days of which were spent in a dark cell.[177] The man had been allowed to speak only to the person who brought him food, had received only bread and water, and had left the cell only twice for a few hours each time to give evidence in court proceedings. The court held that such treatment was "harsh and unreasonable," and that the superintendent had acted outside the scope of his authority to "receive and safely keep" people.[178]

Challenges based on cruel or unusual punishment were generally unsuccessful. In 1861, the Supreme Judicial Court of Massachusetts dismissed a lawsuit against the master of a house of correction brought by a man who alleged that he suffered injuries to his feet from being held in solitary confinement without proper clothing in a cold cell.[179] The court held that to allow the action would

> "transfer to the supervision of the courts … the question of the proper management of our jails and houses of correction and require them to pass upon all the alleged abuses arising from neglect by the officers to discharge the functions of their offices properly."[180]

It concluded that there was no relationship between an incarcerated person and the master that would give rise to cause of action in such a case.[181]

In 1890, a New York court dismissed a lawsuit brought by a man incarcerated at Sing Sing who was restrained in handcuffs in a wet dungeon for eight days and given only bread and water, then held "for a long time" in solitary confinement.[182] Holding that the punishment was authorized by

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[176] *Id*. (emphasis added).
[177] Howard v. State, 28 Ariz. 433 (1925).
[178] *Id.* at 437-38.
[179] Williams v. Adams, 85 Mass. 171 (1861).
[180] *Id.*
[181] *Id.*
[182] Wightman v. Brush, 56 Hun. 647 (N.Y. 1890).

statute, the court deferred to the decision of the warden that the measure was necessary in order to produce "the submission or obedience of the convict." Thus it was not cruel or unusual.

In *State v. Cahill*, a man claimed that he was justified in escaping from a prison in Iowa where he was held in solitary confinement due to the conditions in his cell which he described as[183]

> "infested with bugs, worms, and vermin; … the toilet was so out of repair that when it flushed the water ran out upon the floor; [and] … the cell was without a chair, bed, or other reasonable comforts."[184]

Rejecting the claim, the court held that the legislature had the right to punish people with solitary confinement. If the cell in which the man was held was "not kept clean and healthful, it should have been given immediate attention by those in charge, and all of the matters complained of entirely corrected."[185] The conditions, even if inadequate, did not violate the prohibition against cruel and unusual punishment in the state constitution and did not justify the man's escape.[186]

In 1860, the Supreme Court of Indiana remarked that solitary confinement, like other forms of punishment, had been tried "but without satisfactory results."[187] A concurring justice of the Supreme Court of Florida later remarked in a dictum that solitary confinement, along with various physical punishments, was:

> "admitted to be cruel punishment, but … had been abolished fifty or sixty years ago when our Declaration of Rights was adopted."[188]

In 1919, the Supreme Court of Missouri upheld the right of private parties to criticize solitary confinement. The warden of the state penitentiary brought a libel action against a newspaper publisher for statements about the warden's "barbaric and archaic treatment of prisoners in the penitentiary."[189] In response, the newspaper brought out the fact that one man had been placed in solitary confinement and forced to stand with his hands chained above his head for nearly

[183] 194 N.W. 191 (Iowa 1923).
[184] *Id.* at 193.
[185] *Id.*
[186] *Id.*
[187] Helton v. Miller, 14 Ind. 577 (1860).
[188] Brown v. State, 152 Fla. 853, 861 (Fla. 1943) (Chapman, J., concurring).
[189] McClung v. Pulitzer Pub. Co., 214 S.W. 193 (Mo. 1919).

fifteen hours a day for twenty consecutive days, he was not allowed to leave his cell at any time, and he was forced to sleep on a bare board on the concrete floor. The man endured these conditions until he made a false statement about a bottle of whisky that had been found in his possession.[190] The defendant also described the practice of guards' whipping incarcerated people. The court rejected the warden's libel claim, holding that newspapers had the right to criticize the official acts of public officers such as the warden, and finding there could be no doubt that the subject was of great public interest.[191]

1.4.2 Legislative Oversight

State legislatures had an important role in convening investigations into conditions at the penitentiaries when reports of abuses emerged, but the early reports were flawed in their determination not to find fault on the part of officials. The 1852 report to the New York legislature on the state's prisons acknowledges that the earlier investigations into the penitentiaries overlooked allegations against officials rather than holding them to account for abusive and harmful practices.

Most of the legislative investigations focused on abuses other than solitary confinement even though strict rules governing the practice enabled officials to abuse incarcerated people without facing any consequences for doing so. The 1849 report to the Pennsylvania legislature did question the effect of solitary confinement on the "physical and mental vigor" of people. Similarly, earlier accounts, such as those recording the 1821 experiment at Auburn, made clear the legislators' awareness that solitary confinement could be harmful. Nevertheless, none of the reports directly considered whether solitary confinement itself was cruel or unusual.

1.5 The End of the Early Experiments

Unlike the deliberate decision to commence solitary confinement, no official decision was made in either Pennsylvania or New York to end the practice; rather, legislation signaling a new approach was enacted long after the practice had ceased.

[190] *Id.* at 194.
[191] *Id.* at 200-201.

Cost considerations impeded reform of solitary confinement. Once the states had committed funds for constructing and operating solitary confinement cells, it was unlikely that they would simply abandon these purpose-built facilities, a point which remains pertinent to current solitary confinement reform. The rivalry between New York and Pennsylvania about which state had the better system may also have distracted from broader questions about the legitimacy and justification for the practice itself and, instead, focused on the narrow areas where the states' practices differed.[192] As the decades wore on, legislative interest in experimenting with different methods of punishment dwindled. Economic downturns and expanding populations distracted public attention away from the penitentiaries. The time frame for experimenting with different forms of punishment was much shorter than the lifespan of these penitentiaries.

In 1867, the Prison Association of New York directed two of its members, Enoch Wines and Theodore Dwight, to "visit and inspect the penal and correctional institutions of the states of the Union, to examine their systems, and to inquire into their systems of criminal justice."[193] Wines and Dwight visited prisons in eighteen states and in Canada. Referring to New York and Pennsylvania, the authors noted that both states' regimes had a common basis of "isolation and labor," the main difference between them being one of application rather than principle.[194] The report went on to estimate that one-third of people incarcerated in the US did not have individual cells and that consequently the rule of silence (derived from the Auburn system) had been relaxed in at least four states and was being enforced with varying degrees of strictness in others.[195]

Wines and Dwight questioned the necessity of enforcing absolute and unbroken silence and recommended a gradual reduction of separation and silence during the course of a person's

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[192] *See* DAVID ROTHMAN, *supra* note 100, at 86 ("The pamphlet warfare between the two camps dominated practically all thinking and writing about the problem of crime and correction. The advantages and disadvantages of Pennsylvania as against Auburn blocked out any other consideration. No one thought to venture beyond the bounds of defining the best possible prison arrangements, and this narrowness of focus was clear testimony to the widespread faith in institutionalization. People argued whether solitary should be continuous and how ducts ought to be arranged, but no one questioned the shared premise of both systems, that incarceration was the only proper social response to criminal behavior. To ponder alternatives was unnecessary when the promise of the penitentiary seemed unlimited.").

[193] ENOCH C. WINES & THEODORE W. DWIGHT, REPORT ON THE PRISONS AND REFORMATORIES OF THE UNITED STATES AND CANADA 1 (1867).

[194] *Id.* at 56.

[195] *Id.* at 175.

sentence.[196] The report recommended that people in prisons be allowed to associate "as human beings, and not be doomed … to eternal dumbness, with heads and eyes fixed like some statue in some direction."[197] Describing solitary confinement as a "warfare on nature," Wines and Dwight recognized that the human instinct towards sociability was necessary for the improvement of people's character.[198] They concluded that they had not observed a single prison in the US in which the disciplinary regime imposed by solitary confinement led to the reform of incarcerated people.[199]

The Wines and Dwight report prompted the establishment in 1870 of the country's first national prison reform association to address the entire prison system. The National Prison Association's Declaration of Principles was adopted at a convention that year and included a statement that the objective of prison discipline was the "moral regeneration" of incarcerated people and not "the infliction of vindictive suffering."[200] The Principles recommended that prison discipline should seek to improve people through education, privileges, a conduct-based system of probation, and religious instruction.[201] Notably absent was any reference to solitary confinement.

Even if the original claimed justification for the early solitary confinement experiments was rehabilitative, in practice, it quickly deteriorated into a punitive measure with few constraints. There was no evidence to suggest that the early solitary confinement experiments led to genuine rehabilitation or behavioral change. As shown by the legislative investigations, penitentiary officials were given considerable discretion to operate the institutions however they saw fit, with few checks on their authority, even after evidence of brutality and harm was apparent. And while widescale solitary confinement was eventually abandoned in the penitentiaries, its use was not fully relinquished. As a result of it having been introduced in the first place, it became an established component of incarceration in America and was later expanded to an even greater order of magnitude.

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[196] *Id.* at 178-179.
[197] *Id.*
[198] *Id.* at 179-180.
[199] *Id.* at 62, 286.
[200] REBECCA MCLENNAN, *supra* note 25, at 93.
[201] *Id.*

1.6 The Re-Emergence of Solitary Confinement

Though solitary confinement as a component of the prison sentence ended in the nineteenth century, it continued to be used in prisons. In 1934, the Federal Government opened the penitentiary at Alcatraz, complete with solitary confinement cells where people were held in isolation, sometimes for long periods of time.[202] The Task Force on Corrections of the President's 1967 Commission on Law Enforcement and Administration of Justice observed in its report that "almost every correctional institution includes a special confinement unit for those who misbehave seriously after they are incarcerated."[203] That report described such units as

> "usually a place of solitary confinement, sometimes without bedding or toilet facilities, accompanied by reduced diet and limited access to reading materials and other diversions, and occasionally without any other kind of light."[204]

It appears that the authors of the 1967 report, like some of the early proponents of solitary confinement, were supportive of measures that improved people's behavior rather than advocating for harsh treatment as a justification in and of itself. The report emphasized that "reward regulates behavior more effectively than punishment," and "when penalties seem excessive, capricious or otherwise unjust, it is difficult for the [prison] officer to be accepted also as a friend or counselor."[205] This movement towards rehabilitation was short-lived.

The reemergence of solitary confinement was particularly pronounced from the 1970s onwards as it came to be used disproportionately against incarcerated political activists, predominantly Black people.[206] Prison officials locked people in isolation in their cells for increasingly long periods to suppress disturbances and to control "those portions of the prison population … deemed dangerous and violent."[207] During the 1971 uprising at Attica prison in New York, one of the demands made of prison administrators was to end the use of solitary confinement. This

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[202] Ashley T. Rubin & Keramet Reiter, *Continuity in the Face of Penal Innovation: Revisiting the History of American Solitary Confinement*, 43 LAW & SOC. INQ. 1604, 1620 (2018).
[203] PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE ON CORRECTIONS, TASK FORCE REPORT: CORRECTIONS 50 (1967).
[204] *Id.*
[205] *Id.* at 51.
[206] Craig Haney, *The Science of Solitary: Expanding the Harmfulness Narrative*, 115 NW. U. L. REV. 211, 215-216 (2020).
[207] Toussaint v. Rushen, 553 F. Supp. 1365, 1367 (N.D. Cal. 1983).

request was ignored, and the riot was brutally suppressed, resulting in the deaths of forty-three people.[208]

In 1983, the United States Penitentiary in Marion, Illinois, was placed into a permanent lockdown following the murder of two correctional officers and several incarcerated people, and a number of escape attempts. One unit in the penitentiary remained in lockdown for twenty-three years, with people confined in their cells in solitary confinement.[209] In 1986, Arizona then opened the country's first supermaximum-security, or "supermax," unit, ushering in a new era of solitary confinement. Each cell in the new unit was made of poured concrete, with no windows, and designed so that prison officers could see into multiple blocks of cells at one time.[210]

In 1994, the Federal Government opened the Administrative Maximum Facility in Florence, Colorado, to replace Marion as a purpose-built supermax facility. The Federal Government also established new "special management units" to hold people in solitary confinement within other federal prisons. These units were justified in part by the murder of a single correctional officer in the early 2000s; as a result, by 2012, over 2,000 people were held in special management units in federal prisons.[211] The historical use of solitary confinement was thus revived and scaled up in response to a perceived "spike in prison violence."[212]

By 2010, almost every state and the Federal Bureau of Prisons ("FBOP") had either built a new supermax unit or retrofitted an existing prison facility to hold people in long-term solitary confinement.[213] Much like the historical experiments, these modern equivalents did not end up being used in the way that the designers envisaged. For example, the people who oversaw the design and construction of Pelican Bay State Prison, a supermax facility in Northern California, expected that it would provide a "small, fixed number of supermax beds," and that people would be assigned to these units on a short-term basis.[214] Instead, people were placed in solitary

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[208] *See* ELIZABETH ANN THOMPSON, BLOOD IN THE WATER: THE ATTICA PRISON UPRISING OF 1971 AND ITS LEGACY 80 (2016).
[209] DOJ REPORT (2016), *supra* note 66, at 7.
[210] Ashley T. Rubin & Keramet Reiter, *supra* note 202, at 1623.
[211] DOJ REPORT (2016), *supra* note 66, at 8.
[212] *Id.*
[213] Keramet Reiter, *Parole, Snitch or Die: California's Supermax Prisons and Prisoners, 1997-2007*, 14 PUNISHMENT & SOC'Y, 530, 532 (2012).
[214] *Id.* at 557.

confinement at Pelican Bay for years or decades. The conditions in these modern institutions are discussed in the next chapter.

CHAPTER 2. THE CURRENT STATE OF SOLITARY CONFINEMENT

Introduction

Since early 2020, around seventy-five percent of people living in America have been subject to some form of lockdown or stay-at-home order as states took steps to fight the spread of the novel coronavirus.[1] Of the many concerns associated with lockdown orders, one is the psychological effects of social isolation.[2] Since the onset of the pandemic, many people have died alone, their family members unable to visit them in hospital, or to grieve their loss with family and friends in ways that are religiously and culturally familiar.[3] Though these restrictions pale in comparison to the experience of incarceration, they amplify the reasons to be concerned about the harm suffered by people in solitary confinement, who experience far more punitive restrictions.[4] They are exposed to the risk of chronic physical and mental health problems, can rarely, if ever, contact or see their families, and experience constant verbal and physical abuse.

Modern solitary confinement is a severe practice which involves segregating people from the general prison population and holding them in bare cells for twenty-two or more hours a day. They have almost no human contact and suffer intense sensory deprivation.

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[1] *Coronavirus: Three Out of Four Americans Under Some Form of Lockdown*, BBC, (31 Mar. 2020), https://www.bbc.com/news/world-us-canada-52103066.

[2] *See, e.g.,* Christoph Pieh et al., *Mental Health During Covid-19 Lockdown in the United Kingdom*, PSYCHOSOMATIC MAGAZINE (Oct.1, 2020) (reporting higher prevalence of depressive, anxiety, and insomnia symptoms relative to pre-pandemic epidemiological data); Jan Hoffman, *Young Adults Report Rising Levels of Anxiety and Depression in Pandemic*, NEW YORK TIMES, (Aug. 13, 2020), https://www.nytimes.com/2020/08/13/health/Covid-mental-health-anxiety.html; William Wan, *The Coronavirus Pandemic is Pushing America into a Mental Health Crisis*, WASHINGTON POST (May 4, 2020), https://www.washingtonpost.com/health/2020/05/04/mental-health-coronavirus/; Theo van Tillburg et al., *Loneliness and Mental Health During the Covid-19 Pandemic: A Study Among Dutch Older Adults*, 20 J. GERONTOL. B. PSYCHOL. SCI. SOC. SCI. (2020).

[3] UNIFORMED SERVICES UNIVERSITY OF THE HEALTH SCIENCES, CENTER FOR THE STUDY OF TRAUMATIC STRESS, WHEN A LOVED ONE DIES FROM COVID-19, https://www.cstsonline.org/assets/media/documents/CSTS_FS_When_a_Loved_One_Dies_from_COVID19.pdf; Bill Keveny, *Coronavirus Robbed My Family of the Opportunity to Mourn our Brother's Death*, USA TODAY (May 7, 2020), https://www.usatoday.com/story/life/2020/05/07/covid-19-made-my-brothers-death-harder-grieve/5170437002/; Judith Graham, *Bereaved Families Are 'the Secondary Victims of Covid-19,'* KHN (Aug 12, 2020), https://khn.org/news/bereaved-families-are-the-secondary-victims-of-covid-19/.

[4] Hannah Giorgis, *Quarantine Could Change How Americans Think of Incarceration*, THE ATLANTIC, (Apr. 28, 2020), https://www.theatlantic.com/culture/archive/2020/04/quarantine-could-change-how-americans-think-incarceration/610831/.

Drawing on the accounts of incarcerated people, this chapter describes the conditions of solitary confinement in US prisons today. It discusses the effects of the practice and the range of harms to which people are exposed, with reference to scientific evidence. The second part of the chapter explores the available demographic data regarding the people held in solitary confinement.

2.1 Types of Solitary Confinement

Solitary confinement is used for different purposes which vary from state to state and prison to prison. Some aspects of solitary confinement may differ depending on the reason for the placement, but generally people face similar conditions and risks of harm. In the case of *In Re Jackson,* the New York Supreme Court described the different categories of people held in solitary confinement in New York City jails:

> "All [solitary confinement] inmates, whatever their status, are subject to the most severe isolation imposed in the New York City prison system. The program does not distinguish between pre-trial detainees and convicted inmates serving sentences, between the most vulnerable inmates and the most predatory; between those convicted of the most serious felonies and those convicted of the most minor offenses; or between those who request voluntary placement due to fear for their own safety and those who are involuntarily placed due to their propensity for violence. The [solitary confinement regime] treats all inmates the same, confining them to cells for up to twenty-three hours per day."[5]

Though the above statement described jails rather than prisons, the same description applies to the latter.

Various terms are used to describe solitary confinement and new terms are constantly being introduced. Certain labels are common to most US jurisdictions. "Administrative segregation" generally refers to solitary confinement that is not imposed for disciplinary reasons but is instead justified as necessary for the safety of the institution. This form of segregation is often used when people are believed to pose a threat to the orderly operation of the prison, a justification that is deployed frequently by corrections officers even when the threat to orderly operation may be minor or non-existent. The criteria for placement into administrative segregation are

[5] In Re Jackson, 895 N.Y.S. 2d 633, 641 (2010).

generally vague by design.[6] People are often placed in administrative segregation because they are suspected to be associated with a prison gang. Depending on the jurisdiction, very little may be required to merit assignment to administrative segregation. A particular tattoo, speaking to or receiving correspondence from a known gang member, or even having a library book that was previously borrowed by a gang member may all constitute sufficient evidence.[7] Expressing discontent with changes such as the introduction of double-celling has also been held to support a finding that a person poses a threat to the safety and security of the prison.[8] Administrative segregation can be among the longest of all forms of solitary confinement and may run for the entire duration of a prison sentence.[9]

Race and ethnicity often influence administrative segregation classifications. For example, in California, possession of artwork containing Aztec images or pamphlets in certain foreign languages was considered confirmation of gang membership, ensuring that people would be placed in administrative segregation until the end of their sentence.[10] In litigation in Massachusetts, prison officials sought to justify the placement of people in administrative segregation without due process by relying on evidence of "the changing racial composition of the prisoner population (increases in African-Americans, Hispanics, and others who are labeled as gang members)" to suggest there had been an increase of violence within the prison.[11] In Texas, people are placed in indefinite administrative segregation if they are deemed to be members of "security threat groups," the terminology used by departments of corrections to define prison gangs. Of the twelve prison gangs identified by the Texas Department of Criminal

[6] IAN O'DONNELL, PRISONERS, SOLITUDE, AND TIME 108 (2014).
[7] *See* Keramet Reiter, *Supermax Administration and the Eighth Amendment: Deference, Discretion, and Double Bunking 1986-2010*, 5 UC IRVINE L. REV. 89, 117 (2015); David H. Cloud et al., *Public Health and Solitary Confinement in the United States*, 105 AM. J. PUB. HEALTH 18, 18-20 (2015) ("In some jurisdictions, assignment to administrative segregation is based solely on a point system that includes factors such as tattoos, known associates, and possessions suggesting gang affiliation, without regard to individual behaviors.").
[8] *See, e.g.,* Cowart v. Pico, 241 A.D.2d 723 (1997) (N.Y.).
[9] Angela Browne et al., *Prisons Within Prisons: The Use of Segregation in the United States*, 24 FED. SENT'G REP. 46, 47 (2011).
[10] Order Extending Settlement at 22-23, Ashker v. Governor of California, No. 4:09 Civ. 5796 (N.D. Cal Jan. 25, 2019).
[11] Haverty v. Comm'r of Corr., 776 N.E.2d 973, 985 (2002).

Justice ("TDCJ"), eight are predominantly Latino in membership while two are predominantly Black.[12]

"Disciplinary segregation" is typically imposed for a breach of prison rules and tends to be of a fixed, rather than indefinite, duration. In some states, however, prison officials "stack" sentences so that people face years or even decades in solitary confinement for minor behavioral infractions. It is not the case, as is often claimed by prison officials, that solitary confinement is only used in response to threatening and dangerous behavior by "the worst of the worst."[13] For example, in Florida, a mentally ill eighteen-year-old was sent to solitary confinement for sixty days when she allegedly asked for a high calorie meal.[14] Within her first three months in isolation, she was found guilty of nine new disciplinary infractions which added another 270 days to her time in solitary confinement. The stacked infractions of which she was found guilty included behavior such as yelling, kicking her cell door, and disrespecting prison staff.[15] In Virginia, a person already in solitary confinement had his initial term stacked because he complained of being denied recreation.[16] In Georgia, such confinement was prolonged for infractions like banging on cell walls or doors, or holding open the metal slot in cell doors.[17] Ian Manuel, who was held in solitary confinement in Florida from the age of fifteen, spent eighteen consecutive years in solitary confinement because of continued disciplinary infractions. These infractions included minor matters such as "having a magazine that had another prisoner's name on the mailing label."[18]

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[12] TEXAS CIVIL RIGHTS PROJECT, TORTURE BY ANOTHER NAME: SOLITARY CONFINEMENT IN TEXAS 10-11 (2019); *see also* Texas Dep't of Crim. Justice, *Security Threat Groups*, *available at* https://www.tdcj.texas.gov/documents/cid/CID_STGMO_FAQ.pdf.

[13] *See, e.g.,* Lance Tapley, *The Worst of the Worst: Supermax Torture in America*, BOSTON REVIEW, (Nov. 1, 2010), https://bostonreview.net/archives/BR35.6/tapley.php; Miles Corwin, *High-Tech Facility Ushers in New Era of State Prisons*, LOS ANGELES TIMES, (May 1, 1990), https://www.latimes.com/archives/la-xpm-1990-05-01-mn-141-story.html; H. D. Butler et al., *What Makes You the "Worst of the Worst"? An Examination of State Policies Defining Supermax Confinement*, 24 CRIM. JUST. POLICY REV. 676 (2013).

[14] Complaint at 14, Harvard et al. v. Inch, No. 4:19 Civ. 212, (N. D. Fla. May 18, 2019) [hereinafter *Harvard v. Inch Complaint*].

[15] *Id*.

[16] AM. CIV. LIBERTIES UNION OF VIRGINIA, SILENT INJUSTICE: SOLITARY CONFINEMENT IN VIRGINIA 33 (2018).

[17] Second Amended Complaint at 61, Gumm v. Ford, No. 5:15 Civ. 41 (M.D. Ga Mar. 11, 2017) [hereinafter *Gumm v. Ford Second Amended Complaint*].

[18] Ian Manuel, *I Survived 18 Years in Solitary Confinement*, NEW YORK TIMES (Mar. 25, 2021), https://www.nytimes.com/2021/03/25/opinion/solitary-confinement-reform.html.

Disciplinary segregation has been imposed on people for no valid reason in various states. People incarcerated in New York state prisons were wrongfully placed in solitary confinement due to flawed drug tests that led to a product liability lawsuit being filed in 2019.[19] One man was placed in disciplinary segregation for six months on the basis of the faulty test results. This delayed his scheduled release from prison and resulted in his losing a job that he had arranged to begin at the time of his release. Other people reportedly were denied release on parole, removed from programs, and held beyond their scheduled release dates because of the faulty tests.

Imposition of solitary confinement is usually unrelated to the crime for which the person has been incarcerated. The main exception tends to be for "protective custody," where the crime may make a person a target for abuse in prison. Members of the LGBTQI community, people who have "snitched" on others in prison, former law enforcement officials, or those who have committed particularly heinous or egregious acts are typically candidates for protective custody, which they themselves sometimes request.[20]

People convicted of the most serious crimes are not necessarily the ones suffering the harsh conditions of solitary confinement. In some states, people on death row have successfully challenged rules automatically placing them in solitary confinement. And in California, the isolation of people condemned to death (before the moratorium on the death penalty in March 2019) was ameliorated by the requirement that they participate in prison work.

Assignment to solitary confinement can make it difficult or impossible for a person to obtain parole. Among the factors the Georgia Board of Pardons and Paroles is required to weigh is whether solitary confinement was imposed. If so, the person cannot possibly meet the other requirement of having attended certain classes, since such classes are not offered to people in solitary confinement.[21] Other collateral consequences of solitary confinement include

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[19] *See* Jan Ransom, *After False Drug Test, He Was in Solitary Confinement for 120 Days*, NEW YORK TIMES, (Nov. 20, 2019), https://www.nytimes.com/2019/11/20/nyregion/prison-inmate-drug-testing-lawsuit.html.

[20] TED CONOVER, NEWJACK: GUARDING SING 127 (2000). *See also* In Re Jackson, 895 N.Y.S. 2d. 633, 635 (N.Y. 2010) (noting that protective custody includes people "charged with a violent sex or hate crime, child abuse, child homicide; … gay and transgendered inmates who are themselves victims of attacks from other inmates; cooperating witnesses; and inmates placed in protective custody because of their identity, for example their status as celebrities or in law enforcement.").

[21] Gumm v. Ford Second Amended Complaint, *supra* note 17, at 80.

difficulties instructing counsel for postconviction proceedings;[22] inability to participate in court-ordered programs or attend court proceedings relating to parental orders;[23] and ineligibility for education programs.[24]

The vague and overbroad criteria for placement into solitary confinement are troubling considering the harsh conditions that result. In some jurisdictions, prison staff can assign people to solitary confinement for years or decades for reasons unrelated to behavior. In Virginia, for example, a person can be confined to "intensive management," a form of long-term solitary confinement, if they display a "routinely disruptive and threatening pattern of behavior and attitude," or demonstrate "the potential for extreme and/or deadly violence against other inmates or staff, as evidenced by their institutional adjustment history, … [or] an extensive criminal history and lifestyle."[25] The state's policy does not define what is meant by "disruptive" or "routinely disruptive" behavior, nor does it provide any guidance as to how a person's criminal history should be taken into account in deciding on placement into long-term solitary confinement.

From time to time, prisons and jails impose "lockdowns" that curtail any movement within the facility and prevent any visitors from entering. Such lockdowns are usually imposed for security reasons such as suppressing a disturbance. While lockdowns are in place, people are confined to their cells and must live in conditions that bear similarities to solitary confinement. In *Larocque v. Turco,* the Superior Court of Massachusetts described the circumstances in which a lockdown is permitted:

> "A lockdown is ordered when an event occurs within the prison that requires the entire prison to be shut down but does not require the assistance of outside personnel and can be handled internally. Lockdown occurs after instances of inmate insurrection, work stoppage, fire, power outage, or loss of other services. An emergency is declared and an announcement is broadcast in

[22] *See, e.g.,* People v. Forest, 2012 WL 7059800 (Ill. App. Ct. 2012).
[23] *See, e.g.,* In Re Walls, 2011 WL 2937141 (Mich. Ct. App. 2011); In the Interest of Devin W*,* 2015 IL App (1st) 143909 (Ill. App. Ct. 2015); In Re A.M.S., 272 S.W.3d 305 (Mo. Ct. App. 2008); In Re Martinez*,* 2014 WL 6603073 (Mich. Ct. App. 2014).
[24] *See, e.g.,* ARK. ADMIN. CODE § 004.00.2-500(VI)(I); OHIO ADMIN. CODE 5120-9-45(E)(3).
[25] Complaint at 141, Thorpe et al. v. Virginia Dep't of Corr., No. 3:19 Civ. 332 (E.D. Va. May 6, 2019) [hereinafter *Thorpe et al. v. Virginia Dep't of Corr. Complaint*].

the institution. Every individual in the facility is returned to his cell. Lockdowns are sometimes followed by institutional searches."[26]

The lockdown that was the subject of *Larocque v. Turco* was imposed after four prison staff were assaulted at a Massachusetts prison. Over the course of eleven days, people were locked in their cells and only some were allowed showers, after a three-day wait. All telephone calls and visits (including from attorneys) were suspended, and mail and email services were delayed or suspended for up to one month. Every single item in every cell was removed and searched. These items included correspondence with lawyers and information relating to legal proceedings. This material was not returned for several weeks after the end of the lockdown.[27]

Though lockdowns are usually of short duration, this is not always the case. In 1983, the Marion Penitentiary was placed in lockdown after an officer was stabbed, and one unit remained locked down, with many people living in solitary confinement, for twenty-three years.[28] Many prisons have imposed months-long lockdowns over the past year in an attempt to manage the coronavirus pandemic.[29]

2.2 Conditions

Solitary confinement is "punishment taken to the extreme."[30] It may induce "the bleakest depression, plunging despair, and terrifying hallucinations."[31] It has been described as a "prison within a prison."[32] Conditions vary in different prisons, but solitary confinement units and supermax prisons share many common features. People are forced to endure these conditions for twenty-two or twenty-three hours per day, over a period of days, weeks, months, or years.

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[26] 2020 WL 2918032 at *2 (Sup. Ct. Mass., Feb 28, 2020).
[27] *Id.* at 4-6.
[28] Justin Peters, *How a 1983 Murder Created America's Terrible Supermax-Prison Culture*, SLATE (Oct. 23, 2013) https://slate.com/news-and-politics/2013/10/marion-prison-lockdown-thomas-silverstein-how-a-1983-murder-created-america-s-terrible-supermax-prison-culture.html.
[29] *See infra* section 2.2.1.
[30] MARY E. BUSER, LOCKDOWN ON RIKERS: SHOCKING STORIES OF ABUSE AND INJUSTICE AT NEW YORK'S NOTORIOUS JAIL (2015).
[31] *Id.*
[32] *Voices from Solitary: Surviving the "Prison Within a Prison,"* SOLITARY WATCH (July 28, 2012) https://solitarywatch.org/2012/07/28/voices-from-solitary-surviving-the-prison-within-a-prison/.

Thomas Silverstein is incarcerated at the federal supermax in Florence, Colorado. He has been held in solitary confinement for thirty-seven years. For purposes of a lawsuit against the FBOP, Mr. Silverstein described the physical conditions in the supermax:

> "The cell was about 8'6" by 10'" … Each [cell] contained a cement bed with metal restraint rings, a cement desk, sink, toilet and shower. In one cell, the walls were cement and I had a mirror and a small horizontal window near the ceiling that I could look out of if I stood on my desk. I could only see the concrete barriers of the outdoor workout area. I couldn't see the sky. In the other cell, the walls were made of steel, and there was no mirror. There was a window; however, I couldn't see out the window because it was covered in mesh that had been painted over, making it difficult for light to shine in. Even though I could dim my cell light, I could never turn it completely off. In addition, the lights in the sallyports of both cells were on twenty-four hours a day.[33]

Others have described solitary confinement cells as similar in size to a small bathroom or a king-sized mattress.[34] Cell roofs are low; people can touch the ceiling if they stand on their toes. Double-celling, in which two people share a cell, is generally used due to overcrowding. Although it might appear confusing to refer to a shared "solitary" cell, this terminology still applies to double-celling because all the other aspects of solitary confinement remain the same. While sharing a cell may reduce social isolation, it is intensely challenging for two people to occupy such a small space for any period, particularly when their habits may be completely different and their personalities incompatible. The harm caused by solitary confinement is not ameliorated simply by forcing people together. A man incarcerated in Arizona described double-celling as the worst experience of solitary confinement "because it's more frustrating seeing a stranger every day and dealing with his habits and attitudes."[35]

Solitary confinement cells are designed to deaden the senses. Rather than having bars, the cell door is typically solid, so that the person cannot see out. At Pelican Bay State Prison in California:

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[33] Declaration of Thomas Silverstein at 31, Silverstein v. Fed Bureau of Prisons et al., No. 7 Civ. 2471, (D. Colo. Feb. 4, 2011) [hereinafter *Silverstein Declaration*].
[34] *Id.* at 66.
[35] AMERICAN FRIENDS SERVICE COMMITTEE, STILL BURIED ALIVE: ARIZONA PRISONER TESTIMONIES ON ISOLATION IN MAXIMUM SECURITY 11 (2014).

> "The doors to the cells consist of solid steel, rather than bars, and are perforated with small holes that allow for a partial view into a concrete hallway. The door has a food slot that an officer may unlock to insert food or mail, and that is also used to handcuff the prisoner before the door is opened."[36]

Aaron Lewis, who is incarcerated at Northern Correctional Institution in Connecticut, wrote that "everything is gray. The walls are all dark gray with holes in it – it's all made out of Quikrete [quick-pour concrete]."[37] The effect of such a monotonous outlook is then exacerbated by prison rules and regulations, such as those banning the display of photos or art on cell walls.[38] At Pelican Bay, people in solitary confinement were eventually allowed to have one wall calendar, and that concession was only made after a prolonged hunger strike.[39]

Bedding consists of a thin mattress, sheets, and two thin blankets.[40] In some cells, all bedding is removed during the day. People's clothes may sometimes be removed as an additional form of punishment, leaving them with only their underwear. Cells are not always temperature-controlled, and in some prisons the temperature exceeds ninety degrees Fahrenheit during the summer and drops below freezing in the winter.

Insect infestation can be severe, particularly in the summer, forcing people to close windows (if they have them) and wear long-sleeved clothing, even in the oppressive heat.[41] Rodent infestation is also common. Shearod McFarland, who is incarcerated in Michigan, wrote:

> "You would barely notice the mice during the day, but at night they would come alive. The sound of rodents romping through the heat registers was loud enough to wake you up. It may sound weak, but being awakened by the sounds of mice in the middle of the night is extremely traumatizing. That along with everything else was a form of psychological terror."[42]

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[36] Complaint at 13, Ashker et al. v. Schwarzenegger et al., No. 4:09, Civ. 5796 (N.D. Cal. Dec. 9, 2009) [hereinafter *Ashker Complaint*].
[37] SIX BY TEN: STORIES FROM SOLITARY 60 (Taylor Pendergrass & Mateo Hoke, eds., 2018).
[38] Appellant's Opening Brief at 7, Grissom v. Roberts et al., No. 17-3185 (10th Cir. Dec. 13, 2017).
[39] Ashker Complaint, *supra* note 36, at 13.
[40] *Id.* at 14.
[41] Complaint at 11, Presley et al. v. Epps et al., No. 4:05 Civ. 148 (N.D. Miss. June 22, 2005) [hereinafter *Presley v. Epps Complaint*].
[42] SIX BY TEN, *supra* note 37, at 132.

Some cells are designed to be soundproof, but it is more common for people to experience interminable noise. The sounds echo throughout the building and include people screaming and banging on walls, officers' conversations, cell doors slamming, and keys and chains rattling constantly. At nighttime, officers slam doors and wake people up as they count them.[43] The sound is constant and agonizing:

> "any kind of sustained or focused thought is virtually impossible due to the constant screams, moans, curses, animal noises, maniacal laughter and hallucinatory ravings of severely mentally ill prisoners, and because of the collective din of prisoners pounding on cell bars and door frames."[44]

Recognizing the harm caused by solitary confinement, the American Institute of Architects ("AIA") amended its Code of Ethics in December 2020 specifically to prohibit its members from knowingly designing spaces intended for prolonged solitary confinement.[45] In a press release announcing the change, the AIA stated that the design of such facilities was inconsistent with "the profession's fundamental responsibility to protect the health, safety and welfare of the public and uphold human rights."[46]

One hour a day is typically allocated to allow people a brief escape from the harsh conditions of solitary confinement cells. People are theoretically entitled to exercise for up to an hour outside of their cells, but prison officers frequently do not grant them this respite. In Virginia supermax prisons, people must be awake at 5:30 in the morning to inform prison officers that they wish to exercise or take a shower that day. If they are not awake when the prison staff make their rounds, they cannot leave their cells for the entire day.[47] Similarly, in Arizona, the staff does not always ask people if they want to exercise, or the question is put quietly or when people are asleep so they cannot hear the offer.[48] Some people choose not to leave their cells for recreation because they do not wish to submit to strip searches, and the staff searches their cells during exercise time and destroys their belongings in the process.[49]

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[43] Ashker Complaint, *supra* note 36, at 13.
[44] Presley v. Epps Complaint, *supra* note 41, at 6.
[45] AMERICAN INSTITUTE OF ARCHITECTS, 2020 CODE OF ETHICS AND PROFESSIONAL CONDUCT, Rule 1.404.
[46] *AIA Board of Directors Commits to Advancing Justice Through Design*, AMERICAN INSTITUTE OF ARCHITECTS (Dec. 11, 2020), https://www.aia.org/press-releases/6356669-aia-board-of-directors-commits-to-advancin.
[47] AM. CIV. LIBERTIES UNION OF VIRGINIA, SILENT INJUSTICE, *supra* note 16, at 36.
[48] Order at 9, Parsons v. Ryan, No. 12 Civ. 601 (D. Ariz. Sep. 16, 2019).
[49] Harvard v. Inch Complaint, *supra* note 14, at 100.

People in solitary confinement do not exercise in an open space. Instead, they are escorted to a room or cage that is not much bigger than their cell. Such spaces are referred to as "dog pens" or "dog runs" because they are constructed of heavy-duty steel and resemble cages.[50] Exercise equipment is seldom provided. At the Florence supermax, the recreation area is a "concrete pit surrounded by high, featureless walls on all sides. It [is] like being inside of a deep, empty swimming pool."[51] The space is so small that people can walk only ten steps in any direction and thirty steps in a circle.[52] In some prisons, people in solitary confinement must remain handcuffed and shackled while they are in the exercise area.[53]

Within the harsh conditions of solitary confinement, some states have created additional, even harsher versions of the practice. For example, in Florida, there are four different forms of solitary confinement. The harshest category, "Maximum Management," is for those who are deemed to pose an "extreme security risk."[54] People in Maximum Management are locked in cages within cells, they are allowed no visitors and no reading material except for a religious text, and their out-of-cell time is extremely limited. On average, people assigned to Maximum Management spend six months in these conditions.[55] The second harshest form is "Close Management," solitary confinement of indefinite duration in a tiny cell (as small as sixty square feet), isolated from others or with a cellmate, and with very limited out-of-cell time.[56] The other two forms used in Florida are "Disciplinary Confinement," similar to disciplinary segregation, and "Administrative Confinement," used temporarily until a person's housing classification status is determined.[57]

People are generally allowed out of their cells three times a week to take a shower for ten to fifteen minutes. Tonja Fenton, who experienced solitary confinement in New York, explained that "[i]n the SHU (Special Housing Unit), hygiene is on the back burner. You might shower three times a week, but that's only if they decide to let you."[58] In Arizona, people are sometimes

[50] SIX BY TEN, *supra* note 37, at 132.
[51] Silverstein Declaration, *supra* note 33, at 32.
[52] *Id.* at 33.
[53] Presley v. Epps Complaint, *supra* note 41, at 6.
[54] SOUTHERN POVERTY LAW CENTER, SOLITARY CONFINEMENT: INHUMANE, INEFFECTIVE, AND WASTEFUL 7 (2019).
[55] *Id.*
[56] *Id.*
[57] *Id.* at 8.
[58] SIX BY TEN, *supra* note 37, at 184.

left in the shower cells for hours at a time due to staffing shortages.[59] They are allowed only the bare minimum of personal hygiene items, such as soap and a toothbrush. If people need feminine hygiene products, they must ask a prison officer each time they require them.[60]

Personal property is generally subject to tight restrictions. Property allowances can be as limited as a maximum of ten books or magazines and up to six cubic feet of property in total.[61] If people want to get a book from the prison library, they might be able to borrow only two books at a time and wait for weeks or months to exchange books.[62] The only library books that some people can access are those allocated to a trolley that is wheeled around the unit from time to time. Many of the books are legal texts.[63] In some states, people in disciplinary segregation are not allowed library books at all.[64]

If people can afford a television or radio, they may be allowed to purchase one from the prison commissary, but the stations and programs available are limited and reception is bad. Many people are not allowed to have television sets in solitary confinement.[65] Those who have difficulty reading and who cannot afford a television or radio must endure "enforced idleness" with little to do but sleep and pace around their cells.[66]

Telephone calls and visits are heavily restricted. Typically, a person in solitary confinement is allowed one or two fifteen-minute telephone calls per month. As is the case for the general prison population, telephone calls are expensive, since such services are provided by third parties.[67] Because most people in solitary confinement cannot work, they have no way of earning the money needed to make phone calls.

Visits from family or friends are also infrequent. Many people do not have any visitors because supermax prisons are often located in isolated areas that are difficult to reach. For example,

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[59] Order at 9, Parsons v. Ryan No. 12 Civ. 601 (D. Ariz. Sept. 16, 2019).
[60] TERRY KUPERS, THE INSIDE STORY OF SUPERMAX ISOLATION AND HOW WE CAN ABOLISH IT 124 (2017).
[61] Ashker Complaint, *supra* note 36, at 13.
[62] Presley v. Epps Complaint, *supra* note 41, at 6.
[63] SIX BY TEN, *supra* note 37, at 184.
[64] *See, e.g.,* GA. ADMIN. CODE § 125-4-2-.08(3).
[65] Harvard v. Inch Complaint, *supra* note 14, at 92.
[66] Complaint at 93, Parsons v. Ryan No. 12 Civ. 601 (D. Ariz. Mar. 22, 2012).
[67] Peter Wagner & Alexi Jones, *State of Phone Justice: Local Jails, State Prisons and Private Phone Providers*, PRISON POLICY INITIATIVE (Feb. 2019), https://www.prisonpolicy.org/phones/state_of_phone_justice.html.

Pelican Bay State Prison in California is located near the state's northern border with Oregon. It is a 355-mile drive from San Francisco and a 728-mile drive from Los Angeles, where many of the incarcerated people's families live.[68] Visiting hours are limited and subject to change with little or no notice. That fact further discourages visits. Potential visitors are unlikely to travel to prisons in far-flung locations even if they have the means if they know there is a reasonable chance they will not be allowed to see the person they have traveled to visit. When visits do take place, the parties are separated by a glass partition and have no physical contact.

Meals are eaten in the cells, in the same small space in which people sleep and use the toilet. It is easy for people to become dehydrated because their only source of water is the toilet and sink combination and sometimes the water is turned off.[69] In some units, the toilets are flushed on timers that are controlled by prison officers.[70] Thus people may be forced to eat their meals amid the stagnant smell of the unflushed toilet.[71]

Meals are pushed into cells on trays through slots in the cell doors. They are often late, cold, and of poorer quality and quantity than the food served to people in the general prison population.[72] Some people are allowed to purchase supplemental food from the commissary, but because the food is expensive, many people lack the means to do so. Most are not allowed to receive food packages.[73] In some prisons, the food served can be dangerously unsanitary. At Mississippi State Penitentiary, for example:

> "The carts holding the stacked food trays are filthy; and the trays on which the food is served are cracked, encrusted with residue from other prisoners' meals, littered with insects, and soiled with bird droppings. The food trays are often left for hours in the hot sun before being served, causing the food to spoil. Sudden bouts of vomiting and diarrhea, likely caused by contaminated or spoiled food, afflict prisoners on a regular basis after meal service."[74]

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[68] Second Amended Complaint at 31, Ruiz et al. v. Brown et al., No. 4:09 Civ. 5796 (N.D. Cal. May 15, 2012) [hereinafter *Ashker Second Amended Complaint*].
[69] SIX BY TEN, *supra* note 37, at 183.
[70] Harvard v. Inch Complaint, *supra* note 14, at 80.
[71] *Id*.
[72] Ashker Complaint, *supra* note 36, at 15; Gumm v. Ford Second Amended Complaint, *supra* note 17, at 64.
[73] Gumm v. Ford Second Amended Complaint, *supra* note 17, at 64.
[74] Presley v. Epps Complaint, *supra* note 41, at 10.

It is not uncommon for people in solitary confinement to lose weight because of the poor quality of the food.[75]

Some solitary confinement units substitute normal meals with "nutraloaf" as an additional form of punishment. There is no set recipe for nutraloaf; it typically consists of some combination of potatoes, rice, beans, grains, flour, and margarine that is blended and baked into a solid loaf. At some facilities, nutraloaf is made of leftovers from other meals.[76] Some states have abandoned the nutraloaf, but it continues to be used in parts of the country.

2.2.1 Conditions Specific to the Coronavirus Pandemic

The coronavirus pandemic has created a special situation which has placed even some general prison populations into effective solitary confinement. In addition, prison administrators have attempted to use actual solitary confinement units and supermax facilities as makeshift medical isolation units despite their unfitness for such purposes. The current situation is due to the virtual impossibility of having incarcerated people follow the advice of public health officials on the steps required to reduce transmission of the coronavirus. That advice includes social distancing, limiting face-to-face contact, washing hands frequently and using hand sanitizer, and wearing face masks. People in prisons are confined in crowded spaces with many people sharing cells or living in close proximity in dormitories.[77] Meals, showers, and recreation all take place in shared areas. It is difficult for people to maintain adequate hygiene because soap and cleaning products are often in limited supply. Even when available, such products may not be hygienic: for example, approximately 125 people at Oakdale Federal Correctional Institution in Louisiana must share bars of soap. They also share four sinks, six showers, and eight toilets between them.[78] There are no clean hand towels, and the laundry is done only twice a week.[79] The unavailability of hand sanitizer is yet another example of cruel and dehumanizing treatment of

[75] *See, e.g.,* Gumm v. Ford Second Amended Complaint, *supra* note 17, at 208 (Mr. Gumm lost around forty pounds during two years in solitary confinement).
[76] Christopher Zoukis, *Use of Nutraloaf on the Decline in U.S. Prisons*, PRISON LEGAL NEWS, (Mar. 31, 2016), https://www.prisonlegalnews.org/news/2016/mar/31/use-nutraloaf-decline-us-prisons/.
[77] *Averting an Imminent Catastrophe: Recommendations to US Local, State and Federal Officials to Reduce Covid-19 in Jails and Prisons*, HUMAN RIGHTS WATCH, (Apr. 29, 2020) https://www.hrw.org/news/2020/04/29/averting-imminent-catastsrophe-recommendations-us-local-state-and-federal-officials.
[78] Petition for Writ of Habeas Corpus, Injunctive and Declaratory Relief at 48, Livas et al. v. Myers et al. (W.D. La. Apr. 6, 2020).
[79] *Id.*

incarcerated people. Though people in prison are denied hand sanitizer because of its alcohol content, some states, including New York and Nebraska, use prison labor to manufacture the sanitizer for sale or use by the public.[80]

Since implementation of the necessary measures to prevent the spread of the coronavirus is difficult, public health experts have recommended that the populations of jails and prisons be reduced.[81] Despite this advice, few people have been released.[82] Instead, lockdown procedures have restricted the number of people entering the facilities and the movement within them. People are confined to their cells or dormitories for up to twenty-three hours per day,[83] cannot make phone calls, take daily showers,[84] or collect mail or medication;[85] they are given sandwiches instead of hot meals for weeks at a time,[86] and they have no access to common areas or television sets.[87] No outside visitors are allowed, few or no classes and programs are offered,

[80] *See, e.g.,* Casey Tolan, *Hand Sanitizer Is Still Considered Contraband In Some Prisons Around The Country*, CNN, (May 5, 2020) https://www.cnn.com/2020/05/05/us/coronavirus-prison-hand-sanitizer-contraband-invs/index.html; Antonia Noori Farzan, *Inmates Are Manufacturing Hand Sanitizer to Help Fight Coronavirus. But Will They Be Allowed to Use It?* WASHINGTON POST, (Mar. 10, 2020) https://www.washingtonpost.com/nation/2020/03/10/hand-sanitizer-prison-labor/.

[81] David Cloud et al., *The Ethical Use of Medial Isolation — Not Solitary Confinement — to Reduce Covid-19 Transmission in Correctional Settings*, AMEND, (Apr. 9, 2020) https://amend.us/wp-content/uploads/2020/04/Medical-Isolation-vs-Solitary_Amend.pdf ("Many public health experts, policymakers, advocates, and community leaders have called for the swift release of as many people as possible from correctional facilities in order to mitigate the accelerated spread of the virus among incarcerated people, correctional workforces, and the larger community.").

[82] *See, e.g.,* Alan J. Keays, *Corrections Locks Down Prison to Stop Coronavirus Spread, But No Blanket Testing*, VERMONT DIGGER, (Apr. 7, 2020) https://vtdigger.org/2020/04/07/corrections-locks-down-prison-to-stop-coronavirus-spread-but-no-blanket-testing/ ("So far, the [Vermont] corrections department has rebuffed … efforts to release or furlough inmates based on medical factors alone"); Joseph Darius Jaafari, *Prison Design Creates Ideal Environment for Coronavirus*, WITF, (Apr. 17, 2020), https://www.witf.org/2020/04/17/prison-design-creates-ideal-environment-for-coronavirus/ ("In lieu of [early] releases, jailers across [Pennsylvania] are keeping inmates in their cells for up to 23 hours a day to keep movement contained"); Alice Speri, *A Woman Died of Covid-19 in a New Jersey Prison After Begging to be Let Out of a Locked Shower*, THE INTERCEPT, (May 11, 2020), https://theintercept.com/2020/05/11/new-jersey-prisons-coronavirus-death/ ("In an effort to fight the spread of the virus inside prisons [New Jersey Governor Phil Murphy] also signed an executive order in early April allowing the temporary release of high-risk inmates and others convicted of nonviolent offenses. But weeks later, less than 3 percent of those eligible had been released.").

[83] Joseph Darius Jaafari, *supra* note 82 ("In lieu of [early] releases, jailers across [Pennsylvania] are keeping inmates in their cells for up to 23 hours a day to keep movement contained.").

[84] Keri Blakinger, *What Happens When More Than 300,000 Prisoners Are Locked Down?* THE MARSHALL PROJECT, (Apr. 15, 2020) https://www.themarshallproject.org/2020/04/15/what-happens-when-more-than-300-000-prisoners-are-locked-down.

[85] *Id.*

[86] *Id.*

[87] *Id.*

and prison employment is suspended.[88] Thus the recent experience of general prison populations in many respects parallels that of people in solitary.

Prison officials have also largely ignored public health experts' recommendation that coronavirus outbreaks in prisons and jails be managed by treating people who are symptomatic or who test positive for the virus in "medical isolation." According to experts, medical isolation should be overseen by medical staff rather than prison officers; medical isolation areas should be well-ventilated and temperature-controlled; patients should be seen at least daily by medical and mental health staff and provided with access to television, music, tablets, email, reading materials, daily telephone calls, and daily outdoor exercise; and people placed in such areas should be informed of the probable length of their stay in isolation and discharged as soon as they are cleared by medical staff.[89] These recommendations stem from the recognition that fear of being placed in solitary confinement may deter people from reporting symptoms.[90] The concern is well-founded, as shown by the fact that people in some prisons have been staying in their cells and trying to avoid attention for fear of being placed in solitary confinement.[91]

Contrary to public health advice, many prisons and jails are using solitary confinement units and supermax prisons to manage coronavirus outbreaks. The Louisiana Department of Corrections reopened a solitary confinement unit at Angola Penitentiary known as "Camp J," which was closed two years ago as part of "a widely publicized reduction in the state's use of solitary confinement."[92] A lawsuit challenging the use of Camp J to house people suspected of having the coronavirus describes the facility as "notoriously unfit for housing even healthy individuals" because it lacks ventilation, heating, and cooling.[93] While there are ceiling fans to help circulate

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[88] Joseph Shapiro, *As Covid-19 Spreads in Prisons, Lockdowns Spark Fear of More Solitary Confinement*, NPR, (June 15, 2020) https://www.npr.org/2020/06/15/877457603/as-covid-spreads-in-u-s-prisons-lockdowns-spark-fear-of-more-solitary-confinemen.

[89] David Cloud et al., *supra* note 81.

[90] *Id.*

[91] *See, e.g.,* Elizabeth Weil-Greenberg, *Prisoners Who Test Positive for Covid-19 in Connecticut Are Sent to a Notorious Maximum-Security Prison*, THE APPEAL, (May 8, 2020), https://theappeal.org/connecticut-covid-19-prison-quarantine-northern-correctional-institution/.

[92] Jean Casella & Katie Rose Quandt, *Prisons' Use of Solitary Confinement Explodes with the Covid-19 Pandemic, While Advocates Push for Alternatives*, SOLITARY WATCH, (Apr. 10, 2020), https://solitarywatch.org/2020/04/10/prisons-use-of-solitary-confinement-explodes-with-the-covid-19-pandemic-while-advocates-push-for-alternatives/.

[93] Class Action Complaint at 155, Gumns et al. v. Edwards et al. (M.D. La. Apr. 14, 2020).

air, the lawsuit notes that "large fans blowing air are likely to spread aerosolized agents around the facility."[94]

The University of California, Irvine, has generated a digital archive of reports from people incarcerated in California's prisons during the pandemic. The titles of some accounts alone reflect the level of suffering experienced by incarcerated people: "Hungry Most Days," "Confusion Reigns," "Fear for My Safety," "Ended His Own Life," and "Total Utter Collapse."[95] One person, incarcerated in the California Institute for Men in Chino, described the experience of spending thirty days alone in a cell in conditions equivalent to administrative segregation. Their mental health deteriorated to the point where they became suicidal and had to be transferred to a crisis unit for six weeks because of the intense difficulty of living in solitary confinement-type conditions. The person described the fear among incarcerated people of reporting symptoms of coronavirus due to the knowledge that they would be placed in solitary confinement:

> "What they were doing is like the folks that tested positive were there, they just put a sign on the door said isolation, and they left them locked in their cell for their 14-day isolation. They didn't even get a chance to use a phone or take a shower. So it made it very counterproductive for anybody that was having symptoms … but nobody wanted to report them because they were afraid of the situation they would be put in, cut off from their family, stuck in a cell alone for, you know, 24 hours a day, 14 straight days without even the ability to use a shower."[96]

The families of people incarcerated during the pandemic have suffered a range of harms due to the loss of physical contact and connection with their relatives. Dr. Shona Minson, a criminology professor at the University of Oxford, conducted interviews with parents and carers of children with a parent in prison in the United Kingdom, where prisons implemented lockdowns like those in US facilities.[97] Dr. Minson's research found that relationships between incarcerated parents and children deteriorated due to the lack of in-person visits and difficulties with phone calls. This loss of contact, Dr. Minson concluded, negatively impacted children's

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[94] *Id.*
[95] PRISONPANDEMIC, *available at* https://prisonpandemic.uci.edu/.
[96] *Id.,* "Deteriorated Mentally."
[97] SHONA MINSON, THE IMPACT OF COVID-19 PRISON LOCKDOWNS ON CHILDREN WITH A PARENT IN PRISON 4, 9 (2021) ("On or around 13th March 2020, prisons in the UK moved to restricted regimes which included a ban on all social visits. Prison lockdowns were widespread in 2020 and continue in 2021." "In many establishments, prisoners were confined to their cells for up to 23 hours each day, and as not all prisoners have access to in-cell telephony this created pressure on the shared phones available for use.").

mental and physical wellbeing, and was likely to affect family reunification and resettlement when people are released from prison.[98]

Lawsuits were filed in courts across the US urgently seeking the release of vulnerable people. Only a few individual applications for compassionate release have been granted. In October 2020, the Court of Appeal of the State of California ordered the California Department of Corrections and Rehabilitation ("CDCR") to implement plans for the immediate transfer or release of people at San Quentin State Prison to reduce the population by fifty percent, based on findings that the coronavirus infection rate was as high as seventy-five percent among incarcerated people at that facility and had resulted in the deaths of twenty-eight incarcerated people and one employee.[99] The court found that the CDCR had acted recklessly in refusing to release or transfer people from San Quentin after receiving advice from public health experts in June about the urgent need to reduce the population. This advice emphasized that the population reduction was necessary to facilitate physical distancing and in light of the "antiquated" state of the prison, with windows that have been welded shut and fans that have not been operated for years.[100] California's Supreme Court has since frozen the relief ordered by the Court of Appeal and directed the lower court to consider holding an evidentiary hearing to investigate whether prison authorities took any steps that would contradict the court's finding that officials acted with deliberate indifference in failing to follow the public health advice.[101]

In June 2020, the Superior Court of North Carolina issued a preliminary injunction directing the Governor and state prison officials to take steps to address the challenges associated with protecting incarcerated people from the pandemic.[102] The injunction included an order that people transferred between correctional facilities must not be isolated in a manner that would otherwise be associated with "punitive or disciplinary purposes."[103] The court specified that prohibited forms of isolation included solitary confinement involving the loss of privileges such as withholding access to telephone calls, canteen privileges, or personal property; restrictions on

[98] *Id.* at 3.
[99] In Re von Staich, A160122 (Cal. Ct. App. Oct. 20, 2020).
[100] *Id.* at * 9.
[101] Order granting Petition for Review, In Re von Staich, S265173, (Cal. Dec. 23, 2020).
[102] North Carolina State Conference of the NAACP et al. v. Cooper et al., 20 CVS 500110 (N.C. Sup. Ct. June 16, 2020).
[103] *Id.* at *7.

exercise, television, radio, or recreational, educational, or vocational activities; or placement in restraints for out-of-cell time.[104] In October 2020, the court ordered the state to provide further information about conditions of confinement and noted that at least twelve incarcerated people had died of the coronavirus since April 2020.[105] That order sought information as to how the state was separating people for isolation and quarantine and when people were returned to their usual incarceration status. The case is ongoing.

In October 2020, the New Jersey state legislature passed the first "public health crisis sentencing" legislation in the country. The statute provides for eligible incarcerated people (excluding anyone convicted of murder or aggravated sexual assault or deemed to be a repetitive compulsive sex offender) to earn "public health emergency credits" if they are within one year of their scheduled release date so that they can be released earlier than they otherwise would have been.[106] As a result, more than 1,000 incarcerated people in New Jersey will be eligible to be released over the coming months and the state's incarcerated population will reduce by approximately thirty-five percent.[107]

In January 2021, the District Court for the Eastern District of Pennsylvania issued an interim order to address the lockdown conditions imposed by the Philadelphia Department of Prisons.[108] The order stated that the Department's existing "shelter-in-place" policy meant that incarcerated people received only fifteen minutes out-of-cell time each day. The court concluded that "such prolonged confinement is harmful to the mental and physical health of incarcerated individuals."[109] The order directed the Department to increase out-of-cell time to at least forty-five minutes per day to allow people to take showers, make telephone calls, and exercise.

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[104] *Id.*
[105] Order for Additional Information, North Carolina State Conference of the NAACP et al. v. Cooper et al., 20 CVS 500110 (N.C. Sup. Ct. Oct. 23, 2020).
[106] S. B. 2519, 219th Leg., Reg. Sess. (N.J. 2020); *see also* https://www.nj.gov/governor/news/news/562020/approved/20201019c.shtml.
[107] Tracey Tully, *2,258 N.J. Prisoners Will Be Released in a Single Day*, NEW YORK TIMES, (Nov. 4, 2020), https://www.nytimes.com/2020/11/04/nyregion/nj-prisoner-release-covid.html.
[108] Interim Order, Remick et al. v. City of Philadelphia, No. 2:20 Civ. 1959 (E.D. Pa. Jan. 13, 2021).
[109] *Id.* at 1.

2.3 Treatment of People in Solitary Confinement

To live in solitary confinement is to experience loneliness, boredom, sensory deprivation, fear, disruption, and violence. Unlike people in the general prison population, those in solitary confinement have no work assignments and very limited human interactions.[110] They are aware, however, that every aspect of their life, including their time in the showers, is under constant surveillance.[111]

The main human contact that most people in solitary confinement experience is that of being handcuffed and shackled to be escorted to the shower or exercise areas, or being subjected to strip searches. Before people leave their cells, they must place their wrists and ankles through slots in the door so that the restraints can be fitted. Aaron Lewis described the effect of being restrained in that way when he arrived at the Northern Correctional Institution:

> "When I first came into Northern, they stripped me of all my clothes – my drawers, socks, T-shirt – and put me in a jumpsuit. They chained me up with leg irons, handcuffs behind my back, and then a tether chain and padlock connecting the handcuffs to the leg irons. They marched me down the hall, like ten COs [corrections officers] and a lieutenant. They want you to know who is running the show. They letting you know like, go ahead, try something. When you chained up like that, and you're naked, it actually paralyzes you. You feel vulnerable in the presence of force. You feel defeated."[112]

When people misbehave in their cells for whatever reason, they face "extraction teams" of prison officers dressed in riot gear:

> "In this procedure, five hollering guards wearing helmets and body armor charge into the cell. The point man smashes a big shield into the prisoner. The others spray mace into his face, push him onto the bed, and twist his arms behind his back to handcuff him, connecting the cuffs by a

[110] *See, e.g.,* OHIO ADMIN. CODE § 5120-3-08(A)(1) and (4) (stating that people assigned to short-term restrictive housing are not entitled to any compensation while those in extended restrictive housing shall receive $9 per month regardless of job assignment).
[111] Craig Haney, *The Science of Solitary: Expanding the Harmfulness Narrative*, 115 NW. U. L. REV. 211, 240 (2020).
[112] SIX BY TEN, *supra* note 37, at 60.

> chain to leg irons. As they continue to mace him, the guards carry him screaming to an observation room, where they bind him to a special chair. He remains there for hours."[113]

It is traumatic for everyone in solitary confinement to hear or see a person being extracted from their cell. Professor Mika'il DeVeaux described the experience in a 2013 article:

> "These incidents were alarming because while in a cell on the gallery, I could hear the sounds as the events were unfolding. And when I could not see, I somehow knew the actions accompanying each sound. These incidents were frightening because being "dragged out" meant that a person was dragged out of a cell feet first, with their head trailing behind on the floor, and often being beaten while being moved. I can still remember the screams, the wailing, the cursing, and the anger. These events were alarming because all who witnessed them unfold could feel the humiliation and shame. We in the cells were utterly powerless and could face a similar fate. There was nothing I could do, nothing anyone could do, except hope to get out of there alive. The possibility of being beaten was all too real. Whom could I tell? Who would listen? Who would care?"[114]

People in solitary confinement are subject to frequent strip searches, including body cavity searches. Anyone who objects to these searches face extraction teams. Extractions and searches can be particularly demeaning for women and transgender people, especially when carried out by male officers:

> "The use of extraction teams is a routine practice in supermax facilities; women are not exempt from it. For women, however, this treatment is uniquely traumatic because male guards usually perform the extraction. The incidents are highly sexualized: women are rendered immobile, placed in a position of extreme vulnerability, stripped of all of their clothing, and then subjected to a full body search. Because about sixty percent of women in prison are survivors of some form of physical or sexual abuse, cell extractions for many of them are not only traumatic in the moment, but result in a re-experiencing of past trauma."[115]

Other abuses are also documented. In 2016, the state of Alaska reached a settlement with the family of Davon Mosley, a twenty-year-old man who died while being held in solitary

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[113] Lance Tapley, *supra* note 13.
[114] Mika'il DeVeaux, *The Trauma of the Incarceration Experience*, 48 HARV. C.R.-C.L.L. REV. 257, 273 (2013).
[115] Cassandra Shaylor, *It's Like Living in a Black Hole: Women of Color and Solitary Confinement in the Prison Industrial Complex*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 385, 392 (1998).

confinement at the Anchorage Correctional Complex for a parole violation. His fiancée obtained video footage of Mr. Mosley's final day in the prison. The film shows

> "[t]he guards throwing food at Davon through the slot in the door … They just throw it in there like he's a dog or something. And they pepper-sprayed him through that slot in the door. You see these long shots of pepper spray going in. Then they took him out of one cell and put him in another. The video didn't show anyone beating him, but it does show five officers walking out of his cell, walking down the hallway high-fiving and laughing. When they brought him back he was naked. He was beat, and they just threw him in. Then they cut his water off, and they pepper-sprayed him while he was naked and had handcuffs on … In the video you see Davon using the water that was in the toilet to rinse his face after the pepper spray because his water got cut off."[116]

Pepper spray, "an everyday possibility in segregation," can spread to surrounding areas and affect people in neighboring cells as well.[117] Albert Woodfox writes that "gassing prisoners was the number one response by security to deal with any prisoner at Angola who demanded to be treated with dignity."[118]

People in solitary confinement depend entirely on prison officers for every aspect of their lives. The staff decide whether people will receive their food on time and in a sanitary manner, whether they will be permitted to make phone calls or borrow library books, and what cleaning products will be available. Prison officers treat every basic necessity, from showers to exercise, as "privileges" that can be withheld at any time and for no reason. The same staff conduct strip searches and cell extractions. They are in a position to make people's lives even more difficult through cruel and petty decisions.

Many people in solitary confinement find it hard to complain about poor conditions or mistreatment. Those who want to do so must obtain complaint forms from the prison staff. Requests for such forms are often ignored, as are the complaints themselves.[119] Fear of

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[116] SIX BY TEN, *supra* note 37, at 83.
[117] *Id. at* 135.
[118] ALBERT WOODFOX, SOLITARY: MY STORY OF TRANSFORMATION AND HOPE 115 (2019).
[119] *See, e.g., At Virginia's Supermax Prisons, Isolation and Abuse Persist Despite Reforms*, SOLITARY WATCH, (Aug. 4, 2016), https://solitarywatch.org/2016/08/04/at-virginias-supermax-prisons-isolation-and-abuse-persist-despite-reforms/.

retaliation also inhibits complaints.[120] It is common practice, for example, for people who complain about sexual assault by a prison officer to be transferred to solitary confinement while the matter is investigated (if such an investigation actually occurs). The Civil Rights Division of the Department of Justice investigated the Edna Mahan Correctional Facility for Women in New Jersey and concluded that women who reported sexual abuse were typically subjected to physical examinations while handcuffed and shackled, strip-searched, and then placed in solitary confinement where they were subject to the same punitive conditions and protocols as people in disciplinary segregation.[121] These women were kept in isolated cells and deprived of work opportunities. The Department of Justice criticized the prison's approach of "categorically subjecting women who report sexual abuse to segregation," noting that this practice could result in increasing the trauma to victims of sexual abuse.[122] Unsurprisingly, victims of sexual assault in prison face a dilemma between reporting the incident and facing retaliation, or not reporting it despite the risk of further abuse.[123] Many choose the latter.[124]

When people in solitary confinement choose to participate in litigation regarding prison conditions, the risk of retaliation is high. In recent litigation in Florida, the district court issued a protective order that described the retaliation and threats visited on people in solitary confinement simply for speaking to the lawyers for the named plaintiff.[125] The court received evidence that people were expressly or implicitly discouraged by prison staff from participating in the litigation; told that they needed to make staff "look good and don't talk to the visitors" during inspections; and threatened with disciplinary violations or property restrictions if they complained. Prison staff also refused to allow people to participate in confidential calls with counsel, withheld meals, did not flush toilets, and confined people in shower cells or restraints for hours at a time.[126] The person conducting the inspections reported that up to seventeen staff

[120] TERRY KUPERS, *supra* note 60, at 133-34 ("If [women] protest or demand their rights, they get bogus disciplinary write-ups and time in "the hole" or solitary … The alternative is to accept the subservient role, to silently tolerate the subtle and not-so-subtle forms of harassment and abuse …").
[121] U.S. DEP'T OF JUST., INVESTIGATION OF THE EDNA MAHAN CORRECTIONAL FACILITY FOR WOMEN 8-9 (2020).
[122] *Id.* at 10.
[123] AM. CIV. LIBERTIES UNION, STILL WORSE THAN SECOND CLASS: SOLITARY CONFINEMENT OF WOMEN IN THE UNITED STATES 10 (2019).
[124] TERRY KUPERS, *supra* note 60, at 131.
[125] Order, Harvard v. Inch, No. 4:19, Civ. 212 (N.D. Fla. Feb. 8, 2021).
[126] *Id.* at 5-14.

were present during cell front interviews, when it was normal practice for only four or five staff to be present.[127]

In issuing the protective order, the magistrate judge described the retaliation, together with "the threat …, or even the reasonable perception" of such retaliation as concerning.[128] The court found that retaliation existed and that it posed a substantial risk to the fairness and integrity of the litigation.[129] While the protective order stated that retaliation would not be tolerated, it only laid out guidelines that were intended to "remain somewhat flexible," depending on the input and experience of the very prison staff who had been found to have engaged in retaliation.[130] As a result, while the Department of Corrections was formally ordered to cease any retaliation or threats, it is not clear to what extent it would be followed. This is particularly troubling given that this was the second such protective order to be issued in the case to address the issue of retaliation.

Due to the futility and potential risk of pursuing official complaints processes, people in solitary confinement find other ways to protest or raise concerns. Hunger strikes are one such method. In July 2011, a group of people incarcerated at Pelican Bay organized a hunger strike that was joined by over 6,600 other people in thirteen California prisons. Earlier that year, incarcerated people had written to the Governor, the Secretary of the CDCR, and the Pelican Bay warden to request improved conditions, including regular and meaningful social contact, adequate healthcare and food, and expanded programs. When their requests were ignored, they began the hunger strike. The group organized the strike by shouting to one another through plumbing pipes in their cells and drainpipes in the exercise area, passing notes under cell doors, and sending correspondence to advocates in San Francisco.[131]

The strike lasted for nearly three weeks, until a representative from the CDCR met with the people leading the strike and agreed to limited improvements. These changes included allowing people to have colored pencils, wall calendars, and warm caps to wear during winter in the exercise area, and to send one photograph of themselves home each year. The departmental

[127] *Id.* at 16.
[128] *Id.* at 40.
[129] *Id.* at 43.
[130] *Id.* at 45.
[131] KERAMET REITER, 23/7: PELICAN BAY PRISON AND THE RISE OF LONG-TERM SOLITARY CONFINEMENT 30 (2016).

representative also agreed to review the procedures for assigning people to solitary confinement. He was criticized by prison officials for agreeing to the requests and was accused of having been coerced by manipulative gang members.[132]

By September 2011, the participants had lost confidence that the promised improvements would be implemented, and a second hunger strike ensued. With 12,000 people in prisons across California participating, the strike lasted for two-and-a-half weeks.[133] It was suspended after the CDCR made a presentation to the representatives leading the strike that detailed the steps that had been taken to implement policy changes.[134]

Frustrated by the slow pace of reform, the group organized a third hunger strike in 2013. It lasted for over two months and involved over 30,000 incarcerated people.[135] An unknown number of participants were hospitalized. Some people signed "do not resuscitate" orders, but a district judge issued an order permitting force-feeding.[136] The hunger strike ended before the order was implemented, after two state legislators announced an investigation and possible legislative reforms at a press conference.

Some of the people who participated in the hunger strikes faced retaliation for their involvement. The leaders were charged with disciplinary violations. During the 2011 strikes, some people were moved into "strip cells" which had air conditioning running constantly, and they were denied adequate clothing or bedding. Another person was moved to a cell where fecal matter had been smeared on the walls. Prison officers refused to provide the requested clothing, bedding, or cleaning products, telling the participants that they could return to their usual cells as soon as they ate something.[137] Prior to the hunger strike, another man had been looking after a frog that he found in the exercise area at Pelican Bay. The man's wife reported that caring for the frog was therapeutic for him, since he had been held in solitary confinement for sixteen

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[132] *Id.* at 196.
[133] Ashker Second Amended Complaint, *supra* note 68, at 154-164.
[134] Open Letter to Gov. Brown (Oct. 16, 2012) https://ccrjustice.org/sites/default/files/assets/PBSP%20Reps%27%20Open%20Ltr%20to%20Gov%20%20Brown_10-16-12.pdf.
[135] KERAMET REITER, *supra* note 131, at 60.
[136] *Id.*
[137] KERAMET REITER, *supra* note 131, at 128; Open Letter to Gov. Brown, *supra* note 134.

years. After the man participated in the hunger strikes, prison officers took the frog away from him.[138]

Some jurisdictions make little or no accommodation for people in solitary confinement with physical disabilities. For example, in Florida, a 46-year-old man used a wheelchair due to partial paralysis and he also suffered from seizures. His cell contained no call button that would have enabled him to alert the staff to warning signs of a seizure. Other people who, observing his distress, did alert the staff, risked receiving a disciplinary infraction for "disorderly conduct" or "inciting a riot."[139] The same man needed urinary catheters. The staff did not consistently bring the correct type or quantity of catheters, forcing him to wash and re-use old catheters without adequate cleaning supplies. As a result, he suffered frequently from painful urinary tract infections.[140]

Another man in Florida lost his balance and fell when he was walking while restrained in leg irons, breaking three bones in his foot. The medical staff directed that crutches be ordered for him, but prison officers refused to provide them, forcing the man to hop around on one foot for several weeks.[141] Despite the risk of another fall, whenever he left his cell the man continued to be restrained in handcuffs, a "black box," which fixes the handcuffs at waist level and confines movement, and a belly chain.[142]

2.4 The Effects of Solitary Confinement

2.4.1 First-Hand Accounts

Sensory deprivation has deleterious effects. Jack Henry Abbott wrote that "solitary confinement in prison can alter the ontological makeup of a stone"[143] and he described its effect upon his release to the general prison population:

[138] AMNESTY INTERNATIONAL, USA, THE EDGE OF ENDURANCE: PRISON CONDITIONS IN CALIFORNIA'S SECURITY HOUSING UNITS 26 (2012).
[139] Harvard v. Inch Complaint, *supra* note 14, at 36.
[140] *Id.* at 38.
[141] *Id.* at 32.
[142] *Id.* at 33.
[143] JACK HENRY ABBOTT, IN THE BELLY OF THE BEAST 45 (1981).

> "I could not orient myself. The dull prison-blue shirts struck me, dazzled me with a beauty they never had. All colors dazzled me. A piece of wood fascinated me by its feel, its texture. The movements of things, the many prisoners walking about, and their multitude of voices – all going in different directions – bewildered me. I was slow and slack-jawed and confused – but beneath the surface I raged."[144]

People in solitary confinement suffer from disturbed sleeping patterns and chronic insomnia. This can be attributed to any number of factors, including the constant noise and the fact that lights are always on, and that few cells receive much in the way of natural light.

Many people experience hallucinations and delirium. Maryam Henderson-Uloho spent seven years in solitary confinement at the Louisiana Correctional Institute for Women. When she hallucinated, she thought she could see her deceased son and hear him speaking to her. She described the utter hopelessness of being stuck in solitary:

> "Your world becomes consumed inside a six-by-nine prison cell, year after year after year. You're just in complete despair. After a while, you start to lose hope. You feel helpless. You just sit there, and you sit there, and you sit, day after day. What kind of life is that for a human being?"[145]

The effects of solitary confinement are particularly devastating to people with mental illnesses, which may develop or be exacerbated by the harsh conditions. In the Florence supermax, for example:

> "Prisoners interminably wail, scream and bang on the walls of their cells. Some mutilate their bodies with razors, shards of glass, writing utensils and whatever other objects they can obtain. Some swallow razor blades, nail clippers, parts of radios and televisions, broken glass and other dangerous objects. Others carry on delusional conversations with voices they hear in their heads, oblivious to the reality and the danger that such behavior might pose to themselves and anyone who interacts with them."[146]

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[144] *Id.* at 51.
[145] SIX BY TEN, *supra* note 37, at 27-28.
[146] Complaint at 5, Bacote et al. v. Fed. Bureau of Prisons, No. 1:12 Civ. 1570 (D. Colo. June 18, 2012).

Self-mutilation and self-harm are common. One man incarcerated at the Florence supermax bit off his own finger. He did not receive mental health care until he was transferred to another prison. As soon as he began to recover, he was repeatedly sent back to Florence, where his condition deteriorated again.[147] Ian Manuel, who was held in solitary confinement in Florida, wrote that:

> "On occasion, I purposely overdose on Tylenol so that I could spend a night in the hospital. For even one night, it was worth the pain."[148]

Mentally ill people in solitary confinement who are in distress throw food and excrement on the floor and walls of their cells and into the hallways. These people may be restrained, that is, chained by their arms and legs to a concrete block, sometimes for an extended period. When they are left in this position, they often have no choice but to urinate and defecate on themselves. They are also unable to eat because of the restraint of their arms.

Despite the known risk of serious mental illness, mental health care in solitary confinement is often inadequate. Consultations with mental health staff take place at cell doors, can be overheard by others, and last only a few minutes. In a 2016 decision, the Appellate Division of the Superior Court of New Jersey expressed concerns about the inadequate mental health evaluations of a man who spent over three years in administrative segregation.[149] The evaluations were conducted in English, which was not the man's native language, and the man was asked questions through a locked cell door and he did not answer. Based on these non-responsive evaluations, the mental health staff concluded that the man was not delusional or suffering from any mental illness.[150]

In many prisons there is little opportunity for private consultations or any follow-up therapy. The main form of mental health treatment is psychotropic medication. People may be permitted to attend group therapy sessions, but these sessions are conducted in the presence of prison

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[147] Andrew Cohen, *How America's Most Famous Federal Prison Faced a Dirty Secret*, THE MARSHALL PROJECT (Dec. 5, 2016), https://www.themarshallproject.org/2016/12/05/how-america-s-most-famous-federal-prison-faced-a-dirty-secret.
[148] Ian Manuel, *supra* note 18.
[149] Mejia v. New Jersey Department of Corrections, 141 A.3d 1209 (N.J. Super. Ct. App. Div. 2016).
[150] *Id.* at 1216.

officers.[151] The people who are allowed to attend these groups are often shackled and sometimes locked in individual cages.[152]

Some people in solitary confinement report that even when they are experiencing serious symptoms of mental illness, the only assistance they have received from mental health staff has been in the form of activities like crossword puzzles. They have reported feeling belittled by mental health and correctional staff when they describe their symptoms, further perpetuating the stigma of mental illness.[153] They perceive that the mental health staff fail to prevent the abuse and neglect of mentally ill people and ignore pleas for help. Mark Hinkston, who is incarcerated in Ohio, writes:

> "A prisoner here was having issues a month ago. He expressed to this mental health staff worker that he was feeling "disturbed" and would harm himself. Although he has a history of self-mutilation, this mental health staff worker walked off laughing then as well. The prisoner cut his arm wide-open in several places and as a result, had to be taken to a medical facility outside of the prison."[154]

Not only do prison officers and mental health staff fail to assist people who require help, in some instances they continue to perpetuate cruel treatment even after a serious incident has occurred:

> "A prisoner had to be rushed to a hospital after slashing his own throat with a razor. Returned soon after to the same solitary cell, waiting prison guards gave him a mop and bucket and ordered him to clean up the mess left by his own spilled blood."[155]

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[151] Harvard v. Inch Complaint, *supra* note 14, at 85.
[152] *Id.*
[153] *See, e.g.,* Mark Hinkston, *Mental Health Abuse, and Neglect at Toledo Correctional Institution*, https://prisonskill.wordpress.com/2021/01/03/mental-health-abuse-and-neglect-at-toledo-correction-institution-by-mark-hinkston-aka-mustafa/ (Jan. 3, 2021) ("As this mental health physician slid a packet of crossword puzzles into the crack of the door to the cell where I'm forced to live in. I expressed to her that was having suicidal thoughts and needed to speak with a mental health staff member. The mental health staff member began to laugh and walk away, making jokes about what I expressed to her with a corrupt correctional officer that's been harassing me every chance he gets.").
[154] *Id.*
[155] ROBERT FERGUSON, METAMORPHOSIS: HOW TO TRANSFORM PUNISHMENT IN AMERICA 150 (2018).

2.4.2 Scientific Research

2.4.2.1 Psychiatric and Psychological Harm

The psychiatric and psychological distress reported by incarcerated people is consistent with findings from clinical studies into the psychopathological effects of solitary confinement. Psychiatrist Stuart Grassian has studied the effects of solitary confinement, describing as "tragic and highly disturbing" the fact that lessons from the historical experiments with solitary confinement discussed in chapter 1 have been ignored by those responsible for addressing the mental health needs of people in prisons today.[156]

A sizeable body of research confirms that people with underlying mental illnesses are likely to suffer exacerbated psychiatric and psychological harm due to solitary confinement. Dr. Grassian's research shows that symptoms include "florid psychotic delirium, marked by severe hallucinatory confusion, disorientation, and even incoherence, and by intense agitation and paranoia."[157]

People with mental illness are overrepresented in solitary confinement populations.[158] Researchers tend to agree that numerous factors contribute to such overrepresentation. These include: a large proportion of incarcerated people present with untreated mental health conditions due to a lack of publicly-available psychiatric care;[159] because of symptoms of mental illness, people may have difficulty complying with prison rules and regulations, leading to placement in

[156] Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J. L. & POL'Y 325, 329 (2006).
[157] *Id.* at 332.
[158] *See, e.g.,* David H. Cloud et al., *supra* note 7, at 22 ("The grave overrepresentation of people with serious mental illnesses in the nation's prisons and jails – and within segregation units in particular – is a public health crisis that demands a response."); Laura Dellazizzo et al., *Is Mental Illness Associated with Placement in Solitary Confinement in Correctional Settings? A Systematic Review and Meta-Analysis,* 29 INT. J. MENTAL HEALTH NURSING 576, 579 (2020) (finding a moderate association between having a "mental health problem" and placement in solitary confinement based on a meta-analysis of a sample of 163,414 incarcerated people; the association remained present once outliers and confounding factors were considered); Craig Haney, *supra* note 111, at 253-54; Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 CRIME & JUST. 441, 503 (2006) ("the allocation of mentally ill inmates to supermax prisons (and sometimes to other places of punitive or administrative segregation) is likely to be high, but the prevalence of adverse psychological symptoms in some supermax prisons is clearly significantly higher than even high base expectancy rates for mental illness.").
[159] David H. Cloud et al., *supra* note 7, at 22 (referring to a 2014 study which found that in forty-four states, more people with serious mental illness were confined in jails and prisons in the state that in the largest remaining state psychiatric hospital).

disciplinary segregation;[160] and people with mental illnesses may be more susceptible to victimization such that they are placed in solitary confinement for protective reasons.[161] Furthermore, inadequate screening and treatment of mental illness within prisons results in correctional staff responding to symptoms of mental illness with punitive measures rather than treatment. Placing a person with a mental illness in solitary confinement causes further deterioration of their condition, potentially exacerbating the length of time that they must spend in isolation.[162] Prison officers may also overlook the need for mental health care out of the misguided belief that a person exhibiting symptoms of mental illness is malingering.[163] The perception among prison officers that incarcerated people feign symptoms of mental illness (despite the ongoing stigma of mental illness within prisons) is longstanding: as noted in chapter 1, officials operating New York's penitentiaries in the 1800s held similar views.[164]

Many people in prison have experienced trauma prior to their incarceration, and placement in solitary confinement can exacerbate the risk of developing post-traumatic stress disorder.[165] One researcher has identified that the trauma of solitary confinement involves not only that caused by profound social isolation and sensory deprivation, but also trauma associated with structural racism for Black people who are disproportionately placed in solitary confinement in comparison to other incarcerated people.[166]

While people with mental illnesses or prior trauma are particularly vulnerable to suffering further harm in solitary confinement, the practice presents risks to everyone. Dr. Grassian suggests that although people who are better able to modulate their emotional expression and behavior and those with stronger cognitive functioning are less severely affected, all individuals placed in

[160] David H. Cloud et al., *supra* note 7, at 22; Laura Dellazizzo et al., *supra* note 158, at 579.
[161] David H. Cloud et al., *supra* note 7, at 22.
[162] Reena Kapoor, *Taking the Solitary Confinement Debate out of Isolation*, 42 J. AM. ACAD. PSYCHIATRY & L. 2, 4-5 (2014) ("Inadequate screening for mental illness allows many inmates to go undiagnosed, and behavior that is related to mental illness will be punished with placement in isolation rather than treated with medication or psychotherapy … placement in solitary confinement feeds on itself, requiring ever-increasing resources to care adequately for the needs of inmates in that setting.").
[163] Laura Dellazizzo et al., *supra* note 158, at 579.
[164] *See* discussion *supra* section 1.3.3.2 (describing the 1839-1840 investigation into alleged abuses at Auburn and Sing, including the whipping of mentally ill people, with one member of the investigating committee noting that "it would appear in almost every instance to have been taken for granted that the [person] was feigning derangement.").
[165] Daniel Pforte, *Evaluating and Intervening in the Trauma of Solitary Confinement: A Social Work Perspective*, 48 CLINICAL SOCIAL WORK J. 77, 78-79 (2020).
[166] *Id.* at 79-80 ("Solitary confinement is both an example of structural racism and a form of trauma.").

solitary confinement still experience "a degree of stupor, difficulties with thinking and concentration, obsessional thinking, agitation, irritability, and difficulty tolerating external stimuli."[167]

Other researchers have reported similar findings. Stanford University's Human Rights in Trauma Mental Health Laboratory conducted a study of people who had been released from long-term solitary confinement at Pelican Bay.[168] The study excluded people who had been transferred to mental health units and those who were unable or unwilling to give informed consent. The results therefore presented a summary of the psychological impact of solitary confinement among what the study's authors described as "likely the most resilient and resourceful" of people formerly held in solitary confinement.[169] Nevertheless, almost all participants in the study reported symptoms consistent with the fifth edition of the Diagnostic and Statistical Manual of Mental Disorders' ("DSM-5") diagnosis for major depressive disorder, including depressed mood, feelings of hopelessness, anger, irritability, loss of pleasure, fatigue, guilt, loss of appetite, and insomnia.[170] The participants also reported symptoms consistent with DSM-5 diagnoses for panic disorder, traumatic stress disorder, and obsessive compulsive disorder, which manifested as feelings of nervousness and worry, paranoia, hyperarousal, and the fear of losing control, as well as physiological symptoms such as increased heart rate and respiration, sweating, muscle tension, and nightmares.[171] Participants also experienced emotional numbing and desensitization which interfered with their social functioning once they returned to the general prison population.[172]

Other documented effects of solitary confinement include confusion, impaired concentration, loss of memory, lethargy, and debilitation.[173] Studies also point to increased rates of self-harm and suicides among people held in solitary.[174]

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[167] *Id.*
[168] HUMAN RIGHTS IN TRAUMA MENTAL HEALTH LAB, STANFORD UNIVERSITY, MENTAL HEALTH CONSEQUENCES FOLLOWING RELEASE FROM LONG-TERM SOLITARY CONFINEMENT IN CALIFORNIA (2017).
[169] *Id.* at 5.
[170] *Id.* at 2.
[171] *Id.*
[172] *Id.*
[173] Peter Scharff Smith, *supra* note 158.
[174] *See, e.g.,* Andrew B. Clark, *Juvenile Solitary Confinement as a Form of Child Abuse*, 45 J. AM. ACAD. PSYCHIATRY & L. 350, 351 (2017) (referring to the Department of Justice's National Study of Jail Suicides which

Professor Craig Haney, a psychologist, observes that scientific knowledge about the harmful psychological effects of solitary confinement is informed by broader literature regarding social isolation, loneliness, and social exclusion.[175] He describes how the "toxic" isolation of solitary confinement causes "natural human reactions and adaptations to the experience of social isolation and loneliness" that can result in dysfunctional and problematic behaviors.[176] For instance, studies have found increased hypervigilance to perceived social threats, which can result in overreactions to external stimuli, and some people in solitary confinement become susceptible to "institutional paranoia" whereby they distrust everyone with whom they interact.[177]

Notably, Dr. Grassian has found that the effects of isolation vary depending not only on the environmental conditions, but also the perceived intent of solitary confinement. For example, if a person perceives that the situation is "likely to be benign" as opposed to threatening, he or she will be more likely to tolerate it better and is less likely to develop adverse psychiatric reactions to the experience.[178] Furthermore, the degree of sensory deprivation, influenced by the physical conditions in solitary confinement (e.g. whether cell doors are solid steel or barred, and whether people receive visitors or have access to reading material and televisions), influences the risk of adverse psychiatric consequences.[179]

2.4.2.2 Neuroscientific Evidence of Brain Deterioration

Neuroscientific research confirms that brain deterioration resulting from the social and environmental deprivations of solitary confinement can be caused by even a brief period in such

showed that, as of 2010, thirty-eight percent of suicides involved people held in isolation, only eight percent of whom were on suicide watch at the time of their deaths); Sarah Glowa-Kollisch et al., *From Punishment to Treatment: The "Clinical Alternative to Punitive Segregation" (CAPS) Program in New York City Jails*, 13 INT. J. ENVIRON. RES. PUBLIC HEALTH 182 (2016) (reporting that 7.3 percent of 225,000 jail admissions between 2010 and 2012 included placement in solitary confinement but constituted 53.3 percent of self-harm and 45 percent of high-lethality self-harm events).

[175] Craig Haney, *supra* note 111, at 222.

[176] *Id.* at 241.

[177] *Id.*

[178] Stuart Grassian, *supra* note 156, at 347.

[179] *Id.* at 346.

an environment, and "such deteriorations have been associated with a number of potentially irreversible mental conditions."[180]

Due to the ethical and practical challenges of conducting research on people in solitary confinement, only one study has measured the brain activity of humans in solitary confinement.[181] In 1972, psychologist Paul Gendreau used electroencephalography (EEG) to measure changes in neural activity in twenty incarcerated people held in solitary confinement for seven days.[182] The study found that after people spent one week in solitary confinement, there was a slowing in EEG frequency, representing a tendency toward increased theta activity that is associated with frustration and stress.[183] More recent neuroimaging research examining the effect of isolation on non-incarcerated adults has shown that socially isolated people are quicker to perceive threatening social stimuli than non-isolated people, producing a "hypervigilant response [that] corresponds with continuous activation of certain neural networks involved in alertness."[184]

Experimental animal research supports clinical studies documenting the effects of solitary confinement on the brain.[185] A series of studies show that social isolation and environmental deprivation result in

> "negative repercussions for both brain structure and function, including reduced cortical volume, diminished neuronal connections in cortical areas and the hippocampus, decreased myelin production, and altered activity in the reward system and the amygdala."[186]

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[180] Federica Coppola, *The Brain in Solitude: An(other) Eighth Amendment Challenge to Solitary Confinement*, J. L. & THE BIOSCIENCES 1, 4 (2019).
[181] Francis X. Shen, *Neuroscience, Artificial Intelligence, and the Case Against Solitary Confinement*, 21 VAND. J. ENT. & TECH. L. 937, 951 (2019).
[182] Paul Gendreau et al., *Changes in EEG Alpha Frequency and Evoked Response Latency During Solitary Confinement*, 79 J. ABNORMAL PSYCHOL. 54, 56 (1972).
[183] *Id.* at 57.
[184] Francis X. Shen, *supra* note 181, at 951, citing Stephanie Cacioppo et al., *Loneliness and Implicit Attention to Social Threat: A High-Performance Electrical Neuroimaging Study*, 7 COGNITIVE NEUROSCIENCE 138, 155 (2016).
[185] Federica Coppola, *supra* note 180, at 208-209.
[186] *Id.* (citing Jelena Djordjevic et al., *Effects of Chronic Social Isolation on Wistar Rat Behavior and Brain Plasticity Markers*, 66 NEUROPSYCHOBIOL. 112 (2012); Kevin Fone & M. Veronica Porkess, *Behavioral and Neurochemical Effects of Post-weaning Social Isolation in Rodents – Relevance to Developmental Neuropsychiatric Disorders*, 32 NEUROSCI. & BIOBEH. REV., 1087 (2008); Jia Liu et al., *Impaired Adult Myelination in the Prefrontal Cortex of Socially Isolated Mice*, 15 NATURE NEUROSCI. 1621 (2012); Esther Castillo-Gómez et al., *Early Social Isolation Stress and Perinatal NMDA Receptor Antagonist Treatment Induce Challenges in the Structure and Neurochemistry of Inhibitory Neurons of the Adult Amygdala and Prefrontal Cortex*, 4 ENEURO 34 (2017); Javier

In humans, such cerebral alterations have been linked to detachment, hostility, higher levels of aggression, and increased susceptibility to psychiatric diseases and neurodegenerative disorders.[187] Such changes may occur after even a short period of time and continue once the person is returned to a social environment.[188] Animal research also shows that the chronic stress of social and environmental deprivation results in brain damage associated with memory loss, cognitive decline, depression, and post-traumatic stress disorder in humans.[189]

The body of neuroscientific evidence that shows how social pain of the like resulting from solitary confinement is "profoundly embodied in the brain" has led neuroscience experts to describe such pain as "fundamentally physical."[190] This evidence undermines the distinction that is often drawn between physical or "real pain" and social or "metaphorical pain."[191]

2.4.2.3 Barriers to Mental Health Treatment

Professor Haney has studied the cultural dynamics that contribute to the inadequate mental health treatment in supermax prisons and solitary confinement units.[192] He observes that the notion that misbehavior might indicate that a person is suffering from psychological impairments, or struggling with personal problems or the untenable environment, becomes inconceivable to the staff working in these units.[193] Instead, a toxic atmosphere within supermax prisons contributes to a culture of harm which leads to mistreatment and brutality. Correctional officers working in these environments are also affected by the "thinly veiled hostility and disdain [that] prevails, [with] tension and simmering conflict often palpable."[194] Even among the mental health staff, Professor Haney writes, "there is a powerful psychological message conveyed by the architecture of containment, separation, and isolation that dominates the supermax environment."[195] The result is a "cruel ecology" that inures staff to the suffering of

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Gilabert-Juan et al., *Post-weaning Social Isolation Rearing Influences Expression of Molecules Related to Inhibitory Transmission and Structural Plasticity in the Amygdala of Adult Rats*, 1148 BRAIN RES. 129 (2012)).
[187] *Id.* at 209.
[188] *Id.*
[189] *Id*.
[190] *Id.* at 213-214.
[191] *Id.*
[192] Craig Haney, *A Culture of Harm: Taming the Dynamics of Cruelty in Supermax Prisons,* 35 CRIM. JUST. & BEHAV. 956 (2008).
[193] *Id.* at 962-63.
[194] *Id.* at 960.
[195] *Id.* at 973-74.

people confined in these units and leaves staff members with little choice but to follow procedures and perpetuate that suffering.

Andrew Clark, a professor of psychiatry, has examined the tension between the ethical obligations of healthcare professionals working in prisons and the practical realities of working in those environments, noting that the "institutional priorities [of prisons] may conflict with, and often trump, the clinical needs of individual patients."[196] In a 2016 article, Professor Clark referred to guidelines promulgated by the World Health Organization and the National Commission on Correctional Health Care, which recommend that clinicians should not participate in "clearing" people for placement in solitary confinement.[197] Instead, those guidelines advise healthcare professionals to ensure that close oversight and appropriate care is provided to people in solitary confinement. Professor Clark's article suggested that while clinicians could follow the approach of some medical practitioners in relation to capital punishment and decline to work in settings where solitary confinement is practiced at all, the fact remains that patients in solitary confinement need effective mental health services.[198] He describes working in such units as an "ethics challenge," noting that if psychiatrists closely observe people in solitary confinement and monitor them for signs of distress, prison administrators may assume that the risk of harm is reduced such that the practice may be continued. In addition, there is a risk that, by advocating on behalf of patients suffering from acute psychological deterioration, psychiatrists "tacitly fail to advocate on behalf of other patients who are somewhat more resilient but suffering nonetheless."[199]

The ethical challenges of providing adequate care to people in solitary confinement are further exacerbated by the physical environment. Because most mental health consultations take place at the cell door, with the practitioner and patient speaking to each other through the food slot or the door, there is little privacy and "no ability to develop trust and patient rapport."[200] Mental

[196] Andrew B. Clark, *supra* note 174, at 354.
[197] *Id.*
[198] *Id. See also* Kenneth Appelbaum, *American Psychiatry Should Join the Call to Abolish Solitary Confinement,* 43 J. AM. ACAD. PSYCHIATRY & L. 406, 413 (2015) (imploring the American Psychiatric Association to "join the chorus opposed to all draconian practices of prolonged solitary confinement.").
[199] *Id.* at 354-355.
[200] David H. Cloud et al., *supra* note 7, at 23.

health staff also experience the challenge of having their professional concerns ignored by correctional staff who regard them as being too sympathetic towards incarcerated people.[201]

Deficiencies in mental health screening and treatment in solitary confinement are epitomized by the case of *Madrid v. Gomez,* which alleged numerous failures by the CDCR in the provision of treatment to people incarcerated at Pelican Bay. In 1995, the District Court for the Northern District of California ruled that the CDCR violated the Eighth Amendment by, among other things, failing to provide adequate mental health care.[202] Chief Judge Thelton Henderson described the "grossly inadequate" mental health care system that existed when the prison opened in 1989 without a single psychiatrist employed to work there. Although some mental health professionals had since been employed, continued understaffing, combined with other chronic problems, rendered ongoing care "constitutionally inadequate."[203]

The judge referred to the heightened need for mental health services due to the prison's solitary confinement unit, but he noted that by 1993, and only as a result of litigation pressure, just nine mental health staff were employed at the prison. At the time, the prison housed 3,500-3,900 people, approximately 1,500 of whom were in solitary confinement.[204] Understaffing, poor record-keeping, and the exclusion of psychiatrists and psychologists from decisions about cell housing decisions resulted in serious compromises to mental health care.[205] As a consequence, the judge concluded, people experiencing severe symptoms due to the conditions in solitary confinement were "simply medicated with psychotropic drugs or ignored."[206] The court ordered ongoing monitoring by a special master and directed the CDCR to fund and fill additional mental health positions at the prison. Monitoring and ongoing litigation concerning CDCR's provision of mental health care throughout the state's prison system continues.[207]

[201] Reena Kapoor, *supra* note 162, at 4.
[202] Madrid v. Gomez, 889 F. Supp. 1146 (N.D. Cal. 1995).
[203] *Id.* at 1214-15.
[204] *Id.* at 1217.
[205] *Id.* at 1221.
[206] *Id.* at 1236-37.
[207] Coleman v. Brown, No. 2:90 Civ. 520 (E.D. Cal.).

2.4.2.4 Physical Health Risks

While the physical health risks of solitary confinement have historically received less attention than mental health risks, medical experts have begun to develop a body of research on the issue.[208]

Professor Brie Williams has examined the physical health effects of solitary confinement on older people. In one study, she observed that the prolonged lack of exposure to sunlight in solitary confinement can cause vitamin D deficiency, placing older adults at a greater risk of fractures and falls.[209] In addition, the small size of solitary confinement cells and the limited opportunities for exercise increase the risks of hypertension, diabetes, arthritis, heart disease, and other conditions, all of which are already disproportionately high among incarcerated people.[210] Professor Williams also writes about older individuals' experiencing visual depth disturbances and exaggerated isolation due to hearing impairments, which can worsen heart disease.[211]

In a 2019 study, Professor Williams examined the cardiovascular health of people in solitary confinement, comparing the prevalence of hypertension diagnoses among men between the ages of twenty-seven and forty-five who were held in solitary confinement at Pelican Bay with men in the maximum-security general population at the prison.[212] The study found hypertension rates were significantly higher among the group in solitary confinement (47.51 percent compared to 16.53 percent).[213]

Another recent study examined self-reported physical symptoms of people held in solitary confinement in Washington state.[214] That research concluded that solitary confinement exacerbates the existing physical health risks of incarceration arising from disruptions to daily

[208] Brie Williams, *Older Prisoners and the Physical Health Effects of Solitary Confinement*, 106 AM. J. PUB. HEALTH 2126 (2016) ("The medical case against [solitary confinement] remains only half-made; the physical health effects of this practice are underdocumented.").
[209] *Id.*
[210] *Id.*
[211] *Id.* at 2127.
[212] Brie Williams et al., *The Cardiovascular Health Burdens of Solitary Confinement*, 34 J. GEN. INTERN. MED. 1977 (2019).
[213] *Id.* at 1978.
[214] Justin Strong et al., *The Body in Isolation: The Physical Impacts of Incarceration in Solitary Confinement*, 15 PLOS ONE (2020).

life and routines, as well as undiagnosed, untreated, or mistreated illnesses.[215] Participants in the study reported weight fluctuations, which, the authors noted, can result in "adverse cardiovascular and psychological outcomes."[216] Another commonly-reported complaint was musculoskeletal pain. The study emphasized that these health concerns have a "grossly disproportionate impact on communities of color" and given the higher rates of placement of Black, Latino, and Native American people in solitary confinement, the physical symptoms reported are likely to impact these groups of people at disproportionately high rates.[217]

Other physiological symptoms reported in connection with solitary confinement include severe headaches, heart palpitations, abdominal pain, chest pressure and pain, problems with digestion and diarrhea, loss of appetite, perspiring hands, dizziness, and fainting.[218] The Stanford study found that people held in long-term solitary confinement at Pelican Bay suffered from chronic pain, vitiligo, joint problems, and visual impairments, all of which continued after they left solitary confinement.[219]

In 2015, the Women in Prison Project of the Correctional Association of New York commented on the specific risks that solitary confinement poses to pregnant people, because it restricts access to critical obstetric care and prevents people from getting the "regular exercise and movement that are vital for a healthy pregnancy." Moreover, the report noted, high levels of stress and depression that can be exacerbated by solitary confinement are particularly dangerous for pregnant people, because they reduce their ability to fight infections, and increase the risk of preterm labor, miscarriage, and low birth weight in babies.[220]

2.4.2.5 Challenges Following Release from Solitary Confinement

The extensive literature on the harm caused by solitary confinement confirms not only that people experience harm while confined, but also that such harm continues after release. Professor Terry Kupers, a psychiatrist who has given expert evidence in numerous lawsuits

[215] *Id.* at 14.
[216] *Id.*
[217] *Id.* at 15. *See* discussion *infra* section 2.5.4.
[218] Peter Scharff Smith, *supra* note 158, at 488-90.
[219] HUMAN RIGHTS IN TRAUMA MENTAL HEALTH LAB, STANFORD UNIVERSITY, *supra* note 168, at 12.
[220] WOMEN IN PRISON PROJECT OF THE CORRECTIONAL ASS'N OF NEW YORK, REPRODUCTIVE INJUSTICE: THE STATE OF REPRODUCTIVE HEALTH CARE FOR WOMEN IN NEW YORK STATE PRISONS 149 (2015).

challenging conditions in solitary confinement, developed the concept of the "SHU Post Release Syndrome."[221] This syndrome, he observed, is most likely to emerge among people who have been held in solitary confinement for a very long time and who are then transferred to a general prison population or released from prison. Professor Kupers describes a number of symptoms associated with the syndrome, including: a tendency to retreat into a confined space and limit the number of people one interacts with; feelings of anxiety in unfamiliar places and with unfamiliar people; heightened suspicion of anyone in close physical proximity; difficulty expressing feelings or trusting anyone; problems with concentration and memory; personality changes; and in some cases, a tendency to resort to alcohol or illicit substances to cope with emotional pain, confusion, and anxiety.

The lasting harm that results from solitary confinement, which is confirmed by neuroscience research showing that brain damage is not reversed upon reintroduction to a normal social environment, affects people's ability to reintegrate into the general prison population or wider society.[222] Participants in the Stanford study reported a number of challenges on their return to the general prison population, including relational estrangement, social impairment, physical illness, and difficulty with the transition to a more chaotic and flexible environment.[223] This group considered that the step down programs facilitated prior to their transition to the general population were of little assistance, with some participants describing them as "unhelpful and disingenuous."[224] Study participants had reservations about correctional officers conducting the programs and they would have preferred that they were run by external coordinators. The participants all reported feeling distressed, overstimulated, and underprepared for "the cacophony of the general prison environment." Some also encountered ongoing restrictions on their movement and activities in the general prison population due to their security status such that their out-of-cell time, employment, education, and contact with family continued to be severely limited.[225]

[221] TERRY KUPERS, *supra* note 60, at 152-53.
[222] Craig Haney, *supra* note 158, at 252.
[223] HUMAN RIGHTS IN TRAUMA MENTAL HEALTH LAB, STANFORD UNIVERSITY, *supra* note 168, at 11-17.
[224] *Id.* at 16.
[225] *Id.* at 25.

Research concerning the experiences of people held in solitary confinement confirms higher rates of post-release harm when compared to incarcerated people who were not held in solitary confinement. For example, one study of formerly incarcerated people found that, among those who had been in solitary confinement, forty-three percent reported symptoms of post-traumatic stress disorder, as compared to sixteen percent of those who had been in the general prison population.[226] The study showed no difference in the presence of symptoms between people who had spent longer or shorter periods of time in solitary confinement.[227] No conclusion was reached in the study as to whether solitary confinement was causative of post-traumatic stress disorder. The researchers suggested that isolation could be a traumatic event that contributed to the illness, or, alternatively, people with undiagnosed post-traumatic stress disorder could have had their symptoms exacerbated while incarcerated, leading to their placement in solitary confinement. Either possibility, the researchers concluded, supported the need for better screening and provision of mental health treatment during and after incarceration.[228]

Another study of formerly incarcerated people concluded that people who reported psychotic symptoms were fifty percent more likely to have spent time in solitary confinement than those who did not report such symptoms.[229] Like the study examining post-traumatic stress disorder among formerly incarcerated people, this research did not draw conclusions as to the causative directions of solitary confinement, due to the researchers' reliance on participants' retrospective recall.

A 2019 study of over 200,000 people released from prisons in North Carolina found that people who had spent any time in solitary confinement were more likely to die in the first year after their release from prison compared to people who had not been held in solitary.[230] Death by suicide or homicide in the first year after release, and opioid overdose within the first two weeks of release were more common among people who had experienced solitary confinement. The study also found that the risk of death and reincarceration was higher among people who had

[226] Brian Hagan et al., *History of Solitary Confinement is Associated with Post-Traumatic Stress Disorder Symptoms Among Individuals Recently Released from Prison*, 95 J. URBAN HEALTH 141 (2018).
[227] *Id.* at 146.
[228] *Id.* at 147.
[229] Arthur Ryan & Jordan DeVylder, *Previously Incarcerated Individuals with Psychotic Symptoms are More Likely to Report a History of Solitary Confinement*, 290 PSYCHIATRY RES. 113064, *2 (2020).
[230] Lauren Brinkley-Rubinstein et al., *Association of Restrictive Housing During Incarceration with Mortality After Release*, 2(10) J. AM. MED. ASS. 8 (2019).

been in solitary confinement more than once, and among people who spent more than fourteen consecutive days in solitary.[231] A Danish study has found that people who had spent even short periods of time (less than a week) in solitary confinement had higher overall mortality rates five years after their release from prison than people who had not been held in solitary.[232]

Researchers have sought to examine whether solitary confinement has any bearing on the likelihood of offending or reincarceration. The data are mixed, though Professor Haney suggests that the experience of solitary confinement does not decrease the likelihood of post-prison criminal behavior.[233] One study found that the risk of recidivism is reduced if people in solitary confinement spend at least three months in the general prison population prior to their release to the community.[234]

Another study examined the effect of disciplinary segregation on subsequent violent infractions in prison and concluded that disciplinary segregation did not significantly affect the rate of subsequent infractions.[235] The researchers found a twenty-one percent decrease in the likelihood of committing a violent infraction following placement in disciplinary segregation among Black people, and people who were identified as being affiliated with a gang were no more likely to commit a subsequent infraction than others released from disciplinary segregation. Furthermore, people who received at least one visit from a family member had a nineteen percent decrease in the likelihood of engaging in a subsequent violent infraction; people who participated in a rehabilitation program had a fourteen percent decrease; and people attending job programs had a six percent reduction.[236] These data contradict the oft-repeated claim that people in solitary

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[231] *Id.*
[232] Christopher Wildeman & Lars H. Andersen, *Solitary Confinement Placement and Post-Release Mortality Risk Among Formerly Incarcerated Individuals: A Population-Based Study*, 5 LANCET PUBLIC HEALTH e107 (2020).
[233] Craig Haney, *supra* note 111, at 251. *See also* H. Daniel Butler et al., *Assessing the Effects of Exposure to Supermax Confinement on Offender Postrelease Behaviors*, 97 PRISON JOURNAL 275 (2017) (finding that placement in supermax did not affect recidivism or other post-release outcomes for people released under supervision); *but see* Kristen M. Zgoba et al., *Assessing the Impact of Restrictive Housing on Inmate Post-Release Criminal Behavior*, 45 AM. J. CRIM. JUST. 102 (2020) (finding that people who had spent time in restrictive housing had higher rates of rearrest, reconviction, and reincarceration within three years of release when compared with incarcerated people who had not spent time in restrictive housing, but noting that the statistical significance in the difference between the two groups studied was separated by mere decimals).
[234] D. Lovell et al., *Recidivism of Supermax Prisoners in Washington State*, 53 CRIME & DELINQUENCY 633 (2007).
[235] Youngki Woo et al., *Disciplinary Segregation's Effects on Inmate Behavior: Institutional and Community Outcomes*, 31 CRIM. JUST. POL'Y REV. 1036, 1040 (2020).
[236] *Id.* at 1049.

confinement are the so-called "worst of the worst" and must remain in solitary confinement to ensure the safety and security of others.

As Professor Haney suggests, reliance on recidivism to determine the effect of solitary confinement is a less meaningful measure than the quality of life experienced by people when they are released.[237] There are limitations to the studies on recidivism, including the sample sizes and comparators used; the extent to which mental health issues and re-entry challenges are taken into account; and differences in measuring, and the definition of, recidivism.

2.5 Demographic Data

2.5.1 Records Available

Data collection relating to solitary confinement varies considerably in quality and reliability among states. Some states publish their own statistics about their prison populations, but few provide detailed demographic information about people in solitary confinement.

It is difficult to verify the accuracy of self-reported data, some of which appear unreliable. For example, the Minnesota legislative auditor published a report noting that, while information on people in solitary confinement is recorded in a prison database, records concerning the length of solitary confinement vary.[238] Some records reflect the length of a disciplinary sentence, while others record actual days spent in solitary. These figures are not necessarily the same because people may be moved due to overcrowding, or they may require medical or mental health care in a separate unit before the end of their solitary sentence.[239]

When departments of corrections report data regarding their solitary confinement populations, it is not uncommon for them to point to lower figures by highlighting particular categories of solitary confinement at the exclusion of others. For example, in testimony submitted to the Connecticut Senate in 2019, the Commissioner of Correction stated:

[237] Craig Haney, *supra* note 111, at 251.
[238] OFFICE OF THE LEGISLATIVE AUDITOR, SAFETY IN STATE CORRECTIONAL FACILITIES: 2020 EVALUATION REPORT 57 (2020).
[239] *Id.*

> "Currently, out of a population of approximately 13,300 offenders there are 29 offenders on Restrictive Housing Status. That means that only 0.2% of our total population has been administratively placed on Administrative Segregation."[240]

Other data collected from Connecticut, however, show that in 2019, the state held 106 people (or 0.8 percent of the prison population) in various forms of solitary confinement.[241]

Since 2013, the Correctional Leaders Association ("CLA") and the Arthur Liman Center for Public Interest Law at Yale Law School have conducted a series of nationwide surveys on the number and demographics of people in "restrictive housing." The reports they have produced to date provide a partial picture of solitary confinement in the nation's prison systems based on self-reported data from states that choose to participate.

2.5.1.1 2020 CLA-Liman Statistics

The CLA-Liman reports use the term "restrictive housing" as opposed to "solitary confinement." The term was defined in the 2016 report as detention in single or double cells separate from the general prison population for twenty-two hours per day or more, for fifteen or more continuous days.[242] The 2018 report amended the definition to mean: "separating prisoners from the general population and holding them in their cells for an average of twenty-two or more hours per day for fifteen or more continuous days" (emphasis added).[243] The same definition was used in the 2020 report.[244]

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[240] State of Connecticut Department of Correction, Office of the Commissioner, *Testimony to the Senate in Opposition to the Administrative Segregation and Restrictive Housing Status Bill* (2019).
[241] *See, e.g.,* CORRECTIONAL LEADERS ASS'N & THE ARTHUR LIMAN CENTER FOR PUBLIC INTEREST AT YALE LAW SCHOOL, TIME-IN-CELL 2019: A SNAPSHOT OF RESTRICTIVE HOUSING 9 (2020) [hereinafter *CLA-LIMAN (2020)*].
[242] ASS'N OF STATE CORRECTIONAL ADMINISTRATORS & THE ARTHUR LIMAN PUBLIC INTEREST PROGRAM AT YALE LAW SCHOOL, AIMING TO REDUCE TIME-IN-CELL, REPORTS FROM CORRECTIONAL SYSTEMS ON THE NUMBERS OF PRISONERS IN RESTRICTED HOUSING AND ON THE POTENTIAL OF POLICY CHANGES TO BRING ABOUT REFORMS 6 (2016) [hereinafter *ASCA-LIMAN (2016)*].
[243] ASS'N OF STATE CORRECTIONAL ADMINISTRATORS & THE ARTHUR LIMAN CENTER FOR PUBLIC INTEREST AT YALE LAW SCHOOL, REFORMING RESTRICTED HOUSING: THE 2018 ASCA-LIMAN NATIONWIDE SURVEY OF TIME-IN-CELL 4 (2018) [hereinafter *ASCA-LIMAN (2018)*].
[244] CLA-LIMAN (2020), *supra* note 241, at 1.

The 2018 report was based on data from forty-four states and the FBOP,[245] while the 2020 report reflected responses from thirty-nine states.[246] Not all of the reporting jurisdictions provided more specific data about the age, race, and gender of their solitary confinement populations, as discussed further in the next sections.

Extrapolating from the information provided by the reporting jurisdictions, the reports estimate the total number of people held in restrictive housing in all US prisons. The 2020 report estimated that between 55,000 and 62,500 people were held in restrictive housing in the summer of 2019.[247] Because the data were collected before the onset of the coronavirus pandemic, they do not take account of the increased use of solitary confinement in 2020. In June 2020, Solitary Watch, a national advocacy organization, estimated there had been a 500 percent increase in the use of solitary confinement in state and federal prisons since the start of the pandemic, with the result that approximately 300,000 people were being held in solitary confinement in 2020.[248]

CLA-Liman's 2018 report estimated that a total of 61,000 people were held in restrictive housing as of the fall of 2017.[249] The 2014 report estimated that between 80,000 and 100,000 people were so held in 2013.[250]

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[245] The following jurisdictions responded to the survey that formed the basis of ASCA-Liman's 2018 report: Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, the FBOP, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Washington, Wisconsin, and Wyoming. The jurisdictions that did not respond to ASCA-Liman's survey for the 2018 report were California, the District of Columbia, Florida, Maine, Vermont, and Virginia. Although West Virginia responded to the survey, it did not provide data about the number of people in restrictive housing. ASCA-LIMAN (2018), *supra* note 243, at 11 and notes 24 and 30.

[246] The following states responded to the survey that formed the basis of ASCA-Liman's 2020 report: Alabama, Arizona, Arkansas, Colorado, Connecticut, Delaware, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Vermont, Virginia, Washington, Wisconsin, and Wyoming. The following jurisdictions did not respond to the survey: Alaska, California, the District of Columbia, the FBOP, Florida, Iowa, Michigan, Nevada, New Jersey, New Mexico, and Utah. New Hampshire responded to the survey but provided data after the deadline for inclusion in the aggregate analysis of data, and West Virginia responded but did not provide data about the number of people in restrictive housing. CLA-LIMAN (2020), *supra* note 241, at 6 and notes 32 and 41.

[247] CLA-LIMAN (2020), *supra* note 241, at 5.

[248] UNLOCK THE BOX, SOLITARY CONFINEMENT IS NEVER THE ANSWER 3 (2020).

[249] ASCA-LIMAN (2018), *supra* note 243 at 4.

[250] *Id.* at 7.

The percentage of people in restrictive housing, calculated as the number in restrictive housing divided by the total prison population reported by each jurisdiction, ranged from 0 to 11 percent among the jurisdictions that self-selected to participate in the 2020 report.[251] In 2018, the percentage ranged from 0.05 percent to 19.0 percent of the total prison population.[252] In 2020, the median percentage of the prison population held in restrictive housing was 3.4 percent, a reduction from 4.2 percent reported in 2018; the average in 2020 was 3.8 percent, while in 2018 it was 4.6 percent.

Thirty-three states now track the length of time that people are held in restrictive housing, but not all states conduct retrospective analyses of their restrictive housing populations.[253] According to the 2020 report, people held for fifteen days to one month in restrictive housing represented 18.6 percent of the total; 27.5 percent were held for one to three months, 15.7 percent for three to six months, 12.7 percent for six months to one year, 14.5 percent for one to three years, 5.2 percent for three to six years, and 5.7 percent for six years or more.[254]

Some states under-report the number of people in solitary confinement through a strained definition of that term, as discussed in further detail below. Errors in data collection may also affect other aspects of the statistics, such as racial demographics and the length of time spent in solitary.

2.5.1.2 Other Statistics

In some states, no public data are available regarding solitary confinement populations. In Maine, data may be collected to measure compliance with 2010 reforms intended to reduce the solitary confinement population, but they are not publicly available. In Georgia, West Virginia, New Hampshire and Vermont, no data appear to have been collected and these states have never participated in any of the CLA-Liman surveys. States which did not participate in the CLA-Liman surveys, but for which data are available from other sources, provide the statistics shown below.

[251] CLA-LIMAN (2020), *supra* note 241, at 8.
[252] ASCA-LIMAN (2018), *supra* note 243, at 10.
[253] CLA-LIMAN (2020), *supra* note 241, at 14-15.
[254] *Id.* at 12.

2.5.1.2.1 California

As noted above, in 2018 CLA-Liman changed its definition of "restrictive housing" to make the term more inclusive. This new definition likely increased some jurisdictions' solitary confinement statistics, a fact which may explain why fewer jurisdictions provided figures for the 2018 and 2020 reports. Notably, jurisdictions with large prison and restrictive housing populations, such as Florida and California, were among those that did not provide data for 2018 or 2020.

Under the earlier CLA-Liman definition of restrictive housing, California was able to report a low number of people in solitary. The 2016 CLA-Liman report recorded that as of September 30, 2015, California had only 1,104 people in restrictive housing out of a total prison population of 117,171. This is because most people in restrictive housing were allowed at least ten hours out of their cells each week, but those ten hours were unevenly distributed throughout the week, so that on some days people were in their cells for less than twenty-two hours a day. Thus the 1,104 number provided by California was simply the population of men held in solitary confinement at Pelican Bay. The state's claim that it had no women in restrictive housing seems suspect for the same reason.

A more accurate account of California's restrictive housing population can be obtained by considering the number of people held in such housing for between sixteen and twenty-four hours per day. Consideration of this number, as reported in CLA-Liman's 2016 report, resulted in an additional 7,225 people. Since California implemented reforms to its restrictive housing policies in response to *Ashker v. Governor of California*, its restrictive housing population has dropped even as the litigation continues, more than ten years after it began.[255]

Although California did not provide data for the 2018 or 2020 CLA-Liman reports, its own statistics for May 2019 record that at the end of that month, the state held 3,408 people, 830 of them female, in some form of solitary confinement such as administrative segregation, SHUs in supermax prisons, and short-term restricted housing.[256] The statistics include some information

[255] *See infra* section 5.3.3.
[256] California Department of Corrections and Rehabilitation, *Monthly Report of Population as of Midnight May 31, 2019*, https://www.cdcr.ca.gov/research/wp-

about the length of time that people are held in solitary confinement, but no data are provided about race or age.

2.5.1.2.2 Federal Bureau of Prisons

The FBOP did not provide data for CLA-Liman's 2020 report. Under the First Step Act of 2018, the Director of the FBOP must now include in data submitted for the National Prisoner Statistics Program the number of people placed in solitary confinement at any time during the previous year.[257] In February 2021, the Bureau of Justice published statistics regarding people incarcerated in federal prisons during 2018 and 2019. In 2018, 11,675 people were held in solitary confinement in federal prisons, constituting 6.4 percent of the total federal prison population. In 2019, 12,035 people were held in solitary confinement in federal prisons, making up 6.8 percent of the total prison population.[258] According to the report, some of these records may have included the same people if they were held in segregation more than once during the year.

More detailed data about people in solitary confinement in federal prisons can be found in the CLA-Liman reports. According to the 2018 report, as of fall 2017, 7,974 people (7,873 men and 101 women) were held in restrictive housing in federal prisons. The percentage of men in restrictive housing in federal prisons was 5.5 percent; while 0.01 percent of women were in restrictive housing.[259] The racial composition of people in restrictive housing in federal prisons in 2015 and 2017 is shown in the following tables.

content/uploads/sites/174/2019/06/Tpop1d1905.pdf?label=View%20May%202019%20Report&from=https://www.cdcr.ca.gov/research/monthly-total-population-report-archive-2019/.

[257] *See infra* section 5.1.2.6.

[258] U.S. DEP'T OF JUST., BUREAU OF JUST. STATISTICS, FEDERAL PRISONER STATISTICS COLLECTED UNDER THE FIRST STEP ACT, 2020 4 (2021).

[259] ASCA-LIMAN (2018), *supra* note 243, at 27-34.

Table 1: Racial Composition of Men in Restrictive Housing and Total Prison Population in Federal Prisons, 2015 and 2017[260]

	2017[261] Total male RH population: 7,873	**2015[262]** Total male RH population: 8,827
White Men Percentage of Total Prison Population	28.8%	25%
Percentage of Restrictive Housing Population	27.0%	26%
Black Men Percentage of Total Prison Population	40.6%	36%
Percentage of Restrictive Housing Population	39.8%	36%
Hispanic Men Percentage of Total Prison Population	27.1%	35%
Percentage of Restrictive Housing Population	28.8%	34%
Asian Men Percentage of Total Prison Population	1.3%	1%
Percentage of Restrictive Housing Population	0.8%	1%
Native American Men Percentage of Total Prison Population	2.2%	No data
Percentage of Restrictive Housing Population	3.5%	No data

[260] Sources: ASCA-LIMAN (2018), *supra* note 243 at 28-30; ASCA-LIMAN (2016), *supra* note 242 at 37-38.
[261] ASCA-LIMAN (2018) defined "restrictive housing" as "separating prisoners from the general population and holding them in their cells for an average of 22 or more hours per day for 15 or more continuous days." *Id.* at 10.
[262] ASCA-LIMAN (2016) defined "restrictive housing" as "separating prisoners from the general population and holding them in cells for 22 hours per day or more, for 15 or more continuous days. The definition includes prisoners held in both single or double cells, if held for 22 hours per more in a cell, for 15 or more continuous days." ASCA-LIMAN (2016), *supra* note 242, at 16.

Table 2: Racial Composition of Women in Restrictive Housing and Total Prison Population in Federal Prisons, 2015 and 2017[263]

	2017 Total female RH population: 101	**2015** Total female RH population: 115
White Women Percentage of Total Prison Population	39.4%	40%
Percentage of Restrictive Housing Population	35.6%	34%
Black Women Percentage of Total Prison Population	22.2%	23%
Percentage of Restrictive Housing Population	36.6%	34%
Hispanic Women Percentage of Total Prison Population	33.1%	32%
Percentage of Restrictive Housing Population	24.8%	27%
Asian Women Percentage of Total Prison Population	2.1%	2%
Percentage of Restrictive Housing Population	0%	2%
Native American Women Percentage of Total Prison Population	3.1%	No data
Percentage of Restrictive Housing Population	3.0%	No data

2.5.1.2.3 Florida

Unlike many other states, Florida is something of an outlier in that it uses solitary confinement to manage nearly ten percent of its prison population, more than twice the national average, and it has not taken any steps to date to reduce its use of the practice.[264] According to the 2016 CLA-Liman report, Florida held 8,103 people in restrictive housing. As already noted, the 2016 report used a narrower definition of "restrictive housing" than the 2018 and 2020 reports; thus, Florida's restrictive housing population may have increased since the 2016 report.

[263] Sources: ASCA-LIMAN (2018), *supra* note 243, at 28-30; ASCA-LIMAN (2016), *supra* note 242, at 37-38.
[264] Harvard v. Inch Complaint, *supra* note 14, at 4.

2.5.1.2.4 Virginia

In accordance with a statute mandating the annual publication of information about people in solitary confinement, the Virginia Department of Corrections published "The Reduction of Restrictive Housing in the Virginia Department of Corrections" in October 2019.[265] According to the report, the state's restrictive housing population dropped from 1,513 to 521 between January 2016 and June 2019.[266] The report claims that there were 484 people in short-term restrictive housing, 37 people in a step-down program, and 602 in SAM Units, protective custody units not regarded as restrictive housing. There is no reference in the report to "long-term restrictive housing."[267]

The statute pursuant to which the report was published defines "restrictive housing" in the following broad terms:

> "Special-purpose bed assignments operated under maximum security regulations and procedures, and utilized under proper administrative process, for the personal protection or custodial management of offenders. The Department of Corrections' restrictive housing shall, at a minimum, adhere to the standards adopted by the American Correctional Association, the accrediting body for the corrections industry."[268]

Twenty-nine percent of people held in short-term restrictive housing in Virginia, according to the report, are held for thirty days or more. The length of time beyond thirty days is not reported. The state could be keeping these people in solitary confinement for months or years and still label them as "short-term." Because the statistics do not delineate the time spent in solitary confinement beyond thirty days, the actual length of Virginia's solitary confinement sentences is not known. Moreover, the report does not treat the stacking of separate sentences to solitary confinement as one continuous term.[269] It is possible, therefore, that people are held in solitary

[265] HAROLD W. CLARKE, THE REDUCTION OF RESTRICTIVE HOUSING IN THE VIRGINIA DEPARTMENT OF CORRECTIONS (2019).
[266] *Id.* at 2.
[267] *Id.* at 3-5.
[268] VA. CODE ANN. § 53.1-39.1(A) (West 2019).
[269] HAROLD W. CLARKE, *supra* note 265, at 9 ("If an offender was placed into and released from short-term restrictive housing or step down program multiple times during the year, each release is shown [separately] … in order to present the length of stay for each [time] in the step down program or short-term restrictive housing".).

confinement for weeks or months without interruption, but their confinement is recorded as a series of separate, shorter sentences.

The Virginia Chapter of the ACLU has questioned the accuracy of the state's figures.[270] In a lawsuit filed in May 2019, the ACLU alleged that at least 242 people had been held for years or decades in Virginia's two supermax prisons, Red Onion State Prison and Wallens Ridge State Prison.[271] The complaint also alleges that although disciplinary segregation in Virginia is explicitly limited to thirty days by the state's policy, people spend months in isolation for disciplinary infractions.[272]

The ACLU's lawsuit challenges the efficacy of Virginia's step down program, which was implemented in 2012 to reduce the size of the solitary confinement population.[273] The complaint describes the step down program as "a confusing maze that lacks transparency and clear benchmarks for progression to the next phase."[274] It alleges that people remain stuck in the program for months at a time and are frequently forced to restart it, all the while being kept in solitary confinement.

Some people are kept permanently in the step down program under a policy labeled "intensive management," which is simply solitary confinement by another name. According to the complaint, people in intensive management are held in permanent isolation even if they complete the step down program and do not commit any disciplinary infractions while they are in the program.[275] The "intensive management" designation is applied to people "with the potential for extreme and deadly violence, defined by a history of willingness to carry out serious or deadly harm or as a result of institutional charges with intent to cause serious harm or kill, or offenders with a high escape risk because of the offender's high profile or notorious crime."[276] These

[270] Frank Green, *Virginia Prison 'Restrictive Housing' Report Shows Its Use is in Decline*, RICHMOND TIMES DISPATCH, (Oct. 11, 2019), https://www.richmond.com/news/virginia/virginia-prison-restrictive-housing-report-shows-its-use-is-in/article_af118a46-a72c-5101-973d-92a2eca703cd.html.
[271] Thorpe et al. v. Virginia Dep't of Corr. Complaint, *supra* note 25.
[272] *Id.* at 32.
[273] *Id.*
[274] *Id.* at 34.
[275] *Id.* at 37.
[276] AM. CIV. LIBERTIES UNION VIRGINIA, SILENT INJUSTICE, *supra* note 16, at 26-27.

people have no meaningful opportunity to have their status reviewed or to progress to a less restrictive environment.

Virginia's Department of Corrections does not regard "intensive management" as solitary confinement; rather, it reports people held there as part of the general prison population, even though they are held in total isolation with severe restrictions on every aspect of their life.[277] Ostensibly complying with the policy that people in intensive management be kept in "single celled housing, segregated recreation and out of cell restraints," people are confined in small cells where they eat all their meals, and are subjected to body cavity searches every time they leave their cells.[278] In August 2016, eighty-four people were in intensive management.[279] The ACLU criticized the step down program in 2018, noting that the state's claimed success in implementing the program was "difficult, if not impossible, to evaluate due to a lack of mandatory reporting or tracking."[280]

2.5.2 Gender

For CLA-Liman's 2020 report, thirty-four jurisdictions provided disaggregated gender data. The responding jurisdictions reported an aggregate 4.28 percent of the total male prison population and 0.8 percent of the total female population in restrictive housing.[281] In absolute numbers, 30,473 males were held in restrictive housing across the reporting jurisdictions (the total male custodial population in those jurisdictions was 711,570) and 542 females were held in restrictive housing (out of a total female custodial population of 61,690).[282]

Most litigation about solitary confinement has focused on men's prisons. As a result, less is known about the conditions in women's prisons. However, it appears that though far fewer women are held in solitary confinement, their conditions are at least as harsh, and sometimes harsher than the men's.[283]

[277] Thorpe et al. v. Virginia Dep't of Corr. Complaint, *supra* note 25, at 26-27.
[278] *Id.* at 148.
[279] AM. CIV. LIBERTIES UNION VIRGINIA, SILENT INJUSTICE, *supra* note 16, at 27.
[280] *Id.* at 34.
[281] CLA-LIMAN (2020), *supra* note 241, at 18.
[282] *Id.* at 19-23.
[283] *See* AM CIV. LIBERTIES UNION, STILL WORSE THAN SECOND-CLASS, *supra* note 123, at 10.

Transgender people are usually held in prisons based on their sex at birth, despite the provisions of the Federal Prison Rape Elimination Act requiring an individual assessment of such persons to determine the best housing for them. Prison officials retain significant discretion.[284] Assignment according to sex at birth creates special vulnerability for transgender people in prison. In 2015, the Department of Justice reported that thirty-five percent of transgender people who had spent time in prison during the previous year were victims of sexual assault.[285] Advocates have noted that the assaults were likely undercounted given the risk of retaliation for reporting.[286]

Having been placed in prisons according to their assigned sex at birth, many transgender people are then placed in protective custody, allegedly for their own good. They may also face solitary confinement for disciplinary violations if they seek to express their gender identity in violation of grooming or dress requirements.[287]

Limited data are available about the number of transgender people held in solitary confinement, and jurisdictions have different methods of identifying such people. In the 2020 CLA-Liman report, twenty-four jurisdictions reported holding an aggregate of 2,371 transgender people in their general prison populations, and 112 people in restrictive housing.[288] The percentage of transgender people in restrictive housing ranged from 0 percent to 14.3 percent of all transgender incarcerated people.[289] Given the limited record-keeping and the variance in identifying transgender people in prison, it is likely that a greater number of transgender people are held in some form of solitary confinement.[290]

2.5.3 Age

Of the thirty-two jurisdictions that provided data about the age of their solitary confinement populations for the 2020 CLA-Liman report, men and women aged 26 - 35 constitute the

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[284] Kate Sosin, *Trans, Imprisoned – and Trapped*, NBC NEWS (Feb. 26, 2020), https://www.nbcnews.com/feature/nbc-out/transgender-women-are-nearly-always-incarcerated-men-s-putting-many-n1142436.
[285] U.S. DEP'T OF JUST., BUREAU OF JUST. STATISTICS, PREA DATA COLLECTION ACTIVITIES 2015.
[286] Kate Sosin, *supra* note 284.
[287] Annette Brömdal et al., *Whole-Incarceration-Setting Approaches to Supporting and Upholding the Rights and Health of Incarcerated Transgender People*, 20 INTERNATIONAL JOURNAL OF TRANSGENDERISM, 341 (2019).
[288] CLA-LIMAN (2020), *supra* note 241, at 58.
[289] *Id.*
[290] *See, e.g.,* BLACK & PINK, COMING OUT OF CONCRETE CLOSETS: A REPORT ON BLACK & PINK'S NATIONAL LGBTQ PRISONER SURVEY (2015) (finding that out of the total number of LGBTQ people surveyed, 85 percent reported having been held in solitary confinement at some point during their sentence).

majority of restrictive housing populations. The data for males show 16.2 percent of those in restrictive housing are between the ages of 18 and 25; 41.6 percent are aged 26 - 35; 32.4 percent are between the ages of 36 and 50; and 9.8 percent are 50 or older. The statistics for females in restrictive housing are: 21.4 percent are between the ages of 18 and 25; 44.9 percent are aged 26 - 35; 24.3 percent are 36 - 50, and 5.6 percent are older than 50.[291]

These statistics exclude young people held in juvenile detention centers. Limited data about the solitary confinement populations in these facilities are available. According to the 2016 Juvenile Residential Facility Census, twenty-two percent of facilities reported holding youth in isolation rooms for four hours or more.[292] In 2014, the Federal Government banned the solitary confinement of people under eighteen.[293] Twenty states have banned or limited the solitary confinement of young people through legislation or administrative rules.[294] Nevertheless, a small number of people under the age of eighteen, having been moved to adult prisons, are then placed in solitary confinement. This may be due to a requirement in the Prison Rape Elimination Act requires that young people be kept entirely separate from adults.[295] According to the CLA-Liman 2020 report, four jurisdictions reported holding a total of eight people under the age of eighteen in restrictive housing.[296]

The use of solitary confinement for older people is an increasing problem as prison populations age. Such confinement exacerbates the physical and mental deterioration experienced by older people in prison, which includes memory loss, confusion, and heart disease. In addition, the lack of sensory stimulation and access to medical care is inconsistent with standard expectations of care for older people, particularly individuals with dementia.[297]

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[291] CLA-LIMAN (2020), *supra* note 241, at 37.
[292] U.S. DEP'T OF JUST., JUVENILE RESIDENTIAL FACILITY CENSUS 2016: SELECTED FINDINGS (2018).
[293] *See infra* section 5.4.6.
[294] *See infra* section 5.1.2.1.
[295] Wendy Sawyer, *Youth Confinement: The Whole Pie 2019*, PRISON POLICY INITIATIVE (Dec. 19, 2019), https://www.prisonpolicy.org/reports/youth2019.html.
[296] CLA-LIMAN (2020), *supra* note 241, at 35-36.
[297] *See* discussion *supra* section 2.4.2.4.

2.5.4 Race and Ethnicity

The racial and ethnic disparities in America's criminal justice system are well-documented. Confinement in solitary facilities reflects a further exacerbation of the disproportionately high rates of incarceration of Black and Latino people.

The disparity in the total prison population is most evident for Black Americans, but Latino people are also overrepresented throughout the criminal justice system. Black and Latino people are more likely than whites to be arrested; once arrested, to be convicted; and once convicted, to receive long prison sentences. In 2016, Black Americans represented 27 percent of all those arrested in the US, more than double their share of the total population. They were 3.5 times more likely to be held in pre-trial detention than non-Hispanic whites. Black and Latino adults combined constitute 29 percent of the total US population, but make up 57 percent of the country's prison population. In 2016, 48 percent of adults serving life sentences were Black and 15 percent were Latino.[298]

The asymmetric racial composition of people in solitary confinement shows similar phenomena. A 2019 report by the Southern Poverty Law Center reflects pronounced racial disparities in Florida's use of solitary confinement. As of December 2018, over 60 percent of people so held were Black (compared to 47 percent of the prison population), while only 34.5 percent were white (compared to 40.1 percent of the prison population).[299]

2.5.4.1 CLA-Liman 2020 Racial Data Regarding Men in Restrictive Housing

The 2020 CLA-Liman report showed the racial composition of people in restrictive housing through data provided by thirty-two jurisdictions. These jurisdictions held a total of 28,155 people in restrictive housing, which is estimated to constitute between 45 and 51.2 percent of the total population in restrictive housing in the US.[300] Of these thirty-two jurisdictions, Black men comprised 43.4 percent of the total male restrictive housing population, as compared to 40.5 percent of the total prison population. In contrast, white men constituted 36.9 percent of the

[298] THE SENTENCING PROJECT, REPORTING TO THE UNITED NATIONS SPECIAL RAPPORTEUR ON CONTEMPORARY FORMS OF RACISM, RACIAL DISCRIMINATION, XENOPHOBIA, AND RELATED INTOLERANCE REGARDING RACIAL DISPARITIES IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM 1-8 (2018).
[299] SOUTHERN POVERTY LAW CENTER, *supra* note 54, at 8.
[300] CLA-LIMAN (2020), *supra* note 241, at 25.

restrictive housing population and 41.4 percent of the total prison population. Only two states (Mississippi and Tennessee) reported having a higher percentage of white men in restrictive housing than in the total prison population.[301]

Like many other prison statistics, the CLA-Liman reports do not distinguish between race and ethnicity, and they treat Hispanic or Latino people as a standalone category. This section therefore includes data about Hispanic or Latino people in solitary confinement as reported by CLA-Liman. Of the jurisdictions that provided racial and ethnic data to CLA-Liman for the 2020 report, Hispanic men constituted 16.9 percent of the restrictive housing population and 15.4 percent of the total male prison population.[302] Native American men constituted 2.1 percent of the restrictive housing population and 1.7 percent of the total prison population, and Asian men constituted 0.3 percent of the restrictive housing population and 0.5 percent of the total prison population.[303]

Table 3: Racial Composition of Men in Restrictive Housing and Total Prison Population in the Five Jurisdictions with the Largest Restrictive Housing Populations Included in CLA-Liman (2020) Report[304]

	Texas Total male RH population: 4,326	**Missouri** Total male RH population: 2,187	**Georgia** Total male RH population: 2,118	**New York** Total male RH population: 2,074	**Arizona** Total male RH population: 1,919
White Men Percentage of Total Prison Population	31.8%	61.8%	34.6%	23.7%	37.8%
Percentage of Restrictive Housing Population	24.5%	55.7%	27.5%	19.1%	23.1%

[301] *Id.* at 30-31.
[302] *Id.* at 24.
[303] *Id.*
[304] Source: CLA-LIMAN (2020), *supra* note 241, at 29-31.

	Texas Total male RH population: 4,326	**Missouri** Total male RH population: 2,187	**Georgia** Total male RH population: 2,118	**New York** Total male RH population: 2,074	**Arizona** Total male RH population: 1,919
Black Men Percentage of Total Prison Population	33.5%	36.4%	61.3%	49.6%	15.2%
Percentage of Restrictive Housing Population	25.5%	43.7%	68.8%	54.4%	17.1%
Hispanic Men Percentage of Total Prison Population	34.1%	2.0%	3.6%	23.2%	39.8%
Percentage of Restrictive Housing Population	49.9%	0%	3.5%	23.9%	50.4%
Asian Men Percentage of Total Prison Population	0.4%	0.2%	0.3%	0.6%	0.4%
Percentage of Restrictive Housing Population	0.1%	0.1%	0.1%	0.2%	0.2%
Native American Men Percentage of Total Prison Population	0%	0.3%	0%	0.9%	5.2%
Percentage of Restrictive Housing Population	0%	0.3%	0%	0.8%	8.2%

As shown by the above table, in all five of these jurisdictions, white men constitute a smaller percentage of the restrictive housing population than the general prison population. In contrast, in four of the five jurisdictions, Black men are overrepresented in restrictive housing compared to their number in prison generally. The same is true for Hispanic men in three of the five jurisdictions.

2.5.4.2 CLA-Liman 2020 Racial Data Regarding Women in Restrictive Housing

With respect to women in restrictive housing, six of the thirty-two reporting jurisdictions had a higher number of white women in restrictive housing compared to their number in the overall

prison population. It should be noted, however, that the number of women in restrictive housing is small in absolute terms. The total number of women held in restrictive housing among the jurisdictions that reported racial and ethnic data to CLA-Liman in 2020 was 497, compared to 28,149 men.

The percentage of Black women in restrictive housing (42.1 percent) was significantly higher than their percentage of the total prison population (21.5 percent). Hispanic women comprised 9.3 percent of the female restrictive housing population as compared to 10.3 percent of the total female prison population.[305]

Table 4: Racial Composition of Women in Restrictive Housing and Total Prison Population in the Four Jurisdictions with the Largest Restrictive Housing Populations Included in CLA-Liman (2020) Report [306]

	Texas Total female RH population: 75	**Missouri** Total female RH population: 71	**North Carolina** Total female RH population: 48	**Wisconsin** Total female RH population: 39
White Women Percentage of Total Prison Population	54.0%	82.8%	69.1%	65.3%
Percentage of Restrictive Housing Population	10.7%	60.6%	50.0%	35.9%
Black Women Percentage of Total Prison Population	23.5%	14.7%	26.3%	22.2%
Percentage of Restrictive Housing Population	50.7%	36.6%	41.7%	56.4%
Hispanic Women Percentage of Total Prison Population	22.0%	3.2%	2.0%	3.3%
Percentage of Restrictive Housing Population	38.7%	0%	2.1%	2.6%
Asian Women Percentage of Total Prison Population	0.4%	0.8%	0.2%	8.2%
Percentage of Restrictive Housing Population	0%	1.4%	0%	0%

[305] CLA-LIMAN (2020), *supra* note 241, at 35.
[306] *Id.* at 32-34.

	Texas Total female RH population: 75	**Missouri** Total female RH population: 71	**North Carolina** Total female RH population: 48	**Wisconsin** Total female RH population: 39
Native American Women Percentage of Total Prison Population	0.1%	0.8%	2.2%	8.2%
Percentage of Restrictive Housing Population	0%	1.4%	6.2%	5.1%

2.5.4.3 Racial Data in States that have Introduced Significant Legislative or Policy Reforms

The following tables show that racial disparities in the use of restrictive housing, according to data provided to CLA-Liman, have not changed significantly between 2015 and 2019 in jurisdictions that have implemented legislative or administrative reforms. For the sake of completeness, it is noted here that not all jurisdictions provided data for all of the CLA-Liman reports. The available data are shown in the tables below. Racial data pertaining to females in restrictive housing in these states are not included because it is difficult to draw any conclusions given the small numbers of women in restrictive housing in each single jurisdiction.

Table 5: Racial Composition of Men in Restrictive Housing and Total Prison Population in Colorado, 2014-2017[307]

	2017 Total male RH population: 10	**2015** Total male RH population: 214	**2014[308]** Total male administrative segregation population: 207
White Men Percentage of Total Prison Population	45.0%	45%	45%
Percentage of Restrictive Housing Population	20.0%	38%	25%

[307] Sources: ASCA-LIMAN (2018), *supra* note 243, at 28-30; ASCA-LIMAN (2016), *supra* note 242, at 37-38; ASS'N OF STATE CORRECTIONAL ADMINISTRATORS AND THE LIMAN PROGRAM, YALE LAW SCHOOL, TIME-IN-CELL: THE LIMAN-ASCA 2014 NATIONAL SURVEY OF ADMINISTRATIVE SEGREGATION IN PRISON 32 (2015) [hereinafter *ASCA-LIMAN (2015)*].

[308] ASCA-LIMAN (2015) defined "administrative segregation" as "separating prisoners from the general population, typically in cells, either alone or with cellmates, and holding them in their cells for most of the hours of the day for thirty days or more. Common terms for this type of confinement include administrative detention, intensive management, and restrictive housing. Please note that administrative segregation does not include punitive/disciplinary segregation or protective custody." ASCA-LIMAN (2015), *supra* note 307, at 10-11.

	2017 Total male RH population: 10	**2015** Total male RH population: 214	**2014**[308] Total male administrative segregation population: 207
Black Men Percentage of Total Prison Population	18.2%	19%	19%
Percentage of Restrictive Housing Population	20.0%	14%	21%
Hispanic Men Percentage of Total Prison Population	32.5%	32%	32%
Percentage of Restrictive Housing Population	60.0%	43%	51%
Asian Men Percentage of Total Prison Population	1.1%	1%	1%
Percentage of Restrictive Housing Population	0%	0%	0%
Native American Men Percentage of Total Prison Population	3.1%	No data	No data
Percentage of Restrictive Housing Population	0%	No data	No data

Table 6: Racial Composition of Men in Restrictive Housing and Total Prison Population in Massachusetts, 2014-2019[309]

	2019 Total male RH population: 1	**2017** Total male RH population: 420	**2015** Total male RH population: 447	**2014** Total male administrative segregation population: 340
White Men Percentage of Total Prison Population	41.5%	42.8%	43%	43%
Percentage of Restrictive Housing Population	100%	35.5%	37%	40%
Black Men Percentage of Total Prison Population	28.5%	27.9%	29%	29%
Percentage of Restrictive Housing Population	0%	31.4%	35%	35%

[309] Sources: CLA-LIMAN (2020), *supra* note 241 at, 29-31; ASCA-LIMAN (2018), *supra* note 243 at 29-30; ASCA-LIMAN (2016), *supra* note 242, at 38; ASCA-LIMAN (2015), *supra* note 307, at 32.

	2019 Total male RH population: 1	**2017** Total male RH population: 420	**2015** Total male RH population: 447	**2014** Total male administrative segregation population: 340
Hispanic Men Percentage of Total Prison Population	27.1%	26.5%	26%	25%
Percentage of Restrictive Housing Population	0%	30%	25%	22%
Asian Men Percentage of Total Prison Population	1.4%	1.4%	1%	1%
Percentage of Restrictive Housing Population	0%	2.1%	2%	2%
Native American Men Percentage of Total Prison Population	0.6%	0.7%	No data	No data
Percentage of Restrictive Housing Population	0%	0.2%	No data	No data

Table 7: Racial Composition of Men in Restrictive Housing and Total Prison Population in Minnesota, 2015 and 2019[310]

	2019 Total male RH population: 246	**2015** Total male RH population: 602
White Men Percentage of Total Prison Population	50.1%	45%
Percentage of Restrictive Housing Population	32.9%	28%
Black Men Percentage of Total Prison Population	38.6%	36%
Percentage of Restrictive Housing Population	41.1%	45%
Hispanic Men Percentage of Total Prison Population	0%	7%

[310] Sources: CLA-LIMAN (2020), *supra* note 241, at 29-31; ASCA-LIMAN (2016), *supra* note 242, at 37-38.

	2019 Total male RH population: 246	**2015** Total male RH population: 602
Percentage of Restrictive Housing Population	0%	7%
Asian Men Percentage of Total Prison Population	2.8%	3%
Percentage of Restrictive Housing Population	0%	1%
Native American Men Percentage of Total Prison Population	8.3%	No data
Percentage of Restrictive Housing Population	23.2%	No data

Table 8: Racial Composition of Men in Restrictive Housing and Total Prison Population in Nebraska, 2015-2019[311]

	2019 Total male RH population: 253	**2017** Total male RH population: 389	**2015** Total male RH population: 589
White Men Percentage of Total Prison Population	51.1%	51.8%	55%
Percentage of Restrictive Housing Population	43.5%	44.7%	52%
Black Men Percentage of Total Prison Population	28.3%	28.6%	27%
Percentage of Restrictive Housing Population	26.5%	29.0%	23%
Hispanic Men Percentage of Total Prison Population	14.7%	13.8%	13%
Percentage of Restrictive Housing Population	22.1%	19.3%	18%
Asian Men Percentage of Total Prison Population	0.8%	0.8%	1%
Percentage of Restrictive Housing Population	0%	0.3%	1%

[311] Sources: CLA-LIMAN (2020), *supra* note 241, at 29-31, ASCA-LIMAN (2018), *supra* note 243, at 28-30; ASCA-LIMAN (2016), *supra* note 242, at 37-38.

	2019 Total male RH population: 253	**2017** Total male RH population: 389	**2015** Total male RH population: 589
Native American Men Percentage of Total Prison Population	4.3%	4.1%	No data
Percentage of Restrictive Housing Population	7.5%	5.9%	No data

Table 9: Racial Composition of Men in Restrictive Housing and Total Prison Population in New Jersey, 2014-2017[312]

	2017 Total male RH population: 1,143	**2015** Total male RH population: 1,316	**2014** Total male administrative segregation population: 1,076
White Men Percentage of Total Prison Population	20.4%	22%	22%
Percentage of Restrictive Housing Population	21.4%	19%	17%
Black Men Percentage of Total Prison Population	61.8%	60%	60%
Percentage of Restrictive Housing Population	61.3%	63%	68%
Hispanic Men Percentage of Total Prison Population	15.6%	16%	17%
Percentage of Restrictive Housing Population	15.0%	17%	13%
Asian Men Percentage of Total Prison Population	0.6%	1%	1%
Percentage of Restrictive Housing Population	0.4%	0%	0%
Native American Men Percentage of Total Prison Population	0%	No data	No data
Percentage of Restrictive Housing Population	0%	No data	No data

[312] Sources: ASCA-LIMAN (2018), *supra* note 243, at 28-30; ASCA-LIMAN (2016), *supra* note 242, at 37-38; ASCA-LIMAN (2015), *supra* note 307, at 32.

Table 10: Racial Composition of Men in Restrictive Housing and Total Prison Population in New York, 2015-2019[313]

	2019 Total male RH population: 2,074	**2017** Total male RH population: 2,630	**2015** Total male RH population: 4,410
White Men Percentage of Total Prison Population	23.7%	23.4%	24%
Percentage of Restrictive Housing Population	19.1%	18.1%	17%
Black Men Percentage of Total Prison Population	49.6%	48.7%	50%
Percentage of Restrictive Housing Population	54.4%	55.2%	56%
Hispanic Men Percentage of Total Prison Population	23.2%	24.7%	23%
Percentage of Restrictive Housing Population	23.9%	23.8%	24%
Asian Men Percentage of Total Prison Population	0.6%	0.5%	0%
Percentage of Restrictive Housing Population	0.2%	0.2%	0%
Native American Men Percentage of Total Prison Population	0.9%	0.8%	No data
Percentage of Restrictive Housing Population	0.8%	0.8%	No data

2.5.4.4 Examination of Racial Disparities

According to a small number of studies that have examined the racial disparities in the use of solitary confinement, race does not always play a decisive role in the use of the practice, after controlling for factors such as the reported commission of infractions.[314] At least one study has, however, indicated that race remained a factor in determining the likelihood of placement in restrictive housing. That study concluded that Native American men were more likely to be held

[313] Sources: CLA-LIMAN (2020), *supra* note 241, at 29-31, ASCA-LIMAN (2018), *supra note* 243, at 28-30; ASCA-LIMAN (2016), *supra* note 242, at 37-38; ASCA-LIMAN (2015), *supra* note 307, at 32.
[314] *See, e.g.,* Joshua C. Cochran et al., *Solitary Confinement as Punishment: Examining In-Prison Sanctioning Disparities*, 35 JUST. QUARTERLY 381 (2017) (reviewing administrative records from Florida Department of Corrections from 2005-2011 and concluding that after controlling for variation in commission of infractions, race did not feature in decisions to place people in disciplinary segregation).

in restrictive housing than white men, but Black and Latino men were less likely to be so placed. The state that was the subject of this research was not identified by name in the study.[315]

The value of these studies depends on the quality of the administrative records used for the data analysis. It is clear that the records in some states do not accurately represent solitary confinement populations. Moreover, while the studies control for factors such as commission of offenses that lead to disciplinary segregation, they do not examine whether bias may lead prison officers to report disciplinary infractions by non-white people for behavior that is overlooked when it involves white people. These studies should also be viewed with caution because they focus on one or two types of solitary confinement and extrapolate their conclusion about the practice in general from a limited sample.

While the disproportionate assignment of Black, Latino, and Native American people to solitary confinement results from a number of factors, the broad discretion exercised by prison officials and the deference granted to their decisions by the courts play a significant part. Prison officials have considerable discretion in determining security classifications, the issuance of disciplinary violations, and decisions on how long people spend in solitary confinement and under what conditions. Moreover, unlike other parts of the criminal justice system where different agencies bear responsibility at different stages of the proceedings (arrests, charges, sentences, and appeals), all decisions about prison discipline, including reviews and appeals, are made by prison officers alone.[316]

Prison officials enforce broad and overly vague disciplinary rules which frequently penalize conduct that may be commonplace outside of the institution. Rules prohibiting behavior such as "insolence" enable prison officials to punish people for almost any behavior that is deemed objectionable. A 2016 New York Times review of 60,000 disciplinary cases in New York prisons revealed that racial disparities were most evident in the case of infractions involving the exercise of discretion by officers, such as rules against disobeying direct orders. The disparities

[315] *See, e.g.,* Melinda Tasca & Jillian Turanovic, *Examining Race and Gender Disparities in Restrictive Housing Placements*, NATIONAL CRIMINAL JUSTICE REFERENCE SERVICE (2018) (reviewing administrative records on all people released from prison in one large state between 2011 and 2014 and concluding that Native American men were more likely to be placed into restrictive housing or disciplinary segregation than white men, whereas Latino and Black men were less likely than white men to be placed into restrictive housing or disciplinary segregation).
[316] Andrea C. Armstrong, *Race, Prison Discipline, and the Law*, 5 UC IRVINE L. REV. 759, 777 (2015).

were less pronounced for violations that required physical evidence, like possession of contraband.[317]

Although there are limited data available about the way these rules are enforced, implicit racial bias likely influences decisions about whose behavior constitutes "insolence." These vague standards may also lead to the punishment of people exhibiting symptoms of mental illness. As non-white people are less likely to receive a diagnosis of mental illness,[318] they may be more likely to be subject to disciplinary violations relating to conduct stemming from such illness.

The courts' deference to prison administrators is shown by the federal court rule that only "some evidence" is needed to meet the standard for a disciplinary violation.[319] The few administrative prison standards that are subject to strict scrutiny, such as race-based housing assignments, require proof of discriminatory intent.[320] It is difficult to prove such intent when assignment results from systemic and structural arrangements rather than the specific decisions of individual prison guards.[321] This is further complicated by a total absence of transparency around prison officials' decision-making. The legal framework, including the courts' tendency to grant deference to prison officials, is discussed in the following chapters.

[317] Michael Schwirtz et al., *The Scourge of Racial Bias in New York State's Prisons*, NEW YORK TIMES (Dec. 3, 2016) https://www.nytimes.com/2016/12/03/nyregion/new-york-state-prisons-inmates-racial-bias.html.
[318] *Racial Disparities in Mental Illness and Criminal Justice*, NATIONAL ALLIANCE ON MENTAL ILLNESS https://www.nami.org/Blogs/NAMI-Blog/July-2019/Racial-Disparities-in-Mental-Health-and-Criminal-Justice.
[319] *See infra* section 3.2.3.
[320] Andrea C. Armstrong, *supra* note 316, at 760.
[321] *Id.*

CHAPTER 3. FEDERAL CONSTITUTIONAL JURISPRUDENCE

Introduction

This chapter examines the development of federal constitutional jurisprudence relating to solitary confinement. Despite the Court's pronouncement in *Wolff v. McDonnell* that "there is no iron curtain drawn between the Constitution and the prisons of this country,"[1] federal courts have gradually imposed stringent tests that limit meaningful constitutional oversight.

Through the development of complex tests to prove both Eighth Amendment and Due Process challenges to solitary confinement, in combination with the statutory barriers presented by the Prison Litigation Reform Act ("PLRA"), many federal court decisions appear to reflect the archaic common law concept of civil death. Under that principle, a person who was outlawed or convicted of a serious crime lost rights of access to the courts.[2] In 1871, the Supreme Court of Appeals of Virginia held that a person convicted of a felony was entitled only to the rights afforded to incarcerated people by statute, and not to any rights in the state's constitution.[3] Though the courts rejected that notion during the 1960s and 1970s, the Supreme Court nevertheless expressed reservations about intervening in the internal affairs of prisons and emphasized the need for deference to the judgments of prison officials.[4]

Even when the Supreme Court first applied the Eighth Amendment to conditions of confinement in *Rhodes v. Chapman* in 1981, it was compelled to state that "the Constitution does not mandate comfortable prisons."[5] In Due Process challenges to solitary confinement, the courts assess conditions based on the "ordinary incidents of prison life," which have led some courts to treat long-term solitary confinement as an acceptable baseline despite the extreme deprivation

[1] 418 U.S. 539, 555-56 (1974).
[2] *Civil Death,* BLACK'S LAW DICTIONARY (11th ed. 2019).
[3] Ruffin v. Commonwealth, 21 Gratt. 790 (1871).
[4] Procunier v. Martinez, 416 U.S. 394, 404-405 (1974). *See also* Howard Eisenberg, *Rethinking Prisoner Rights Cases and the Provision of Counsel*, 17 S. ILL. U.L.J. 417, 423, 426 (1993).
[5] Rhodes v. Chapman, 452 U.S. 337, 347 (1981).

experienced by people living in such conditions. Equal Protection jurisprudence has also had limited influence on solitary confinement with only a few successful challenges to date.

3.1 Eighth Amendment

The Eighth Amendment's prohibition on cruel and unusual punishments was taken from the English Bill of Rights of 1689. Significantly, the provision in the latter was intended to prohibit punishments not specifically authorized by statute or by a sentencing judge.[6] Despite its derivation, the Eighth Amendment, as interpreted by US courts, has not incorporated that prohibition.

In 1958, the Supreme Court in *Trop v. Dulles* announced the general approach of federal courts, stating that the words of the Eighth Amendment

> "are not precise, and … their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[7]

The Supreme Court considers different sources to determine the meaning of "evolving standards of decency." On occasion, it has had regard to foreign and international law. Thus in *Trop v. Dulles*, a plurality observed that "the civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for a crime."[8] In *Atkins v. Virginia*, a majority of the Court acknowledged that imposition of the death penalty on intellectually disabled people was "overwhelmingly disapproved" within the world community, [9] and in *Roper v. Simmons*, the majority referred to the "overwhelming weight of international opinion against the juvenile death penalty."[10] The majority in *Roper* observed that while foreign opinion was not controlling, it provided "respected and significant confirmation" for the Court's own conclusion.[11]

Another source that the Court has considered relevant to the meaning of "evolving standards of decency" is evidence of a national consensus reflected by state legislation and practice. In *Roper*, the Court explained that these "objective indicia of consensus" provided "essential

[6] COLIN DAYAN, THE STORY OF CRUEL AND UNUSUAL 6 (2007).
[7] Trop v. Dulles, 315 U.S. 86, 101 (1958) (plurality opinion).
[8] *Id.* at 102-103.
[9] 536 U.S. 304, 317 (2002).
[10] 543 U.S. 551, 578 (2005).
[11] *Id.*

instruction," but went on to note that it was the Court's role to exercise its own independent judgment as to whether the death penalty was a disproportionate punishment for juveniles in violation of the Eighth Amendment.[12] The rejection of the juvenile death penalty in the majority of states, and its infrequent use in states where the penalty remained in existence, the Court held, constituted sufficient evidence that society viewed juveniles as "categorically less culpable than the average criminal."[13]

In 1962, the Supreme Court in *Robinson v. California* held that the provisions of the Eighth Amendment apply to the states through the Fourteenth Amendment.[14] It was only in 1978 that the Supreme Court first addressed conditions of confinement in the case of *Hutto v. Finney*, holding that they were subject to scrutiny under the Eighth Amendment.[15] There, the Court affirmed a remedial order entered by the district court to address cruel and unusual conditions in Arkansas' prison system. One of the requirements of the remedial order was a thirty-day limitation on placements in solitary confinement. Generally, however, challenges to solitary confinement based on the Eighth Amendment's prohibition against cruel and unusual punishment have had mixed success. The courts have held that "the mere fact of solitary confinement does not, in and of itself, violate the Eighth Amendment."[16]

The Court has developed a two-part test to assess whether conditions within prisons violate the Eighth Amendment. The test comprises an objective component, i.e., proof that a given condition or deprivation is "sufficiently serious," and a subjective component, i.e., that it was inflicted with "deliberate indifference."[17] The test has resulted in limited scrutiny of prison conditions, including solitary confinement.

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[12] *Id.* at 564.
[13] *Id.* at 567 (quoting Atkins v. Virginia, 536 U.S. 304, 316 (2002)).
[14] Robinson v. California, 370 U.S. 600 (1962) (holding a California statute that imposed a sentence of imprisonment upon conviction of the offense of addiction to narcotics to be cruel and unusual in violation of the Eighth and Fourteenth Amendments).
[15] Hutto v. Finney, 437 U.S. 678 (1978).
[16] Brown v. Faucher, No. 3:19-CV-00690, 2019 WL 3231205 at *3 (D. Conn. July 18, 2019), (citing Hutto v. Finney, 437 U.S. 678, 686 (1978)).
[17] Wilson v. Seiter, 501 U.S. 294, 298 (1991).

3.1.1 Sufficiently Serious Conditions

To establish a sufficiently serious condition or deprivation, proof of serious harm or a "substantial risk of serious harm" is required.[18] The standard is high. In *Rhodes v. Chapman*, the Court held that double-celling in cells designed to hold a single person did not violate the Eighth Amendment. Writing for the majority, Justice Powell stated that the Constitution "does not mandate comfortable prisons," and only deprivations that deny "the minimal civilized measure of life's necessities" meet the standard of an Eighth Amendment violation.[19] In *Hudson v. McMillian*, a case concerning the excessive use of force by prison officers who assaulted a man while he was handcuffed and shackled, the Court reasoned that "extreme deprivations are required to make out a conditions of confinement claim" because "routine discomfort is part of the penalty that criminal offenders pay for their offenses against society."[20] In one case, the fact that a person spent thirty years in solitary confinement did not satisfy the objective test.[21] Even the extreme practice of placing people in isolation in "strip cells" without sheets, blankets, or clothing has not been regarded as a sufficiently serious deprivation.[22]

The courts have further held that to establish a violation, the conditions challenged must result in the deprivation of a single need. Solitary confinement, however, rarely presents a single deprivation. The Court in *Wilson v. Seiter* held that a combination of unfavorable conditions may violate the Eighth Amendment when any single one of them would not do so, but the conditions must have a "mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth or exercise – for example, a low cell temperature at night combined with a failure to issue blankets."[23] The Court said that "nothing so amorphous as 'overall conditions' can rise to the level of cruel and unusual punishment" when there is no deprivation of a single need.[24]

The complaint in *Wilson v. Seiter* alleged that conditions within an Ohio prison violated the Eighth and Fourteenth Amendments. Specifically, it asserted that the prison was overcrowded,

[18] Farmer v. Brennan, 511 U.S. 825, 834 (1994).
[19] Rhodes v. Chapman, 452 U.S. 337, 347, 349 (1981).
[20] Hudson v. McMillian, 503 U.S. 1 (1992) (quoting Rhodes v. Chapman, 452 U.S. at 347).
[21] Isby v. Brown, 856 F.3d 508, 522, 524 (7th Cir. 2017).
[22] Guinn v. Rispoli, 323 Fed. Appx. 105, 107, 108 (3d Cir. 2009).
[23] Wilson, 501 U.S. at 304.
[24] *Id.*

with people double-bunked in dormitories and allocated less than fifty square feet of space each. Temperatures were said to be excessively high in the summer which gave rise to heat-related rashes and respiratory problems, while in winter the dormitory was "nearly frigid," and people were not given enough clothes to keep warm. The complaint further contended that bathrooms were dirty and slippery, and the food services posed a serious threat because of inadequate sanitation, ventilation, and drainage. Housing assignments were said to contribute to a dangerous and stressful environment, because people were not classified in accordance with regulations, and people with physical and mental illnesses were housed in the wrong dormitories.[25]

Writing for the majority, Justice Scalia rejected a proposed distinction between "short-term" or "one-time" conditions in which proof of an official's state of mind would be required to establish an Eighth Amendment violation, and continuing or systemic conditions where no proof of mindset would be necessary.[26] Rather, the majority required proof of deliberate indifference, in addition to proof that the condition in issue is sufficiently serious. The *Wilson* Court's rejection of a broader "totality of conditions" approach is problematic for challenges to solitary confinement. The combination of factors which sustain the practice may result in a range of harms rather than a single deprivation. Because of the Court's narrow approach, many challenges to solitary confinement focus on a single element of the practice, such as constant lighting,[27] lack of outdoor exercise,[28] or inadequate food.[29] Thus the actual experience of living in solitary confinement becomes diminished due to the artificial focus on a single deprivation. The test's requirement for proof of a single deprivation also appears to disregard the fact that solitary confinement produces lasting harm that manifests itself in different ways.[30]

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[25] Brief for Petitioner at 3, Wilson v. Seiter, 501 U.S. 294 (1991) (No. 89-7376).
[26] Wilson, 501 U.S. at 300.
[27] Obama v. Burl, 477 Fed. Appx. 409 (8th Cir. 2012) (holding allegations of constant lighting stated claim for violation of Eighth Amendment); *but see* Stewart v. Beard, 417 Fed. Appx. 117 (3d Cir. 2011) (holding constant illumination in solitary confinement unit did not violate the Eighth Amendment).
[28] Perkins v. Kansas Dept. of Corr., 165 F.3d 803 (1999) (holding plaintiff housed in administrative segregation stated a claim for violation of the Eighth Amendment by alleging that he was denied outdoor exercise for more than nine months).
[29] Prude v. Clarke, 675 F.3d 735 (7th Cir. 2012) (holding that an exclusive diet of nutraloaf could result in hardship that would violate the Eighth Amendment); *but see* Tyler v. Lassiter, WL 866325, (E.D.N.C. Mar. 3, 2016) (holding that a seven-day nutraloaf diet did not create a substantial risk of harm and therefore did not meet the objective test).
[30] *See supra* section 2.4.2.

A further problem with the "sufficiently serious" standard is that it is at odds with another test for harm in Eighth Amendment cases alleging excessive force by prison officials. The Court has held in such cases that proof of "significant injury" is not required.[31] The claimant need only show that the harm was not *de minimis*.[32] The Court explained its rationale for the different tests in *Hudson*:

> "In the excessive force context, society's expectations are different. When prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated … This is true whether or not significant injury is evident. Otherwise the Eighth Amendment would permit any physical punishment, no matter how diabolic or inhuman, inflicting less than some arbitrary quantity of injury. Such a result would have been as unacceptable to the drafters of the Eighth Amendment as it is today."[33]

Justices Thomas and Scalia, dissenting, called attention to the inconsistency between the two tests.[34] Justice Thomas questioned the majority's reasoning that "society's standards of decency are not violated by anything short of uncivilized conditions of confinement … but are automatically violated by any malicious use of force, regardless of whether it even causes an injury."[35] The justice described the distinction as "puzzling:"

> "I see no reason why our society's standards of decency should be more readily offended when officials, with a culpable state of mind, subject a prisoner to a deprivation on one discrete occasion than when they subject him to continuous deprivations over time. If anything, I would think that a deprivation inflicted continuously over a long period would be of greater concern to society than a deprivation inflicted on one particular occasion."[36]

The dissenting opinion highlights the artificial nature of the objective test for which there is no basis in the text of the Eighth Amendment.

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[31] Hudson v. McMillian, 503 U.S. 1 (1992).
[32] *Id.* at 9-10.
[33] *Id.*
[34] The dissenting justices would instead have required proof of significant injury.
[35] Hudson, 503 U.S. at 25 (Thomas, J., dissenting).
[36] *Id.*

3.1.2 Deliberate Indifference

The deliberate indifference test originated from a case concerning the provision of medical treatment to incarcerated people. In *Estelle v. Gamble*, the Court held that to state a violation of the Eighth Amendment in relation to medical treatment, there must be allegations of "acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs."[37] Only deliberate indifference to such needs, the Court said, offends "evolving standards of decency" and violates the Eighth Amendment.[38]

The issue before the Court in *Estelle* was framed in terms of the government's obligation to provide medical care for people in prison, but the case also shows the punitive use of solitary confinement. Mr. Gamble had sustained a back injury when a bale of cotton fell on him while he was unloading a truck in the course of his prison job. He repeatedly sought medical treatment and exemptions from returning to work due to ongoing back pain, heart trouble, and migraines. He was prescribed pain medication on several occasions but was not exempted from work. He was charged with a disciplinary infraction for refusing to work and was then placed in solitary confinement for two months.[39] While in solitary confinement, Mr. Gamble asked to see a doctor because he was experiencing chest pains and blackouts. He was not seen by medical staff for a full day after making this request because the warden's permission was required before a person in solitary confinement could see a doctor.[40] When Mr. Gamble complained of chest pains later that week, he was not allowed to see a doctor for another two days.[41]

Although the majority's opinion acknowledged that "an inmate must rely on prison authorities to treat his medical needs,"[42] it nevertheless held that Mr. Gamble did not state a cognizable Eighth Amendment claim in respect of the actions of the prison's medical staff. The staff's decisions not to order x-rays or other diagnostic tests, the majority considered, did not rise to the level of cruel and unusual punishment, and at most, amounted to medical malpractice which should be pursued as a tort claim in state court.[43] Because Mr. Gamble had been seen repeatedly by

[37] Estelle v. Gamble, 429 U.S. 97, 106 (1976).
[38] *Id.*
[39] Brief for Respondent at 22-23, Estelle v. Gamble, 429 U.S. 97 (1976) (No. 75-929).
[40] *Id.* at 23.
[41] 429 U.S. note 8.
[42] *Id.* at 103.
[43] *Id.* at 107.

medical staff, delays and inadequacies in his care notwithstanding, the majority concluded that there was no deliberate indifference. The majority did not consider whether placement in solitary confinement, and delays in allowing Mr. Gamble to see medical staff while he was so held, constituted cruel and unusual punishment.

Justice Stevens wrote a dissenting opinion that criticized the majority's imposition of subjective motivation, namely, deliberate indifference to serious medical needs, as the criterion for determining whether cruel and unusual punishment had been inflicted.[44] He considered that the constitutional standard should be based on the character of the punishment and not the motivation of the individual who inflicted it.[45]

In *Whitley v. Albers*, the Court justified the deliberate indifference standard for medical treatment cases because it could "typically be established or disproved without the necessity of balancing competing institutional concerns for the safety of prison staff or other inmates."[46] This reasoning does not, however, account for the fact that competing institutional factors did appear to affect the adequacy of medical treatment in *Estelle.* One of the reasons that the treatment was said to have been inadequate was that Mr. Gamble did not have prompt access to medical treatment while he was in solitary confinement because of the prison's policy that required the warden's approval for him to see a doctor. Nevertheless, the *Whitley* Court considered the distinction appropriate for medical cases.

The respondent in *Whitley* had been shot in the leg by a prison officer who was attempting to quell a disturbance and free another officer who had been taken hostage at the Oregon State Penitentiary. Prior to the shooting, several people incarcerated in the prison had been found to be intoxicated and they were placed in solitary confinement. Others living in the same cellblock became agitated because they believed officers were using unnecessary force.[47]

In determining the appropriate standard for establishing an Eighth Amendment violation, the Court reasoned that:

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[44] 429 U.S. at 116 (Stevens, J., dissenting).
[45] *Id.*
[46] Whitley v. Albers, 475 U.S. 312, 320 (1986).
[47] 475 U.S. at 315-17.

> "the infliction of pain in the course of a prison security measure … does not amount to cruel and unusual punishment simply because it may appear in retrospect that the degree of force authorized or applied for security purposes was unreasonable, and hence unnecessary in the strict sense."[48]

The Court's deference to prison security measures arose in the context of prison officers using force to subdue a disturbance, but similar deference to institutional security as a justification for practices that cause harm can be found in cases regarding solitary confinement.

The *Whitley* Court held that the infliction of pain did not violate the Eighth Amendment because it did not rise to the level of "wanton and unnecessary."[49] Although the Court acknowledged that Mr. Albers was only in the area where the disturbance took place "for benign reasons," it considered that prison officials could not realistically have been expected to consider every contingency or minimize every risk. The fact that the prison officials did not consider making an exemption from the order to shoot people not involved in the disturbance, the Court held, was unfortunate, but it did not constitute wantonness.[50]

In *Wilson v. Seiter*, the Court did not apply *Whitley's* "wanton and unnecessary" standard but instead extended the deliberate indifference test to a claim regarding prison conditions.[51] The *Whitley* Court's reasoning that a different test for medical treatment was justified given the influence of institutional concerns was therefore abandoned. In defining "punishment," the *Wilson* majority reasoned that "if the pain is not formally meted out as punishment by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer."[52] The Court referred to Judge Posner's definition of punishment in *Duckworth v. Franzen* to support its reasoning:

> "The infliction of punishment is a deliberate act intended to chastise or deter. This is what the word means today; it is what it meant in the eighteenth century … [I]f a guard accidentally

[48] *Id.* at 319.
[49] *Id.*
[50] *Id.* at 325.
[51] Wilson v. Seiter, 501 U.S. 294 (1991).
[52] *Id.* at 300.

stepped on [a] prisoner's toe and broke it, this would not be punishment in anything remotely like the accepted meaning of the word."[53]

Duckworth v. Franzen concerned a fire on an Illinois Department of Corrections bus that was transporting people to different prisons. Thirty-five passengers were handcuffed and chained together on the bus when it caught fire. Only one person managed to get off the bus and he was pushed back inside by a prison officer. One person died in the fire and others suffered serious injuries. Judge Posner held that a reasonable and properly instructed jury could not have found the prison officials' behavior to be punishment because there was no evidence of either deliberate or reckless infliction of suffering.[54]

3.1.2.1 High Threshold

Case law demonstrates that it is very difficult for incarcerated people to establish deliberate indifference, even in situations where they have suffered serious harm. Although deliberate indifference may be inferred where prison officials ignore a serious medical condition that is known or obvious to them,[55] the courts have routinely held that a showing of medical malpractice is insufficient to establish deliberate indifference.[56] In *Smith v. Harris*, a man was unable to show deliberate indifference by prison dental staff who delayed treatment for infected teeth and denied him pain medication when his teeth were eventually extracted.[57] The Fifth Circuit held that a delay in medical care violates the Eighth Amendment only if it results in substantial harm, and "at most," Mr. Smith could only establish that the dental staff were negligent in failing to prescribe him pain medication.

The interests of prison officials tend to be prioritized over those of incarcerated people in determining whether there was deliberate indifference. In *Arenas v. Calhoun*, for example, the mother of a man who died by suicide alleged that a prison official was deliberately indifferent because the official waited for seven minutes to enter the man's cell after first observing he had a

[53] Duckworth v. Franzen, 780 F.2d 645, 652 (7th Cir. 1985), *cert. denied,* 479 U.S. 816 (1986).
[54] *Id.* at 652-53.
[55] Brown v. Hughes, 894 F.2d 1533, 1538 (11th Cir. 1990).
[56] *See, e.g.,* Toguchi v. Chung, 391 F.3d 1051 (9th Cir. 2004); Smith v. Harris, 401 Fed. Appx. 952 (5th Cir. 2010); Hart v. Bertsch, 529 F. Supp. 2d 1032 (D.N.D. 2008).
[57] 401 Fed. Appx. 952 (5th Cir. 2010).

noose tied around his neck.[58] Yet the Fifth Circuit found the officer was not deliberately indifferent, observing that the threshold to meet that standard was "extremely high."[59] While the officer recognized a substantial risk of harm, the court decided that entering the cell alone "would have jeopardized [the officer's] personal safety and that of the prison itself."[60] The court noted the possibility that the man may have been staging a suicide attempt to lure officers into his cell, despite there being no evidence of his having ever acted in such a way. Moreover, the officer was wearing a stab-proof vest and armed with pepper spray, and all the other people in the unit were locked in their cells.[61] Nevertheless, the court concluded that the officer had never interacted with the man and it was "irrelevant that [he] lacked a violent criminal history, because [he] had no way of knowing that."[62]

In *Richardson v. District of Columbia*, the warden of a DC jail was found not to have acted with deliberate indifference towards a transgender woman by placing her in a cell with a man. The woman had repeatedly expressed concern about her cellmate threatening to sexually assault her; she had asked to be moved to a different cell and had submitted three written grievances.[63] She was later raped by her cellmate. The court held that the warden was not aware of the concerns that Ms. Richardson had relayed to prison officials such that no jury could find the warden had the requisite knowledge to support a finding of deliberate indifference.[64] The court considered it more plausible that the warden acted with deliberate indifference by failing to prevent transgender women from being housed with men, but held that if that were the case, then the warden was entitled to qualified immunity.[65]

Courts have been willing to find deliberate indifference in particularly egregious cases. In *Weeks v. Chaboudy*, the Sixth Circuit held that prison officials were deliberately indifferent in declining to admit Mr. Weeks, a paralyzed man who required a wheelchair, to the prison infirmary (the only area of the prison equipped for wheelchairs) and instead kept him in administrative

[58] 922 F.3d 616 (5th Cir. 2019).
[59] *Id.* at 620 (quoting Domino v. Tex. Dep't of Crim. Just., 239 F.3d 752, 756 (5th Cir. 2001)).
[60] *Id.* at 621.
[61] *Id.* at 622.
[62] *Id.*
[63] 322 F. Supp. 3d 175 (D.D.C. 2018).
[64] *Id.* at 183.
[65] *Id.* at 183-84.

segregation.[66] As a consequence, Mr. Weeks was unable to shower or leave his cell. The court held that the squalid conditions in which Mr. Weeks was forced to live due to his being denied a wheelchair were clearly foreseeable by the prison doctor who declined to admit Mr. Weeks to the infirmary.[67] The court rejected the doctor's asserted defense of qualified immunity.[68]

In *Casey v. Lewis*, the District Court for the District of Arizona held that Arizona's Department of Corrections had been deliberately indifferent to systemic failings in the provision of medical, dental, and mental health care.[69] The various problems identified by the court included a lack of staff, delays in specialist referrals and care, prison officials' obstructing medical care, delays in dental treatment, and people with serious mental illnesses being placed in solitary confinement without receiving any treatment for weeks or months at a time. The court held that because of these problems, the existing healthcare staff could not provide adequate treatment.[70] The court described the treatment of mentally ill people as "appalling" and "inexcusable."[71] While it noted that the staff shortages were attributable to the Department's financial difficulties, it concluded that lack of funding was not a defense to deliberate indifference.[72]

3.1.2.2 Definition of Punishment

The *Wilson* Court's narrow definition of punishment as constituting only the specific penalty imposed by statute or the sentencing judge ignores the reality that prison conditions are part of the punishment. In his concurring opinion in *Farmer v. Brennan*, Justice Blackmun took the same view, observing that "[t]he Court's unduly narrow definition of punishment blinds it to the reality of prison life."[73]

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[66] 984 F.2d 185 (6th Cir. 1993).
[67] *Id.* at 187.
[68] *Id.*
[69] 834 F. Supp. 1477 (D. Ariz. 1993).
[70] *Id.* at 1547-48.
[71] *Id.* at 1550.
[72] *Id.* at 1548.
[73] Farmer v. Brennan, 511 U.S. 825, 855 (1994) (Blackmun, J., concurring). Dee Farmer, a transgender woman who was raped and assaulted while incarcerated in a male prison, the Federal Penitentiary in Terre Haute, Indiana, alleged that prison officials violated the Eighth Amendment by acting with deliberate indifference to her safety because they were aware that the prison was a violent environment with a history of assaults and that Ms. Farmer was particularly vulnerable to being attacked. The Court remanded the case to the district court to determine whether the officials had been deliberately indifferent, with instructions that the subjective recklessness standard applicable in criminal law was the appropriate test for deliberate indifference. On remand, the district court entered summary judgment for the prison officials. The Court of Appeals for the Seventh Circuit vacated summary

That definition also disregards the interpretation of the English Bill of Rights that prohibited punishments not authorized by statute or by the sentencing judge. Moreover, it is at odds with *Hutto v. Finney* where the Court recognized that solitary confinement "is a form of punishment subject to scrutiny under Eighth Amendment standards."[74] Finally, the interpretation is inconsistent with decisions outside the Eighth Amendment context. For example in *Griffin v. Wisconsin,* a Fourth Amendment case, the Court described solitary confinement as a form of punishment.[75]

The courts have held that the penological justification for a condition of confinement is relevant to whether that condition violates the Eighth Amendment.[76] Absent a "legitimate penological purpose for a prison official's conduct, courts have 'presumed malicious and sadistic intent.'"[77] Yet that doctrine is defeated by judicial deference to decisions of prison officials, particularly when the justification of institutional security is asserted. Close examination is rarely given to claims by officials that solitary confinement has a legitimate penological justification, namely, to maintain order and safety within the prison.[78]

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judgment, holding that the lower court had abused its discretion by granting summary judgment without fully considering Ms. Farmer's efforts to secure additional discovery. 81 F.3d 1444 (7th Cir. 1996).

[74] Hutto v. Finney, 437 U.S. 678, 685 (1978). At issue in this case was a remedial order entered by the District Court for the Eastern District of Arkansas to address conditions in the Arkansas penal system that the court characterized as "a dark and evil world completely alien to the free world." Holt v. Sarver, 309 F. Supp. 362, 381 (E.D. Ark. 1970). To address the unconstitutional conditions, the District Court made an order that, among other things, placed a thirty-day limit on punitive segregation. That part of the order was challenged on appeal. A majority of the Supreme Court found no error in the inclusion of the time limit in the remedial order, noting that it presented little danger of interfering with prison administration and that the Commissioner of Correction had stated that people should not ordinarily be held in punitive segregation for more than fourteen days. 437 U.S. at 688.

[75] Griffin v. Wisconsin, 483 U.S. 868, 874 (1987).

[76] Grenning v. Miller-Stout, 739 F.3d 1235, 1250 (9th Cir. 2014) ("the precise role of legitimate penological interests is not entirely clear in the context of an Eighth Amendment challenge to conditions of confinement," but "the existence of a legitimate penological justification has, however, been used in considering whether adverse treatment is sufficiently gratuitous to constitute punishment for Eighth Amendment purposes.").

[77] Wood v. Beauclair, 692 F.3d 1041, 1050 (9th Cir. 2012) (quoting Giron v. Corr. Corp of Am., 191 F.3d 1281, 1290 (10th Cir. 1999)).

[78] *See, e.g.,* Silverstein v. Fed. Bureau of Prisons, 559 Fed. Appx. 739, 762 (10th Cir. 2014) ("While Mr. Silverstein's thirty-year duration in segregated confinement is an extraordinary length of time, we defer to the [FBOP's] judgment that accommodating [his] demands by releasing him into the open prison population or transferring him to a less secure facility would impair its ability to protect all who are inside the prison's walls … [T]he [FBOP] has had to strike a delicate balance between reducing the restrictions imposed on Mr. Silverstein … and its legitimate security concerns in ensuring the security of all who come in contact with Mr. Silverstein, as well as his own security, by keeping him in segregated confinement. This is a considered choice for which we should not substitute our judgment."); Talib v. Gilley, 138 F.3d 211, 214 (5th Cir. 1998) (holding prison officials had a legitimate penological interest in requiring people in lockdown to kneel on the floor with their hands behind their backs before they were served meals in their cells.).

3.1.2.3 Conditions of Confinement

The application of the deliberate indifference test to cases involving prison conditions is problematic because, unlike those relating to medical treatment, these cases do not always involve identifiable prison officials to whom this mental element can be attributed.[79] This was recognized by Judge Posner in *Duckworth v. Franzen* when he criticized the term "deliberate indifference," labeling it "not self-defining." Judge Posner added: "[i]ndeed, like other famous oxymorons in law – "all deliberate speed" for example or "substantive due process" – it evades rather than expresses precise meaning."[80]

In light of these problems, some scholars have suggested that deliberate indifference or actual awareness could be imputed to prison officials by a showing of the scientific evidence demonstrating the harm caused by solitary confinement.[81] The Fourth Circuit took such an approach in *Porter v. Clarke*, where it held prison officials were deliberately indifferent to the "substantial risk of serious psychological and emotional harm" arising from the placement of people on death row in long-term solitary confinement.[82] The court pointed to the "extensive scholarly literature describing and quantifying the adverse mental health effects of prolonged solitary confinement" as evidence that "the risk of such harm 'was so obvious that it had to have been known.'"[83] The court agreed with the lower court's finding that "it would defy logic" to suggest that prison officials were unaware of the potential harm caused by the lack of human interaction.[84]

An alternative to imputing knowledge to prison officials is simply to remove the subjective test altogether.[85] Such an approach has support from the concurring opinion in *Rhodes*, which took the view that when determining whether prison conditions are cruel and unusual, the "touchstone

[79] Wilson v. Seiter, 510 U.S. 294, 310 (White, J., concurring) ("Inhumane prison conditions often are the result of cumulative actions and inactions by numerous officials inside and outside a prison, sometimes over a long period of time. In these circumstances, it is far from clear whose intent should be examined … In truth, intent is simply not very meaningful when considering a challenge to an institution such as a prison system.").
[80] Duckworth v. Franzen, 780 F.2d 645, 652 (7th Cir. 1985).
[81] *See, e.g.,* Christine Rebman, *The Eighth Amendment and Solitary Confinement: The Gap in Protection from Psychological Consequences*, 49 DEPAUL L. REV. 567, 618-19 (2000).
[82] 923 F.3d 348, 364 (4th Cir. 2019).
[83] *Id.* (quoting Makdessi v. Fields, 789 F.3d 126, 136 (4th Cir. 2015)).
[84] *Id.* (citing Porter v. Clarke, 290 F. Supp. 3d 518, 532 (E.D. Va. 2018)).
[85] *See, e.g.,* Elizabeth Bennion, *Banning the Bing: Why Solitary Confinement is Cruel and Far Too Usual Punishment*, 90 IND. L.J. 741, 773 (2015).

is the effect upon the imprisoned."[86] The concurrence cited *Laaman v. Helgemoe*, which held that when "the cumulative impact of the conditions of incarceration threatens the physical, mental, and emotional health and well-being of the inmates and/or creates a probability of recidivism and future incarceration," the conditions violate the Constitution.[87] If the test for violation of the Eighth Amendment focused on the effect of the condition on the incarcerated person, the mindset of officials would be irrelevant. To be sure, for such a test to be truly effective, the "totality of conditions" rule may also require revision to reflect the realities of prison life. The touchstone test would be open to the criticism that it might open the floodgates of litigation relating to prison conditions. However, statutory barriers to frivolous litigation guard against such a concern. In any event, the contours of the constitutional prohibition against cruel and unusual punishment should not be determined by concerns about courts' workloads.[88]

Although the Supreme Court has not directly considered the application of the Eighth Amendment to solitary confinement, three justices have indicated a need for scrutiny of the practice. In *Davis v. Ayala*, a death penalty case decided by the Court in 2015, Justice Kennedy penned a concurring opinion in which he expressed concern about the fact that the petitioner had been held in administrative segregation for approximately twenty years. Justice Kennedy wrote that if the issue were presented,

> "the judiciary may be required, within its proper jurisdiction and authority, to determine whether workable alternative systems for long-term [solitary] confinement exist, and, if so, whether a correctional system should be required to adopt them."[89]

In 2017, Justice Breyer dissented from the denial of a stay of execution of a death sentence in *Ruiz v. Texas*. He observed that Mr. Ruiz had spent twenty-two years in solitary confinement and had developed symptoms including severe anxiety and depression, suicidal ideation, hallucinations, disorientation, memory loss, and sleep difficulty. Justice Breyer considered that

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[86] Rhodes v. Chapman, 452 U.S. 337, 364 (1981) (Brennan, J., concurring) (quoting Laaman v. Helgemoe, 437 F. Supp. 269, 323 (D.N.H. 1977)).
[87] *Id.* at 364.
[88] *See* Hudson v. McMillian, 503 U.S. 1, 15 (1992) (Blackmun, J., concurring) ("Perhaps judicial overload is an appropriate concern in determining whether statutory standing to sue should be conferred on certain plaintiffs … But this inherently self-interest concern has no appropriate role in interpreting the contours of a substantive constitutional right.").
[89] 576 U.S. 257, 290 (2015) (Kennedy, J., concurring).

the case was appropriate for Eighth Amendment scrutiny of extended solitary confinement.[90] In 2018, in a statement respecting the denial of certiorari in *Apodaca v. Raemisch*, Justice Sotomayor called for courts and corrections officials to "remain alert to the clear constitutional problems" of keeping people in "near-total isolation" in long-term solitary confinement.[91]

3.2 Due Process

Unlike in Eighth Amendment jurisprudence, the Supreme Court has specifically considered due process challenges to placement in solitary confinement. The case law reveals, however, that the due process protections provide only limited oversight. Over the last fifty years, the Court has narrowed the protection against the deprivation of liberty under the Fifth and Fourteenth Amendments in the context of prison disciplinary decisions. In 1968, then-Judge Brennan wrote in *Jackson v. Bishop* that

> "a prisoner of the state does not lose all his civil rights during and because of incarceration. In particular, he continues to be protected by the due process and equal protection clauses which follow him through the prison doors."[92]

Despite this statement, the jurisprudence has developed in such a way that only limited due process protection is now afforded to incarcerated people seeking to challenge the process by which they are placed in solitary confinement.

3.2.1 Development of Jurisprudence

The Supreme Court first considered the application of the Due Process Clause to prison disciplinary proceedings in 1974 in *Wolff v. McDonnell.*[93] At issue in the litigation was the process by which Nebraska's prison officials imposed penalties for "flagrant or serious"

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[90] 137 S. Ct 1246 (Mem.) (2017) (Breyer, J., dissenting).
[91] 139 S. Ct. 5, 10 (Mem.) (2018) (Sotomayor, J.).
[92] Jackson v. Bishop, 404 F.2d 571, 576 (8th Cir. 1968). The case concerned the use of the strap as a disciplinary measure against people incarcerated in Arkansas. In holding that the practice violated the prohibition against cruel and unusual punishment, Judge Blackmun noted that one of the justifications advanced for its use was that "whipping is the primary disciplinary measure in the Arkansas system. Prisoners there have few privileges which can be withheld from them as punishment. *Facilities for segregation and solitary confinement are limited.*" (Emphasis added.) *Id.* at 575. The reference to solitary confinement suggests that it was a more palatable alternative to physical punishment, mirroring one of the justifications advanced by those responsible for introducing solitary confinement in the 18th and 19th century penitentiaries, as discussed in chapter 1.
[93] 418 U.S. 539 (1974).

misconduct.[94] The two kinds of punishment for such misconduct were forfeiture of good-time credits, which increased the length of incarceration, or solitary confinement, which "involve[d] alteration of the conditions of confinement."[95] The class action centered around the deprivation of good-time credits but the majority observed in a footnote that the same procedure for deprivation of good-time credits applied to solitary confinement placement. In finding that it would be difficult to distinguish between the procedural due process requirements for the imposition of each penalty, the majority considered that solitary confinement represented "a major change in the conditions of confinement" such that there should be "minimum procedural safeguards as a hedge against arbitrary determination of the factual predicate for imposition of the sanction."[96]

Justice White's majority opinion rejected the state's contention that the Fourteenth Amendment did not protect the interests of incarcerated people who were subject to disciplinary procedures. While the Constitution itself did not guarantee good-time credits, the majority found that the state had created such a right by statute. It held that the liberty protected by the Fourteenth Amendment entitled incarcerated people to minimum due process procedures.[97]

In determining what procedures were required to satisfy the Due Process Clause, Justice White wrote of the contentious atmosphere in which prison disciplinary proceedings take place:

> "Although there are very many varieties of prisons with different degrees of security, we must realize that in many of them the inmates are closely supervised and their activities controlled around the clock. Guards and inmates co-exist in direct and intimate contact. Tension between them is unremitting. Frustration, resentment, and despair are commonplace. Relationships among the inmates are varied and complex and perhaps subject to the unwritten code that exhorts inmates not to inform on a fellow prisoner."[98]

Against this background, the majority decided that the procedures required to satisfy the Due Process Clause included advanced written notice (at least twenty-four hours) of the claimed violation, determination of the matter by an impartial committee, the opportunity to call

[94] *Id.* at 545, 547.
[95] *Id.* at 547.
[96] *Id.* n. 19.
[97] *Id.* at 556-557.
[98] *Id.* at 562.

witnesses and present documentary evidence when not in conflict with institutional safety, and a written statement of the committee's findings describing the evidence relied upon and the reasons for the disciplinary action that resulted.[99]

In holding that people did not have an unconditional right to call witnesses or present documentary evidence in their defense, the majority wrote that to allow such rights would present "obvious potential for disruption and for interference with the swift punishment that in individual cases may be essential to carrying out the correctional program of the institution."[100] The majority also held that allowing confrontation and cross-examination of witnesses would pose "considerable potential for havoc inside the prison walls," despite evidence that many states already allowed cross-examination in prison disciplinary proceedings.[101] The majority concluded that the prescribed procedures required to satisfy the Due Process Clause were not "graven in stone" and further consideration would be required if the nature of prison disciplinary proceedings changed in the future.[102]

Justice Marshall, joined by Justice Brennan, filed a separate opinion concurring in part and dissenting as to the due process requirements prescribed by the majority. In his view, the due process protections were "little more than empty promises."[103] Justice Marshall considered that the Court's decision deprived people of the procedural tools that were essential to present a meaningful defense. Specifically, without an enforceable right to call witnesses or present documentary evidence, people had no ability to defend themselves beyond giving their own version of events.[104] And absent a right to confront and cross-examine adverse witnesses, people had no ability to challenge the allegations of prison officials. As a result, the disciplinary hearing would constitute "little more than a swearing contest, with each side telling its version of the facts – and, indeed, with only the prisoner's story subject to being tested by cross-

[99] *Id.* at 563.
[100] *Id.* at 566.
[101] *Id.* at 567.
[102] *Id.* at 571-72.
[103] *Id.* at 580-81 (Marshall and Brennan JJ., concurring in part and dissenting in part).
[104] *Id.* at 581-82.

examination."[105] To Justice Marshall, it seemed obvious that "even the wrongfully charged inmate will invariably be the loser."[106]

Justice Douglas also filed a separate opinion, disagreeing with the majority's view that the Due Process Clause did not give rise to rights of confrontation or cross-examination. He agreed that solitary confinement was a deprivation that required due process prior to its imposition, noting that such rights are required "whenever an individual risks condemnation to a 'grievous loss.'"[107] The justice considered that because the liberty of incarcerated people was already circumscribed by their confinement, their interest in the limited liberty remaining was more substantial.[108] He reiterated that conviction of a crime "does not render one a nonperson whose rights are subject to the whim of the prison administration."[109] Justice Douglas, like Justices Marshall and Brennan, considered that cross-examination and confrontation were essential rights that should be available in disciplinary cases. The availability of these rights, he emphasized, should not be left to "the unchecked and unreviewable discretion of the prison disciplinary board."[110] Justice Douglas rejected the suggestion that to allow such rights would undermine prison administration, describing that view as "outmoded and indeed anti-rehabilitative, for it supports the prevailing pattern of hostility between inmate and personnel."[111]

Though *Wolff* was primarily concerned with the forfeiture of good-time credits, federal courts proceeded on the basis that the same due process protections also applied to disciplinary proceedings that resulted in different types of solitary confinement. In *McKinnon v. Patterson*, for example, the Second Circuit held that people confined to "keeplock" in a New York state prison were entitled to *Wolff* due process protections.[112] The court examined conditions in keeplock, where people were confined in their own cells for twenty-three or more hours a day, denied contact with others, unable to work or participate in the normal routine of the prison, and

[105] *Id.*
[106] *Id.*
[107] *Id.* at 594 (Douglas, J., dissenting) (citing Morrissey v. Brewer, 408 U.S. 471, 481 (1972); Goldberg v. Kelly, 397 U.S. 254, 263 (1970); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)).
[108] *Id.* at 594.
[109] *Id.*
[110] *Id.* at 596.
[111] *Id.* at 597.
[112] 568 F.2d 930 (2d Cir. 1977).

had limited access to showers and physical activity.[113] Comparing keeplock to other forms of solitary confinement, the court held that, but for the fact that people were confined in their own cells and retained their personal belongings, the deprivations were much the same as those visited on people segregated in a SHU.[114] Differences in terminology among the various forms of solitary confinement were not dispositive in determining whether minimal due process was required.[115] Because keeplock did not differ substantially from other forms of punishment that constituted "substantial deprivations" requiring due process, imposition of this sanction likewise required due process.[116] The court reached this finding even though the keeplock sanctions were imposed for a maximum of two weeks. It reasoned that neither *Wolff* nor subsequent cases created exceptions based on the duration of the sanction.[117]

The Supreme Court next had occasion to consider the application of the Due Process Clause to prison disciplinary proceedings in 1983 in *Hewitt v. Helms.*[118] The case concerned the placement of a man in administrative segregation for over seven weeks while his involvement in a riot within a prison in Pennsylvania was investigated. Mr. Helms was found guilty of participating in the riot and was placed in disciplinary segregation for a further six months.[119] The Court held that the placement in administrative segregation in "less amenable and more restrictive quarters for nonpunitive reasons" while the investigation was conducted was "the sort of confinement that inmates should reasonably anticipate receiving at some point in their incarceration."[120] It distinguished administrative segregation from penalties like loss of parole or good-time credits, which, the Court reasoned, resulted in a "far more significant change in a prisoner's freedoms than that at issue here."[121] That distinction relies on the view that penalties such as loss of parole and good-time credits extend the time that must be spent in prison, unlike solitary confinement.

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[113] *Id.* at 932.
[114] *Id.* at 936.
[115] *Id.* at 937 (citing United States *ex rel*. Walker v. Mancusi, 467 F.2d 51 (2d Cir. 1972), Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971), Crooks v. Warne, 516 F.2d 837 (2d Cir. 1975) and Powell v. Ward, 542 F.2d 101 (2d Cir. 1976)).
[116] *Id.* at 938.
[117] *Id.* at 938-39.
[118] 459 U.S. 460 (1983).
[119] *Id.* at 465.
[120] *Id.* at 468.
[121] *Id.*

Despite finding that Mr. Helms did not have a liberty interest based on the Fourteenth Amendment in avoiding administrative segregation, the Court nevertheless held that he had acquired such an interest due to the language of the Pennsylvania statutes and regulations in issue. Because of the repeated use of "explicitly mandatory language requiring specific substantive predicates," the state had created a liberty interest such that Mr. Helms was entitled to due process.[122]

The Court upheld the state's procedures for assigning Mr. Helms to administrative segregation. It measured the procedural requirements with reference to *Matthews v. Eldridge*, namely the "private interests at stake, the governmental interests involved, and the value of procedural requirements in determining what process is due."[123] In this case, the Court held that Mr. Helms's private interest was "not one of great consequence," because he was "merely transferred from one extremely restricted environment to an even more confined situation."[124] The majority considered that, unlike disciplinary confinement, no stigma of wrongdoing or misconduct applied to placement in administrative segregation, and it would not impact Mr. Helms's parole prospects.[125] It attached weight to the fact that administrative segregation was a "catchall" category to describe the confinement of people for their own safety, to protect other incarcerated people, to break up "potentially disruptive groups," or for placement pending classification or transfer.[126] The Court's reasoning that administrative segregation does not carry the stigma associated with disciplinary segregation does not accurately reflect all of the collateral consequences associated with placement in solitary confinement.

In contrast to its view that Mr. Helms's interests were not of great consequence, the Court regarded the governmental interests as significant. It attached weight to prison officials' belief that Mr. Helms might pose a threat to the safety of others if he remained in the general population, and their view that it was necessary to separate him from the general population until the investigation had concluded.[127] The majority found that the safety of the staff and other

[122] *Id.* at 472.
[123] *Id.* at 473 (citing Matthews v. Eldridge, 424 U.S. 319, 335 (1976)).
[124] *Id.*
[125] *Id.*
[126] *Id.* at 468.
[127] *Id.* at 473.

incarcerated people was "perhaps the most fundamental responsibility of the prison administration."[128]

The majority determined that the grounds for confining Mr. Helms to administrative segregation did not involve "decisions or judgments that would have been materially assisted by a detailed adversary proceeding."[129] It echoed the reasoning in *Wolff* that prison disciplinary proceedings take place in a "volatile atmosphere" where incarcerated people might pose an "unacceptable threat to the safety of other prisoners and guards."[130] It went on to find that a perceived threat to security would not be "appreciably fostered" by allowing "trial-type procedural safeguards."[131] Instead, the Due Process Clause required only an informal, non-adversarial review of the evidence.[132] The majority held that Mr. Helms was entitled to receive notice of the charges against him and an opportunity to respond, but a written statement would suffice unless officials decided it would be useful to allow an oral presentation.[133] Therefore, Mr. Helms had been accorded all the process that was due after being confined to administrative segregation.

In a dissenting opinion, Justice Stevens, joined by Justices Brennan, Marshall, and Blackmun, described the conditions in administrative segregation as "significantly more restrictive than those experienced … in the general prison population."[134] The dissenting justices disagreed with the majority's conclusion that Mr. Helms's liberty interest existed only because of Pennsylvania's regulations.[135] They suggested that this holding was "dramatically different" from *Wolff*, where the Court "squarely held that every prisoner retains a significant residuum of constitutionally protected liberty following his incarceration."[136]

Justice Stevens considered that the question for the Court was whether placement in administrative segregation constituted a "sufficiently grievous change in a prisoner's status to require the protection of due process."[137] In his view, the benchmark against which such a

[128] *Id.*
[129] *Id.* at 473-74.
[130] *Id.* at 474.
[131] *Id.*
[132] *Id.*
[133] *Id.* at 476.
[134] *Id.* at 479 (Stevens, J., dissenting).
[135] *Id.* at 482.
[136] *Id.* at 482-483 (citing Wolff, 418 U.S. 555-56).
[137] *Id.* at 484.

change should be measured was confinement in the general prison population.[138] In comparing the two, he concluded that "not only is there a disparity, the disparity is drastic [and] concededly as serious as the difference between confinement in the general prison population and 'disciplinary segregation.'"[139] While the state's regulations were relevant because they suggested that placement in administrative segregation affected a constitutionally-protected liberty interest, the regulations themselves did not create that interest. Instead, due process safeguards were required whenever a person's liberty was "further curtailed" by being placed in administrative segregation.[140]

The dissenting justices also took a different view from the majority as to the adequacy of the due process protections accorded to Mr. Helms. Justice Stevens considered that due process required an opportunity to present views orally to the prison officials. Limiting the right to present only a written statement did not provide a "meaningful opportunity to be heard," in light of the fact that many incarcerated people had received limited education.[141] The dissenting justices were of the view that the same right should arise at each periodic review of the decision to keep a person in administrative segregation, and officials should be required to provide a written statement explaining the reasons for the decision each time.[142] By receiving a written statement, Justice Stevens wrote, people might have an opportunity to improve their conduct.[143] In the dissenting justices' view, neither the right to allow oral presentations nor the provision of written reasons would impose an undue burden on prison officials.[144]

In 1985, the Court addressed another aspect of due process in prison disciplinary proceedings, namely the evidentiary threshold required to revoke good-time credits. In *Superintendent v. Hill*, two people faced disciplinary charges for allegedly assaulting another incarcerated man.[145] The assault was not witnessed by prison officials, but a guard found the injured person and observed three others running away. He gave evidence at the disciplinary proceedings, including testimony that the prison medic told him that the man had been beaten. Both men facing

[138] *Id.* at 487.
[139] *Id.*
[140] *Id.* at 488.
[141] *Id.* at 489-90 (citing Goldberg v. Kelly, 397 U.S. 254, 267-69 (1970)).
[142] *Id.* at 494-95.
[143] *Id.*
[144] *Id.* at 495-96.
[145] 472 U.S. 445 (1985).

disciplinary charges denied their involvement, and the victim provided a written statement in which he said the others had not caused his injuries.[146] The board found both men guilty of assault, revoked 100 days of good-time credits each, and ordered they be confined in isolation for fifteen days.[147]

The Court recognized that a governmental decision resulting in the loss of an important liberty interest violated due process if that decision was not supported by any evidence.[148] The requirements of due process are met, it held, if there is "some evidence" to support the disciplinary board's decision.[149] It did not require evidence that prevented any conclusion except the one reached by the disciplinary board, and the Court upheld the "meager" evidence in this case as sufficient to satisfy due process.[150]

In *Luna v. Pico*, the Second Circuit held that hearing officers failed to afford due process because their findings were not supported by some evidence.[151] However, the court found that the right was not clearly established such that the officials were entitled to qualified immunity. Mr. Luna had been charged with stabbing another man, even though a prison officer who witnessed the stabbing did not see Mr. Luna at the time, and she observed him in his cubicle immediately after the incident.[152] Mr. Luna was placed in solitary confinement pending determination of the disciplinary charges against him. Two hearings were conducted, and he was found guilty at both; the findings were overturned by officials on review due to insufficient evidence.[153] The only evidence against Mr. Luna was an allegation made by the victim alleging that he was the perpetrator. The victim refused to testify at the disciplinary hearings. Mr. Luna spent 204 days in solitary confinement while the disciplinary process was conducted.[154]

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[146] *Id.* at 447-48.
[147] *Id.* at 448.
[148] *Id.* at 455 (citing Douglas v. Buder, 412 U.S. 430 (1973) (per curiam); Schware v. Bd. of Bar Examiners, 353 U.S. 232, 239 (1947); U.S. *ex rel.* Vajtauer v. Comm'r of Immigration, 273 U.S. 103, 106 (1927)).
[149] *Id.* at 455-57.
[150] *Id.* at 457.
[151] 356 F.3d 481 (2d Cir. 2004).
[152] *Id.* at 484.
[153] *Id.* at 484-86.
[154] *Id.* at 486.

The court explained that it had not construed *Hill* to require consideration of whether there was "any evidence that could support the disciplinary decision."[155] Rather, in previous cases, the court had sought to determine whether there was "reliable evidence" of guilt.[156] On the facts of this case, the evidence was insufficient to establish guilt. The letter from the victim (who refused to testify) and a misbehavior report restating the victim's assertion were the only pieces of evidence; the author of the misbehavior report had not been called to give oral evidence at the disciplinary hearing.[157] The court held that the evidence consisted only of "a bare accusation by a victim who then refused to confirm his initial allegations."[158] No effort was made to establish the victim's credibility or to verify his assertion that Mr. Luna had been the perpetrator. While it was unnecessary, in the court's view, for a victim to testify, prison officials were required to conduct an independent credibility assessment of the evidence.[159]

Despite there being no reliable evidence on which the prison officials could have reached their findings, they were entitled to qualified immunity because it was not objectively unreasonable for the officials to have found Mr. Luna guilty. The court reasoned that the "some evidence" standard was "less than precise,"[160] there were no previous Second Circuit or Supreme Court decisions involving disciplinary findings based solely on accusations made by victims, and state law "arguably support[ed] defendants' position."[161] However, the suggestion that state law supported the prison officials is misguided given that a different evidentiary standard ("substantial evidence") applied to prison disciplinary proceedings under New York state law. It is troubling that the unclear parameters of the "some evidence" standard meant that Mr. Luna spent nearly seven months in solitary confinement for infractions for which there was insufficient evidence to meet this low standard, yet the prison officials were not held accountable for violating his due process rights.

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[155] *Id.* at 488.
[156] *Id.* (citing Taylor v. Rodrigues, 238 F.3d 188, 194 (2d Cir. 2001); Zavaro v. Coughlin, 970 F.2d 1148, 1152 (2d Cir. 1992) (holding the qualified immunity doctrine does not protect a hearing officer where there is no reliable evidence whatsoever of an incarcerated person's guilt)).
[157] *Id.* at 489.
[158] *Id.*
[159] *Id.*
[160] *Id.* at 490.
[161] *Id.* at 490-91.

In 1995, the Court limited the circumstances in which people are entitled to due process prior to placement in solitary confinement. In *Sandin v. Conner*, the plaintiff, Mr. Conner, had been found guilty of misconduct and subjected to thirty days in solitary confinement in a prison in Hawaii after he retorted with "angry and foul language" during a strip search and rectal cavity search.[162] The disciplinary committee denied his request to call witnesses at the hearing because the prison was short-staffed.

The Court retreated from its approach in *Hewitt v. Helms*, holding that the focus on the language of prison regulations had resulted in people searching for mandatory language in regulations to claim "entitlements to various state-conferred privileges."[163] *Hewitt* had thus created disincentives for states to codify prison management procedures in regulations, and had led to "the involvement of federal courts in the day-to-day management of prisons."[164] Instead of focusing on mandatory language in prison regulations, the Court preferred to focus on the nature of the deprivation in issue. It posed a new test for determining whether due process applied to the deprivation by asking whether it was an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life."[165]

The Court compared conditions in disciplinary segregation with those in other forms of solitary confinement and held that Mr. Conner's segregation was not an atypical and significant hardship that required due process.[166] It reasoned that people in the prison's general population were subjected to lengthy periods of lockdown and Mr. Conner's segregation did not constitute "a major disruption to his environment."[167] The Court regarded as significant the fact that Mr. Conner was serving an indeterminate prison sentence so the sanction did not affect the duration of his sentence.[168] Thus the benchmark adopted by the Court for comparing conditions in disciplinary segregation was other types of solitary confinement and lockdown of the general population. By holding that disciplinary segregation – or indeed any form of solitary confinement – was not an atypical and significant hardship in relation to the ordinary incidents of

[162] 515 U.S. 472, 475 (1995).
[163] *Id.* at 481.
[164] *Id.* at 481-82.
[165] *Id.* at 483-84.
[166] *Id.* at 486.
[167] *Id.*
[168] *Id.* at 487.

prison life, the Court discarded its finding in *Wolff* that solitary confinement "represents a major change in the conditions of confinement … [and] there should be minimum procedural safeguards" prior to imposing the sanction.[169] The *Sandin* Court did not elaborate on the reasons for taking such a different view of solitary confinement. Its adoption of other forms of solitary confinement as a benchmark significantly narrowed the circumstances in which due process rights applied. It also creates a perverse incentive to maintain restrictive conditions in the general prison population to support the position that solitary confinement, by comparison, is not an atypical or significant hardship.

Justices Ginsburg and Stevens, dissenting, considered that Mr. Conner did have a liberty interest in avoiding disciplinary segregation. They recognized that the deprivation of privileges associated with such confinement, combined with the stigma and potential effect on parole prospects, gave rise to a liberty interest requiring due process.[170] In a separate dissent, Justices Breyer and Souter also found that disciplinary segregation was an atypical and significant hardship. They explained that the punishment "worked a fairly major change in Conner's conditions," which involved being confined to his cell alone for the entire day, save for fifty minutes for brief exercise and showers, during which time he remained isolated from others and was constrained by leg irons and waist chains.[171]

Justice Breyer criticized the majority's justification for its interpretation on the grounds that the federal courts had become involved in day-to-day prison administration. He accepted that broader application of the Due Process Clause to prison disciplinary cases would require courts to separate "the unimportant from the potentially significant" deprivations of liberty.[172] However, in his view, it was no more difficult for the courts to undertake this task than any other judicial task, and it was entirely possible for courts to distinguish:

[169] 418 U.S. 571, n. 19.
[170] 515 U.S. 488-89 (Ginsburg, J., dissenting).
[171] *Id.* at 494 (Breyer, J., dissenting).
[172] *Id.* at 500 (Breyer, J., dissenting).

> "less significant matters such as television privileges, 'sack' versus 'tray' lunches, playing the state lottery, attending an ex-stepfather's funeral, or the limits of travel when on prison furlough … from more significant matters such as the solitary confinement at issue."[173]

In 2005, the Supreme Court applied the atypical and significant hardship test in the case of *Wilkinson v. Austin* and held that indefinite placement in an Ohio supermax, in conditions that were "more restrictive than any other form of incarceration" in the state, did give rise to a liberty interest.[174] People incarcerated at the supermax were confined for twenty-three hours a day in isolation cells measuring seven by fourteen feet, the light remained on at all times, and during the one hour per day that they were allowed to leave their cells, they only had access to a small indoor recreation cell.[175] The Court found these conditions were "synonymous with extreme isolation," and people were denied "almost any environmental or sensory stimuli and almost all human contact."[176] In the court of appeals, Ohio conceded that people in the supermax had a liberty interest in avoiding placement in that prison, but the US government, appearing as amicus curiae, disagreed with this concession before the Supreme Court.

The Court accepted that assignment to the supermax constituted an atypical and significant hardship "under any plausible baseline."[177] Unlike the conditions at issue in *Sandin*, two additional factors were determined to support a liberty interest in this case: the fact that placement was of indefinite duration with only an annual review, and that people were disqualified from consideration for parole.[178] The Court acknowledged that the "atypical and significant hardship" test formulated in *Sandin* had generated divergence and difficulty in locating "the appropriate baseline," but it did not resolve the point because it was satisfied that assignment to the supermax was atypical and significant "under any plausible baseline."[179]

Even though the conditions gave rise to a liberty interest, the Court found there was no due process violation.[180] The state's process for assigning people to the supermax included notifying

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[173] *Id.*
[174] 545 U.S. 209, 214 (2005).
[175] *Id.* at 214, 223.
[176] *Id.* at 214.
[177] *Id.* at 223.
[178] *Id.*
[179] *Id.* at 223.
[180] *Id.*

them of the factual basis for placement and providing a fair opportunity for rebuttal.[181] The state also allowed people to submit objections prior to the final review, which, the Court held, reduced the possibility of erroneous placement.[182] Such a risk was further reduced through the fact that a review was conducted within thirty days of transfer to the supermax.[183] Applying *Matthews v. Eldridge*, the Court held that the procedural protections were sufficient to comply with the Due Process Clause.[184] It noted the state's dominant interest in proper prison management, particularly the need to ensure "the safety of guards and prison personnel, the public, and the prisoners themselves."[185] The Court amplified the issue of prison safety in the following terms:

> "Prison security, imperiled by the brutal reality of prison gangs, provides the backdrop of the state's interest. Clandestine, organized, fueled by race-based hostility and committed to fear and violence as a means of disciplining their own members and their rival gangs seek nothing less than to control prison life and to extend their power beyond prison walls."[186]

The Court also emphasized the need for deference to prison officials, noting "the problem of scarce resources is another component of the State's interest."[187] Whereas the cost of confining a person to a maximum-security prison was $34,167 annually, that amount rose to $49,007 for placement in the supermax.[188] The Court assumed that it was therefore difficult for the state to fund "more effective education and vocational assistance programs to improve the lives of prisoners." In the Court's reasoning, it followed that prison officials were entitled to substantial deference before requiring "additional expenditures for elaborate procedural safeguards when correctional officials conclude that a prisoner has engaged in disruptive behavior."[189]

On remand, the district court found in *Austin v. Wilkinson (Austin VI)* that Ohio's actual procedures did not comport with its due process obligations, the state having never implemented the proposed procedures that formed the basis of the Supreme Court's decision.[190] Having

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[181] *Id.* at 225.
[182] *Id.* at 225-26.
[183] *Id.* at 227.
[184] *Id.* at 225.
[185] *Id.*
[186] *Id.* at 227.
[187] *Id.* at 228.
[188] *Id.*
[189] *Id.*
[190] Austin v. Wilkinson (Austin VI), 502 F. Supp. 2d 660, 665-66 (N.D. Ohio, 2006).

ordered the state to comply with its due process requirements, the district court had occasion once more to assess such compliance in *Austin v. Wilkinson (Austin VII)*. The court found that people were being held in the supermax on a permanent or semi-permanent basis and their due process rights were still being violated by prison officials' failure to notify them of the actions required for eligibility to leave supermax.[191] Instead, officials were simply informing people that their prior offense was of such severity that they would remain in the supermax regardless of their subsequent behavior while in solitary confinement.[192]

3.2.2 The Liberty Interest and Solitary Confinement

The lack of guidance from the Court regarding the appropriate baseline for assessing what constitutes an atypical and significant hardship has generated a divergence of approaches, as the *Wilkinson* Court recognized. Circuit courts have approached the question of whether a liberty interest exists with reference to a range of factors. The Second, Ninth and Tenth Circuits have all relied on the duration of the solitary confinement placement. While the Second Circuit has held that solitary confinement of 305 or more days gives rise to a liberty interest,[193] and the Ninth Circuit recognized a liberty interest in solitary confinement of twenty-seven months,[194] the Tenth Circuit has held that supermax placement of twenty years does not give rise to such an interest.[195] Judicial acceptance of such long periods of confinement is a far cry from the 1977 decision of the Second Circuit in *McKinnon v. Patterson*, where the court held that two weeks in keeplock represented a "substantial deprivation" that required due process procedures.[196]

Duration is not the only factor that the circuit courts consider. Other circuits also examine the conditions in solitary confinement. In *Beverati v. Smith*, the Fourth Circuit compared conditions in administrative segregation with those in the general prison population and held that administrative segregation was "similar in most respects" to the general population and conditions were "not particularly onerous" such that there was no liberty interest.[197] The court reached this conclusion in spite of evidence that the administrative segregation cells were

[191] Austin v. Wilkinson (Austin VII), WL 2840352 at *7 (N.D. Ohio, 2007).
[192] *Id.*
[193] Colon v. Howard, 215 F.3d 227 (2d Cir. 2000).
[194] Brown v. Oregon Dep't of Corr., 751 F.3d 983 (9th Cir. 2014).
[195] Grissom v. Roberts, 902 F.3d 1162 (10th Cir. 2018).
[196] McKinnon v. Patterson, 568 F.2d 930, 938 (2d Cir. 1977).
[197] 120 F.3d 500, 503-04 (4th Cir. 1997).

"infested with vermin, … smeared with human feces and urine; and were flooded with water from a leak in the toilet on the floor above."[198] People in administrative segregation did not receive clean clothing, linen, or bedding with the frequency required by prison regulations, they were only able to leave their cells three or four times per week, no educational or religious services were available, and food was served in "considerably smaller portions."[199]

The Third Circuit has adopted a two-factor test that examines both duration and the nature of the conditions to determine whether atypical and significant hardship.[200] The Fifth Circuit likewise considered both duration and conditions in *Bailey v. Fisher*, explaining that the courts "employ a sliding scale, taking into account how bad the conditions are and how long they last … truly onerous conditions for a brief period of time may not be atypical; less onerous conditions for an extended period of time may be."[201] Though the conditions were found to be similar to those in the Ohio supermax in issue in *Wilkinson*, the court regarded as significant the fact that the plaintiff's administrative segregation did not affect his release date, and it remanded the case for further evidence about how long he had been in solitary confinement.

Referring to a previous decision where the Fifth Circuit had suggested that two-and-a-half years in solitary confinement posed a "a threshold of sorts for atypicality," the court in *Bailey* concluded that "18-19 months of segregation under even the most isolated of conditions may not implicate a liberty interest."[202] The court did not explain why the two-and-a-half-year benchmark was the threshold for declaring a liberty interest. The case cited in *Bailey* to support this conclusion was *Wilkerson v. Goodwin*, which concerned the solitary confinement of Albert Woodfox in the Louisiana State Penitentiary. At the time of the *Wilkerson* decision, Mr. Woodfox had spent thirty-nine years in solitary confinement.[203] In *Wilkerson*, the court declared that it "need not dwell on duration" due to the exceptional length of time that Mr. Woodfox had been in isolation. That period of confinement, combined with the restrictive conditions, was held to give rise to a liberty interest requiring due process. The *Wilkerson* court therefore had no

[198] *Id.* at 504.
[199] *Id.*
[200] Williams v. Sec'y, Pennsylvania Dep't of Corr., 848 F.3d 549 (3d Cir. 2017); Shoats v. Horn, 213 F.3d 140, 144 (3d Cir. 2000).
[201] 647 Fed. Appx. 472, 476 (5th Cir. 2016).
[202] *Id.*
[203] 774 F.3d at 848-49.

reason to address why two-and-a-half years constituted a suitable threshold for a liberty interest when a shorter period did not.

The justifications for placement in solitary confinement also feature in circuit courts' assessments of whether a liberty interest exists, in contrast with the time threshold used by other circuits. In *Jones v. Baker*, the Sixth Circuit held that placement in administrative segregation for two-and-a-half years was not atypical and significant because it was for the "extraordinarily good reason" of investigating the plaintiff's involvement in a prison riot.[204] While the length of time itself was "atypical," the court decided there was no liberty interest because the state's administrative code allowed for indefinite segregation.

In *Rezaq v. Nalley*, the Tenth Circuit applied a four-part test to assess whether conditions in the federal supermax prison created a liberty interest.[205] The test considered whether: the segregation related to and furthered a legitimate penological interest, conditions were extreme, the segregation increased the duration of confinement, and the segregation was indeterminate.[206] While the conditions in the supermax were "undeniably harsh" in comparison to conditions "routinely imposed in the administrative segregation setting," the court determined that they were not extreme and therefore placement in the supermax did not give rise to a liberty interest.[207] The court compared the conditions to those in the Ohio supermax examined in *Wilkinson* and observed that, unlike in that prison, people in the federal supermax were permitted to shout through cell doors to communicate with one another, and they were allowed outdoor exercise.[208] In any event, the court noted, the conditions in the federal supermax were "comparable to those routinely imposed in the administrative segregation setting."[209] In this context, then, the court imposed an extremely high threshold for conditions to give rise to a

[204] 155 F.3d 810, 813 (6th Cir. 1998).
[205] 677 F.3d 1001 (10th Cir. 2012).
[206] *Id.* at 1011-12 (citing Estate of DiMarco v. Wyoming Dep't of Corr., 473 F.3d 1334 (10th Cir. 2007)).
[207] *Id.* at 1014-15. ("[P]laintiffs had control over the lights in their cells, the opportunity for outdoor recreation, regular contact with staff, and the ability to occasionally communicate with other inmates. Their cells, while unquestionably small and stark, contained a television that aired black-and-white educational and religious programming. The inmates spent twenty-three hours per day in their cells. When they were permitted outdoor recreation, the inmates remained alone in fenced-in areas slightly larger than their cells. The inmates were permitted five no contact social visits and two fifteen-minute phone calls per month.").
[208] *Id.* at 1015.
[209] *Id.*

liberty interest by introducing an "extreme" requirement that must exceed the highly restrictive conditions ordinarily associated with administrative segregation.

In the course of the litigation, the FBOP had issued revised procedures for wardens to follow before referring anyone to the supermax.[210] The FBOP then implemented these revised procedures and conducted retroactive hearings for people already placed in the supermax. Every hearing resulted in a recommendation of continued placement in supermax.[211] Thus, even where some kind of procedure is mandated, it appears to be perfunctory rather than meaningful. Rather, it is the challenge itself that in some instances provides relief to the plaintiffs. In the *Rezaq* case, the three people challenging their placement in supermax were transferred to less-restrictive "communication management units" after filing their lawsuit.[212]

3.2.3 Due Process Protections

In the few cases where people facing solitary confinement are held to have a liberty interest, the due process protections to which they are entitled are limited. They consist of: advance written notice of the alleged violation; a fair opportunity to rebut the charge(s); determination by an impartial committee; the opportunity to call witnesses and present evidence where doing so does not pose a risk to institutional safety; and a written statement of the committee's findings with the evidence relied upon and the reasons for the result.

Despite the *Wolff* Court holding that the procedures it prescribed were not "graven in stone," in the four decades since *Wolff* was decided, processes have not evolved to reflect that solitary confinement today is used for extremely long periods of time and often in harsher conditions. While the *Wolff* Court recognized that solitary confinement represented a "major change in the conditions of confinement," the stringent test for identifying a liberty interest has had the result that courts now treat solitary confinement as an "ordinary, expected and permissible incident of prison life."[213]

[210] *Id.* at 1005.
[211] *Id.* at 1006.
[212] *Id.* at 1005.
[213] Bailey v. Fisher, 647 Fed. Appx. 472, 474 (5th Cir. 2016).

The combination of the "some evidence" standard, deference to prison officials, and the limited opportunity to present a meaningful defense to disciplinary charges or changes in security classifications has resulted in the Due Process Clause providing little protection to people facing solitary confinement. Since *Wilkinson*, due process obligations only arise where the confinement implicates other factors such as the duration of the prison sentence or eligibility for parole. Federal jurisprudence has eroded the holdings of earlier judgments that recognized solitary confinement itself presents a significant intrusion on the liberty interest of people whose rights are already curtailed.

Moreover, the limited due process procedures offer little protection to people with cognitive impairments, limited education or literacy skills, or non-English speakers who may have difficulty understanding a written notice and preparing a response within twenty-four hours. The Court in *Wolff* acknowledged that illiterate people should be able to seek assistance from another incarcerated person or a staff member.[214] However, in light of the Court's statements about the hostility between prison staff and incarcerated people, this approach is unlikely to be meaningful. Given the courts' repeated holdings that people subject to disciplinary hearings do not have an unqualified right to call witnesses due to security reasons, prison officials may not willingly permit the attendance of another incarcerated person at the hearing.

In *Powell v. Ward*, the Southern District of New York held that the Due Process Clause required officials to provide a Spanish translator for non-English speakers.[215] No cases have addressed the question of due process protections for people who speak languages for which no translator is readily available. Nor have the courts considered how due process protections may need to be tailored to accommodate people with disabilities, including impairments that are caused or exacerbated by solitary confinement.

[214] Wolff, 418 U.S. at 570.
[215] 487 F. Supp. 917, 932 (S.D.N.Y. 1980).

3.3 Equal Protection

Despite the pronounced disparities that are prevalent throughout the use of solitary confinement, there have been few successful challenges to solitary confinement based on the Equal Protection Clause of the Fourteenth Amendment.

3.3.1 Race

Equal protection jurisprudence indicates that the clause has had limited impact in terms of the pronounced racial disparities in the use of solitary confinement. While the Court has held that the use of race to determine housing placements for people entering prison is subject to strict scrutiny,[216] the requirement to prove discriminatory intent may defeat an equal protection challenge to the disparate impact of solitary confinement on particular racial groups.[217]

One successful challenge involving solitary confinement that alleged racial discrimination in violation of the Equal Protection Clause arose in the case of *Santiago v. Miles*.[218] Incarcerated people at the Elmira Correctional Facility in New York brought a class action alleging that various policies and practices at the prison were racially discriminatory. The District Court for the Western District of New York found that the plaintiffs proved "the existence of a pattern of racism" at the prison which was evident in job placements, housing assignments, and discipline.[219] Statistical evidence showed that Black and Hispanic people were disciplined more frequently than white people, and they were more likely than white people to receive severe punishments including solitary confinement or loss of good time credits.[220] Preferable housing assignments and prison jobs were also granted to white people at disproportionately higher rates.

In concluding that race was an important factor that influenced the prison's decisions, the court noted that disparate impact alone was insufficient to prove a violation of the Equal Protection Clause.[221] If statistics were the sole basis for inferring discriminatory intent, the court held, the

[216] Johnson v. California, 543 U.S. 499 (2005).
[217] *See* Washington v. Davis, 426 U.S. 229, 237-38 (1976); McCleskey v. Kemp, 481 U.S. 279 (1987).
[218] 774 F. Supp. 775 (W.D.N.Y. 1991).
[219] *Id.* at 777.
[220] *Id.* at 787.
[221] *Id.* at 797.

disparity must be "so large and significant that [it] could not be caused by chance."[222] Here, the statistical evidence revealed "gross" deviations that were "so great that they could not be explained by chance or some other benign reason."[223] In addition to the significant and unrebutted statistical evidence, the court heard evidence from more than twenty witnesses, including current and formerly incarcerated people and staff, who testified about "an entrenched attitude of discrimination and racism."[224] This evidence established that prison officials knew that white people were receiving preferential treatment, but did nothing to address the imbalance until the lawsuit was filed.[225] Thus the combination of persuasive statistical evidence and witness testimony was sufficient to establish proof of discriminatory intent to support a finding that the defendants' conduct violated the Equal Protection Clause.

The finding in *Santiago* was a result of significant evidence of racial discrimination in several areas of the prison's operation. It was not focused solely on disciplinary infractions or solitary confinement; the racial animus was also evident in other areas such as broader housing assignments and prison jobs. Because of the broad scope of the plaintiffs' claim, they were able to call numerous witnesses to testify about the racist practices at the prison which, in combination with the statistical evidence, was sufficient to prove an Equal Protection violation.

3.3.2 Gender

Much like equal protection challenges alleging racial discrimination, the clause has only been invoked successfully in one case involving solitary confinement concerning unequal treatment based on gender. In *Casey v. Lewis*, the District Court for the District of Arizona held that Arizona's Department of Corrections violated the Equal Protection Clause by providing fewer mental health services for women in the state's prison system than it did for men.[226] The case involved several allegations of inadequate medical treatment and mental health care across the state's facilities for incarcerated women. One of the matters in issue was the use of lockdown

[222] *Id.* at 798 (citing McCleskey v. Kemp, 481 U.S. 279, 293-94 (1987); Castaneda v. Partida, 430 U.S. 482, 494 n.13 (1977); Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 at 265-66 (1977); Hillery v. Pulley, 563 F. Supp. 1228, 1238-39 (E.D. Cal. 1983) *aff'd,* 733 F.2d 644 (9th Cir. 1984), *aff'd,* 474 U.S. 254 (1986)).
[223] *Id.*
[224] *Id.* at 800.
[225] *Id.* at 800-01.
[226] 834 F. Supp. 1477 (D. Ariz. 1993).

and solitary confinement to manage seriously mentally ill women due to a lack of mental health staff.[227] To uphold different treatment based on gender, the court observed, the state had to show an exceedingly persuasive justification.[228] Any classification based on gender must serve important governmental objectives and be "substantially related to achievement of those objectives."[229] In accordance with this standard, therefore, the court held, females in the state's prisons must be treated in parity with males.[230] The court found that fewer mental health services were provided for women than men, and the lack of those services resulted in more egregious cases of deliberate indifference to the women's needs.[231] The court also held that the various inadequacies in the provision of medical and mental health treatment violated the Eighth Amendment.

As was the case in *Santiago v. Miles*, *Casey v. Lewis* concerned a wide range of practices across the prison system that were not limited to the use of solitary confinement. As a result, there was a larger body of evidence to establish the equal protection violation based on gender. There have been no successful individual challenges to solitary confinement alone that allege gender-based equal protection violations.

3.3.3 Other People Similarly Situated

The only other federal case in which an equal protection violation has been upheld in relation to solitary confinement is that of *Reynolds v. Arnone.*[232] Mr. Reynolds, who spent twenty-three years in solitary confinement in a Connecticut prison, sought summary judgment on the basis that his conditions violated the Eighth Amendment and the Equal Protection Clause. His equal protection claim was not based on an allegation that he had been placed in solitary confinement due to his membership of a protected class; rather, he alleged that he had been treated differently from others similarly situated and that there was no rational basis for the differential treatment.[233] To establish this claim, Mr. Reynolds had to show an "extremely high degree of similarity" with

[227] *Id.* at 1529.
[228] *Id.* at 1550 (citing Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981)).
[229] *Id.* (citing Craig v. Boren, 429 U.S. 190, 198 (1976); McCoy v. Nevada Dep't of Prisons, 776 F. Supp. 521, 523 (D. Nev. 1991)).
[230] *Id.*
[231] *Id.* at 1551.
[232] 402 F. Supp.3d 3 (D. Conn. 2019).
[233] *Id.* at 30.

the people to whom he compared himself.[234] He identified two other people who, like himself, had been convicted of capital crimes prior to Connecticut's repeal of the death penalty and had subsequently been resentenced to life imprisonment. Unlike Mr. Reynolds, however, these two people were not held in "level five" security facilities, but instead were housed in the general prison population.[235]

The court found that Mr. Reynolds had shown an extremely high degree of similarity to the other two people, because all three had been sentenced to death after being convicted of murder, had had their death sentences vacated, and were now serving life sentences without the possibility of release.[236] Furthermore, no rational basis supported Mr. Reynolds' placement in solitary confinement. The court noted that the other two men received a lower score in a risk assessment for their "length of sentence" classification which allowed them to live in the general population, even though all three were serving sentences of the same duration.[237] The court rejected the defendants' claim that Mr. Reynolds' higher security classification could be justified by the risk that he might attempt to escape, noting that a separate review had assessed his risk of escape as low. Thus Mr. Reynolds' higher security classification and placement in solitary confinement was irrational and served no legitimate purpose, in violation of the Equal Protection Clause.[238]

3.4 Barriers to Relief

Incarcerated people face various constraints in pursuing federal litigation and obtaining relief. Those barriers are discussed in this section.

3.4.1 Prison Litigation Reform Act

Enacted in 1996, the PLRA imposes a set of barriers on incarcerated people that drastically limits their access to the federal courts. The PLRA bars recovery of damages for mental and emotional harm without a prior showing of physical injury; limits actions by indigent people seeking to proceed *in forma pauperis*; and requires the exhaustion of administrative remedies before the

[234] *Id.*
[235] *Id.*
[236] *Id.* at 32.
[237] *Id.*
[238] *Id.* at 33-34.

commencement of court proceedings. It also limits the scope of relief that courts can order in the event a violation of rights is established with respect to prison conditions.

Proponents of the PLRA claimed it would curtail an alleged flood of frivolous litigation.[239] Senators cited erroneous statistics showing an increase in litigation relating to prisons in previous years to support their claims, while failing to acknowledge the dramatic increase in the size of the country's prison population during that same period.[240] The rate of court filings per 1,000 incarcerated people actually decreased seventeen percent between 1980 and 1996.[241] The PLRA was enacted quickly, with little debate, as a part of an omnibus appropriations bill for farmers.[242] The courts have criticized its "sloppy drafting."[243] In *McGore v. Wigglesworth*, the Chief Judge of the Court of Appeals for the Sixth Circuit noted that the statute is riddled with "typographical errors, … creates conflicts with the rules of Appellate Procedure …; and is internally inconsistent."[244]

The claimed justification for the PLRA – to reduce the amount of "frivolous" litigation – overlooked the fact that the federal courts already had mechanisms for dismissing such lawsuits or imposing sanctions under the Federal Rules of Civil Procedure.[245]

3.4.1.1 Bar on Claims for Mental and Emotional Harm

One of the limitations imposed by the PLRA that affects people in solitary confinement is set out in 42 U.S.C. § 1997e(e):

> "no federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act."

[239] 141 CONG. REC. S14,418 (1995) (statement of Senator Orrin Hatch).
[240] James E. Robertson, *Psychological Injury and the Prison Litigation Reform Act: A "Not Exactly," Equal Protection Analysis*, 37 HARV. J. ON LEGIS. 105, 142 (2000), citing JOHN SCALIA, BUREAU OF JUSTICE STATISTICS, PRISONER PETITIONS IN THE FEDERAL COURTS, 1980-96, 8 (1997).
[241] James E. Robertson, *supra* note 240, at 142.
[242] Terri LeClerq, *Rhetorical Evil and the Prison Litigation Reform Act*, 15 LEGAL COMM. & RHETORIC: JAWLD 47, 50 (2018).
[243] James E. Robertson, *supra* note 240, at 115.
[244] 114 F.3d 601, 603 (6th Cir. 1997).
[245] FED. R. CIV. P. 12(b)(6) and 11(c).

The statute does not define "physical injury," "mental injury," or "emotional injury." This provision limits federal lawsuits based solely on the psychological harm caused by solitary confinement absent proof of separate physical injury. This barrier, however, is inconsistent with the neuroscience research which demonstrates that there is a physical basis for the mental harm caused by isolation and sensory deprivation.[246] The PLRA's distinction between mental and physical harm is therefore an artificial one which limits the ability of incarcerated people to seek recourse for certain types of harm.

The courts have held that § 1997e(e) does not preclude all remedies for mental and emotional injuries suffered while in custody; it merely bars compensatory damages. In *Zehner v. Trigg*, the Seventh Circuit dismissed a claim for damages for mental and emotional injuries suffered as a result of exposure to asbestos, but noted that injunctive relief remained available.[247] The court conceded that an injunction was of little value to the plaintiffs because it could not "save them from the fear that they might one day become ill," and "if these plaintiffs are to be compensated for that fear at all, it must be by damages."[248] However, the court noted, Congress had decided that damages for such harm should not be awarded, and the court held that the statute was constitutional.[249] Other courts have indicated that nominal and punitive damages and declaratory relief are not barred by § 1997e(e).[250]

Significantly for people in solitary confinement, courts have found that physical injuries arising because of psychological harm do not overcome the bar on civil actions imposed by § 1997e(e). In *Davis v. District of Columbia*, the DC Circuit Court of Appeals upheld dismissal of a claim by a man whose HIV-positive status was disclosed by a prison official to other incarcerated people without his consent.[251] Mr. Davis claimed mental and emotional harm, but he also produced an affidavit from a psychiatrist explaining that Mr. Davis had suffered from weight loss, loss of appetite, and insomnia after the unauthorized disclosure. Mr. Davis contended that these

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[246] *See supra* section 2.4.2.2.
[247] 133 F.3d 459, 462 (7th Cir. 1997).
[248] *Id.*
[249] *Id.* at 462-63.
[250] *See, e.g.,* Waters v. Andrews, 2000 WL 16111126 (W.D.N.Y. Oct. 16, 2000) (citing Allah v. Al-Hafeez, 226 F.3d 247 (3d Cir. 2000) (holding that § 1997e(e) did not bar a First Amendment claim for punitive and nominal damages); Horne v. Coughlin, 191 F.3d 244, 250 (2d Cir. 1999) (noting availability of injunctive relief for constitutional challenge to prison regulation), *cert. denied,* 528 U.S. 1052 (1999)).
[251] 158 F.3d 1342 (D.C. Cir. 1998).

symptoms qualified as physical injury for purposes of § 1997e(e).[252] The court rejected this assertion, holding that the statute required the physical injury to arise prior to the mental or emotional harm. The court also noted the "statutory purpose of discouraging frivolous suits preclude[s] reliance on the somatic manifestations of emotional distress Davis alleges."[253] Moreover, in *Adnan v. Santa Clara Cty Dep't of Corr.*, the District Court for the Northern District of California held that a plaintiff could not claim compensatory damages for mental or emotional distress resulting from his placement in solitary confinement while being held in pretrial detention, because he did not allege any physical injury in connection with those conditions.[254]

However, other courts have held that § 1997e(e) does not preclude a challenge to solitary confinement based on the Eighth Amendment because proof of mental or emotional injury is not required to establish an Eighth Amendment violation. In *Waters v. Andrews*, the District Court for the Western District of New York applied this reasoning in declining the defendants' application for summary judgment, observing that the plaintiff's Eighth Amendment claim did not require proof of mental or emotional distress.[255] The plaintiff had been strip-searched and placed in an observation cell in a special housing unit. She was given a thin, translucent paper gown to wear which did not fully conceal her body. She had no undergarments, personal hygiene items, toilet paper, or a replacement gown, and she was not allowed to take a shower.[256] The cell in which she was held was dirty and the mattress was blood-stained and smelled of urine. The court considered there was a material issue of fact as to whether the conditions in which the woman was held constituted a physical injury under the statute, because a reasonable jury could find that exposure to noxious odors such as body odors, as well as "dreadful conditions of confinement," amounted to physical injury.[257]

The scope of the bar on actions for mental and emotional injuries under § 1997e(e) is unclear and courts have taken different approaches to defining physical injury. Although the statute does not absolutely prohibit constitutional challenges to solitary confinement conditions, it certainly

[252] *Id.* at 1349.
[253] *Id.*
[254] 2002 WL 32058464 at *3 (N.D. Cal. Aug. 15, 2002).
[255] *Id.*
[256] *Id.* at *2.
[257] *Id.* at *8.

creates an additional impediment to such challenges, particularly where mental and emotional injury is alleged. Moreover, by removing the ability of incarcerated people to claim damages for mental and emotional injuries that they sustain due to dehumanizing prison conditions, the statute appears to grant prison officials "carte blanche to impose all the mental and emotional injury they want."[258] As the Seventh Circuit recognized in *Zehner*, injunctive relief cannot remedy the harm that has already been caused by the infliction of mental or emotional distress. Thus § 1997e(e) removes a form of judicial redress from people in prisons solely because of their incarceration, despite the incarceration being the cause of the mental or emotional harm that would otherwise be actionable.

3.4.1.2 Exhaustion of Remedies

The second burdensome aspect of the PLRA is the requirement in § 1997e(a) that all available administrative remedies be exhausted before any federal action is brought with respect to prison conditions. Under a prior statute enacted in 1980, district courts could stay civil rights actions brought by incarcerated people for up to 180 days while "plain, speedy, and effective administrative remedies" were exhausted.[259] The Supreme Court described this provision as a "limited exhaustion requirement."[260] The new provision imposed by the PLRA "invigorated the exhaustion prescription" by mandating exhaustion of *all* available remedies and removing any requirement that such remedies be plain, speedy, or effective.[261] Though it has been asserted that the PLRA's exhaustion requirement promotes efficiency by reducing the quantity of lawsuits and affording prison officials an opportunity to address complaints internally, this claim is not supported by the legislative history.[262] By removing the express requirement that administrative remedies be plain, speedy, and effective, and mandating exhaustion of internal administrative remedies, Congress has made it significantly more difficult to pursue complaints about prison conditions.

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[258] John Boston, *The Prison Litigation Reform Act: The New Face of Court Stripping*, 67 BROOK. L. REV. 429, 435 (2001).
[259] Civil Rights of Institutionalized Persons Act, 94 Stat. 352 (1980), as amended, 42 U.S.C. § 1997e (1994 ed.).
[260] McCarthy v. Madigan, 503 U.S. 140, 150-51 (1992).
[261] Porter v. Nussle, 534 U.S. 516, 524 (2002).
[262] *See, e.g.,* Amador v. Superintendents of Dept. of Corr. Serv., 2007 WL 4326747, *4 (S.D.N.Y. Dec. 4, 2007) (noting the exhaustion requirement protects administrative agency authority by providing an opportunity to correct its own mistakes and promotes efficiency as claims are generally settled faster and more economically in proceedings before an agency than in federal court).

The exhaustion requirement "invites technical mistakes resulting in inadvertent non-compliance … and barring litigants from court because of their ignorance and uncounseled procedural errors."[263] Given the complexity of administrative processes, incarcerated people are certainly not encouraged or supported to pursue administrative complaints. Indeed, by doing so, they face the risk of retaliation from staff.[264]

Predictably, § 1997e(a) has resulted in complex and lengthy court proceedings to determine what constitutes exhaustion of all administrative remedies. For example, in *Amador v. Andrews*, a complaint was filed in 2003 by seventeen women in New York prisons alleging sexual abuse and rape by prison officials.[265] In 2007, the district court granted summary judgment in favor of prison officials as to some of the plaintiffs' claims, on the basis that not all the plaintiffs had followed the state's three-step grievance procedure for reporting sexual abuse. While all the plaintiffs had made complaints, some had communicated them to the inspector-general, the immediate supervisor of the alleged abuser, or other prison officials they felt comfortable approaching.[266] The plaintiffs asserted that the usual administrative remedies were unavailable to them due to the threat of retaliation and because the three-step grievance process was difficult for victims of sexual abuse to initiate.[267]

The district court rejected these submissions, holding that the fact that some plaintiffs had been able to pursue the formal grievance process "cut[] against these plaintiffs' argument," and finding that there was no evidence that attempts to pursue the formal grievance process were thwarted by officials.[268] Four years later, on appeal, the Second Circuit partially reversed the district court's holding and observed also that it was clear that the inspector-general's investigation of alleged acts of sexual abuse was an "integral part of the internal grievance procedure."[269] Because of the length of time that had elapsed since the filing of the original

[263] John Boston, *supra* note 258, at 431.
[264] *Id.*, n.7 (2001) ("One of the dirty secrets of American corrections is the persistence of secret threats and retaliation against prisoners who complain about their treatment, including those who use the grievance systems that the PLRA has now made mandatory. Despite the enormous difficulty of proving this kind of claim, there is a steady stream of court and jury findings documenting such actions.").
[265] Amador v. Superintendents of Dept. of Corr. Serv., 2007 WL 4326747 (S.D.N.Y. Dec. 4, 2007).
[266] *Id.* at *7.
[267] *Id.* at *8.
[268] *Id.*
[269] Amador v. Andrews, 655 F.3d 89, 98 (2d Cir. 2011).

complaint, the Second Circuit also had to address questions about the mootness of some claims. The substantive claims brought by the plaintiffs in *Amador* have never been resolved by the courts.

3.4.1.3 In Forma Pauperis Actions

The PLRA limits the extent to which indigent people can pursue litigation without paying filing fees. The PLRA requires partial payment of court fees by incarcerated people, calculated with reference to the balance of their prison accounts.[270] Filing fees owed by incarcerated people cannot be discharged in bankruptcy.[271] These restrictions affect all incarcerated people, but they are particularly burdensome for people in solitary confinement who are usually unable to get prison jobs.[272]

The PLRA imposes a "three-strikes" provision that prohibits incarcerated people from pursuing lawsuits *in forma pauperis* if they have already brought three actions or appeals that have been dismissed for being frivolous or malicious, or for failing to state a claim.[273] Dismissal on any of these grounds, even if an appeal of the dismissal is pending, counts as a strike.[274] There is no time limit on the accrual of strikes. Thus, in one case, a person was barred from proceeding *in forma pauperis* in a 1997 claim because of strikes he was said to have accrued between 1981 and 1984.[275]

Courts have differed as to whether failure to exhaust all administrative remedies counts as a strike, despite the opacity of internal administrative procedures.[276] The resulting confusion comes at the expense of incarcerated people, who must decide whether to risk pursuing litigation and accruing a strike in the absence of clear guidance. Though the PLRA was ostensibly intended to promote efficiency and resolution of complaints within prison systems, the statute instead operates to keep claims out of federal courts.

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[270] 28 U.S.C. § 1915(b)(1) and (2).
[271] 11 U.S.C. § 523(a)(17).
[272] John Boston, *supra* note 258, at 433.
[273] 28 U.S.C. § 1915(g).
[274] Coleman v. Tollefson, 575 U.S. 532, 538 (2015).
[275] Evans v. McQueen, No. 97-6471, 1997 U.S. App. LEXIS 26886 (4th Cir. Sept. 29, 1997).
[276] Anderson v. Jutzy, 175 F. Supp. 3d 781 (E.D. Mich. 2016) (holding that failure to exhaust administrative remedies did not count as a strike under 28 U.S.C. § 1915(g)); *but see* White v. Lemma, 947 F.3d 1373 (11th Cir. 2020) (holding an incarcerated person had accrued a strike for failure to exhaust administrative remedies).

3.4.1.4 Narrowly Drawn Relief

18 U.S.C. § 3626 limits the relief that federal courts can grant in civil actions relating to prison conditions so that relief must be narrowly drawn and extend no further than necessary to correct the violation of the right. The relief must be the least intrusive means necessary to correct the violation, and courts must give substantial weight to "any adverse impact on public safety or the operation of a criminal justice system" that might result from the relief. Not only, therefore, do the federal courts afford deference to prison officials when determining whether there was a violation; they must also afford deference when determining the scope of relief.

This provision limits not only preliminary injunctive relief, but also settlements and consent decrees.[277] In the rare event that a court decides to make a release order, the statute imposes further restrictions by mandating that a three-judge panel be convened, and requiring that the panel be satisfied that such an order is necessary because overcrowding is the primary cause of the violation and no other relief will suffice.[278] No release order can be made unless the court has previously entered an order for less intrusive relief that has failed to remedy the violation, and the department of corrections has had a reasonable amount of time to comply with that prior order.[279]

In *Brown v. Plata*, the Supreme Court upheld such a remedial order in a 5:4 decision.[280] The case concerned overcrowding in California's prisons, which had operated at nearly 200 percent capacity for over eleven years. A three-judge court ordered the state to reduce the prison population to 137.5 percent of capacity. Describing the overcrowding in the state's prisons as "exceptional," the Supreme Court affirmed the order, noting that people in the prisons were "crammed into spaces neither designed nor intended to house inmates."[281] The reduction order was made after the governor had declared a state of emergency in the prisons. It followed failures to comply with other remedial orders entered by the district court to address various Eighth Amendment violations. While the order required the state to reduce capacity to 137.5 percent within two years, the state submitted a proposed plan that would achieve the required

[277] *See infra* chapters 5 and 6.
[278] 18 U.S.C. § 3626(a)(3)(E).
[279] 18 U.S.C. § 3626(a)(3)(A).
[280] 563 U.S. 493 (2011).
[281] *Id.* at 502.

reduction over five years. This proposal was rejected, although the Supreme Court suggested that the three-judge panel give "serious consideration" to other modifications proposed by the state.[282] The *Plata* litigation encapsulates the ways in which federal jurisprudence and statute combine to prolong challenges to prison conditions and ultimately delay meaningful improvements for as long as possible. In contrast, as discussed in chapter 4, state courts are not subject to these same restrictions in granting relief.

3.4.2 Qualified Immunity

Qualified immunity presents another barrier to meaningful relief for people seeking to hold prison officials accountable for constitutional violations. The federal courts have developed this defense which applies to government officials in civil actions for deprivation of rights where their acts do not violate clearly established law.[283] If it is raised by prison officials prior to trial, the burden then shifts to the incarcerated person to establish lack of immunity.[284] The qualified immunity test imposes a "heavy two-part burden."[285]

A recent Supreme Court decision illustrates the application of qualified immunity in a case concerning conditions of confinement. In *Taylor v. Riojas*, the Court overturned the Fifth Circuit's decision to grant qualified immunity to prison officials who placed a man in "a pair of shockingly unsanitary cells."[286] One of the cells was covered in feces and the other was "frigidly cold … [and] equipped with only a clogged drain in the floor to dispose of body wastes." Mr. Taylor was forced to sleep naked on the floor, which was covered in sewage.[287]

In the Fifth Circuit, the court explained that, to overcome the qualified immunity defense, Mr. Taylor had to show, first, that the officials violated his right to be free from cruel and unusual punishment, and second, that this right was clearly established at the time of the violation.[288] The court found that the first part of the test had been met given the "paltry conditions" of the cells which exposed Mr. Taylor to a substantial risk of harm and denied him a minimal civilized

[282] *Id.* at 544.
[283] Harlow v. Fitzgerald, 457 U.S. 800 (1982).
[284] Brown v. Callahan, 623 F.3d 249, 253 (5th Cir. 2010).
[285] Grissom v. Roberts, 902 F.3d 1162, 1167 (10th Cir. 2018) (citing Casey v. W. Las Vegas Indep. School Dist., 473 1323, 1327 (10th Cir. 2007)).
[286] Taylor v. Riojas, 141 S. Ct. 52 (2020).
[287] *Id.* at 53.
[288] Taylor v. Stevens, 946 F.3d 211 (5th Cir. 2019).

measure of life's necessities.[289] Nevertheless, the Fifth Circuit found that Mr. Taylor's claim failed on the second element because the right to be exempt from such conditions was not clearly established at the time of the violation. The court reasoned that:

> "Taylor stayed in his extremely dirty cell for only six days. Though the law was clear that prisoners couldn't be housed in cells teeming with human waste for months on end … we hadn't previously held that a time period so short violated the Constitution."[290]

The Fifth Circuit determined that the prison officials were entitled to qualified immunity because the lack of established precedent had deprived them of fair warning that their specific acts were unconstitutional.[291]

The Supreme Court took the opposite view. It held that "no reasonable correctional officer could have concluded that, under the extreme circumstances of this case, it was constitutionally permissible to house Taylor in such deplorably unsanitary conditions for such an extended period of time."[292] It went on to state that "any reasonable officer should have realized that … [the] conditions of confinement offended the Constitution."[293] The Court rejected the Fifth Circuit's reliance on the specific period of time in which Mr. Taylor was held in these conditions as the basis for granting qualified immunity and focused instead on the egregious conditions of confinement. *Taylor* is significant because it signals a move away from the practice adopted by federal courts to date of requiring specific, similar facts – here, the precise period of confinement in squalid conditions – to give rise to a "clearly established right."

In cases challenging placement in solitary confinement that do not involve quite the same appalling conditions to which Mr. Taylor was subjected, it remains to be seen whether the requirement of a "clearly established right" will continue to favor prison officials. To date, courts have imposed a high standard to show that a right is clearly established. For example, in *Grissom v. Roberts*, the Tenth Circuit granted qualified immunity to prison officials in a case involving a man who was held in solitary confinement for twenty years.[294] Although Mr.

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[289] *Id.* at 222.
[290] *Id.*
[291] *Id.*
[292] 141 S. Ct at 53.
[293] *Id.* at 54.
[294] 902 F.3d 1162 (10th Cir. 2018).

Grissom cited four federal cases that recognized that the harm of long-term solitary confinement could violate the Eighth Amendment, the court held these cases were insufficient to show a clearly established right because none of them were decided by the Tenth Circuit or the Supreme Court.[295]

[295] *Id.* at 1174.

CHAPTER 4. STATE CONSTITUTIONAL JURISPRUDENCE

Introduction

This chapter examines state jurisprudence as it relates to solitary confinement. While many state courts apply federal jurisprudence in both cruel and unusual punishment claims and due process challenges, there is a range of different approaches. This is aided by the wider array of state constitutional provisions and the willingness of some courts to interpret provisions identical to their federal counterpart in different ways. Indeed, as Justice Brennan has observed, state constitutions are "a font of individual liberties."[1]

State constitutional provisions and judgments provide various alternatives for challenging solitary confinement. Although scholars have commented on the jurisprudence of particular states regarding individual rights, and some have discussed the rights of incarcerated people, there has been no specific focus on solitary confinement.[2] This chapter contributes to the scholarly literature by examining how solitary confinement may be scrutinized by state courts and state constitutions, the alternative avenues that depart from federal precedent, and the reasons why state constitutional jurisprudence relating to solitary confinement remains underexplored.

4.1 The Role of State Courts

In 1973, the Court of Appeals of Ohio recognized that state courts serve an important function in articulating the rights of incarcerated people. In the case of *In Re Lamb* it was alleged that

[1] William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

[2] *See, e.g.,* William W. Berry, III, *Cruel State Punishments*, 98 N.C.L. REV. 1201 (2020); Richard P. Bullock, *The Declaration of Rights of the Louisiana Constitution of 1974: The Louisiana Supreme Court and Civil Liberties*, 51 LA. L. REV. 787 (1991), Matthew Clifford and Thomas Huff, *Some Thoughts on the Meaning and Scope of Montana's "Dignity" Clause with Possible Applications*, 61 MONT. L. REV. 301 (2000), Caroline Davidson, *State Constitutions and the Humane Treatment of Arrestees and Pretrial Detainees*, 19 BERKELEY J. CRIM. L. 1 (2014), Lee Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 LA. L. REV. 1 (1974), David C. Hawkins, *Florida Constitutional Law: 1990 Survey of the State Bill of Rights*, 15 NOVA. L. REV. 1049 (1991), Linda Hemphill, *Challenging Conditions of Confinement: A State Constitutional Approach*, 20 WILLAMETTE L. REV. 409 (1984), Robert Keiter, *An Essay on Wyoming Constitutional Interpretation*, 21 LAND & WATER L. REV. 527 (1986), Louis Jenkins, *The Declaration of Rights*, 21 LOY. L. REV. 9 (1975), Robert W. Lough, *Tennessee Constitutional Standards for Conditions of Pretrial Detention: A Mandate for Jail Reform*, 48 TENN. L. REV. 688 (1981), James G. McLaren, *The Meaning of the Unnecessary Rigor Provision in the Utah Constitution*, 10 B.Y.U. J. PUB. L. 27 (1996).

placing people in punitive detention (solitary confinement) violated the Ohio Constitution and the Fifth and Fourteenth Amendments of the US Constitution.[3] The court observed that "primary responsibility for the delineation of prisoners' rights in state and local custodial institutions ought properly to fall upon the state judiciary."[4] It went on to explain that

> "it is both eminently sensible and infinitely less strain on the delicate balance of federal-state relations in the administration of our federal system of criminal justice to posit such primary responsibility on the state judiciary. Rather than viewing the state judicial system as a delaying but necessary obstacle to be overcome in the exhaustion of state remedies before the consideration of federal constitutional questions is undertaken in the federal courts, … it is especially important that both prisoners and prison administrators recognize that the conflict between prison disciplinary action and prisoners' constitutional rights will receive careful scrutiny in the first instance at the state, as well as the federal level."[5]

The court characterized "the failure of the state courts to come to grips with problems in their own custodial institutions" as "astonishing."[6] Due to their role in sentencing, the court observed, state courts "cannot evade their continuing responsibility to protect [incarcerated people's] basic rights after conviction."[7] Although a separate analysis of the state and federal provisions that were allegedly violated was not conducted, the court concluded that the petitioners had been illegally held in solitary confinement in violation of both the Ohio Constitution and the US Constitution.[8]

The Ohio court's recognition of the need for state courts to take "primary responsibility" for defining state and federal constitutional rights has been recognized elsewhere. In 1977, Justice Brennan wrote:

[3] 296 N.E.2d 280 (Ohio Ct. App. 1973).
[4] *Id.* at 285.
[5] *Id.*
[6] *Id.* at 284-85.
[7] *Id.* at 285.
[8] *Id.* at 288.

> "State courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law."[9]

Justice Brennan suggested that state courts were increasingly "construing state constitutional counterparts of provisions of the Bill of Rights as guaranteeing … even more protection than the federal provisions, even those identically phrased."[10] The justice linked state courts' increasing recognition of these rights with the Supreme Court's turn away from protecting individual rights.[11] He indicated that the Supreme Court's decisions on individual rights are not "mechanically applicable to state law issues, and state court judges and the members of the bar seriously err if they so treat them."[12]

In line with Justice Brennan's comments, many state courts have recognized that their constitutions need not be interpreted in the same manner as the Federal Constitution. The Supreme Court of Connecticut held in *State v. Rizzo* that it may find that the state constitution provides greater protection of individual rights than the Federal Constitution, subject to six factors: persuasive federal precedents, the text of the relevant provision of the state constitution, the intent of the drafters of the constitution, related state precedents, persuasive precedents from other state courts, and current understanding of economic and sociological norms or public policies.[13] Other courts also look to textual differences and matters of particular state interest in ruling on the scope of constitutional protections.[14] These approaches give state courts some latitude to interpret state constitutions in a way that can improve conditions in solitary confinement, or even restrict or eliminate the practice altogether.

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[9] William J. Brennan, Jr., *supra* note 1, at 491. *See also* Prock v. District Court of Pittsburg County, 630 P.2d 772, 779 (Okla. 1981) (quoting Case v. Nebraska, 381 U.S. 336, 345-46 (1965) (Brennan, J., concurring) "None can view with satisfaction the channeling of a large part of state criminal business to federal trial courts. If adequate state procedures, presently all too scarce, were generally adopted, much would be done to remove the irritant of participation by federal district courts in state criminal procedure."). The court in Prock observed that "This observation is equally apropos with respect to prison discipline cases. Judicial lethargy is unlikely to help the state solve whatever problems may still exist in its penal system."

[10] William J. Brennan, Jr., *supra* note 1, at 495.

[11] *Id.*

[12] *Id.* at 502.

[13] State v. Rizzo, 833 A.2d 363, 391 (Conn. 2003) (citing City Recycling, Inc. v. State, 778 A.2d 77 (Conn. 2001)).

[14] State v. Gunwall, 720 P.2d 808, 811 (Wash. 1986) (the court considers "(1) the textual language; (2) differences in the text; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern.").

4.2 Conditions of Confinement

State constitutional jurisprudence reflects a broader range of different approaches to challenges to prison conditions than federal jurisprudence. This can be seen not only from different interpretations of prohibitions against cruel and unusual punishments, but also from interpretations of additional constitutional provisions such as prohibitions against unnecessary rigor or abuse, requirements for safe and comfortable prisons and the humane treatment of incarcerated people, the requirement of rehabilitation or reformation, and recognition of individual dignity. State courts can exercise greater flexibility in challenges to prison conditions, including solitary confinement, by interpreting these constitutional provisions with reference to state statutes, common law, and practices.

4.2.1 Cruel and Unusual Punishment

Forty-seven state constitutions contain some form of prohibition against cruel and unusual punishment.[15] Some courts have held state provisions offer greater protection than the Eighth Amendment, though the parameters are rarely specified with precision. In other cases, courts have simply adopted the two-part test that governs Eighth Amendment jurisprudence.

4.2.1.1 State Provisions Different from the Eighth Amendment

The Supreme Court of Indiana has recognized that "the language of each provision of the Constitution must be treated with particular deference, as though every word had been hammered into place."[16] Presumably other state courts apply the same attention to the wording of their own constitutions. Nevertheless, most of the states whose constitutions are worded differently from the Eighth Amendment have not, to date, interpreted prohibitions against cruel and unusual punishment differently from the federal courts.

[15] State v. Gardner, 947 P.2d 630, 636, n.5 (Utah 1997) ("A prohibition against cruel and unusual punishment appears in forty-four of the fifty state constitutions as well as the Constitution of the United States, and similar prohibitions appear in three others … Only the constitutions of Connecticut, Illinois, and Vermont do not contain a guarantee that cruel and unusual punishments shall not be inflicted.").
[16] City Chapel Evangelical Free Inc. v. City of South Bend ex rel. Dept. of Redevelopment, 744 N.E.2d 443 (Ind. 2001) (quoting McIntosh v. Melroe Co., 729 N.E.2d 972 (Ind. 2000) (Dickson, J., dissenting)).

Louisiana's Constitution prohibits laws that subject any person to "torture …, cruel, excessive, or unusual punishment."[17] Interpretations of this provision have largely focused on the meaning of "excessive punishment," which is broader than the prohibition on "excessive fines" in Louisiana's previous constitution.[18] The Supreme Court of Louisiana held in *State v. Sepulvado*, a 1979 decision concerning an excessive sentence, that "the deliberate inclusion of a prohibition against 'excessive' as well as 'cruel and unusual' punishment adds an additional constitutional dimension to judicial imposition and review of sentences."[19] Louisiana's courts have reviewed sentences for alleged excessiveness since *Sepulvado*.[20]

Though Louisiana's prohibition against torture has not been tested in any challenge to solitary confinement, that provision is more relevant to the practice than the prohibition on excessive sentences which the courts have reviewed. The reference to torture was new to the 1974 constitution: its predecessor prohibited only "treatment designed … to compel confession of crime."[21] The current constitution was initially drafted to prohibit "cruel, unusual or excessive *treatments*," but the word "treatments" was removed "not because of any concern related to questioning procedures or punishment, but because of fear that it might be construed as preventing physicians from using novel or unusual methods."[22] A member of the Louisiana House of Representatives wrote in 1975 that the prohibition against torture

> "outlaws virtually all forms of corporal punishment and treatment … Clearly this forbids some methods of administering the death penalty, *long periods of confinement in isolation,* highly restrictive diets, forced administration of drugs and, of course, physical abuse of all sorts."[23]

Nevertheless, there has been no holding that solitary confinement violates the prohibition against torture under the Louisiana Constitution.

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[17] LA. CONST., art. I, § 20.
[18] LA. CONST., art. I, § 12 (1921).
[19] 367 So. 2d 762, 764 (La. 1979).
[20] *See, e.g.,* State v. Perry, 610 So. 2d 746 (La. 1992) (holding the death penalty for a person found guilty but mentally ill not constitutionally excessive); State v. Hamdalla*,* 126 So. 3d 19 (La. 2013) (holding a sentence of eighty years at hard labor for a rape conviction not constitutionally excessive).
[21] LA. CONST., art. I, § 11 (1921).
[22] Lee Hargrave, *supra* note 2, at 63, citing *Committee Proposal 25,* § 18 *in* Calendar of the Constitutional Convention of 1973 of the State of Louisiana (emphasis added).
[23] Louis Jenkins, *supra* note 2, at 38-39.

In the Maryland Constitution, the relevant provision is entitled "Avoidance of … Cruel and Unusual Punishment," but the provision itself provides that "no Law to inflict cruel and unusual *pains and penalties* ought to be made."[24] Despite the clearly different wording, the Court of Special Appeals of Maryland held in *Walker v. State* that the Eighth Amendment and the state provision are *in pari materia*, "because both of them were taken virtually verbatim from the English Bill of Rights of 1689."[25] The court has not addressed whether the phrase "pains and penalties" could be interpreted differently from the federal courts' restrictive definition of the word "punishment."

New Hampshire's Constitution does not explicitly prohibit cruel and unusual punishment. It provides that "all penalties ought to be proportioned to the nature of the offense … Where the same undistinguishing severity is exerted against all offenses, the people are led to forget the real distinction in the crimes themselves."[26] In interpreting the provision, the courts have focused on proportionality between the offense and the sentence, rather than the character of the punishment. In *State v. Enderson*, the Supreme Court of New Hampshire held that fines imposed for gambling convictions were not disproportionate to the offense and remarked that the state provision offers "at least as much protection against disproportionate punishment as does the Eighth Amendment."[27] The court had previously observed in *State v. Dayutis* that the Federal Constitution need only be addressed "insofar as federal law would provide greater protection."[28] In that case, a sentence was held to be disproportionate in violation of the state constitution, and the court therefore did not address the federal prohibition.[29] The state provision has not been invoked in any challenge to conditions of confinement although such conditions also raise the question of proportionality.

South Carolina's Constitution states that neither "cruel, *nor corporal,* nor unusual punishment" shall be inflicted.[30] However, the courts have never interpreted that provision differently from the Eighth Amendment and there are few cases in which both the Eighth Amendment and the

[24] MD. CONST. art. 16 (emphasis added).
[25] 452 A.2d 1234, 1240 (Md. Ct. Spec. App. 1982).
[26] N.H. CONST. art. 18th.
[27] 804 A.2d 448 (N.H. 2002).
[28] 498 A.2d 325, 328 (N.H. 1985) (citing State v. Ball, 471 A.2d 351 (N.H. 1983)).
[29] *Id.* at 329.
[30] S.C. CONST. art. I, § 15.

state prohibition were considered.[31] The lack of case law on the state prohibition is unfortunate because the explicit reference to corporal punishment could suggest a broader interpretation of the term "cruel and unusual" to include forms of punishment other than corporal.

Examination of these differences in wording between the Eighth Amendment and state constitutions relating to cruel and unusual punishment might allow for a closer alignment of decisions with the intent and purpose of state constitutions and provide a wider view regarding the constitutionality of solitary confinement.

4.2.1.2 State Provisions Similar to the Eighth Amendment

Paradoxically, some states with provisions similar to the Eighth Amendment have interpreted their constitutions as conferring broader protection against cruel and unusual punishment than the federal provision.

In California, that was accomplished through emphasis on a small difference in wording. The state constitution prohibits "cruel *or* unusual punishment," in contrast to the federal prohibition of "cruel *and* unusual punishment."[32] In *People v. Anderson* the state supreme court, in holding that the death penalty violated the state constitution, noted that the drafters of the prohibition "modified [it] before adoption to substitute the disjunctive 'or' for the conjunctive 'and' in order to establish their intent that both cruel and unusual punishments be outlawed in [the] state."[33] Likewise, the state's court of appeals has held that California's provision provides greater protection by prohibiting cruel *or* unusual punishment.[34] As a result, the courts separately assess violations of the state and federal prohibitions.[35] Nevertheless, the courts have never found that a punishment violates the state constitution but not the Federal Constitution.[36] Interpretation of the state prohibition against cruel or unusual punishment in a manner different from federal jurisprudence is precluded by a separate constitutional provision that states that while the rights

[31] *See, e.g.,* State v. Wilson*,* 413 S.E.2d 19 (S.C. 1992) ("the use of the disjunctive 'or' rather than 'and' in the South Carolina Constitution is of no importance in this case, since the analysis we employ is the same under both constitutions.").
[32] CAL. CONST. art. I, § 17.
[33] 493 P.2d 880, 885 (Cal. 1972).
[34] People v. Haller, 94 Cal. Rptr.3d 846 (Cal. Ct. App. 2009).
[35] People v. Baker, 229 Cal. Rptr.3d 40 (Cal. Ct. App. 2018).
[36] In People v. Anderson, 493 P.2d 880 (Cal. 1972), the court held that the death penalty violated the state prohibition against cruel and unusual punishment and thus the court did not need to consider whether it violated the Federal Constitution.

guaranteed by the state constitution are not dependent on those guaranteed by the Federal Constitution, the right not to suffer cruel or unusual punishment (as well as other rights relating to criminal procedure) "shall be construed by the courts of this State in a manner consistent with the Constitution of the United States."[37]

The Supreme Judicial Court of Massachusetts signaled in *Michaud v. Sheriff of Essex Cty* that the rights guaranteed under the state prohibition against cruel or unusual punishments are "at least equally as broad as those guaranteed under the Eighth Amendment."[38] In *Michaud*, the court affirmed an order holding that unsanitary jail conditions violated both the Eighth Amendment and the Massachusetts Declaration of Rights. The evidence before the court established that cells in a local jail did not have flush toilets or running water. One bucket (with no lid) was provided for each cell, including those that housed more than one person.[39] The buckets were only emptied once per day and rinsed with cold water. The odor was described as "unbearable."[40] People confined in the cells ate their meals and slept near the unemptied buckets.[41] The court had regard to federal decisions that held similar conditions violated the Eighth Amendment but it went on to acknowledge that these cases were not the sole basis for determining if the conditions violated standards of human decency.[42] The court held that state regulations, which imposed "minimum standards of human habitation in prisons," also provided "an objective standard for assessing whether sanitary conditions at the jail fall below minimum standards of decency."[43]

The view that the state constitutional provision is broader than its federal counterpart was also adopted by the Michigan Court of Appeals in *People v. Benton*, though the issue was tested under the state constitution first. The court remarked that if a punishment "passes muster under

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[37] CAL. CONST. art. I, § 24.
[38] 458 N.E.2d 702, 708 (Mass. 1983).
[39] *Id.* at 703-04.
[40] *Id.*
[41] *Id.*
[42] *Id.* at 705-06 (citing Chavis v. Rowe, 643 F.2d 1281, 1291–92 (7th Cir. 1981), *cert. denied sub nom*. Boles v. Chavis*,* 454 U.S. 907 (1981); Kirby v. Blackledge, 530 F.2d 583, 586–87 (4th Cir. 1976); LaReau v. MacDougall, 473 F.2d 974, 978 (2d Cir. 1972), *cert. denied,* 414 U.S. 878; Lovell v. Brennan, 566 F. Supp. 672, 695–96 (D. Me. 1983); Griffin v. DeRobertis, 557 F. Supp. 302, 305–06 (N.D. Ill.1983); Strachan v. Ashe, 548 F. Supp. 1193, 1202–03 (D. Mass. 1982); Flakes v. Percy, 511 F. Supp. 1325, 1332 (W. D. Wis. 1981); Mitchell v. Untreiner, 421 F. Supp. 886, 894 (N. D. Fla. 1976); Bel v. Hall, 392 F. Supp. 274, 276–77 (D. Mass. 1975); Osborn v. Manson, 359 F. Supp. 1107, 1112 (D. Conn. 1973)).
[43] *Id.* at 706-707.

the state constitution, then it necessarily passes muster under the Federal Constitution."[44] It went on to hold that a mandatory twenty-five-year minimum sentence for sex offenses did not violate either the state or the Federal Constitution. Michigan's provision, like those of California and Massachusetts, prohibits "cruel *or* unusual punishments."[45]

Minnesota's Constitution also prohibits "cruel *or* unusual punishments."[46] In *State v. Vang*, the Minnesota Supreme Court described the difference in language from the Eighth Amendment as "not trivial."[47] In contrast with the approach taken by the US Supreme Court, the court in *Vang* conducted separate analyses of whether a sentence imposed for crimes committed by a person when he was fourteen years old was cruel or unusual. The court first held that the question of cruelty required comparison of the gravity of the offense with the severity of the sentence.[48] Then next it considered whether the sentence was unusual by asking whether "a consensus exists among the states that the sentence offends evolving standards of decency."[49] A finding that a mandatory sentence of life imprisonment was neither cruel nor unusual led to the conclusion that there was no violation of the state constitution or the Eighth Amendment.

The Constitution of Washington prohibits "cruel punishment" with no reference to "unusual punishment."[50] Nevertheless, this provision has been held to provide more protection than the Eighth Amendment. In *State v. Witherspoon*, the court upheld a sentence of life without parole and reasoned that if a sentence did not violate the "more protective state provision," no analysis of the Eighth Amendment was required.[51]

New York's constitutional provision is identical to the Eighth Amendment.[52] However, the two constitutions were analyzed separately by a lower court in a case challenging the capital punishment statute then in effect.[53] In *People v. Hale*, the court first conducted "an interpretive

[44] 817 N.W.2d 599, 607 (Mich. Ct. App. 2011) (citing People v. Nunez, 619 N.W. 2d 550 (Mich. Ct. App. 2000)).
[45] MICH. CONST. art. I, § 16 (emphasis added).
[46] MINN. CONST. art. I, § 5 (emphasis added).
[47] 847 N.W.2d 248, 263 (Minn. 2014).
[48] *Id.* (citing State v. Juarez, 837 N.W. 2d 473, 482 (Minn. 2013)).
[49] *Id.*
[50] WASH CONST. art. I, § 14.
[51] 329 P.3d 888, 894 (Wash. 2014) (citing State v. Rivers, 921 P.2d 495 (Wash. 1996) and State v. Fain, 617 P.2d 720 (Wash. 1980)).
[52] N.Y. CONST. art. I, § 5.
[53] People v. Hale, 661 N.Y.S.2d 457 (N.Y. Sup. Ct. 1997).

analysis of the constitutional provision in question, focusing on whether the text of the state constitution specifically recognizes rights not enumerated in the Federal Constitution."[54] Because the provisions are identical, this analysis provided no reason to interpret the state prohibition differently from the Eighth Amendment.[55] That conclusion was followed by a "non-interpretive" analysis, requiring "judicial perception of sound policy, justice, and fundamental fairness."[56] It explored whether any state statute or the common law had defined the right at issue, the history and traditions of the state, evidence that the right was of particular state concern, and state attitudes toward the definition, scope or protection of the right.[57] The court's non-interpretive analysis also required a review of the history of the state's use of the death penalty. The conclusion reached, informed by "New York's contemporary values," was that the death penalty did not violate the state constitution.[58]

Tennessee's prohibition against cruel and unusual punishment is also identical to the Eighth Amendment but the courts have indicated that the state provision may have broader meaning.[59] In *State v. Black*, the Supreme Court of Tennessee held that a "more expansive" interpretation of the state provision was not foreclosed merely because the two provisions are "textually parallel."[60] However, after analysis of the death penalty under the state constitution, the court reached a result consistent with decisions of the US Supreme Court and some other state courts, finding that the death penalty did not violate the state constitution.[61]

Though there has not been a finding to date that solitary confinement constitutes cruel and unusual punishment under a state constitution, the state courts' broader interpretation of language similar to the Eighth Amendment may permit a challenge to the practice in the future. Moreover, some state statutes provide that solitary confinement may only be used for the limited

[54] *Id.* at 472.
[55] *Id.*
[56] *Id.* (citing People v. P.J. Video, 501 N.E.2d 556 (N.Y. 1986)).
[57] *Id.*
[58] *Id.* at 473.
[59] TENN. CONST. art. I, § 16.
[60] 815 S.W.2d 166, 188 (Tenn. 1991) (citing California v. Greenwood, 486 U.S. 35, 50, 108 (1988); California v. Ramos, 436 U.S. 992, 1013-14 (1983); Doe v. Norris, 751 S.W.2d 834, 838 (Tenn. 1988); Miller v. State, 584 S.W.2d 758, 760 (Tenn. 1978)).
[61] 815 S.W.2d 166 (Tenn. 1991).

purposes of punishment or the protection of vulnerable people.[62] State courts might draw on these provisions to inform interpretation of prohibitions against cruel and unusual punishment.

4.2.1.3 Deliberate Indifference

In contrast to the approach adopted by the federal courts, some jurisdictions have treated solitary confinement as punishment without requiring proof of deliberate indifference. In 1983, the Court of Criminal Appeals of Oklahoma described solitary confinement as "institutional punishment," but nevertheless held it did not violate the prohibition against cruel and unusual punishment.[63] In *Cootz v. State*, a concurring opinion of the Idaho Supreme Court remarked that the placement of a person in solitary confinement for sixty days was at odds with the principle that people convicted of criminal offenses "are not sent to prison with directions while incarcerated that they are to have punishment inflicted upon them."[64] While these decisions predate *Wilson v. Seiter's* requirement of deliberate indifference, they nevertheless demonstrate that different definitions of the meaning of punishment are available.

Other courts have, however, applied the same deliberate indifference standard applied by the federal courts. In *Faraday v. Comm'r of Corr.*, for example, the Supreme Court of Connecticut held there was no deliberate indifference on the part of prison medical staff who refused to refer a man to a specialist despite his complaining of back pain and an old CT scan showing evidence of a herniated disc.[65] The court held that even if the evidence established that medical treatment had been inadequate, it did not show that the staff knew their refusal to arrange for the man to be examined by a specialist created an undue risk of harm. Furthermore, while a specialist examination might have been useful, that fact alone was held to be insufficient to constitute deliberate indifference.[66] Even if the official's belief was objectively unreasonable, it could still be nonculpable, according to the court.[67]

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[62] ARIZ. REV. STAT. ANN. § 31.271 (West 1983) ("Facilities shall confine more than one person in each cell or room except as strictly necessary *for the purposes of punishment* or the protection of specific prisoners.") (Emphasis added).
[63] Owens v. State, 665 P.2d 832, 835 (Okla. Crim. App. 1983) (citing Conway v. State, 483 P. 2d 350 (Okla. Crim. App. 1971)).
[64] 785 P.2d 163, 168 (Idaho 1989) (Bistline, J., concurring).
[65] 952 A.2d 764 (Conn. 2008).
[66] *Id.* at 775.
[67] *Id.* at 774 (citing Salahuddin v. Goord, 467 F.3d 263, 281 (2d Cir. 2006)).

In *Roberson v. TDCJ-Brad Livingston*, the Court Appeals of Texas held that officials did not act with deliberate indifference when they placed a man in administrative segregation in a cell that was infested with cockroaches, rats, blood, and feces.[68] Mr. Roberson alleged that he was denied toilet paper, cleaning supplies, and eating utensils for six days, and he was forced to eat with dirty hands.[69] In finding no deliberate indifference on the part of officials, the court stated that while the cell conditions were "filthy," there was no evidence in the record that Mr. Roberson had made anyone aware of them "during his short confinement in the administrative segregation cell."[70]

Recent cases concerning the coronavirus also show that the high threshold for deliberate indifference has prevented incarcerated people from obtaining compassionate release from prison despite the heightened risk due to the public health emergency. In Montana, New York, and Washington, courts have declined to grant compassionate release because no deliberate indifference could be shown on the part of prison officials.[71] The Appellate Division of the New York Supreme Court in *Carroll v. Keyser* overturned a lower court's decision ordering release because while the man was incarcerated under conditions "posing a substantial risk of serious harm," he failed to provide evidence "from anyone with firsthand knowledge" to establish deliberate indifference.[72] Arguably the proposal of imputing knowledge of the risk of harm caused by solitary confinement to demonstrate deliberate indifference in that context could equally apply to these cases.[73] It is unclear how courts can assert no deliberate indifference exists when prison officials fail to take steps to mitigate the risk of harm that the coronavirus poses to incarcerated populations.[74]

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[68] 2017 WL 3530933 (Tex. Ct. App. Aug. 17, 2017).
[69] *Id.* at *1.
[70] *Id.* at *6.
[71] Disability Rights Montana v. Montana Judicial Dist. 1-22, WL 1867123 (Mont. Apr. 14, 2020); People *ex rel.* Carroll v. Keyser, 184 A.D.3d 189 (N.Y. App. Div. 2020); Colvin v. Inslee, 467 P.3d 953 (Wash. 2020).
[72] People *ex rel.* Carroll v. Keyser, 184 A.D.3d 189, 194 (N.Y. App. Div. 2020).
[73] *See supra* section 3.1.2.3.
[74] Brie Williams et al., *Correctional Facilities in the Shadow of Covid-19: Unique Challenges and Proposed Solutions*, HEALTH AFFAIRS BLOG (Mar. 26, 2020), https://www.healthaffairs.org/do/10.1377/hblog20200324.784502/full/; David Cloud et al., *The Ethical Use of Medical Isolation – Not Solitary Confinement – to Reduce COVID-19 Transmission in Correctional Settings*, AMEND (Apr. 9, 2020) https://amend.us/wp-content/uploads/2020/04/Medical-Isolation-vs-Solitary_Amend.pdf.

Other state courts have recognized deliberate indifference in egregious cases of mistreatment but many of these cases reinforce the high threshold of the test. In Florida, for example, the District Court of Appeal reversed dismissal of a claim against prison officials for failing to provide gluten-free meals to a man with celiac disease and diabetes.[75] Because the man required high-calorie meals in order to manage his diabetes, he was forced to eat meals containing gluten, which, due to his celiac disease, "caused vomiting, stomach pains, headaches, fatigue, and skin irritation."[76] The court described all of these symptoms as "a mere inconvenience."[77] However, it determined that the man's diabetes elevated his condition to a "serious medical need."[78] The court found that medical staff were aware of the man's celiac disease but nevertheless refused to provide gluten-free meals. They therefore failed to respond to his medical needs despite his ongoing symptoms, thus establishing deliberate indifference sufficient to withstand dismissal of the claim.[79]

In *Williams v. Indiana Dep't of Corr.*, the Court of Appeals of Indiana reversed summary judgment in favor of prison officials in a claim brought by the estate of a woman who died from complications of lupus and a blood clotting disorder.[80] Prison medical staff had allowed the woman's prescription for lupus medication to lapse and did not follow up on problems with her blood tests. The woman complained of symptoms, but her prescriptions were not restarted, and no specialist referral was made. Her condition deteriorated over the course of several months and included her suffering bleeding gums, nose bleeds, and eventually becoming bedbound and unable even to write requests for medical assistance.[81] The court found that the medical staff were aware of the woman's serious medical conditions and a reasonable fact-finder could readily conclude that their responses were "so plainly inappropriate as to permit the inference that [they] intentionally or recklessly disregarded [her] needs."[82] Indeed, the record showed "systemic and gross deficiencies in her medical care" which could amount to deliberate indifference.[83]

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[75] Toney v. Courtney, 191 So. 3d 505 (Fla. Dist. Ct. App. 2016).
[76] *Id.* at 508.
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] 142 N.E.2d 986 (Ind. Ct. App. 2020).
[81] *Id.* at 993.
[82] *Id.* at 1006.
[83] *Id.*

In *Williams v. Hudson Cty Corr. Center*, the Superior Court of New Jersey affirmed a finding of deliberate indifference on the part of corrections officials stemming from the death of a man who had been arrested on narcotics charges.[84] The man was doubled over in pain, vomiting, and asked to go to the infirmary, but the staff ignored his request and locked him in a cell. When the man was eventually moved to the infirmary, he was not physically examined and the on-call doctor was not notified.[85] An infirmary worker found the man unresponsive the following day and he was pronounced dead shortly afterwards.[86] Medical experts testified that the man would have been in acute pain due to peritonitis for at least thirty-six hours.[87] The court affirmed the trial court's conclusion that a jury could reasonably conclude that the failure to make any effort to diagnose or treat the man constituted deliberate indifference.[88]

Unlike the holding of the Supreme Court of Connecticut in *Faraday* that an objectively unreasonable belief that treatment was not required supported a finding of no deliberate indifference, the New Jersey court took the opposite view in this case. It held that despite a good faith belief that the man was suffering from heroin withdrawal, the officials' failure to examine the man, provide treatment, and contact the on-call doctor constituted deliberate indifference.[89]

4.2.2 Requirement of Safe and Comfortable Prisons and Humane Treatment

In contrast to the US Supreme Court's pronouncement that the Federal Constitution "does not mandate comfortable prisons,"[90] Delaware, Kentucky, Tennessee, and Wyoming all have constitutional provisions requiring safe and comfortable prisons and/or the humane treatment of incarcerated people.[91]

The only substantive case law to discuss any of these provisions is contained in a federal court decision from Tennessee. In *Grubbs v. Bradley*, a federal district court held that Tennessee's

[84] 2011 WL 4008016 (N.J. Super. Ct. App. Div. 2011).
[85] *Id.* at *2.
[86] *Id.* at *3.
[87] *Id.*
[88] *Id.* at *6.
[89] *Id.* at *7.
[90] Rhodes, 452 U.S. 347 (1981).
[91] DEL. CONST. art. I, § 11 ("… in the construction of jails a proper regard shall be had to the health of prisoners"); KY. CONST. § 254 ("The Commonwealth shall maintain control of the discipline, and provide for all supplies, and for the sanitary condition of the convicts …"); TENN. CONST. art I, § 32 ("That the erection of prisons, the inspection of prisons, and the humane treatment of prisoners, shall be provided for"); WYO. CONST. art. I, § 16 ("… The

provision, requiring the humane treatment of incarcerated people, does not provide any protection beyond that available under the Eighth Amendment.[92] The court determined that the well-established federal principle that incarcerated people must have their basic needs met in accordance with evolving standards of decency is equivalent to Tennessee's provision.[93] This reasoning, however, fails to take into account the fact that Tennessee's Constitution has a separate provision prohibiting cruel and unusual punishment so that, taken together, the two provisions support broader rights than are afforded by the Eighth Amendment. Furthermore, although the Supreme Court has held that the Eighth Amendment does not permit inhumane conditions, such conditions violate the Constitution only if they satisfy the two-part test of a sufficiently serious deprivation and deliberate indifference.[94] There is no justification for this test to determine the parameters of a separate provision that calls for the humane treatment of incarcerated people.

Other courts have recognized a requirement to provide humane treatment even in the absence of an express constitutional provision. In 1908, the Supreme Court of Michigan implicitly recognized such a right in *Leah v. Whitbeck*, which concerned a sheriff's decision to keep a man in solitary confinement in a jail where he was being held for failure to pay a debt.[95] The court found that the conditions in which the man was held were illegal and "contrary to every sentiment of justice and humanity."[96] It is uncertain whether the court would have reached this conclusion, however, if the man had been incarcerated for a criminal offense rather than a civil matter.

Though the provision of safe and comfortable prisons or humane treatment might appear to be enhanced by explicit constitutional language, jurisdictions without these provisions have honored the same obligations by interpreting standards of decency with reference to statutes. In *Good v. Comm'r of Corr.*, a case involving a claim that a prison's water supply was contaminated with

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erection of safe and comfortable prisons, and inspection of prisons, and the humane treatment of prisoners shall be provided for.").

[92] 552 F. Supp. 1052 (M.D. Tenn. 1982).

[93] *Id.* at 1125.

[94] Farmer v. Brennan, 511 U.S. at 847 (holding that prison officials may be liable under the Eighth Amendment for denying humane conditions of confinement only if they know that the conditions present a substantial risk of harm and they disregard that risk by failing to take reasonable measures to abate it).

[95] Leah v. Whitbeck, 151 Mich. 327 (1908). *See supra* section 1.4.1.

[96] *Id.* at 336.

carcinogens, the Supreme Judicial Court of Massachusetts interpreted constitutional standards with reference to regulations concerning the quality of drinking water.[97] Although those regulations were not "constitutionally required," the court held that "they reflect the public attitude that contemporary society's standards of decency include the availability of safe drinking water."[98]

Like Massachusetts, Wisconsin's Constitution does require the humane treatment of incarcerated people. However, a statute directs prison wardens, superintendents, and officials to "uniformly treat the inmates with kindness."[99] The courts have held that this provision, which is entitled "humane treatment and punishment," does not create a private right of action, but merely authorizes various state regulations.[100] It has not been used successfully in any challenge to prison conditions.

To date, no challenge to solitary confinement has been brought in any of the jurisdictions with a constitutional provision requiring safe and comfortable prisons or humane treatment. Nevertheless, considering the evidence about the risk of harm from solitary confinement, these rights offer a different basis for challenging the practice.

4.2.3 Requirement of Reformation and Rehabilitation

Seven state constitutions refer explicitly to reformation or rehabilitation as principles of criminal law and administration.[101] Courts have considered the right to rehabilitation in challenges to prison sentences and in relation to the provision of programs and education in prison.

The right to rehabilitation has been construed narrowly in challenges to the length of sentences. While Indiana's State Supreme Court held in *Fointno v. State* that the criminal justice system "must afford an opportunity for rehabilitation where reasonably possible,"[102] in *Henson v. State* it concluded that the reformation clause applies to the penal code as a whole and provides no

[97] 629 N.E.2d 1321, 1323 (Mass. 1994).
[98] *Id.*
[99] WIS. STAT. ANN. § 302.08 (West 1947).
[100] *See, e.g.,* Lobley v. Yang, 2019 WL 136693 (E.D. Wis. Jan. 8, 2019).
[101] ALASKA CONST., art. I, § 12; ILL. CONST., art. I, § 11; IND. CONST., art. I, § 18; MONT. CONST. art. II, § 28; N.H. CONST., pt. 1, art. 18th; OR. CONST., art. I, § 15; WYO. CONST., art. I, § 15.
[102] 487 N.E.2d 140, 144 (Ind. 1986).

basis for challenging the duration of sentences.[103] Though the issue has not been litigated, presumably the same reasoning would extend to challenges to conditions of confinement that result from those sentences.

The Illinois Supreme Court has held that the state's reformation clause[104] requires that rehabilitation be considered as one objective of sentencing; it will not suffice simply to consider "rehabilitative factors in imposing a sentence."[105] In *People v. Wendt*, the court upheld a sentence of probation to run consecutively with a prison sentence, holding that the elimination of this approach would "unnecessarily restrict courts in fashioning a sentence" aimed at rehabilitation.[106] In *People v. Thompson*, the court held that a person's potential for rehabilitation should not be accorded greater weight at sentencing than the seriousness of the offense.[107] This approach suggests that rehabilitation is regarded as one of many factors to be considered rather than as the objective of the sentence.

In four states, the right to rehabilitation has informed interpretations regarding prison programs. In *State v. Evans*, the Supreme Court of New Hampshire held that "recognition of rehabilitation as a *goal* of confinement does not lead inexorably to the conclusion that inmates have a right to rehabilitation."[108] The court overturned an order by a lower court that directed a prison warden to develop a plan for state-funded college-level programs at the prison. Adopting the same deferential approach to prison administrators as the federal courts, it held that the judiciary is "ill-suited to assume the responsibilities of prison administration."[109]

In Oregon, the Court of Appeals described the reformation clause then in effect as "significant as a hortative philosophical base for Oregon's penal code and correctional programs."[110] The court went on to state that, absent "extraordinary circumstances of cruel and unusual punishment," the

[103] 707 N.E.2d 792, 796 (Ind. 1999).
[104] ILL. CONST., art. I, § 11 ("All penalties shall be determined according to the seriousness of the offense and with *the objective of restoring the offender to useful citizenship …*") (emphasis added).
[105] People v. Wendt, 645 N.E.2d 179 (1994).
[106] *Id.* at 184.
[107] 2020 IL App (1st) 17126, *14.
[108] 127 N.H. 501, 504 (1985).
[109] *Id.* (citing Procunier v. Martinez*,* 416 U.S. 396, 404-05, 94 S. Ct. 1800, 1807, 40 L. Ed. 2d 224 (1974); Nadeau v. Helgemoe, 561 F.2d 411, 417 (1st Cir. 1977); Breedlove v. Cripe, 511 F. Supp. 467, 469 (N.D. Tex.1981)).
[110] Kent v. Cupp, 554 P.2d 196, 198 (Or. 1976).

judiciary did not have authority to require implementation of rehabilitation programs.[111] As well as recognizing the principle of reformation, Oregon's Constitution requires that incarcerated people be "actively engaged full-time in work or on-the-job training," with certain exceptions.[112] However, this separate provision does not provide "a legally enforceable right to a job or to otherwise participate in work, on-the-job training, or educational programs," [113] and the purpose of the clause is designed to generate income for prisons rather than to address the rehabilitative needs of incarcerated people.

On the other hand, Alaska's reformation clause has been held to create an affirmative right.[114] In *Ferguson v. State, Dep't of Corr.*, the state supreme court reasoned that the constitutional reference to reformation is "not a meaningless guarantee; rather, it creates a right to rehabilitation."[115] Therefore, a plaintiff who had been excluded from a prison rehabilitation program could not be barred from the program without due process.[116] In *Rathke v. Corr. Corp. of Am., Inc.*, the court reiterated that holding.[117] The *Rathke* case involved a man who lost his prison job when he was placed in solitary confinement for failing a drug test. He was informed that he would have to pay $45 for the sample to be retested. He was also told that he would remain in solitary confinement for a further sixty to ninety days while his appeal challenging the drug test was considered.[118] The court found that he had established a colorable claim based on the right to rehabilitation. In 2020, the court held in *Antenor v. Dep't of Corr.* that visitation was part of rehabilitation, and that telephone contact was a "crucial component of visitation" because families may find "travel to the correctional facility for in-person visitation prohibitively expensive."[119] The case was remanded for further evidence to ascertain whether the price

[111] *Id.*
[112] OR. CONST., art. I, § 41.
[113] OR. CONST., art. I, § 41(3).
[114] ALASKA CONST., art. I, § 12 ("… Criminal administration shall be based upon the following: the need for protecting the public, community condemnation of the offender, the rights of victims of crimes, restitution from the offender, and the *principle of reformation*." (Emphasis added)).
[115] 816 P.2d 134, 139 (Alaska 1991).
[116] *Id.*
[117] 153 P.3d 303, 309 (Alaska 2007).
[118] *Id.* at 307.
[119] 462 P.3d 1, 15 (Alaska 2020).

charged for making prison phone calls was unconstitutionally burdensome on the right to rehabilitation.[120]

Though West Virginia's Constitution does not have a reformation or rehabilitation clause, the Supreme Court of Appeals of West Virginia held in *Cooper v. Gwinn* that incarcerated people have a statutory right to rehabilitation which is guaranteed by the Due Process Clause of the state constitution.[121] The Department of Corrections was required by statute to "establish, maintain and direct a varied program of education for inmates in all institutions."[122] The Due Process Clause was deemed to require that incarcerated people "enjoy the benefit of this legislatively enacted rule of law."[123] It was evident, the court found, that the legislature required rehabilitation to be a primary goal of the state's correctional system.[124] The evidence established that the Department had not made a "real and substantial effort to implement appropriate rehabilitative programs" at the state's prison for women.[125] The court ordered the Department to consult standards promulgated by the American Correctional Association and the Commission on Accreditation for Corrections and to prepare a plan to implement education, rehabilitation, and treatment programs.[126]

No challenge has yet been asserted to solitary confinement as such. Recognition of the right to rehabilitation and its application to visitation, as in the case of Alaska, and to prison programs, as in the case of Alaska and West Virginia, would certainly ameliorate some of the sensory deprivation and isolation caused by solitary confinement. It may also ultimately be used to invalidate solitary confinement itself, since evidence about the detrimental effect of the practice on life skills and emotional capacity could support a claim of violation of that right.

[120] *Id.*
[121] 298 S.E.2d 781, 788-89 (W. Va. 1981).
[122] W.VA. CODE ANN. § 62-13-4 (repealed 2018).
[123] 298 S.E.2d at 788.
[124] *Id.*
[125] *Id.* at 793.
[126] *Id.* at 794-95.

4.2.4 Prohibition of Unnecessary Rigor

Six state constitutions prohibit unnecessary rigor[127] or abuse during arrest or incarceration.[128] While some of the prohibitions refer to jails rather than prisons, the titles of the provisions, and judicial interpretations, indicate that the protections apply to people in prisons as well.

Oregon's Supreme Court has adopted the broadest interpretation of unnecessary rigor. In *Sterling v. Cupp*, the court held that the clause is violated where "a particular prison or police practice would be recognized as an abuse to the extent that it cannot be justified by necessity."[129] In that case, the court held that the unnecessary rigor clause prohibited the practice of subjecting men in prison to pat-down searches by female prison officers. Recognizing that the claim involved a privacy interest, the court reasoned that the guarantee against unnecessary rigor was "a more cogent premise than a federal right of privacy."[130] While the prohibition was not restricted to "beatings and other forms of brutality," it did not encompass all methods and conditions of punishment.[131] In the instant case, the court's interpretation did not "disregard the numerous and pervasive conditions intrinsic to the life of prisoners," finding that "even convicted prisoners retain claims to personal dignity, and [that] … under the conditions of arrest and imprisonment the relation between the sexes poses particularly sensitive issues."[132] Women in Oregon prisons were not subjected to frisk searches by male officers and therefore, the court reasoned, men in prison should not be denied the same proprieties.[133] Necessity, which might have justified the practice, was not established by the employment of male or female corrections officers.[134]

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[127] IND. CONST. art I, § 15 ("No person arrested, or confined in jail, shall be treated with unnecessary rigor"); OR. CONST. art. I, § 13 ("No person arrested, or confined in jail, shall be treated with unnecessary rigor"); TENN. CONST. art. I, § 13 ("[N]o person arrested and confined in jail shall be treated with unnecessary rigor"); UTAH CONST. art I, § 9 ("… Persons arrested or imprisoned shall not be treated with unnecessary rigor"); WYO. CONST. art I, § 16 ("No person arrested and confined in jail shall be treated with unnecessary rigor …").
[128] GA. CONST. art. 1, § 1, ¶ XVII ("… nor shall any person be abused in being arrested, while under arrest, or in prison.").
[129] 625 P.2d 123, 130 (Or. 1981).
[130] *Id.* at 129.
[131] *Id.* at 129-30.
[132] *Id.*
[133] *Id.* at 132-33.
[134] *Id.* at 136.

As one scholar has observed, the *Sterling* court's view that the unnecessary rigor clause incorporates harm to human dignity is "significant because it implicitly recognizes the legitimacy of psychological pain."[135] Psychological damage could thus support an unnecessary rigor challenge to solitary confinement.[136] However, the clause has rarely been invoked in challenges to prison conditions and has not yet been considered in relation to solitary confinement.[137]

In *Bott v. DeLand*, the Utah Supreme Court approved the *Sterling* court's unnecessary abuse standard in its interpretation of Utah's unnecessary rigor clause.[138] Mr. Bott alleged negligence and unnecessary rigor on the part of Utah prison officials due to inadequate medical care. He had reported blurred vision and was placed on a waiting list to see an optometrist. His vision continued to deteriorate over the course of four weeks to the point where he lost sight in both eyes and began suffering from severe headaches, nausea, dizziness, and body aches. Despite repeatedly reporting these symptoms to the staff, he was not examined or referred to the prison physician. When Mr. Bott was finally assessed six weeks later, he was diagnosed with malignant hypertension and severe renal failure. By the time of the trial, he was dependent on hemodialysis and his life expectancy was greatly reduced.[139] One of the issues on appeal was whether damages were available for violations of the unnecessary rigor provision. The court emphasized that "unnecessary rigor must be treatment that is clearly excessive or deficient and unjustified, not merely the frustrations, inconveniences and irritations that are common to prison life."[140]

In *Dexter v. Bosko*, the Utah Supreme Court overturned the dismissal of a claim of unnecessary rigor in a case stemming from a vehicle accident in which a man being transported in custody became paralyzed and died five years later due to complications from his injuries.[141] The court held that the unnecessary rigor clause

[135] Linda Hemphill, *supra* note 2, at 432.
[136] *Id.*
[137] *See, e.g.,* Smith v. Dep't of Corr., 182 P.3d 250 (Ct. App. Or. 2008) (holding that restrictions on incarcerated people's mail were valid and did not violate the unnecessary rigor clause); Barrett v. Peters, 383 P.3d 813 (Or. 2016) (affirming that the constitutional rights of incarcerated people from Oregon, including the prohibition against unnecessary rigor, were retained when they were incarcerated in other states under the Interstate Corrections Compact).
[138] 922 P.2d 732 (Utah 1996).
[139] *Id.* at 735.
[140] *Id.* at 741.
[141] 184 P.3d 592 (Utah 2008).

> "protects persons arrested or imprisoned from the imposition of circumstances on them during their confinement that demand more of the prisoner than society is entitled to require. The restriction on unnecessary rigor is focused on the circumstances and nature of the process and conditions of confinement."[142]

The court compared the unnecessary rigor clause to the prohibition against cruel and unusual punishment. While the two provisions overlap, the court noted, their purposes are different: "torture may be cruel and unusual but strict silence during given hours may not. Strict silence, however, may impose unnecessary rigor or unduly harsh restrictions."[143] This interpretation indicates that the prohibition of unnecessary rigor is broader than that against cruel and unusual punishment, and may cover conditions common to solitary confinement.

In both *Bott* and *Dexter*, the Utah Supreme Court held that money damages were available for violations of the unnecessary rigor clause. *Dexter* narrowed the holding of *Bott* by confining the availability of damages to cases where officials act with flagrant culpability.[144] The flagrancy standard is similar to the test for qualified immunity because it requires "the contours of the right [to] be sufficiently clear that a reasonable official would understand that what he is doing violates that right."[145] Where the official is unaware of a clear prohibition, the court requires proof that an obvious and known serious risk of harm exists and that the official acted with knowledge of that risk without reasonable justification.[146]

In *State v. Houston*, the Utah Supreme Court held that the unnecessary rigor provision did not apply to a seventeen-year-old's challenge to a sentence of life without parole.[147] Adopting an interpretation different from the Oregon court's, *State v. Houston* held that Utah's provision focuses on prison conditions, whereas a challenge to the length of a sentence is more appropriately considered under the cruel and unusual punishment clause.[148]

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[142] *Id.* at 596.
[143] *Id.*
[144] *Id.* at 597-98 (citing Spackman v. Bd. of Educ., 16 P.3d 533 at 538-39) (Utah 2000) (holding money damages were available for violation of open education and due process clauses in the state constitution)).
[145] *Id.*
[146] *Id.*
[147] 353 P.3d 55, 72 (Utah 2015).
[148] *Id.*

Indiana's courts have taken a rather narrower view of unnecessary rigor as applied to conditions of confinement, despite dictum in an 1860 decision of the Supreme Court of Indiana which described solitary confinement as a form of unnecessary rigor:

> "The very essence of punishment, and the sole use of the prison walls, is the confinement of the convict within them; his real exclusion from the rest of the world, rendering him for the time *civiliter mortuus. Humanity indeed forbids, as unnecessary rigor, that his confinement should be absolutely solitary*, or that all his natural and civil rights should be temporarily annihilated …"[149]

More recently, that court held in *Ratcliff v. Cohn* that the placement of a fourteen-year-old in a special needs unit within an adult prison did not violate Indiana's unnecessary rigor clause.[150] The plaintiff contended that her placement in the unit was inappropriate because she was living with adults with severe psychological disorders who were incapable of functioning in the prison's general population.[151] The court held that the clause prohibited only physical abuse and that placement in the restrictive and difficult conditions of an adult special needs unit did not rise to the level of unnecessary rigor.[152]

Smith v. Dep't of Corr. followed the *Ratcliff* decision and narrowly construed the concept of physical abuse.[153] In that case, Mr. Smith, who was incarcerated in the Westville Correctional Facility in Indiana, had complained to prison staff that his cell was flooding because other people had blocked their toilets, so that the floor of his cell was covered in water and fecal matter. He kicked his cell door to attract prison officers' attention and requested a mop. The staff told him to remove his shoes, but when he refused to do so they entered his cell, shot mace pellets at him, stripped him down to his underwear, and placed him in full restraints for two hours.[154] Upon returning to his cell, Mr. Smith found the mace had not been cleaned up and caused him further harm.[155] Without providing any explanation, the court concluded that the actions of the prison officers did not constitute physical abuse.[156] The court then found that the prison officials were

[149] Helton v. Miller, 14 Ind. 577, 585 (1860) (emphasis added).
[150] 693 N.E.2d 530, 541 (Ind. 1998).
[151] *Id.*
[152] *Id.* (citing Kokenes v. State, 13 N.E.2d 524 (Ind. 1938), Bonahoon v. State, 178 N.E. 570 (Ind. 1931) and Roberts v. State, 307 N.E.2d 501 (Ind. 1974)).
[153] 871 N.E.2d 975 (Ind. Ct. App. 2007).
[154] *Id.*
[155] *Id.*
[156] *Id.* at 984.

justified in telling Mr. Smith to remove his shoes because he had kicked his cell door and thus the officials were "acting to maintain order and discipline" in a volatile situation.[157]

The courts of Georgia, Tennessee, and Wyoming have not had occasion to issue substantive rulings on the unnecessary rigor and abuse clauses in their constitutions. In 1898, however, the Supreme Court of Wyoming referred to the prohibition against unnecessary rigor as one of several clauses underpinning the "fundamental law that the Penal Code shall be founded upon the humane principles of reformation and prevention."[158]

Unnecessary rigor and abuse prohibitions offer another avenue for additional challenges to conditions within solitary confinement and to the practice itself. This is so particularly in jurisdictions that view the provisions as applicable to conditions of confinement.

4.2.5 Recognition of Dignity

The constitutions of Montana and Puerto Rico announce that "the dignity of the human being is inviolable."[159] The Puerto Rico courts have not had occasion to interpret the provision.

In Montana, the principle has informed the interpretation of the prohibition against cruel and unusual punishment. In *Walker v. State*, Montana's Supreme Court held that conditions imposed on a mentally ill man incarcerated in the Montana State Penitentiary were "an affront to the inviolable right of human dignity" and constituted cruel and unusual punishment by exacerbating his mental illness.[160] Mr. Walker had bipolar disorder and his condition deteriorated after he stopped taking his prescribed medication due to side effects. The prison staff placed him on a series of "behavior management plans," which were described as "tools using a 'carrot-and-stick approach' of withdrawing and returning privileges based on conduct."[161] In accordance with these plans, Mr. Walker was placed in isolation in a bare cell, deprived of all of his clothing and bedding for several days at a time, and the water to his sink and toilet was turned off.[162] He was not given hot meals and was instead provided slices of meat and cheese served with bread.[163]

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[157] *Id.*
[158] State v. Bd. of Comm'rs of Laramie Cty., 55 P. 451 (Wyo. 1898).
[159] MONT. CONST. art. II, § 4; P.R. CONST. art. II, § 1.
[160] 68 P.3d 872, 885 (Mont. 2003).
[161] *Id.* at 885.
[162] *Id.* at 876.
[163] *Id.*

Though the behavior plans were intended to last for a maximum of two days, Mr. Walker was required to have at least twenty-four hours of "clear conduct" before his clothing and other items were returned.[164] Due to his illness, he was unable to comply.

A psychiatrist testified that the restrictive behavioral plans were counter-therapeutic, punitive, and cruel.[165] He told the court that "leaving an inmate in a bare cell, naked, and forced to sleep on a concrete slab is humiliating, degrading, and extremely painful physically."[166] Evidence was presented that prison staff ignored complaints about the unhygienic state of the unit where Mr. Walker was segregated; the cell walls were said to be encrusted with blood, feces, and vomit.[167]

The court held that the right to dignity was fundamental and triggered "the highest level of scrutiny and … protection."[168] While cases alleging cruel and unusual punishment were usually decided without reference to the right to dignity, in this case the court found the right especially relevant, holding that the state constitution

> "forbids correctional practices which permit prisons in the name of behavior modification to disregard the innate dignity of human beings, especially in the context where those persons suffer from serious mental illness."[169]

In such circumstances, the court held, the prison had "crossed into the realm of psychological torture."[170] While the cruel and unusual punishment provision did not guarantee that Mr. Walker would not suffer "some psychological effects from incarceration or segregation," the treatment he experienced violated the dignity clause and amounted to cruel and unusual punishment.

The right to personal dignity was also acknowledged in *Stirling v. Cupp*, discussed above, in the interpretation of Oregon's unnecessary rigor clause, even though Oregon's Constitution does not mention personal dignity.[171] Other state courts have also referred to dignity in relation to aspects

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[164] *Id.* at 876.
[165] *Id.* at 882.
[166] *Id.*
[167] *Id.* at 883.
[168] *Id.* (citing Dorwart v. Caraway, 58 P.3d 128 (Mont. 2002) (Nelson, J., concurring)).
[169] *Id.* at 884.
[170] *Id.*
[171] Sterling v. Cupp, 290 Or. 611, 620 (1981).

of criminal punishment.[172] The absence of an express constitutional reference to dignity has not prevented it from influencing constitutional interpretations. Even in federal courts, though the right to dignity is not explicitly recognized by the Federal Constitution, the principle has been referred to in various Eighth Amendment challenges though its parameters have never been fully articulated.[173] The US Supreme Court has held that dignity is "the basic concept underlying the Eighth Amendment."[174] Thus dignity can inform interpretation of cruel and unusual punishment and courts have the opportunity to invoke the principle in all cases concerning conditions of confinement. The harm and deprivations of solitary confinement call for even greater recognition of dignity in constitutional interpretation.

4.3 Due Process

Unlike state jurisprudence concerning cruel and unusual punishment, there is less divergence among the states regarding the due process protections available to people facing solitary confinement. Most states' due process clauses are identical or similar to the federal Due Process Clause. This section discusses state jurisprudence that has adopted different interpretations. As is the case with scholarship discussing solitary confinement as cruel and unusual punishment, little has been written about the role of state courts and state due process protections in relation to solitary confinement.

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[172] Johanna Kalb, *Litigating Dignity: A Human Rights Framework*, 74 ALB. L. REV. 1725, 1730 (2010) ("For example, California, Kansas, and West Virginia test the constitutional validity of criminal punishment by considering whether it is 'so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity'" (citing State v. Gomez, 235 P.3d 1203, 1210 (Kan. 2010) (quoting State v. Freeman, 574 P.2d 950, 956 (Kan. 1978))); In Re Lynch, 503 P.2d 921, 930 (Cal. 1972) and State v. Booth, 685 S.E.2d 701, 708 (W. Va. 2009))). *See also* Cootz v. State, 785 P.2d 163 (Idaho 1989) (Bistline, J., concurring) ("[C]ompetent authority suggests that an inmate is entitled to more rights and a greater degree of dignity than seems to be the present norm" (citing Meachum v. Fano, 427 U.S. 215, 234 (1976) (Stevens, J., dissenting))).

[173] *See* Hope v. Pelzer, 536 U.S. 730 (2002) (holding that the act of chaining an incarcerated person to a post violated "the basic concept underlying the Eighth Amendment, [which] is nothing less than the dignity of man" (quoting Trop, 356 U.S. at 100)); Roper v. Simmons, 543 U.S. 551, 560 (2005) (holding that imposition of the death penalty on a person under the age of eighteen violated the Eighth Amendment and stating that the Amendment "reaffirms the duty of the government to restrict the dignity of all persons."); Brown v. Plata, 536 U.S. 493, 510 (2011) (finding overcrowding and lack of mental health care in California's prisons grossly inadequate and stating that incarcerated people "retain the essence of human dignity inherent in all persons. Respect for that dignity animates the Eighth Amendment prohibition against cruel and unusual punishment.") *See also* Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169 (2011); Laura Rovner, *Dignity and the Eighth Amendment: A New Approach to Challenging Solitary Confinement*, 9 ADVANCE 3 (2015).

[174] Trop v. Dulles, 356 U.S. at 100.

4.3.1 Broader Due Process Protections

4.3.1.1 Alaska

In 1975, the Supreme Court of Alaska held in *McGinnis v. Stevens* that the state constitution required greater due process protections in prison disciplinary proceedings than those imposed by the US Supreme Court in *Wolff*.[175] The court agreed with the *Wolff* Court that people involved in prison disciplinary proceedings were not entitled to "the full panoply of rights due an accused in a criminal proceeding."[176] However, it differed from the *Wolff* majority by holding that the state's Due Process Clause included the right to call witnesses, present documentary evidence, and conduct cross-examination.[177] The court rejected the suggestion that allowing incarcerated people to call witnesses and present evidence would create disciplinary problems that outweighed "the fundamental value these rights provide as vehicles for ascertaining the truth."[178] Confrontation and cross-examination, the court held, were "fundamental prerequisites to a fair hearing."[179] If the disciplinary committee had "compelling reasons" not to allow witnesses and cross-examination, it was required to record its decision and to provide reasons.[180] The court's finding that the state's Due Process Clause called for additional procedures beyond those available under the Federal Constitution aligns with the concurrence in *Wolff* in which Justice Marshall observed that due process required the right to call and cross-examine witnesses and present documentary evidence to avoid disciplinary hearings becoming "little more than a swearing contest … with only the prisoner's story subject to being tested."[181]

The court in *McGinnis* also differed from *Wolff* by holding that Alaskan people were entitled to counsel in disciplinary hearings where the alleged misconduct constituted a felony, and requiring that the hearing be recorded for the purposes of appeal.[182] These broader due process protections, the court held, were available to people facing "major deprivations" of liberty and did not apply to minor infractions or classification decisions that were unrelated to disciplinary

[175] 543 P.2d 1221, 1236 (Alaska 1975).
[176] *Id.* at 1226.
[177] *Id* at 1230-31.
[178] *Id.* at 1230.
[179] *Id.* at 1231.
[180] *Id.*
[181] 418 U.S. 539, 581-82 (Marshall, J., concurring in part and dissenting in part).
[182] 543 P.2d at 1232, 1236-37.

findings.[183] The court explained that whether a disciplinary matter was major or minor required consideration of the relative gravity of the offense and the nature of the consequences that would result.

In 2011, the state supreme court held in *James v. State, Dep't of Corr.* that a person from Alaska who was incarcerated in Arizona under an inter-state corrections compact had been deprived of due process because he was prevented from confronting and cross-examining witnesses, and the hearing was not recorded.[184] The court clarified its holding in *McGinnis* regarding the application of due process to "major disciplinary proceedings." It explained that major disciplinary proceedings included those alleging "low-moderate offenses" that resulted in "serious punishment such as solitary confinement and loss of good time credit."[185] The court repeated the finding made in *McGinnis* that solitary confinement was "one of the most severe punishments" that could be imposed at a disciplinary hearing and it held here that twenty days of punitive segregation for a "low-moderate infraction" required due process.[186] In confirming the due process protections to which Mr. James was entitled, the court noted that Alaska's Administrative Code provides incarcerated people with the right to confront accusers in disciplinary hearings.[187] The court referred to case law from New Jersey that recognized the confrontation right in disciplinary proceedings.[188]

In 2013, the Supreme Court of Alaska reaffirmed in *Barber v. State* that punitive segregation is a liberty deprivation that triggers the state's due process guarantee.[189] Mr. Barber sought to appeal his placement in punitive segregation but failed to pay the filing fee for the appeal. He contended that the filing fee exceeded his means and unconstitutionally deprived him of an appeal. The court observed that while due process did not encompass the right to an automatic appeal of a disciplinary action, there nevertheless existed a fundamental right to court access to challenge the proceeding because it implicated a liberty interest in avoiding punitive

[183] *Id.* at 1237.
[184] 260 P.3d 1046, 1047 (Alaska 2011).
[185] *Id.* at 1051-52.
[186] *Id.* at 1052.
[187] *Id.* at 1053 (citing ALASKA ADMIN. CODE tit. 22, § 05.435 (1999)).
[188] *See infra* section 4.3.1.3.
[189] 314 P.3d 58, 64 (Alaska 2013).

segregation.[190] Inability to access the court due to the filing fee was held to constitute a denial of Mr. Barber's procedural due process rights.

4.3.1.2 Michigan

In *Dickerson v. Warden, Marquette Prison*, the Court of Appeals of Michigan held that two people placed in administrative confinement for eight months (during an investigation into an infraction) were entitled to receive a hearing, present evidence, and speak in their own defense prior to the placement.[191] At the conclusion of the eight-month segregation, the men were then held in solitary confinement for a further seven days as a disciplinary sanction for the infraction. The court rejected the warden's submission that the hearing conducted prior to the placement in administrative segregation was a "security classification hearing," as distinct from a disciplinary hearing, such that due process rights did not apply.[192] It held that, under newly-amended legislation, the men were entitled to the same due process protections that applied to disciplinary hearings.[193] The court remarked that administrative segregation at the prison was identical to solitary confinement and "in either situation, all privileges and rights are identical."[194] It emphasized that the length of time in administrative segregation was a factor in its decision. While circumstances might arise where "administrative segregation for a short period of time would be proper and necessary … without first providing notice or a hearing," here, the "sham" hearing prior to the long placement in administrative segregation violated due process.[195]

In *Tocco v. Marquette Prison Warden*, the Michigan Court of Appeals held that the due process rights articulated in *Wolff* had broader application in Michigan. Unlike *Wolff's* holding that due process rights applied to disciplinary determinations involving only serious misconduct, in Michigan, such rights attached to "any situation in which a prisoner may be deprived of a right or significant privilege."[196] The court reiterated that the due process protections to which people were entitled were the same as those identified in *Wolff.* In *Tocco*, a misconduct report alleged that the plaintiff participated in a prison riot. He was found guilty at a disciplinary hearing. Mr.

[190] *Id.* at 65.
[191] 298 N.W.2d 841 (Mich. Ct. App. 1980).
[192] *Id.* at 846.
[193] *Id.* at 846.
[194] *Id.* at 845.
[195] *Id.* at 846.
[196] 333 N.W.2d 295, 297 (Mich. Ct. App. 1983).

Tocco contended that his due process rights were violated because he was not provided with the misconduct report or documents referred to therein, and he did not learn of the existence of the report until the hearing. In holding that failure to provide the report violated due process, the court concluded that the document was relevant and there was no legitimate basis for withholding it.[197]

Michigan's Court of Appeals had occasion to consider due process rights in relation to prison disciplinary proceedings again in *Casper v. Marquette Prison Warden.*[198] Mr. Casper was found guilty of major misconduct due to his participation in a prison riot. The prison disciplinary committee reached its finding based on evidence from confidential informants. The court referred to various federal decisions that held that procedural due process required that the evidentiary record contain the underlying factual information from which the disciplinary board could determine the credibility and reliability of confidential informants.[199] Although it was unnecessary for the informant to appear before the committee, their credibility and reliability had to be established by sufficient evidence.[200] Here, the court held there was inadequate evidence in the record to show that the confidential informant was credible and reliable.[201]

Though the Michigan courts initially took a broader view of due process than *Wolff*, in the 1995 case of *Martin v. Stine*, the Michigan Court of Appeals applied *Sandin v. Conner.*[202] The court held here that the plaintiff had no liberty interest in a five-day loss of privileges and confiscation of his property.[203] Consistent with *Sandin*, the Michigan court concluded that the loss of privileges did not constitute an atypical or significant deprivation because it was not a "dramatic departure" from the conditions of the sentence, nor did it affect its duration.[204]

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[197] *Id.*
[198] 337 N.W.2d 56 (Mich. Ct. App. 1983).
[199] *Id.* at 57-58 (citing Gomes v. Travisono, 510 F.2d 537 (1st Cir. 1974); Kyle v. Hanberry, 677 F.2d 1386 (11th Cir. 1983); Hayes v. Walker, 555 F.2d 625 (7th Cir. 1977)).
[200] *Id.*
[201] *Id.*
[202] 542 N.W.2d 884 (Mich. Ct. App. 1995).
[203] *Id.* at 891.
[204] *Id.*

4.3.1.3 New Jersey

One year after the Court handed down its judgment in *Wolff*, the Supreme Court of New Jersey in *Avant v. Clifford* considered whether the state's prison disciplinary standards complied with the requirements laid out by *Wolff*.[205] The plaintiffs in *Avant* had been placed in administrative segregation following disciplinary hearings relating to a riot at a state prison. Though the court did not examine due process rights with reference to the state constitution, it held that the state's disciplinary standards provided broader due process protections than those set forth by *Wolff*. Specifically, the court found that while the composition of the disciplinary committee satisfied *Wolff*, the state's "rightness and fairness standard" would be "better satisfied" by ensuring that two members of the disciplinary committee were not selected from the prison officer staff. [206] In holding that there should not be more than one corrections official on the committee, the court referred to "the pervasive and understandable friction between correctional officers and prisoners."[207]

Second, while the court recognized that the disciplinary committee had discretion to conduct hearings "within reasonable limits," people were to be given the opportunity to confront and cross-examine witnesses where necessary for adequate presentation of the evidence.[208] The court emphasized that this right was particularly important where serious issues of credibility existed. It held that if the committee denied the right of confrontation and cross-examination, it was required to explain its reasons orally and in writing.

Next, the court addressed the potential risk that the privilege against self-incrimination could be violated in the face of the threat of solitary confinement or loss of good time. It found that a person exercising the right to silence was likely to be "stripped of his most valuable defense" with the result that they would be prevented from "making a free and rational choice."[209] The court considered it was "intolerable" that one constitutional right should be surrendered in order

[205] 341 A.2d 629 (N.J. 1975).
[206] *Id.* at 646.
[207] *Id.*
[208] *Id.* at 647.
[209] *Id.* at 654 (citing Miranda v. Arizona, 384 U.S. 436, 464-65 (1966)).

to assert another, and therefore held that any testimony given in prison disciplinary proceedings could not be used in a subsequent criminal prosecution.[210]

In *Jacobs v. Stephens*, the Supreme Court of New Jersey allowed the violation of broader due process rights guaranteed by state regulations in a case where a man was placed in administrative segregation for 180 days after an argument with a prison officer.[211] Although Mr. Jacobs was supposed to receive written notice of the charges against him at least twenty-four hours prior to the hearing, he received only twenty-two hours' notice. The court held that deviation from the twenty-four-hour rule should be permitted "only in extreme circumstances," but nevertheless found here that Mr. Jacobs was not prejudiced by the reduced notice period.[212] Mr. Jacobs also contended that he was unable to present a proper defense because he was not informed of his right to confrontation and cross-examination. The court held that in the future, people should be informed of these rights, but it determined that Mr. Jacobs was not prejudiced because the testimony of other witnesses did not support his position.[213]

In 2003, the Appellate Division of the Superior Court of New Jersey held in *Jones v. Dep't of Corr.* that due process rights were violated when a man was denied the right to confront and cross-examine witnesses in a disciplinary hearing.[214] Mr. Jones testified to a different version of events from a prison officer, and further clarification of the officer's testimony was only provided in a written statement. The court held that Mr. Jones's opportunity to develop and present evidence supporting his position had been unduly curtailed and the hearing officer's decision was based on a credibility finding favorable to the prison officer.[215] It concluded that the hearing officer's findings could not have been fairly reached without offering Mr. Jones the opportunity to cross-examine the prison officer, noting that "in-person confrontation and cross-examination have traditionally been regarded as the best ways to test credibility."[216] The court found no basis for denying Mr. Jones's request to call the prison officer, described the failure as

[210] *Id.*
[211] 625 A.2d 712 (N.J. 1995).
[212] *Id.* at 715.
[213] *Id.* at 716-17.
[214] 819 A.2d 1 (N.J. Sup. Ct. App. Div. 2003).
[215] *Id.* at 4.
[216] *Id.* (citing Miller v. Henderson, 124 A.2d 23 (N.J. App. Div. 1956); Decker v. Dept. of Corr., 751 A.2d 1094 (N.J. App. Div. 2000)).

"distressing," and warned that future violations of the right might lead the court to reverse disciplinary decisions without remanding the matter for a new hearing.[217]

Although New Jersey's regulations offer broader due process protections than those provided by the federal courts, the case law demonstrates that even these broader rights have been diminished in some instances, such as in the *Jacobs* case. However, the *Jones* case indicates that the state's courts take seriously violations of the right to confront and cross-examine witnesses in disciplinary hearings, particularly where there are conflicting issues of credibility between witnesses.

4.3.2 "Some Evidence" Standard

Most states have followed the federal "some evidence" standard imposed by *Hill* as the threshold for a guilty finding in prison disciplinary proceedings. Exceptions to this general approach can be found in the statutes and regulations of Maryland, Massachusetts, Nevada, New Jersey, New York, and Pennsylvania.

In Maryland, the Court of Special Appeals held in *Bryant v. Dep't of Public Safety and Corr. Service* that the appropriate threshold was whether there was "substantial evidence" in the record to support the finding.[218] This case predated *Hill.* Maryland's regulations now require the hearing officer to reach a finding as to whether the evidence proves "more likely than not" that the violation was committed.[219] The relevant statutory provision of Nevada imposes the same standard.[220]

The Massachusetts Appeals Court has applied a "substantial evidence" test, requiring that there be evidence in the record that "a reasonable mind might accept as adequate to support a conclusion."[221] This standard has since been changed by regulations which impose a

[217] *Id.* at 5.
[218] 365 A.2d 764, 769 (Md. Ct. Spec. App. 1976).
[219] MD. CODE REGS 12.03.01.22 (2018).
[220] NEV. REV. STAT. ANN. § 209.369(3)(b) (West 2017).
[221] Allen v. Dept. of Corr., 871 N.E.2d 506 (Mass. App. Ct. 2007) (quoting Cepulonis v. Comm'r of Corr., 445 N.E.2d 178 (Mass. App. Ct. 1983)).

"preponderance of the evidence" standard.[222] The same preponderance standard applies under Pennsylvania's regulations.[223]

New Jersey's regulations similarly impose a different standard, requiring "substantial evidence."[224] Likewise, New York's Civil Practice statute applies a "substantial evidence" standard to decisions of all administrative agencies.[225] The courts have defined the test as requiring "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact."[226] In *Brown v. Annucci*, the Appellate Division of the Supreme Court held that substantial evidence did not support a prison disciplinary committee's decision, because the record did not contain the confidential information upon which the hearing officer based the finding of guilt.[227] Moreover, the hearing officer did not independently assess the reliability of other confidential information in connection with the charged violations.[228]

In other states that follow the "some evidence" standard, the courts have generally followed the federal courts' interpretation of this threshold as requiring only "meager evidence." The Court of Criminal Appeals of Alabama has held in four different cases that the standard is not met where the only evidence relied upon are hearsay statements in disciplinary reports.[229] In each of these cases, the court held that the hearing committee failed to establish the credibility of the underlying evidence relied upon to sustain the disciplinary charges.

In California, the Court of Appeal held in the case of *In Re Gomez* that the "some evidence" standard was not met in a case in which prison officials concluded that a man had engaged in behavior which might lead to violence or disorder based on his alleged participation in a three-day hunger strike.[230] Officials claimed to have reached their decision based on testimony from a prison officer, but the court found that no-one had testified at the disciplinary hearing. Other

[222] 103 MASS. CODE REGS. 430.16 (West 2019).
[223] 37 PA. CODE § 93.10(b)(5) (West 2005).
[224] N.J. ADMIN. CODE § 10A:4-9.15 (West 2014).
[225] N.Y. C.P.L.R. § 7803 (West 1962).
[226] 300 Gramatan Ave. Assoc. v. State Div. of Human Rights, 45 N.Y.2d 176, 180 (1978).
[227] 182 A.D.3d 885 (N.Y. App. Div. 2020).
[228] *Id.*
[229] Washington v. State, 690 So. 2d 539 (Ala. Crim. App. 1997); Hearin v. State, 741 So. 2d 1122 (Ala. Crim. App. 1999); Gowers v. State, 766 So. 2d 986 (Ala. Crim. App. 2000); Bryant v. Dept. Corr., 61 So. 3d 1109 (Ala. Crim. App. 2010).
[230] 201 Cal. Rptr. 3d 124 (Cal. Ct. App. 2016).

evidence that officials relied upon included a review of Mr. Gomez's segregation record, which noted that he had refused nine meals, and the fact that Mr. Gomez pleaded guilty to the disciplinary infraction.[231] Mr. Gomez disputed the latter claim.[232] Applying *Hill*, the court noted that prison disciplinary action would not be disturbed as long as some evidence supported the decision.[233] Nevertheless, the "exceedingly deferential nature" of the standard did not "convert a court … into a potted plant."[234] Though there was evidence that Mr. Gomez had refused nine consecutive meals, this did not establish that he had engaged in behavior that might lead to violence or disorder in violation of the regulation.[235]

The Supreme Court of Idaho likewise found that the "some evidence" standard was not satisfied in the case of *Cootz v. State.*[236] Mr. Cootz was charged with violating prison rules for kicking a prison officer. The only evidence presented against him was an offense report from the officer. Mr. Cootz requested that four witnesses testify in his defense at the hearing. Two gave evidence while two others did not, and Mr. Cootz was found guilty and placed in disciplinary detention for sixty days.[237] The court noted that while the scope of the state's due process clause is not necessarily the same as its federal counterpart, the "some evidence" standard was appropriate.[238] Nevertheless, the standard was not met here because the hearing officer failed to record in writing the evidence on which he relied. The court regarded this failure as significant considering later testimony from the hearing officer that he believed that the sergeant overseeing the unit where the officer worked would not have allowed the offense report to be filed if he did not believe it to be accurate.[239]

Furthermore, the court noted that the hearing officer claimed to have relied on testimony from Mr. Cootz despite the fact that he did not testify at the hearing.[240] The court reasoned that it was "not a heavy burden" to require prison officials to state the evidence upon which they relied in

[231] *Id.* at 129.
[232] *Id.*
[233] *Id.* at 133 (citing In Re Zepeda, 47 Cal. Rptr. 3d 172 (Cal. Ct. App. 2006)).
[234] *Id.* at 133-34 (citing In Re Lawrence, 82 Cal. Rptr. 3d 169 (Cal. Ct. App. 2008) (quoting In Re Scott, 15 Cal. Rptr. 3d 32 (Cal. Ct. App. 2004))).
[235] *Id.* at 136-37.
[236] 785 P.2d 163 (Idaho 1989).
[237] *Id.* at 164.
[238] *Id.* at 165.
[239] *Id.* at 166-67.
[240] *Id.*

reaching disciplinary decisions.[241] In a concurring opinion, Justice Bistline urged the adoption of a higher threshold than the "some evidence" standard, referring to the "substantial evidence" standard then in effect in Maryland.[242] The justice expressed doubt as to the majority's adoption of *Hill*, observing that that case concerned the revocation of good time credits, and it did not consider "the liberty interests which are implicated by numerous days of isolated confinement."[243]

In 2014, the Supreme Court of Kentucky held in *Ramirez v. Nietzel* that the "some evidence" standard was not met in a disciplinary hearing where the hearing officer refused to allow Mr. Ramirez to call the victim of an alleged assault and declined to view surveillance camera footage of the incident.[244] At first glance, the court stated, it was difficult to conclude that the evidence against Mr. Ramirez failed to meet the evidentiary standard. The investigating officer found that Mr. Ramirez had participated in a fight, and the disciplinary committee accepted that report. However, the court observed that "any examination for due process must amount to more than a glance."[245] It found the presentation of "some evidence" against Mr. Ramirez to be "fundamentally flawed" due to the failure to review the surveillance footage.[246] The court reasoned that "due process, even inside prisons, requires more than simply parroting 'institutional safety,'" and it remarked that an incarcerated person's attempt to deny a disciplinary charge "begins on an uphill climb because his credibility is already severely downgraded."[247] Documentary evidence is therefore critical in order to address issues of credibility and obtain an "unvarnished version of the facts."[248] The court held that the hearing officer must review security footage if requested to do so, and that such a review can take place in camera if necessary.

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[241] *Id.* at 167.
[242] *Id.* at 168 (Bistline, J., concurring).
[243] *Id.*
[244] 424 S.W.3d 911 (Ky. 2014).
[245] *Id.* at 917.
[246] *Id.*
[247] *Id.* at 918-19.
[248] *Id.* at 919.

4.3.3 Other Due Process Issues

4.3.3.1 Access to Writing Materials

The courts in Idaho and Wisconsin have considered the issue of incarcerated people not having writing materials while in solitary confinement which can affect their access to the courts. In *Free v. State*, the Court of Appeals of Idaho held that depriving a person in administrative segregation of writing materials was a violation of due process because it prevented him from preparing a rebuttal statement or notes for the hearing committee.[249] As a consequence, Mr. Free had been effectively denied access to the courts. If he wanted to appeal the hearing committee's decision, the only material that the court would consider would be the committee's report and Mr. Free's rebuttal statement; no further evidence or argument would be received.[250] The court referred to US Supreme Court precedent holding that the constitutional right of access to the courts necessitates the provision of writing tools. The court concluded that Mr. Free was deprived of a fair opportunity to make an effective rebuttal statement that was inherently prejudicial in violation of due process.[251]

In Wisconsin, however, the Court of Appeals held in *Kirsch v. Endicott* that people in a severely restrictive form of solitary confinement who were denied pens and provided with only crayons and "paper products in quantities equal to what is kept in a shoebox" for one afternoon or evening per week were not deprived of due process.[252] The court reasoned that "so long as plaintiffs are furnished with writing instruments, they are not denied their right of access to the courts." Being restricted to the use of crayons, the court held, did not completely prevent people from drafting legal documents.[253] The court did not consider whether limiting access to paper to only one day per week might interfere with the right of access to the courts. Thus, the due process protection available to these people was significantly curtailed.

[249] 874 P.2d 571, 577 (Idaho Ct. App. 1993).
[250] *Id.*
[251] *Id.* at 578 (citing Bounds v. Smith, 430 U.S. 817, 824-25 (1977)).
[252] 549 N.W.2d 761, 763, 766 (Wis. Ct. App. 1996).
[253] *Id.* at 766.

4.3.3.2 Solitary Confinement while Investigation or Classification Pending

State courts have taken different positions on the legality of placement in solitary confinement while an investigation is underway, or a security classification is pending.

In Massachusetts, the Supreme Judicial Court held in *LaChance v. Comm'r of Corr.* that prison officials violated due process rights by holding a man in administrative segregation for ten months pending a decision on his transfer or reclassification.[254] Mr. LaChance was moved to administrative segregation after he threw food at another person. He was granted only informal reviews of his segregation, rather than the more formal reviews conducted for people in disciplinary segregation. The court described the conditions in administrative segregation as "synonymous with extreme isolation," like those in *Wilkinson v. Austin.*[255] It held that the ten-month detention "exceeded the bounds of reasonable confinement" and gave rise to a liberty interest.[256] The informal review procedures followed by prison staff were deemed insufficient to safeguard Mr. LaChance from abuse. He had no opportunity to speak or test the basis for his placement in administrative segregation and he was not informed of the steps he needed to take to mitigate the perceived risk he posed.[257]

Although the court accepted that prison officials have broad discretion in matters of prison management, it expressed concern about their use of administrative segregation pending classification as a pretext to confine people indefinitely without any meaningful opportunity for review.[258] However, the prison officials were entitled to qualified immunity because Mr. LaChance's due process rights were not clearly established at the time of the violation.[259]

The Supreme Court of Oregon held in *Bekins v. Cupp* that a man placed in solitary confinement for ninety days prior to a hearing was entitled to due process.[260] The court considered that there was a difference between placing a person in solitary confinement for disciplinary purposes rather than an investigation, reasoning that confinement for disciplinary reasons would be

[254] 978 N.E.2d 1199 (Mass. 2012).
[255] *Id.* at 1205 (quoting Wilkinson v. Austin, 549 U.S. 209, 214, 224 (2005)).
[256] *Id.* at 1206.
[257] *Id.*
[258] *Id.*
[259] *Id.* at 1207.
[260] 545 P.2d 861 (Or. 1976).

"substantially longer than for investigation."[261] It held that prison officials should be able to confine people in solitary pending investigation "if they reasonably suspect [the person to] present a threat to the order of the institution."[262] The due process rights of people placed in solitary confinement while an investigation was conducted, the court determined, required a supervisory official to have a reasonable suspicion, supported by evidence, that the person would constitute a threat to security if they were not placed in segregation.[263] That finding had to be recorded in writing and provided to the person.[264] The court emphasized that its decision was limited to solitary confinement only, and it did not apply to other penalties. It also indicated that if the confinement was for seven days or less, then written reasons did not need to be provided.[265]

In contrast, the Appellate Court of Illinois held in *Durbin v. Gilmore* that the plaintiff was not denied due process by being placed in solitary confinement while he was under investigation.[266] In accordance with the Illinois Administrative Code, Mr. Durbin could be held in "investigative status" for up to thirty days, or longer if the period was extended.[267] Prison officials were entitled to interview him during this time and the court held that this did not implicate any due process rights, which only arose during the resulting disciplinary hearing at the conclusion of the investigation.[268]

4.4 Barriers to Relief

Many states have provisions similar to the PLRA that seek to limit challenges brought by incarcerated people. The most common restrictions are limitations on claims *in forma pauperis*,

[261] *Id.* at 864.
[262] *Id.* at 865.
[263] *Id.*
[264] *Id.*
[265] *Id.*
[266] 718 N.E.2d 292 (Ill. App. Ct. 1999).
[267] *Id.* at 295 (citing ILL. ADMIN. CODE tit. 20, § 504.40 (1999)).
[268] *Id.* at 296.

and the three-strike provision.[269] The requirement that all administrative remedies be exhausted before pursuing court action is also a feature of some state statutes.[270]

Notably, only six states limit incarcerated people from recovering damages for mental or emotional injury without a prior showing of physical injury as the PLRA does.[271] Of these six statutes, two impose narrower bars than their federal counterpart. In Alabama, the statute limits the bar on recovery to actions filed pro se, although the majority of claims filed by incarcerated people are so filed.[272] Idaho's statute, meanwhile, limits civil actions for mental or emotional injury suffered while in custody, but it allows such actions to be pursued upon a showing of either physical injury or a "diagnosed severe and disabling mental illness."[273] This provision therefore avoids the artificial distinction between physical and mental harm created by the PLRA.

Some state restrictions on challenges to prison conditions are more onerous than the PLRA. For example, courts are empowered in some states to deduct good time credits for *in forma pauperis* applications that are deemed frivolous, in bad faith, or deficient in material information.[274] Other statutes authorize courts to impose fees and costs on incarcerated people for filing frivolous or malicious actions and even to revoke access to property such as televisions, radios, and stereos.[275]

However, state courts can limit the impact of these statutory barriers through constitutional interpretation. The Supreme Court of Alaska held in *Barber v. State, Dept. of Corr.* that while the state may have a legitimate interest in reducing frivolous litigation by incarcerated people,

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[269] *See, e.g.,* DEL. CODE ANN. tit. 10, § 880 (West 1995); FLA. STAT. ANN. § 57.085(7) (West 2004); LA. STAT. ANN. § 15:1186(F) (West 1997).
[270] *See, e.g.,* ALA. CODE § 14-15-4 (1975); COLO. REV. STAT. ANN. §13-17.5-102.3 (West 1998); KAN. STAT. ANN. § 75-52,138 (West 1994).
[271] ALA. CODE § 14-15-4(g) (2013); IDAHO CODE ANN. § 19-4222 (West 2000); LA. STAT. ANN. § 15:1184E (1997); MICH. COMP. LAWS § 600.5511(1) (1999); OKLA. STAT. ANN. tit. 57 § 566.4A (West 2002); S.D. CODIFIED LAWS §21-62-3 (2010).
[272] *See, e.g.,* Jennifer Winslow, *The Prison Litigation Reform Act's Physical Injury Requirement Bars Meritorious Lawsuits: Was it Meant To?* 49 UCLA L. REV. 1655, 1665 (2002) (citing ROGER A. HANSON & HENRY W.K. DALEY, U.S. DEP'T OF JUST., CHALLENGING THE CONDITIONS OF PRISONS AND JAILS, A REPORT ON SECTION 1983 LITIGATION 21-22 (1995) (noting that in 1995, ninety-six percent of lawsuits by incarcerated people were filed pro se)).
[273] IDAHO CODE ANN. § 19-4222 (West 2000).
[274] *See, e.g.,* MASS. GEN. LAWS ANN. ch. 261 § 29(f).
[275] ARK. CODE ANN. § 16-106-203 (West 1997).

the Due Process Clause in the state's constitution prevents that interest from barring an indigent individual's challenge to a disciplinary penalty.[276] The court held that an erroneous outcome of the disciplinary proceedings was of such importance as to override the interest in preventing frivolous litigation.[277]

Notably, state statutes do not impose the same limitations on relief as those that constrain the federal courts.[278] Therefore state courts may grant broader and prompter relief than their federal counterparts in cases involving prison conditions. In *Harrah v. Leverette*, the Supreme Court of Appeals of West Virginia found prison officials violated the Due Process Clause and the Eighth Amendment by placing people in solitary confinement and committing severe physical abuse.[279] In considering the appropriate remedy, the court indicated its preference was not to interfere with prison management, but it then stated that:

> "Prison does not strip an individual of all human dignity. This court is dedicated to the preservation of the rights vested in every person by our constitution and the federal constitution. Any attempt by the government to abridge those rights is anathema to us; repeated infractions, despite clear proscriptions by this court and federal courts, are unforgivable."[280]

Referring to a previous opinion concerning Eighth Amendment violations at a juvenile detention facility, the court remarked that

> "when the state is guilty of extraordinary dereliction, discharge is a remedy. We warned prison officials about its possible use in previous opinions … We will not continue to witness cruel and unusual punishment and blatant due process violations by prison officials and respond with injunctions and admonitions."[281]

Emphasizing that the Department of Corrections "must understand that abuse of the constitutional rights of prisoners may result in release of the victims," the court ordered the creation of plans tailored to each person affected by the violations that would reduce the degree of restraint to which they were subject. It was suggested by the court that these plans might

[276] 314 P.3d 58 (Alaska 2013).
[277] *Id.* at 65-66.
[278] *See supra* section 3.4.1.4.
[279] 271 S.E.2d 322 (W.Va. 1980).
[280] *Id.* at 331.
[281] *Id.* at 332 (referring to State *ex rel*. K.W. Werner, 242 S.E.2d 907 (W.Va. 1978)).

include release from parole restrictions, release on parole, reduction in sentence length, or transfer to a less restrictive facility.[282] The court described this remedy as a "compromise … between unconditional release and continuation of present status." While it was reluctant to release people for constitutional deprivations unrelated to the charges for which they were incarcerated, the court reiterated that the prison's activities "must be permanently corrected or else the government may be enjoined from putting any convicted criminals in jail or prison."[283] Though *Harrah v. Leverette* was decided prior to the enactment of the PLRA's limitation on the scope of federal courts' remedies, that statute would not have restricted the West Virginia court in any event.

A more recent example of a state court being in a position to order relief that is broader than that which would be possible if constrained by the PLRA can be found in the decision of *In re Von Staich*, where the California Court of Appeal ordered a fifty percent reduction in the population at San Quentin State Prison in order to manage the coronavirus pandemic.[284] Such an order would have been impossible for a federal court to make without first ordering less intrusive relief and giving the CDCR the opportunity to comply; a prospect that would place incarcerated people at San Quentin at serious risk given the high rates of coronavirus among the population at the prison.

Qualified immunity is available in most states to counter claims alleging violations of state constitutional rights.[285] In 2020, Colorado enacted a statute to abolish the defense.[286] State courts can decide not to recognize the defense to claims of violations of state civil rights. In 2007, the California Court of Appeal declined to allow qualified immunity as a defense to a state civil rights claim on the basis that the doctrine was "entirely a creation of the United States

[282] *Id.* at 332-33.
[283] *Id.* at 333.
[284] *See supra* section 2.2.1.
[285] *See, e.g.,* Duarte v. Healy, 537 N.E.2d 1230, 1232 (Mass. 1989) (holding that while the Massachusetts Civil Rights Act did not expressly provide for qualified immunity, the state legislature intended to incorporate the defense as recognized by the federal courts.).
[286] 2020 Colo. Legis. Serv. Ch. 110 (West).

Supreme Court."[287] The court held that if the state legislature had intended to incorporate qualified immunity into state law, it would have done so.[288]

4.5 The Case for State Constitutional Jurisprudence

The jurisprudence and constitutional provisions discussed in this chapter show that state courts and state constitutions offer different avenues to pursue challenges to solitary confinement that have been largely unexplored to date. There are different justifications for state courts to develop their own constitutional jurisprudence separate and apart from federal jurisprudence. In his analysis of Justice Brennan's 1977 article that called on state courts to increase constitutional protections for individual rights, California Supreme Court Justice Goodwin Liu suggests that the legitimacy of state constitutional jurisprudence "does not primarily depend on the development of a distinctive, state-centered jurisprudence."[289] Rather, in Justice Liu's view, state courts may depart from federal precedent because of distinctive constitutional language, or because they disagree with federal constitutional reasoning.[290] The precise contours of constitutional provisions, Justice Liu writes, are "open to vigorous debate, often with no easy resolution."[291] Judge Jeffrey Sutton of the Sixth Circuit has suggested that some state courts diminish their constitutions by interpreting them in lockstep with the Federal Constitution. He describes as "inexplicable" the notion that "the meaning of a federal guarantee proves the meaning of an independent state guarantee."[292]

There are good reasons to support the development of state constitutional jurisprudence relating to solitary confinement that does not simply follow the federal jurisprudence. The first is the locus of incarceration and the dominant role played by state courts in sentencing, as recognized by the Court of Appeals of Ohio in the case of *In Re Lamb.*[293] As of December 2018, approximately eighty-eight percent of people incarcerated in prisons in the US were held in state

[287] Venegas v. Cty of Los Angeles, 63 Cal. Rptr. 3d 741, 750 (Cal. Ct. App. 2007).
[288] *Id.* at 753.
[289] Goodwin Liu, *State Constitutions and the Protection of Individual Rights: A Reappraisal*, 92 N.Y.U. L. REV. 1307, 1312 (2017).
[290] *Id.*
[291] *Id.* at 1338.
[292] Jeffrey Sutton, *What Does – and Does Not – Ail State Constitutional Law*, 59 U. KAN. L. REV. 687, 707-08 (2011).
[293] *See infra* section 4.1.

custody.[294] Given their central role in sentencing the vast majority of incarcerated people in the country, state courts should therefore scrutinize the conditions of confinement in which these people are held.

A second reason is that state courts may be better fora than federal courts for pursuing claims for violations of constitutional rights specifically relating to prison conditions. Justice Liu and Judge Sutton both address this issue in the context of claims for violations of any constitutional right. Justice Liu contends that federal courts may decline to enforce constitutional rights to their "full conceptual boundaries" because of the concern that such an interpretation would bind not only the Federal Government but also the states.[295] Of course, the same concern does not apply in reverse to state courts' interpretations.

Further, Justice Liu notes that while most state court judges face greater electoral accountability, in contrast to the life tenure of federal judges, the evidence to suggest that state courts are less responsive than federal courts to individual rights claims is mixed.[296] This can certainly be seen in the context of constitutional claims relating to prisons, where both state and federal courts vary in terms of receptivity to claims concerning the rights of incarcerated people. While there is an argument that "majoritarian pressures are thought to make state courts less responsive," it could also be said that recent moves toward reforming solitary confinement in some state legislatures (discussed in the next chapter) may influence state judges to be more receptive to the need for closer scrutiny of the practice.

Finally, as both Justice Liu and Judge Sutton acknowledge, nearly all state constitutions are easier to amend than their federal counterpart.[297] While Justice Liu suggests that the prospect of a constitutional decision being overruled, in effect, by an electoral initiative, could lead to judicial restraint, on the other hand, he recognizes that such accountability "may aid rather than diminish the legitimacy of countermajoritarian decision-making by state courts."[298] Describing the different methods by which constitutional amendments may take place, Judge Sutton notes

[294] U.S. DEP'T OF JUST., BUREAU OF JUST. STATISTICS, PRISONERS IN 2018, 3 (2020).
[295] Goodwin Liu, *supra* note 289, at 1330.
[296] Judge Sutton has pointed out that eighty-seven percent of state judges throughout the country face some form of election during their careers, though the timing and methods of elections vary in each state. Jeffrey Sutton, *supra* note 292, at 700.
[297] Goodwin Liu, *supra* note 289, at 1331; Jeffrey Sutton, *supra* note 292, at 692-93.
[298] Goodwin Liu, *supra* note 289, at 1331.

that the most common method of amending a state constitution is legislative, but constitutional conventions and popular initiatives are also used in some states, all subject to different requirements and limitations.[299] State constitutional amendments may offer another avenue for furthering solitary confinement reform, though, as explained in this chapter, there is broad scope for courts to interpret existing constitutional provisions in such a way as to find the practice unconstitutional.

A further reason for state courts to continue developing their own constitutional jurisprudence separate from the federal jurisprudence is the role of state-specific influences on interpretation and the fact that the drafters of the Federal Constitution looked to the language of states' constitutions and states' experience. Some state provisions, for example, predate the Eighth Amendment or its application to the states.

Given these justifications that weigh in support of state courts developing their constitutional jurisprudence that does not simply adopt the federal jurisprudence, the question arises as to why so few challenges concerning solitary confinement have been pursued in state courts to date. It may simply be the case that, as Justice Liu observes, judges, and indeed law school graduates, "are primarily trained in federal law and find it familiar."[300] The body of federal case law relating to solitary confinement is certainly "abundant and well-developed," albeit flawed. There may be further practical reasons as to why cases concerning solitary confinement are not based on state constitutional arguments. Many challenges to prison conditions are brought by pro se litigants who rely on litigation handbooks that are based on federal jurisprudence. In addition, state constitutional challenges to excessive sentences that allege violations of the cruel and unusual punishments clause (or equivalent) have largely resulted in state courts adopting federal precedent, with the result that few sentences are overturned on the basis of disproportionality.[301] Given that there have been significantly more state constitutional challenges to excessive

[299] Jeffrey Sutton, *supra* note 292, at 693-98.
[300] Goodwin Liu, *supra* note 289, at 1315.
[301] William W. Berry III, *Cruel and Unusual Non-Capital Punishments*, AM. CRIM. L. REV. forthcoming (October 20, 2020); William W. Berry III, *Cruel State Punishments*, 98 N.C. L. REV. 1201, 1205-06 (2020) ("[A]lmost all states have an analogue to the Eighth Amendment. In most states, the application of such provisions has not exceeded the scope of the Eighth Amendment, meaning that the state constitutional provisions have not added any further restrictions beyond that of the federal provision.").

sentences, and these challenges have often been unsuccessful, litigants seeking to challenge prison conditions may consider that they are unlikely to prevail in such challenges in state courts.

This is not to say that state courts and state jurisprudence are unworthy of further exploration as an alternative avenue for future challenges. The absence of the PLRA's limitations on the scope of relief that state courts can grant weighs in favor of pursuing litigation in state courts, particularly in those jurisdictions discussed in this chapter that have adopted broader interpretations of constitutional provisions that may be favorable to people seeking to challenge solitary confinement. Recent state court decisions relating to prison conditions stemming from the coronavirus pandemic may raise awareness of the potential for incarcerated people to obtain broader and quicker relief in these venues than they otherwise might obtain in federal courts.

CHAPTER 5. RECENT AND CURRENT REFORMS

Introduction

This chapter explores recent attempts to reform solitary confinement through legislation and regulations, bills, litigation settlements and consent decrees, and administrative measures. These reforms have not received the same scholarly attention as the federal constitutional jurisprudence. However, if successful, some of these measures are substantially more likely to result in changes to the use of solitary confinement. The chapter explores common issues that arise throughout the various approaches to reform, and the ways that different legislatures, courts, and administrators have addressed or failed to address problems. Further analysis of the reform measures follows in chapter 6.

5.1 Legislation and Regulations

As of April 2021, thirty-six states, the District of Columbia, and Congress have enacted legislation or regulations that impose some limits on solitary confinement.[1] The range of reforms across legislation and regulations is significant: some greatly reduce the circumstances in which the practice may be used, while others do little more than require minimal data collection.

5.1.1 Comprehensive Reform Statutes

Massachusetts, Nebraska, New Jersey, and New York have all enacted relatively comprehensive reform legislation that purport to reduce the circumstances in which people can be held in solitary confinement. Common features among these statutes, which are discussed in more detail in this section, include bans on solitary confinement except in limited circumstances, maximum limits on the length of time that a person can be held in solitary confinement, reporting

[1] These states include: Alabama, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, South Carolina, Texas, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

obligations, and bans on placing vulnerable populations in solitary confinement. Montana and Minnesota have also passed reform legislation, but it is less comprehensive.

5.1.1.1 Massachusetts

In 2018, Massachusetts enacted legislation that limited the circumstances in which solitary confinement can be used. Under the statute, restrictive housing is authorized as a form of discipline or where a person's continued presence in the general prison population poses an unacceptable risk to the safety of others, the damage or destruction of property, or to the operation of the facility.[2] Such authorization of course still leaves significant discretion to prison officials to place people in disciplinary segregation because a wide range of conduct can be construed as posing an "unacceptable risk" to other people, property, or the operation of a prison.

The statute requires that all restrictive housing units provide people with the same meals as those given to the general population; people must receive showers at least three times a week; they are afforded rights of visitation and communication with approved people, access to reading and writing materials, a radio or television if in restrictive housing for more than thirty days, periodic mental and psychiatric examinations and access to treatment as required; the same access to canteen purchases and right to retain property in their cells as people in the general population; and the same access to disability accommodations as people in the general prison population.[3]

The statute prohibits the placement of people with serious mental illness in restrictive housing unless the person cannot be held safely in the general population and there is no available placement in a secure treatment unit.[4] If a person with a serious mental illness is placed in restrictive housing, the state must find more appropriate housing for them and record the

[2] MASS. GEN. LAWS ch. 127 § 39(a) (2018).
[3] MASS. GEN. LAWS ch. 127 § 39(b) (2018).
[4] MASS. GEN. LAWS ch. 127, § 39A(a). "Serious mental illness" is defined as: "a current or recent diagnosis by a qualified mental health professional of 1 or more of the following disorders described in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders: (i) schizophrenia and other psychotic disorders; (ii) major depressive disorders; (iii) all types of bipolar disorders; (iv) a neurodevelopmental disorder, dementia or other cognitive disorder; (v) any disorder commonly characterized by breaks with reality or perceptions of reality; (vi) all types of anxiety disorders; (vii) trauma and stressor related disorders; or (viii) severe personality disorders; or a finding by a qualified mental health professional that the prisoner is at serious risk of substantially deteriorating mentally or emotionally while confined in restrictive housing, or already has so deteriorated while confined in restrictive housing, such that diversion or removal is deemed to be clinically appropriate by a qualified mental health professional." MASS. GEN. LAWS ch. 127, § 1 (2018).

anticipated timeframe for resolution in writing. Mental health treatment must be provided while the person is held in restrictive housing.[5]

Pregnant people are also excluded from placement in restrictive housing.[6] However, unlike some other states, Massachusetts' prohibition does not extend the exemption to people in the postpartum period or to people who have had a miscarriage or termination. The statute also states that the fact that a person is lesbian, gay, bisexual, transgender, queer, or intersex, or has a gender identity or expression, or sexual orientation uncommon in the general population cannot be grounds for placement in restrictive housing, effectively removing the commonly relied upon basis for placing LGBTQI people in protective custody.[7]

Placement reviews must be conducted for people expected to be held in restrictive housing for more than sixty days and must follow the due process protections guaranteed by the federal courts. The person must be notified within fifteen days of the hearing of the behavioral standards and program participation goals that will increase their chances of being moved to a less restrictive placement at their next review.[8]

The Commissioner of Corrections is required to compile and report monthly data regarding the number of people held in restrictive housing to a "Restrictive Housing Oversight Committee," which consists of various officials appointed by the Governor.[9] Members of the committee include a corrections administrator, a member of a correctional officers' union, a person with experience in criminal justice or corrections policy research, the President of the Massachusetts Sheriffs Association or a designee, a former judge, the Executive Director of the Disability Law Center or a designee, the Executive Director of the Prisoners' Legal Services or a designee, the Executive Director of the Massachusetts Association for Mental Health or a designee, and a licensed social worker.[10]

The committee is authorized to collect information about the use of restrictive housing and is required to report annually to the House and Senate with recommendations to minimize the use

[5] MASS. GEN. LAWS ch. 127, § 39A(a) (2018).
[6] MASS. GEN. LAWS ch. 127, § 39A(d) (2018).
[7] MASS. GEN. LAWS ch. 127, § 39A(c) (2018).
[8] MASS. GEN. LAWS ch. 127, § 39B(c) (2018).
[9] MASS. GEN. LAWS ch. 127, § 39D (2018).
[10] MASS. GEN. LAWS ch. 127, § 39G(a) (2018).

of the practice.[11] The commissioner must provide quarterly data to the committee that include: the number of people in restrictive housing who have been diagnosed with a serious mental illness or attempted acts of self-harm or suicide; the total number of people in restrictive housing and the reasons for their placement; a breakdown by race, age, gender, ethnicity, and disability; the number released directly to the community from restrictive housing or within thirty days of their release from restrictive housing; and the number of mental health professionals working in restrictive housing.[12] The committee is empowered to access correctional institutions and interview incarcerated people and staff, but the statute does not explicitly require inspections.[13] Thus, while its report to the House and Senate must address conditions in restrictive housing, the reliability of these reports may depend on information provided by prison officials and incarcerated people who are able to speak freely to members of the committee without fear of retaliation.

People with an anticipated release date of under 120 days may not be held in restrictive housing.[14] This prohibition, however, is subject to two exceptions: restrictive housing for fewer than five days is allowed, or if the person poses "a substantial and immediate threat."[15] Any person in restrictive housing with fewer than 180 days until their release from prison must receive reentry programming that includes:

> "substantial re-socialization programming in a group setting, regular mental health counseling to assist with the transition, housing assistance, assistance obtaining state and federal benefits, employment readiness training and programming designed to help the person rebuild interpersonal relationships … [including] anger management and parenting courses and other re-entry planning services offered to inmates in a general population setting."[16]

While it is important that people in solitary confinement are at least offered these services to assist them in advance of their release, this provision also demonstrates the extent to which solitary confinement cannot be justified for people who are soon to leave prison. It is also

[11] MASS. GEN. LAWS ch. 127, § 39G(b)-(d) (2018).
[12] MASS. GEN. LAWS ch. 127, § 39D(b) (2018).
[13] MASS. GEN. LAWS ch. 127, § 39G(c) (2018).
[14] MASS. GEN. LAWS ch. 127, § 39F (2018).
[15] *Id.*
[16] *Id.*

questionable whether programs such as job preparation and interpersonal skills training will be effective within the isolated environment of solitary confinement.

Massachusetts' regulations impose limited obligations regarding the amount of time people in restrictive housing are allowed out of their cells. The superintendent of each facility must assess whether and to what extent out-of-cell activities "over and above five hours per week" will be available "consistent with the safety and security of staff and inmates in that restrictive housing unit."[17] The regulation indicates that additional out-of-cell activities might include additional recreation periods or programs, and the assessment as to whether additional out-of-cell time is to be granted will depend on the number of people in the unit, the number of staff, the physical space available, the nature of the threat posed by particular people, and "the climate of the restrictive housing unit."[18] Depending on the determinations made by different superintendents, therefore, in some units, people may only be allowed out of their cells for activities for five hours per week.

As is the case in many states, there are limits on the use of solitary confinement for young people in Massachusetts. The "involuntary room confinement" of youth committed to the Department of Youth Services is prohibited as a form of punishment, harassment, as a consequence for noncompliance, or in retaliation for any conduct.[19] Assuming room confinement is not used for any of these purposes, no time limit exists on the period that room confinement may last. Massachusetts' regulations require that each use of room confinement be recorded and reviewed internally, and failure by staff to follow the policy regarding involuntary room confinement can result in disciplinary or corrective action.[20]

5.1.1.2 Nebraska

Nebraska's most recent legislation limiting the use of solitary confinement, enacted in 2019, follows legislation passed in 2015 that required an annual report to the Governor and legislature setting out a long-term plan "with the explicit goal of reducing the use of restrictive housing."[21]

[17] 103 MASS. CODE REGS. 423.14.
[18] *Id.*
[19] MASS. GEN. LAWS ch. 120, § 10b (2018).
[20] 109 MASS. CODE REGS. 5.03.
[21] NEB. REV. STAT. ANN. § 83-173.02.

The existing statute provides that no person shall be held in restrictive housing unless it is in the least restrictive manner consistent with maintaining order in the facility.[22] From March 2020, no member of a vulnerable population, namely, anyone who is under the age of eighteen, pregnant, or diagnosed with a serious mental illness, developmental disability, or traumatic brain injury, can be placed in restrictive housing.[23]

Juvenile detention facilities cannot place young people in room confinement as punishment or for a disciplinary sanction, in response to a staffing shortage, or as retaliation.[24] No one may be placed in room confinement unless all less restrictive alternatives have been exhausted and the person poses "an immediate and substantial risk of harm" to themselves or others. People may only be kept in room confinement for the minimum period necessary to eliminate the risk of harm.[25] The facility must notify the person's parent or guardian and attorney of record of any placement in room confinement.[26] People in room confinement must receive the same access as those in the general facility to meals, contact with parents or guardians, legal assistance, and

[22] NEB. REV. STAT. § 83-173.03(1).
[23] NEB. REV. STAT. § 83-173.03(3). "Serious mental illness" is defined as "any mental health condition that current medical science affirms is caused by a biological disorder of the brain and that substantially limits the life activities of the person with the serious mental illness. Serious mental illness includes, but is not limited to (i) schizophrenia, (ii) schizoaffective disorder, (iii) delusional disorder, (iv) bipolar affective disorder, (v) major depression, and (vi) obsessive compulsive disorder." NEB. REV. STAT. ANN. § 44-792(5)(a) (1999). "Developmental disability is defined to mean "a severe, chronic disability, including an intellectual disability, other than mental illness, which: (1) is attributable to a mental or physical impairment unless the impairment is solely attributable to an emotional disturbance or persistent mental illness; (2) is manifested before the age of twenty-two years; (3) is likely to continue indefinitely; (4) results in substantial functional limitations in one of each of the following areas of adaptive functioning: (a) conceptual skills, including language, literacy, money, time, number concepts, and self-direction; (b) social skills, including interpersonal skills, social responsibility, self-esteem, gullibility, wariness, social problem solving, and the ability to follow laws and rules and to avoid being victimized; and (c) practical skills, including activities of daily living, personal care, occupational skills, health care, mobility, and the capacity for independent living; and (5) reflects the individual's need for a combination and sequence of special, interdisciplinary, or generic services, individualized support, or other forms or assistance that are of lifelong or extended duration and are individually planned and coordinated." NEB. REV. STAT. ANN. § 77-1107 (2017). "Traumatic injury" is defined as ""[A]n acquired injury to the brain caused by an external physical force, resulting in total or partial functional disability or psychosocial impairment, or both, that adversely affects a child's educational performance. Traumatic brain injury applies to open or closed head injuries resulting in impairments in one or more areas, including cognition; language; memory; attention; reasoning; abstract thinking; judgment; problem solving; sensory, perceptual, and motor abilities; psychosocial behavior; physical functions; information processing; and speech. Traumatic brain injury does not include brain injuries that are congenital or degenerative or brain injuries induced by birth trauma." NEB. REV. STAT. ANN. § 79-1118.01(15) (1993).
[24] NEB. REV. STAT. § 83-4, 134.01(2).
[25] NEB. REV. STAT. § 83-4, 134.01(3)-(5).
[26] NEB. REV. STAT. § 83-4, 134.01(6).

access to educational programs.[27] They must be continuously monitored and consecutive periods of room confinement are prohibited.[28]

Nebraska's regulations emphasize the goal of reducing restrictive housing by prioritizing programs, initiatives, incentives, and "mission specific housing" (discussed below) in place of sanctions.[29] Programs must be offered in congregate classrooms, where space allows, and programs and behavioral health resources must be directed at the reduction of risks and addressing incarcerated peoples' needs.[30]

Where punitive sanctions are necessary, the regulations state that alternatives to restrictive housing must be used wherever possible. Such alternatives include short-term cell restrictions, loss of privileges, work or restitution assignments, and assigned programming.[31] Under the statute, restrictive housing must be used primarily as a short-term intervention for the purpose of managing risk, rather than as a form of punishment or incapacitation.[32] The "guiding focus" of restrictive housing, according to the regulations, is goal planning, behavior change, and treatment to enable the person to live successfully in the general prison population and return to the community.[33]

"Mission specific housing" encompasses alternative placements for people with serious mental illness, those in need of protective custody, and others with special needs. The regulations direct that people held in such housing should receive treatment and be subject to the least restrictive conditions possible.[34] Mission specific units operate as general population units with out-of-cell programs and opportunities for people to interact with others during meals and in recreation, dayrooms, and activities.[35]

The regulations require implementation of re-entry and discharge protocols prior to a person's release to the community, with the goal of returning people to the general prison population, or

[27] NEB. REV. STAT. § 83-4, 134.01(8).
[28] NEB. REV. STAT. § 83-4, 134.01(10)-(11).
[29] 72 NEB. ADMIN. CODE § 1-003.01.
[30] 72 NEB. ADMIN. CODE § 1-004.06.
[31] 72 NEB. ADMIN. CODE § 1-004.01.
[32] 72 NEB. ADMIN. CODE §§ 1-004.01-02.
[33] 72 NEB. ADMIN. CODE § 1-004.03.
[34] 72 NEB. ADMIN. CODE § 1-003.06.
[35] 72 NEB. ADMIN. CODE § 1-004.08.

to mission specific or treatment-based and behaviorally-focused housing prior to their release.[36] Where possible, people are not to be released directly from restrictive housing to the community, and if a person in restrictive housing has 120 days or fewer remaining on their sentence, a multi-disciplinary review team must liaise with the facility to arrange release planning consistent with that offered to people in the general prison population.[37]

5.1.1.3 New Jersey

In 2019, New Jersey's Isolated Confinement Restriction Act was passed. The state legislature had been endeavoring to enact solitary confinement reform legislation for some time; in 2016, a reform bill was passed by both houses of the legislature but was vetoed by the then-Governor.[38] The 2019 statute, which took effect in August 2020, defines "isolated confinement" as confinement alone or in a cell with others for approximately twenty or more hours per day in a state correctional facility, or twenty-two hours or more per day in a county correctional facility, with severely restricted activity, movement, and social interaction.[39] The definition of isolated confinement excludes "confinement due to a facility-wide or unit-wide lockdown that is required to ensure the safety of inmates and staff."[40]

The statute sets out principles on the use of isolated confinement, citing reforms adopted by the Obama Administration in January 2016 to reduce solitary confinement in federal facilities and the "devastating and lasting psychological consequences of solitary confinement on persons detained in correctional facilities."[41] Under the statute, isolated confinement may only be used where corrections officers have reasonable cause to believe there is a substantial risk of serious harm, which must be proved by clear and convincing evidence.[42] No-one may be placed in isolated confinement for non-disciplinary reasons.[43] Except in the case of lockdowns, the maximum period that anyone can be held in isolated confinement is twenty consecutive days, or thirty days in any sixty-day period.[44] Correctional facilities must maximize the time that people

[36] 72 NEB. ADMIN. CODE § 1-003.07.
[37] 72 NEB. ADMIN. CODE § 1-008.03.
[38] S.B. 51, 217th Leg., Governor's Veto (Dec. 5, 2016), https://www.njleg.state.nj.us/2016/Bills/S0500/51_V1.PDF.
[39] N.J. STAT. ANN. § 30:4-82-7.
[40] *Id.*
[41] N.J. STAT. ANN. § 30:4-82.6(d).
[42] N.J. STAT. ANN. § 30:4-82.8(a)(1).
[43] N.J. STAT. ANN. § 30:4-82.8(a)(2).
[44] N.J. STAT. ANN. § 30:4-82.8(a)(9).

in isolated confinement spend outside their cells by providing access to recreation, education, therapy, activities, and social interaction with staff and other incarcerated people.[45]

Vulnerable people may not be placed in isolated confinement under any circumstances.[46] Under the statute, vulnerable populations include people aged twenty-one or younger, sixty-five or older, those with serious medical conditions that cannot be treated effectively in isolated confinement, people who are pregnant, in the postpartum period (up to forty-five days after childbirth), or who have recently suffered a miscarriage or terminated a pregnancy, people with significant auditory or visual impairments, and people who are perceived to be lesbian, gay, bisexual, transgender, or intersex.[47] The definition also includes people with mental illness, a history of psychiatric hospitalization, or recent manifestation of conduct that indicates the need for observation or evaluation to determine the presence of mental illness, and people with developmental disabilities.[48]

The due process procedures set forth in the statute are broader than those guaranteed by the federal courts. Under the legislation, people are entitled to an initial hearing within seventy-two hours of their placement, periodic reviews, the right to be represented (though the statute does not specify who the representative may be), an independent hearing officer, and a written statement of reasons for the placement decision.[49]

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[45] N.J. STAT. ANN. § 30:4-82.8(a)(11).
[46] N.J. STAT. ANN. § 30:4-82.8(b).
[47] N.J. STAT. ANN. § 30:4-82.7.
[48] "Mental illness" includes "[A] current, substantial disturbance of thought, mood, perception, or orientation which significantly impairs judgment, capacity to control behavior, or capacity to recognize reality, but does not include simple alcohol intoxication, transitory reaction to drug ingestion, organic brain syndrome, or developmental disability unless it results in the severity of impairment described herein. The term mental illness is not limited to "psychosis" or "active psychosis," but shall include all conditions that result in the severity of impairment described herein." N.J. STAT. ANN. § 30:4-27.2. The definition of "developmental disability" is similar to that contained in Nebraska's statute: "a severe, chronic disability of a person which: (1) is attributable to a mental or physical impairment or combination of mental or physical impairments; (2) is manifest before age 22; (3) is likely to continue indefinitely; (4) results in substantial functional limitations in three or more of the following areas of major life activity, that is, self-care, receptive and expressive language, learning, mobility, self-direction and capacity for independent living or economic self-sufficiency; and (5) reflects the need for a combination and sequence of special interdisciplinary or generic care, treatment or other services which are of lifelong or extended duration and are individually planned and coordinated. Developmental disability includes, but is not limited to, severe disabilities attributable to an intellectual disability, autism, cerebral palsy, epilepsy, spina bifida and other neurological impairments where the above criteria are met." N.J. STAT. ANN. § 30:6D-25(b).
[49] N.J. STAT. ANN. § 30:4-82.8(a)(4).

The statute requires the promulgation of regulations (which have not yet been finalized) that will establish less restrictive alternatives to isolated confinement, require training of staff working in solitary confinement, and impose documentation requirements relating to decisions, procedures, and reviews of all people placed in isolated confinement.[50] The regulations will also require the Department of Corrections to publish quarterly reports on its website detailing the use of isolated confinement, broken down by age, sex, gender identity, ethnicity, mental illness, and type of confinement status at each facility. The reports must set out the isolated confinement population on the last day of each quarter and a non-duplicative cumulative count of people placed in isolated confinement for each fiscal year.[51]

Another statute enacted by the New Jersey legislature in August 2020 may also be relevant to solitary confinement reform, though it is not directly targeted at the practice. The Dignity for Incarcerated Primary Caretaker Parents Act requires the Department of Corrections to provide parenting classes to incarcerated parents, establish policies that encourage and promote visitation for primary caretaker parents by reducing restrictions on visiting hours and the number of minor children allowed to visit at any one time and authorizing contact visits, and strengthens the functions of the Corrections Ombudsperson to enforce the rights of incarcerated people.[52] The Corrections Ombudsperson was already authorized to inspect prisons and investigate conditions of confinement, but the 2020 legislation extends that authority by requiring the provision of information to incarcerated people and their families, the identification of systemic issues and responses upon which the Governor and legislature may act, and the promotion of public awareness and understanding of the rights of incarcerated people.[53] The oversight of the ombudsperson may be of assistance in ensuring that any systemic issues arising out of the solitary confinement reform legislation can be addressed.

5.1.1.4 New York

New York's Humane Alternatives to Long-Term Solitary Confinement ("HALT") Act was signed by the Governor in March 2021. The Governor has signaled an intention to negotiate

[50] N.J. STAT. ANN. § 30:4-82.11.
[51] N.J. STAT. ANN. § 30:4-82.11(e).
[52] N.J. STAT. ANN. §§ 30:1B-6.6 - 6.9.
[53] N.J. STAT. ANN. §§ 52:27EE-26 - 28.

changes to the legislation, but at the time of writing, these changes have not been publicly announced. The new law will take effect in March 2022.

The legislation limits the circumstances in which people may be placed in "segregated confinement," which constitutes any form of cell confinement for more than seventeen hours per day. The definition excludes such confinement during a facility-wide emergency or when it involves the provision of medical or mental health treatment.[54] No person can be held in segregated confinement for more than fifteen consecutive days or twenty days in any sixty-day period.[55] The legislation directs that de-escalation, intervention, informational reports, and the withholding of incentives are the preferred methods of responding to misbehavior unless it is determined that non-disciplinary interventions have failed or that they would not succeed. Segregated confinement sanctions are to be used as a last resort.[56]

"Special populations," namely, anyone aged twenty-one or younger, fifty-five or older, with a disability, who is pregnant or in the postpartum period for up to eight weeks after giving birth, or caring for a child in a correction institution, cannot be placed in segregated confinement at all.[57] They may, however, be held in keeplock for up to forty-eight hours prior to a disciplinary hearing. If placed in keeplock, they must be given at least seven hours of out-of-cell time per day, and if they are to be held for more than forty-eight hours, they must be transferred to a residential rehabilitation unit or a residential mental health unit. People with serious mental illnesses must be diverted or removed from segregated confinement and transferred to a mental health treatment unit.[58] If a person with a serious mental illness is held in a residential

[54] 2021 N.Y. Sess. Laws (2277-A) (McKinney), § 1.
[55] 2021 N.Y. Sess. Laws (2277-A) (McKinney), § 5(i).
[56] 2021 N.Y. Sess. Laws (2277-A) (McKinney), § 6.
[57] 2021 N.Y. Sess. Laws (2277-A) (McKinney), §§ 2 and 5(h). The definition of "disabled" in the legislation is taken from N.Y. EXEC. LAW § 292(21)(a) (McKinney 1998): "(a) a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques or (b) a record of such an impairment or (c) a condition regarded by others as such an impairment …"
[58] 2021 N.Y. Sess. Laws (2277-A) (McKinney), § 4(d). "Serious mental illness" is defined as "a current diagnosis of … one or more of the following types of Axis I diagnoses, as described in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders, … : schizophrenia (all sub-types), delusional disorder, schizophreniform disorder, schizoaffective disorder, brief psychotic disorder, substance-induced psychotic disorder (excluding intoxication and withdrawal), psychotic disorder not otherwise specified, major depressive disorders, bipolar disorder I and II; or is actively suicidal or has engaged in a recent, serious suicide attempt; or diagnosed with a mental condition that is frequently characterized by breaks with reality, or perceptions of reality, that lead the individual to experience significant functional impairment involving acts of self-harm or other behavior that have a seriously adverse effect on life or on mental or physical health; or diagnosed with a severe personality disorder that

rehabilitation unit for more than thirty days, they must be moved to a mental health treatment unit.

The residential rehabilitation units are intended to house people deemed to require more than fifteen days of segregated confinement in separate housing where they will receive therapy, treatment, and rehabilitation programs.[59] These units must provide at least six hours out-of-cell time per day for congregate programs, and an additional hour for recreation.[60] All of these services and the recreation time must be congregate unless there is a significant and unreasonable risk to safety and security. People held in segregated confinement must be given at least four hours' out-of-cell time per day.[61] Out-of-cell time in both segregated confinement and residential rehabilitation units may be reduced in limited circumstances, but such restrictions can only be imposed for a maximum of fifteen days.[62] People in residential rehabilitation units cannot be placed in restraints unless they are deemed necessary due to an unreasonable risk to safety or security.[63] No equivalent prohibition applies to people in segregated confinement.

The legislation prohibits limitations on services, treatment, or basic needs (including clothing, food, and bedding) as punishment, absent a significant and unreasonable risk to safety and security. People in residential rehabilitation units must be given access to all their personal property unless a specific item is deemed to pose unreasonable risk.[64] They must also be assessed for an individual rehabilitation plan and have access to programs and work assignments equivalent to those offered in the general prison population.[65] Segregated confinement may not be used for protective custody; if necessary, people requiring protection can be placed in conditions that must conform, at a minimum, to those of the residential rehabilitation units.[66]

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is manifested by frequent episodes of psychosis or depression, and results in a significant functional impairment involving acts of self-harm or other behavior that have a seriously adverse effect on life or on mental or physical health; or determined to have otherwise substantially deteriorated mentally or emotionally while in segregated confinement and is experiencing significant functional impairment indicating a diagnosis of serious mental illness and involving self-harm or other behavior that have a serious adverse effect on life or on mental or physical health." N.Y. CORRECT. LAW, § 137(e) (McKinney 2019).

[59] 2021 N.Y. Sess. Laws (2277-A) (McKinney), § 2.

[60] 2021 N.Y. Sess. Laws (2277-A) (McKinney), § 5(j)(ii).

[61] *Id.*

[62] 2021 N.Y. Sess. Laws (2277-A) (McKinney), § 5(j)(vi).

[63] 2021 N.Y. Sess. Laws (2277-A) (McKinney), § 5(j)(vii).

[64] 2021 N.Y. Sess. Laws (2277-A) (McKinney), § 5(j)(iii).

[65] 2021 N.Y. Sess. Laws (2277-A) (McKinney), § (5)(j)(iv) and (v).

[66] 2021 N.Y. Sess. Laws (2277-A) (McKinney), § 5(k)(iv).

A hearing must be convened prior to placement in segregated confinement or within five days of the placement. People are entitled to be represented by an attorney, law student, paralegal, or another incarcerated person at the hearing. The Department of Corrections and Community Supervision ("DOCCS") can object to the paralegal or other incarcerated person if they reasonably disapprove based on objective written criteria. Meaningful periodic reviews of people held in residential rehabilitation units must occur at least every sixty days. Once a person is released from a residential rehabilitation unit, any time remaining on a disciplinary sanction must be dismissed.[67]

Staff working in special housing, keeplock, and residential rehabilitation units must receive thirty-seven-and-a-half hours of training prior to their assignment and twenty-one hours annually thereafter. The training must cover topics such as the purpose and goals of non-punitive therapeutic environments, trauma-informed care, restorative justice, and dispute resolution methods. Hearing officers must also receive thirty-seven-and-a-half hours of training on the physical and psychological effects of segregated confinement, due process rights, and natural justice remedies.[68]

The legislation imposes new reporting obligations that include the publication of monthly reports on the DOCCS website, together with semi-annual and annual cumulative reports showing the total number of people in segregated confinement and residential rehabilitation units disaggregated by age, race, gender, mental health treatment level, special health accommodations, need for and participation in substance abuse programs, pregnancy status, continuous length of time spent in such units, all incidents resulting in sanctions, and the number of people held in such units in each facility.[69] The Justice Center for the Protection of People with Special Needs is empowered to investigate DOCCS's compliance with the legislative provisions relating to segregated confinement and residential rehabilitation units and report annually to DOCCS and the legislature.[70] The State Commission of Correction is also required

[67] 2021 N.Y. Sess. Laws (2277-A) (McKinney), § 5(*l*) and (m).
[68] 2021 N.Y. Sess. Laws (2277-A) (McKinney), § 5(n).
[69] 2021 N.Y. Sess. Laws (2277-A) (McKinney), § 5(o).
[70] 2021 N.Y. Sess. Laws (2277-A) (McKinney), § 11.

to assess compliance and report at least annually to local correctional facilities, the governor, and the legislature.[71]

5.1.1.5 Minnesota

Enacted in 2019, Minnesota's statute allows for people to be placed in disciplinary segregation for rule violations, or administrative segregation where their presence in the general prison population poses "a serious threat to life, property, self, staff, or other inmates, or to the security or orderly running of the institution."[72] This is the standard set of justifications used by prisons across the country for placing people in solitary confinement. The statute does not restrict the use of solitary confinement except to require that conditions in restrictive housing units approximate those in the general population, "including reduced lighting during nighttime hours."[73]

The statute requires minimal reviews of people in disciplinary segregation. The Commissioner of Corrections must be notified of all people held in restrictive housing for more than thirty days and the reasons for placement. A behavior management plan is required for any person held in restrictive housing for more than 120 days.[74]

The most reform-oriented provision in the statute is one requiring the Commissioner to design and implement a "continuum of interventions" that include informal sanctions, administrative segregation, formal discipline, disciplinary segregation, and step down management for disciplinary infractions.[75] Unlike the reform statutes which emphasize that solitary confinement should be used as a last resort and require other non-punitive sanctions instead, Minnesota's statute merely provides for punitive measures based on restrictive housing. The only attention paid by the statute to conditions in such units relates to lighting; there is no requirement for increased time out-of-cell, activities, social interaction, or therapy. The Commissioner must

[71] 2021 N.Y. Sess. Laws (2277-A) (McKinney), § 12.
[72] MINN. STAT. ANN. § 243.521.
[73] MINN. STAT. ANN. § 243.521(2).
[74] MINN. STAT. ANN. § 243.521(3).
[75] MINN. STAT. ANN. § 243.521(4).

design and implement a system of incentives so that people who demonstrate "appropriate behavior" can earn privileges and accelerate their return to the general population.[76]

The statute directs that people in restrictive housing who exhibit serious symptoms of mental illness must be screened by mental health staff for appropriate treatment and placement, but there is no prohibition on placing or keeping mentally ill people in solitary confinement.[77] No definitions are provided of "serious symptoms of mental illness" or "mental illness." If the mental health staff consider that a person's behavior may be treated more appropriately through alternative interventions or programs, or that the behavior that resulted in a person being placed in restrictive housing was due to mental illness, such information "must be considered during the disciplinary process."[78] However, the requirement to consider this information does not extend to a directive that people should not be placed in disciplinary segregation. Notably, there is no prohibition on placing vulnerable populations in solitary confinement.

The statute prohibits the release of people directly into the community who have been in restrictive housing for more than sixty days "absent a compelling reason."[79] No examples of compelling reasons are provided.

In terms of oversight, the Commissioner of Corrections must report annually to the legislature on the number of people in restrictive housing and their age and race, the number transferred from restrictive housing to the mental health unit, and the length of time served in restrictive housing, including consecutive terms.[80] The provision does not call for any information regarding efforts to reduce restrictive housing or to improve conditions in restrictive housing units.

To date, no regulations have been promulgated that give effect to the legislation.

5.1.1.6 Montana

Montana also enacted restrictive housing legislation in 2019. Though it imposes more limits on solitary confinement than Minnesota's statute, this legislation also does not offer the same level

[76] MINN. STAT. ANN. § 243.521(7).
[77] MINN. STAT. ANN. § 243.521(5)(a).
[78] MINN. STAT. ANN. § 243.521(5)(b).
[79] MINN. STAT. ANN. § 243.521(8).
[80] MINN. STAT. ANN. § 243.521(9).

of comprehensive reform as that introduced in Massachusetts, New Jersey, or New York. The minimal protections of people in restrictive housing are subject to the discretion of prison officers, as evidenced by exceptions throughout the statute for security or safety considerations. No reporting or oversight obligations are imposed. None of the provisions in the statute are aimed at rehabilitating people in solitary confinement or offering incentive-based programs to model behavior change. In other words, the statute largely provides a framework for operating solitary confinement as it is already used in many states, with some limited restrictions.

The statute indicates that restrictive housing should be used only as a response to the most serious and threatening behavior, for the shortest amount of time, and in the least restrictive conditions possible.[81] However, the legislation does not impose a maximum time limit on the period that a person can be held in restrictive housing, and it stipulates only that people so held may not be kept in their cells for more than twenty-two hours in any twenty-four hour period.[82] The statute also requires that people in restrictive housing be allowed a minimum of one hour of exercise outside of their cell on five days each week, unless safety or security considerations dictate otherwise.[83]

Pregnant people and those in the first six weeks of the postpartum period may not be placed in restrictive housing "unless exigent circumstances exist," although the precise circumstances are not defined in the statute.[84] Thus prison officials retain discretion to place pregnant and postpartum people in restrictive housing, but their placement may not exceed twenty-four hours in total.[85] There is no ban on placing other vulnerable groups in restrictive housing, although some provisions limit the circumstances relating to placements of people with mental disorders.[86] Specifically, those with mental disorders cannot be kept in restrictive housing for more than fourteen days unless a multidisciplinary team determines the presence of an "immediate and

[81] MONT. STAT. ANN. § 53-30-701(2).
[82] MONT. STAT. ANN. § 53-30-703(5).
[83] MONT. STAT. ANN. § 53-30-718(1).
[84] MONT. STAT. ANN. § 53-30-703(6).
[85] *Id.*
[86] "Mental disorder" is defined as: "exhibiting impaired emotional, cognitive, or behavioral functioning that interferes seriously with an individual's ability to function adequately except with supportive treatment or services. The individual also must: (a) currently have or have had within the past year a diagnosed mental disorder; and (b) currently exhibit significant signs and symptoms of a mental disorder." MONT. STAT. ANN. § 53-30-702.

present danger to others or to the safety of the institution."[87] The statute envisages situations in which these people will remain in restrictive housing for more than fourteen days, because it requires mental health assessments for people diagnosed with a behavioral or mental health disorder who are confined beyond thirty days.[88]

The basic requirements for conditions in restrictive housing are minimal and leave discretion to prison officials. People in restrictive housing must be given prescribed medication and medical treatment, clothing that is not degrading, access to basic personal items (unless there is imminent danger that the item will be destroyed or used to induce self-injury), the opportunity to shower and shave three times per week, laundry, barbering and hair care services, and the same opportunity to exchange bedding, clothing, and linen as people in the general prison population.[89] Exceptions to these allowances may be permitted if deemed necessary by a supervisor.[90] The statute does not enumerate reasons why supervisors may decide to withhold these basic necessities.

People in restrictive housing must also be allowed: to write and receive letters on the same basis as people in the general prison population, opportunities for visitation unless there are "substantial reasons for withholding visitation privileges" (again, no reasons are listed in the statute), access to personal legal documents and available reference material, and access to reading material from the prison library.[91] The services to which people in restrictive housing are entitled include educational programs, the commissary, the library, social services, counseling, religious guidance, and recreational programs.[92] However, the statute provides that these services need not be identical to those offered to people in the general prison population, although there should not be major differences for any reasons other than "danger to life, health, or safety."[93] Given that the statute allows people in restrictive housing to be kept in their cells for twenty-two hours per day, however, it is difficult to envisage how some of these services could be provided in a similar way to those provided to the general population. The statute also

[87] MONT. STAT. ANN. § 53-30-708(5).
[88] MONT. STAT. ANN. § 53-30-705(4).
[89] MONT. STAT. ANN. § 53-30-716(1)(a).
[90] MONT. STAT. ANN. § 53-30-716(1)(b).
[91] MONT. STAT. ANN. § 53-30-717(1).
[92] MONT. STAT. ANN. § 53-30-717(2).
[93] MONT. STAT. ANN. § 53-30-717(3).

states that people with disabilities should not be denied reasonable accommodations simply because they are in restrictive housing "unless safety or security concerns render the accommodation unreasonable."[94]

Prisons are required to "attempt to ensure" that no-one is released directly into the community after spending more than thirty days in restrictive housing, and when such releases do occur, a tailored release plan must be prepared which notifies the person of community resources.[95] Prisons must also establish step down programs, defined as an "individualized program that includes a system of review [with] criteria to prepare an inmate for transition to the general population or community and that involves a coordinated, multidisciplinary team approach that includes mental health, case management, and security practitioners."[96] At a minimum, step down programs must provide monthly evaluations that assess individuals' compliance with the program's requirements, and provide gradual increases in out-of-cell time, group interaction, education, programs, privileges, and pre- and post-screening evaluations.[97]

For youth facilities, restrictive housing must not exceed twenty-four hours and it may only be used to protect the youth or others. Youth facilities must allow people at least two hours out of their cells during the twenty-four-hour period, and they must arrange for administrative, clinical, social work, religious, and medical staff to visit youth in protective custody at least daily.[98]

5.1.2 Partial Reforms

Many states have enacted legislation or regulations that impose partial limits or restrictions on aspects of solitary confinement.

5.1.2.1 Young People

In addition to Massachusetts, Nebraska, New Jersey, and Montana, twenty-six other states, the District of Columbia and the Federal Government have all enacted legislation or regulations relating to the solitary confinement of young people, commonly referred to as "room

[94] MONT. STAT. ANN. § 53-30-717(4).
[95] MONT. STAT. ANN. § 53-30-725(2).
[96] MONT. STAT. ANN. § 53-30-725(1).
[97] *Id.*
[98] MONT. STAT. ANN. § 53-30-720.

confinement" or "room restriction."[99] Although this dissertation does not focus on reforms of solitary confinement at youth facilities, a brief examination of the legislation and regulations pertaining to these reforms is called for due to the quantity of legislation enacted and the significant variance between jurisdictions. As shown in this section, even in an area that has received greater attention, significant gaps remain in terms of reforming the practice, and the fact that corrections officials continue to exercise considerable discretion.

Of the jurisdictions discussed in this section, only New Mexico has enacted legislation that prohibits the placement of any person under the age of eighteen in restricted housing with no exceptions.[100] The only other jurisdiction with legislation that has a near-total prohibition is New Hampshire, where room confinement is only allowed as part of "a routine practice applicable to substantial portions of the population at the [youth detention center]," and it may not be imposed as a consequence for individual behavior.[101] Though it does not expressly state that solitary confinement cannot be used in any other circumstances, the effect of this statute appears to limit the practice to facility-wide lockdowns.

Nineteen of the jurisdictions covered in this section have imposed maximum time limits on the period that a young person can spend in solitary confinement or room confinement. The shortest maximum periods can be found in the regulations of Colorado, Kentucky, and Maine, which all limit room confinement for minor violations to sixty minutes.[102] Kentucky's regulations increase the maximum period to twenty-four hours for a major rule violation.[103] The regulations of Kentucky and Maine, which are based on standards recommended by the American Correctional Association, stipulate that room confinement is only to be used for the purpose of "cooling off." The federal statute states that where a young person is placed in room confinement, they must be released as soon as they have "sufficiently gained control so as to no longer engage in behavior

[99] Restrictions on the placement of young people in solitary confinement have been addressed in legislation and regulations in Alabama, Arkansas, California, Colorado, Connecticut, Florida, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maine, Maryland, Michigan, Mississippi, Nevada, New Hampshire, New York, Ohio, Oklahoma, Texas, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.
[100] N.M. STAT. ANN. § 33-16-3(A).
[101] N.H. REV. STAT. ANN. § 126-U:5-c.
[102] 12 COLO. CODE REGS. § 2509-8:7.713.24(F)(2); 505 KY. ADMIN. REGS. 2:120(6)(a); 03-201-12 ME. CODE R. Subs. 15.3, § VII.
[103] 505 KY. ADMIN. REGS. 2:120(8).

that threatens serious and immediate risk of physical harm."[104] If they do not regain control, then, if the person has been placed in room confinement solely because they present a risk of physical harm to themselves, they must be released thirty minutes after the placement.[105]

The longest period allowed by any of the statutes that impose a maximum limit is five days.[106] However, maximum time limits do not of themselves provide a complete picture, because many statutes and regulations allow extensions with supervisory approval.[107] Furthermore, the legislation and regulations in Connecticut, Indiana, Maryland, New York, and West Virginia impose no time limits at all. On the other hand, irrespective of whether they impose time limits, some statutes and regulations direct that the solitary confinement of young people is to be used for the briefest time possible and they require that the person be released as soon as they no longer present any risk, or once the desired behavioral outcome has been achieved.[108]

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[104] 18 U.S.C. § 5043(b)(2)(B)(i).
[105] 18 U.S.C. § 5043(b)(2)(B)(ii)(II).
[106] 6 VA. ADMIN. CODE §§ 35-71-1150B and 35-101-1100F.
[107] ALA. ADMIN. CODE r. 950-1-6-.05(g) (providing that room restriction may not exceed eight hours without review and administrative authorization); ARK. STAT. ANN. § 9-2-371(b) (limiting punitive isolation or solitary confinement as a disciplinary measure to a maximum of twenty-four hours unless the placement is due to commission of a physical or sexual assault, or conduct that poses an imminent threat of harm, or an attempted escape; and the director of the facility provides written authorization to keep the juvenile in solitary confinement for more than twenty-four hours); CAL. WELF. & INST. CODE § 208.3 (requiring staff to document the reason for any extension beyond four hours, develop an individualized reintegration plan and obtain authorization from the superintendent); LA. ADMIN. CODE tit. 22, § 787 (providing that placement in administrative segregation should not exceed twenty-four hours unless justified for security reasons and allowing for administrative segregation to extend to up to five days for commission of certain offenses); OHIO ADMIN. CODE 5139-37-16(6) (requiring review of room confinement every four hours and documentation as to the continued need for room confinement); OKLA. ADMIN. CODE § 377:3-13-144(1)(B) (allowing juveniles to be placed in room confinement for more than one period of three hours in any twenty-four hour period if they are examined by a mental health professional at the conclusion of the three-hour period); WASH. REV. CODE ANN. § 13.022.020(2)(a) (allowing extensions beyond four-hour maximum if an individual reintegration plan is prepared and the extension is authorized by the superintendent or designee every four hours thereafter); and WIS. ADMIN. CODE DOC § 346.49(1) (allowing cell confinement to continue beyond one hour if approved by the superintendent and requiring the superintendent or designee to visit people in cell confinement at least once every six hours during business hours until the person is released from cell confinement).
[108] D.C. CODE ANN. § 24-912(e) ("Room confinement shall be used for the briefest period of time possible"); 03-201-12 ME. CODE R. § VII ("The juvenile is returned to the group when the negative behavior is under control"); NEV. REV. STAT. ANN. § 62B.215(4) ("A child may be subjected to corrective room restriction only for the minimum time required to address the negative behavior, rule violation or threat … and the child must be returned to the general population as soon as reasonably possible."); N.Y. COMP. CODES R. & REGS. tit. 9, § 180-1.9(c)(11)(viii) ("A review of the necessity for continued confinement shall be made … to effectuate the return of the child to the regular program as soon as the child is no longer a danger to himself/herself or others"); OKLA. ADMIN. CODE § 377:3-13-144(I)(1)(B) ("As soon as the juvenile is sufficiently under control so as to no longer pose a serious and immediate danger to him or herself or others, the juvenile shall be released from solitary confinement"); WASH. REV. CODE ANN. § 13.22.020(2)(e) ("Staff must remove the juvenile from isolation and room confinement when … (i) the purpose of the confinement is met; (ii) the desired behavior is evident; or (iii) the juvenile has been evaluated by a professional who has determined the juvenile is no longer an imminent risk to self, staff or the general

The stated purpose of solitary confinement for young people also varies among jurisdictions. In its 2020 statute, Washington's legislature made the following legislative findings which emphasized that the practice should not be used for punitive purposes:

> "(1) [P]rolonged isolation for juveniles may cause harm. [It] has also been shown as ineffective at reducing behavioral incidents and may increase anxiety and anger in youth.
>
> (2) Creating alternative solutions to solitary confinement for juveniles will further protect the wellbeing of juveniles in all detention facilities and institutions and enhance the rehabilitative goals of Washington's juvenile justice system. This act seeks to end the use of solitary confinement in juvenile facilities when used as a form of punishment or retaliation …
>
> (3) The legislature intends to prevent the use of solitary confinement and, in the limited instances of isolation, ensure that the use advances the rehabilitative goals of Washington's juvenile justice system, and that it is not used as a punitive measure."[109]

Some other statutes and regulations similarly state that solitary or room confinement should not be used for the purposes of punishment, coercion, administrative convenience, or retaliation.[110] In some jurisdictions, the statement that solitary confinement is not to be used as punishment for young people seems to leave open the possibility that it may nevertheless be used for other purposes, or that it may sometimes be an acceptable form of punishment. For example, Illinois' regulation provides that policies and procedures should be reviewed periodically to ensure segregation is not "*routinely* used as punishment."[111] Ohio's regulation provides that room confinement should not be used for punishment, administrative convenience, retaliation, or staffing shortages "absent exigent circumstances," thus leaving some discretion to facility officials.[112]

New York's regulation states that room confinement must not be used as punishment, and it is only authorized in cases where a child presents a serious and evident danger to him or herself or

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population."); WIS. ADMIN. CODE DOC § 346.49(1)(a) ("The juvenile shall be released as soon as the danger has ended.").

[109] WASH. REV. CODE ANN. § 13.22.005.

[110] CAL. WELF. & INST. CODE § 208.3(3)(b); D.C. CODE ANN. § 24-912(a); 18 U.S.C. § 5043(b)(1); OHIO ADMIN. CODE 5139-37-16(E)(1).

[111] ILL. ADMIN. CODE tit. 20, § 2602.70(a).

[112] OHIO ADMIN. CODE 5139-36-21(J).

others.[113] However, a separate regulation provides for "juvenile separation units" within correctional facilities which are designed for people under the age of eighteen who would otherwise be placed in disciplinary segregation in a SHU.[114] According to the regulation, these units must not be operated as disciplinary housing units, but the young people confined in them "may be subject to limitations on the quantity and type of property they are permitted to have in their cells and may receive access to programs that are more restrictive than those afforded general population inmates."[115] The regulation allows six hours of out-of-cell time on weekdays and two hours per day on weekends, which can be withheld if the person "presents an imminent risk of danger" to themselves or others. While this regulation states that these units do not operate as disciplinary housing units, it is difficult to view their conditions as anything other than punitive. Whether these provisions will be amended in light of the enactment of the HALT Act remains to be determined.

Other jurisdictions' statutes and regulations impose more limited rationales on the purpose for which room confinement or solitary confinement may be used, directing that it must be limited only to situations where behavior presents the risk of physical harm or threatens security.[116] In Nevada, corrective room restriction is only allowed for the purpose of modifying negative behavior, holding a child accountable for a rule violation, or ensuring safety or security.[117] Oklahoma's regulation states that solitary confinement is "a serious and extreme measure to be imposed only in emergency situations."[118]

The statutes and regulations in California, the District of Columbia, Idaho, Nevada, Oklahoma, Washington, and the federal statute, all require that before room confinement or solitary confinement is imposed, less restrictive measures must be attempted to resolve the problem.[119] The alternative measures suggested in the federal statute include talking to the person to attempt

[113] N.Y. COMP. CODES R. & REGS. tit. 9, § 180-1.9(c)(11)(iii).
[114] N.Y. COMP. CODES R. & REGS. tit. 7, § 321.2.
[115] *Id.*
[116] FLA. ADMIN. CODE ANN. r. 63E-7.107(15); MD CODE ANN., CORR. SERVS. § 9-614.1(c); WIS. ADMIN. CODE DOC § 346.49(1)(a).
[117] NEV. REV. STAT. ANN. § 62B.215(1).
[118] OKLA. ADMIN. CODE § 377:3-13-144(I)(1)(A).
[119] CAL. WELF. & INST. CODE § 208.3(b)(1); D.C. CODE ANN. § 24-912(b)(2)(A); IDAHO ADMIN. CODE r. 05.02.02.222.01(c); NEV. REV. STAT. ANN. § 62B.215(1); OKLA. ADMIN. CODE § 377:3-13-144(I)(1)(A); WASH. REV. CODE ANN. § 13.22.030(1)(a); 18 U.S.C. § 5043(b)(2)(A).

to de-escalate the situation and arranging a mental health consultation. In some jurisdictions, the requirement to exhaust other less restrictive measures does not apply where doing so might "pose a threat to the safety or security of any minor, ward, or staff."[120]

Some jurisdictions also provide formal or informal due process to young people prior to their placement in room confinement. In Colorado, Idaho, Kentucky, Maine, and Wyoming, the person must be told the reason(s) for their placement and be given an opportunity to explain their behavior.[121] In Colorado, this requirement extends to informing the person that the duration of their confinement will depend on their interaction with staff and their participation in counseling during the restriction period. In Maine, the regulation states that the person in confinement "participates in determining the end of the timeout." Under the federal statute and the District of Columbia's regulation, the staff must inform the person of the reasons for room confinement, but they are not required to give the person the opportunity to explain their behavior.[122] Louisiana, Michigan, and Wisconsin provide formal due process rights for young people facing room confinement as a disciplinary sanction. All three jurisdictions require a hearing before an impartial decisionmaker, assistance from a staff member to prepare a defense, and the right to appeal the decision.[123]

Another area with significant variance in legislation and regulations among jurisdictions concerns the conditions in room confinement. Twelve states and the District of Columbia impose some minimal requirements. Some guarantee only basic necessities, such as Louisiana, which prohibits any reduction in food or calorie intake, and requires that youth have access to bathroom facilities;[124] Mississippi, where people must have "reasonable access to water, toilet facilities and hygiene supplies;"[125] and New York, where people must be provided with at least "a bed, chair, desk or chest, mattress, pillow, sheet and blanket."[126] Others require conditions

[120] *See, e.g.,* CAL. WELF. & INST. CODE § 208.3(b)(1).
[121] 12 COLO. CODE REGS. § 2509-8:7.713.2(F)(1); IDAHO ADMIN. CODE r. 05.02.02.222.01(b); 505 KY. ADMIN. REGS. 2:120(6)(b); 03-201-12 ME. CODE R. subs 15.3, § VII; 049.0029.11 WYO. CODE R. § 9(c)(iii)(B).
[122] 18 U.S.C. § 5043(b)(2)(ii); D.C. CODE ANN. § 24-912(b)(2)(B).
[123] LA. ADMIN. CODE tit. 67, § 7515(E)(4)(b); MICH. ADMIN. CODE r. 400.4132; WIS. ADMIN. CODE DOC § 346.48.
[124] LA. ADMIN. CODE tit. 67, § 7515(E)(2)(g)-(h).
[125] 31 MISS. ADMIN. CODE Pt. 9, R 4.5(11).
[126] N.Y. COMP. CODES R. & REGS. tit. 9, § 180-1.9(c)(11)(iv).

that approximate those of the general facility population, but items may be withheld if they are deemed to pose risk.[127]

The more reform-oriented provisions include those of the District of Columbia, which requires that room confinement involve "the least restrictive conditions practicable and consistent with the individualized rationale for treatment,"[128] and Florida and Idaho, which both require that the door to the room in which the person is held remains open or unlocked.[129] Florida's regulation goes further still by requiring staff to "attempt to engage in productive interactions at least every thirty minutes," and to use techniques such as "conflict resolution, behavior management, and constructive dialogue" to facilitate the person's reintegration back into the general facility population. Washington's statute similarly requires that staff attempt to communicate with the person "to evaluate and encourage [them] on the goals and objectives [they] need to achieve in order to be released from isolation or room confinement."[130] Maine's regulation states that room confinement must be of short duration so as not to restrict or deny the person's participation in programs.[131] Many statutes and regulations also require the staff to conduct visual checks of people in room confinement at least every fifteen or thirty minutes.[132]

Though most statutes and regulations require internal record-keeping, few impose reporting requirements regarding the use of room confinement, whether internally or externally. Of course, some reporting obligations may be covered in other statutory obligations addressing general reporting requirements for facilities that use solitary confinement.[133] Only the District of Columbia and Washington require external reports specifically about the use of room confinement. In the District of Columbia, the Department of Youth Rehabilitation Services and the Department of Corrections must provide an annual report to the Mayor and the Council

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[127] FLA. ADMIN. CODE ANN. r. 63E-7.107(15)(e); MD. CODE ANN., CORR. SERVS. § 9-614.1(d); NEV. REV. STAT. ANN. § 62B.215(5); OKLA. ADMIN. CODE § 377:3-13-44(15)(C); WASH. REV. CODE ANN. § 13.22.020(2)(d); 049.0029.11 WYO. CODE R. § 9(c)(iii)(A).
[128] D.C. CODE ANN. § 24-912(b)(2)(C).
[129] FLA. ADMIN. CODE ANN. r. 63E-7.107(15)(c); IDAHO ADMIN. CODE r. 05.02.02.222(1)(e).
[130] WASH. REV. CODE ANN. § 13.22.020(2)(b).
[131] 03-201-12 ME. CODE Subs. 15.3, R. § VII.
[132] 12 COLO. CODE REGS. § 2509-8:7-713.2(F)(2); IDAHO ADMIN. CODE r. 05.02.02.222(2); 210 IND. ADMIN. CODE 6-3-3(c)(6); 505 KY. ADMIN. REGS. 2:120(7); LA. ADMIN. CODE tit. 67, § 7515(E)(2)(b); MICH. ADMIN. CODE r. 400.4163(2)(e); 31 MISS. ADMIN. CODE Pt. 9, R. 4.5(10); NEV. REV. STAT. ANN. § 62B.215(3); OHIO ADMIN. CODE 5139-37-16(E)(3); OKLA. ADMIN. CODE § 377:3-13-44(15)(B); 6 VA. ADMIN. CODE § 35-71-1140(B); WASH. REV. CODE ANN. § 13.22.020(2)(b); 049.0029.11 WYO. CODE R. § 9(iii)(C).
[133] *See infra* section 5.1.2.6.

regarding the use of room confinement (with data about the total number of people in room confinement, the average and longest length of placement, and the greatest number of times that any person was placed in room confinement), and explaining the steps taken to reduce unnecessary room confinement.[134]

Washington's statute requires monthly reports showing the number of times that isolation and room confinement is used, the circumstances leading to its use, the duration of each confinement, whether supervisory review occurred, the race and age of each person placed in confinement, whether a medical or mental health assessment was conducted, and whether the person was denied access to medication, meals, or reading material. This information must be reported to the Department of Children, Youth and Families for inclusion in a report to the legislature in December 2022. From November 2022, the department must also publish this information annually on its website. From January 2023, the department is required to conduct periodic reviews of policies, procedures, and the use of solitary confinement, isolation, and room confinement, and report its findings to the legislature every three years.[135]

Nevada and New York both require internal reporting on the use of room confinement to the relevant departments. In Nevada, facilities must report monthly to the Division of Child and Family Services on the number of children subjected to corrective room restriction, the length of time held, and the reason that any attempt at returning the child to the general population was unsuccessful.[136] New York's facilities must provide monthly reports to the Office of Children and Family Services on the number of children placed in room confinement, the length of placement, the official who authorized the placement, and the names of any officials who visited the child.[137] Such reports do not, however, include data regarding people held in the "juvenile separation units" operated by the Department of Corrections. Thus the data collected in New York (which are not publicly available) do not provide a complete account of all young people in isolated conditions in the state's correctional facilities.

[134] D.C. CODE ANN. § 24-912(g).
[135] WASH. REV. CODE ANN. § 13.22.040.
[136] NEV. REV. STAT. ANN. § 62B.215(7).
[137] N.Y. COMP. CODES R. & REGS. tit. 9, § 180-1.9(c)(11)(ix).

5.1.2.2 Pregnant People

While the shackling and use of physical restraints on pregnant people has been the subject of legislative and policy reform in more than half of US states, less progress has been made in relation to solitary confinement despite the recognized harm associated with placing pregnant people in isolation.[138] Only eight states currently have statutes or regulations that specifically relate to the placement of pregnant people in solitary confinement.[139] All eight have introduced these restrictions in the last two years.

Georgia's statute prohibits the use of solitary confinement, administration segregation, or medical observation in a solitary setting for any pregnant woman or woman in the six-week period following childbirth (which may be extended by a physician if there are complications).[140] In New Mexico, a person who is known to be pregnant may not be placed in restricted housing.[141] These are the only two states to impose total prohibitions with no exceptions.

In the remaining states, prohibitions on placing pregnant people (and in most instances, people in the postpartum period) in solitary confinement are subject to the exception that it may be used where necessary for the health and safety of the person, others, or to preserve the security of the institution.[142] Texas's prohibition refers only to administrative segregation; the state eliminated

[138] *See, e.g., 23 States Still Allow Shackling Pregnant Prisoners*, CRIME AND JUSTICE NEWS, (Jan. 27, 2020), https://thecrimereport.org/2020/01/27/23-states-still-allow-shackling-pregnant-prisoners/.
[139] These states are: Florida, Georgia, Louisiana, Maryland, New Mexico, South Carolina, Texas, and Virginia.
[140] GA. CODE § 42-1-11.3(e). The statute directs that this prohibition shall not prevent the placement of a woman in a cell or hospital room by herself.
[141] N.M. STAT. ANN. §33-16-3(B).
[142] FLA. STAT. ANN. § 944.241(4)(b) ("A pregnant prisoner may be involuntarily placed in restrictive housing if … necessary to protect the health and safety of the pregnant prisoner or others or to preserve the security and order of the correctional institution and … there are no less restrictive means available."); MD. CODE ANN., CORR. SERVS. § 9-601.1(c)(1) (A pregnant person may be placed in restrictive housing as a temporary response to "(i) behavior that poses a serious and immediate risk of physical harm to the inmate or another or an immediate and credible flight risk that cannot be reasonably prevented by other means; or (ii) a situation that poses a risk of spreading a communicable disease that cannot be reasonably mitigated by other means."); S.C. CODE ANN. § 24-13-35(J) (West 2020) (facilities must not place pregnant or postpartum inmates in restrictive housing "unless there is a reasonable belief the inmate will harm herself, the fetus, or another person, or pose a substantial flight risk."); TEX. GOV'T. CODE ANN. § 501.114(a) (prohibiting placement of pregnant or postpartum people in administrative segregation unless "the placement is necessary based on a reasonable belief that the inmate will harm herself, her unborn child or infant, or any other person, or will attempt escape."); VA. CODE ANN. §§ 53.1-40.12(D) and 53.1-40.13(B) (prohibiting placement of pregnant and postpartum people in restrictive housing or solitary confinement unless there is a reasonable belief that "the inmate will harm herself, the fetus, the newborn child, or any other person, or poses a substantial flight risk.").

disciplinary segregation in 2017 but pregnant people and those in the postpartum period could presumably still be placed in solitary confinement for protective reasons.

In contrast, Florida's statute provides greater protection to pregnant people and those in the postpartum period, despite the exception that still allows placement in restrictive housing. It provides that placement in restrictive housing may only occur if "there are no less restrictive means available."[143] Any corrections official who places a pregnant or postpartum person in restrictive housing must justify the necessity for the placement and explain why less restrictive means are not available and whether a qualified healthcare professional objects to the placement. A copy of the official's report must be provided to the incarcerated person within twelve hours of the placement.[144] Furthermore, people placed in restrictive housing under this provision must be seen by a healthcare professional at least once every twenty-four hours, observed hourly by a correctional officer, housed in "the least restrictive setting consistent with the health and safety of the pregnant prisoner," and given a medical treatment plan approved by a healthcare professional.[145]

Maryland's provisions offer similar protections to Florida's. Any decision to place a pregnant or postpartum person in restrictive housing must record the reason, including an explanation as to why no less restrictive housing is possible. The decision must be reviewed at least every twenty-four hours, and a copy of the written decision must be provided to the person.[146] Anyone placed in restrictive housing must be medically assessed every eight hours, held in the least restrictive setting consistent with the person's health and safety, and provided with an intensive treatment plan that is approved by the official overseeing women's health and services.[147]

The relevant statutory provision in Virginia is less protective. It requires the preparation of a report justifying the reason for placing a pregnant or postpartum person in restrictive housing or solitary confinement.[148] The report must be provided to the official in charge of the facility, but the person placed in solitary confinement is not entitled to receive a copy. There are no

[143] FLA. STAT. ANN. § 944.241(4)(b).
[144] *Id*.
[145] FLA. STAT. ANN. § 944.241(4)(c).
[146] MD. CODE ANN. CORR. SERVS. § 9-601.1(c)(2) and (3).
[147] MD. CODE ANN. CORR. SERVS. § 9-601.1(d).
[148] VA. CODE ANN. §§ 53.1-40.12(D) and 53.1-40.13(B).

provisions requiring restrictive housing to be in the least restrictive setting possible, nor mandating periodic review of the placement.

Florida's statute is the only one to contain an enforcement provision. Any pregnant or postpartum person placed in restrictive housing in violation of the statute may file a grievance with the correctional institution and be granted an extension to file their grievance. The enforcement provision is separate from any other right to relief or claim under federal or state law.[149] Corrections officials in Florida must also inform incarcerated females of the rules adopted pursuant to the statute and post the rules in common areas of the prison.[150]

None of the statutes impose external reporting obligations and only two require the compilation of data for internal reporting purposes. In Maryland, any facilities that authorize the placement of a pregnant person in restrictive housing must submit a report within thirty days to the Commissioner of Correction, the Commissioner of Pretrial Detention and Services, and the person responsible for overseeing women's health and services in the facility. The report must contain the reason for and details about the placement, including medical assessments, date and time of the placement and release, and any physical or mental effects on the person or fetus.[151] In Virginia, the warden must compile a monthly summary of all written reports regarding restrictive housing placements and submit them to the director of the Department of Corrections.[152] Virginia's statute also requires training of correctional officers and juvenile correctional officers who may have contact with pregnant people. This training must include, among other things, "the impact of being placed in restrictive housing or solitary confinement on pregnant inmates."[153] Virginia's is the only statute to impose staff training obligations in this regard.

The statutes vary in their application to people in the postpartum period. The provisions in Maryland's statute and New Mexico's statute make no reference to the postpartum period. Florida's statute defines the "postpartum recovery period" as twenty-fours following delivery unless a physician recommends a longer period, but the prohibition on placing people in

[149] FLA. STAT. ANN. § 944.241(5).
[150] FLA. STAT. ANN. § 944.241(6).
[151] MD. CODE ANN. CORR. SERVS. § 9-601.1(g).
[152] VA. CODE ANN. § 53.1-40.14.
[153] VA. CODE ANN. § 53.1-40.15.

restrictive housing only applies to pregnant people.[154] South Carolina's prohibition applies to pregnant people and anyone who has given birth within the previous thirty days;[155] Georgia's extends to six weeks following childbirth;[156] and Louisiana and Virginia's both apply for eight weeks following childbirth.[157] Unlike New Jersey's statute and some bills, none of the other currently-enacted statutes prohibit the solitary confinement of a person whose pregnancy has been terminated or who has suffered a miscarriage.[158]

5.1.2.3 People with Mental Illnesses and Developmental Disabilities

In addition to the statutes discussed in section 5.1.1, five other state statutes and regulations impose some restrictions on placing people with mental illnesses in solitary confinement. These restrictions are all limited to people with serious or significant mental illnesses or disabilities.

In 2014, Colorado passed a statute prohibiting the placement of any person with a "behavioral or serious mental health disorder in long-term isolated confinement except when exigent circumstances are present."[159] The statute does not define "behavioral or serious mental health disorder" and while it remains current, it has in effect been subsumed by Colorado's administrative reforms that have resulted in the prohibition of long-term solitary confinement of all incarcerated people.[160]

In Nevada, there is a prohibition on placing people with serious mental illnesses or significant mental impairments in solitary confinement solely based on their illness or impairment. People may still, however, be placed in solitary if officials consider it necessary "for the safety of the offender, staff, or any other person." If placed in solitary confinement, people with serious mental illnesses or mental impairments must receive a daily health and welfare check.[161]

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[154] FLA. STAT. ANN. § 944.241(2)(g) and (4).
[155] S.C. CODE ANN. § 24-13-35(J).
[156] GA. CODE ANN. § 42-1-11.3(a)(2) and (e).
[157] LA. STAT. ANN. § 15:865; VA. CODE ANN. §§ 53.1-40.11 and 53.1-40.13.
[158] *See infra* section 5.2.2.3.
[159] COLO. REV. STAT. ANN. § 17-1-113.8(1).
[160] *See infra* section 5.4.1.
[161] NEV. REV. STAT. ANN. § 209.369(1)(b). The statute defines "serious mental illness or other significant mental impairment" as "a substantial disorder of thought or mood that significantly impairs judgment, behavior or capacity to recognize reality, which may include, without limitation, a person who is found to have current symptoms of, or who is currently receiving treatment based on a type of diagnosis found in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders, published by the American Psychiatric Association; or … an intellectual

New Mexico's statute prohibits solitary confinement for people with a "serious mental disability," who have received a diagnosis, or who are exhibiting "self-injurious behavior, grossly abnormal and irrational behaviors, delusions, or suicidal behavior," unless a health care professional determines that the behavior is not related to a serious mental disability.[162] The prohibition on placing people with serious mental disabilities in solitary confinement does not apply during the first five days of the person's confinement in the prison.[163] The warden or person in charge of the prison may place people with serious mental disabilities in solitary confinement to prevent an imminent threat of physical harm. Such placements cannot exceed forty-eight hours and the warden or person in charge must record the circumstances giving rise to the placement, prepare a written plan for moving the person out of solitary confinement at the earliest opportunity, and notify the prison's health services administrator in writing of the placement.[164] If the person continues to pose an "ongoing and realistic threat of physical harm to another person," the forty-eight hour period may be extended for a further forty-eight hours. However, an extension is only authorized where: other methods for ensuring the safety of the threatened person are insufficient, impractical, or inappropriate; the person in solitary confinement is held for the shortest period and under the least restrictive conditions practicable; and the person receives regular access to medical and mental health care. If the period is extended, a written record is required, and the prison's health services administrator must be notified.[165]

Under Texas's regulations, people may not be placed in administrative segregation until a mental health assessment is conducted. If the assessment indicates that administrative segregation is not

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disability, [namely] autism, cerebral palsy, epilepsy or any other neurological condition diagnosed by a qualified professional that: (a) is manifested before the person affected attains the age of 22 years; (b) is likely to continue indefinitely; (c) results in substantial functional limitations, as measured by a qualified professional, in three or more of the following areas of major life activity: (1) taking care of oneself; (2) understanding and use of language; (3) learning; (4) mobility; (5) self-direction; and (6) capacity for independent living; and (d) results in the person affected requiring a combination of individually planned and coordinated services, support or other assistance that is lifelong or has an extended duration." NEV. REV. STAT. § 209.369(7).

[162] "Serious mental disability" is defined as: "(1) a serious mental illness, including schizophrenia, psychosis, major depression and bipolar disorder; or (2) having a significant functional impairment along with a brain injury, organic brain syndrome or intellectual disability." N.M. STAT. ANN. § 33-16-2(D).

[163] N.M. STAT. ANN. § 33-16-4(A)(2).

[164] N.M. STAT. ANN. § 33-16-4(A)(3).

[165] N.M. STAT. ANN. § 33-16-4(A)(4).

appropriate, the person may not be so held.[166] The regulation does not apply to other forms of solitary confinement.

Vermont's statute required the adoption of rules relating to the segregation of people with "serious functional impairments."[167] Under the statute, people with serious functional impairments cannot be held in solitary confinement for more than fifteen days if the reason for the placement is disciplinary segregation; and not more than thirty days for any other reason (including at the request of the person).[168] The thirty-day period may be extended with the approval of a mental health professional and physician. The statute requires the Department of Corrections to report monthly to the Joint Legislative Justice Oversight Committee on each person in solitary confinement with a serious functional impairment, including the reason for and length of the placement. The report must also record any incidents of self-harm or attempted suicide. A copy of the report is provided to Vermont's Defender General. The Department of Corrections must also report annually on all people in solitary confinement who received mental health services.[169]

5.1.2.4 Conditions in Solitary Confinement

In addition to the reform statutes discussed in section 5.1.1, three other states impose minimum requirements for conditions in solitary confinement through legislation or regulations.

Maine's statute requires that people in segregation receive sufficient and wholesome nutritious food, and adequate sanitary and other conditions necessary for their health.[170] In Nevada, people placed in disciplinary segregation must receive the same meal rations as people in the general prison population, visits, mail, a minimum of five hours of exercise per week (except where it poses a threat to the safety or security of the prison), and access to reading and legal material

[166] TEX. GOV'T. CODE ANN § 501.068.
[167] VT. STAT. ANN. tit. 28, § 701a. The statute defines "serious functional impairment" as "(A) a disorder of thought, mood, perception, orientation, or memory as diagnosed by a qualified mental health professional, which substantially impairs judgment, behavior, capacity to recognize reality, or ability to meet the ordinary demands of life and which substantially impairs the ability to function within the correctional setting; or (B) a developmental disability, traumatic brain injury, or other organic brain disorder, or various forms of dementia or other neurological disorders, as diagnosed by a qualified mental health professional, which substantially impairs the ability to function in the correctional setting." VT. STAT. ANN. tit. 28, § 906.
[168] VT. STAT. ANN. tit. 28, § 701a(a).
[169] VT. STAT. ANN. tit. 28, § 701a(c).
[170] ME. REV. STAT. ANN. tit. 34-A, § 3032.

from the library.[171] These allowances are only applicable to people held in disciplinary segregation.

Ohio's regulation provides that people in restrictive housing are entitled to legal material and services; mail and kites (written messages sent internally within a prison or jail); reading materials; out-of-cell exercise for one hour per day, five days per week; a toothbrush, toothpaste, deodorant, feminine hygiene products, and soap; hair care services; a toilet, wash basin, running water, bunk, mattress, pillow, sheets, and blankets; state-issued clothing; adequate light for reading; access to medical and mental health services; adequate food; telephone calls to access the judicial process and family emergencies as approved by the managing officer; cleaning materials approved by the managing officer; and access to educational services, the commissary, library, social services, behavioral health and treatment services, religious guidance and recreational programs.[172] Any of these allowances, with the exception of medical, mental health care, legal services, and kites, may be withheld when deemed necessary for the safety or security of the institution or the wellbeing of the person, or for "abuse of cell privileges."[173]

5.1.2.5 Direct Release to the Community

In addition to the statutes discussed in section 5.1.1, only one other state imposes limitations on releasing people held in solitary confinement directly to the community. In Illinois, the Department of Corrections must make "every attempt" to ensure people are not directly released from disciplinary segregation to the community. The effect of the regulation is limited since it makes no reference to other forms of solitary confinement. It provides that, within 180 days prior to release, the Deputy Director of the Department of Corrections must decide if the person "may transition through a less secure placement option." If, however, the Deputy Director decides that continued placement in disciplinary segregation is appropriate, a "transition and stabilization plan" must be developed. The plan must incorporate "appropriate programming, based on safety and security concerns."[174] The regulation provides no guidance on the content of the transition plan, and the emphasis on safety and security concerns suggests that its primary

[171] NEV. REV. STAT. ANN. § 209.369(5)(b).
[172] OHIO ADMIN. CODE 5120-9-10(H).
[173] OHIO ADMIN. CODE 5120-9-10(I) and (J).
[174] ILL. ADMIN. CODE tit. 202, § 504.680.

focus is not the individual needs of the person in solitary confinement or their imminent return to the community.

5.1.2.6 Reporting and Oversight

Twelve states and the Federal Government impose reporting obligations regarding the use of solitary confinement.[175]

The federal reporting obligation was introduced as part of the First Step Act of 2018. It requires the Director of the FBOP to include the number of people placed in solitary confinement at any time during the previous year in the data provided for the National Prisoner Statistics Program.[176] The data for this program are then submitted in a report to the Committees on the Judiciary of the Senate and the House of Representatives.[177]

The reporting obligations in California's statute derive from a 2012 report by the CDCR entitled "The Future of California Corrections: A Blueprint to Save Billions of Dollars, End Federal Court Oversight and Improve the Prison System." The Inspector General is required to conduct periodic reviews of various aspects of the state's prison operations addressed by that report, including the use of and conditions within security housing units.[178] The most recent report, published in August 2020, merely states that "the *Ashker* settlement resulted in a substantial decline in both the number of step-down program participants and the SHU population," and it does not provide any details about the number of people held in solitary confinement or the conditions therein.[179]

In Colorado, a 2011 statute requires the Director of the Department of Corrections to report annually to the Judiciary Committees of the State Senate and House of Representatives on "the status of administrative segregation; reclassification efforts for offenders with mental health disorders or intellectual and developmental disabilities, including duration of stay, reason for

[175] The states with reporting obligations include California, Colorado, Connecticut, Illinois, Maryland, Massachusetts, Minnesota, Nebraska, New Jersey, New Mexico, New York, and Virginia.
[176] First Step Act of 2018, Pub. L. No. 115-391, § 610(a)(2).
[177] First Step Act of 2018, Pub. L. No. 115-391, § 610(b).
[178] CAL. PENAL CODE § 6126(g)(4).
[179] OFFICE OF THE INSPECTOR GENERAL, BLUEPRINT MONITORING ELEVENTH REPORT 4 (2020). *See* discussion of Ashker settlement *infra* section 5.3.3.

placement, and number and percentage discharged; and any internal reform efforts."[180] The statute further instructs that any cost savings resulting from the reduction of administrative segregation placements must be redirected to support behavior-modification programs, incentive programs, mental health services or programs, or similar efforts designed as viable alternatives to administrative segregation.[181]

Connecticut's statute requires the Department of Correction to collate and publish detailed data regarding people in restrictive housing. The Department must publish on its website the formula for calculating mental health scores as well as descriptions of all forms and phases of housing at facilities with people in restrictive housing.[182] It must also submit an annual report to the Criminal Justice Policy and Planning Division containing aggregated and anonymized data showing the number of people in restrictive housing as of the first day of the twelve months preceding the date of the report. The data must be disaggregated by age, gender identity, ethnicity, mental health score, and the form and phase of restrictive housing. The report must contain equivalent data regarding people in administrative segregation. Finally, it must describe the actions taken during the previous twelve months to reduce reliance on administrative segregation and to mitigate the harmful effects of the practice.[183] In January 2019, the Commissioner of Correction was required to submit a report to the General Assembly regarding the use and oversight of all forms and phases of housing for people in restrictive housing.[184]

The reporting obligations imposed by Illinois' regulations are less onerous than those contained in Connecticut's statute. The Department of Corrections must collect and report data on the average length of stay in segregation, secured housing, and restrictive housing; and data per 100 people released directly from segregation, secured housing, or restrictive housing to the community. These data are included in the Department's quarterly report to the General Assembly and must be reviewed by the Director of Corrections' executive team on a quarterly basis.[185] The primary focus of the data collection is on violence reduction and incentivizing

[180] COLO. REV. STAT. ANN. § 17-1-113.9(1).
[181] COLO. REV. STAT. ANN. § 17-1-113.9(2).
[182] CONN. GEN. STAT. ANN. § 18-96b(b). The current Restrictive Housing Matrix, last reviewed by the Department of Corrections in June 2016, is available at https://portal.ct.gov/-/media/DOC/Pdf/Ad/ad0904attbpdf.pdf?la=en. Of the nine types of restrictive housing listed in the matrix, four are authorized for use for indefinite periods.
[183] CONN. GEN. STAT. ANN. § 18-96b(c).
[184] CONN. GEN. STAT. ANN. § 18-96b(e).
[185] 730 ILL. COMP. STAT. ANN. 5/3-2-12.

good conduct within correctional facilities, rather than implementing reforms of restrictive housing.

In Maryland, data are collected annually and submitted to the Governor's Office of Crime Prevention, Youth and Victim Services showing, among other things, the number of people placed in restrictive housing in the preceding year by age, race, gender, housing classification, and the basis for placement; the number of people with a serious mental illness placed in restrictive housing; the definition of "serious mental illness"; the number of people known to have been pregnant when placed in restrictive housing; the average and median lengths of stay; the number of incidents of death, self-harm, and attempted self-harm; and the number of people released directly from restrictive housing to the community. The report must also include any other data that the Department of Corrections considers relevant to the use of restrictive housing and any changes to written policies or procedures relating to restrictive housing, including steps taken to reduce the practice. The information submitted in this report is then made available on a public website and provided to the General Assembly.[186]

New Mexico's transparency and reporting provision requires correctional facilities to report every three months on the age, gender, and ethnicity of every person placed in restricted housing, the reason for the placement, and the dates of placement and release. Reports prepared by prisons must be submitted to the legislature, while those prepared by jails are submitted to the Board of County Commissioners. The Department of Corrections must post all reports on its website.[187]

New Mexico's statute also requires separate reports from private prisons and jails. Every three months, these facilities must submit reports of all monetary settlements paid to incarcerated people, formerly incarcerated people, or their estates resulting from lawsuits relating to the use of restricted confinement or any other matter. Like the general transparency and reporting provision, private jails must submit their reports to the Board of County Commissioners, while

[186] MD. CODE ANN., CORR. SERVS. § 9-614.
[187] N.M. STAT. ANN. § 33-16-5.

private prisons report to the legislature. There is no requirement for these reports to be made public.[188]

In Virginia, the Department of Corrections must compile an annual report to the General Assembly and the Governor with data for the previous fiscal year that include the number of people placed in and released from restrictive housing; the age, sex, race, ethnicity, mental health status, medical status, security level, and custody level of each person placed in restrictive housing or SAM units;[189] the disciplinary offense history preceding the placement; the number of days each person spent in restrictive housing; the number of people released directly from restrictive housing to the community; the number of full-time mental health staff; and any changes made to written policies or procedures regarding restrictive housing and SAM units. The report must also be provided to the House of Delegates and the Senate, posted on the General Assembly's website, and published on the Department's website.[190]

Virginia's statute also requires the Board of Corrections to consult with a "stakeholder work group" to review standards governing the use of solitary confinement. The work group comprises representatives of affected groups, including sheriffs, regional superintendents, public defenders, formerly incarcerated people, mental health experts, disability rights advocates, and civil liberties advocates. The group must present its findings to the legislature and publish them on the Department of Corrections' website, and then the Board has discretion to promulgate standards consistent with the findings of the report.[191]

5.1.2.7 Employees

In addition to New Jersey and New York, Connecticut and Oregon also require training of employees who work in solitary confinement. In Connecticut, the training must cover the long and short-term psychological effects of administrative segregation, and de-escalation and communication techniques to divert people from situations that may result in their being placed in administrative segregation. Employees must also receive training in symptoms of mental

[188] N.M. STAT. ANN. § 33-16-6.
[189] *See supra* section 2.5.1.2.4.
[190] VA. CODE ANN. § 53.1-39.1.
[191] 2020 Va. Laws Ch. 522.

illness, risks and side effects of psychotropic medications, de-escalation techniques for managing people with mental illness, and the consequences of untreated mental illness.[192]

Oregon's regulations set out a series of selection criteria for employees who wish to work in disciplinary segregation units. Potential candidates must complete a trial period, undergo mental health training, and achieve a satisfactory result on their most recent performance appraisal. At a minimum, they must demonstrate maturity and tolerance, a constructive interest in working with people in disciplinary segregation, good judgment, and conflict-reduction skills.[193] Assignments to disciplinary segregation are reviewed twice annually and rotations take place as necessary "in the best interest of the employee or the facility." Staff working in disciplinary segregation must be rotated out of the units after a maximum of two years and they must work in another unit (not a SHU) for at least six months.[194]

5.1.2.8 Statutory Punishment Provisions

Although not reform-oriented, Delaware, Michigan, Tennessee, and Wisconsin all incorporate solitary confinement as a form of punishment within their statutory regimes.[195] People placed in solitary confinement pursuant to such provisions could, in theory, overcome the problems presented by the federal courts' narrow definition of punishment that requires proof of deliberate indifference where it is not imposed by statute or a sentencing judge.[196] If solitary confinement is instead imposed as part of a statutory or sentencing regime, arguably the requirement to prove deliberate indifference to establish an Eighth Amendment violation is not necessary. All four statutes are old but remain in existence, although none appear to be invoked in sentencing today.

5.2 Recent Bills

Over the last two years, bills have been introduced in twenty-two state legislatures and in Congress that present a wide range of potential reforms.[197] Some bills propose substantive

[192] CONN. GEN. STAT. ANN. § 18-96b(g).
[193] OR. ADMIN. R. 291-011-0015(1).
[194] OR. ADMIN. R. 291-011-0015(2).
[195] DEL. CODE ANN. tit. 11, § 3902 (1899); MICH. COMP. LAWS ANN. § 801.25 (1846); TENN. CODE ANN. § 41-24-402 (1829); WIS. STAT. ANN. §§ 302.10 and 302.40 (1947).
[196] *See supra* section 3.1.2.2.
[197] Bills have been introduced in Arizona, Arkansas, Florida, Georgia, Hawaii, Illinois, Kentucky, Louisiana, Maryland, Mississippi, Nebraska, Nevada, New Jersey, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Vermont, Virginia, and Wisconsin.

overhauls, while others address only single issues such as the solitary confinement of pregnant people or the creation of new oversight mechanisms. The series of reform bills follows nearly a decade of such proposals being introduced in state legislatures around the country. In 2013, state legislatures in New Hampshire, Florida, and Texas were considering various proposals that would limit youth solitary confinement, impose time limits, or require annual reports on the number of people in solitary confinement affected by mental illness.[198] Earlier bills in Texas and Kentucky proposed policy reviews and studies that were to consider abolishing solitary confinement.[199] While none of these proposals were enacted at the time, some were incorporated into later statutes. In some states, like New Hampshire, reform bills have been introduced for years but have never been enacted, while in New Jersey, New York, and Nebraska, the legislatures have eventually passed reform bills after repeated attempts to do so.

The following section discusses thematic issues arising from the bills introduced between 2019 and 2021. As is the case with existing legislation, a range of approaches have been adopted. The bills show the different views of legislators as to what may be required to reduce or eliminate solitary confinement, or at least improve oversight of the practice.

5.2.1 General Limits

Thirteen bills introduced in the last two years impose general limits and restrictions, either on the purpose of placement or on the length of time spent in solitary confinement.[200]

5.2.1.1 Purpose of Solitary Confinement

In Arizona, two bills were introduced in 2020 that proposed to prohibit and restrict isolated confinement respectively.[201] One bill would prohibit isolated confinement unless there is reasonable cause to believe there exists a "substantial risk of immediate and serious harm as evidenced by recent threats and conduct and any less restrictive intervention would be insufficient to reduce that risk." The other bill contains the same proposal, and also requires the

[198] H.B. 480, 2013 Reg. Sess. (N.H. 2013); H.B. 959, 2013 Reg. Sess. (Fla. 2013); S.B. 1357, 83rd Leg., Reg. Sess. (Tex. 2013).
[199] H.B. 3761, 82nd Leg., Reg. Sess. (Tex. 2011); H.B. 271, 2001 Reg. Sess. (Ky. 2001).
[200] These bills have been introduced in Arizona, Connecticut, Florida, Georgia, Hawaii, Maine, Nebraska, Nevada, Pennsylvania, Virginia, and Congress.
[201] H.B. 2691, 54th Leg., 2nd Reg. Sess. (Ariz. 2020); S.B. 1617, 54th Leg., 2nd Reg. Sess. (Ariz. 2020).

prison to establish the risk by clear and convincing evidence. That bill further proposes a prohibition on solitary confinement for nondisciplinary reasons.

Two federal bills also introduced limits on the purpose for which solitary confinement may be used. Senate Bill 719, introduced in March 2019, proposed to limit administrative segregation to situations where it is necessary to control a "substantial and immediate threat that cannot be addressed through alternative housing," or to hold someone temporarily pending transfer, classification, or resolution of another temporary administrative matter.[202] Disciplinary segregation would be limited to situations where it is necessary to punish significant and serious disciplinary infractions where alternative sanctions would not adequately regulate the behavior in issue.[203] The use of SMUs would be restricted to situations where segregation is required for the temporary housing of people whose "history, behavior, or circumstances require enhanced management approaches that cannot be addressed through alternative housing."[204] Placement in an administrative maximum facility like the Florence supermax would be allowed where the Attorney-General determines that special administrative measures are necessary, or to house people who pose an "ongoing significant and serious threat to the safety of other inmates, staff, or the public that cannot be addressed through alternative housing."[205]

Congressional House Bill 8155, introduced in September 2020, would restrict solitary confinement to situations where there is reasonable cause to believe that people pose a substantial risk of serious harm to others, as evidenced by recent threats or conduct, and a less restrictive intervention would not reduce the risk. Both federal bills therefore emphasize that solitary confinement should not be used where other, less restrictive alternatives are available. The correctional facility would bear the burden of establishing this standard by clear and convincing evidence.[206]

A bill introduced in Connecticut's Senate in March 2021 would substantially limit the use of isolated confinement, which is defined as confinement in a cell, alone or with others, for more

[202] S. 719, 116th Cong. § 2(b)(5)(A) (2019).
[203] S. 719, 116th Cong. § 2(b)(5)(B) (2019).
[204] S. 719, 116th Cong. § 2(b)(6) (2019).
[205] S. 719, 116th Cong. § 2(b)(7) (2019).
[206] H.R. 8155, 116th Cong., 2nd Sess., § 2(a) (2020).

than sixteen hours per day.[207] Under this bill, only senior employees would be able to authorize placements in isolated confinement, and only for up to seventy-two hours in any given situation.[208] A physical and mental examination would be required prior to a person's placement in isolated confinement and the Department of Corrections must have attempted to defuse the situation leading to the placement through de-escalation techniques and less restrictive measures.[209] The Department would be required to continue de-escalation efforts after placing the person in isolated confinement. The bill bans isolated confinement for reasons relating to race, color, national origin, sexual orientation, sex, gender identity, or expression.[210]

A Senate Bill introduced in Florida would prohibit solitary confinement, defined as the placement of a person in a cell, alone or with others, in substantial isolation, for more than twenty-two hours per day.[211] It states that, absent exigent circumstances, people may only be placed in "restrictive confinement," meaning placement in a cell in substantial isolation for more than twenty hours per day, if the placement would reduce the safety threat posed by those circumstances.[212] The bill defines "exigent circumstances" as those which present "an immediate and substantial threat to the safety of an inmate or a correctional staff member."[213] Restrictive confinement may not be used as a consequence for noncompliance, punishment, harassment, or retaliation.[214]

The legislative findings in a Senate Bill introduced in Hawaii acknowledge that people with mental health issues are more likely than other incarcerated people to be placed in solitary confinement. The bill also refers to analysis conducted between 2008 and 2012 by the University of Cincinnati Corrections Institute that found "higher rates of recidivism among those incarcerated individuals who were subjected to more severe punishments."[215] The bill proposes that administrative and disciplinary segregation should only be used where "less severe forms of punishment are not available and when a committed person commits an offense involving

[207] S.B. 1059, Gen Assemb., Jan. Sess., § 3(a)(9) (Conn. 2021).
[208] S.B. 1059, Gen Assemb., Jan. Sess., § 3(b)(5) (Conn. 2021).
[209] S.B. 1059, Gen Assemb., Jan. Sess., § 3(b)(2) (Conn. 2021).
[210] S.B. 1059, Gen Assemb., Jan. Sess., § 4 (Conn. 2021).
[211] S.B. 762, 122nd Leg., § 944.175(1)(e) (Fla. 2020).
[212] S.B. 762, 122nd Leg., § 944.175(3) (Fla. 2020).
[213] S.B. 762, 122nd Leg., § 944.175(1)(a) (Fla. 2020).
[214] S.B. 762, 122nd Leg., § 944.175(3) (Fla. 2020).
[215] S.B. 2520, 30th Leg., § 1 (Haw. 2020).

violence; escapes or attempts to escape or poses a serious threat to the security of other committed persons or correctional facility staff, or both."[216]

Nevada's Senate Bill would require the Director of the Department of Corrections to adopt regulations to ensure that solitary confinement can only be used as a last resort, in the least restrictive manner, and for the shortest period safely possible. The requirement that solitary confinement be utilized in the "least restrictive manner" stands in conflict with the bill's definition of solitary confinement as placement in a cell for twenty-two or more hours per day.[217] The bill also contemplates that long-term solitary confinement will continue to be used, as evidenced by a requirement that a multidisciplinary classification committee will review each person's placement at least every seven days for the first sixty days, and at least once every thirty days thereafter.[218] The bill would limit the class of offenses for which people may be placed in disciplinary segregation to serious offenses only, although the definition of "administrative segregation" is sufficiently broad as to encompass lesser violations.[219]

A bill introduced in both the House and Senate in Pennsylvania provides that people could not be placed in solitary confinement unless there is reasonable cause to believe there is a substantial risk of immediate serious harm, evidenced by recent threats or conduct, and a less restrictive intervention would be insufficient to reduce that risk.[220] The correctional institution or facility bears the burden of establishing this standard by clear and convincing evidence. People may also be placed in solitary confinement for disciplinary sanctions. Any decision to place a person in solitary confinement must be made by the chief administrator.[221]

In Virginia, the Senate (but not the House) passed a bill in 2021 that would largely eliminate isolated confinement, defined as confinement in a cell alone or with another person for twenty or more hours per day.[222] Under this bill, isolated confinement would only be allowed for the

[216] S.B. 2520, 30th Leg., § 2 (Haw. 2020).
[217] S.B. 187, 81st Reg. Sess., § 10 (Nev. 2021).
[218] S.B. 187, 81st Reg. Sess., § 11(1) and (8) (Nev. 2021).
[219] S.B. 187, 81st Reg. Sess., § 2 (Nev. 2021) (defining "administrative segregation" as the separation of a person from the general population when their presence poses a serious threat to life, property, self, staff, others, or the security and orderly operation of the facility or institution).
[220] H.B. 497 and S.B. 832, 203rd Gen. Assemb., Reg. Sess., § 5102(a)(1) (Pa. 2019).
[221] H.B. 497 and S.B. 832, 203rd Gen. Assemb., Reg. Sess., § 5102(a)(4) (Pa. 2019).
[222] S.B. 1301, Special Sess. I, § 1 (Va. 2021).

purpose of providing medical or mental health treatment for up to forty-eight hours to prevent "an imminent threat of physical harm," and a further forty-eight hours to investigate "an ongoing and realistic threat of imminent physical harm to another."[223] The bill also requires that in the event of a facility-wide lockdown, the facility administrator must specify in writing the justifications for the lockdown and explain why less restrictive interventions are insufficient. It also retains the possibility of placing people in protective isolation for their own safety, but such placements require the informed consent of the person or, absent consent, clear and convincing evidence that the placement is necessary to prevent reasonably foreseeable harm.

The bills introduced in Arizona, Congress, Pennsylvania, and Virginia all impose the same burden of requiring the prison to establish the need for solitary confinement by clear and convincing evidence of the risk of harm based on recent threats or conduct. By requiring specific evidence, less discretion is left to prison officers to decide of their own volition that there is a sufficient risk of harm to justify solitary confinement. Most of the bills also treat solitary confinement as a last resort, to be used only if less restrictive alternatives are insufficient.

5.2.1.2 Time Limits

Arizona's House and Senate Bills, Florida's Senate Bill, Nebraska's Legislative Bill, Pennsylvania's House and Senate Bills, and the Federal House Bill, would all limit solitary confinement to a maximum of fifteen consecutive days or no more than twenty days during any sixty-day period.[224] The fifteen-day limit is consistent with the "Nelson Mandela Rules" adopted by the United Nations, which recommend the prohibition of indefinite and "prolonged solitary confinement," defined as any period exceeding fifteen consecutive days.[225]

Arizona's Senate Bill would limit isolated confinement to a maximum of ten consecutive days or twenty days during any sixty-day period during a facility-wide lockdown.[226] Had it been

[223] *Id.*
[224] H.B. 2691 and S.B. 1617, 54th Leg., 2nd Reg. Sess., § 31-602(A)(3) (Ariz. 2020); S.B. 762, 122nd Leg., § 944.175(3)(a) and (b) (Fla. 2020); L.B. 620, 107th Leg., 1st Sess., §§ 2 and 3 (Neb. 2021); H.B. 497 and S.B 832, 203rd Gen. Assemb., Reg. Sess., § 5102(c)(2) and (3) (Pa. 2019); H.R. 8155, 116th Cong., 2nd Sess., § 2(a)(8) (2020).
[225] G.A. Res. 70/175, Rules 43(1)(a) and (b) and 44 (Dec. 17, 2015).
[226] S.B. 1617, 54th Leg., 2nd Reg. Sess., § 31-602(A)(10) (Ariz. 2020).

enacted, such a provision might have been significant in terms of the measures adopted to manage the coronavirus response in the state's prisons.

A Federal Senate Bill proposes that administrative segregation be limited to a maximum of fifteen consecutive days or no more than twenty days in a sixty-day period unless an individual asks to remain in administrative segregation, or a multidisciplinary staff committee approves a temporary extension of up to fifteen days, which must be reviewed every three days.[227] That bill then proposes that disciplinary segregation should be limited to thirty consecutive days, or forty days in a sixty-day period. This period can be extended if a disciplinary hearing officer considers that the infraction was of "such an egregious and violent nature that a longer sanction is appropriate."[228] No maximum time limit is proposed for placement in the administrative maximum prison or in a SMU.

Connecticut's Senate Bill would limit isolated confinement to a maximum of seventy-two hours.[229] Isolated confinement could be used only in response to certain "serious incidents," or to address a substantial threat of imminent physical harm evidenced by recent conduct.[230] The definition of "serious incidents" includes events that impact the normal operation of a facility, such as health emergencies, thereby suggesting that lockdowns such as those implemented in response to the coronavirus pandemic would still be authorized.[231]

Georgia's House Bill sets out time limits that correspond to the number of previous disciplinary infractions. For a first infraction, solitary confinement could not exceed fifteen days; a second infraction would result in placement for nonconsecutive periods not exceeding thirty days; and subsequent infractions could lead to placement for nonconsecutive periods of up to forty-five days.[232] For solitary confinement unrelated to disciplinary infractions, that is, where a person poses an immediate and substantial risk of physical harm, the confinement could not exceed fifteen consecutive days or more than a total of ninety days during a rolling one-year period.[233]

[227] S. 719, 116th Cong. § 2(b)(5)(A)(ii) (2019).
[228] S. 719, 116th Cong. § 2(b)(5)(B)(ii) (2019).
[229] S.B. 1059, Gen Assemb., Jan. Sess., § 3(b)(5) (Conn. 2021).
[230] S.B. 1059, Gen Assemb., Jan. Sess., § 3(b)(1) (Conn. 2021).
[231] S.B. 1059, Gen Assemb., Jan. Sess., § 3(a)(18)(N) (Conn. 2021).
[232] H.B. 714, 155th Gen. Assemb., Reg. Sess., § 42-5-58(d) (Ga. 2019).
[233] H.B. 714, 155th Gen. Assemb., Reg. Sess., § 42-5-58(e) (Ga. 2019).

Hawaii's Senate Bill also proposes different time limits for administrative and disciplinary segregation. Administrative segregation would be limited to a maximum of fourteen days during any thirty-day period, while the maximum period of disciplinary segregation could not exceed sixty days during any 180-day period.[234]

5.2.2 Vulnerable Populations

Numerous bills focus on vulnerable populations, whether proposing substantive reforms to all aspects of solitary confinement or smaller, targeted reforms. Many seek to protect additional categories of vulnerable populations beyond those currently identified in existing legislation.

5.2.2.1 Young People

A number of bills include young people in their definitions of the vulnerable populations that may not be placed in solitary confinement.[235] Arizona's Senate Bill includes people who are twenty-one years or younger within the definition of "vulnerable population."[236] One federal bill refers to people aged twenty-five or younger in its definition of vulnerable people.[237] Other bills prohibit the solitary confinement of young people whether or not they are defined as members of vulnerable populations.[238]

Some bills do not prohibit solitary confinement but would instead restrict its use for vulnerable populations. Georgia's reform bill includes people who are eighteen or younger in its definition of "vulnerable incarcerated person."[239] Under this bill, except during facility-wide lockdowns, vulnerable people may not be placed in restrictive housing unless alternative disciplinary sanctions have been attempted and have failed, and there is a risk of physical harm or a risk to the security of the facility that has not been mitigated. A bill introduced in Hawaii similarly

[234] S.B. 2520, 30th Leg., §§ 2(b)(1) and 2(d)(1) (Haw. 2020).
[235] Substantive bills containing provisions relating to the solitary confinement or room restriction of young people, and bills directed only to that issue, have been introduced in Arizona, Florida, Georgia, Hawaii, Illinois, Kentucky, Pennsylvania, South Carolina, Tennessee, and Virginia.
[236] S.B. 1617, 54th Leg., 2nd Reg. Sess., § 31-602(E)(10) (Ariz. 2020).
[237] H.R. 8155, 116th Cong., 2nd Sess., §§ 2(a)(11) and 2(b)(3)(A) (2020).
[238] S.B. 461, 242nd Leg., Reg. Sess., § 2(g)(1)(i) (N.Y. 2019) (banning solitary confinement of any person under twenty-one); H.B. 497 and S.B. 832, 203rd Gen. Assemb., Reg. Sess., § 5103(b) (Pa. 2019) (banning solitary confinement of anyone age twenty-one or younger and requiring referral to a specialized unit or psychiatric facility where necessary); H.B. 3919 and S.B. 471, 123rd Gen. Assemb., 1st Reg. Sess., § 7 (S.C. 2019) (banning solitary confinement of any person under the age of eighteen).
[239] H.B. 714, 155th Gen. Assemb., Reg. Sess., §§ 42-5-58(a)(6)(A) and 42-5-58(h) (Ga. 2019).

states that people aged twenty-one or younger may not be placed in solitary confinement unless all less restrictive forms of punishment have been attempted, and medical and mental health clearance is granted.[240]

A bill passed by the Senate in Virginia limits "isolated confinement" for juveniles. "Isolated confinement" is defined as placement in a cell alone or with someone else, for seventeen or more hours per day.[241] Under this bill, young people could only be placed in isolated confinement for the purpose of receiving medical or mental health treatment for up to twenty-four hours to prevent an imminent threat of physical harm, and for a further twenty-four hours if there is an ongoing and realistic threat of imminent physical harm to another person. The bill retains the possibility of placement in isolated confinement for protective reasons, but it would require that activities, programming, movement, and social interaction be offered. Placements in protective confinement would be reviewed every forty-eight hours and must consider whether a less restrictive setting could be utilized.

Numerous bills propose limits on the length of time that young people can be held in solitary confinement and require that it only be used as a last resort once all less restrictive alternative measures have been exhausted.[242] Some approach room confinement in similar terms, stating that it may only be used as a temporary response to behavior that poses an immediate and substantial danger, or a serious and immediate threat to the orderly operation of the facility.[243]

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[240] S.B. 2520, 30th Leg., § 2(e) (Haw. 2020).
[241] S.B. 1301, Special Sess. I, § 1 (Va. 2021).
[242] H.B. 165 & S.B. 228, 122nd Leg., Reg. Sess., § 2(h) (Fla. 2020) (placing time limits on different forms of solitary confinement for people under the age of eighteen); S.B. 762, 122nd Leg., Reg. Sess., §§ 1(f),(g) and 5 (Fla. 2020) (prohibiting solitary confinement of people who are twenty-one or younger unless all other options to deescalate the situation have been exhausted); H.B. 347, 122nd Leg., Reg. Sess., §§ 1(e), 2(a) and 3(a) (Fla. 2020) (allowing solitary confinement of people under nineteen only where necessary to address an imminent risk of harm once all less-restrictive means have been exhausted); H.B. 4898, 101st Gen. Assemb., 2nd Reg. Sess., §§ 5 and 10 (Ill. 2020) (prohibiting solitary confinement of anyone under twenty-one as a form of discipline, punishment, retaliation, or for any reason other than in response to behavior posing an immediate and serious risk of physical harm and requiring less-restrictive options to be pursued first); H.B. 147, 2020 Reg. Sess., §§ 1(2) and 3(c) (Ky. 2020) (banning solitary confinement of young people except where necessary to prevent imminent and significant physical harm and where less-restrictive alternatives were unsuccessful); H.B. 1185 and S.B. 655, 111th Gen. Assemb., 1st Reg. Sess., § 2(d) (Tenn. 2019) (allowing solitary confinement only once less-restrictive options have been exhausted except where attempting those options poses a threat to the safety of others and imposing time limits on any period in solitary confinement).
[243] S.B. 2119, 30th Leg., § 1(d) (Haw. 2020); S.B. 1018, 123rd Gen. Assemb., 2nd Reg. Sess., § 21(2)(C) (S.C. 2020); H.B. 939, 203rd Gen. Assemb., Reg. Sess., § 6329(a),(b) and (d) (Pa. 2020).

5.2.2.2 Older People

Five bills include older people in their definitions of vulnerable populations that may not be placed in solitary confinement or may only be placed in solitary confinement under limited circumstances.[244] Only New Jersey and New York currently have such a prohibition in existing legislation, and the protection of older people from solitary confinement has received less attention in bills than the protection of young people.

All the bills that propose protections of older people seek to make substantive reforms of solitary confinement; none are standalone bills targeting older people only. One bill proposes protections for people who are fifty-five and older; [245] three apply to people sixty-five or older;[246] and one to people seventy or older.[247] The actual protections vary. Only Arizona's bill prohibits placement in solitary confinement altogether.[248] The federal bill and Pennsylvania's bill both direct that older adults should be placed in other units instead of solitary confinement, at the determination of prison administrators.[249] No definitions are provided as to what these separate units (referred to as "specialized units" in the Pennsylvania bill) must comprise. It is assumed that the conditions in such units do not allow for solitary confinement. Nevertheless, in the absence of regulations, the bills would leave some discretion to prison officials to determine the conditions in these units which could end up resembling conditions akin to solitary confinement. The bills introduced in Georgia and Hawaii both direct that older people must not be placed in solitary confinement until alternative sanctions or less restrictive forms of punishment have been attempted.[250]

5.2.2.3 Pregnant People

The protection of pregnant and postpartum people has attracted greater attention in recent bills than in previously enacted legislation. Fourteen bills either treat pregnant people and those in the

[244] These provisions are contained in bills introduced in Congress, Arizona, Georgia, Hawaii, and Pennsylvania.
[245] S.B. 1617, 54th Leg., 2nd Reg. Sess., § 31-602(E)(10)(b) (Ariz. 2020).
[246] H.R. 8155, 116th Cong., 2nd Sess., § 2(b)(3)(B) (2020); H.B. 714, 155th Gen. Assemb., Reg. Sess., § 42-5-58(a)(6)(B) (Ga. 2019); S.B. 2520, 30th Leg., § 2(j)(2) (Haw. 2020).
[247] H.B. 497 and S.B. 832, 203rd Gen. Assemb., Reg. Sess., § 5103(c) (Pa. 2019).
[248] S.B. 1617, 54th Leg., 2nd Reg. Sess., § 31-602(A)(17) (Ariz. 2020).
[249] H.R. 8155, 116th Cong., 2nd Sess., § 2(a)(11) (2020); H.B. 497 and S.B. 832, 203rd Gen. Assemb., Reg. Sess., § 5103(c) (Pa. 2019).
[250] H.B. 714, 155th Gen. Assemb., Reg. Sess., § 42-5-58(h) (Ga. 2019); S.B. 2520, 30th Leg., § 2(e) (Haw. 2020).

postpartum period as members of vulnerable populations whose placement in solitary confinement should be subject to restrictions, or such requirements are addressed in standalone bills.[251]

Five bills include pregnant people or those in the postpartum period in the definitions of vulnerable populations that are exempt from solitary confinement or subject to restrictions on such placement.[252] Bills introduced in Arizona, Georgia, Hawaii, and Congress include people who had a miscarriage or a termination in the definition of vulnerable people that are subject to protection. The Arizona and Pennsylvania bills would prohibit the placement of pregnant and postpartum people in solitary confinement without any exceptions. The others all allow for placement in solitary confinement under the same limited circumstances applicable to other vulnerable populations, as discussed above in relation to older people.

Seven other bills propose restrictions on the placement of pregnant and postpartum people in solitary confinement, but do not treat pregnant people as members of vulnerable populations.[253] None of these bills include provision for people who have had a miscarriage or termination. Most of the restrictions mirror those proposed for other vulnerable people. They only allow placement in extraordinary circumstances, or where the person poses a substantial and immediate threat of harm and all less restrictive options to de-escalate the situation have been exhausted. Two bills, one introduced in Congress and the other in Florida, direct that pregnant and postpartum people may only be held in solitary confinement for a maximum of five days, after which time they must be released to the general prison population or to protective custody.[254]

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[251] These bills have been introduced in Congress, Arizona, Florida, Georgia, Hawaii, Illinois, Ohio, Pennsylvania, Tennessee, and Wisconsin. Three bills containing provisions relating to pregnant people in solitary confinement have been introduced in Pennsylvania, and two such bills have been introduced in Congress and in Tennessee.
[252] S.B. 1617, 54th Leg., 2nd Reg. Sess., §§ 31-602(A)(17) and (E)(10) (Ariz. 2020); H.R. 8155, 116th Cong., 2nd Sess., §§ 2(a)(11) and (b)(3)(F) (2020); H.B. 714, 155th Gen. Assemb., Reg. Sess., § 42-5-58(a)(6)(C) and (h) (Ga. 2019); S.B. 2520, 30th Leg., §§ 2(e) and (j) (Haw. 2020); H.B. 497 and S.B. 832, 203rd Gen. Assemb., Reg. Sess., §§ 5101 and 5103(a) (Pa. 2019).
[253] H.B. 2255, 54th Leg., 2nd Reg. Sess., §31-601(G) (Ariz. 2020); S. 719, 116th Cong., 1st Sess., § 2(b)(4)(A) (2019); S.B. 762, 122nd Leg., Reg. Sess., § 944.175(6)(4)(A) (Fla. 2020); S.B. 3418, 101st Gen. Assemb., 2nd Reg. Sess., § 3-6-7.4 (Ill. 2020); S.B. 18, 133rd Gen. Assemb., § 2901.10(B) and (C) (Ohio 2019); H.B. 2875, 204th Gen. Assemb., § 5905.1 (Pa. 2020); A.B. 398, 104th Leg., Reg. Sess., § 1(2)(c) (Wis. 2019).
[254] S. 719, 116th Cong., 1st Sess., § 2(b)(4)(A) (2019); S.B. 762, 122nd Leg., Reg. Sess., § 944.175(6)(4)(A) (Fla. 2020).

Tennessee's bill is the only one to propose a total ban on solitary confinement for pregnant people and those in the postpartum period. It would prohibit such placements regardless of whether they are for punishment or safekeeping.[255]

Four bills would also require training for prison officials, either on the rules regarding solitary confinement for pregnant and postpartum people, or on the impact of solitary confinement on these people.[256]

5.2.2.4 LGBTI People

Seven bills include protections for people who are, or are perceived to be, lesbian, gay, bisexual, transgender, or intersex.[257] In bills introduced in Arizona, Congress, Hawaii, and Pennsylvania, protections would apply to people who are "perceived to be" LGTBI, while Georgia's bill applies to people who are, or are perceived by the facility to be, LGBTI.

Florida's bill states that people may not be placed in solitary confinement solely because of their identification or status as a member of a vulnerable population. The definition of vulnerable population includes people who are LGBTI or gender non-conforming. A second federal bill also includes gender non-conforming and LGBTI people in the definition of vulnerable people. It states that these people may not be placed in solitary confinement only by reason of their being LGBTI.[258]

5.2.2.5 People with Mental Illnesses and Developmental Disabilities

Ten bills incorporate protections for people with mental illnesses and developmental disabilities. They either limit the circumstances in which people can be placed and held in solitary confinement or prohibit placement altogether.[259] Five offer protection by including such people

[255] S.B. 1150, 111th Gen. Assemb., 1st Reg. Sess., § 4(c) (Tenn. 2019).
[256] H.B. 2255, 54th Leg., 2nd Reg. Sess., §31-601(L) (Ariz. 2020); S.B. 3418, 101st Gen. Assemb., 2nd Reg. Sess., § 3-6-7.1(b)(B) (Ill. 2020); H.B. 2875, 204th Gen. Assemb., § 5909(3) (Pa. 2020); A.B. 398, 104th Leg., Reg. Sess., § 1(2)(e) (Wis. 2019).
[257] S.B. 1617, 54th Leg., 2nd Reg. Sess., §§ 31-602(A)(17) and (E)(10)(h) (Ariz. 2020); H.R. 8155, 116th Cong., 2nd Sess., §§ 2(a)(11) and (b)(3)(H) (2020); S. 719, 116th Cong., 1st Sess., § 2(b)(4)(B) (2019); S.B. 762, 122nd Leg., Reg. Sess., § 944.175(4) (Fla. 2020); H.B. 714, 155th Gen. Assemb., Reg. Sess., § 42-5-58(a)(6)(D) and (h) (Ga. 2019); S.B. 2520, 30th Leg., §§ 2(e) and (j)(8) (Haw. 2020); H.B. 497 and S.B. 832, 203rd Gen. Assemb., Reg. Sess., §§ 5101(5) and 5103(a) (Pa. 2019).
[258] S. 719, 116th Cong., 1st Sess., § 2(b)(4)(B) (2019).
[259] Such bills have been introduced in Congress, Arizona, Florida, Georgia, Hawaii, Maryland, New York, and Wisconsin. Two bills have been introduced in Congress and in New York.

within the definition of vulnerable populations.[260] Five others expressly refer to people with mental illnesses or developmental disabilities and propose limits on solitary confinement.[261] Arizona's bill would prohibit solitary confinement without exception for people with mental illnesses or developmental disabilities. A federal bill would require that people be placed in alternative units instead of solitary confinement.[262] The remaining bills impose limits on the circumstances in which people can be placed in solitary confinement or require mental health assessments prior to placement.

In addition to the bills that propose some form of protection for people with mental illness, two others call for studies or evaluations on the use of solitary confinement for this population. These bills have been introduced in Nevada and North Carolina.[263] Nevada's bill would require an evaluation of the conditions and use of disciplinary segregation for vulnerable populations, including people with mental illness. The evaluation would include "analysis of efforts to eliminate the use of solitary confinement for people with severe mental illness." North Carolina's bill proposes that the Department of Public Safety "study the issue of confinement of persons with mental illness." The study would examine, among other issues, the types of confinement used for people diagnosed with mental illness and their average length of stay in restrictive housing.

[260] S.B. 1617, 54th Leg., 2nd Reg. Sess., §§ 31-602(A)(17) and (E)(10) and (11) (Ariz. 2020) (defining "member of a vulnerable population" to include people with a serious mental disability or a disability based on a mental illness, with a history of psychiatric hospitalization, or who have recently exhibited conduct, including serious self-mutilation, that indicates the need for further observation or evaluation to determine the presence of mental illness); H.R. 8155, 116th Cong., 2nd Sess., §§ 2(a)(11) and (b)(3)(C) (2020) (defining "vulnerable person" to include any person who has a disability based on a mental illness, history of psychiatric hospitalization, or has recently exhibited conduct, including serious self-mutilation, indicating the need for further observation or evaluation to determine the presence of mental illness); S. 719, 116th Cong., 1st Sess., § 2(b)(4)(A) (2019); H.B. 714, 155th Gen. Assemb., Reg. Sess., § 42-5-58(a)(6)(E) (Ga. 2019) (definition of "vulnerable incarcerated person" includes people with a diagnosed mental illness, intellectual, developmental, or physical disability, or traumatic brain injury); S.B. 2520, 30th Leg., §§ 2 (j) (Haw. 2020) (definition of vulnerable population includes people with a mental or physical disability, history of psychiatric hospitalization, or who have recently exhibited conduct, including but not limited to serious self-mutilation, that indicates the need for further observation or evaluation to determine the presence of mental illness).

[261] S.B. 762, 122nd Leg., Reg. Sess., § 944.175(6) (Fla. 2020); H.B. 742, 441st Gen. Assemb., § 9-614.2(c) (Md. 2020); S.B. 5976, 242nd Leg., Reg. Sess., § 1(a) (N.Y. 2019); S.B. 461, 242nd Leg. Sess., § 2(g) (N.Y. 2019); A.B. 825, 104th Leg., Reg. Sess., § 3 (Wis. 2020).

[262] H.R. 8155, 116th Cong., 2nd Sess., § 2(a)(11) (2020).

[263] S.B. 187, 81st Leg., Reg. Sess. § 11(7) (Nev. 2021); H.B. 781, Reg. Sess., § 1 (N.C. 2019).

5.2.2.6 People with Physical Disabilities

Six bills incorporate protections for people with physical disabilities.[264] Most include people with physical disabilities within the definition of vulnerable populations. The bills vary in their definitions of "physical disability." Two refer simply to "physical disability" without any explanation of the conditions covered.[265] Two describe "serious medical condition[s] that cannot effectively be treated in isolated confinement" and "significant auditory or visual impairment[s]."[266] Two refer to physical disabilities that "a licensed medical health professional determines is likely to be exacerbated" by solitary confinement.[267]

In contrast to the six bills that expressly incorporate protections for people with disabilities, a bill introduced in Nevada does not propose any protections, but merely directs an examination of the conditions and use of disciplinary segregation for this group.[268]

5.2.3 Conditions in Solitary Confinement

Nine bills address conditions in solitary confinement.[269] The most limited provisions require only that cells be adequately ventilated, lit, temperature-controlled, clean, and equipped with properly functioning sanitary fixtures;[270] or that people in solitary confinement may not be denied food, water, medical care, or any other basic necessity.[271] Four bills require prisons to maximize out-of-cell time by offering recreation and educational programs, therapy, activities, and opportunities for social interaction with staff and other incarcerated people.[272] A federal bill

[264] These bills have been introduced in Congress, Arizona, Florida, Georgia, and Hawaii. Two such bills were introduced in Congress.
[265] H.B. 714, 155th Gen. Assemb., Reg. Sess., § 42-5-58(a)(6)(E) (Ga. 2019); S.B. 2520, 30th Leg., § 2 (j) (Haw. 2020).
[266] S.B. 1617, 54th Leg., 2nd Reg. Sess., §§ 31-602(A)(17) (Ariz. 2020); H.R. 8155, 116th Cong., 2nd Sess., § 2(a)(11) (2020).
[267] S. 719, 116th Cong., 1st Sess., § 2(b)(4)(A) (2019); S.B. 762, 122nd Leg., Reg. Sess., § 944.175(6) (Fla. 2020).
[268] S.B. 187, 81st Leg., Reg. Sess., § 11(7) (Nev. 2021).
[269] S.B. 1617, 54th Leg., 2nd Reg. Sess., § 31-602(A)(11)-(14) (Ariz. 2020); H.B. 2691, 54th Leg., 2nd Reg. Sess. (Ariz. 2020); S.B. 1059, Gen Assemb., Jan. Sess., § 3(b) (Conn. 2021); H.R. 8155, 116th Cong., 2nd Sess., § 2(a)(9) (2020); S. 719, 116th Cong., 2nd Sess., § 2(b)(1)(A)-(D) (2019); H.B. 714, 155th Gen. Assemb., Reg. Sess., § 42-5-58(i)(1) (Ga. 2019); S.B. 2520, 30th Leg., § 2(c) (Haw. 2020); S.B. 187, 81st Leg., Reg. Sess., § 11(9) and (11) (Nev. 2021); H.B. 497 and S.B. 832, 203rd Gen. Assemb., Reg. Sess., § 5102(g) (Pa. 2019).
[270] H.B. 2691, 54th Leg., 2nd Reg. Sess. (Ariz. 2020).
[271] H.R. 8155, 116th Cong., 2nd Sess., § 2(a)(9) (2020).
[272] S.B. 1617, 54th Leg., 2nd Reg. Sess., § 31-602(A)(12) (Ariz. 2020); S. 719, 116th Cong., 2nd Sess., § 2(b)(1)(A) and (C) (2019); S.B. 187, 81st Leg., Reg. Sess., § 11(9) and (11) (Nev. 2021); H.B. 497 and S.B. 832, 203rd Gen. Assemb., Reg. Sess., § 5102(g) (Pa. 2019).

specifies that the out-of-cell time must be at least four hours per day; a bill introduced in Nevada would require at least two hours of out-of-cell recreation; while bills introduced in Pennsylvania and Arizona are silent on the amount of out-of-cell time that must be provided. Nevada's bill also requires that people in solitary confinement be allowed weekly contact visits, subject to individualized safety concerns.

Connecticut's bill would require out-of-cell time of at least eight hours per day, subject to an exception where people are held in isolated confinement due to a serious incident, threat of imminent physical harm, or a request for protective segregation.[273] The bill also directs that people in isolated confinement must be continuously monitored to ensure their safety and wellbeing, and they must have sufficient and regular access to toilets, water, food, light, air, and heat.[274]

A bill introduced in Georgia requires that people in solitary confinement receive the same access as people in the general prison population to telephones, visits, mail, reading materials, food and water, showers, clothing and bedding, feminine hygiene products, and medical care.[275] Hawaii's bill, which sets out minimum standards for administrative segregation only, requires that people receive in-cell programs, face-to-face interaction with staff, a television or radio (or both), reading materials, outdoor exercise (although no minimum time is specified), and basic furnishing in their cells.[276]

5.2.4 Release to the Community

Seven bills address the issue of direct release from solitary confinement to the community.[277] Three provide that people may not be directly released unless it is necessary for the safety of the person, staff, other incarcerated people, or the public.[278] Although not expressly stated in any of these bills, it appears that the intent of these provisions is that people be moved out of solitary confinement in the six-month period prior to their release. A fourth bill simply states that, unless

[273] S.B. 1059, Gen Assemb., Jan. Sess., § 3(b)(1) (Conn. 2021).
[274] S.B. 1059, Gen Assemb., Jan. Sess., § 3(b)(3) (Conn. 2021).
[275] H.B. 714, 155th Gen. Assemb., Reg. Sess., § 42-5-58(i)(1) (Ga. 2019).
[276] S.B. 2520, 30th Leg., § 2(c) (Haw. 2020).
[277] Bills containing provisions regarding direct release to the community have been introduced in Arizona, Congress, Georgia, Maryland, Nevada, and Pennsylvania. Two bills have been introduced in Congress.
[278] S.B. 1617, 54th Leg., 2nd Reg. Sess., § 31-602(A)(15) (Ariz. 2020); H.R. 8155, 116th Cong., 2nd Sess., § 2(a)(10) (2020); H.B. 497 and S.B. 832, 203rd Gen. Assemb., Reg. Sess., § 5102(g)(5) (Pa. 2019).

necessary for safety reasons, an incarcerated person may not be released directly to the community.[279] However, it does not specify any particular time period prior to release when people should be moved out of solitary confinement.

Two bills require transitional processes for people in solitary confinement who have an anticipated release day of 180 days or less. A federal bill provides that people should not be held in solitary confinement in the final 180 days unless it is limited to a maximum of five days, or the person poses a "substantial and immediate threat."[280] Anyone held in solitary confinement during this period must be provided with "re-socialization programming in a group setting," mental health counseling, and re-entry services. The second bill, introduced in Maryland, does not impose any restriction on placing or keeping people in solitary confinement during the final 180 days of their sentence, but it imposes similar obligations with respect to services to assist with the transitional process.[281] These measures include group programs, mental health counseling, assistance in finding and obtaining state and federal benefits, and re-entry planning, continuum of care, and referral services.

Nevada's bill would require that people be placed in the general population for at least thirty days prior to their release, and that they receive priority for step down programs. People in solitary confinement must receive the same types of re-entry preparation as people in the general prison population, and these programs must begin at least one year before their scheduled release date.[282]

5.2.5 Reporting and Oversight

Eleven bills introduce reporting requirements about the use of solitary confinement.[283] The majority require periodic, public reporting of data disaggregated by age, sex, ethnicity, and mental illness (without revealing any personal identifying information). Most reports must be

[279] H.B. 714, 155th Gen. Assemb., Reg. Sess., § 42-5-58(j) (Ga. 2019).
[280] S. 719, 116th Cong., 2nd Sess., § 2(b)(2)(A) (2019).
[281] H.B. 740, 441st Gen. Assemb., § 9-614.2(c) and (d) (Md. 2020).
[282] S.B. 187, 81st Leg., Reg. Sess., § 11(5) (Nev. 2021).
[283] S.B. 1617, 54th Leg., 2nd Reg. Sess., § 31-602(D)(6) (Ariz. 2020); H.B. 1530, 92nd Gen. Assemb., § 2(b) (Ark. 2019); S.B. 1059, Gen Assemb., Jan. Sess., § 3(g) (Conn. 2021); S.B. 762, 122nd Leg., Reg. Sess., § 944.175(7) (Fla. 2020); H.B. 557, 122nd Leg., Reg. Sess., § 958.16 (Fla. 2020); S.C.R. 161, 30th Leg., Reg. Sess. (Haw. 2020); H.B. 147, Reg. Sess., § 1(4) and (5) (Ky. 2020); S.B. 187, 81st Leg., Reg. Sess., § 11(13) (Nev. 2021); H.B. 497, 203rd Gen. Assemb., Reg. Sess., § 5114 (Pa. 2019); H.B. 284, Reg. Sess., § 5 (Vt. 2019).

published on departmental websites and submitted to legislatures. Two bills only require collection of data about young people.[284] A bill introduced in Nevada would require that reports include data from both state and private facilities.[285]

Eight bills propose new oversight functions, seven of which are not specific to solitary confinement but include the power to investigate its use. Many of the oversight roles take the form of corrections ombuds offices or correctional oversight committees.[286] The scope of authority granted to these positions varies. In Arizona's bill, the new office would be empowered to monitor conditions and issue periodic reports and recommendations.[287] Mississippi's bill includes similar provisions, but it would also allow the ombudsman to initiate investigations itself or in response to complaints, conduct scheduled and unannounced inspections of facilities, interview incarcerated people and staff, conduct public hearings, and subpoena witnesses and documents.[288] A New York bill would grant the ombudsman similar authority, and in addition, require the ombudsman to interview and review all candidates for appointments as superintendents at any state correctional facility.[289] If the ombudsman concluded that the commissioner had appointed a candidate who was not qualified, the ombudsman would be required to notify the candidate and make a public statement to that effect.[290]

Connecticut's bill would establish a "Correction Accountability Commission" and require the Correction Ombuds, among other things, to conduct a study on conditions in correctional facilities and halfway houses and report the findings to the General Assembly.[291]

Pennsylvania's bill is the only one to propose oversight specific to solitary confinement. It would require the appointment of an independent investigator within the Department of

[284] H.B. 557, 122nd Leg., Reg. Sess., § 958.16 (Fla. 2020) (requiring submission of reports internally, to the Department of Law Enforcement only); H.B. 147, Reg. Sess., § 1(4) and (5) (Ky. 2020) (requiring annual submission of reports to the legislature).
[285] S.B. 187, 81st Leg., Reg. Sess., § 11(13) (Nev. 2021).
[286] H.B. 2894, 54th Leg., 2nd Reg. Sess. (Ariz. 2020); H.B. 2754, 54th Leg., 2nd Reg. Sess. (Ariz. 2020); S. 719, 116th Cong., 1st Sess., § 2(e) (2019); S.B. 1059, Gen Assemb., Jan. Sess., §§ 1 and 2 (Conn. 2021); S.B. 2756, 135th Leg., Reg. Sess., § 47-5-36(1) (Miss. 2020); S.B. 777, 242nd Leg. Sess., § 1 (N.Y. 2019).
[287] H.B. 2894, 54th Leg., 2nd Reg. Sess., §§ 41-2102 and 41-2108 (Ariz. 2020).
[288] S.B. 2756, 135th Leg., Reg. Sess., § 47-5-36(1) (Miss. 2020).
[289] S.B. 777, 242nd Leg. Sess., § 1(14)(a) (N.Y. 2019).
[290] S.B. 777, 242nd Leg. Sess., § 1(14)(b) (N.Y. 2019).
[291] S.B. 1059, Gen Assemb., Jan. Sess., §§ 1 and 2(n) (Conn. 2021).

Corrections to monitor prisons' compliance with rules restricting the use of solitary confinement.[292] The investigator would be required to conduct interviews with people in solitary confinement, review documents regarding solitary confinement placements, and report any abuse of the rules to the Department. The bill also would also require the Department to conduct misconduct hearings to investigate the misuse of solitary confinement.[293] The hearing review board would consist of a psychologist or psychiatrist, a mental health professional with a counseling background, and a licensed social worker. If the board found that solitary confinement had been misused, the prison would be required to return the affected person to the general prison population.

Two federal bills would establish commissions or work groups to develop new standards for solitary confinement.[294] A third bill requires the FBOP to submit a report to the legislature with recommendations to reduce solitary confinement in federal prisons "to near zero over the 10-year period beginning on the date of the submission of the report."[295]

One of the federal bills would also establish a Civil Rights Ombudsman within the FBOP.[296] The ombudsman would be appointed by the Attorney-General and report to the Director of the FBOP. Their functions would include reviewing and investigating complaints of civil rights violations, referring violations to the Department of Justice, and identifying areas for improvement to policies and practices to reduce solitary confinement. The ombudsman would submit an annual report to Congress. Reports made to the ombudsman would not constitute an administrative remedy for the purposes of the PLRA.[297]

The same bill would also establish a National Resource Center on Solitary Confinement Reduction and Reform.[298] This center would coordinate with state, local, and federal correctional systems to reduce solitary confinement; facilitate the exchange of information between different facilities, national experts, and researchers; evaluate jurisdictions that have reduced solitary confinement and identify best practices; research the effectiveness of

[292] H.B. 497 and S.B. 832, 203rd Gen. Assemb., Reg. Sess., § 5110 (Pa. 2019).
[293] H.B. 497 and S.B. 832, 203rd Gen. Assemb., Reg. Sess., § 5111 (Pa. 2019).
[294] S. 719, 116th Cong., 1st Sess., § 6 (2019); H.R. 4488, 116th Cong., 1st Sess., §§ 2-4 (2019).
[295] H.R. 8155, 116th Cong., 2nd Sess., § 3 (2020).
[296] S. 719, 116th Cong., 1st Sess., § 2(e) (2019).
[297] S. 719, 116th Cong., 1st Sess., § 2(e)(10) (2019).
[298] S. 719, 116th Cong., 1st Sess., § 6 (2019).

alternatives to solitary confinement; develop self-assessment tools for jurisdictions to examine their use of solitary confinement; and conduct public webinars to inform facilities of new and promising practices.[299] The center would be administered by the Bureau of Justice Assistance and would report annually to the House and Senate Judiciary Committees.

A Congressional House Bill proposes a new National Solitary Confinement Study and Reform Commission to conduct a "comprehensive legal and factual study of the penological, physical, mental, social, fiscal, and economic impacts of solitary confinement" on federal, state, and local governments, and communities and social institutions generally.[300] The commission would report on its findings within two years, and recommend national standards to reduce solitary confinement.[301] Within two years of receiving the report, the Attorney-General would then publish a final rule adopting national standards to reduce solitary confinement.[302] The standards would be based on the independent judgment of the Attorney-General, taking into account the recommendations of the commission as well as "such data, opinions, and proposals that the Attorney-General determines appropriate to consider."[303] However, the bill contains a limitation which provides that the Attorney-General shall not establish standards "that would impose substantial additional costs compared to the costs presently expended by federal and state correctional systems."[304] The bill would link states' compliance with the new standards to the receipt of federal funding. It proposes that the Attorney-General would reduce by five percent the amount that a state or local government receives under the Omnibus Crime and Safe Streets Act from the second year of the standards' operation for any state or local government that is not in compliance.[305]

5.2.6 Employees

Four bills address the training of employees working in solitary confinement.[306] Hawaii's bill would merely require that staff undergo "appropriate training … to develop the skills necessary

[299] S. 719, 116th Cong., 1st Sess., § 6(b) (2019).
[300] H.R. 4488, 116th Cong., 1st Sess., § 3(d)(1) (2019).
[301] H.R. 4488, 116th Cong., 1st Sess., § 3(3) (2019).
[302] H.R. 4488, 116th Cong., 1st Sess., § 4(a)(1) (2019).
[303] H.R. 4488, 116th Cong., 1st Sess., § 4(a)(2) (2019).
[304] H.R. 4488, 116th Cong., 1st Sess., § 4(a)(3) (2019).
[305] H.R. 4488, 116th Cong., 1st Sess., § 4(c) (2019).
[306] Bills containing provisions relating to training have been introduced in Congress, Hawaii, Nevada, and Pennsylvania.

to protect the mental and physical health" of people in solitary confinement.[307] A bill introduced in Pennsylvania would require training on when solitary confinement may be imposed, the maximum time a person may be held in solitary confinement, less restrictive interventions, and the identification of developmental disabilities, symptoms of mental illness and trauma disorders, and methods of safely responding to people in distress.[308]

A federal bill would require that employees be trained to recognize symptoms of mental illness, risks and side effects of psychiatric medications, de-escalation techniques for managing people with mental illness, consequences of untreated mental illness, the long- and short-term psychological effects of solitary confinement, and de-escalation and communication techniques to divert people from situations that might result in their being placed in solitary confinement.[309] A bill introduced in Nevada proposes regulations that would require employees working in solitary confinement to complete training on effective communication, crisis intervention, and de-escalation.[310]

Though not specific to solitary confinement, the training provisions in Connecticut's bill would be relevant to people held in isolation. It proposes that, in addition to existing training on symptoms and consequences of mental illness and placement in administrative segregation, employees would also receive training on the recognition of and techniques for mitigating trauma and vicarious trauma.[311] Existing programs and support for employees would also be extended to include the development and use of strategies to prevent and treat the effects of trauma on employees.[312]

5.2.7 Due Process Protections

Six bills propose due process protections that are broader than those articulated by the federal courts.[313] In all six, the protections apply when a person faces placement in solitary confinement

[307] S.B. 2520, 30th Leg., § 2(h) (Haw. 2020).
[308] H.B. 497 and S.B. 832, 203rd Gen. Assemb., Reg. Sess., § 5113(5) (Pa. 2019).
[309] S. 719, 116th Cong., 1st Sess., § 2(d) (2019).
[310] S.B. 187, 81st Leg., Reg. Sess., § 11(10) (Nev. 2021).
[311] S.B. 1059, Gen Assemb., Jan. Sess., § 3(k) (Conn. 2021).
[312] S.B. 1059, Gen Assemb., Jan. Sess., § 3(*l*) (Conn. 2021).
[313] These bills have been introduced in Congress, Arizona, Georgia, and Pennsylvania. Two bills containing due process provisions were presented in Congress and in Arizona.

or the continuation of such placement, thereby avoiding the need to consider the atypical and significant hardship test.[314]

Four bills would provide the right to representation at disciplinary or classification hearings.[315] A federal bill proposes that the right to representation be pursuant to the Defender Services Program administered by the Department of Justice; while Pennsylvania's bill provides that people would be represented by legal counsel.

Other protections proposed in the bills include rights of appeal;[316] periodic and ongoing review processes;[317] private, face-to-face interviews with multidisciplinary staff committees; and the imposition of a clear and convincing evidentiary standard instead of the some evidence standard.[318] None of the bills propose to allow confrontation or cross-examination of witnesses.

5.3 Settlements and Consent Decrees

Solitary confinement reform has also been pursued through litigation. This section explores a sample of settlement agreements and consent decrees reached in different cases. The cases discussed in this section have been selected for the range of issues they address; geographic diversity; and due to their relative recency in terms of settlement, subsequent proceedings, and developments.

5.3.1 Mississippi

5.3.1.1 Presley v. Epps

In 2005, a class action was filed in the District Court for the Northern District of Mississippi on behalf of people confined in a solitary confinement unit, Unit 32, at the Mississippi State

[314] *See supra* section 3.2.2.
[315] H.B. 2691, 54th Leg., 2nd Reg. Sess., § 1(H) (Ariz. 2020); S.B. 1617, 54th Leg., 2nd Reg. Sess., § 31-602(A)(5) (Ariz. 2020); H.R. 8155, 116th Cong., 2nd Sess., § 2(a)(4) (2020); H.B. 497, 203rd Gen. Assemb., Reg. Sess., § 5102(b) (Pa. 2019).
[316] S. 719, 116th Cong., 1st Sess., § 2(b)(8) (2020).
[317] S.B. 1617, 54th Leg., 2nd Reg. Sess., § 31-602(A)(5) (Ariz. 2020); H.R. 8155, 116th Cong., 2nd Sess., § 2(a)(4) (2020); S. 719, 116th Cong., 1st Sess., § 2(b)(8) (2020); H.B. 497, 203rd Gen. Assemb., Reg. Sess., § 5102(b) (Pa. 2019).
[318] H.B. 714, 154th Gen. Assemb., Reg. Sess., § 42-5-58(e) (Ga. 2019).

Penitentiary at Parchman.[319] Unit 32 held nearly 1,000 people in five buildings. Describing the conditions in Unit 32 as "barbaric," the complaint alleged a range of Eighth Amendment violations, including that people were subject to profound isolation and confined to their cells for twenty-three or twenty-four hours per day, except for five-minute showers three times per week.[320] Their "sporadic" exercise took place in cages only slightly larger than the cells, and people remained fully shackled in handcuffs, leg-irons, and waist-chains during their exercise period. Most people in Unit 32 had no access to programs, jobs, religious services, social interaction, or pastimes. At best, they were allowed to exchange two books from the library every three to four months.[321] The complaint also alleged that the physical conditions in Unit 32 were unsanitary, insect infestations were pervasive, excessive force was deployed routinely, security staffing was "dangerously inadequate," and medical, mental health, and dental care was lacking.[322]

The complaint in *Presley v. Epps* resulted in a relatively prompt consent decree, which was approved by the court in April 2006.[323] Most of the terms in the decree related to physical conditions, with the state agreeing to improve hygiene standards, provide adequate lighting, implement a mosquito and pest control program, and ensure proper cleaning and sanitizing of food trays and that food be served at appropriate and safe temperatures.[324] The only provision in the consent decree specific to solitary confinement stipulated that the state would allow people out-of-cell exercise "consistent with ACA Standards for Adult Correctional Institutions [and] … have new exercise pens completed no later than July 1, 2006."[325] The consent decree also required the state to formulate a plan to enable people to "earn their way to less restrictive housing" through good behavior and a step down program.[326]

[319] Complaint, Presley et al. v. Epps et al., No. 4:05 Civ. 148 (N.D. Miss. June 22, 2005) [hereinafter *Presley v. Epps Complaint*].
[320] *Id.* at 2.
[321] *Id.*
[322] *Id.* at 3.
[323] Order Approving Consent Decree, Presley et al. v. Epps et al., No. 4:05 Civ. 148 (N.D. Miss. Apr. 28, 2006).
[324] Consent Decree at 1-3, Presley et al. v. Epps et al., No. 4:05 Civ. 148 (N.D. Miss. Feb. 15, 2006).
[325] *Id.* at 3-4.
[326] *Id.* at 4.

Pursuant to the decree, the plaintiffs' counsel and experts had access to Unit 32, the prison hospital, records, incarcerated people, and staff in order to monitor compliance.[327] In the course of ongoing monitoring, various deficiencies were identified, leading to supplemental consent decrees relating to the provision of medical and mental health care, use of force, and the classification of people in administrative segregation.[328] A supplemental consent decree regarding classification provided that people with severe mental illness could not be held in administrative segregation for more than fourteen days.[329]

It was also agreed that people who were not "high-level gang members" would no longer be held in long-term administrative segregation (defined as sixty days or more) solely because of their gang affiliation. Furthermore, people in administrative segregation who did not commit any serious rule violations and who completed rehabilitative programs would be released from administrative segregation and transferred to the general prison population within two years. This provision would not apply to anyone who murdered another person while incarcerated, planned or participated in a major riot, escaped from custody and caused serious physical injury to another person, or posed a significant risk of physical injury to others if they were to be moved to the general population.[330] The state agreed to provide program space and staffing to facilitate the use of dayrooms and a dining hall, and provide education, rehabilitative services, and recreational activities (congregate and individual) for "eligible Unit 32 inmates" within seven months of the date of the decree.[331]

In accordance with the consent decree, a step down unit would transition people with mental illnesses out of administrative segregation.[332] The step down unit consisted of thirty-two cells, and people would progress through two phases of intensive mental health treatment. Preference

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[327] *Id.* at 5.
[328] Supplemental Consent Decree on Medical Care, Presley et al. v. Epps et al., No. 4:05 Civ. 148 (N.D. Miss. Apr. 28, 2006); Supplemental Consent Decree on Mental Health Care, Use of Force and Classification, Presley et al. v. Epps et al., No. 4:05 Civ. 148 (N.D. Miss. November 13, 2007) [hereinafter *Presley v. Epps Supplemental Consent Decree on Mental Health Care, Use of Force and Classification*].
[329] Presley v. Epps Supplemental Consent Decree on Mental Health Care, Use of Force and Classification, *supra* note 328, at 7.
[330] *Id.* at 8-9.
[331] *Id.* at 11.
[332] Terry Kupers et al., *Beyond Supermax Administrative Segregation: Mississippi's Experience Rethinking Prison Classification and Creating Alternative Mental Health Programs*, 36 CRIM. JUST. & BEHAVIOR 1037, 1042 (2009).

for admission into the program was given to "motivated prisoners."[333] During the first phase, people were still housed in segregation, while in the second, they were moved to a more open environment.[334] In the first phase, people participated in group therapy in ankle restraints that were secured to bolts in the floor. Once they progressed to the second phase, treatment and congregate activities took place without cuffs or restraints.[335]

By February 2009, the number of people in solitary confinement in Unit 32 had decreased from over 900 to below 100 (with approximately eighty additional people in administrative segregation remaining in the unit on death row). As of March 2009, the statewide number of people in administrative segregation (excluding those on death row) was 181.[336]

In August 2010, the court issued an order dismissing the case without prejudice by agreement of the parties.[337] This agreement was reached after the state agreed to close Unit 32, relocate the population remaining in Unit 32 to other facilities, and correct deficiencies in the provision of medical and mental health care.[338] The state agreed that people with serious mental illnesses who had been held in Unit 32 would be transferred to the East Mississippi Correctional Facility ("EMCF").[339]

In June 2012, the Commissioner of Mississippi's Department of Corrections, Christopher Epps, testified before the US Senate Subcommittee on the Constitution, Civil Rights, and Human Rights in a hearing entitled "Reassessing Solitary Confinement: The Human Rights, Fiscal, and Public Safety Consequences."[340] At that hearing, Commissioner Epps discussed the closure of Unit 32. In his written statement, he explained that the Department of Corrections had

[333] *Id.*
[334] *Id.*
[335] *Id.* at 1042-1043.
[336] *Id.* at 1045.
[337] Order of Dismissal Without Prejudice by Agreement of the Parties, Presley et al. v. Epps et al., No. 4:05 Civ. 148 (N.D. Miss. August 2, 2010).
[338] *Id.* at 1.
[339] *Id.*
[340] *Reassessing Solitary Confinement: The Human Rights, Fiscal, and Public Safety Consequences: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Human Rights of the S. Comm. on the Judiciary*, 112th Cong. 18 (2012) (statement of Christopher Epps, Mississippi Department of Corrections).

"developed specific administrative housing units for the mentally ill [from Unit 32] with specially trained correctional officers."[341]

5.3.1.2 Dockery v. Hall

In 2019, the District Court for the Southern District of Mississippi ruled on a challenge to conditions of confinement in a separate case alleging cruel and unusual conditions at EMCF.[342] The complaint was filed in 2013 and alleged various Eight Amendment violations, including the misuse of solitary confinement. The plaintiffs contended that they were being denied their one hour of out-of-cell time per day to shower and exercise, sometimes for weeks on end. They also asserted that EMCF's solitary confinement units held "dozens of seriously mentally ill prisoners who are locked down in filthy cells for days, weeks, or even years at a time."[343] Some people in solitary confinement had not been permitted to shower for weeks and were only allowed to do so on the day before a visit from plaintiffs' counsel.[344] It was also alleged that the physical conditions in the solitary confinement units were inadequate due to non-functioning plumbing, vermin infestation, lights that did not operate, and deafening noise levels.[345] Some people had been held in these conditions for years.

A bench trial was held in 2018 and the district court issued a judgment in 2019, finding no violations of the Eighth Amendment. The court rejected the submission that the Mandela Rules' fifteen-day standard constituted the maximum period that a person should be held in solitary confinement. The judge stated that the Rules did not create "a benchmark for determining whether any constitutional rights have been violated."[346] The court also rejected the plaintiffs' claims that their placements in solitary confinement were unjustified, that the conditions were inhumane, or that the defendants were deliberately indifferent to these conditions.[347]

The judgment referred to the fact that Christopher Epps, the former Commissioner of Mississippi's Department of Corrections, had since pleaded guilty to federal charges of money

[341] *Id.* at 55.
[342] Dockery v. Hall, 443 F. Supp.3d 726 (S.D. Miss. 2019).
[343] Complaint at 2, Dockery et al. v. Epps et al., No. 3:13 Civ. 326 (S.D. Miss. May 30, 2013).
[344] *Id.* at 9.
[345] *Id.* at 2-4.
[346] 443 F. Supp. 3d at 743.
[347] *Id.*

laundering and fraud in connection with the awarding of certain contracts relating to EMCF. After his conduct came to light, various changes were implemented at the facility. The judgment stated that between the date that the complaint was filed (when Mr. Epps was still Commissioner) and the trial,

> "the manner in which the prison was being operated did not remain stagnant. Instead, multiple changes were made at the prison that impacted staffing, physical and mental health care, and environmental conditions."[348]

The judgment made no reference to any improvement in conditions in the solitary confinement units. It found that "the prison that existed at the time of trial was not the same as the one that had existed when this lawsuit was filed."[349] Indeed, the judge expressed "surprise[] with respect to the cleanliness and condition of the prison in particular after seeing photographs of the facility that were taken prior to the lawsuit's having been filed before trial, and hearing the anecdotal evidence presented by the prisoners who testified at trial."[350]

In February 2020, the US Department of Justice's Civil Rights Division announced it had opened an investigation into conditions of confinement in four Mississippi prisons, including Parchman.[351] The investigation will focus on various issues, one of which is the "appropriate use of isolation at Parchman."

5.3.2 Indiana

5.3.2.1 Mast v. Donahue

In 2005, a class action complaint was filed in federal court in Indiana on behalf of mentally ill people confined within the SHU at the Wabash Valley Correctional Facility.[352] The complaint alleged that the Department of Correction was violating the Eighth Amendment by confining mentally ill people to conditions of extreme social isolation and sensory deprivation. People in

[348] *Id.* at 752.
[349] *Id.*
[350] *Id.*
[351] U.S. DEP'T OF JUST., *Justice Department Announces Investigation into Conditions in Four Mississippi Prisons*, (Feb. 5, 2020) https://www.justice.gov/opa/pr/justice-department-announces-investigation-conditions-four-mississippi-prisons.
[352] Complaint at 12, Mast et al. v. Donahue et al., No. 2:05 Civ. 37 (S. D. Ind. Feb. 3, 2005).

the SHU at Wabash were held in windowless single cells for twenty-four hours per day except for the occasional opportunity to exercise in a solitary, walled-off exercise area.[353] Though people were offered showers daily, they would be locked in the shower and left there for more than an hour at a time. There was no maximum time limit on placement in the SHU, and the mental health treatment was described as "systemically inadequate."[354] Mentally ill people were often placed in four-point restraints and strapped to beds, stripped to their underwear, placed in their cells with nothing but a blanket, and forcibly removed from cells by extraction teams consisting of up to five prison officers wearing body armor.[355] Due to symptoms of mental illness, some people continued to accumulate disciplinary infractions leading to additional time in the SHU. As a result, "the more severe a prisoner's mental illness, the more likely he is to become "stuck" in the SHU, where the harsh conditions will exacerbate his mental illness still further."[356]

Following two years of settlement discussions, the parties reached a private settlement agreement in 2007.[357] They chose to enter a private settlement agreement because the PLRA limits the scope of prospective relief in civil actions relating to prison conditions. Under the PLRA, relief must be "narrowly drawn, extend[] no further than necessary to correct the violation of the Federal right, and [be] the least intrusive means necessary to correct the violation."[358] The PLRA allows parties to enter into private settlement agreements that are not subject to these limitations, but such agreements cannot be enforced unless the proceedings are reinstated, or remedies are pursued in state court under state law.[359]

The parties agreed to the following definition of "seriously mentally ill" for the purposes of the private settlement agreement:

[353] *Id.* at 4-5.
[354] *Id.* at 6-7.
[355] *Id.* at 8-9.
[356] *Id.* at 9.
[357] Private Settlement Agreement between Defendants and Plaintiffs, Mast et al. v. Donahue et al., No. 2:05 Civ. 37 (S. D. Ind. Jan. 23, 2007) [hereinafter *Mast Private Settlement*].
[358] 18 U.S.C. § 3626(a)(1)(A).
[359] 18 U.S.C. § 3626(c).

> "prisoners who have a current diagnosis, or evidence, of any Diagnostic and Statistical Manual IV (DSM-IV) Axis I diagnosis or who are receiving treatment for such a diagnosis, or prisoners who have been diagnosed with a mental disorder that is worsened by confinement in the SHU."[360]

This definition is important because a narrower definition was adopted in subsequent litigation (discussed below).[361]

Under the settlement agreement, the state agreed that seriously mentally ill people would not be held in the Wabash SHU, and that the Department of Correction would provide "a continuum of services" for people requiring psychiatric treatment.[362] The agreement required face-to-face screening of all people placed in the SHU within two business days of their placement, and, if they were determined to be seriously mentally ill, they were to be transferred elsewhere within seventy-two hours. Everyone held in the SHU would receive a weekly mental health evaluation. Because the agreement resulted in the removal of seriously mentally ill people from the SHU, it did not address the conditions for other people who remained there.

The agreement allowed for two years of monitoring by the plaintiffs' counsel. The Department of Correction was required to provide monthly information regarding everyone in the SHU who was prescribed psychotropic medications, the names of everyone in the SHU with an DSM Axis I diagnosis, the names of people who had been admitted to the SHU after being in the state's psychiatric facility, and details about anyone removed from the SHU upon being found to be seriously mentally ill.[363]

The court approved the private settlement in November 2007 and ordered a stay of proceedings for two years.[364] In 2009, the case was dismissed without prejudice, subject to reinstatement by the parties pursuant to the terms of the settlement agreement.[365]

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[360] Mast Private Settlement, *supra* note 357, at 10.
[361] *See infra* section 5.3.2.2.
[362] Mast Private Settlement, *supra* note 357, at 10.
[363] *Id.* at 6-7.
[364] Order Finding Private Settlement Agreement to be Fair, Reasonable and Adequate, Mast et al. v. Donahue et al., No. 2:05, Civ. 37 (S.D. Ind. Nov. 26, 2007).
[365] Order Dismissing Case Without Prejudice, Mast et al. v. Donahue et al., No. 2:05, Civ. 37 (S.D. Ind. Dec. 31, 2009).

In 2019, the parties agreed to terminate the private settlement agreement due to a separate settlement reached in *Indiana Protection and Advocacy Services v. Indiana Department of Correction*.[366] After receiving a report from the plaintiffs' counsel recording objections to the termination of the agreement, the court closed the case.[367]

5.3.2.2 Indiana Protection & Advocacy Services Commission. v Indiana Department of Correction

The Indiana Protection and Advocacy Services Commission ("IPAS") filed a lawsuit in 2008 on behalf of seriously mentally ill people incarcerated in all Indiana prisons. It alleged that the Department of Correction was holding people in "excessively isolated and harsh conditions which exacerbate their illnesses."[368] In an amended complaint, IPAS sought to bring the action on its own behalf and on behalf of "current and future mentally ill prisoners committed to the Indiana Department of Correction and who are housed in settings … that feature extended periods of time in cells, including, but not limited to, prisoners in disciplinary segregation, administrative segregation, or in the New Castle Psychiatric Unit."[369] That complaint alleged that a "significant number" of people with serious mental illnesses were confined in segregation units where they were subject to severe isolation and lack of environmental stimulation.[370] Many of the allegations in the complaint are similar to those made in the *Mast* complaint. For example: mentally ill people frequently experienced violent extractions from their cells by armored corrections officers; mental health assessments were conducted infrequently; and people were confined in their cells for at least twenty-three hours per day and handcuffed whenever they left their cells.[371]

A bench trial was held in 2011 and the court ruled that the plaintiffs had prevailed on their Eighth Amendment claim.[372] The court identified three ways in which segregation was harmful

[366] Stipulation to Terminate Private Settlement Agreement Following Notice to the Class and Approval by the Court, Mast et al. v. Comm'r, Indiana Dep't of Corr. et al., No. 2:05, Civ. 37 (S.D. Ind. Mar. 18, 2019).
[367] Order Approving Termination of the Private Settlement Agreement, Mast et al. v. Comm'r, Indiana Dep't of Corr. et al., No. 2:05, Civ. 37 (S.D. Ind. July 23, 2019).
[368] Complaint at 1, Indiana Protection & Advocacy Services Comm'n v. Comm'r, Indiana Dep't of Corr., No. 1:08, Civ. 1317 (S.D. Ind. Oct. 1, 2008).
[369] Amended Class Action Complaint at 3, Indiana Protection & Advocacy Services Comm'n et al. v. Comm'r, Indiana Dep't of Corr., No. 1:08, Civ. 1317 (S.D. Ind. Dec. 2, 2009).
[370] *Id.* at 9.
[371] *Id.* at 10.
[372] 2012 WL 6738517 (S.D. Ind. Dec. 31, 2012).

to people with serious mental illness: lack of social interaction, sensory deprivation, and enforced idleness.[373] The court found that the Department was aware of the "pernicious effects of segregation" on people with serious mental illness. It referred to the *Mast* settlement and a Mental Health Services Plan from 2008 in which the Department acknowledged the need to "prevent decompensation secondary to confinement in segregation housing."[374] Noting that a preponderance of the evidence supported the claim that the effect of segregation on mentally ill people was "toxic to their welfare," the judge concluded that, without appropriate treatment and relief, the effects of segregation would continue to cause serious injury.[375] The court also found that the Department had been deliberately indifferent in failing to provide minimally adequate mental health care.[376]

In determining the appropriate remedy, the court held that the plaintiffs were entitled to "the delivery of mental health care which is within the bounds of the Eighth Amendment."[377] The case was remanded for further proceedings to determine an appropriate remedy. The parties conferred to develop a plan to remedy the constitutional violations, and in 2016 proposed a private settlement agreement which was subsequently approved by the court.[378] This agreement defined "serious mental illness" more narrowly than the *Mast* agreement:

> "a. Prisoners determined to have a current diagnosis or recent significant history of schizophrenia, delusional disorder, schizophreniform disorder, schizoaffective disorder, brief psychotic disorder, substance-induced psychotic disorder (excluding intoxication and withdrawal), undifferentiated psychotic disorder, bipolar I or II disorders;
> b. Prisoners diagnosed with any other validated mental illness that is clinically severe, based on evidence-based standards, and that results in significant functional impairment; and
> c. Prisoners diagnosed with an intellectual or developmental disability or other cognitive disorder that results in a significant functional impairment.
> d. As used above:
> (i) "Recent significant history" refers to a diagnosis made at any time in the last 12 months.

[373] *Id.* at *15.
[374] *Id.*
[375] *Id.* at *17.
[376] *Id.* at *23.
[377] *Id.* at *24.
[378] Order Finding Private Settlement Agreement to be Fair, Reasonable and Adequate, Indiana Protection & Advocacy Services Comm'n v. Comm'r, Indiana Dep't of Corr., No. 1:08, Civ. 1317 (S.D. Ind. Mar. 24, 2016).

(ii) "Significant functional impairment" includes one of the following as determined by qualified mental health staff:

- Within the previous 6 months, the prisoner has either made a suicide attempt that mental health staff considers serious, inflicted self-injury that mental health staff considers serious, or both;
- The prisoner has demonstrated difficulty in his/her ability to engage in activities of daily living including eating, grooming and/or personal hygiene, maintenance of housing area, participation in recreation, ambulation.
- The prisoner has demonstrated a pervasive pattern of dysfunctional or disruptive social interactions, bizarre or disruptive behavior, etc., as a result of mental illness.

(iii) A misdiagnosis does not qualify as a diagnosis or determination of mental illness for purposes of this settlement, once the error has been determined by a qualified mental health professional."

Under the agreement, people with serious mental illness would be placed in settings where they would receive at least ten hours of therapeutic programming each week and time out-of-cell for recreation, showers, and other purposes. During group therapy sessions, people would not be restrained unless it was deemed necessary for security reasons.[379] Individual therapy was to be provided at least once per month and would take place in a setting that provided aural privacy unless it was unsafe to do so.[380] Additional out-of-cell time would be provided "where possible and appropriate."[381]

The parties also agreed, however, that people with serious mental illness could remain in restrictive housing for up to thirty days, during which time they would not receive therapeutic programming.[382] People held under this thirty-day exception would have, at a minimum, face-to-face contact with a mental health professional "multiple times a week, with no more than three non-contact days between contact."[383] During a facility-wide lockdown, the Department was to

[379] *Id.* at 15.
[380] *Id.*
[381] *Id.* at 16.
[382] Private Settlement Agreement at 6-10, Indiana Protection & Advocacy Services Comm'n v. Comm'r, Indiana Dep't of Corr., No. 1:08, Civ. 1317 (S.D. Ind. Jan. 27, 2016).
[383] *Id.* at 10.

continue to provide minimally adequate treatment unless it posed an unacceptable risk to the safety and security of the facility, staff, incarcerated people, or the public.[384]

The agreement contained oversight provisions requiring the provision of information to the plaintiffs' counsel; the filing of status reports with the court every six months; and permitting the plaintiffs' counsel to tour each or any of the mental health units every six months.[385]

The private settlement agreement remained in effect for three years from the date of the court's approval in March 2016, after which time the case was to be dismissed without prejudice. However, shortly before the settlement agreement was due to expire, the parties agreed to an extension, on the proviso that the *Mast* case would be closed.[386]

A report from the plaintiffs' counsel regarding the closure of the *Mast* case noted that opposition from the plaintiff class to the proposed dismissal focused on two points: the potential for seriously mentally ill people at Wabash to be returned to the SHU; and the fact that segregation was "inappropriate for all prisoners, regardless of their mental health, and the unit at Wabash …, which does not have windows, is particularly problematic."[387] As to the second point, plaintiffs' counsel noted that the *Mast* decree did not address the segregation of people who were not mentally ill and therefore that objection was deemed irrelevant. Regarding the first point, counsel agreed that the definitions of "seriously mentally ill" in the *Mast* and *IPAS* agreements differed, and that the *IPAS* agreement did not include every Axis I DSM-IV diagnosis.[388] However, counsel reported that the *IPAS* agreement required ongoing monitoring of the medical records of people who were reclassified as no longer being seriously mentally ill. The report stated that counsel would continue to monitor whether anyone was improperly placed in restrictive housing, including in the SHU at Wabash.[389]

In an order closing the *Mast* case, the court explained that:

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[384] *Id.* at 18.
[385] *Id.* at 22-23.
[386] Order Approving Termination of the Private Settlement Agreement at 4, Mast et al. v. Comm'r, Indiana Dep't of Corr. et al., No. 2:05, Civ. 37 (S.D. Ind. July 23, 2019).
[387] Report of Class Counsel at 13, Mast et al. v. Comm'r, Indiana Dep't of Corr. et al., No. 2:05, Civ. 37 (S.D. Ind. June 10, 2019).
[388] *Id.* at 13-15.
[389] *Id.* at 17.

> "termination of the Mast Agreement in exchange for a one-year extension of the IPAS Agreement is more beneficial to the intended [Mast] class members than allowing the IPAS Agreement to immediately lapse so the Mast Agreement can continue indefinitely."[390]

The court observed that the plaintiff class in *Mast* did not appear to have any members at the time the order was made, because "all seriously mentally ill prisoners have been removed from the [SHU] at Wabash."[391] Moreover, the court noted that the *IPAS* Agreement was broader in scope because it applied to all of Indiana's facilities, not just Wabash. It therefore prevented all seriously mentally ill people from being housed for extended periods of time in segregation or restrictive housing, "subject to the limited exceptions based on dangerousness and voluntariness."[392]

The *IPAS* settlement agreement was extended to July 2020. In a joint status report filed in March 2020, the parties informed the court that one of the units used to treat mentally ill people was destroyed by a fire in September 2018, and there had been a delay in rebuilding it.[393] Because there was insufficient space, the requirement to provide ten hours per week for out-of-cell treatment was not being met.[394] The plaintiffs proposed a further extension of the settlement agreement to July 2021 in order to allow the state to comply fully with the settlement agreement. According to the report, the Department was considering this proposal at the time that the report was filed.[395]

5.3.3 California

In 2009, two people incarcerated at Pelican Bay State Prison filed a pro se lawsuit against the state of California in *Ashker v. Governor*, alleging various constitutional violations in connection with their indefinite placement in solitary confinement in the Pelican Bay SHU.[396] They were held indefinitely in the SHU because the CDCR had designated them as gang members. The

[390] *Id.* at 7.
[391] *Id.*
[392] *Id.* at 8.
[393] Parties' Further Status Report at 1, Mast et al. v. Comm'r, Indiana Dep't of Corr. et al., No. 2:05, Civ. 37 (S.D. Ind. July 23, 2019).
[394] *Id.* at 2.
[395] *Id.* at 4-5.
[396] Complaint, Ashker et al. v. Schwarzenegger et al., No. 4:09, Civ. 5796 (N.D. Cal. Dec. 9, 2009).

complaint alleged that the CDCR violated due process through its approach to "validating" people's status as gang members.[397]

An amended complaint was filed in September 2012 on behalf of all people in indeterminate SHU placements in Pelican Bay on the basis of gang validation, and a subclass of people who were or would be held for more than ten years in the Pelican Bay SHU.[398] The complaint alleged that people in the SHU were confined in cramped, windowless cells for between twenty-two and twenty-four hours per day, denied telephone calls, contact visits, and vocational, recreational, or educational programming.[399] The SHU contained 1,056 individual cells, and approximately 500 people had been confined there for more than ten years.[400] Many of the class members had been incarcerated in Pelican Bay since the facility was opened in 1989 and thus had spent over twenty-five years in isolation. The complaint detailed the "unrelenting and crushing mental anguish, pain and suffering" that the plaintiffs experienced from living in such restrictive conditions.[401] It also described the hunger strikes that were coordinated in 2011 to protest these conditions, and the subsequent retaliation against the people who led the strikes.[402]

Class certification was granted in 2014, following an unsuccessful application by CDCR to dismiss the claim as moot in 2013.[403] Discovery and production of expert reports followed, and in September 2015, the parties entered into a settlement agreement.[404] The settlement was approved by the court in January 2016.[405]

Pursuant to the settlement agreement, the CDCR agreed that people would not be placed in administrative segregation, a SHU, or step down program solely on the basis of gang validation.[406] The CDCR agreed to modify eligibility for the step down program so that it would

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[397] *Id.* at 11-13, 89-91.
[398] Second Amended Complaint at 36, Ruiz et al. v. Brown et al. No. 4:09, Civ. 5796 (N.D. Cal. Sep. 10, 2012).
[399] *Id.* at 1.
[400] *Id.* at 1, 9.
[401] *Id.* at 26-27.
[402] *Id.* at 34. See *supra* discussion in section 2.3.
[403] Order Granting in Part Motion for Class Certification, Ashker et al. v. Governor et al. No. 4:09, Civ. 5796 (N.D. Cal. June 2, 2014).
[404] Settlement Agreement, Ashker et al. v. Governor et al. No. 4:09, Civ. 5796 (N.D. Cal. Sep. 1, 2015) [hereinafter *Ashker Settlement Agreement*].
[405] Order Granting Final Approval of Class Action Settlement Agreement, Ashker et al. v. Governor et al. No. 4:09, Civ. 5796 (N.D. Cal. Jan. 26, 2016).
[406] Ashker Settlement Agreement, *supra* note 404, at 4.

be based on individual behavior rather than gang validation status.[407] The step down program was intended to be a "rehabilitative, gang behavior diversion program" whereby people would receive incremental increases in privileges and freedom of movement.[408] The CDCR was also required to review all gang-validated people currently in the SHU. Anyone who had not been found guilty of a SHU-eligible rule violation with a gang connection within the previous two years would be released to a "general population institution consistent with his case factors."[409]

The agreement also provided for the establishment of a "Restrictive Custody General Population Housing Unit" or "RCGP."[410] The RCGP is a high-security housing unit designed to accommodate people from the SHU to provide "increased opportunities for positive social interaction with other prisoners and staff," including education, yard or out-of-cell time in "small group yards" in groups approved by a classification committee, access to religious services, support services, job assignments, and leisure time activity groups.[411]

The CDCR agreed that it would not house anyone in the Pelican Bay SHU for more than five continuous years. Anyone deemed to require ongoing SHU placement beyond this time would, however, be transferred to another SHU in the state.[412] The CDCR was required to provide plaintiffs' counsel with data and documentation for two years following the court's approval of the settlement to monitor compliance with the agreement.[413]

In November 2017, the plaintiffs sought an extension of the settlement agreement, alleging that the CDCR continued to violate the due process rights of people incarcerated at Pelican Bay by relying on confidential information to validate gang affiliations and return people to solitary confinement.[414] The motion further alleged that the CDCR's procedural protections for the placement of people in the RCGP were inadequate, and that the CDCR had continued to use

[407] *Id.* at 5.
[408] *Id.* at 6-7.
[409] *Id.* at 8.
[410] *Id.* at 10.
[411] *Id.* at 10-11.
[412] *Id.* at 12.
[413] *Id.* at 13-16.
[414] Motion for Extension of Settlement Agreement based on Systemic Due Process Violations, Ashker et al. v. Governor et al. No. 4:09, Civ. 5796 (N.D. Cal. Nov. 20, 2017).

gang validations as a basis to deny parole. A twelve-month extension to the agreement was ordered, effective from January 2019.[415]

Prior to the court's issuing the order extending the settlement agreement, in December 2018, the district court made separate orders to address problems identified in the parties' joint status reports.[416] These orders concluded that the CDCR had violated the settlement agreement in two respects. First, the court found that members of the plaintiff class were not offered out-of-cell time beyond that which they received in the SHU. Nor did such allowances comport with the CDCR's regulations and practices with respect to people in the general prison population with the same security status.[417] The plaintiffs had made various suggestions to increase out-of-cell time, including measures such as allowing meals in the dining hall; or work, education, or vocational programs, but they did not seek to include these proposals in the court's order, in light of the PLRA's requirement that relief be narrowly tailored.[418] The plaintiffs did, however, seek an order directing the CDCR to comply with increased monitoring requirements relating to out-of-cell time, and to allow the plaintiffs to appoint an expert to conduct visits and access data and documentation. The court accepted the monitoring requests, concluding that they were minimally intrusive, narrowly tailored, and consistent with the settlement agreement.[419]

The CDCR's second violation of the settlement, the court found, arose from a failure to provide some class members with exercise and leisure activities in groups.[420] The CDCR had designated these individuals, who were confined in the RCGP, as "walk-alone status," meaning that they were allowed to exercise, but not with other people. The court concluded that this approach violated the requirement that the CDCR provide "increased opportunities for social interaction" that included "time in small group yards … and leisure time activity groups."[421] The court agreed with the plaintiffs that the inclusion of the word "group" in the settlement agreement

[415] Order Granting Motion to Extend Settlement Agreement, Ashker et al. v. Governor et al. No. 4:09, Civ. 5796 (N.D. Cal. Jan. 25, 2019).
[416] Order Adopting Remedial Plans and Granting Stay of Enforcement of Remedial Plans; Order Adopting Out-of-Cell Time Plan; Order Adopting Walk-Alone Status Plan, Ashker et al. v. Governor et al. No. 4:09, Civ. 5796 (N.D. Cal. Dec. 7, 2018) [hereinafter *Remedial Orders 1-3 respectively*].
[417] Remedial Order 1, *supra* note 416, at 1-2.
[418] *Id.* at 7.
[419] *Id.* at 8-9 and Remedial Order 3, *supra* note 416.
[420] Remedial Order 1, *supra* note 416, at 2.
[421] *Id.* at 9.

required that such activities must involve more than one person. The court ordered the prison's institutional classification committee to determine whether people in the RCGP should be classified as "walk-alone" or not. If necessary, the court noted, the committee could allow for the formation of groups comprising only two people.[422] The committee was ordered to provide anyone designated as "walk-alone" and plaintiffs' counsel with reasons for the decision, and to explain why any person could not exercise in a group, even a group of two.[423]

The CDCR appealed these two orders. In August 2020, the Ninth Circuit reversed the district court's finding and held that the CDCR had not violated the settlement agreement.[424] In relation to out-of-cell time, the court determined that the settlement agreement did not limit the CDCR's discretion for people who had been removed from the SHU, and the CDCR was not required to provide any specific amount of out-of-cell time for this group of people.[425]

As to people designated in walk-alone status, the court described the settlement's language requiring increased opportunities for social interaction as "aspirational," but held it did not impose a strict requirement for greater social interaction.[426] The court rejected the lower court's interpretation of "small group yards," noting that the settlement agreement did not state "how many, … if any, other prisoners need be in the same group yard." The court determined that the plain meaning of the clause was to give the institutional classification committee discretion to limit the number of people in the small group yards. It concluded that the plaintiffs "cannot now complain about how the [committee] has exercised that discretion."[427] While people on walk-alone status might be limited in their physical contact with others in group activities and in the yard, the court noted that they were still able to interact through meetings with teachers (through cell doors), job assignments, phone calls, and contact and no-contact visits. Thus, the court found that the walk-alone status limitations were "only minor deviations" from the requirements of the settlement agreement.[428]

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[422] *Id.* at 11.
[423] Remedial Order 3, *supra* note 416, at 2.
[424] Ashker et al. v. Newsom et al., 968 F.3d 939 (9th Cir. 2020).
[425] *Id.* at 945.
[426] *Id.*
[427] *Id.*
[428] *Id.* at 946.

The plaintiffs have petitioned the Ninth Circuit to rehear the case en banc.[429] They have also filed a motion to extend the settlement agreement based on the same systemic due process violations.[430] The petition to the Ninth Circuit is pending. Separately, in April 2021, the district court extended the settlement agreement for a further twelve months due to ongoing due process violations.[431]

5.3.4 New York

In 2016, the Southern District of New York approved a settlement in *Peoples v. Annucci*, a class action brought on behalf of people in New York prisons who were, or would in the future, be subject to disciplinary confinement in a SHU.[432] The lawsuit alleged that the DOCCS violated the Eighth and Fourteenth Amendments by placing people in long-term solitary confinement without due process.

The first complaint was filed pro se in 2011 by a man who received a disciplinary infraction for possessing legal documents in his cell.[433] He was held in the SHU for three years. The complaint was later broadened to seek relief on behalf of a class of people placed in disciplinary segregation. The lawsuit alleged that, as of 2012, 4,300 people were locked in tiny concrete cells for twenty-three hours a day for minor infractions, and that DOCCS's policies encouraged sentences to the SHU for behavior that presented no risk of harm to others or to the security of the prison.[434] SHU sentences had been imposed for infractions that included having an untidy cell, littering, possessing unauthorized jewelry, unreported illness, and "correspondence violations."[435] Furthermore, DOCCS's policies granted the staff broad discretion to impose long SHU sentences without mandatory upper limits, guidelines, or protocols, nor was there any limit on the number of consecutive sentences to the SHU.[436] The complaint also alleged that Black

[429] Plaintiffs-Appellees' Petition for Rehearing En Banc, Ashker et al. v. Newsom et al., No. 18-16427 (9th Cir. Aug. 31, 2020).
[430] Plaintiffs' Second Motion for Extension of Settlement Agreement Based on Systemic Due Process Violations, Ashker et al. v. Newsom et al., No. 4:09 Civ. 5796 (N.D. Cal. Sep. 25, 2020).
[431] Order Extending Settlement Agreement, Ashker et al. v. Newsom et al., No. 4:09 Civ. 5796 (N.D. Cal. Apr. 9, 2021).
[432] Order Approving Settlement, Peoples et al. v. Annucci et al., No. 1:11 Civ. 2694 (S.D.N.Y Mar. 31, 2016).
[433] Complaint, Peoples et al. v. Fischer et al., No. 1:11 Civ. 2694 (S.D.N.Y. Apr. 18, 2011).
[434] Second Amended Complaint at 2, 27, Peoples et al. v. Fischer et al., No. 1:11 Civ. 2694 (S.D.N.Y. Dec. 26, 2012).
[435] *Id.* at 27.
[436] *Id.* at 29-30.

people were more likely to receive sentences to the SHU than others: in June 2011, Black people constituted sixty-two percent of the individuals held at the Upstate and Southport correctional facilities, where people with the longest SHU sentences were held, while, in contrast, approximately forty-nine percent of the general prison population was Black.[437]

The conditions in the SHU were like those described in other cases: people were confined in small cells furnished with only a toilet, sink, and bed. Exercise took place in empty pens that were much larger than cells. People in the SHU were deprived of all meaningful human contact and interaction, unable to participate in activities, programs, or classes, allowed to shower only twice per week, unable to make telephone calls, and subject to the threat of "deprivation orders," whereby DOCCS officials would withhold exercise, showers, clothing, bedding, or toilet paper as punishment.[438]

The parties reached a settlement in December 2015.[439] Pursuant to an interim agreement in January 2014, DOCCS was required to offer alternatives to SHU placements for young people and people with special needs; a presumption against SHU placements for pregnant people was established; the oversight of DOCCS's disciplinary system was strengthened through the creation of a new Assistant Commissioner role; guidelines were implemented for all disciplinary confinement sanctions; and some steps were implemented to improve SHU conditions by increasing outdoor exercise time and providing headphones and in-cell study packets "in specified circumstances and locations."[440] The study packets were intended to address topics including behavior modification and substance abuse, and people would be expected to complete them alone with some assistance in the form of a cell-side visit from an instructor.

The final settlement agreement contained detailed provisions requiring the creation of several "SHU-Alternative Programs" that would be established at various facilities. These programs established progressive increases in out-of-cell time, beginning with a maximum of four hours (two for programs and two for exercise) for four days a week, and two hours on the remaining three days. Restraint chairs would be used for programs, and participants would also move in

[437] *Id.* at 33.
[438] *Id.* at 74-76.
[439] Settlement Agreement, Peoples et al. v. Fischer et al., No. 1:11 Civ. 2694 (S.D.N.Y. Dec. 16, 2015).
[440] *Id.* at 9.

restraints during the early phases of the program.[441] Provisions requiring the establishment of "Step Down to Community Programs" created two new programs aimed at people in the SHU with between forty-five and sixty days remaining until their release date. The goal of the step down program was to assist people to prepare for release through "social skills practice, relapse prevention, family reintegration and employment readiness."[442] Such programs would be offered for three hours per day, five days per week. During the first phase of the program, participants would be confined to restraint chairs.[443]

The agreement created new keeplock units as alternatives to the SHUs. People confined in these new units would be allowed one hour of daily congregate recreation, access to telephone calls, and the same personal property allowances and access to visitors as the general population.[444] Conditions in the SHUs were to be improved through the provision of shower curtains, trialing a tablet program, and allowing telephone calls, books from a library cart, and enrolment in approved correspondence courses (at individuals' own expense).[445]

The settlement agreement did not preclude the continued use of administrative segregation or protective custody.[446] It also did not address the racial disparities raised in the complaint. The agreement is effective for five years and DOCCS must comply with various monitoring and reporting obligations, including by providing quarterly reports, notifying plaintiffs' counsel of proposed regulations that may affect the terms of the agreement, facilitating tours and assessments of facilities twice each year, and meeting annually to discuss compliance issues.[447]

The district court approved the settlement in March 2016. Judge Shira Scheindlin described it as "historic" and stated that it would "greatly reduce the frequency, duration, and severity of solitary confinement in New York state prisons."[448] While acknowledging that there was "undoubtedly more work to be done, both with respect to solitary confinement and with the

[441] *Id.* at 7-9.
[442] *Id.* at 19.
[443] *Id.* at 19-20.
[444] *Id.* at 30-31.
[445] *Id.* at 38-40.
[446] *Id.* at 28.
[447] *Id.* at 49-56.
[448] Opinion and Order at 2-3, Peoples et al. v. Annucci et al., No. 1:11 Civ. 2694 (S.D.N.Y. Apr. 14, 2016).

conditions of prisons in general," Judge Scheindlin remarked that the settlement would end the use of and conditions in solitary confinement as they had existed in New York for decades.[449]

The judge also expressed hope that the contours of the settlement agreement and the "collaborative process by which it was reached" would provide a "model for other states that are addressing issues of prison reform."[450] In considering objections from the plaintiffs' class, Judge Scheindlin noted that many comments expressed concern about DOCCS's ability to implement the settlement. Some objections addressed issues not covered by the settlement, including: requests for more cameras in SHUs; better mental health diagnoses and treatment; placing date and time stamps on incoming mail; improving the quality and quantity of food; improving conditions in administrative segregation; improving access to religious services; providing warmer clothing and cells; and implementing reforms to protect people from physical and sexual abuse.[451] Notwithstanding these objections, the judge concluded that the settlement was fair and reasonable, and the majority of the plaintiff class supported the settlement.[452] While the settlement could not address every problem in prisons or in solitary confinement, Judge Scheindlin remarked that

> "further reforms are likely to follow, especially when the Governor, Attorney-General, and Commissioner of DOCCS, representing the people of New York, have all demonstrated their strong commitment to improving the conditions of confinement for prisoners within the state's custody."[453]

Further reforms did not eventuate until March 2021, when the HALT Act was passed.[454] *Peoples v. Annucci* is ongoing with continued enforcement of the settlement agreement.

5.3.5 Georgia

In May 2019, the District Court for the Middle District of Georgia approved a settlement in *Gumm v. Ford*, a class action brought on behalf of people who were or would be confined in the

[449] *Id.*
[450] *Id.*
[451] *Id.* at 22.
[452] *Id.*
[453] *Id.* at 28-29.
[454] *See supra* section 5.1.1.4.

SMU in the Georgia Diagnostic and Classification Prison.[455] The initial complaint was filed pro se in February 2015. The plaintiff alleged Fourteenth Amendment violations arising from his being held for five years in solitary confinement in the SMU without meaningful review of his placement, contrary to policy and state regulations.

An amended complaint filed in 2017 also challenged the conditions of confinement in the SMU under the Eighth Amendment.[456] People in the SMU were confined to cells for twenty-three to twenty-four hours per day and deprived of almost all human contact and sensory stimulation. Cell doors and windows were covered with metal shields, and recreation was only allowed for up to five hours per week, divided into two segments of two-and-a-half hours.[457]

The amended complaint alleged that the state described the SMU as a "behavior modification program" that incentivized people to return to the general prison population. In practice, however, people were placed in the SMU indefinitely, regardless of their behavior.[458] Different policies governed the processes for assignments to and transfers out of the SMU. The complaint alleged that prison officials provided no information about what was required for eligibility to leave the SMU.[459] For example, the named plaintiff was informed in a placement review that he would remain in the SMU because he posed a threat to "the operation of safe and secure facilities [due to] being an escape risk."[460] Another placement review simply contained the word "remain," and no further information was provided.[461] At the time the amended complaint was filed, Mr. Gumm had been in the SMU for seven years.

The parties entered into a settlement agreement in December 2018.[462] To address the alleged Eighth Amendment violations relating to conditions, the agreement required increased out-of-cell time of at least four hours per day on weekdays (subject to security or safety considerations).[463] Three hours of that time would be spent in a common area using restraint

[455] Order Approving Settlement, Gumm et al. v. Ford et al., No. 5:15 Civ. 41 (M.D. Ga. May 7, 2019).
[456] Second Amended Complaint, Gumm et al. v. Ford et al., No. 5:15 Civ. 41 (M.D. Ga. Mar. 11, 2017).
[457] *Id.* at 5-6.
[458] *Id* at 4.
[459] *Id.* at 89.
[460] *Id.* at 161.
[461] *Id.* at 162.
[462] Settlement Agreement Regarding the Special Management Unit, Gumm et al. v. Ford et al., No. 5:15 Civ. 41 (M.D. Ga. Dec. 21, 2018).
[463] *Id.* at 12.

tables while the fourth hour would be spent in an exercise cage. The agreement allowed for out-of-cell time to be withheld for up to fourteen days as a punishment for serious disciplinary offenses.[464] There was no requirement under the agreement that people be allowed out of their cells at all on weekends.[465]

Other conditions addressed in the settlement included improved access to book carts (at least once per week), tablets, two hours of programs or classes per week, access to chaplaincy services, and a requirement that food be of the same quality and quantity as that provided to people in the general prison population.[466] The state also agreed that people in the SMU would be provided with medication, clothing, and basic personal items, the same opportunity to clean their cells as people in the general prison population, and showers three times per week.[467]

The agreement imposed a maximum two-year limit on placement in the SMU, unless the person had committed a serious offense while incarcerated (such as murder, assault causing grievous bodily injury, taking another person hostage, or escaping outside the facility); their offense that resulted in their prison sentence was "so egregious that they were placed in the SMU immediately" upon arrival at the prison; or the person posed "such an exceptional, credible, and articulable risk to the safe operation of the prison system or to the public" due to their "unique position of influence and authority over others."[468] The state agreed to implement formal hearings prior to assignment to the SMU with at least forty-eight hours' notice, a right to attend and be heard, to submit written objections, and to appeal.[469] Review hearings would be conducted every sixty to ninety days once people were assigned to the SMU, and mental health evaluations would be conducted in advance of hearings.[470] Every person placed in the SMU would receive a management plan explaining the review process and detailing the goals and steps necessary to qualify for transfer out of the SMU.[471]

[464] *Id.* at 16.
[465] *Id.* at 7.
[466] *Id.* at 19-30.
[467] *Id.* at 31-37.
[468] *Id.* at 44.
[469] *Id.* at 48
[470] *Id.* at 49-51.
[471] *Id.* at 53.

The parties agreed to limited monitoring and reporting requirements, including four meetings during the three-year term of the agreement, access to records and data, and three onsite visits over the term of the agreement with at least seven business days' notice in advance.[472]

In its order approving the settlement, the court noted that the Department of Corrections had expressly stipulated that the terms of the agreement satisfied the requirements of the PLRA.[473] The court therefore did not conduct a provision-by-provision review of the agreement to determine whether each clause complied with the PLRA.[474] While concluding that the agreement complied with the PLRA, the judge noted that

> "a remedial order narrowly tailored to preventing future violations of certain class members' federal rights is not overbroad even though its 'collateral effects' may improve conditions for prisoners generally."[475]

Most of the plaintiff class's objections to the settlement agreement, the judge noted, expressed concerns about the state's prior failure to implement settlement terms, particularly in relation to out-of-cell time and adequate staffing numbers. Concerns were also expressed about the lack of progress in improving conditions in the SMU and implementing agreed procedures for placement and retention in the SMU.[476] Many class members reported that, due to a lack of staff, people were being denied the requisite out-of-cell time, and some also complained about having no access to programs or library services. The judge concluded that none of these objections provided a basis for rejecting the settlement, and the court would address any failure to comply if it arose. The court noted also that the Department of Corrections had agreed that it was required to dedicate the resources necessary to implement the settlement's terms.[477] The judge described

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[472] *Id.* at 57-61.
[473] Order Approving Settlement at 5-6, Gumm et al. v. Ford et al., No. 5:15 Civ. 41 (M.D. Ga. May 7, 2019).
[474] *Id.* at 4 (referring to 18 U.S.C. §§ 3626(a)(1)(A) and 3626(c)(1) (requiring courts to find that relief is narrowly drawn, extends no further than necessary to correct the violation of the federal right, and is the least intrusive means necessary to correct the violation of the federal right)).
[475] *Id.* at 9 (citing Plata v. Brown, 563 U.S. 493, 531 (2011) (holding that an order requiring the release of incarcerated people to ensure timely medical care for the plaintiff class was not overbroad, even though the order would benefit people outside the plaintiff class by reducing prison violence and prompting parole reform)).
[476] *Id.* at 20-21.
[477] *Id.* at 21-22.

the two-year limit on placement in the SMU (with exceptions) and the use of restraint tables for out-of-cell time as fair and reasonable solutions to the issues raised in the complaint.[478]

5.4 Administrative Reforms

Some states have introduced solitary confinement reforms through administrative policy changes alone, though in most cases, these changes were prompted by litigation or the threat of litigation. Colorado and Maine provide two examples of successful policy reform. The approaches taken in these two states, together with examples of policy reform in other states, are discussed in this section.

5.4.1 Colorado

In 2011, a study conducted by the National Institute of Corrections concluded that the number of people in long-term solitary confinement in Colorado was increasing and people were held in such conditions for an average of two years.[479] Colorado's Department of Corrections then implemented a series of reforms over the next six years. The Department first reviewed all people held in solitary confinement for more than twelve months and reassigned some to step down units with the intention of preparing them to return to the general population. It then reduced the list of infractions punishable by solitary confinement and eliminated indefinite placement in administrative segregation. The Department also developed a residential treatment program for mentally ill people in solitary confinement, which included ten hours of out-of-cell treatment and ten hours of out-of-cell recreation per week, again with the objective of returning people to the general population.[480] A statute was enacted in 2014 that banned long-term solitary confinement for people with serious mental illness except in exigent circumstances.[481]

[478] *Id.* at 22-24.
[479] U.S. DEP'T OF JUST., REPORT AND RECOMMENDATIONS CONCERNING THE USE OF RESTRICTIVE HOUSING 75 (2016) [hereinafter *DOJ Report (2016)*].
[480] *Id.*
[481] COLO. REV. STAT. ANN. § 17-1-113.8(1) (West 2014).

Between November 2011 and May 2015, the Department reduced the number of people in administrative segregation from 1,505 to 131, and it reported that the average length of time spent in administrative segregation dropped from twenty-eight months to eight months.[482]

The Department continued to implement administrative reforms, introducing a fifteen-day maximum on solitary confinement placements in October 2017.[483] Violations could not be stacked such that consecutive sentences were no longer allowed.[484] The state's policies also prohibit the placement of pregnant and young people in solitary confinement.[485] The current practice remains that people may only be held in solitary confinement for a maximum of fifteen days. CLA-Liman's 2018 report stated that, as of fall 2017, Colorado held ten people, or 0.1 percent of its prison population, in restrictive housing, and that number dropped to zero as of July 2019.[486]

In 2018, the Department's then-Executive Director reported that people formerly held in solitary confinement would, from that time forward, be allowed out of their cells for at least four hours per day, and they would spend their time at restraint tables with others where they could engage in programs and other activities.[487] The reduction of the solitary confinement population led to the closure of one of the state's supermax prisons, though it was reopened in 2020 as part of the state's plan to close private prisons.[488] The Director of the Department has reportedly

[482] *Id.*
[483] *Colorado Bans Solitary Confinement for Longer than 15 Days*, CPR NEWS, (Oct. 13, 2017), https://www.cpr.org/2017/10/13/colorado-bans-solitary-confinement-for-longer-than-15-days/.
[484] ASS'N OF STATE CORRECTIONAL ADMINISTRATORS AND THE LIMAN CENTER FOR PUBLIC INTEREST LAW AT YALE LAW SCHOOL, WORKING TO LIMIT RESTRICTIVE HOUSING: EFFORTS IN FOUR JURISDICTIONS TO MAKE CHANGES 3 (2018).
[485] *Id.*
[486] ASS'N OF STATE CORRECTIONAL ADMINISTRATORS & THE ARTHUR LIMAN CENTER FOR PUBLIC INTEREST AT YALE LAW SCHOOL: REFORMING RESTRICTED HOUSING: THE 2018 ASCA-LIMAN NATIONWIDE SURVEY OF TIME-IN-CELL 12 (2018) [hereinafter *ASCA-LIMAN (2018)*]; CORRECTIONAL LEADERS ASS'N & THE ARTHUR LIMAN CENTER FOR PUBLIC INTEREST AT YALE LAW SCHOOL: TIME-IN-CELL 2019: A SNAPSHOT OF RESTRICTIVE HOUSING 9 (2020) [hereinafter *CLA-LIMAN (2020)*].
[487] *Id.* at 4.
[488] John Herrick, *Centennial South, a Colorado Prison Shuttered in 2012, Reopens*, COLORADO INDEPENDENT (Mar. 7, 2020), https://www.coloradoindependent.com/2020/03/07/centennial-south-reopens-polis/.

acknowledged that "retro-fitting" the supermax prison so that people can be accommodated without being held in solitary confinement will be difficult.[489]

The Department's narrative about implementing solitary confinement reforms is framed in terms of the state recognizing that it was "simply the right thing to do."[490] However, the state had also been subject to litigation concerning its use of solitary confinement prior to the implementation of the reforms. In 2010, a plaintiff in one of the state's supermax prisons filed a lawsuit alleging violations of the Eighth and Fourteenth Amendments, the Americans with Disabilities Act, and the Rehabilitation Act, arising from the denial of access to outdoor exercise during his twelve years in solitary confinement, lack of mental health treatment, and barriers to progression out of administrative segregation.[491] The district court issued a final judgment in August 2012 which found the Department had unconstitutionally denied the plaintiff access to outdoor exercise.[492]

Because the Department did not implement any changes in response to this litigation but instead transferred the plaintiff to another prison where he would have access to outdoor exercise, a second lawsuit was initiated in 2013.[493] This class action complaint alleged that the Department still failed to provide outdoor exercise at the supermax prison. As demonstrated by the 2010 litigation, when people complained about the lack of outdoor exercise, they were transferred to other prisons.[494] A settlement agreement was reached in November 2015 and it was approved by the court in 2016.[495] The Department agreed to complete the construction of outdoor yards and to permit all incarcerated people to exercise outdoors for one hour per day, three days per week, subject to safety and security concerns or exigent circumstances. It also agreed to increase

[489] Alex Burness & John Herrick, *Inside Centennial South, the Maximum Custody Security Prison Colorado Could Soon Reopen*, COLORADO INDEPENDENT (Aug. 8, 2019), https://www.coloradoindependent.com/2019/08/08/centennial-south-dean-williams/.
[490] Rick Raemisch, *Why We Ended Long-Term Solitary Confinement in Colorado*, NEW YORK TIMES, (Oct. 12, 2017), https://www.nytimes.com/2017/10/12/opinion/solitary-confinement-colorado-prison.html; Rick Raemisch, *Why I Ended the Horror of Long-Term Solitary in Colorado's Prisons*, ACLU (Dec. 5, 2018), https://www.aclu.org/blog/prisoners-rights/solitary-confinement/why-i-ended-horror-long-term-solitary-colorados-prisons.
[491] Complaint, Anderson v. State of Colorado et al., No. 1:10 Civ. 1005 (D. Colo. May 3, 2010).
[492] Final Order and Judgment, Anderson v. State of Colorado et al., No. 1:10 Civ. 1005 (D. Colo. Aug. 24, 2012).
[493] Decoteau v. Raemisch, No. 1:13 Civ. 3399 (D. Colo.).
[494] Complaint at 5, Decoteau v. Raemisch, No. 1:13 Civ. 3399 (D. Colo. Dec. 17, 2013).
[495] Order Approving Settlement, Decoteau v. Raemisch, No. 1:13 Civ. 3399 (D. Colo. July 6, 2016).

exercise time to four hours per day, seven days per week (most of which would still be spent in the indoor exercise cells).[496]

While the administrative reforms were broader than the issues raised in these two cases, it is notable that the reforms took place after this litigation was commenced.

5.4.2 Maine

In 2011 and 2012, Maine's Department of Corrections implemented a series of administrative reforms to reduce the number of people held in solitary confinement. Prior to these reforms, people incarcerated in the SMU in Maine State Prison were isolated alone for twenty-three hours per day with limited human contact, and there was no maximum limit on the time they could be kept there.[497] The administrative reforms were prompted by a legislative resolve passed by the Maine Legislature in 2010 which directed the Department of Corrections to review its policies relating to the placement of people in the SMU.[498] According to the ACLU, the reforms were also motivated by the threat of litigation.[499]

In accordance with the resolve, the State's Board of Corrections established a focus group to review relevant policies and external submissions. A report by the focus group identified various problems with the use of solitary confinement and recommended changes.[500] The Department of Corrections then implemented those recommendations. The first major change was to reduce disciplinary segregation by providing other options that did not involve moving people to the SMU and limiting segregation as a response to serious offenses. Administrative segregation was allowed only for "extreme circumstances," and a third category of "high risk segregation status" was eliminated altogether.[501]

In addition, the Department of Corrections introduced a new requirement that whenever a person was moved to the SMU, their usual bed had to be retained in the general population. Consequently, placement in the SMU could not be used to transfer people permanently out of

[496] Settlement Agreement at 3-5, Decoteau v. Raemisch, No. 1:13 Civ. 3399 (D. Colo. Nov. 4, 2015).
[497] AM. CIV. LIBERTIES UNION OF MAINE, CHANGE IS POSSIBLE: A CASE STUDY OF SOLITARY CONFINEMENT REFORM IN MAINE 10 (2013).
[498] Resolve, Chapter 213, LD 1611, 124th Leg., 2nd Reg. Sess. (Me. 2010).
[499] AM. CIV. LIBERTIES UNION OF MAINE, *supra* note 497, at 19.
[500] *Id.* at 24.
[501] *Id.* at 14-15.

their units. The staff were given additional training in methods and techniques for managing people, and limits were imposed on the use of segregation while investigations were conducted.[502] Finally, new processes were implemented to limit the amount of time people could be assigned to the SMU. Each person would receive an individual plan detailing specific requirements and goals with the objective of returning them to the general population. These plans were developed in consultation with corrections and mental health staff.[503]

As a result of these reforms, the Department of Corrections closed one of the two solitary confinement units at the Maine State Prison. By 2012, the SMU's population had halved in size to approximately forty-six people.[504] Maine appears to have sustained these reductions: CLA-Liman's 2020 report showed that twenty people, or 0.9 percent of the state's prison population, were held in restrictive housing as of July 2019.[505]

In March 2021, a reform bill was introduced in the Maine legislature that prohibited all solitary confinement and required that the commissioner be notified of any person held in segregation for more than five days and the reasons for the confinement.[506]

5.4.3 New Mexico

New Mexico has implemented some administrative-level reforms to solitary confinement, but they have not been as comprehensive as those introduced in Colorado and Maine, nor do they appear to apply consistently across all prisons in the state. In 2012, New Mexico's Corrections Department worked with the Vera Institute of Justice to evaluate its use of segregation.[507] At that time, the Department reported that approximately eleven percent of the state's incarcerated population was in solitary confinement, and Vera considered that the practice was overused for disciplinary purposes. Approximately 75 percent of the people in solitary confinement were

[502] *Id.* at 16-17.
[503] *Id.* at 17.
[504] *Id.* at 13.
[505] CLA-LIMAN (2020), *supra* note 486, at 10.
[506] H.P. 508, 130th Leg., 1st Reg. Sess. (Me 2021), §§ 3 and 4. The bill defines solitary confinement as segregation during which time the person has contact with another person fewer than three times in a twenty-four-hour period. "Segregation" is defined in current legislation as separation from the general population for administrative or punitive reasons.
[507] VERA INST. OF JUST., CASE STUDY: NEW MEXICO CORRECTIONS DEP'T, *available at* http://cloud.quallsbenson.com/uploads/case-study-new-mexico.pdf.

inactive gang members held in protective custody.[508] The Department stated that it reduced the use of segregation for protective custody and eliminated long-term protective custody.[509] A thirty-day limit was imposed on disciplinary segregation, and a "Restoration to Population Program" was introduced to place inactive gang members in a separate general population setting where they could participate in programs and "safely renounce their gang affiliations."[510]

The Department also established a transition program called the "Predatory Behavior Management Program" to prepare people in long-term solitary confinement to return to the general population. In 2015, the Department reported that its solitary confinement population had dropped from eleven percent to below seven percent.[511] However, a 2019 report by the ACLU of New Mexico casts doubt on these statistics.[512] That report concluded that New Mexico's policies and procedures use inconsistent definitions and terminology.[513] It also noted that while the ACLU regards people in the first three stages of the Predatory Behavior Management Program as being in solitary confinement due to the restrictive living conditions, the Department does not count all three of these stages within its solitary confinement statistics.[514] Furthermore, the report casts doubt on the Department's statement that people are not released directly from solitary confinement to the community.[515]

5.4.4 Washington

Like New Mexico, Washington has also worked with Vera to implement administrative reforms.[516] Between 2011 and 2016, the Washington Department of Corrections instituted a series of cognitive behavioral and skill-building programs designed to increase congregate activity and reduce the solitary confinement population. It modified its sanctioning guidelines

[508] *Id.*
[509] DOJ REPORT (2016), *supra* note 479, at 76.
[510] *Id.*
[511] *Id.* at 77.
[512] AM. CIV. LIBERTIES UNION OF NEW MEXICO, SOLITARY CONFINEMENT IN NEW MEXICO: A REVIEW OF POLICIES, PRACTICES AND INMATE EXPERIENCES IN ISOLATION (2019).
[513] *Id.* at 5.
[514] *Id.* at 64-65.
[515] *Id.* at 73-74.
[516] DOJ REPORT (2016), *supra* note 479, at 75.

and reduced the length of time that people could be held in administrative segregation from sixty days to forty-seven days.[517] The state also implemented a step down program.[518]

In May 2019, the Department of Corrections issued a press release announcing a second partnership with Vera.[519] In October 2020, the Department said it was working towards eliminating restrictive housing for vulnerable people, particularly those with serious mental illness; improving living conditions; and significantly reducing the length of time that people spend in restrictive housing.[520] According to that update, the maximum period that a person can be held in administrative segregation has been reduced from forty-seven to thirty days, and the Department has implemented changes in its maximum custody units to help people return to the general population more quickly.

The Office of the Washington Corrections Ombuds issued its first Annual Report in November 2019 which referred to the partnership with Vera.[521] That report noted that, at that time, there were "no specific initiatives that recognize the disparate impact of the disciplinary system and restrictive housing and provide for special and different treatment of individuals on the mental health caseload."[522] The report recommended a number of changes that the Department should implement to address the solitary confinement of people with serious mental illnesses, emphasizing that "sanctions should only be imposed after review with a mental health lens and written consideration of the potential impact on the person."[523] More broadly, the report observed that the Department's efforts at policy reform were

> "directly impeded by its policy office, which is at best sclerotic, with policy changes sometimes taking over a year and some policies not having been updated for a decade. This results in staff

[517] *Id.* at 75-76.
[518] VERA INST. OF JUST., FINDINGS AND RECOMMENDATIONS FOR THE NORTH CAROLINA DEP'T OF PUBLIC SAFETY 11 (2016).
[519] *The Washington State Department of Corrections Partners with the Vera Institute to Focus on Restrictive Housing Reforms*, (May 16, 2019), https://www.doc.wa.gov/news/2019/05162019p.htm.
[520] Washington State Department of Corrections, *Washington Corrections Continues Restrictive Housing Reforms*, (Oct. 28, 2020), https://www.doc.wa.gov/news/2020/10282020.htm.
[521] OFFICE OF THE CORRS. OMBUDS, ANNUAL REPORT 22 (2019).
[522] *Id.* at 22-23.
[523] *Id.*

either feeling disincentivized to try to create change or they create workarounds that may or may not reflect the written policy."[524]

In November 2019, a state court lawsuit was filed after corrections officials reportedly placed people in solitary confinement for initiating a hunger strike.[525]

A Department of Corrections fact sheet published in October 2020 reports that a "Restrictive Housing Steering Committee" was established in February 2018 to monitor restrictive housing and make recommendations regarding reform of policies and procedures.[526] The fact sheet lists different programs that are offered to people in restrictive housing, though it is not clear which programs are available at which facilities, nor whether eligibility requirements apply. According to the fact sheet, as of October 2020, 518 people were in administrative segregation and 423 people were in "MAX Custody," another form of solitary confinement.

5.4.5 North Carolina

In 2015, North Carolina's Department of Public Safety also began working with Vera to reduce the use of solitary confinement. According to a report by Vera, the Department had started to implement several administrative reforms. A new policy prohibited solitary confinement for people under the age of eighteen.[527] The Department changed its policies regarding solitary confinement for people with mental illness so that it could only be used as a last resort and for a maximum of thirty days in any calendar year.[528] New therapeutic diversion units were established for people with mental illness to provide at least ten hours per week of out-of-cell treatment and ten hours of unstructured time in "a more therapeutic environment." Staff working in those units were trained in crisis management and in managing people with intensive mental

[524] *Id.* at 4-5.
[525] Joseph O'Sullivan, *Inmates Sue Washington Corrections Officials After Being Put in Solitary Confinement Over Food Strike*, DAILY NEWS, (Nov. 1, 2019), https://tdn.com/news/state-and-regional/inmates-sue-washington-corrections-officials-after-being-put-in-solitary-confinement-over-food-strike/article_b952a5e0-a39f-58c0-a573-082c740554f7.html.
[526] DEP'T OF CORR. WASHINGTON STATE, FACT SHEET: RESTRICTIVE HOUSING (2020), *available at* https://www.doc.wa.gov/docs/publications/fact-sheets/400-FS004.pdf.
[527] VERA INST. OF JUST., FINDINGS AND RECOMMENDATIONS FOR THE NORTH CAROLINA DEP'T OF PUBLIC SAFETY 57 (2016).
[528] *Id.*

health needs. At the time of Vera's report, the Department was in the process of amending its disciplinary policy so that acts of self-harm would not be treated as disciplinary infractions.[529]

To reduce long-term segregation, the Department established a "rehabilitative diversion unit" to operate as a step down program and transition people from solitary confinement to the general population. The program was intended to take eighteen months to complete, and people would earn increased privileges as they progressed through it. During their first three months in the program, however, they were confined to their cells in conditions identical to solitary confinement. Vera recommended that this initial three-month period be abolished.[530]

Vera's report noted the nationwide racial discrepancies in the use of solitary confinement. Among other recommendations, the report suggested that the Department should establish a committee to study, monitor, and address the disproportionate "minority contact with the disciplinary process and representation in the restrictive housing units."[531] The report recommended that such a committee could explore the reasons for racial disparities in the use of solitary confinement and monitor the effects of reform in this respect. It also advised the Department that its data collection and reporting on restrictive housing should include breakdowns by race.[532]

In June 2019, North Carolina's Senate Select Committee on Prison Safety issued a report to the legislature with eight recommendations.[533] The eighth recommendation was that the Department of Public Safety should develop methods to provide better mental health services to people in prisons and reduce the use of solitary confinement.[534]

In October 2019, a class action complaint was filed in the Superior Court of North Carolina challenging the state's use of solitary confinement.[535] The complaint alleged that while the state had attempted to reduce the number of people in solitary confinement through the introduction of

[529] *Id.* at 58.
[530] *Id.* at 50.
[531] *Id.* at 27.
[532] *Id.*
[533] S. SELECT COMM. ON PRISON SAFETY, REP. TO THE 2019 REG. SESS. OF THE 2019 GEN. ASSEMB. OF NORTH CAROLINA (2019).
[534] *Id.* at 10.
[535] Complaint, DeWalt et al. v. Hooks et al., PC-NC-0018 (N.C. Sup. Ct. Oct. 2019).

therapeutic diversion units, only a small number of people had access to these units.[536] According to the complaint, as of July 2019, approximately 3,000 people were held in solitary confinement units in the state's prisons, and many had been in those units for months or years.[537]

The data contained in the CLA-Liman reports show that North Carolina's restrictive housing population has not decreased since the reforms were implemented. According to the CLA-Liman 2018 report, as of fall 2017, 1,109 people, or three percent of the state's prison population were held in restrictive housing.[538] By July 2019, however, the number of people in restrictive housing had increased to 1,654, or 4.7 percent of the total prison population.[539]

5.4.6 Federal Bureau of Prisons

In July 2015, President Obama asked the Attorney-General to review solitary confinement in American prisons. The Department of Justice conducted a review and published a report in 2016 that described the use of restrictive housing in federal facilities and made recommendations to reduce the practice.[540] President Obama then announced in January 2016 that the recommendations contained in the report would be adopted to "reform the federal prison system."[541] At the time the report was published, the FBOP held 9,914 people in solitary confinement, approximately 6.1 percent of the total population of people incarcerated in federal prisons.

The Department of Justice's report made recommendations to address conditions and the use of restrictive housing for people with serious mental illness, juveniles and young people, LGBTI and gender non-conforming people, and pregnant and post-partum women. On the topic of conditions, the report observed that people received five hours of out-of-cell recreation per week. It noted that the FBOP "hopes to increase this minimum number of hours and aspires to eventually provide [people] at least two hours out-of-cell time per day."[542] To increase the

[536] *Id.* at 79.
[537] *Id.* at 109-10.
[538] ASCA-LIMAN (2018), *supra* note 486, at 13.
[539] CLA-LIMAN (2020), *supra* note 486, at 10.
[540] DOJ REPORT (2016), *supra* note 479.
[541] Barack Obama, *Why We Must Rethink Solitary Confinement*, WASHINGTON POST (Jan. 25, 2016), https://www.washingtonpost.com/opinions/barack-obama-why-we-must-rethink-solitary-confinement/2016/01/25/29a361f2-c384-11e5-8965-0607e0e265ce_story.html.
[542] DOJ REPORT (2016), *supra* note 479, at 115.

amount of time people could spend outside of their cells, however, the FBOP would need to increase the number of staff working in solitary confinement or reduce the number of people held in these units. Assessing the estimated costs of hiring sufficient staff to facilitate an additional two hours out-of-cell for every person in solitary confinement at $47.6 million per year, the report concluded that it would be "more prudent" to reduce the number of people in solitary confinement.[543] It noted that the ability to increase time out-of-cell would "vary somewhat by institution" and thus merely recommended that "the Bureau adopt a policy that encourages Wardens to increase out-of-cell time in a manner consistent with the resources and staffing constraints at their facilities."[544]

One policy change that drew significant attention, in part because of President Obama's announcement, was the decision to prohibit solitary confinement for people under the age of eighteen. Under a new policy, juveniles could be placed in "restrictive settings" as a temporary measure only to address behavior that posed "a serious and immediate risk to any individual."[545] However, the report acknowledged that the FBOP was only responsible for a very small number of people under eighteen; as of December 2015, only forty-five people under eighteen were incarcerated in federal custody, comprising a miniscule proportion of the 161,517 people in federal prisons at the time.[546] Of these forty-five people, thirteen were held in solitary confinement between September 2014 and September 2015.[547] Therefore the prohibition on placing people under eighteen in solitary confinement had very limited impact.

The report summarized scientific literature on brain development in young people and noted that young adults (people between the ages of eighteen and twenty-four) are more likely to "engage in risk-seeking behavior, have difficulty moderating their responses in emotionally charged situations, or not have fully developed a future-oriented method of adult-quality decision-making."[548] As of November 2015, young adults constituted five percent of the FBOP's population but more than eight percent of the solitary confinement population. However, the

[543] *Id.* at 115-116.
[544] *Id.* at 116.
[545] *Id.* at 114.
[546] *Id.* at 116.
[547] *Id.* at 61.
[548] *Id.* at 59.

report did not recommend a total prohibition on solitary confinement for young adults. Rather, correctional systems were encouraged to

> "incorporate developmentally responsive policies and practices for young adults, and as resources allow, implement modified therapeutic housing communities with wrap-around programming in order to reduce the number of incidents that result in placement in restrictive housing."[549]

The report described people with serious mental illness who are violent or disruptive as "pos[ing] a special challenge [because] their behavior often requires removal from the general population, and yet "traditional" forms of restrictive housing … present challenges to ensure that an inmate's mental health does not deteriorate."[550] In 2014, the FBOP revised its mental health treatment policy to require the provision of appropriate services to people in solitary confinement. As a consequence, two secure mental health units were established, and people with very serious mental illnesses were diverted from some solitary confinement units.[551] The report recommended that people with serious mental illness should not be placed in restrictive housing unless: they presented "such an immediate and serious danger that there is no reasonable alternative," a qualified mental health practitioner determined that the person was not at risk of suicide or experiencing symptoms of psychosis; and, if the placement was for disciplinary reasons, that lack of responsibility for misconduct due to mental illness did not undermine the reason for the placement.[552] The report also called for daily screening for signs of serious mental illness, and removal of people for treatment in medical facilities or other treatment centers if recommended by mental health staff.

The report also recommended that LGBTI and gender-nonconforming people not be placed in solitary confinement solely due to their status or identification.[553] Where such people were placed in solitary confinement for protective reasons, their conditions should be "comparable to those of the general population to the extent possible."[554] Similarly, the report recommended that people who were pregnant, post-partum, or who had recently had a miscarriage or

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[549] *Id.* at 102.
[550] *Id.* at 46.
[551] *Id.* at 46-51.
[552] *Id.* at 99-100. "Immediate and serious danger" was described as that which might arise during an emergency, such as a large-scale prison riot, but would only last as long as emergency conditions were present.
[553] *Id.* at 102.
[554] *Id.*

terminated a pregnancy should not be placed in solitary confinement. Again, this recommendation was subject to the proviso that solitary confinement might still be appropriate as a "temporary response to behavior that poses a serious and immediate risk of physical harm."[555]

In February 2021, Senator Dick Durbin acknowledged that the Federal Government was trailing behind states in making progress on solitary confinement reform. During the Senate confirmation hearing for Attorney-General Merrick Garland, Senator Durbin (who chaired the Senate Subcommittee hearings to investigate solitary confinement in 2012 and 2014), remarked that "many states are way ahead of the federal prison system" in this regard.[556]

Notably, the Federal Government recognizes the human rights implications associated with long-term solitary confinement when it is used in other countries. A State Department report in 2021 on Human Rights Practices in Cuba describes various "human rights issues" in that country. One of the issues raised in the report is the common practice of solitary confinement as punishment in Cuban prisons, with some people subjected to isolation for "months at a time" and being "unable to contact friends or family until they were released."[557]

[555] *Id.* at 102-03.
[556] Dick Durbin, *Durbin Questions AG Nominee Garland on First Step Act, State of Federal Prisons in America*, (Feb. 22, 2021), https://www.durbin.senate.gov/newsroom/press-releases/durbin-questions-ag-nominee-garland-on-first-step-act-state-of-federal-prisons-in-america.
[557] U.S. DEP'T OF STATE, 2020 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: CUBA 3, 6 (2021).

CHAPTER 6. ANALYSIS OF REFORMS

Introduction

Chapter 5 describes the many and varied approaches that have been taken to attempt to reform solitary confinement. This chapter examines those measures in more detail, first, by reviewing the different methods of reform, and second, by critiquing issues common to all types of reform.

The analysis of the reforms in this chapter includes consideration of issues raised by abolition scholars, particularly the concept of "non-reformist reforms." Professor Dorothy Roberts describes non-reformist reforms as "transformative changes in carceral systems with the objective of demolishing those systems rather than fixing them."[1] Harsha Walia's "guiding question" on non-reformist reforms is whether they increase the possibility of freedom.[2] It is helpful to analyze solitary confinement reforms through this lens because it enables an examination not only of whether proposed reforms are likely to reduce or eliminate solitary confinement, but it also requires consideration of what happens once reforms are implemented.

While reform is an ongoing project, it is necessary to consider whether there is a risk that current reforms might be undermined by the institutional operations of prisons.[3] As discussed in this chapter, many reforms have not resulted in greater freedoms for people in prison, and they do little to reduce the amount of discretion granted to prison officials. There is a tension between the need to push for continuous oversight and improvement, on the one hand, and the risk that the language of reform simply becomes a part of the prison's operation without resulting in

[1] Dorothy Roberts, *Abolition Constitutionalism*, 133 HARV. L. REV. 1, 114 (2019).
[2] *Id.*
[3] *See* MICHEL FOUCAULT, DISCIPLINE AND PUNISH 234 (Alan Sheridan trans., Vintage Books 2d ed. 1995) ("The movement for reforming the prisons, for controlling their function, is not a recent phenomenon. It does not even seem to have originated with a recognition of failure. Prison 'reform' is virtually contemporary with the prison itself: it constitutes, as it were, its programme. From the outset, the prison was caught up in a series of accompanying mechanisms, whose purpose was apparently to correct it, but which seem to form part of its very functioning, so closely have they been bound up with its existence throughout its long history.").

meaningful change. As Mariame Kaba wrote in 2014, "with every successive call for 'reform,' the prison has remained stubbornly violent, brutal, and inhumane."[4]

With a few exceptions, the more comprehensive reforms implemented to date tend to impose a maximum fifteen-day limit on placements in solitary confinement. While this limit is consistent with international guidelines including the United Nations' Mandela Rules, the recommendation to limit time in solitary confinement to no more than fifteen days has existed for decades. As early as 1959, the American Correctional Association's Manual stated that solitary confinement should be used as a last resort and for no longer than fifteen days.[5] Although it is promising that this recommendation is finally being implemented in some states, it is long overdue, and it is still far from commonplace among the reforms being proposed and implemented.

6.1 Types of Reform

6.1.1 Legislation and Regulations

Chapter 5 outlines the range of different legislative approaches to attempt solitary confinement reform to date, whether through comprehensive statutes or incremental changes that address aspects of the practice. Of the comprehensive reform legislation that has been enacted, the statutes of Massachusetts, Nebraska, New Jersey, and New York address more aspects of solitary confinement and impose greater constraints on its use than those enacted in Minnesota and Montana. The latter leave significant discretion to prison officials, for example, by allowing solitary confinement where a person is deemed to pose a threat to themselves, others, or the security of the institution; and by not imposing maximum time limits on solitary confinement.[6] Those statutes also do little to address conditions in solitary confinement, in contrast to the more comprehensive reform statutes that require that people in solitary confinement at least receive minimum periods of time out-of-cell each day.[7]

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[4] Mariame Kaba, *Prison Reform's in Vogue and Other Strange Things*, TRUTHOUT (Mar. 21, 2014), https://truthout.org/articles/prison-reforms-in-vogue-and-other-strange-things/.
[5] Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 CRIME & JUST. 441, 467 (2006).
[6] *See supra* sections 5.1.1.5 and 5.1.1.6.
[7] MASS. GEN. LAWS ANN. ch. 127 § 39(b); NEB. REV. STAT. ANN. § 83-173.03(1); N.J. STAT. ANN. § 30:4-82.8(a)(11).

Some existing legislation and regulations seek to limit or reduce solitary confinement but do not offer alternatives, aside from other punitive measures, to replace the practice. One exception can be found in Nebraska.[8] The regulations in that state require the management of behavior through programs, initiatives, incentives, and mission-specific housing instead of relying on sanctions; and implementation of comprehensive reentry and discharge protocols with the goal of returning all people in restrictive housing to the general population, or to treatment-based or behaviorally-focused housing prior to their release from prison. Minnesota's statute also requires the Commissioner of Corrections to design a system of incentives so that people in solitary confinement can earn additional privileges and accelerate their return to the general prison population.[9]

Where there is sufficient political support to secure the passage of legislation, it can result in significant changes within a relatively short period. However, as shown by the number of bills that have been introduced but not enacted in many different states, gaining the necessary political support is difficult and slow. This is demonstrated, for example, by the fact that Nebraska's statute was enacted in 2019 after a law was passed in 2015 requiring annual reports on long-term plans to reduce restrictive housing; and in New Jersey, where reform legislation was finally passed in 2019 after a 2016 veto of a previous bill by the then-Governor. New York's solitary confinement reform legislation was eventually enacted in 2021 following many years of activism and the repeated introduction of reform bills.[10]

Once enacted, moreover, all reform legislation, whether comprehensive or partial, requires ongoing oversight and dedicated resources if the provisions are to be fully effective. Massachusetts' legislation, enacted in 2018, imposed a range of limits on solitary confinement, including the prohibitions of solitary confinement for people with serious mental illness. In November 2020, however, the US Department of Justice announced that after a two-year investigation, it had reasonable cause to believe that the Massachusetts Department of Corrections was violating the Eighth Amendment in numerous respects, including by placing

[8] 72 NEB. ADMIN. CODE § 1-003.
[9] MINN. STAT. ANN. § 243.521(7).
[10] Troy Closson, *New York Will End Long-Term Solitary Confinement in Prisons and Jails*, NEW YORK TIMES (Apr. 1, 2021), https://www.nytimes.com/2021/04/01/nyregion/solitary-confinement-restricted.html.

people experiencing mental health crises in restrictive housing.[11] The Department of Justice has reportedly notified the state of the minimum remedial measures required to address the violations, and its investigation into the use of restrictive housing for people on mental health watch remains open.

6.1.2 Litigation

While the time-consuming nature and potential problems with compliance are drawbacks to reform legislation, these difficulties increase when litigation is used to seek reform. As demonstrated by case law, settlements, and consent decrees, it can be difficult for plaintiffs even to commence litigation, given efforts by prisons to avoid such claims by transferring potential plaintiffs to other facilities. Once commenced, the litigation can take years to resolve, followed by more time in court for appeals or issues relating to compliance with the settlement or decree. In many jurisdictions, however, litigation remains the most feasible option for pursuing any type of reform due to the lack of political interest in legislative or administrative change.[12] As shown in chapter 5, some states and prisons seem content with the prospect of diverting resources into ongoing litigation and appeals rather than directing those resources into the implementation of measures that could resolve those court proceedings.

Of the many problems with relying on litigation to achieve reform, one is that the scope of relief is limited in several ways. First, relief applies only to the plaintiff or plaintiff class, and does not lead to improvements for other people in similar conditions who are held in different prisons, or who are not part of the plaintiff class. Second, most litigation is brought in federal court despite the problems with federal jurisprudence and the underexplored avenues for challenging solitary confinement in state courts. Consequently, relief must comport with the PLRA's requirements that it be narrowly tailored, extend no further than necessary, and be the least intrusive means necessary to correct the violation of the right.[13] This provision limits meaningful reform. It

[11] U.S. DEP'T OF JUST., *Justice Department Alleges Conditions at Massachusetts Department of Corrections Violate the Constitution*, (Nov. 17, 2020), https://www.justice.gov/opa/pr/justice-department-alleges-conditions-massachusetts-department-corrections-violate.
[12] Margo Schlanger, *Incrementalist vs Maximalist Reform: Solitary Confinement Case Studies*, 115 NW. U. L. REV. 273, 307 (2020) (quoting counsel acting in solitary confinement litigation in Indiana: "I have a hard time thinking how political [solitary confinement reform] would be feasible in this state. Reform has to happen through the courts.").
[13] 18 U.S.C. § 3626(c)(1) and (a)(1)(A).

allows prisons and states to alter practices that violate the Constitution and substitute them with practices that are still punitive and do little to improve conditions or reduce the use of solitary confinement. It certainly does not incentivize prisons or states to find new and innovative alternatives to solitary confinement, particularly if those measures are likely to require any significant expenditure or reorganization of prison facilities. The *Ashker* settlement provides an example of the limited steps that prisons must take to comply with a settlement agreement. While Pelican Bay officials were required to offer "small group yards" and group activities, the appeals court held that the groups could consist of only one person and the CDCR would still be in compliance with the agreement.[14]

While parties can enter into private settlement agreements to avoid the limitations imposed by the PLRA, these agreements are not enforceable except by reinstatement of the proceeding or by bringing a state court action for breach of contract; both of which require further litigation.[15] Ongoing litigation requires significant resources, which most incarcerated people do not have. They are therefore reliant on the limited resources of pro bono legal services or non-profit organizations.

The limitations of settlements and consent decrees are reflected in some plaintiffs' objections. The courts have tended to diminish the significance of these objections by characterizing them as representing only a small proportion of the overall class of plaintiffs,[16] but it is worth considering how many people in solitary confinement, particularly members of classes defined by mental health diagnoses, can raise objections. Fear of retaliation may also contribute to a reluctance to object.

Many objections reflect the limited scope of settlements, noting, for example, that solitary confinement is inappropriate for anyone regardless of their mental health status, or that a

[14] *See supra* section 5.3.3.
[15] *See supra* section 5.3.2.
[16] *See, e.g.,* Order Finding Private Settlement Agreement to be Fair, Reasonable and Adequate, Mast et al. v. Donahue et al. at 4, No. 2:05 Civ. 37 (S.D. Ind. Nov. 26, 2007) ("Few people actually object and by far the largest percentage of relevant comments are from people who believe they should be in one of the treatment units that have been established."); Opinion and Order at 21-22, Peoples et al. v. Annucci et al., No. 1:11 Civ. 2694 (S.D.N.Y. Apr. 14, 2016) ("57 objections [were raised] – on a conservative calculation, this accounted for 1.54 percent of the current number of class members in SHU and 0.11 percent of the more than 50,000 individuals in DOCCS custody.").

settlement only addresses disciplinary but not administrative segregation. In addition, the objections foreshadow concerns about departments' failure to comply with the terms of settlement agreements. The courts' only response to these valid concerns is to state their expectation that plaintiffs' counsel will monitor compliance and bring any failures to the court's attention. Some plaintiffs' objections, while outside of the scope of the issues covered by the litigation, illustrate the reasons for concern about non-compliance. People objecting to the *Peoples v. Annucci* settlement, for example, raised various issues that suggested an environment of fear, distrust, and inhumane conditions within solitary confinement units. This can be seen through requests for additional cameras, greater protection from physical and sexual abuse, improved food quality and portions, warmer clothing and cells, improved mental health diagnoses and treatment, and requiring date and time stamps to record receipt of incoming mail to incarcerated people.[17] The courts cannot remedy these systemic and serious concerns within the limited confines of deciding whether to approve a settlement agreement. Rather, these issues must be addressed either in separate litigation or in another forum such as by legislation or an independent ombuds office. Nevertheless, the objections raise genuine concerns about the extent to which compliance with a settlement agreement is realistic and whether conditions will in fact improve for the plaintiff class.

Despite the problems associated with using litigation to achieve reform, bringing these cases can increase public awareness of prison practices and eventually contribute to impetus for wider reform. As demonstrated by the historical experiments with solitary confinement, it was only when public opinion began to shift away from supporting the practice that it came to an end. Many states that have implemented legislative or administrative reforms have only done so after being involved in protracted litigation.[18]

Professor Malcolm Feeley has described litigation as "probably the most important source of change in prisons and jails during the past forty years."[19] His 2004 article, which is not specific to solitary confinement, describes judicial intervention in prison conditions cases as a "distinct

[17] *See supra* section 5.3.4.
[18] *See infra* section 5.4.1.
[19] Malcolm F. Feeley & Van Swearingen, *The Prison Conditions Cases and the Bureaucratization of American Corrections: Influences, Impacts, and Implications*, 24 PACE L. REV. 433, 442 (2004).

and singular success," despite the limitations of litigation.[20] One of the reasons for this success, it is suggested, is that judges presiding over litigation have "abandoned their traditional role as 'interpreters' of preexisting norms and explicitly embraced a policy-making role."[21] This approach can be seen in some solitary confinement litigation, where courts and special masters have, to varying degrees, overseen detailed implementation plans and compliance issues.

Professor Feeley observed that judicial decrees in prison conditions cases had "not been uniformly effective," noting that problems re-emerged when courts terminate jurisdiction or focus on other problems, and prison officials have responded to litigation with "symbolic rather than real responses."[22] These issues have featured in solitary confinement litigation, as can be seen from the settlements reached in cases such as *Ashker v. Governor*, where extensions to settlement agreements and further hearings on issues of non-compliance have continued since the settlement agreement was reached in 2015.

Professor Feeley's article praises the "bureaucratization of American corrections," though he describes the bureaucracy resulting from litigation as a "double-edged sword."[23] In his opinion, the reforms that flowed from litigation have improved protections and services for incarcerated people while also increasing the "efficiency and effectiveness of prison administrators."[24] For solitary confinement litigation, the latter might be true, but it is far from clear that improved protections or services have resulted. Increasing bureaucracy and court approval of prison conditions may be "a mixed blessing" because "bureaucratic form can easily be mistaken for substance."[25] By lending legitimacy to the practices of departments of corrections, courts may have simply made it harder to challenge the underlying violations that gave rise to the litigation in the first place. As shown by the settlements and consent decrees discussed in chapter 5, litigation has not achieved significant improvements for many people in solitary confinement.

In any event, litigation is nevertheless valuable in terms of keeping courts involved in the oversight of prison conditions. Courts are reluctant to become involved in the day-to-day

[20] *Id.* at 435.
[21] *Id.* at 434-35.
[22] *Id.* at 434.
[23] *Id.* at 466.
[24] *Id.*
[25] *Id.* at 474-75.

management of prisons, but solitary confinement litigation necessarily requires more detailed examinations of policy and administrative decisions.

6.1.3 Administrative Measures

At first glance, successful administrative reforms, such as those implemented in Colorado and Maine, appear to be the most efficient and effective way to reduce solitary confinement. However, closer examination suggests that most administrative reforms are not as successful as those introduced in Colorado or Maine.

As is the case with legislative reform, administrative changes do not tend to arise solely on the initiative of state or prison officials acting in the best interests of incarcerated people. Rather, they often result from litigation, the threat of litigation, or investigations into problematic practices. In this regard, it is too simplistic to describe the administrative reforms of states like Colorado or Maine as "quick fixes" that led to swift improvements without the need for legislative or judicial intervention. Of course, it is preferable that states decide to act proactively rather than engaging in protracted litigation. By doing so, these states have implemented some meaningful changes that improved conditions for more incarcerated people than would otherwise have been the case.

Colorado and Maine are unusual in that their administrative reforms resulted in substantial reductions in the use of solitary confinement across the board. Caution is required, however, when determining the weight to attribute to Maine's reforms, given the small size of the state's solitary confinement population even prior to the implementation of its reforms. In Colorado, though the reforms have undoubtedly been successful, they were the result of a years-long project, and it is of some concern that even since their implementation, the state is now reopening the supermax prison and that officials have acknowledged that it will be difficult to retrofit this facility.[26]

In other states that have implemented administrative reforms, their success has been more mixed. It is difficult to test states' claims of success due to variations in terminology, conflicting reports, and unreliable data. Unless other oversight functions exist (such as the Corrections Ombuds now

[26] *See supra* section 5.4.1.

established in Washington), states' claims that they have reduced solitary confinement will likely only be challenged in litigation.

Administrative reforms are typically incremental and require long-term commitment. In the states that have attempted administrative reform, many have worked with external institutes such as the Vera Institute more than once over a period of several years.

As is the case with legislative reform and most litigation, most administrative reforms have not taken into account the racial disparities inherent in the use of solitary confinement. Even where the Vera Institute has recommended measures to address systemic racism, no changes have yet been made. The primary focus of administrative reforms to date has rather been on protecting or removing people with serious mental illness from solitary confinement.

While there are only a few examples of successful administrative reform, one promising aspect of this approach comes from the fact that there is willingness at the executive level of departments of corrections to implement changes. However, one of the difficulties in implementation is the need for support from prison officers and their unions. The Executive Director of Colorado's Department of Corrections has indicated that no such issues arose in the implementation of their reforms, though only brief remarks were made on this topic.[27] While some unions and corrections officers may oppose reforms in whatever format in which they are proposed, the difficulty with administrative-level reforms is that departments may have less leverage to force corrections officers to implement changes that are not mandated by a court or a legislature.

6.2 Thematic Issues

This section analyzes thematic issues common to all types of solitary confinement reform, some of which require further examination if future reform efforts are to succeed.

[27] *See, e.g.,* ASS'N OF STATE CORRECTIONAL ADMINISTRATORS & THE LIMAN CENTER FOR PUBLIC INTEREST AT YALE LAW SCHOOL, WORKING TO LIMIT RESTRICTIVE HOUSING: EFFORTS IN FOUR JURISDICTIONS TO MAKE CHANGES 4 (2018) ("Culture was never an issue with us. Of course our staff was used to using segregation on a regular if not overused basis. It's not a question of culture. It's a question of leadership."). *See* discussion *infra* section 6.2.9.

6.2.1 Terminology

Different definitions apply to solitary confinement, restrictive housing, administrative segregation, disciplinary segregation, and other terminology.[28] The variations differ in each jurisdiction, and sometimes within the same jurisdiction. While the occasional reference can be found to indicate that "different terminology does not exempt a practice from being solitary confinement,"[29] it is more often the case that solitary confinement (or equivalent terminology) is defined very specifically. Consequently, states and prisons may be able to make relatively minor changes to their practices and declare significant reductions in the use of solitary confinement.

For example, if the statutory definition of solitary confinement means confinement in a cell for twenty-two hours or more per day, as is the case in Massachusetts, and in bills introduced in Nebraska and Nevada, then merely allowing people to spend three hours per day out of their cells would mean that those states could continue to hold people in isolated conditions for the majority of the day but still record reductions in the use of solitary confinement. In contrast, allowing people only three hours per day outside of their cells would constitute isolated confinement in New Jersey, where the statute defines the term to mean approximately twenty hours per day in a cell.[30]

A related issue is the use of alternative terminology to describe solitary confinement-like conditions without actually categorizing them as such. The Virginia Department of Corrections' use of "intensive management," where people are ostensibly regarded as part of the general prison population despite being held in complete isolation with severe restrictions on their movement and activity, is one such example.[31] While these types of interpretations enable states

[28] *Compare* MASS. GEN. LAWS ANN. ch. 127, § 1 (definition of restrictive housing means confinement to a cell for more than 22 hours per day) *and* NEB. REV. STAT. ANN. § 83-170(13) (defining restrictive housing as out-of-cell time of less than 24 hours per week) *and* N.J. STAT. ANN. § 30:4-82.7 (isolated confinement means approximately 20 hours or more per day in a cell) *and* 2021 N.Y. Sess. Laws (2277-A) (McKinney), § 1 (defining segregated confinement as any form of cell confinement for more than 17 hours a day) *and* S.B. 1617, 54th Leg., 2nd Reg. Sess., § 31-602(E)(6) (Ariz. 2020) (defining isolated confinement as approximately 17 hours or more per day with severely restricted activity) *and* H.B. 714, 155th Gen. Assemb., Reg. Sess., § 42-5-58(a)(4) (Ga. 2019) (defining restrictive housing as being locked in a cell for more than 21 hours during a 24 hour period).
[29] *See, e.g.,* WASH. REV. CODE ANN. § 13.22.010(9) (West 2020).
[30] *See supra* section 5.1.1.3.
[31] See *supra* sections 2.2.1 and 2.5.1.2.4.

to produce promising reports about their reduced use of solitary confinement, in practice, they are not reforms.

It is also notable, particularly in light of the coronavirus pandemic, that many definitions of solitary confinement and related terminology explicitly exclude lockdowns.[32] While most definitions predated the pandemic, the exclusion of lockdowns is problematic. Although many lockdowns are intended to be of short duration, for the purposes of quelling a potential disturbance or riot, not all have been short. The lockdown of the Marion Penitentiary, for example, lasted for twenty-three years, and lockdowns imposed to manage the coronavirus have lasted for many months.[33] In any event, it would indeed be unfortunate if future legislative and administrative reforms did not take the lessons of the pandemic into account by failing to regulate lockdowns more closely.

Variation in definitions can also be seen in other important terminology, particularly in the identification of vulnerable groups. No specific policy reasons have been found for the differences in identifying these categories of people. With the exception of New Jersey, New York, and Washington, most existing legislation defines young people as those under eighteen, or eighteen and under.[34] However, some more recent bills extend the definition of young people to those twenty-one or younger, or twenty-five or younger.[35] In similar vein, with the exception of New Jersey, existing legislation providing protection for pregnant people does not extend to people who terminate a pregnancy or who have a miscarriage, whereas some more recent bills do include such provisions.[36] Definitions of "serious mental illness" also vary as to whether or not they include developmental disabilities and functional impairments; and existing legislation affords less protection to people with physical disabilities than the proposed protections contained in recent bills.[37]

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[32] *See, e.g.,* D.C. CODE ANN. § 24-911(3); N.J. STAT. ANN. § 30:4-82-7; 2021 N.Y. Sess. Laws (2277-A) (McKinney), § 1; S.B. 1617, 54th Leg., 2nd Reg. Sess., § 31-602(E)(6) (Ariz. 2020); H.B. 714, 155th Gen. Assemb., Reg. Sess., §§ 42-5-58(a)(6)(A) and 42-5-58(h) (Ga. 2019). *But see* S.B. 1301, Special Sess. I, § 1 (Va. 2021) (requiring written reasons to explain the necessity for any lockdown that exceeds twenty-four hours).
[33] *See supra* section 2.1.
[34] *See supra* section 5.1.2.1.
[35] *See supra* section 5.2.2.1.
[36] *See supra* sections 5.1.1.3, 5.1.2.2, and 5.2.2.3.
[37] *See supra* sections 5.1.2.3, 5.2.2.5 and 5.2.2.6.

The development of definitions, particularly in legislation and bills, demonstrates that reform of solitary confinement must be viewed as an ongoing project that reflects developing information about the harm that the practice causes to vulnerable groups.[38]

6.2.2 Conditions

Few reform measures make significant changes to improve conditions. Most existing legislation merely guarantees people the same access to basic amenities and services provided to the general prison population (such as food, medication, and disability accommodations).[39] Some statutes require that time out-of-cell be maximized but do not specify time allowances. As a result, out-of-cell time is likely to be determined based on prior practice, the availability of prison staff, and resource or space constraints. In some cases, even these basic rights are subject to a proviso that allows staff to withhold services for unspecified security reasons, or they are not guaranteed for all solitary confinement populations. For example, in some states, the basic conditions only apply to people in disciplinary segregation and not administrative segregation. Only New York's new legislation mandates at least six hours' out-of-cell time per day for people in residential rehabilitation units and four hours for people in segregated confinement. The law also requires that people in residential rehabilitation units be allowed all their personal property unless specific items are deemed to pose an unreasonable risk to safety or security.[40]

A limited number of bills address conditions in solitary confinement, and few indicate that conditions will improve markedly.[41] Once again, some bills merely direct that people in solitary confinement must receive the same services as people in the general population; others offer even less, directing, for example, that food, water, and medical care may not be denied, or that cells must be clean, temperature-controlled, and equipped with properly functioning sanitary fixtures. Only one bill requires that people in solitary confinement be allowed at least two hours out-of-cell time each day. The remainder either make no reference to out-of-cell time or simply stipulate that such time must be offered, without specifying how long that period should be. A bill passed by the Senate (but not the House) in Virginia in February 2021 initially proposed that

[38] *See infra* section 6.2.7.
[39] *See supra* sections 5.1.1 and 5.1.2.4.
[40] *See supra* section 5.1.1.4.
[41] *See supra* section 5.2.3.

people placed in solitary confinement be offered at least three hours of activities intended to promote personal development, but that provision was deleted from the final version of the bill after discussions with the Virginia Department of Corrections.[42]

Some of the settlements and consent decrees contain more explicit requirements about conditions in solitary confinement, including provisions to allow people to spend time outside of their cells and to interact with others.[43] However, as shown by subsequent litigation alleging non-compliance with settlement agreements, and by objections submitted by members of plaintiffs' classes to proposed settlements, the plaintiff classes did not always receive these minimal allocations.

Other provisions in settlement agreements relating to conditions, like those in legislation and bills, guarantee only basic amenities and services, such as shower curtains, and allowing people to clean their cells, have showers three times per week, and to receive food of the same quality and quantity as that offered to the general population. In addition, the impact of provisions targeted toward people with psychological impairments is limited to minimal therapy and written tasks.[44]

Though it is more difficult to assess the conditions that result from administrative reforms, it appears that in many cases, they too, are limited. Colorado's Department of Corrections introduced restraint tables to facilitate social interaction between people outside of their cells, and in Washington, various programs were reportedly developed to "increase congregate activity." North Carolina's therapeutic diversion units, meanwhile, offer alternative accommodation so people with mental illnesses receive ten hours per week out-of-cell for treatment and ten hours of unstructured time in a "more therapeutic environment." Presumably

[42] Noah Fleischman, *Former Norfolk Inmate Spent 16 Months in Solitary Confinement. A New Senate Bill Aims to Prohibit It*, VIRGINIAN PILOT (Feb. 3, 2021), https://www.pilotonline.com/government/virginia/vp-nw-solitary-confinement-bill-virginia-senate-20210204-p2j3jko25bewlayej4fft3dyn4-story.html.

[43] *See supra* sections 5.3.1.1 (Presley settlement required the Mississippi Department of Corrections to arrange program space and staffing for day room use, a dining hall, and educational and other rehabilitation services and recreational activities); 5.3.3 (Ashker settlement required the California Department of Corrections and Rehabilitation to increase opportunities for positive social interaction including education, yard and out-of-cell time in small groups, access to religious services, job assignments, and leisure activity groups); and 5.3.5 (Gumm settlement required the Georgia Department of Corrections to provide four hours of out-of-cell time per day, three hours of which would be spent at a restraint table, and one hour in an exercise cage).

[44] *See supra* sections 5.3.2.2 and 5.3.4 (referring to the IPAS and Peoples v. Annucci settlements).

the people confined in these units must still spend the remaining 148 hours each week in their cells.

While some of the proposed reforms may address minor issues that contribute to the risk of physical harm associated with solitary confinement (such as requiring the provision of meals that are of the same quality and quantity as those provided to the general population), this risk is not adequately addressed by most reforms. For example, allowing increased out-of-cell time does not guarantee that people will be able to spend that time outside, where they may be exposed to sunlight that might counteract the risk of vitamin D deficiency. Nor do any of the reforms allow for exercise in areas larger than a cell or exercise cage or mandate the provision of equipment so that exercise can act as a meaningful preventive measure to address risks to physical health.

Given that so few states have, to date, imposed a maximum time-limit on the period that people can be held in solitary confinement, it is troubling that so few reform efforts require any substantial improvements to conditions. Such changes could ameliorate the harm caused by sensory deprivation and social isolation as well as risks to physical health. Unless states and prisons allocate the necessary resources to improve conditions, people in solitary confinement will continue to be exposed to these risks of harm.

6.2.3 Data Collection and Reporting

Existing and proposed legislation and regulations, as well as litigation settlements and consent decrees, impose a range of data collection and reporting obligations on prisons and states. Given the issues with defining solitary confinement and subpopulations held in solitary confinement, there may be reasons to be skeptical about the reliability of some data. In addition, there are differences in the ways that jurisdictions count the length of time a person spends in solitary confinement. For example, Virginia counts each placement in solitary confinement separately even if the person is held continuously in solitary confinement.[45] Such an approach undermines genuine efforts to achieve reform, because it suggests that people are being held in restrictive conditions for shorter periods than is actually the case. Though the bill has not made any progress since its introduction, the federal proposal to establish a National Solitary Confinement

[45] *See supra* section 2.5.1.2.4.

Study and Reform Commission and to standardize definitions used for data about solitary confinement, would, if enacted, address some existing problems with data collection and reporting.[46]

Some jurisdictions have reportedly been collecting data about people in solitary confinement for some time. According to the 2020 CLA-Liman Report, Minnesota began tracking the length of time that people were held in restrictive housing in 1950, Connecticut in 1970, North Carolina in 1974, and Colorado in 1985.[47] While some of these states have made significant progress toward reducing the use of solitary confinement, others have not. In contrast, Nebraska and Maine only began collecting information more recently (from 2016 or later), yet both jurisdictions have made more significant progress toward reform. It is not clear what other data have been collected, or how reliable they are. Of course, it is too simplistic to assume that data collection is only valuable if it results in legislative or administrative reform and indeed, in jurisdictions where there is little political support for reform, the availability of data may be more valuable than in states with greater political support for reform, because it might contribute to public pressure or support litigation efforts.

It is not always clear, however, what prisons and states do with the data that are collected. For example, as discussed further below, the data consistently show that solitary confinement is used disproportionately on Black, Latino, and Native American people, yet no reforms to date reflect any attempt to address these disparities.

Data are provided to external sources for various reasons. In the context of litigation settlements and consent decrees, they enable plaintiffs' counsel to track placements in solitary confinement and to question the bases for assigning or retaining people in such conditions. Data provided to legislative bodies may fulfil different purposes. These include the provision of information for budgets, infrastructure, or possibly to address potential exposure to litigation; as well as to make progress toward reform. The latter is most evident from statutes and bills that explicitly require

[46] H.R. 4488, 116th Cong., 1st Sess., § 2(5) (2019).
[47] CORRECTIONAL LEADERS ASS'N & THE ARTHUR LIMAN CENTER FOR PUBLIC INTEREST AT YALE LAW SCHOOL, TIME-IN-CELL 2019: A SNAPSHOT OF RESTRICTIVE HOUSING 14-15 (2020).

that reports include information about steps being taken to reduce the use of solitary confinement.[48]

6.2.4 Oversight

Existing reforms largely leave the oversight of solitary confinement to internal and external reporting obligations. A number of bills propose new oversight functions, particularly through the creation of corrections ombuds offices or oversight committees. Though in some cases it is too early to assess whether such functions will be effective in overseeing solitary confinement and their influence on reforms, they certainly offer potential for greater scrutiny of the practice. These oversight functions may be particularly important in jurisdictions that do not implement comprehensive reforms. For example, the first annual report of the Washington Corrections Ombuds contained several recommendations for the state to implement to address the use of solitary confinement. The report's overall assessment of the Department of Corrections and its ability to implement reforms was direct in its critique of the impediments created by the Department's "sclerotic" policy office.[49]

The effectiveness of ombuds offices or equivalent inspectorate roles depends on their independence, scope of authority, resources, and bipartisan support for their functions. The value of these roles derives not only from their perceived independence but also the public pressure that can result from investigative findings.[50] While granting additional functions to ombuds offices may provide additional oversight, such as the proposal in a New York bill to require their approval of superintendent appointments, including the ombudsman in this process may undermine their perceived independence. For example, if the ombuds office were to approve the appointment of a particular superintendent and later decline to investigate practices at the prison where that superintendent worked, the ombuds' impartiality would be called into question. There is also a question of the sufficiency of resources, that is, whether it is preferable

[48] *See, e.g.,* MD. CODE ANN., CORR. SERVS. § 9-614; H.R. 8155, 116th Cong., 2nd Sess., § 3 (2020); S.C.R. 161, 30th Leg., Reg. Sess. (Haw. 2020).
[49] *See supra* section 5.4.4.
[50] *See, e.g.,* Howard Gadlin, *The Ombudsman: What's In a Name*, 16 NEGOT. J. 37, 40 (2000); M. Brophy, *The Ombudsman as a Means of Dispute Resolution*, Address to the International Bar Association, Canada (1998).

for resources to be dedicated solely to investigating prison conditions and practices rather than being used to vet candidates for employment.

Of the various jurisdictions that have established or propose to establish these oversight functions, it is important that they remain separate from, and are not regarded as, administrative remedies that must be exhausted in accordance with the PLRA before an incarcerated person can bring a federal lawsuit. New Jersey's statute states that the submission of complaints to the corrections ombudsman shall not be deemed to constitute part of the administrative exhaustion process.[51] Bills introduced in Mississippi and Congress contain similar provisions.[52] Absent this clarification, additional oversight functions may simply present a further impediment to incarcerated people seeking to challenge conditions of confinement by delaying their ability to commence litigation until their complaint is investigated by the independent office.

Some of the other oversight functions proposed but not implemented are worthy of further consideration. The proposal in Pennsylvania to establish a review board to convene "solitary confinement misconduct hearings" for the purpose of investigating wrongful placements in solitary confinement would offer an additional check on the practice.[53] The hearing board's composition, comprising a psychologist or psychiatrist, mental health professional with a counseling background, and a licensed social worker, suggests that its focus will be the misuse of solitary confinement for people with mental illness. One promising aspect of the proposed composition of this board is that it does not include any corrections officials, nor is the board required to consider issues such as the safety and security of the institution, or punitive justifications for solitary confinement. The only relief available, if the board were to find there had been a wrongful placement, is an order directing the person's release to the general population. Ideally, the provision would also require a review of the decisions that led to the wrongful placement and an investigation into the steps that need to be implemented to avoid recurrence. While the current proposal, if enacted, would at least offer immediate relief for individuals, its impact on systemic change appears more limited.

[51] N.J. STAT. ANN. § 52:27EE-28.1(n).
[52] S.B. 256, 135th Leg., Reg. Sess., § 8(n) (Miss. 2020); S. 719, 116th Cong., 1st Sess., § 2(e)(10) (2019).
[53] *See supra* section 5.2.5.

Aside from settlements and consent decrees, the courts do not play any role in the oversight of reforms. One bill introduced in Hawaii would change this by requiring juvenile detention facilities to notify the senior family court judge and the presiding judge who ordered the child's placement at the facility of any child placed in room confinement and the reasons for the placement.[54] This approach could be valuable in terms of increasing judicial awareness of the use of solitary confinement in facilities. In jurisdictions where solitary confinement is used frequently, if judges were notified of each such placement, these notifications could lead them to consider more carefully the justifications for incarcerating people (especially young people) in the first place.

Various bills propose, and existing statutes have already established, commissions and work groups to examine solitary confinement. In some cases, these commissions and groups have contributed to further reforms, including in Colorado, Maine, Montana, and Nebraska. In other states, the call for studies and commissions may offer a preliminary step toward reform. In North Carolina, for example, a 2019 bill proposed a study by the Department of Public Safety into the use of solitary confinement of people with mental illness, and to report its findings to the legislature.[55] An earlier version of that bill proposed a prohibition on placing people with serious mental illness in solitary confinement except in exigent circumstances. The latter version of the bill was not enacted, which indicates a lack of political support for even minimal investigation into the state's use of solitary confinement let alone the imposition of restrictions on the practice.

There is a risk that by establishing various commissions and work groups – or indeed collecting data without clear plans for how those data will be used – states can appear to be taking steps toward reform without intending to do so. For example, legislation was passed in Texas in 2013 to appoint a third party to make recommendations to reduce the use of administrative segregation, and a commission was established to review solitary confinement in Rhode Island in 2016.[56] Neither of these measures resulted in those states implementing changes based on those reviews.

[54] H.B. 1788, 30th Leg., Reg. Sess., § 1(d)(4) (Haw. 2020).
[55] H.B. 781, Gen. Assemb., Reg. Sess., § 1 (N.C. 2019).
[56] 2013 Tex. Sess. Law Serv. Ch. 1184; H.R. 5, 148th Gen. Assemb. (Del. 2015).

A federal bill proposes the establishment of a National Solitary Confinement Study and Reform Commission.[57] The Commission would conduct a comprehensive study of the

> "penological, physical, mental, medical, social, fiscal, and economic impacts of solitary confinement … on federal, state and local governments; and communities and social institutions generally, including individuals, families, and businesses within such communities and social institutions."

Some of this work has already been carried out: for example, one topic the Commission would address is "the general relationship between solitary confinement and mental illness." However, there would be value in having a national commission conduct an overarching review for the purpose of making findings and recommendations to reduce solitary confinement so it is used "only under extreme emergency standards."[58] The purpose of the Commission's work is to develop national standards that would then be adopted by the Attorney-General.[59] By connecting compliance with the national standards to the receipt of federal funding, state and local governments would be incentivized to comply. If it were enacted, the proposal would therefore offer real potential to effect reform. The extent of the reform would of course depend on the scope of the final standards. It bears mentioning that the bill currently states that the Commission shall not propose standards that would impose "substantial additional costs compared to the costs presently expended by correctional facilities, and shall seek to propose standards that reduce the costs of incarceration at such facilities."[60] Though it has been acknowledged that reducing solitary confinement can result in cost-savings for states and prisons, it is expected that upfront expenditure would be required to repurpose solitary confinement units and create alternative housing. It is not clear from the bill whether or to what extent the Commission could weigh future cost-savings against immediate expenditure in order to require implementation of measures to reduce solitary confinement.

[57] H.R. 4488, 116th Cong., 1st Sess., § 3 (2019).
[58] H.R. 4488, 116th Cong., 1st Sess., § 3(e)(2)(A) (2019).
[59] *See supra* section 5.2.5.
[60] H.R. 4488, 116th Cong., 1st Sess., § 3(e)(3) (2019).

6.2.5 Less Restrictive Alternatives

Various statutes, bills, administrative reforms, and litigation settlements require less restrictive alternatives be attempted.[61] Most statutes and bills do not specify what constitutes a "less restrictive alternative," though indications can be found in some statutes and from prisons' practices. For example, New Jersey's statute calls for the promulgation of regulations to establish less restrictive alternatives that include separating the person from others, transfer to another facility, any non-isolated confinement sanction, or restrictions on privileges.[62]

Some so-called reforms merely allow the continuation of solitary confinement in different facilities. The *Ashker* settlement in California imposed a five-year maximum period for placement in the Pelican Bay SHU, but it nevertheless allowed for people to be transferred to other state SHUs at the end of this period.[63] Other reforms would increase alternative punitive measures in place of solitary confinement. Some such measures, however, are not dissimilar to solitary confinement. For example, the keeplock cells used in New York state, whereby people are confined to their own cells instead of being placed in a solitary confinement unit, still involve restricted movement and isolation, although greater time out-of-cell is allowed.

In some jurisdictions, "less restrictive alternatives" have encompassed more, however, than merely the use of different punitive methods in place of solitary confinement. To facilitate groups and social interaction between people held in solitary cells, some prisons physically restrain people. In his written testimony to the Senate Subcommittee on the Constitution, Civil Rights, and Human Rights in 2012, the then-Commissioner of Mississippi's Department of Corrections, Christopher Epps, described the process for providing group counseling to people held in solitary confinement units. Such groups, Commissioner Epps testified, were conducted

[61] NEB. REV. STAT. ANN. § 83-4, 134.01(2) (West 2020); N.J. STAT. ANN. § 30:4-82.11; CAL. WELF. & INST. CODE § 208.3(b)(1); D.C. CODE ANN. § 24-912(b)(2)(A); IDAHO ADMIN. CODE r. 05.02.02.222.01(c); NEV. REV. STAT. ANN. § 62B.215(1); OKLA. ADMIN. CODE § 377:3-13-144(I)(1)(A); WASH. REV. CODE ANN. § 13.22.030(1)(a); 18 U.S.C. § 5043(b)(2)(A); FLA. STAT. ANN. § 944.214(4)(b) (West 2020); MD. CODE ANN. CORR. SERVS. § 9-601.1(c)(2) and (3) (West 2019); H.B. 2691, 54th Leg., 2nd Reg. Sess. (Ariz. 2020); S.B. 1617, 54th Leg., 2nd Reg. Sess. (Ariz. 2020); H.R. 8155, 116th Cong., 2nd Sess., § 2(a) (2020); H.B. 497 and S.B. 832, 203rd Gen. Assemb., Reg. Sess., § 5102(a)(1) (Pa. 2019); H.B. 714, 155th Gen. Assemb., Reg. Sess., § 42-5-58(h) (Ga. 2019); S.B. 2520, 30th Leg., § 2(e) (Haw. 2020); S.B. 1301, Special Sess. I, § 1 (Va. 2021); Consent Decree at 4, Presley et al. v. Epps et al., No. 4:05 Civ. 148 (N.D. Miss. Feb. 15, 2006).
[62] N.J. STAT. ANN. § 30:4-82.11.
[63] *See supra* section 5.3.3.

"outside the cells by using an innovative method of attaching leg restraints to a floor restraint. This provided the necessary security to allow face-to-face interaction between offenders."[64] One component of the Settlement Agreement reached in *Peoples v. Annucci* in New York involved groups that would be conducted with people confined in restraint chairs.[65] New York's HALT Act will prohibit the use of restraints on people in residential rehabilitation units, but that prohibition does not apply to people in segregated confinement.[66] Colorado and Virginia have also used restraint tables and chairs to enable people otherwise held in solitary confinement to socialize with others.[67] In its 2016 report, the Department of Justice indicated that the FBOP intended to purchase 610 "secure programming chairs," so that people in restrictive housing could "receive in-person educational and mental health programming in a less restrictive manner than currently used."[68]

While the use of restraints might facilitate opportunities for greater social interaction, thus ameliorating the harm caused by social isolation and lack of environmental stimulation, it is questionable whether the act of physically restraining people for hours at a time can truly be regarded as a less restrictive alternative. There is a risk in this approach that prisons are merely swapping one form of control for another, particularly where the replacement method carries its own potential to cause harm. The Vera Institute has recommended to states seeking to reduce solitary confinement that the use of restraints be kept to a minimum.[69] Moreover, while standards govern the use of restraints in clinical settings, such standards have not been uniformly adopted for their use in the correctional context. The Code of Federal Regulations allows for restraints to be used on people in administrative or disciplinary segregation with the warden's approval.[70] When the warden determines that four-point restraints are necessary, certain

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[64] *Reassessing Solitary Confinement: The Human Rights, Fiscal, and Public Safety Consequences: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Human Rights of the S. Comm. on the Judiciary*, 112th Cong. (2012) (written statement of Christopher Epps, Mississippi Department of Corrections).
[65] Settlement Agreement at 19-20, Peoples et al. v. Annucci et al., No. 1:11 Civ. 2694 (S.D.N.Y. Dec. 16, 2015); *see supra* section 5.3.4.
[66] *See supra* section 5.1.1.4.
[67] *See supra* section 5.4.1; VERA INST. OF JUST., FINDINGS AND RECOMMENDATIONS FOR THE NORTH CAROLINA DEP'T OF PUBLIC SAFETY 47 (2016).
[68] U.S. DEP'T OF JUST., REPORT AND RECOMMENDATIONS CONCERNING THE USE OF RESTRICTIVE HOUSING 116 (2016).
[69] *See, e.g.,* VERA INST. OF JUST., FINDINGS AND RECOMMENDATIONS FOR THE NORTH CAROLINA DEP'T OF PUBLIC SAFETY 47 (2016).
[70] 28 C.F.R. § 552.22(g).

procedures must be followed: soft restraints must be used where possible, the person must be dressed in appropriate clothing, staff must check the person at least every fifteen minutes and periodically rotate them if they are restrained to a bed, and a review must be conducted every two hours to determine whether the person can be released.[71] The American Bar Association's Criminal Justice Standards recommend that restraint mechanisms, including handcuffs and restraint chairs, should not be used as a form of punishment or retaliation. They also suggest that the least restrictive forms of restraint should be used, for the shortest time necessary.[72]

There are physical risks associated with the use of restraints in non-health care settings where prison staff are not adequately equipped to ensure such measures are used safely.[73] For example, people whose movement is restricted by arm and leg restraints face an increased risk of falls.[74] In March 2021, officials in St. Francois County, Missouri, settled a wrongful death lawsuit with the family of a man who died in the county jail after being held in a restraint chair for twenty-four hours.[75] Prior to his arrest, the man had swallowed various drugs, but he was not evaluated by the jail's medical staff, nor was he given his prescription anti-seizure medication. According to another class action lawsuit filed against St. Francois County officials in December 2020, people confined in the jail's restraint chair – who were often experiencing mental health crises – were unable to use bathroom facilities, and were denied medical care, food, or water while restrained.[76] Similar lawsuits have been brought against jail officials in at least nine places since 2013, and The Marshall Project has reviewed lawsuits and press reports regarding the use of restraint chairs in county jails and concluded that such chairs have been linked to twenty jail deaths between 2014 and 2020.[77]

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[71] 28 C.F.R. § 552.24.
[72] AM. BAR ASS'N, CRIMINAL JUSTICE STANDARDS, standard 23.59, *available at* https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/crimjust_standards_treatmentprisoners/#23-5.9.
[73] Michael K. Champion, *Seclusion and Restraint in Corrections – A Time for Change*, 35 J. AM. ACAD. PSYCHIATRY & L. 426, 428 (2007).
[74] *See supra* section 2.2.
[75] Robert Patrick, *St. Francois County Officials Agree to Pay $1.8M to Settle Jail Death Lawsuit*, ST. LOUIS POST DISPATCH, (Mar. 10, 2021), https://www.stltoday.com/news/local/crime-and-courts/st-francois-county-officials-agree-to-pay-1-8m-to-settle-jail-death-lawsuit/article_fcd3c606-ad51-565c-bff6-f7b6794de2df.html.
[76] Complaint at 103, Hopple et al. v. St Francois County et al., No. 4:20 Civ. 1838 (E.D. Mo. Dec. 21, 2020).
[77] Maurice Chammah, *They Went to Jail. Then They Say They Were Strapped to a Chair for Days*, THE MARSHALL PROJECT, (Feb. 2, 2020), https://www.themarshallproject.org/2020/02/07/they-went-to-jail-then-they-say-they-were-strapped-to-a-chair-for-days ("Experts caution that after the imminent threat passes, using the chair can be dangerous, leading to deaths by overdose and blood clots resulting from extended periods in the same position.").

While restraints may have a place in facilitating temporary transitions of people from solitary confinement to environments with greater social interaction, such mechanisms are vulnerable to abuse. The blanket availability of physical restraints also cannot be justified on the grounds of safety or security in light of the fact that many people in solitary confinement do not present specific safety risks. Few of the reform measures implemented or proposed to date contain explicit standards governing the use of restraints.[78]

The risks associated with less restrictive alternatives require further exploration and consideration. Closer oversight will certainly be necessary if restraints are to become a long-term or entrenched practice in place of solitary confinement, as opposed to a short-term transition measure for individuals who pose specific safety concerns. Any broader use of restraints does not constitute the "non-reformist reform" envisioned by abolition scholars because these measures certainly do not increase the possibility of freedom.

6.2.6 Step Down Programs

While the objectives of step down programs might appear to be a promising step towards reducing solitary confinement, they can also be problematic. There is a risk that step down programs simply constitute solitary confinement by another name, and people assigned to such units are held there on a long-term basis with little or no opportunity to return to the general population. The experience in Virginia, as detailed in the lawsuit concerning the Red Onion and Wallens Ridge State Prisons, demonstrates that some people have been kept in permanent solitary confinement in step down programs with no meaningful opportunity to progress to less restrictive environments.[79]

Furthermore, closer scrutiny is required to assess the programs offered in step down programs to determine whether they offer genuine assistance and resocialization to incarcerated people. As evidenced by the experience of people who participated in the step down program at Pelican

[78] Some policies and settlements refer to the progressive reduction in the use of restraints. *See, e.g.,* Settlement Agreement at 25, Peoples et al. v. Annucci et al., No. 1:11 Civ. 2694 (S.D.N.Y. Dec. 16, 2015) (stating that SHU-Alternative Programs will each have operations manuals detailing, *inter alia,* the use of restraints, the goal of which will be to progressively reduce such use at each level "consistent with the need to operate the … program in a safe, secure manner, allowing the inmate fewer restraints and a greater simulation of the general population environment prior to release from the SHU-Alternative Program.").
[79] *See supra* section 2.5.1.2.4.

Bay, such programs may do little to prepare people to return to the general prison population.[80] Measures such as in-cell study packets and written assignments or group discussions facilitated by correctional officers where there is no rapport or trust between participants and officers may be unlikely to result in behavior change for people in the programs. Such measures may be particularly limited in their impact for people with limited literacy skills, cognitive difficulties, and mental or physical illnesses.[81] Participation in groups may also be challenging for people who have been held in solitary confinement for long periods because they may experience anxiety in new surroundings and find it difficult to interact with others.[82] In addition, given the ongoing problem of exercise time being canceled in solitary confinement units, concern arises as to whether increased out-of-cell time will actually be granted to people in step down programs.

6.2.7 Partial Reforms and Vulnerable Populations

Many reforms are partial in nature and focus primarily on vulnerable populations, particularly young people, pregnant people, and those with serious mental illnesses, as groups that should be granted special protection. The rationale for offering such protection is clearer for some groups than it is for others, but none are without problems. Where vulnerable groups are more likely to suffer harm, or greater harm, than the general population, the justification for offering special protections for these groups is clear. However, the variance in definitions means that many people with similar characteristics to members of vulnerable groups do not receive the same protection. For instance, in one jurisdiction, a twenty-year-old may be placed in solitary confinement while in another jurisdiction, he or she would qualify as a member of a vulnerable population.

Similar issues arise with respect to definitions of mental illness. There is a concern with respect to mental illness that only those people with existing "serious" diagnoses may receive protection,

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[80] *See supra* section 2.4.2.5.

[81] *See supra* section 5.3.4 (per the Peoples v. Annucci settlement in New York, alternate SHU programs were to provide "in-cell study packets" to address issues including behavior modification and substance abuse, with limited input in the form of a cell-side visit from an instructor once or twice per week). *See also* Jennifer Pishko, *The End of Solitary Confinement*, PACIFIC STANDARD, (Mar. 2, 2016) https://psmag.com/news/the-end-of-solitary-confinement (describing workbooks assigned to people in the step down program at Pelican Bay which asked people in solitary confinement to complete assignments such as: "explain how unhealthy family relationships may have contributed to your irresponsible, criminal behavior," and "describe a healthy family relationship.").

[82] *See supra* section 2.4 (describing the harm caused by solitary confinement and in particular the effects of "SHU Post Release Syndrome").

while people with diagnosed conditions who are not regarded as exhibiting sufficiently serious symptoms can still be placed in solitary confinement. Furthermore, the reform measures introduced to date do not address the wider group of people who may not be formally diagnosed with a serious mental illness but who may have a history of trauma or other characteristics that make them more vulnerable to the harm of solitary confinement. Under current reform measures, most of these people can still be placed in solitary confinement, where their condition may deteriorate and become serious. At this point, they might qualify for removal and return to the general population or to a specialized treatment unit to the extent such units exist, but harm may have already occurred. In addition, some prisons have undermined definitions by re-diagnosing people who were formerly classified as having a serious mental illness so that they could be returned to solitary confinement.[83]

The current and proposed reforms fail to address the significant need identified by healthcare professionals for increased mental health screening and treatment of all incarcerated people. While bans on placing people with serious mental illness in solitary confinement may protect some people from having their symptoms exacerbated, the reforms do not protect those who have not received a diagnosis. Moreover, the conditions in which mental health staff must provide treatment in solitary confinement units are inadequate.[84] They place healthcare practitioners in difficult ethical positions in terms of their obligations to ensure the welfare of their patients within environments where security interests take precedence. Furthermore, none of the reforms address issues of harm resulting from solitary confinement once people are released.

A further issue regarding vulnerable populations concerns LGBTI people. Some statutes and bills include LGBTI people in the definition of vulnerable populations. However, some definitions refer to people who are "perceived to be" LGBTI or even "perceived by facility staff" as LGBTI. These definitions could therefore exclude people who are LGBTI and include others who are not. Only some statutes allow people to request protective custody in solitary

[83] Amy Fettig, *How Do We Reach A National Tipping Point in the Campaign to Stop Solitary?* 115 NW. U. L. REV. 311, 332 (2020) ("[A]dvocates have found that prisoners who were previously diagnosed as seriously mentally ill in New York prisons were mysteriously and somewhat miraculously rediagnosed with a much less severe mental illness so that they could be placed in isolation.").
[84] *See supra* section 2.4.2.3.

confinement. The reasons for including LGBTI people in the vulnerable population require further examination. Such people are often placed in solitary confinement on the basis that it is necessary for their own safety, but they may also be overrepresented in solitary confinement due to victimization and targeted disciplinary infractions, for example, by expressing their gender identity in ways that do not conform with prison rules.[85] However, none of the reform measures consider other options to protect LGBTI people in the general population, and few address the issue of targeted disciplinary infractions.

Professor Margo Schlanger has examined the competing tensions between "maximalist" and "incrementalist" approaches to criminal justice reform.[86] In the context of solitary confinement, she writes, maximalists argue that modest reforms, such as those that only protect vulnerable groups, imply that solitary confinement is acceptable in certain circumstances, such as when it is "imposed on the right populations."[87] Furthermore, modest reforms use up the limited attention available to support advocacy efforts directed at helping the wider solitary confinement population. In contrast, incrementalists contend that modest approaches can lead prison officials to develop solutions to implement further reforms. Once the most vulnerable people are removed from solitary confinement, officials can direct their attention to the wider solitary confinement population. Incrementalists suggest that once solitary confinement units are sufficiently depopulated, the elevation in cost-per-person may become unsustainable politically.[88] This argument of course assumes that prisons will allow solitary confinement units to remain unfilled once vulnerable populations are removed from them, which may not be the case. Given the general embrace of solitary confinement in response to the coronavirus pandemic and the reopening of closed supermax facilities, it seems unlikely that prison officials would leave units empty unless reform legislation or policy was so restrictive that they were unable to move new people into them. Rather, once solitary confinement cells and units are available, they are likely to be used. As the chair of the Texas Senate's Criminal Justice Committee remarked in 2017,

[85] *See supra* section 2.5.2.
[86] Margo Schlanger, *supra* note 12.
[87] *Id.* at 276.
[88] *Id.* at 277.

> "I know part of the problem – they overbuilt the damn number of ad seg cells … The number for how many we need was just pulled out of the air. But when you build them you gotta use them."[89]

There is not a straightforward answer to the tensions Professor Schlanger identifies. While it is important to mitigate the heightened risk of harm to the more vulnerable people in solitary confinement, the prospect that reform efforts may end at that point is troubling. This can be seen, for example, from the fact that many jurisdictions have implemented measures to address the solitary confinement of young people, but few of those jurisdictions have done anything similar in relation to adults. Given that young people constitute a small proportion of the overall number of people held in solitary confinement, these partial reforms alone will not result in significant reductions in the use of solitary confinement.[90] Similarly, reforms targeted at pregnant women will have limited impact on the numbers of people in solitary confinement, as demonstrated by the data that show the majority of people in solitary confinement are men.[91] Other partial reforms not directed at vulnerable groups, such as Texas's elimination of disciplinary segregation, have also had limited impact because much larger numbers of people are still held in administrative segregation in that state.[92] Moreover, advocates in Texas expressed concern that people previously held in disciplinary segregation would simply be re-classified and placed in administrative segregation.[93]

The overarching issue remains that solitary confinement is harmful to everyone, and for reform to be truly successful, the practice must be reduced to the point that no-one is exposed to the risk of harm. From a broader abolition perspective, the same tensions between incrementalism and

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[89] Keri Blakinger, *Texas Prisons Eliminate Use of Solitary Confinement for Punitive Reasons*, HOUSTON CHRONICLE (Sep. 21, 2017), https://www.houstonchronicle.com/news/houston-texas/houston/article/Texas-prisons-eliminate-use-of-solitary-12219437.php.

[90] *See supra* 2.5.3 (CLA-Liman's 2020 report stated that four out of thirty-two states that provided disaggregated age data in 2019 held a total of eight people under the age of eighteen in restrictive housing, but note that the CLA-Liman reports do not address solitary confinement in juvenile detention facilities); and 5.4.6 (at the time that the Federal Government banned solitary confinement for people under the age of eighteen, only thirteen people had been held in solitary confinement during the preceding year).

[91] *See supra* 2.5.2 (Of the thirty-four responding jurisdictions that participated in CLA-Liman's 2020 report, a total of 30,473 males were held in restrictive housing compared to 542 females).

[92] Keri Blakinger, *supra* note 89 (reporting that approximately seventy-five people were held in disciplinary segregation at the time the state abolished that category, while nearly 4,000 people were held in administrative segregation).

[93] *Id.*

maximalism can be applied to solitary confinement reform as compared with the overall project of prison abolition.

6.2.8 Race and Ethnicity

The racial disparities in the use of solitary confinement are evident from available data, and no significant improvements in this area have resulted even in jurisdictions that have implemented reforms.[94] Little attention is paid to the issue of race in any reforms introduced to date. A bill introduced in Connecticut prohibits placement in solitary confinement on the basis of race, creed, color, national origin, nationality, or ancestry.[95] Other reforms require the collection of data that are disaggregated by (among other things) race. These limited measures will not address the systemic racism in the overuse of solitary confinement among Black, Latino and Native American people. It is unclear whether Vera's recommendation to North Carolina to establish a commission to study racial disparities in the use of solitary confinement has been implemented.[96]

Absent proper examination of racial disparities and development of protocols to address them, racial and ethnic disparities are likely to remain even if solitary confinement populations are reduced. In jurisdictions where the practice is eliminated entirely, there is no reason to expect that Black, Latino, and Native American people will not continue to be overrepresented in the receipt of disciplinary infractions and resulting sanctions used in place of solitary confinement, unless reforms address systemic racism in disciplinary infractions and classification decisions. The prevalence of racism in disciplinary and classification decisions is underexplored; while a small number of studies have examined racial disparities in solitary confinement, they do not consider the issue of race in the underlying infractions that led to placement in solitary confinement.[97] In 2016, the New York Times revealed that a review of 60,000 disciplinary cases in New York state prisons showed pronounced racial disparities. Following publication of that report, the Governor ordered the state's inspector general to investigate racial disparities in

[94] *See supra* section 2.5.4.
[95] S.B. 1059, Gen. Assemb., Reg. Sess., § 3(4) (Conn. 2021).
[96] *See supra* section 5.4.5.
[97] *See supra* section 2.5.4.4.

discipline in the state's prisons.[98] As of November 2020, that investigation remained open.[99] No public updates have been made regarding the status or progress of the investigation since it was announced in 2016.

Furthermore, to the extent that reforms offer protection for vulnerable populations such as people with serious mental illness or physical disabilities, the issue of racial and ethnic disparities must also be considered. A 2017 report by the Department of Justice, drawing on self-reported symptoms of "serious psychological distress," noted that more white people met the threshold for serious psychological distress than Black or Hispanic people in prisons and jails.[100] White people in prison were also more likely than Black people to have ever been told they had a mental disorder.[101] Therefore, white people may be more likely than Black, Latino, or Native American people to be eligible for protection from solitary confinement, or alternative therapeutic forms of housing, under new reform measures.

6.2.9 Training of Employees

Some statutes and bills require basic training related to solitary confinement for the staff working in those units.[102] The training requirements proposed by bills and recent statutes are slightly more extensive than earlier legislation in that they generally require staff receive training on matters including the identification of symptoms of mental illness and developmental disorders, methods of safely responding to people in distress, techniques to divert people from situations that would cause them to be placed in solitary confinement, restorative justice, trauma-informed care, and dispute resolution methods.

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[98] Michael Schwirtz et al., *Governor Cuomo Orders Investigation of Racial Bias in N.Y. State Prisons*, NEW YORK TIMES, (Dec. 5, 2016), https://www.nytimes.com/2016/12/05/nyregion/governor-cuomo-orders-investigation-of-racial-bias-in-ny-state-prisons.html.

[99] Email confirmation to a Freedom of Information Law Request, Nov. 27, 2020, on file.

[100] U.S. DEP'T OF JUST., BUREAU OF JUST. STATISTICS, INDICATORS OF MENTAL HEALTH PROBLEMS REPORTED BY PRISONERS AND JAIL INMATES, 2011-12, 1 (2017). *See also* U.S. DEP'T OF HEALTH & HUMAN SERVICES, MENTAL HEALTH: CULTURE, RACE AND ETHNICITY 32 (2001) (referring to research showing that Black people generally are subject to overdiagnosis of schizophrenia but underdiagnosed for bipolar disorder, depression, and possibly anxiety, and noting that these problems extend beyond Black people: "Widely held stereotypes of Asian Americans as "problem free may prompt clinicians to overlook their mental health problems.").

[101] U.S. DEP'T OF JUST., BUREAU OF JUST. STATISTICS, INDICATORS OF MENTAL HEALTH PROBLEMS REPORTED BY PRISONERS AND JAIL INMATES, 2011-12, 4 (2017).

[102] *See supra* sections 5.1.1.3 and 5.2.6.

Hawaii's bill proposes that staff receive training "to develop the skills necessary to protect the mental and physical health" of people in solitary confinement. While it is important that corrections officers receive such training, it is concerning that no reform measures – whether legislative or otherwise – require training of more senior officials who are responsible for decisions about resource allocation, staffing, and conditions in solitary confinement. Absent changes made by management and supervisory staff, it is questionable whether the training of correctional staff alone will be beneficial beyond improving some individual responses to people in immediate distress.

Moreover, as reported by both incarcerated people and researchers, there are significant cultural problems within solitary confinement units that mean that corrections officers do not treat mental health concerns with appropriate sensitivity or seriousness. The long-established view among correctional officers that people exhibiting symptoms of mental illness are malingering might not be overcome by intermittent training on the symptoms of mental illness. This leads to a broader concern that, unless states and prisons commit to providing the necessary financial resources to improve solitary confinement facilities, corrections officers working in these units will have limited impact on reform. This is particularly the case in many states where the basic conditions in solitary confinement are not improved by reforms.

6.2.10 Corrections Employees and Reform

People employed by departments of corrections experience stress and trauma from working in solitary confinement units. A counselor in Connecticut's New Haven Correctional Center described the frustration of trying to help people in solitary confinement, describing the practice as "heap[ing] trauma on top of trauma," and forcing her to devote her time to helping people in crisis rather than treating their underlying mental health problems.[103] Remarking that "nothing good comes out of solitary confinement," she now supports its abolition. A reform bill introduced in Connecticut seeks to address the risk of harm to departmental employees by extending workers' compensation benefits for mental health treatment.

[103] Emilia Otte, *Legislation and Lawsuit Take Aim at Solitary Confinement in Connecticut Prisons*, CT EXAMINER (Mar. 2, 2021), https://ctexaminer.com/2021/03/02/legislation-and-lawsuit-take-aim-at-solitary-confinement-in-connecticut-prisons/.

Despite the experiences of employees, some unions oppose reforms, typically citing safety concerns. Litigation settlements have been one target of unions' opposition. The New York State Correctional Officers and Police Benevolent Association ("NYSCOPBA") criticized the *Peoples v. Annucci* settlement agreement.[104] The president of NYSCOPBA asserted that the reforms resulting from that settlement created "dire circumstances and unhealthy environments for the rest of the inmate population, and more importantly, the staff."[105] The California Correctional Peace Officers Association ("CCPOA") similarly opposed the settlement agreement in *Ashker v. Governor*.[106] Having been denied leave to intervene in the litigation, the CCPOA criticized the CDCR for reaching the settlement "in glaring opposition" to the concerns of corrections officers. The CCPOA contended that the agreement would "further exacerbate gang activity and prison violence, … threaten[] the security of our institutions, and exponentially increase[] risks to the safety of both correctional officers and inmates."[107]

Unions have also opposed attempts at legislative reform. For example, the NYSCOPBA expressed opposition in 2019 to a reform bill.[108] Their position was based on the view that the bill failed to take account of an increase in prison violence after the state entered into the *Peoples v. Annucci* settlement. They also asserted that the bill would undermine the need for staff to "utilize effective disciplinary measures when necessary." More recently, the same union has criticized the HALT Act, asserting that the reduction of punitive segregation is "reckless" because it increases safety concerns for prison staff and incarcerated people.[109] This claim, however, stands in contrast to the legislative justification that accompanied the bill:

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[104] *See supra* section 5.3.4.
[105] *See, e.g.,* Brian Mann, *NY Corrections Officers Reject New Discipline Rules, Oppose Solitary Confinement Reform*, NORTH COUNTRY PUBLIC RADIO, (Apr. 3, 2017), https://www.northcountrypublicradio.org/news/story/33698/20170403/ny-corrections-officers-reject-new-discipline-rules-oppose-solitary-confinement-reform.
[106] CALIFORNIA CORRECTIONAL PEACE OFFICERS ASS'N, *CCPOA Denounces CDCR's Agreement to End Unlimited Use of Solitary Confinement* (Sep. 3, 2015), https://web.archive.org/web/20150919001029/https://www.ccpoa.org/wp-content/uploads/2015/09/Press-Release-CDCR-settlement-in-Ashker-vs-Brown.pdf.
[107] *Id.*
[108] New York State Correctional Officers and Police Benevolent Ass'n, *HALT Bill Information and Talking Points*, (June 14, 2019), https://www.nyscopba.org/wp-content/uploads/2019/06/190614_HALT-Bill-Info-and-Talking-Points.pdf; Michael Powers, *Another Voice: 'Special Housing Units' Protect Safety of Inmates*, BUFFALO NEWS, (Mar. 21, 2019) https://buffalonews.com/opinion/another-voice-special-housing-units-protect-safety-of-inmates/article_7a532489-1c9d-5253-8bd0-280d82699bd9.html.
[109] Troy Closson, *supra* note 10.

> "Despite claims that segregated confinement is used in response to the most violent behavior, five out of six disciplinary infractions that result in SHU time in New York prisons are for non-violent conduct."[110]

In similar vein, the Nebraska Fraternal Order of Police opposed a 2020 bill that proposed some limits on solitary confinement. They were joined in their opposition by the Director of the Department of Corrections, who claimed that the bill would compromise the safety of staff and prisons.[111]

Some national unions have supported limited solitary confinement reform.[112] In 2014, Lance Lowry, the President of Local 3807 of the American Federation of State, County, and Municipal Employees wrote an open letter on behalf of corrections officers in Texas to oppose changes to conditions of confinement on death row which resulted in the placement of more people in solitary confinement.[113] The letter stated that housing people in such conditions was "a waste of valuable security personnel and money." It called for the provision of privileges (such as television and tablets) to incentivize positive behavior, noting that "lack of visual or audio stimulation result[s] in increased psychological incidents and results in costly crisis management." That same year, Mr. Lowry submitted written testimony to the Senate Subcommittee's hearing on solitary confinement. He testified that the intended purpose of administrative segregation was to reduce violence, but no such reduction had resulted from its "greatly increased" use in Texas since the 1990s. Mr. Lowry expressed concern about releasing people in solitary confinement directly into the community when they had received "little or no treatment to correct the behavior which led to their incarceration in solitary conditions." He also suggested that the over-use of solitary confinement in Texas might be explained by a lack of trained and experienced staff. He believed that if this issue were addressed, staff could better

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[110] A.B. 2500, 242nd Leg., Reg. Sess., Justification (N.Y. 2019), *available at* https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A02500&term=2019&Summary=Y&Actions=Y&Committee%26nbspVotes=Y&Floor%26nbspVotes=Y&Memo=Y&Text=Y.

[111] JoAnne Young, *Nebraska Prison Staff Oppose Proposed Changes to Restrictive Housing*, LINCOLN JOURNAL STAR (Feb. 12, 2020), https://journalstar.com/legislature/nebraska-prison-staff-oppose-proposed-changes-to-restrictive-housing/article_928770d8-2e7b-54a3-b507-00fd99ee708b.html.

[112] James Ridgeway & Jean Casella, *Big Labor's Lock 'Em Up Mentality*, MOTHER JONES, (Feb. 22, 2013), https://www.motherjones.com/politics/2013/02/biggest-obstacle-prison-reform-labor-unions/ (noting that most of the national unions have not taken a position on solitary confinement).

[113] Open letter from Lance Lowry, President, Local 3807 AFSCME Texas Correctional Employees (Jan. 20, 2014), https://assets.documentcloud.org/documents/1009819/deathrow-signed.pdf.

manage the increased number of people with mental illnesses and reduce reliance on solitary confinement.[114] When Texas prisons eliminated disciplinary segregation in 2017, Mr. Lowry told the Houston Chronicle that the change did not pose any major security concerns and that he supported the development as a move to "modernize the prison system."[115] A representative from the TDCJ also addressed the issue of safety and noted that there had been "no dramatic change" in major prison violence from 2012 onwards, when the state began to reduce disciplinary segregation.[116]

It bears noting that the complexity of intra-departmental dynamics is such that different employees or groups of employees within departments of corrections hold opposing views about the need for reform. Some mental health staff working in solitary confinement units perceive that their professional concerns are ignored or undermined by prison officers.[117] When a representative from the CDCR met with incarcerated people to discuss ending the hunger strike at Pelican Bay and agreed to review the procedures for assigning people to solitary confinement, he was criticized by prison officials for agreeing to the requests and accused of being manipulated by the group involved in the strike.[118] In Virginia, the ACLU reports that food portions allocated to people in solitary confinement increase when officials from the Department of Corrections' headquarters visit the supermax prisons.[119] Senior officials not employed day-to-day at the prisons may therefore be misinformed about some aspects of the treatment of people in solitary confinement.

Though some unions have voiced opposition to proposed legislative and court-ordered reforms, it is likely that the same sentiments arise in relation to administrative reforms. Because such reforms generally attract less publicity, however, it is more difficult to examine the positions taken by unions and corrections officers in this context. Such opposition could undermine

[114] *Reassessing Solitary Confinement II: The Human Rights, Fiscal, and Public Safety Consequences: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Human Rights of the S. Comm. on the Judiciary*, 113th Cong., 2nd Sess., 95-96 (2014) (written statement of Lance Lowry).
[115] Keri Blakinger, *supra* note 89.
[116] *Id.* (noting that in 2012, there were 96 serious assaults on staff and 1,242 on incarcerated people; in 2016, there were 108 such assaults on staff and 1,456 on incarcerated people).
[117] *See supra* section 2.4.2.3.
[118] *See supra* section 2.2.
[119] AM. CIV. LIBERTIES UNION OF VIRGINIA, SILENT INJUSTICE: SOLITARY CONFINEMENT IN VIRGINIA 36 (2018).

administrative reforms because they are not generally subject to the same oversight or scrutiny as those imposed by a court or legislature.

CHAPTER 7. RECOMMENDATIONS AND CONCLUSION

7.1 Recommendations

7.1.1 More Attention Must be Directed at Improving Conditions

Given that few reform measures impose a fifteen-day limit on solitary confinement consistent with international guidance and generally accepted standards, it is troubling that most reforms do not significantly improve conditions in solitary confinement. Furthermore, in many states, prison officials can still withhold basic services and amenities from people in solitary confinement if they decide it is necessary under the broad justification of institutional security.

In the limited circumstances where some units offer improved conditions, most people are not eligible for those placements; rather, the units are designed only for people needing intensive mental health treatment or those eligible for step down programs. Within the "improved" alternative accommodations, out-of-cell time, social interaction, and necessary support is not always available. Some step down units have been revealed to constitute nothing more than solitary confinement by a different name.[1]

Certain improvements, such as increased time outside of one's cell and access to telephone calls, may address some of the harm associated with sensory deprivation. However, not everyone in solitary confinement can benefit from these measures. Better access to library book carts or provision of in-cell programs, for example, may offer little to people who struggle with mental health issues, vision or hearing disturbances, or literacy problems. Very few reforms even allow people in solitary confinement to have a television or radio in their cells. Given that scientific research suggests that the risk of adverse psychiatric experiences may vary depending on the degree of sensory deprivation, which is influenced by factors such as whether a cell door is solid or barred, whether people receive visitors, or have access to televisions, greater resources should be dedicated to improvements in these areas to mitigate risks to mental health.[2] Even so,

[1] *See supra* section 6.2.6 and Mariame Kaba, *Prison Reform's in Vogue and Other Strange Things*, TRUTHOUT, (Mar. 21, 2014), https://truthout.org/articles/prison-reforms-in-vogue-and-other-strange-things/ ("Unfortunately I fear that we are currently living through an era of label changing and semantics shifting.").
[2] *See supra* section 2.4.2.1.

however, such measures do not mitigate the risk of harm to physical health.[3] This risk could be ameliorated by requiring, at a minimum, that all cells have natural light, lights do not remain on for twenty-four hours per day, people be granted meaningful amounts of outside recreation time, and the provision of exercise equipment and other amenities consistent with the recommendations of medical experts.

In addition, legislation or regulations should prescribe minimum requirements for the provision of medical and mental health treatment for people prior to, during, and following placement in solitary confinement. Such treatment should be consistent with standards agreed by medical and mental health experts. For example, mental health consultations should not take place at cell doors where there is no opportunity for privacy or for the consultant to develop rapport with their patient. At present, most reforms fail to address this unmet need despite the extensive evidence of the harm that solitary confinement causes, and the potential for lasting harm after a person is released from solitary confinement. Merely banning the placement of people with serious mental illness from solitary confinement is insufficient to address the risk of harm in light of evidence showing that other people without such diagnoses may develop symptoms during or after placement in isolation.

Even if these basic needs are addressed, greater emphasis is required to address the importance of facilitating social interaction and improving the environment within solitary confinement units. While some states have sought to introduce these measures through the implementation of group programs and the like, most have not. To counter the risk of harm that solitary confinement poses, the conditions in solitary confinement units require urgent attention in all reform measures. Some of the costs associated with improving conditions could be covered by savings resulting from the reduction of solitary confinement populations, as implemented by Colorado in 2011.[4]

Attention must also be directed to the use of physical restraints as less restrictive alternatives to facilitate greater social interaction and out-of-cell time for people in solitary confinement and step down units. Few reform measures impose any limitations around the use of such restraints,

[3] *See supra* section 2.4.2.4.
[4] *See supra* section 5.1.2.6.

despite the risks of physical and emotional harm that may be associated with them. There is a troubling risk that restraint devices could be substituted for solitary confinement without any meaningful justification or oversight such that people will continue to be exposed to harm.

7.1.2 Prioritize Meaningful Independent Oversight

Whether reform results from legislation, litigation, or administrative measures, meaningful independent oversight is important, among other things, to ensure:

(a) Any less restrictive alternatives are genuinely less restrictive, do not simply replace one form of control or harm with another, and that proper account is taken of the risks associated with using physical restraints in correctional settings;
(b) Members of vulnerable populations are correctly identified and protected from solitary confinement, and any reassessment of their status is conducted fairly and objectively, so that they are not wrongly reclassified and returned to solitary confinement;
(c) Step down programs operate as genuine transition units with the objective of returning people to the general prison population or preparing them for release from prison, and do not become long-term solitary confinement units under a different name;
(d) Meaningful improvements in the conditions in solitary confinement units; and
(e) People in solitary confinement can lodge complaints without the risk of retaliation from prison staff.

In some states, the most effective means of oversight may be in the form of an independent inspectorate or ombuds office; in other states, different roles such as legislative commissions, reports to the legislature, or judicial oversight, may suffice. However, ombuds officers or inspectors with authority to conduct visits to prisons are likely to be better placed to observe conditions firsthand and to speak directly with people in solitary confinement.

For these functions to be genuinely effective, adequate resources are required to facilitate thorough investigations and appropriately tailored recommendations that will result in meaningful changes. Inspections and prison visits would be of greater value if significant notice

is not required in advance of such visits.[5] To counter the risk of retaliation against anyone who raises concerns with the ombuds officer or inspector, people could be visited at random (with the officer ensuring that different people are identified at each inspection). Conversations would need to take place in a room or cell without the presence of any prison staff, and aural privacy would need to be ensured. Furthermore, in assessing conditions, it would be prudent to seek information regarding standard practices on days when no visitors are expected, and not merely rely on what is presented on the day of the inspection. Review of documentary records (or noting the absence of such records) is also essential to develop an accurate picture of conditions. Furthermore, the families of incarcerated people might offer additional information about problems within solitary confinement units.

The effectiveness of independent oversight functions will also depend on their not becoming another administrative remedy that incarcerated people must exhaust within the meaning of the PLRA before they can bring a lawsuit. This issue has been addressed by some legislation and bills and it must be standard practice in all states.[6]

There are several promising examples of ombuds offices that have the potential to act as independent checks on departments of corrections. It is important that these offices operate independently from the departments that they are charged with investigating. In terms of progressing reform, there is greater value in having independent oversight offices than internal committees to review individual solitary confinement placement decisions. While these bodies might offer a useful check on placement decisions and ensure individuals are not wrongly placed in solitary confinement, they are less likely to influence systemic changes that will lead to wider reform.

Though few reform measures have taken this approach, the courts can provide a separate venue to improve oversight. One example can be found in Hawaii's proposal to require notification to

[5] *See supra* sections 2.3 (people incarcerated in Florida were told to make the staff "look good," and not to talk to inspectors visiting in the course of litigation, and the person conducting the inspection reported that there were three times as many staff present on the day of the inspection compared to any other day); 5.3.1.2 (people held in Unit 32 at Parchman in Mississippi, who had been denied showers for weeks, were allowed to shower the day before a visit from plaintiffs' counsel); and 6.2.10 (ACLU of Virginia reporting that food portions allocated to people in solitary confinement increase when officials from departmental headquarters visit the supermax prisons).
[6] *See supra* section 6.2.4.

family court judges when a young person is placed in room confinement.[7] There is some merit in involving the courts in this process given that they are the institutions responsible for sentencing people to prisons and detention facilities. However, in light of the judiciary's reluctance to become involved in day-to-day prison operational matters, the barriers imposed by the PLRA, and the length of time it takes courts to resolve complaints about prison conditions, it may be preferable that oversight be confined to separate, independent functions solely dedicated to the task of investigating prisons and departments of corrections.

7.1.3 Limit the Discretion of Corrections Officers

Decisions about placing people in solitary confinement and how long they will remain there should not be left to the individual discretion of prison officers. To that end, legislatures should limit as much as possible the use of language that allows solitary confinement to be used where necessary in the interests of maintaining order or protecting the safety of the institution. All placement decisions should be made according to specific, measurable criteria, and determined in consultation with medical and mental health staff. Where solitary confinement practices are justified on the broad claim of institutional security, specific, identifiable concerns must be required to support the assertion.[8] This is particularly important in light of the fact that proponents of solitary confinement contend that it is necessary to protect staff and other incarcerated people from violence, even when most placements in solitary confinement do not arise from violent infractions.[9] Proposals to require that senior employees approve all solitary confinement placements would also curtail the discretion of prison officers.[10]

[7] *See supra* section 6.2.3 (describing Hawaii's bill that would require juvenile detention facilities to notify family court judges when any child is placed in room confinement and the reasons for the placement).
[8] *See supra* section 5.2.1.1 (discussing bills introduced in Arizona, Congress, Pennsylvania, and Virginia that would all require evidence of the risk of harm based on recent threats or conduct).
[9] *See supra* sections 1.3.2 (New York penitentiary employees in the early 1800s advocated for solitary confinement because they believed the congregate housing model exposed them to vulnerability); 6.2.10 (NYSCOPBA criticized the reform legislation passed in New York in 2021 on the basis that eliminating solitary confinement would increase safety concerns, despite the fact that five out of every six disciplinary infractions resulting in solitary confinement were for non-violent conduct; Texas officials reported that there had been no dramatic change in prison violence from the time the state began to reduce the availability of disciplinary segregation).
[10] *See supra* section 5.2.1.1 (discussing bills introduced in Connecticut and Nevada that would require approval from senior officials or administrators prior to placing anyone in solitary confinement).

State legislatures and courts should ensure due process protections apply to all people facing solitary confinement, regardless of the length of the placement.[11] These rights should not be limited in application only to circumstances where there is deemed to be "atypical and significant hardship" as required by the federal courts.[12] It is of note that many states provide at least informal due process protections to young people facing potential room confinement. These rights range from the opportunity to explain one's behavior through to formal hearings with assistance from staff to prepare a defense and to appeal.[13] Given that room confinement placements are usually of shorter duration than adult solitary confinement placements, at least the same due process rights should be extended to adults.

The due process procedures themselves should also extend beyond the protections articulated by the federal courts to ensure that people facing solitary confinement have a genuine opportunity to contest the placement. Therefore, the protections should include: the right to attend the hearing in person, to call witnesses and present relevant documentary evidence, to confront and cross-examine witnesses, to be represented or accompanied by another person, ideally someone with legal training, but at the very least, another incarcerated person, and a right of appeal. In addition, following the precedent of the Supreme Court of New Jersey in *Avant v. Clifford*, any statements made by a person at a prison disciplinary hearing should not be admissible against them in any subsequent criminal prosecutions.[14]

One further reform already adopted in some states that should be included in all reform measures is to depart from the "some evidence" standard to require a higher evidentiary threshold to justify placement in solitary confinement. The "some evidence" rule affords prison officers significant discretion because only meager evidence is required to satisfy due process obligations. Imposition of a higher threshold is consistent with stricter control on the use of solitary confinement and the need for sufficient evidence to support the placement.[15]

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[11] *See supra* sections 5.1.1.1 (due process obligations in Massachusetts' statute); 5.1.1.3 (due process obligations in New Jersey's statute); and 5.2.7 (proposed due process provisions in reform bills).
[12] *See supra* section 3.2.2.
[13] *See supra* section 5.1.2.1.
[14] *See supra* section 4.3.1.3.
[15] *See supra* sections 4.3.2, 5.1.1.3 and 5.2.1.1 (referring to existing statutes and regulations that have departed from the "some evidence" standard; New Jersey's reform statute's requirement of reasonable cause to believe there is a

Oversight functions will serve an important role in ensuring that due process protections are meaningful and not merely symbolic.

7.1.4 Reforms Must Reflect and Address Racial and Ethnic Disparities

Aside from collecting data about the racial and ethnic composition of solitary confinement populations, almost all reform measures currently fail to address the pervasive racial and ethnic disparities in the use of solitary confinement. The collection of data, by itself, is unlikely to resolve this entrenched problem unless the data show such gross deviations that cannot be explained by chance.[16]

Reform measures must examine the underlying reasons that result in solitary confinement placements and the systemic racism underpinning these decisions. This requires analysis of racial and ethnic bias in the exercise of discretion in finding disciplinary infractions, and in determining penalties for disciplinary infractions. Removing disciplinary infractions that rely solely on discretionary judgments by prison officers from the infractions that are punishable by solitary confinement may help to reduce racial and ethnic bias in disciplinary segregation placements.[17]

Race must also be considered when assessing non-punitive solitary confinement classifications, particularly administrative segregation. With prison gang membership (or suspected membership) frequently relied upon as the basis for placing people in administrative segregation, reforms must target the process by which prison gangs are identified and the basis for determining that people are members of such gangs. It is also necessary to address the use of tenuous and unreliable evidence often deemed sufficient to support a finding that a person is a member of a prison gang.[18]

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substantial risk of serious harm on the basis of clear and convincing evidence; and bills introduced in Arizona, Pennsylvania and Congress that all propose a clear and convincing evidentiary standard).

[16] *See* discussion *supra* section 3.3.1 (in Santiago v. Miles a federal district court found Equal Protection violations on the basis of race based on significant statistical disparities and unrebutted witness testimony).

[17] *See supra* section 2.5.4.4 (describing the New York Times' investigation of prison disciplinary decisions in New York state which revealed that racial disparities were most pronounced in the case of infractions involving the exercise of discretion by prison officers and less apparent in the case of infractions requiring physical evidence).

[18] *See supra* sections 2.1 (describing the TDCJ's identification of twelve prison gangs; eight of which are predominantly Latino in membership, while two are predominantly Black and two are predominantly white); and

Furthermore, the impact of race on mental health classification and treatment decisions, and its relevance to eligibility for alternate programs in place of solitary confinement, must be addressed.[19] The trauma of systemic racism as one component of the harm that results from solitary confinement should be considered in support of broadening the categories of people who are to be protected from solitary confinement.[20]

With many states now requiring collection of data disaggregated by race and ethnicity, among other factors, greater understanding of systemic racism in solitary confinement placement decisions could be achieved through requiring racial and ethnic breakdowns of the data showing the reasons why people are placed in solitary confinement, as well as the continuous length of each placement.

While some states now require training for prison officers working in solitary confinement units, none of the proposed or recently implemented reforms identify systemic racism or bias as topics that must be covered by training. While training is not a panacea, greater awareness of systemic racism in solitary confinement, particularly on the part of disciplinary hearing officers and people responsible for classification decisions, might also contribute to a reduction in the pronounced racial and ethnic disparities.

7.1.5 Utilize Legislative Findings and Training Material to Show Deliberate Indifference

State legislatures can address the high threshold imposed by the federal courts' deliberate indifference test by making legislative findings that emphasize the harm caused by solitary confinement.[21] Such findings, combined with the "extensive scholarly literature describing and quantifying the adverse mental health effects of prolonged solitary confinement" could establish deliberate indifference and show that the harm is "so obvious that it had to have been known."[22] Further evidence of the obvious risk of harm could also be demonstrated through the topics

5.3.3 (describing the CDCR's use of tenuous evidence to justify placing people in solitary confinement because they were deemed to be members of prison gangs as one of the issues addressed in the Ashker settlement).

[19] *See supra* section 6.2.8.

[20] *See supra* section 2.4.2.1.

[21] *See supra* sections 5.1.2.1 and 5.2.1.1 (describing findings in legislation enacted in Washington and in a bill introduced in Hawaii describing some of the harm caused by solitary confinement).

[22] *See supra* section 3.1.2.3 (referring to the Fourth Circuit's decision in Porter v. Clarke).

addressed in training provided to corrections officers. Specifically, legislation or regulations can direct that training materials include information about the psychological and physical effects of solitary confinement.[23]

Furthermore, a reduction in the use of solitary confinement could be achieved by limiting solitary confinement for use only as a punitive measure in response to the most serious of infractions. This approach would require prisons to eliminate solitary confinement for administrative segregation or protective custody which may not be politically feasible in those states that are unwilling to enact comprehensive reform that limits solitary confinement to a maximum of fifteen days. Imposing solitary confinement for punitive reasons only, in accordance with legislation, might overcome the obstacle created by the federal courts' narrow definition of punishment and the requirement for proof of deliberate indifference on the part of the inflicting officer.

7.1.6 Federal Legislative Reform

Although at present it seems unlikely that any of the bills introduced in Congress will be passed, there are several measures that, if enacted, would contribute meaningfully to genuine reform.

7.1.6.1 National Solitary Confinement Standards

The proposed National Solitary Confinement Study and Reform Commission to develop national standards on the use of solitary confinement may be valuable if the standards recommended by that Commission and adopted by the Attorney-General are sufficiently rigorous.[24] It is of some concern, however, that the bill would require that the standards do not impose substantial additional costs on federal or state correctional systems. Further examination of such a provision is needed to ensure that the standards would not be so weakened by this requirement as to be ineffective. The real value of this proposal, if it were enacted, would lie in the incentives for states to comply with the new national standards through the reduction in federal funding for failure to adhere to the standards. If this proposal were not included in the legislation, it seems unlikely that establishing a Commission to study solitary confinement and make

[23] *See supra* section 5.1.2.7 (describing Connecticut's statute that requires training on the long and short-term psychological effects of administrative segregation).
[24] *See supra* section 5.2.5 (explaining the proposed National Solitary Confinement Study and Reform Commission).

recommendations on best practice would, on its own, be particularly helpful without the ability to link compliance to federal funding.

7.1.6.2 PLRA Repeal

Repeal of the PLRA could have a significant influence on solitary confinement reform. Absent the limitations of the PLRA, people held in solitary confinement would face fewer restrictions in seeking to challenge their conditions of confinement and the psychological and emotional harm that results. The removal of the requirement to exhaust all administrative remedies and the limits on bringing actions *in forma pauperis* would improve access to courts, judicial oversight, and scrutiny of prison conditions. It could force prisons and states to act more promptly to improve conditions rather than rely on the delays that result from the barriers created by the PLRA.

Furthermore, repeal of the PLRA would remove the limits on the scope of relief that could be granted by federal courts which might lead to more meaningful improvements in conditions that violate federal rights as opposed to the narrowest and least intrusive relief possible.

7.1.7 Areas for Further Research

Much of the research into the harm caused by solitary confinement, particularly harm to physical health, focuses on long-term placements. In light of the fact that some reforms have limited solitary confinement to fifteen days, further research on the physical health risks associated with shorter-term placements would be beneficial. Such research could be particularly important for future legal challenges, given the courts' tendency to determine that only very long periods in solitary confinement might constitute cruel and unusual punishment. This information would also be helpful in relation to the use of solitary confinement in jails.

Another area of harm that merits examination relates to the experiences of the families of people held in solitary confinement. While constitutional analysis of the meaning of cruel and unusual punishment focuses solely on the experience of the incarcerated person, some legislatures are beginning to recognize the wider familial impact of prison conditions on family members.[25] Faced with limited access to telephone calls, mail, and email, people in solitary confinement are disconnected from the people who are likely to support them when they leave prison. The

[25] *See* discussion *supra* section 5.1.1.3 (describing New Jersey's Incarcerated Primary Caretaker Parents Act).

restrictions on contact also impede people's ability to participate in important family decisions, including time-sensitive issues such as proceedings concerning parental rights. Courts in various US jurisdictions have upheld the termination of parental rights where the incarcerated person was unaware of, or unable to participate in, court proceedings because they were in solitary confinement.[26] Courts have also upheld termination orders where the incarcerated parent did not maintain contact with their child or participate in court-ordered parenting courses because they were in solitary confinement.[27] Further examination of legislative, judicial, and policy measures that could address these collateral consequences of solitary confinement would contribute to the development of a wider framework in which to situate the harm caused by solitary confinement.

This dissertation does not examine other countries' solitary confinement practices or their approaches to reform. Comparative analysis may be beneficial, in part to identify the potential influence of foreign courts' decisions on US reforms. In the context of extradition proceedings, some foreign courts have deemed that the "very harsh" conditions of solitary confinement in US prisons are not a sufficient basis to halt extradition, while others have taken the opposite view.[28] Furthermore, the remedies awarded by foreign courts to address the misuse of solitary confinement in their jurisdictions might provide further insight into additional avenues worthy of exploration in the US.[29] The experiences and approaches of prison inspectorates in other

[26] *See, e.g.,* In Re Walls, 2011 WL 2937141 (Mich. Ct. App. 2011) (concerning a father who was in solitary confinement at the time of the permanency planning hearing and who had not received mail during that period to participate in the hearing, and holding that the trial court did not err when it found reasonable efforts were made to reunite the father with his child).

[27] *See, e.g.,* In the Interest of Devin W, 2015 IL App (1st) 143909 (Ill. App. Ct. 2015) (upholding parental termination order and noting, inter alia, that the parent had no visits with his children while he was in solitary confinement); In Re A.M.S., 272 S.W.3d 305 (Mo. Ct. App. 2008) (upholding the parental termination order of a father who was unable to participate in family support meetings and unable to attend parenting classes due to his placement in administrative segregation); In Re Martinez, 2014 WL 6603073 (Mich. Ct. App. 2014) (affirming termination order and observing that the mother was unable to participate in foster care agency services while she was in solitary confinement, "which was the result of her own aggressive behavior.").

[28] *See, e.g.,* Babar Ahmad v. United Kingdom, 609 Eur. Ct. H.R. (2012) (allowing extradition after finding that placement in solitary confinement in the Florence Supermax would not constitute inhuman or degrading treatment in violation of the European Convention); Att'y General v. Damache, [2015] IEHC 339 (Ir.) (declining to commit Mr. Damache to prison to await extradition to the US on the basis that being subjected to confinement in the Florence Supermax would violate the Irish Constitution's rights to bodily and mental integrity, human dignity, and the right not to be subjected to inhuman or degrading treatment); Assange v. United States of America, [2021] EW Misc1 (MagC) (Eng.) (barring extradition and referring to evidence showing the conditions in US prisons, including long-term solitary confinement, presented a risk to the mental health of Mr. Assange).

[29] *See, e.g.,* Francis v. R, 2021 ONCA 197 (Can.) (upholding a damages award of CAD30 million to people held in administrative segregation in Ontario's correctional facilities).

countries may also inform best practice for corrections ombuds and other offices assigned to investigate solitary confinement conditions in this country.

7.2 Conclusion

Given the long history of solitary confinement in the US, the damage that is caused by this practice is well-established and well-known. Despite extensive scientific literature about the different forms of harm, however, reforms have been slow to be implemented and many remain limited in scope. The recommendations in this chapter identify the measures that must first be addressed for reforms to be successful.

Some reform measures are promising, but many fall short in achieving significant change. This is particularly apparent in terms of the failure to address harsh physical conditions and lack of services for people in solitary confinement, racial and ethnic disparities, protection of vulnerable groups, and the degree of discretion granted to prison officers who decide when to place people in solitary confinement. It is also troubling that states and prisons might use reforms to justify practices that are similar if not identical to solitary confinement, but perhaps with different terminology and different controls. Such an outcome will only result in ongoing harm. In light of the coronavirus pandemic and the experiences of incarcerated people over the last year, it is also concerning that many reforms exclude prison-wide lockdowns from the measures designed to limit or abolish solitary confinement.

The most appropriate forum for advancing reform will vary between jurisdictions. Based on the reforms implemented to date, it appears generally that state legislatures are best placed to implement comprehensive reform. Legislation has the widest reach compared to the more limited application of settlement agreements, consent decrees, or administrative decisions. It is also the most effective means of limiting the circumstances in which solitary confinement is permitted, carefully defining the populations that should be exempt from the practice and the circumstances under which it should not be allowed, identifying alternative, non-punitive measures in place of solitary confinement, and establishing oversight functions to monitor compliance. For legislative changes to be truly effective, robust oversight and enforcement against prisons that fail to adhere to reform provisions is essential.

Comprehensive reform legislation has broad application, but many states lack the necessary political appetite to enact such statutes. Therefore, a combination of litigation, administrative measures, and partial legislative reforms will all assist in improving conditions for some groups currently subject to solitary confinement. The states that have successfully enacted comprehensive reform to date have all done so after years of attempting unsuccessfully to pass legislation, or in response to public pressure, investigations, and/or litigation or the threat of litigation. While caution is warranted when relying on partial legislative reform, administrative reform, and litigation, the incremental changes offered by these approaches are still valuable to the extent that they contribute to the ongoing project and are not regarded, of themselves, as the final result. Litigation can increase public scrutiny of prison practices and lead to improvements for targeted groups. Ongoing judicial oversight of settlement agreements and consent decrees, while cumbersome, can help to ensure compliance with the terms and maintain public accountability.

Administrative reforms that result in meaningful changes and improvements, particularly those that provide increased protection of vulnerable groups or implement alternatives to solitary confinement, are also valuable. Caution is needed in relying on administrative reforms, however, because of the limited oversight and reliance on accurate self-reporting from departments of corrections regarding the success of these measures. Administrative reforms have reduced solitary confinement significantly in only two jurisdictions, and these are not typical of most attempts at administrative reform. Moreover, for administrative reforms to be truly successful, independent oversight and accountability is needed.

The courts' influence on reforms overall has been limited. Judicial decisions and the threat of litigation, however, certainly contribute to recognition by officials and legislators that reform is required. Moreover, if reforms can be implemented by state legislatures or through administrative policy, then courts may come to recognize that "evolving standards of decency" now reflect that solitary confinement is cruel and unusual, in the same way that the Supreme Court has concluded with respect to the imposition of the death penalty on young people and people with intellectual disabilities. This may be a longer-term project, however, though some courts have been more willing than others to acknowledge the harm caused by solitary confinement.

Keegan Rolenc, who was held in solitary confinement in Minnesota for twelve months, wrote from his isolation cell:

> "It must have been a very cruel mind to come up with an invention such as this."[30]

The inhumanity associated with solitary confinement has been recognized since it was first introduced in the US, even if some of its early proponents were not motivated wholly by cruelty. A county judge later described Mr. Rolenc's experience in solitary confinement as "barbaric," and told him, "I don't know how you did it."[31] Judges, legislators, medical and scientific experts, incarcerated people, and prison officials have acknowledged the many types of harm associated with the practice. While some recent measures are promising, this dissertation demonstrates that considerable work remains to achieve successful reform.

[30] Andy Mannix, *Way Down in the Hole: Extreme Isolation Scars State Inmates*, MINNESOTA STAR TRIBUNE, (Dec. 4, 2016), https://www.startribune.com/excessive-solitary-confinement-scars-minnesota-prison-inmates/396197801/.
[31] Andy Mannix, *A Year After Solitary, Keegan Rolenc Walks a Difficult Path*, MINNESOTA STAR TRIBUNE, (Dec. 26, 2017), https://www.startribune.com/a-year-after-solitary-keegan-rolenc-walks-a-difficult-path/466501163/.

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