

**April 11 (Class 10):      Ending Isolation: The Movement to  
#Stop Solitary**

The last ten years have seen a radical shift in public opinion about the use of solitary confinement. Commitments to lessen the numbers of people in isolated settings and to reduce the degrees of isolation have emerged from across the political spectrum. Legislators, judges, and directors of correctional systems at both state and federal levels, joined by a host of private sector voices, have called for change. In many jurisdictions, prison directors are revising their policies to limit the use of restricted housing and the deprivations it entails. The law of solitary appears ripe for change as well; in 2015, Justices Breyer and Kennedy suggested that conditions in solitary might violate the 8th Amendment. What accounts for this rapid change? Which actors and what forms of advocacy were mobilized get to this point, and what lessons can be drawn for prison reform more generally from the stop solitary movement?

Atul Gawande, *Hellhole*, New Yorker (Mar. 30, 2009)

*Wilkinson v. Austin*, 545 U.S. 209 (2005)

Benjamin Wallace-Wells, *The Plot From Solitary*, New York Magazine (Feb. 26, 2014)

Elizabeth Alexander, “*This Experiment, So Fatal*”: *Some Initial Thoughts on Strategic Choices in the Campaign Against Solitary Confinement*, 5 U.C. Irvine L. Rev. 1 (2015)

David Fathi, *Victory! UN Crime Commission Approves Mandela Rules on Treatment of Prisoners*, ACLU (May 27, 2015)

Mandela Rules (excerpts)

Settlement Agreement, *Ashker v. Brown*, C 09-05796 (Aug. 31, 2015)

Press Release, Liman Program Releases New Report on Prisoners in Administrative Segregation (Sept. 1, 2015)

*Davis v. Ayala*, 135 S. Ct. 2187 (2015) (excerpts)

Taylor Pendergrass, *What Can Reforming Solitary Confinement Teach Us About Reducing Mass Incarceration?*, The Marshall Project (Oct. 13, 2015)

Reginald Dwayne Betts, *Only Once I Thought About Suicide*, Yale L.J. Forum (Jan. 15, 2016)

Ashbel T. (“A.T.”) Wall, *Time-In-Cell: A Practitioner’s Perspective*, Yale L.J. Forum (Jan. 15, 2016)

# HELLHOLE

*The United States holds tens of thousands of inmates in long-term solitary confinement. Is this torture?*

**BY ATUL GAWANDE**

**H**uman beings are social creatures. We are social not just in the trivial sense that we like company, and not just in the obvious sense that we each depend on others. We are social in a more elemental way: simply to exist as a normal human being requires interaction with other people.

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*P.O.s have reported that the simple experience of isolation is as much of an ordeal as any physical abuse they have suffered.*

ILLUSTRATION BY BRAD HOLLAND



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**T**he main argument for using long-term isolation in prisons is that it provides discipline and prevents violence. When inmates refuse to follow the rules—when they escape, deal drugs, or attack other inmates and corrections officers—wardens must be able to punish and contain the misconduct. Presumably, less stringent measures haven't worked, or the behavior would not have occurred. And it's legitimate to incapacitate violent aggressors for the safety of others. So, advocates say, isolation is a necessary evil, and those who don't recognize this are dangerously naïve.

The argument makes intuitive sense. If the worst of the worst are removed from the general prison population and put in isolation, you'd expect there to be markedly fewer inmate shankings and attacks on corrections officers. But the evidence doesn't bear this out. Perhaps the most careful inquiry into whether supermax prisons decrease violence and disorder was a 2003 analysis examining the experience in three states—Arizona, Illinois, and Minnesota—following the opening of their supermax prisons. The study found that levels of inmate-on-inmate violence were unchanged, and that levels of inmate-on-staff violence changed unpredictably, rising in Arizona, falling in Illinois, and holding steady in Minnesota.

Prison violence, it turns out, is not simply an issue of a few belligerents. In the past thirty years, the United States has quadrupled its incarceration rate but not its prison space. Work and education programs have been cancelled, out of a belief that the pursuit of rehabilitation is pointless. The result has been unprecedented overcrowding, along with unprecedented idleness—a nice formula for violence. Remove a few prisoners to solitary confinement, and the violence doesn't change. So you remove some more, and still nothing happens. Before long, you find yourself in the position we are in today. The United States now has five per cent of the world's population, twenty-five per cent of its prisoners, and probably the vast majority of prisoners who are in long-term solitary confinement.

It wasn't always like this. The wide-scale use of isolation is, almost exclusively, a phenomenon of the past twenty years. In 1890, the United States Supreme Court came close to declaring the punishment to be unconstitutional. Writing

for the majority in the case of a Colorado murderer who had been held in isolation for a month, Justice Samuel Miller noted that experience had revealed “serious objections” to solitary confinement:

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 community.

Prolonged isolation was used sparingly, if at all, by most American prisons for almost a century. Our first supermax—our first institution specifically designed for mass solitary confinement—was not established until 1983, in Marion, Illinois. In 1995, a federal court reviewing California’s first supermax admitted that the conditions “hover on the edge of what is humanly tolerable for those with normal resilience.” But it did not rule them to be unconstitutionally cruel or unusual, except in cases of mental illness. The prison’s supermax conditions, the court stated, did not pose “a sufficiently high risk to all inmates of incurring a serious mental illness.” In other words, there could be no legal objection to its routine use, given that the isolation didn’t make *everyone* crazy. The ruling seemed to fit the public mood. By the end of the nineteen-nineties, some sixty supermax institutions had opened across the country. And new solitary-confinement units were established within nearly all of our ordinary maximum-security prisons.

The number of prisoners in these facilities has since risen to extraordinary levels. America now holds at least twenty-five thousand inmates in isolation in supermax prisons. An additional fifty to eighty thousand are kept in restrictive segregation units, many of them in isolation, too, although the government does not release these figures. By 1999, the practice had grown to the point that Arizona, Colorado, Maine, Nebraska, Nevada, Rhode Island, and Virginia kept between five and eight per cent of their prison population in isolation, and, by 2003, New York had joined them as well. Mississippi alone held eighteen hundred prisoners in supermax—twelve per cent of its prisoners over all. At the same time, other states had just a tiny fraction of their inmates in solitary confinement. In 1999, for example, Indiana had eighty-five supermax beds; Georgia had only ten. Neither of these two states can be described as being soft on crime.

Advocates of solitary confinement are left with a single argument for subjecting thousands of people to years of isolation: What else are we supposed to do? How else are we to deal with the violent, the disruptive, the prisoners who are just too dangerous to be housed with others?

As it happens, only a subset of prisoners currently locked away for long periods of isolation would be considered truly dangerous. Many are escapees or suspected gang members; many others are in solitary for nonviolent breaches of prison rules. Still, there are some highly dangerous and violent prisoners who pose a serious challenge to prison discipline and safety. In August, I met a man named Robert Felton, who had spent fourteen and a half years in isolation in the Illinois state correctional system. He is now thirty-six years old. He grew up in the predominantly black housing projects of Danville, Illinois, and had been a force of mayhem from the time he was a child.

His crimes were mainly impulsive, rather than planned. The first time he was arrested was at the age of eleven, when he and a relative broke into a house to steal some Atari video games. A year later, he was sent to state reform school after he and a friend broke into an abandoned building and made off with paint cans, irons, and other property that they hardly knew what to do with. In reform school, he got into fights and screamed obscenities at the staff. When the staff tried to discipline him by taking away his recreation or his television privileges, his behavior worsened. He tore a pillar out of the ceiling, a sink and mirrors off the wall, doors off their hinges. He was put in a special cell, stripped of nearly everything. When he began attacking counsellors, the authorities transferred him to the maximum-security juvenile facility at Joliet, where he continued to misbehave.

Felton wasn't a sociopath. He made friends easily. He was close to his family, and missed them deeply. He took no pleasure in hurting others. Psychiatric evaluations turned up little more than attention-deficit disorder. But he had a terrible temper, a tendency to escalate rather than to defuse confrontations, and, by the time he was released, just before turning eighteen, he had achieved only a ninth-grade education.

Within months of returning home, he was arrested again. He had walked into a Danville sports bar and ordered a beer. The barman took his ten-dollar bill.

"Then he says, 'Naw, man, you can't get no beer. You're underage,'" Felton recounts. "I says, 'Well, give me my ten dollars back.' He says, 'You ain't getting shit. Get the hell out of here.'"

Felton stood his ground. The bartender had a pocket knife on the counter. “And, when he went for it, I went for it,” Felton told me. “When I grabbed the knife first, I turned around and spinned on him. I said, ‘You think you’re gonna cut me, man? You gotta be fucked up.’”

The barman had put the ten-dollar bill in a Royal Crown bag behind the counter. Felton grabbed the bag and ran out the back door. He forgot his car keys on the counter, though. So he went back to get the keys—“the stupid keys,” he now says ruefully—and in the fight that ensued he left the barman severely injured and bleeding. The police caught Felton fleeing in his car. He was convicted of armed robbery, aggravated unlawful restraint, and aggravated battery, and served fifteen years in prison.

He was eventually sent to the Stateville Correctional Center, a maximum-security facility in Joliet. Inside the overflowing prison, he got into vicious fights over insults and the like. About three months into his term, during a shakedown following the murder of an inmate, prison officials turned up a makeshift knife in his cell. (He denies that it was his.) They gave him a year in isolation. He was a danger, and he had to be taught a lesson. But it was a lesson that he seemed incapable of learning.

Felton’s Stateville isolation cell had gray walls, a solid steel door, no window, no clock, and a light that was kept on twenty-four hours a day. As soon as he was shut in, he became claustrophobic and had a panic attack. Like Dellelo, Anderson, and McCain, he was soon pacing back and forth, talking to himself, studying the insects crawling around his cell, reliving past events from childhood, sleeping for as much as sixteen hours a day. But, unlike them, he lacked the inner resources to cope with his situation.

Many prisoners find survival in physical exercise, prayer, or plans for escape. Many carry out elaborate mental exercises, building entire houses in their heads, board by board, nail by nail, from the ground up, or memorizing team rosters for a baseball season. McCain recreated in his mind movies he’d seen. Anderson reconstructed complete novels from memory. Yuri Nosenko, a K.G.B. defector whom the C.I.A. wrongly accused of being a double agent and held for three years in total isolation (no reading material, no news, no human contact except with interrogators) in a closet-size concrete cell near Williamsburg, Virginia, made chess sets from threads and a calendar from lint (only to have them discovered and swept away).

But Felton would just yell, “Guard! Guard! Guard! Guard! Guard!,” or bang his cup on the toilet, for hours. He could spend whole days hallucinating that he was in another world, that he was a child at home in Danville, playing in the streets, having conversations with imaginary people. Small cruelties that others somehow bore in quiet fury—getting no meal tray, for example—sent him into a rage. Despite being restrained with handcuffs, ankle shackles, and a belly chain whenever he was taken out, he managed to assault the staff at least three times. He threw his food through the door slot. He set his cell on fire by tearing his mattress apart, wrapping the stuffing in a sheet, popping his light bulb, and using the exposed wires to set the whole thing ablaze. He did this so many times that the walls of his cell were black with soot.

After each offense, prison officials extended his sentence in isolation. Still, he wouldn't stop. He began flooding his cell, by stuffing the door crack with socks, plugging the toilet, and flushing until the water was a couple of feet deep. Then he'd pull out the socks and the whole wing would flood with wastewater.

“Flooding the cell was the last option for me,” Felton told me. “It was when I had nothing else I could do. You know, they took everything out of my cell, and all I had left was toilet water. I'd sit there and I'd say, ‘Well, let me see what I can do with this toilet water.’”

Felton was not allowed out again for fourteen and a half years. He spent almost his entire prison term, from 1990 to 2005, in isolation. In March, 1998, he was among the first inmates to be moved to Tamms, a new, high-tech supermax facility in southern Illinois.

“At Tamms, man, it was like a lab,” he says. Contact even with guards was tightly reduced. Cutoff valves meant that he couldn't flood his cell. He had little ability to force a response—negative or positive—from a human being. And, with that gone, he began to deteriorate further. He ceased showering, changing his clothes, brushing his teeth. His teeth rotted and ten had to be pulled. He began throwing his feces around his cell. He became psychotic.

It is unclear how many prisoners in solitary confinement become psychotic. Stuart Grassian, a Boston psychiatrist, has interviewed more than two hundred prisoners in solitary confinement. In one in-depth study, prepared for a legal challenge of prisoner-isolation practices, he concluded that about a third developed acute psychosis with hallucinations. The markers of vulnerability that he observed in his interviews were signs of cognitive dysfunction—a history of seizures, serious mental illness, mental retardation, illiteracy, or, as in Felton's case, a diagnosis such as attention-deficit hyperactivity disorder,

signalling difficulty with impulse control. In the prisoners Grassian saw, about a third had these vulnerabilities, and these were the prisoners whom solitary confinement had made psychotic. They were simply not cognitively equipped to endure it without mental breakdowns.

A psychiatrist tried giving Felton anti-psychotic medication. Mostly, it made him sleep—sometimes twenty-four hours at a stretch, he said. Twice he attempted suicide. The first time, he hanged himself in a noose made from a sheet. The second time, he took a single staple from a legal newspaper and managed to slash the radial artery in his left wrist with it. In both instances, he was taken to a local emergency room for a few hours, patched up, and sent back to prison.

Is there an alternative? Consider what other countries do. Britain, for example, has had its share of serial killers, homicidal rapists, and prisoners who have taken hostages and repeatedly assaulted staff. The British also fought a seemingly unending war in Northern Ireland, which brought them hundreds of Irish Republican Army prisoners committed to violent resistance. The authorities resorted to a harshly punitive approach to control, including, in the mid-seventies, extensive use of solitary confinement. But the violence in prisons remained unchanged, the costs were phenomenal (in the United States, they reach more than fifty thousand dollars a year per inmate), and the public outcry became intolerable. British authorities therefore looked for another approach.

Beginning in the nineteen-eighties, they gradually adopted a strategy that focussed on preventing prison violence rather than on delivering an ever more brutal series of punishments for it. The approach starts with the simple observation that prisoners who are unmanageable in one setting often behave perfectly reasonably in another. This suggested that violence might, to a critical extent, be a function of the conditions of incarceration. The British noticed that problem prisoners were usually people for whom avoiding humiliation and saving face were fundamental and instinctive. When conditions maximized humiliation and confrontation, every interaction escalated into a trial of strength. Violence became a predictable consequence.

So the British decided to give their most dangerous prisoners more control, rather than less. They reduced isolation and offered them opportunities for work, education, and special programming to increase social ties and skills. The prisoners were housed in small, stable units of fewer than ten people in individual cells, to avoid conditions of social chaos and unpredictability. In

these reformed “Close Supervision Centres,” prisoners could receive mental-health treatment and earn rights for more exercise, more phone calls, “contact visits,” and even access to cooking facilities. They were allowed to air grievances. And the government set up an independent body of inspectors to track the results and enable adjustments based on the data.

The results have been impressive. The use of long-term isolation in England is now negligible. In all of England, there are now fewer prisoners in “extreme custody” than there are in the state of Maine. And the other countries of Europe have, with a similar focus on small units and violence prevention, achieved a similar outcome.

In this country, in June of 2006, a bipartisan national task force, the Commission on Safety and Abuse in America’s Prisons, released its recommendations after a yearlong investigation. It called for ending long-term isolation of prisoners. Beyond about ten days, the report noted, practically no benefits can be found and the harm is clear—not just for inmates but for the public as well. Most prisoners in long-term isolation are returned to society, after all. And evidence from a number of studies has shown that supermax conditions—in which prisoners have virtually no social interactions and are given no programmatic support—make it highly likely that they will commit more crimes when they are released. Instead, the report said, we should follow the preventive approaches used in European countries.

The recommendations went nowhere, of course. Whatever the evidence in its favor, people simply did not believe in the treatment.

I spoke to a state-prison commissioner who wished to remain unidentified. He was a veteran of the system, having been either a prison warden or a commissioner in several states across the country for more than twenty years. He has publicly defended the use of long-term isolation everywhere that he has worked. Nonetheless, he said, he would remove most prisoners from long-term isolation units if he could and provide programming for the mental illnesses that many of them have.

“Prolonged isolation is not going to serve anyone’s best interest,” he told me. He still thought that prisons needed the option of isolation. “A bad violation should, I think, land you there for about ninety days, but it should not go beyond that.”

He is apparently not alone among prison officials. Over the years, he has come to know commissioners in nearly every state in the country. “I believe that today you’ll probably find that two-thirds or three-fourths of the heads of correctional agencies will largely share the position that I articulated with you,” he said.

Commissioners are not powerless. They could eliminate prolonged isolation with the stroke of a pen. So, I asked, why haven’t they? He told me what happened when he tried to move just one prisoner out of isolation. Legislators called for him to be fired and threatened to withhold basic funding. Corrections officers called members of the crime victim’s family and told them that he’d gone soft on crime. Hostile stories appeared in the tabloids. It is pointless for commissioners to act unilaterally, he said, without a change in public opinion.

This past year, both the Republican and the Democratic Presidential candidates came out firmly for banning torture and closing the facility in Guantánamo Bay, where hundreds of prisoners have been held in years-long isolation. Neither Barack Obama nor John McCain, however, addressed the question of whether prolonged solitary confinement is torture. For a Presidential candidate, no less than for the prison commissioner, this would have been political suicide. The simple truth is that public sentiment in America is the reason that solitary confinement has exploded in this country, even as other Western nations have taken steps to reduce it. This is the dark side of American exceptionalism. With little concern or demurral, we have consigned tens of thousands of our own citizens to conditions that horrified our highest court a century ago. Our willingness to discard these standards for American prisoners made it easy to discard the Geneva Conventions prohibiting similar treatment of foreign prisoners of war, to the detriment of America’s moral stature in the world. In much the same way that a previous generation of Americans countenanced legalized segregation, ours has countenanced legalized torture. And there is no clearer manifestation of this than our routine use of solitary confinement—on our own people, in our own communities, in a supermax prison, for example, that is a thirty-minute drive from my door.

**R**obert Felton drifted in and out of acute psychosis for much of his solitary confinement. Eventually, however, he found an unexpected resource. One day, while he was at Tamms, he was given a new defense lawyer, and, whatever expertise this lawyer provided, the more important thing was genuine human contact. He visited regularly, and

sent Felton books. Although some were rejected by the authorities and Felton was restricted to a few at a time, he devoured those he was permitted. “I liked political books,” he says. “‘From Beirut to Jerusalem,’ Winston Churchill, Noam Chomsky.”

That small amount of contact was a lifeline. Felton corresponded with the lawyer about what he was reading. The lawyer helped him get his G.E.D. and a paralegal certificate through a correspondence course, and he taught Felton how to advocate for himself. Felton began writing letters to politicians and prison officials explaining the misery of his situation, opposing supermax isolation, and asking for a chance to return to the general prison population. (The Illinois Department of Corrections would not comment on Felton’s case, but a spokesman stated that “Tamms houses the most disruptive, violent, and problematic inmates.”) Felton was persuasive enough that Senator Paul Simon, of Illinois, wrote him back and, one day, even visited him. Simon asked the director of the State Department of Corrections, Donald Snyder, Jr., to give consideration to Felton’s objections. But Snyder didn’t budge. If there was anyone whom Felton fantasized about taking revenge upon, it was Snyder. Felton continued to file request after request. But the answer was always no.

On July 12, 2005, at the age of thirty-three, Felton was finally released. He hadn’t socialized with another person since entering Tamms, at the age of twenty-five. Before his release, he was given one month in the general prison population to get used to people. It wasn’t enough. Upon returning to society, he found that he had trouble in crowds. At a party of well-wishers, the volume of social stimulation overwhelmed him and he panicked, headed for a bathroom, and locked himself in. He stayed at his mother’s house and kept mostly to himself.

For the first year, he had to wear an ankle bracelet and was allowed to leave home only for work. His first job was at a Papa John’s restaurant, delivering pizzas. He next found work at the Model Star Laundry Service, doing pressing. This was a steady job, and he began to settle down. He fell in love with a waitress named Brittany. They moved into a three-room house that her grandmother lent them, and got engaged. Brittany became pregnant.

This is not a story with a happy ending. Felton lost his job with the laundry service. He went to work for a tree-cutting business; a few months later, it went under. Meanwhile, he and Brittany had had a second child. She had found work as a certified nursing assistant, but her income wasn’t nearly enough. So he took a job forty miles away, at Plastipak, the plastics

manufacturer, where he made seven-fifty an hour inspecting Gatorade bottles and Crisco containers as they came out of the stamping machines. Then his twenty-year-old Firebird died. The bus he had to take ran erratically, and he was fired for repeated tardiness.

When I visited Felton in Danville last August, he and Brittany were upbeat about their prospects. She was working extra shifts at a nursing home, and he was taking care of their children, ages one and two. He had also applied to a six-month training program for heating and air-conditioning technicians.

“I could make twenty dollars an hour after graduation,” he said.

“He’s a good man,” Brittany told me, taking his arm and giving him a kiss.

But he was out of work. They were chronically short of money. It was hard to be optimistic about Felton’s prospects. And, indeed, six weeks after we met, he was arrested for breaking into a car dealership and stealing a Dodge Charger. He pleaded guilty and, in January, began serving a seven-year sentence.

Before I left town—when there was still a glimmer of hope for him—we went out for lunch at his favorite place, a Mexican restaurant called La Potosina. Over enchiladas and Cokes, we talked about his family, Danville, the economy, and, of course, his time in prison. The strangest story had turned up in the news, he said. Donald Snyder, Jr., the state prison director who had refused to let him out of solitary confinement, had been arrested, convicted, and sentenced to two years in prison for taking fifty thousand dollars in payoffs from lobbyists.

“Two years in prison,” Felton marvelled. “He could end up right where I used to be.”

I asked him, “If he wrote to you, asking if you would release him from solitary, what would you do?”

Felton didn’t hesitate for a second. “If he wrote to me to let him out, I’d let him out,” he said.

This surprised me. I expected anger, vindictiveness, a desire for retribution. “You’d let him out?” I said.

“I’d let him out,” he said, and he put his fork down to make the point. “I wouldn’t wish solitary confinement on anybody. Not even him.” ♦

\* (#corrected)Correction, April 6, 2009: Three per cent of the general population had difficulties with “irrational anger,” not three per cent of prisoners in the general population, as originally stated.

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Atul Gawande, a  
surgeon and  
public-health  
researcher,  
became a *New*

*Yorker* staff writer in 1998.

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125 S.Ct. 2384  
Supreme Court of the United States

Reginald A. WILKINSON, Director, Ohio Department of Rehabilitation and Correction, et al.,  
Petitioners,  
v.  
Charles E. AUSTIN et al.

No. 04-495. | Argued March 30, 2005. | Decided June 13, 2005.

KENNEDY, J., delivered the opinion for a unanimous Court.

### **Opinion**

Justice KENNEDY delivered the opinion of the Court.

This case involves the process by which Ohio classifies prisoners for placement at its highest security prison, known as a “Supermax” facility. Supermax facilities are maximum-security prisons with highly restrictive conditions, designed to segregate the most dangerous prisoners from the general prison population. We must consider what process the Fourteenth Amendment to the United States Constitution requires Ohio to afford to inmates before assigning them to Supermax. We hold that the procedures Ohio has adopted provide sufficient procedural protection to comply with due process requirements.

### **I**

The use of Supermax prisons has increased over the last 20 years, in part as a response to the rise in prison gangs and prison violence. About 30 States now operate Supermax prisons, in addition to the two somewhat comparable facilities operated by the Federal Government. In 1998, Ohio opened its only Supermax facility, the Ohio State Penitentiary (OSP), after a riot in one of its maximum-security prisons. OSP has the capacity to house up to 504 inmates in single-inmate cells and is designed to “ ‘separate the most predatory and dangerous prisoners from the rest of the ... general [prison] population.’ ”

Conditions at OSP are more restrictive than any other form of incarceration in Ohio, including conditions on its death row or in its administrative control units. The latter are themselves a highly restrictive form of solitary confinement. In OSP almost every aspect of an inmate’s life is controlled and monitored. Inmates must remain in their cells, which measure 7 by 14 feet, for 23 hours per day. A light remains on in the cell at all times, though it is sometimes dimmed, and an inmate who attempts to shield the light to sleep is subject to further discipline. During the one hour per day that an inmate may leave

his cell, access is limited to one of two indoor recreation cells.

Incarceration at OSP is synonymous with extreme isolation. In contrast to any other Ohio prison, including any segregation unit, OSP cells have solid metal doors with metal strips along their sides and bottoms which prevent conversation or communication with other inmates. All meals are taken alone in the inmate's cell instead of in a common eating area. Opportunities for visitation are rare and in all events are conducted through glass walls. It is fair to say OSP inmates are deprived of almost any environmental or sensory stimuli and of almost all human contact.

Aside from the severity of the conditions, placement at OSP is for an indefinite period of time, limited only by an inmate's sentence. For an inmate serving a life sentence, there is no indication how long he may be incarcerated at OSP once assigned. Inmates otherwise eligible for parole lose their eligibility while incarcerated at OSP.

Placement at OSP is determined in the following manner: Upon entering the prison system, all Ohio inmates are assigned a numerical security classification from level 1 through level 5, with 1 the lowest security risk and 5 the highest. The initial security classification is based on numerous factors (*e.g.*, the nature of the underlying offense, criminal history, or gang affiliation) but is subject to modification at any time during the inmate's prison term if, for instance, he engages in misconduct or is deemed a security risk. Level 5 inmates are placed in OSP, and levels 1 through 4 inmates are placed at lower security facilities throughout the State.

Ohio concedes that when OSP first became operational, the procedures used to assign inmates to the facility were inconsistent and undefined. For a time, no official policy governing placement was in effect. Haphazard placements were not uncommon, and some individuals who did not pose high-security risks were designated, nonetheless, for OSP. In an effort to establish guidelines for the selection and classification of inmates suitable for OSP, Ohio issued Department of Rehabilitation and Correction Policy 111-07 (Aug. 31, 1998). This policy has been revised at various points but relevant here are two versions: the "Old Policy" and the "New Policy." The Old Policy took effect on January 28, 1999, but problems with assignment appear to have persisted even under this written set of standards. After forming a committee to study the matter and retaining a national expert in prison security, Ohio promulgated the New Policy in early 2002. The New Policy provided more guidance regarding the factors to be considered in placement decisions and afforded inmates more procedural protection against erroneous placement at OSP.

Although the record is not altogether clear regarding the precise manner in which the New Policy operates, we construe it based on the policy's text, the accompanying forms, and the parties' representations at oral argument and in their briefs. The New Policy appears to operate as follows: A classification review for OSP placement can occur either (1) upon entry into the prison system if the inmate was convicted of certain offenses, *e.g.*, organized crime, or (2) during the term of incarceration if an inmate engages in specified conduct, *e.g.*, leads a prison gang.. The review process begins when a prison official prepares a "Security Designation Long Form" (Long Form). This three-page form details matters such as the inmate's recent violence, escape attempts, gang affiliation, underlying offense, and

other pertinent details.

A three-member Classification Committee (Committee) convenes to review the proposed classification and to hold a hearing. At least 48 hours before the hearing, the inmate is provided with written notice summarizing the conduct or offense triggering the review. At the time of notice, the inmate also has access to the Long Form, which details why the review was initiated. The inmate may attend the hearing, may “offer any pertinent information, explanation and/or objections to [OSP] placement,” and may submit a written statement. He may not call witnesses.

If the Committee does not recommend OSP placement, the process terminates. If the Committee does recommend OSP placement, it documents the decision on a “Classification Committee Report” (CCR), setting forth “the nature of the threat the inmate presents and the committee’s reasons for the recommendation,” as well as a summary of any information presented at the hearing. The Committee sends the completed CCR to the warden of the prison where the inmate is housed or, in the case of an inmate just entering the prison system, to another designated official.

If, after reviewing the CCR, the warden (or the designated official) disagrees and concludes that OSP is inappropriate, the process terminates and the inmate is not placed in OSP. If the warden agrees, he indicates his approval on the CCR, provides his reasons, and forwards the annotated CCR to the Bureau of Classification (Bureau) for a final decision. (The Bureau is a body of Ohio prison officials vested with final decisionmaking authority over all Ohio inmate assignments.) The annotated CCR is served upon the inmate, notifying him of the Committee’s and warden’s recommendations and reasons. The inmate has 15 days to file any objections with the Bureau.

After the 15-day period, the Bureau reviews the CCR and makes a final determination. If it concludes OSP placement is inappropriate, the process terminates. If the Bureau approves the warden’s recommendation, the inmate is transferred to OSP. The Bureau’s chief notes the reasons for the decision on the CCR, and the CCR is again provided to the inmate.

Inmates assigned to OSP receive another review within 30 days of their arrival. That review is conducted by a designated OSP staff member, who examines the inmate’s file. If the OSP staff member deems the inmate inappropriately placed, he prepares a written recommendation to the OSP warden that the inmate be transferred to a lower security institution. If the OSP warden concurs, he forwards that transfer recommendation to the Bureau for appropriate action. If the inmate is deemed properly placed, he remains in OSP and his placement is reviewed on at least an annual basis according to the initial three-tier classification review process outlined above.

## II

This action began when a class of current and former OSP inmates brought suit under Rev. Stat. § 1979, 42 U.S.C. § 1983, in the United States District Court for the Northern District of Ohio against various Ohio prison officials. We refer to the class of plaintiff inmates, respondents here, collectively as “the

inmates.” We refer to the prison officials, petitioners here, as “Ohio.”

The inmates’ complaint alleged that Ohio’s Old Policy, which was in effect at the time the suit was brought, violated due process. In addition the inmates brought a claim that certain conditions at OSP violated the Eighth Amendment’s ban on cruel and unusual punishments, but that claim was settled in the District Court. The extent to which the settlement resolved the practices that were the subject of the inmates’ Eighth Amendment claim is unclear but, in any event, that issue is not before us. The inmates’ suit sought declaratory and injunctive relief. On the eve of trial Ohio promulgated its New Policy and represented that it contained the procedures to be followed in the future. The District Court and Court of Appeals evaluated the adequacy of the New Policy, and it therefore forms the basis for our determination here.

After an 8-day trial with extensive evidence, including testimony from expert witnesses, the District Court made findings and conclusions and issued a detailed remedial order. First, relying on this Court’s decision in *Sandin v. Conner*, 515 U.S. 472, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995), the District Court found that the inmates have a liberty interest in avoiding assignment to OSP. Second, the District Court found Ohio had denied the inmates due process by failing to afford a large number of them notice and an adequate opportunity to be heard before transfer; failing to give inmates sufficient notice of the grounds serving as the basis for their retention at OSP; and failing to give the inmates sufficient opportunity to understand the reasoning and evidence used to retain them at OSP. Third, the District Court held that, although Ohio’s New Policy provided more procedural safeguards than its Old Policy, it was nonetheless inadequate to meet procedural due process requirements. In a separate order it directed extensive modifications to that policy.

The modifications the District Court ordered to Ohio’s New Policy included both substantive and procedural reforms. The former narrowed the grounds that Ohio could consider in recommending assignment to OSP. For instance, possession of drugs in small amounts, according to the District Court, could not serve as the basis for an OSP assignment. The following are some of the procedural modifications the District Court ordered:

Finding that the notice provisions of Ohio’s New Policy were inadequate, the District Court ordered Ohio to provide the inmates with an exhaustive list of grounds believed to justify placement at OSP and a summary of all evidence upon which the Committee would rely. Matters not so identified, the District Court ordered, could not be considered by the Committee.

The District Court supplemented the inmate’s opportunity to appear before the Committee and to make an oral or written statement by ordering Ohio to allow inmates to present documentary evidence and call witnesses before the Committee, provided that doing so would not be unduly hazardous or burdensome. The District Court further ordered that Ohio must attempt to secure the participation of any witness housed within the prison system.

Finding the New Policy’s provision of a brief statement of reasons for a recommendation of OSP placement inadequate, the District Court ordered the Committee to summarize all evidence supporting

its recommendation. Likewise, the District Court ordered the Bureau to prepare a “detailed and specific” statement “set[ting] out all grounds” justifying OSP placement including “facts relied upon and reasoning used.” The statement shall “not use conclusory,” “vague,” or “boilerplate language,” and must be delivered to the inmate within five days.

The District Court supplemented the New Policy’s 30-day and annual review processes, ordering Ohio to notify the inmate twice per year both in writing and orally of his progress toward a security level reduction. Specifically, that notice must “advise the inmate what specific conduct is necessary for that prisoner to be reduced from Level 5 and the amount of time it will take before [Ohio] reduce[s] the inmate’s security level classification.”

Ohio appealed. First, it maintained that the inmates lacked a constitutionally protected liberty interest in avoiding placement at OSP. Second, it argued that, even assuming a liberty interest, its New Policy provides constitutionally adequate procedures and thus the District Court’s modifications were unnecessary. The Court of Appeals for the Sixth Circuit affirmed the District Court’s conclusion that the inmates had a liberty interest in avoiding placement at OSP. The Court of Appeals also affirmed the District Court’s procedural modifications in their entirety. Finally, it set aside the District Court’s far-reaching substantive modifications, concluding they exceeded the scope of the District Court’s authority. This last aspect of the Court of Appeals’ ruling is not the subject of review in this Court.

We granted certiorari to consider what process an inmate must be afforded under the Due Process Clause when he is considered for placement at OSP. For reasons discussed below, we conclude that the inmates have a protected liberty interest in avoiding assignment at OSP. We further hold that the procedures set forth in the New Policy are sufficient to satisfy the Constitution’s requirements; it follows, then, that the procedural modifications ordered by the District Court and affirmed by the Court of Appeals were in error.

### III

Withdrawing from the position taken in the Court of Appeals, Ohio in its briefs to this Court conceded that the inmates have a liberty interest in avoiding assignment at OSP. The United States, supporting Ohio as *amicus curiae*, disagrees with Ohio’s concession and argues that the inmates have no liberty interest in avoiding assignment to a prison facility with more restrictive conditions of confinement. At oral argument Ohio initially adhered to its earlier concession, but when pressed, the State backtracked. We need reach the question of what process is due only if the inmates establish a constitutionally protected liberty interest, so it is appropriate to address this threshold question at the outset.

The Fourteenth Amendment’s Due Process Clause protects persons against deprivations of life, liberty, or property; and those who seek to invoke its procedural protection must establish that one of these interests is at stake. A liberty interest may arise from the Constitution itself, by reason of guarantees implicit in the word “liberty,” or it may arise from an expectation or interest created by state laws or

policies.

We have held that the Constitution itself does not give rise to a liberty interest in avoiding transfer to more adverse conditions of confinement. We have also held, however, that a liberty interest in avoiding particular conditions of confinement may arise from state policies or regulations, subject to the important limitations set forth in *Sandin v. Conner*, 515 U.S. 472, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995).

*Sandin* involved prisoners' claims to procedural due process protection before placement in segregated confinement for 30 days, imposed as discipline for disruptive behavior. *Sandin* observed that some of our earlier cases, *Hewitt v. Helms* (1983), in particular, had employed a methodology for identifying state-created liberty interests that emphasized "the language of a particular [prison] regulation" instead of "the nature of the deprivation." In *Sandin*, we criticized this methodology as creating a disincentive for States to promulgate procedures for prison management, and as involving the federal courts in the day-to-day management of prisons. For these reasons, we abrogated the methodology of parsing the language of particular regulations.

"[T]he search for a negative implication from mandatory language in prisoner regulations has strayed from the real concerns undergirding the liberty protected by the Due Process Clause. The time has come to return to the due process principles we believe were correctly established in and applied in *Wolff* and *Meachum*. Following *Wolff*, we recognize that States may under certain circumstances create liberty interests which are protected by the Due Process Clause. But these interests will generally be limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life."

After *Sandin*, it is clear that the touchstone of the inquiry into the existence of a protected, state-created liberty interest in avoiding restrictive conditions of confinement is not the language of regulations regarding those conditions but the nature of those conditions themselves "in relation to the ordinary incidents of prison life."

Applying this refined inquiry, *Sandin* found no liberty interest protecting against a 30-day assignment to segregated confinement because it did not "present a dramatic departure from the basic conditions of [the inmate's] sentence. We noted, for example, that inmates in the general population experienced "significant amounts of 'lockdown time' " and that the degree of confinement in disciplinary segregation was not excessive. We did not find, moreover, the short duration of segregation to work a major disruption in the inmate's environment.

The *Sandin* standard requires us to determine if assignment to OSP "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." In *Sandin's* wake the Courts of Appeals have not reached consistent conclusions for identifying the baseline from which to measure what is atypical and significant in any particular prison system. This divergence indicates the difficulty of locating the appropriate baseline, an issue that was not explored at length in the briefs. We need not

resolve the issue here, however, for we are satisfied that assignment to OSP imposes an atypical and significant hardship under any plausible baseline.

For an inmate placed in OSP, almost all human contact is prohibited, even to the point that conversation is not permitted from cell to cell; the light, though it may be dimmed, is on for 24 hours; exercise is for 1 hour per day, but only in a small indoor room. Save perhaps for the especially severe limitations on all human contact, these conditions likely would apply to most solitary confinement facilities, but here there are two added components. First is the duration. Unlike the 30-day placement in *Sandin*, placement at OSP is indefinite and, after an initial 30-day review, is reviewed just annually. Second is that placement disqualifies an otherwise eligible inmate for parole consideration. While any of these conditions standing alone might not be sufficient to create a liberty interest, taken together they impose an atypical and significant hardship within the correctional context. It follows that respondents have a liberty interest in avoiding assignment to OSP.

OSP's harsh conditions may well be necessary and appropriate in light of the danger that high-risk inmates pose both to prison officials and to other prisoners. That necessity, however, does not diminish our conclusion that the conditions give rise to a liberty interest in their avoidance.

#### IV

A liberty interest having been established, we turn to the question of what process is due an inmate whom Ohio seeks to place in OSP. Because the requirements of due process are "flexible and cal[1] for such procedural protections as the particular situation demands," we generally have declined to establish rigid rules and instead have embraced a framework to evaluate the sufficiency of particular procedures. The framework, established in *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), requires consideration of three distinct factors:

"First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

The Court of Appeals upheld the District Court's procedural modifications under the assumption that *Sandin* altered the first *Mathews* factor. It reasoned that, "[i]n this first factor, *Sandin* affects the due process balance: because only those conditions that constitute 'atypical and significant hardships' give rise to liberty interests, those interests will necessarily be of a weight requiring greater due process protection." This proposition does not follow from *Sandin*. *Sandin* concerned only whether a state-created liberty interest existed so as to trigger *Mathews* balancing at all. Having found no liberty interest to be at stake, *Sandin* had no occasion to consider whether the private interest was weighty vis-à-vis the remaining *Mathews* factors.

Applying the three factors set forth in *Mathews*, we find Ohio's New Policy provides a sufficient level of process. We first consider the significance of the inmate's interest in avoiding erroneous placement at

OSP. Prisoners held in lawful confinement have their liberty curtailed by definition, so the procedural protections to which they are entitled are more limited than in cases where the right at stake is the right to be free from confinement at all. The private interest at stake here, while more than minimal, must be evaluated, nonetheless, within the context of the prison system and its attendant curtailment of liberties.

The second factor addresses the risk of an erroneous placement under the procedures in place, and the probable value, if any, of additional or alternative procedural safeguards. The New Policy provides that an inmate must receive notice of the factual basis leading to consideration for OSP placement and a fair opportunity for rebuttal. Our procedural due process cases have consistently observed that these are among the most important procedural mechanisms for purposes of avoiding erroneous deprivations. Requiring officials to provide a brief summary of the factual basis for the classification review and allowing the inmate a rebuttal opportunity safeguards against the inmate's being mistaken for another or singled out for insufficient reason. In addition to having the opportunity to be heard at the Committee stage, Ohio also invites the inmate to submit objections prior to the final level of review. This second opportunity further reduces the possibility of an erroneous deprivation.

Although a subsequent reviewer may overturn an affirmative recommendation for OSP placement, the reverse is not true; if one reviewer declines to recommend OSP placement, the process terminates. This avoids one of the problems apparently present under the Old Policy, where, even if two levels of reviewers recommended against placement, a later reviewer could overturn their recommendation without explanation.

If the recommendation is OSP placement, Ohio requires that the decisionmaker provide a short statement of reasons. This requirement guards against arbitrary decisionmaking while also providing the inmate a basis for objection before the next decisionmaker or in a subsequent classification review. The statement also serves as a guide for future behavior.

As we have noted, Ohio provides multiple levels of review for any decision recommending OSP placement, with power to overturn the recommendation at each level. In addition to these safeguards, Ohio further reduces the risk of erroneous placement by providing for a placement review within 30 days of an inmate's initial assignment to OSP.

The third *Mathews* factor addresses the State's interest. In the context of prison management, and in the specific circumstances of this case, this interest is a dominant consideration. Ohio has responsibility for imprisoning nearly 44,000 inmates. The State's first obligation must be to ensure the safety of guards and prison personnel, the public, and the prisoners themselves.

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 rivals, gangs seek nothing less than to control prison life and to extend their power outside prison walls. Murder of an inmate, a guard, or one of their family members on the outside is a common form of gang discipline and control, as well as a condition for membership in some gangs.. Testifying against, or otherwise informing on, gang activities can invite

one's own death sentence. It is worth noting in this regard that for prison gang members serving life sentences, some without the possibility of parole, the deterrent effects of ordinary criminal punishment may be substantially diminished.

The problem of scarce resources is another component of the State's interest. The cost of keeping a single prisoner in one of Ohio's ordinary maximum-security prisons is \$34,167 per year, and the cost to maintain each inmate at OSP is \$49,007 per year. We can assume that Ohio, or any other penal system, faced with costs like these will find it difficult to fund more effective education and vocational assistance programs to improve the lives of the prisoners. It follows that courts must give substantial deference to prison management decisions before mandating additional expenditures for elaborate procedural safeguards when correctional officials conclude that a prisoner has engaged in disruptive behavior.

The State's interest must be understood against this background. Were Ohio to allow an inmate to call witnesses or provide other attributes of an adversary hearing before ordering transfer to OSP, both the State's immediate objective of controlling the prisoner and its greater objective of controlling the prison could be defeated. This problem, moreover, is not alleviated by providing an exemption for witnesses who pose a hazard, for nothing in the record indicates simple mechanisms exist to determine when witnesses may be called without fear of reprisal. The danger to witnesses, and the difficulty in obtaining their cooperation, make the probable value of an adversary-type hearing doubtful in comparison to its obvious costs.

A balance of the *Mathews* factors yields the conclusion that Ohio's New Policy is adequate to safeguard an inmate's liberty interest in not being assigned to OSP. Ohio is not, for example, attempting to remove an inmate from free society for a specific parole violation, or to revoke good-time credits for specific, serious misbehavior, where more formal, adversary-type procedures might be useful. Where the inquiry draws more on the experience of prison administrators, and where the State's interest implicates the safety of other inmates and prison personnel, the informal, nonadversary procedures set forth in *Greenholtz*, and *Hewitt v. Helms* provide the appropriate model. Although *Sandin* abrogated *Greenholtz's* and *Hewitt's* methodology for establishing the liberty interest, these cases remain instructive for their discussion of the appropriate level of procedural safeguards. Ohio's New Policy provides informal, nonadversary procedures comparable to those we upheld in *Greenholtz* and *Hewitt*, and no further procedural modifications are necessary in order to satisfy due process under the *Mathews* test. Neither the District Court nor the Court of Appeals should have ordered the New Policy altered.

....

Prolonged confinement in Supermax may be the State's only option for the control of some inmates, and claims alleging violation of the Eighth Amendment's prohibition of cruel and unusual punishments were resolved, or withdrawn, by settlement in an early phase of this case. Here, any claim of excessive punishment in individual circumstances is not before us.

The complaint challenged OSP assignments under the Old Policy, and the unwritten policies that

preceded it, and alleged injuries resulting from those systems. Ohio conceded that assignments made under the Old Policy were, to say the least, imprecise. The District Court found constitutional violations had arisen under those earlier versions, and held that the New Policy would produce many of the same constitutional problems. We now hold that the New Policy as described in this opinion strikes a constitutionally permissible balance between the factors of the *Mathews* framework. If an inmate were to demonstrate that the New Policy did not in practice operate in this fashion, resulting in a cognizable injury, that could be the subject of an appropriate future challenge. On remand, the Court of Appeals, or the District Court, may consider in the first instance what, if any, prospective relief is still a necessary and appropriate remedy for due process violations under Ohio's previous policies. Any such relief must, of course, satisfy the conditions set forth in 18 U.S.C. § 3626(a)(1)(A).

\* \* \*

The Court of Appeals was correct to find the inmates possess a liberty interest in avoiding assignment at OSP. The Court of Appeals was incorrect, however, to sustain the procedural modifications ordered by the District Court. The portion of the Court of Appeals' opinion reversing the District Court's substantive modifications was not the subject of review upon certiorari and is unaltered by our decision.

The judgment of the Court of Appeals is affirmed in part and reversed in part, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

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NEW YORK

## The Plot From Solitary

Four alleged members of rival gangs launched a hunger strike 30,000 strong from the isolation of their Supermax cells. Was the prison system that corralled them not strong enough, or is solitary confinement an impossible idea?

By [Benjamin Wallace-Wells](#) Published Feb 26, 2014



Todd Ashker, alleged member of the Aryan Brotherhood.

(Photo: Courtesy of California Department of Corrections and Rehabilitation)

On July 8 of last year, a 50-year-old man named Todd Ashker, an inmate at California's Pelican Bay State Prison, began a hunger strike. He had compiled a list of demands, but the essential one was that the policy that dictated the terms of his imprisonment be abolished. Ashker was housed in Pelican Bay's Security Housing Unit, the most restrictive prison unit in California and a place of extreme isolation. Convicts stay in their cells 23 hours a day and leave only to exercise in a concrete room, alone; their meals are fed into their cell through a slot. Other than an awareness that they are staring at the same blank wall as seven other men kept in their "pod," they are completely alone. Ashker has been there since 1990; in his view, he has been

subject to nearly a quarter-century of continuous torture. "I have not had a normal face-to-face conversation with another human being in 23 years," he told me recently, speaking from the other side of a thick plate of glass.

The sheer length of time inmates spend here has made Pelican Bay a novel experiment in social control. The California prison system allows any confirmed gang member to be kept in the SHU indefinitely, with a review of his status only every six years. (Prisoners who kill a guard or another inmate, by contrast, are given a five-year term in the SHU.) This policy has filled Pelican Bay with men considered the most influential and dangerous gang leaders in California. Ashker, allegedly a senior member of the Aryan Brotherhood, had for years shared a pod with Sitawa Jamaa, allegedly the minister of education of the Black Guerrilla Family, and Arturo Castellanos, allegedly an important leader of the Mexican Mafia. In the next pod over was Antonio Guillen, allegedly one of three "generals" of Nuestra Familia. According to the state, these men have spent much of their lives running rival,

racially aligned criminal organizations dedicated, often, to killing one another. But over a period of years, through an elaborate and extremely patient series of conversations yelled across the pod and through the concrete walls of the exercise room, the four men had formed a political alliance. They had a shared interest in protesting the conditions of their confinement and, eventually, a shared strategy. They became collaborators.

The men planned for the hunger strike meticulously. They had staged two more modest strikes in 2011, and afterward some had staged private fasts in their cells to try to learn how long they might be able to go without food. The four men had spent the spring putting on weight. Ashker had calculated how much water he needed to drink to keep his electrolytes balanced, his heart pumping: 240 ounces a day. In June, the men sent letters to an activist group detailing their grievances, explaining when the strike would begin, and asking other prisoners to join them. In letters to families and friends, they spread the word. Corrections officers throughout the state heard the news; on July 2, a few senior officials visited from Sacramento to meet with the prisoners and measure their intent. They left convinced the men were serious. Then, a few days later, the prisoners stopped eating.

The severity of his isolation meant that as the strike began, Ashker had little idea of what effect it was having or how many other prisoners had decided to join him. It turned out to be the largest coordinated hunger strike in American history. On the first day, 30,000 prisoners across the state refused their meals. Three days in, more than 11,000 still had not eaten. "We had expected hundreds, even thousands," says Dr. Ricki Barnett, a senior official in the state's correctional health-care system. "We did not expect tens of thousands."

From the beginning, even the most basic matters about the strike—what Ashker and the others were after, why so many people joined them, what the strike demonstrated—were opaque, and profoundly disputed. To the prisoners and their supporters, this was a protest against barbaric treatment, and the SHU was both an outrage in itself and a symbol of the arbitrariness and brutality of the prison system across the nation. The strike's leaders had challenged the SHU's constitutionality in court, arguing that the limits it placed on social interaction violated the Eighth Amendment's prohibition on cruel and unusual punishment, and they had watched closely as a few other states, some pressured by prisoners and others mandated by judges, had de-emphasized solitary confinement. They believed they were part of a human-rights movement. But the prison officials saw something far simpler at work: a tactical maneuver by the gangs, acting in collusion, to end a system that had made it much more difficult for them to operate as they pleased.

No one had any idea how long the strike would last. For an action like this to have any effect, the four prisoners believed, it needed to be open-ended—the risk needed to mount that they might die on the prison's watch. Ashker had studied the story of Bobby Sands, the IRA hunger striker who had lasted 66 days and whose death was



A cell in the Pelican Bay SHU.

(Photo: Reuters)

horrible: He had gone blind, had begun to bleed from bedsores, had lost his mental capacities. The prison health department had done its own research and distributed a medical notice to all state inmates: Those without other health conditions can in most cases expect to live at least several weeks on a hunger strike. This was a tentative statement, though. Hunger strikes are rare enough that there is no good data,

and the doctors had been reading up on histories of Civil War internment camps.

Jamaa thought his fellow inmates might need some concrete encouragement. His private fast the previous fall had lasted 33 days, and he believed he could have gone longer. Soon after last summer's strike began, the four leaders were moved from the SHU to a unit called Administrative Segregation, and Jamaa, entering the unit, started to holler, "Forty days and 40 nights! Forty days and 40 nights!" If prisoners can be counted upon to know any literature, it is the literature of suffering that in the Bible precedes redemption. Jamaa had chosen his slogan with intent: They were Moses in the desert. At night, Jamaa would drop on his knees, put his mouth to the crack between the door and the floor, and yell: "Forty days and 40 nights!" Soon, new hunger strikers arriving in AdSeg were shouting the slogan as they were hustled in. It was then that Jamaa began to believe their movement had some possibility, some momentum.

At first, the fasting prisoners at Pelican Bay were lethargic. Then, after about a week, the nurses found them suddenly chatty and energized. "There were these pockets of brilliant clarity," says Bill Woods, the chief nurse at the prison. "There is a certain point where your body equalizes out. It has this mechanism to survive." In their temporary home at AdSeg, the hunger strikers exercised outdoors in individual metal cages, which for some prisoners provided their first view of the horizon in decades. Frogs crawled into the cages; the prisoners could see small wildflowers in the grass. For the first time in years, the men could look into one another's faces. Jamaa told his sister, 20 days in, that he thought they could last another 60 days, which terrified her. When lawyers asked how they were holding up, one of the prisoners replied, "Not too bad. I can feel the breeze."

This didn't last. By late July, the prisoners in AdSeg were cold all the time. Ashker developed a constant pain underneath his collarbone. He started to notice symptoms of claustrophobia—tightness, panic—which in all his time in isolation he had never suffered before. Ashker has a thick chest, and he was convinced that the pain was his body consuming itself, hunting for nutrients. "I could feel the muscle flowing off my body," he told me.

Over time, the Corrections Department emptied most of AdSeg, transporting dozens

of hunger strikers to the state prison at Sacramento, closer to major hospitals. Ashker and his three collaborators were considered too influential and dangerous to transport, and so they were left behind—four prisoners alone, spaced out in an otherwise empty corridor of cells as long as a city block. On the weekends, they met with attorneys, and they learned that though the hunger strike had greatly diminished, a hundred prisoners around the state were still refusing food. At night, sometimes, they would try to strategize, shouting at one another underneath their doors, but often they found they were too weak to make themselves heard, and so they would return to their bunks and cover themselves with blankets to conserve energy. It was in this manner that the leaders of the California prison hunger strike approached the end of a summer spent without food, in the same way that they had spent much of their adult lives: in tense, anticipatory solitude.

Picture yourself in a car heading north from San Francisco. Six hours after you leave that spotless city—after you pass the blissful yuppie towns of California wine country, and then the redwoods and hippie outposts of Mendocino and Humboldt, and then two hours of vacant, foggy coast north of Eureka—you arrive in Crescent City, 13 miles from the Oregon border. Physically, culturally, Pelican Bay is as remote from the rest of California as the state's borders permit. Plaques in the motels warn visitors of the danger of tsunamis. Topographically speaking, the place is a fortress of isolation: Alaska-like, rocky and vertical and misty. It is an amazing place to put a prison.



An exercise yard in the Pelican Bay SHU.  
(Photo: Jim Wilson/The New York Times/Redux)

It is also an amazing prison. Pelican Bay opened in 1989 in response not just to the escalation of crime during the 1980s but to the particular shape that crime had taken. In California, where the inmate population had quadrupled in a decade, prison gangs had been strengthened by the sheer number of people moving through the system. What were at first temporary self-defense cadres became more permanent, and powerful, until they grew into umbrella groups of street gangs. In 1989, a member of the Black Guerrilla Family, a gang formed in prison, shot and killed Huey Newton, the founder of the Black Panther Party, on a West Oakland street. Within a few

years, senior leaders of the Mexican Mafia, another prison gang, were asserting control over all of the Hispanic street crews in Southern California: The Mafia taxed street drug sales in return for protecting affiliated gang members who entered the

system. Throughout the '80s, the state had been building ever-more-restrictive units in an effort to quarantine the most influential gang leaders, but none had been effective enough. Pelican Bay was meant to solve that problem.

"From the time it opened, Pelican Bay was seen as having some historical significance," says Craig Haney, a psychology professor at the University of California, Santa Cruz, who studies prisons. "Many of us saw Pelican Bay as perhaps the wave of the future, and that's what it became."

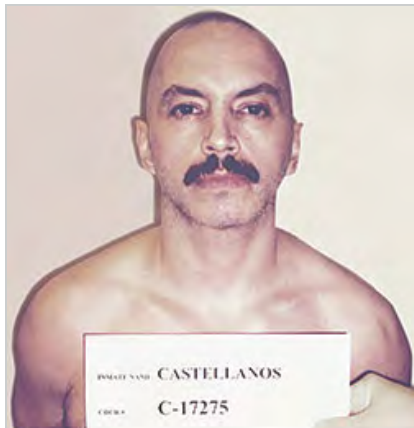
The Pelican Bay SHU, which houses 1,100 prisoners in almost as many cells, takes up half of the prison and operates under policies designed less to punish prisoners than to isolate them from other members of their gangs. Arriving inmates are often told that there are only three ways to leave the SHU: "Parole, snitch, or die." But parole boards routinely inform SHU inmates that they will not be granted parole until they agree to leave their gang and explain its operations, a formal process known as debriefing. Doing so would send them back to a regular prison, where they would likely become gang targets. So many SHU inmates believe they only really have one option. "A while back, I realized I was probably going to spend the rest of my life in the SHU," Ashker told me.

Haney visited Pelican Bay three years after it opened and surveyed 100 SHU inmates as an expert consultant to a prisoner lawsuit challenging the unit's constitutionality. On his first day at the prison, the psychologist saw such florid psychosis that he called the attorneys and urged them to emphasize the confinement of the mentally ill. Once Haney began his interviews, he found serious psychological disturbances in nearly every prisoner. More than 70 percent exhibited symptoms of "impending nervous breakdown"; more than 40 percent suffered from hallucinations; 27 percent had suicidal thoughts. Haney noticed something subtler, too: A pervasive asociality, a distancing. More than three-quarters of the prisoners exhibited symptoms of social withdrawal. Even longtime prisoners reported feeling a profound loss of control when they entered the SHU, in part because they weren't sure whether they'd ever be released. Many reported waking up with a rolling, nonspecific anxiety. The SHU "hovers on the edge of what is humanly tolerable," wrote Thelton Henderson, the federal judge who decided the prisoner lawsuit in 1995. You can sense a vast uncertainty in that first word, *hovers*. The judge ordered major reforms—the seriously mentally ill, for instance, could no longer be housed there—but he let the SHU stand.

That was more than 18 years ago. Some of the same prisoners are still there. Haney returned to Pelican Bay last year, for a follow-up study, and found that these patterns of self-isolation had deepened. Many inmates had discouraged family members from visiting, and some seemed to consider all social interactions a nuisance. "They have systematically extinguished all of the social skills they need to survive," Haney says. Those inmates who do comparatively well tend to replace the social networks outside the SHU with those within it—which, in a society composed of alleged gang members, often means gangs. "In isolation," he says, "gang activity is

the only contact that is possible; it is the only loyalty that is possible; it is the only connection that is possible.”

This is one way of understanding the paradox of American mass incarceration: There are 2.4 million prisoners across the country, four times more than in 1980, and Supermax facilities managed similar to Pelican Bay in at least 44 states, and though this corresponds with a dramatic drop in street crime, the system of prison gangs has flourished. In Pelican Bay, there are significantly fewer murders in the prison than there were a decade ago, but the gangs’ power has hardly softened: Prosecutors allege that current SHU inmates manage the affairs of street gangs in Los Angeles and direct negotiations with Mexican cartels. Elsewhere, the situation is even less stable. Baltimore’s city jail had, by 2012, fallen so completely under the control of a prison gang that, according to prosecutors, its leader not only maintained a network of guards who smuggled in drugs and weapons, but also impregnated four guards while behind bars. Last year in Colorado, an alleged member of a white prison gang, who had served several years in SHU-like isolation, assassinated the executive director of the state’s prison system on the official’s own doorstep.



Arturo Castellanos

(Photo: Courtesy of California Department of Corrections and Rehabilitation)

These are signs that the system either isn’t working well enough or isn’t working at all. Over the summer, when international television broadcasts began to pick up the news of the hunger strike and demonstrations were staged in Berkeley and Los Angeles and celebrities like Jay Leno and Bonnie Raitt wrote letters of support, Ashker and the others began to talk more broadly about what was possible. “A worldwide movement against solitary confinement,” Ashker explained. This was rhetoric, but sometimes the

medium is more important than the message. The fact of the hunger strike—that men who had spent decades in as restrictive a prison as has been devised had convinced a quarter of the state’s prison population to starve itself—did not necessarily prove that their conditions amounted to torture. But it did suggest something else: that perhaps human isolation of the kind that Pelican Bay was built to achieve was impossible. Every hunger strike is a form of Roman advertising, a demand to be recognized: *I am still here*. The leaders of the Pelican Bay hunger strike, conscious of it or not, were making a second statement, too: *Look at what we can do*.

In 1987, Ashker killed another white inmate at New Folsom prison, entering the man’s cell and stabbing him 26 times. Prosecutors were convinced the murder

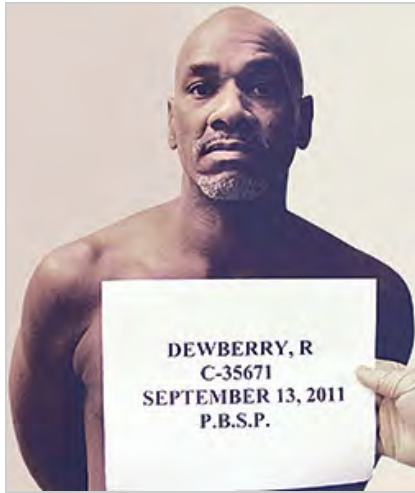
had been an Aryan Brotherhood hit, ordered because the victim had refused to cut the gang in on his methamphetamine deals. When the case came to trial, Ashker persuaded his court-appointed attorney, Philip Cozens, to call another inmate, an Aryan Brother named Paul Schneider, as a witness. Prison guards brought Schneider to the courthouse in leg irons, and he and Cozens spoke about the upcoming testimony in a side corridor. When the conversation had finished, and Cozens, back turned, was walking away, Schneider attacked the lawyer from behind, with an eight-inch blade he had hidden in his rectum. Cozens survived the stabbing. He believes that Ashker was behind the attack, that the knifing was an attempt to provoke a mistrial. But the judge refused to halt the case, and Cozens, now accompanied by a bodyguard, continued to serve as defense counsel. Ashker was convicted of second-degree murder. Schneider wound up testifying anyway. Ashker, he reportedly told the jury, was "a good white dude."

Ashker got his first swastika tattoo when he was 19, a seventh-grade dropout in prison for burglary. He says he was motivated partly by white pride and partly by the sheer juvenile thrill of doing something outrageous. He describes himself then as "a rebel at heart." This identity exchange happens often in prison: an inmate fuzzes out the specific parts of his personhood and instead inhabits the most threatening idea of his race. But that tattoo, and the others that followed, have a context, prison officials say: They advertised that he was affiliated with the Aryan Brotherhood, the white prison gang that was then warring with the Black Guerrilla Family. Ashker denies membership in a gang, but by 1990, three years after the murder, prison officials had pinpointed him as an Aryan Brother. Pelican Bay was built to house "the worst of the worst." Ashker fit the bill. In he went.

Ashker is six feet tall, with a handlebar mustache and somewhat wild eyes, but his speech is direct and tautly compressed. Even his handwriting exhibits extreme control: His script is impeccable. "Eager to talk," is how a fellow inmate describes him. "They don't give us a lot of time," Ashker said tensely when we met. Because Ashker has few connections to family (his mother has visited exactly once, in 1993) and because there are few whites in the Pelican Bay SHU, the pressures of isolation fell more heavily on him than on most other prisoners. "You do a lot of self-reflection—you don't have a choice," he said. "If you think too much about the past, or the future, it gets real depressing. I look at it as, my life has been a waste of space." He said this very matter-of-factly.

Prisoners in the SHU look for a salve against this abyss or a distraction from it. Often they nurse a grievance. "You get through the first four or five years on anger alone," Jamaa told me. Ashker is, unexpectedly, an optimist, and he learned to channel his anger through the law. Shortly after moving to the SHU, he was shot in his right arm by a guard. Three weeks later, while under treatment by prison doctors, an artery in his arm burst and he nearly lost his hand. Ashker sued, and a federal jury awarded him \$225,000. This opened his mind. He earned a paralegal's certificate through a correspondence course. He has now sued the prison system 15 times—for forbidding SHU inmates from sending letters to inmates in other prisons,

for refusing to let him buy thermal shirts to keep his injured arm warm. Once, after Ashker had represented himself at a legal hearing in San Francisco in which the judge ruled in his favor, he was driven back across the Golden Gate Bridge in chains. It was one of those perfect California days—sun shining everywhere. “There are these moments,” he told me, remembering, “when you realize that you are still alive.”



Sitawa Jamaa (known by officials as Ron Dewberry)

(Photo: Courtesy of California Department of Corrections and Rehabilitation)

In 2006, authorities at Pelican Bay reorganized the SHU. Until then, the prison had often rubber-stamped SHU inmates' requests to be moved to another pod, meaning that members of the same gang were often housed together. The reorganization created a prison within a prison within the prison, moving the most influential leaders of each gang to a wing called the Short Corridor, isolating them from lieutenants who had been doing their bidding. Which is how, not by accident but by some warped genius of institutional design, four men with what officials believe to be vast influence over

the entire state's inmate population came to be housed within shouting distance.

The men were wary around one another at first. But they were aging, and perhaps growing more reflective, and they had nothing to do but talk with neighbors they couldn't see; the experience of the SHU is monotony in motion. Guillen talked about his son, who had been arrested; Castellanos about his brother, who was also in the SHU. They had grievances in common, too: Their isolation in the Short Corridor seemed to confirm to them that they had been singled out. Ashker grew particularly close to an older, politically minded white inmate on the pod named Danny Troxell. Eventually, Troxell and Ashker became something of a revolutionary book club. They read Naomi Wolf, Howard Zinn, Michel Foucault. The ideas that stayed with Ashker the longest came from Zinn: that they were all members of a single prisoner class and that racial animosities had been leveraged by the guards to divide them. “One of their purposes,” he told me, “is to sever all your ties to humanity.”

By 2009, Ashker was corresponding with a sociologist at SUNY-Binghamton named Denis O'Hearn, and on O'Hearn's suggestion, he read a copy of a book the professor had written, a biography of Bobby Sands. O'Hearn had, in his book, emphasized that even though Sands had died during his protest, he had achieved a great deal in winning political sympathy for his cause. In studying Sands, Ashker read of an ancient Irish tradition called the King's Threshold, in which a commoner who believed that he had been wronged by a nobleman would fast on the aristocrat's door

to gain attention and public sympathy. Ashker found this incredibly moving. He and Troxell began to talk about Sands's example and about the risks and possibilities a hunger strike might offer. Jamaa, a studied revolutionary who had been reading about Sands and other hunger strikers for two decades, listened to Ashker's epiphany with jaded amusement. But he did listen. "Every time we'd start talking about it, we'd notice the pod going quiet—we knew people were listening," Ashker told me.

What Ashker and Troxell represented was a kind of "split faction" within the Aryan Brotherhood, Lieutenant Jeremy Frisk explained in a conference room in Pelican Bay's headquarters building earlier this winter. Projected onto a screen was a diagram of the Aryan Brotherhood's hierarchy. The three men at the top of the diagram, who he said composed the gang's "commission," had been ambivalent about the project, in part because Ashker was not especially popular within the Brotherhood and in part because they saw little advantage. But Guillen, Castellanos, and Jamaa, Frisk said, each had more personal pull among their racial groups. The Black Guerrilla Family has long been the most political gang, and its members could be expected to participate. The Pelican Bay gang-investigations unit soon noticed coded messages discussing the wisdom of a hunger strike passed among members of the two Hispanic groups and to their allies on the outside. In these deliberations, Frisk believes, Castellanos and Guillen were decisive. "Castellanos is, if not the most influential Mexican Mafia member, right there at the top. Once you put his name on something with orders, the southern Hispanics are going to do it," he said. "And Guillen is the street-regiment general for the NF." One former Nuestra Familia member says that his gang's participation had been all Guillen's doing: "It was Chuco Guillen, 100 percent."

To see the yard as the prison guards do is to become alert to a hidden social physics in which the real actors are not individuals but networks. There is never just a hotheaded punch to a guard's cranium, never just an enterprising drug dealer caught smuggling in supply. Political protests are never just that; they are always a conversation, in thug semiotics, among gangs and between gangs and guards, each move deliberated over with great care by a council of elders isolated in solitary cells. Guards talk with respect about the ingenuity of gang leaders, and with exasperation at the ends to which it is put ("a waste of human talent," Frisk says about the SHU). Prison officials believe that gangs control most of what goes on among the state's inmate population. In the high-security prisons, "almost everything happening out there has some influence of gang activity," says Michael Stainer, a deputy commissioner of the California prison system.

This means that most convicts sentenced to prison in California are also sentenced to a relationship with a gang. Each of the four major gangs in the system enjoy something close to a racial monopoly on membership: the Aryan Brotherhood for whites, the Black Guerrilla Family for African-Americans, the Mexican Mafia for Hispanics from the southern part of the state, and Nuestra Familia for Hispanics



Antonio Guillen

(Photo: Courtesy of California Department of Corrections and Rehabilitation)

from the Central Valley and farther north. Prisons sometimes institute separate exercise schedules for each racial group, and it is very rare to find two cell mates in California from different ones. These practices have helped to reduce gang conflict but also, obviously, strengthen the gang system. Corrections officials at Pelican Bay will often switch, sometimes in midsentence, between referring to a “gang” and a “race” and a “group.”

This ambiguity has long been institutionalized in the “validation” process through which alleged gang members are committed to the SHU. Investigators must document three pieces of evidence confirming an inmate’s gang membership. Often this is a tattoo or the statement of an anonymous informant. But expressions of ethnic identity and radicalism—black nationalist writings, for instance—can also be counted as gang-related. Even social relationships between members of the same ethnic group can be outlawed: Some prisoners have been validated for speaking with a known gang member from their own racial group. The prison officials, Jamaa told me, “blur the line between what is a gang and what is a racial group. They have to, because they don’t understand where a gang ends and a racial group begins.”

Pelican Bay is a strange hybrid of a place: Systems of isolation and communication vie constantly for control. SHU prisoners learned the architecture of the toilet drains and have used them to shout messages to other pods. Members of Nuestra Familia developed a system of information exchange through the law library—ghostwriting messages in legal books and then sending coded messages in letters to family members explaining which page in which book fellow gang members ought to consult. In gang lore, Pelican Bay has assumed a mythic place: The Mexican Mafia calls it La Playa Azul (“the Blue Beach”), and the bylaws of Nuestra Familia stipulate that its core leaders must be housed there. When a court order temporarily increased mail monitoring at Pelican Bay last fall, Frisk heard from gang investigators in the Los Angeles area: The crews were saying that there were no instructions coming from headquarters, that they did not know what to do. But most of the time, despite extreme restrictions, gangs find a way to function. “All Aryan Brotherhood decisions, including membership and the decision to murder another member, are conducted by vote,” says Bryan Elrod, a former Aryan Brotherhood member who recently “debriefed” and was transferred out of Pelican Bay. “Sometimes it could take months to complete voting in SHU.” But the votes did happen.

The central mystery of this summer’s hunger strike lies in its scope. Why did 30,000 prisoners around the state join a protest called by four men in the SHU? Most prison

officials contend that these prisoners were prodded by the gangs. "There was a high element of coercion going on," Stainer says. Many of the inmates who went on strike lasted just three days—proof, another senior prison official told me, that many participants were only joining to get credit from their gang. Javier Zubiata, a former Nuestra Familia member, was asked during his debriefing interviews why he had joined the strike. He said that he had seen the public letter from Antonio Guillen, and "we took that as an order from a general."

Even so, prison officials had documented only one example of explicit coercion: an inmate at Corcoran state prison who was beaten after he refused to help his cell mate participate. Beyond that, there was nothing violent. In Pelican Bay, things were quiet. "They had said that they wanted the protest to be peaceful, and by and large it was," says Clark Ducart, the chief deputy warden. Which suggests that perhaps the protesting prisoners were motivated by something other than simply pressure and that the allegiance they feel to their gang is not only a matter of intimidation and racial supremacy.

At every stage in the criminal-justice system, its basic moral complexity recurs: What part of a criminal act is an individual's responsibility alone, and what part is the consequence of his circumstances—of poverty or racial alienation? In Pelican Bay, the prisoner is treated not as an individual but as a soldier for the group to which he belongs. The crucial question the validation process has asked, for years, has not been "What has this man done?" but "To what does this man belong?" But there has been a self-fulfilling element to this approach: Treat prisoners as racial blocs and all social networks as if they are gangs, and for all of its essential violence and brutality, the gang will retain some of the warmth, the underlying human attachment, of the social network on which it is built. "To this day, I love some of those men," Elrod told me earlier this month from the secure unit at Kern Valley State Prison where he is now housed to keep him safe from the revenge violence of his former brothers.

Once the Short Corridor Collective, as Ashker and his conspirators started to call themselves, had a hunger strike in mind, even ordinary grievances acquired weight. In 2011, the SHU was put on lockdown after a disturbance in the general population. "We hadn't even done anything," Ashker told me. "I said, 'Hey, this is just gonna be the norm. Everything that happens, they're gonna come back on us.'" Among the Brotherhood, word circulated that Ashker and Troxell were "willing to go out in a box." Jamaa wrote letters to prisoners-rights groups; if the Collective was serious, they needed some support from outside. That summer, the Collective staged their first two brief hunger strikes, which resulted in minor victories, like getting a pull-up bar and a handball in the exercise room. Even here, though, gang activity and political activity were hard to separate: Elrod says that when he and Ashker were briefly moved into AdSeg together, they took the chance to discuss Aryan Brotherhood business.

The next year, the Collective published a joint letter calling for the cessation of all hostilities among racial groups in prison. Jamaa had written the original draft and read it out to the others on the cell block, who each helped to edit it. To the four men in the Collective, the document felt like a great accomplishment, an end to the interracial prison wars in which they had spent their adult lives. They had some hope that the truce could eventually extend to the streets. "This is an historical document," Jamaa said. "We are a prisoner class now."

They asked the Corrections Department to post the letter in each of their facilities, and they imagined videos broadcast in prisons around the state in which they urged inmates to cooperate rather than to fight one another. The officials refused and issued Castellanos a rules violation when he discussed it with his family. The men in the Collective took it hard. Soon those same family and neighborhood networks that prison officials believe are often used to convey gang commands out to the street were carrying news of a coming hunger strike, and inside the Short Corridor the inmates were putting on weight in anticipation.

It felt freezing in AdSeg, all the time. The four remaining prisoners were convinced that the guards were blasting in cold air, trying to freeze them into submission. But each time the prison doctor, Donna Jacobsen, visited the AdSeg, she checked the thermometer, and it always read normal. Their bodies, she thought, must simply have lost the ability to regulate temperature.

Negotiations were static. The prisoners were demanding face-to-face meetings with top state correctional officials; these were refused. But the medical threat was escalating. Jacobsen, a former HIV physician from Miami, was focused less on the prisoners' steady deterioration than on what might happen to them once they started to eat again. "Being on hunger strike isn't the riskiest part; it's the refeeding that can be incredibly dangerous," Jacobsen says. The longer the prisoners went without nutrients, the more their electrochemical systems slipped out of balance. Refeeding "can basically stop your heart if you don't have the right levels." Her staff had offered vitamin supplements to the men to try to stabilize their electrolytes. After some initial resistance, they were accepted. But there was a paradoxical effect: "The vitamins rejuvenated us," Jamaa told me. When a low-ranking official from Sacramento came up to meet with the prisoners, Jamaa rebuffed him. "I said, 'I'm willing to die right now.'"

Each weekend, a veteran Oakland activist lawyer named Anne Butterfield Weills made the long drive up to Crescent City to meet with the prisoners. "I literally saw them shrink," Weills says. She received a call from strikers who had been transported down to Sacramento: Did Ashker, Jamaa, Castellanos, and Guillen want them to continue to strike? What should they do? Newspaper and television stations were reporting a macabre daily watch—how many men were still on strike, how long had they each gone. One hunger striker had died already, though the coroner would later rule that he had strangled himself. There were still 69 men who had not eaten at all in more than 40 days, and many of them had written letters saying they would

not cave. Weills was spending some of her time at Pelican Bay working on advance medical directives.

Then the standoff ended. On the 43rd day of the strike, Judge Henderson (the same judge who had, nearly two decades earlier, ordered reforms to the SHU) issued an order giving the state permission to force-feed prisoners who were at "near-term risk of death or acute bodily injury." The order also allowed the state to override prisoners' Do Not Resuscitate orders, if it had a reason to believe they had been coerced. Health officials, worried about the escalating risks, had joined the Corrections Department's petition for the order. "I was concerned that the 40 or 50 leftover people might die," says Barnett, the senior official at the department.

The leaders of the strike "were blindsided," Weills says. The protocols for force-feeding, in place for a decade at the Guantánamo Bay prisons, are medically straightforward but still deeply invasive: A tube is inserted up a patient's nose and down into his stomach, and restraints are used if the patient physically resists. Of the dozens of prisoners on strike, the leaders wondered, how many would go through with force-feeding? And would there be any power in resisting? "Our leverage was the threat of death," Ashker told me. Now that was gone.

Until this point, the prisoners had thought of the guards—and, more broadly, the state—as their captors. But the state is also their warden and their protector: A prison is designed to separate convicts from society and prevent them from doing more harm, but also to shelter them and keep them alive. The judge's order returned repeatedly to the problem of coercion. The specter of gang influence was so strong, Henderson's ruling suggested, that the state could not trust that a prisoner's advance medical directive had been made freely—that he had made his own decision about the terms under which he was willing to die. The strike leaders had thought that by volunteering to risk their own deaths they could compel the state to see them as individuals, and that in at least this one instance they could reassert freedom of control over their lives. But they had been wrong.

The men were still not eating, but they were debating how to proceed. Two prominent state legislators offered to hold a special hearing on conditions in the SHU. During the first hunger strikes, in 2011, Jamaa had been the hard-liner, but he is also the most politically attuned, and the promise of ongoing legislative scrutiny, something the prisoners had never managed to win, seemed to him a breakthrough. "That is a victory," he told the others.

Eventually, somewhat reluctantly, they all agreed. On September 5, the 59th day of the hunger strike, the leaders of the Short Corridor Collective announced that they were "suspending" their action. The next day, Jacobsen met with each of the prisoners in their cells to explain the dangers of refeeding and the ideal way to manage it. Their sustenance once more in the hands of the state, they were gingerly, carefully, fed.

The end of the hunger strike was so deflating that it wasn't until the second legislative hearing into SHU conditions was held, this month in Sacramento, that it began to seem plausible that Jamaa had been right, and that the hunger strikers had won something meaningful. At that hearing, even officials with the Corrections Department seemed to acknowledge that change to the SHU was inevitable. "We all agree that it is far too easy to get in and too hard to get out, and the stays in this environment have been far too long," Martin Hoshino, an undersecretary of Corrections, testified. Hoshino and Stainer presented the Department of Corrections' new validation process, which is meant to emphasize not associations but behavior. Tom Ammiano, the chair of the Assembly's Committee on Public Safety, introduced a bill that would prohibit any prisoner from being kept in isolation indefinitely.

Prison policy is usually shaped out of public view, but the duration and visibility of the hunger strike has helped make the subject politically urgent. Last week, New York State agreed to extensive new restrictions on whom it could confine to its SHU. This week, in Washington, the Senate Judiciary Committee is holding a hearing titled "Reassessing Solitary Confinement." Other states have also curtailed the use of isolation recently—Indiana, where change was compelled by a federal judge's ruling, and Maine, Mississippi, and Colorado, which had faced pressure from prisoners'-rights groups. These changes are too few to constitute a total rejection of the practice. But for the first time, it has begun to seem plausible that the American attachment to this special kind of imprisonment is not a national peculiarity so much as a generational one, and that a 25-year experiment may be ending.

To Ashker, these changes are the subject of much attention and contemplation. But they are also very abstract. Since the hunger strike, he has been more isolated than ever. Before last year's strike began, he was moved to a new pod, which had the effect of breaking up the Short Corridor Collective and separating him from Danny Troxell, his good friend. Troxell had given Ashker a small photograph of himself as a memento. When the guards found it, they took it away and gave Ashker a major rules violation for having secreted it. "They said it was gang-related," he said bitterly when we spoke in December. "I mean, it's a photograph."

His television has been taken away from him as a consequence of the rules violation. For all of his legal endeavors and strategic planning, he has received only two social visits since 2007. He is the only white man in his new pod and is surrounded by strangers speaking Spanish. On some Sunday afternoons, he listens to a D.J. called Sista Soul on a public radio station that broadcasts from Humboldt County and plays recorded messages to the men in Pelican Bay sent in by family members, ex-girlfriends, female pen pals. A rare recent call for Ashker, from a woman whom he has never met: "This is a shout-out of love and admiration to Todd in the SHU from Julie in Western Australia. I hope hearing my voice brightens your day. Bye for now, my love."

He has had trouble getting comfortable in his new cell. The problem is his mattress.

It is too short, and his feet dangle off the end. It is also too thin. "As soon as I laid on it, it flattened out," he told me. He tried shaking out the padding, smoothing it out with his palm. "It's good for a minute, but then as time passes, it collapses again." The padding is now permanently separated to the sides of his mattress, so that as he enters his sixth decade of life, he is sleeping on a thin plastic sleeve on a stone bench.

"I feel like exploding," Ashker said.

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**UC Irvine Law Review**  
April, 2015

Article

"THIS EXPERIMENT, SO FATAL"<sup>aa1</sup>: SOME INITIAL THOUGHTS ON STRATEGIC CHOICES IN THE  
CAMPAIGN AGAINST SOLITARY CONFINEMENT

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## INTRODUCTION

The symposium's theme of ensuring prisoners' access to services provides an opportunity to explore issues related to prisoners in solitary confinement since they experience the most extreme barriers to access. Indeed, the intended effect of placement in isolation is to cut off access to most of the services and programs that are available to prisoners in the general population. Following decades of growth in the numbers of prisoners confined in isolation, a new campaign to end the use of solitary confinement in America's prisons has coalesced in recent years. This campaign has already achieved considerable success in revealing isolated confinement as an unreasonably dangerous form of punishment that violates core concepts of human dignity. American prisons appear to be approaching a tipping point in which a prison practice that has been almost universally accepted in this country may lose its perceived status as a legitimate form of confinement.

If delegitimizing the use of solitary confinement is now a realistic possibility, that fact raises new questions for the campaign to end this scourge. Those marching under the banner of reform have ranged from prison commissioners to community activists, including former prisoners and their families. The former tend to phrase their goals in terms of reducing overuse of isolation; the latter generally seek something closer to complete abolition. As the campaign continues to build momentum, however, it is increasingly apparent that the current coalition in support of reform obscures internal divisions between the reformers and the abolitionists. Many of the correctional officials who have agreed that the use of isolation should be reduced have carefully not foresworn any use of isolation. In contrast, the codirector of Solitary Watch criticized aspects of a Senate hearing on isolated confinement in March 2014 as too likely to leave many prisoners subjected to conditions that resemble torture.

Litigation challenging the use of isolated confinement is at the same crossroads. To date, essentially all of the litigation successes have come from challenges to the imposition of isolated confinement on behalf of particularly vulnerable groups. For many of these vulnerable groups, the legal theories have resulted in a substantial body of precedents supporting their claims. While this litigation has achieved important results, so far there are no examples of successful litigation attacking isolated confinement across the board. This Article, after a brief review of the American roots of the practice of isolated confinement, will discuss the status of litigation challenges to isolation on behalf of particularly

vulnerable groups, because any future litigation strategy will have to contend with the body of case law from that litigation. In addition, in a number of jurisdictions, in the short term, litigation targeted at vulnerable groups may be the most that can be successfully pursued, and such litigation is highly valuable in its own right to the extent that it provides a remedy to some of those in isolation. Nonetheless, the long-term litigation goal must be ending isolated confinement. Finally, this Article discusses why courts have, so far, shown so little willingness to require an end to isolation and provides some suggestions about what a future litigation strategy aimed at abolition could look like, including some initial suggestions on the components that would have to be in place for such litigation to succeed in eliminating rather than simply circumscribing this scourge.

## I. A MAP WITH FUZZY BOUNDARIES

The definition of “solitary confinement” or “isolated confinement” is intrinsically fuzzy because the details of solitary confinement vary across many dimensions. There is no standard definition of solitary confinement; prison officials generally prefer more antiseptic terms such as “administrative segregation” or “special management unit.” The core concept of solitary confinement, however, is captured in the *Interim Report of the Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*:

There is no universally agreed upon definition of solitary confinement. The Istanbul Statement on the Use and Effects of Solitary Confinement defines solitary confinement as the physical isolation of individuals who are confined to their cells for 22 to 24 hours a day. In many jurisdictions, prisoners held in solitary confinement are allowed out of their cells for one hour of solitary exercise a day. Meaningful contact with other people is typically reduced to a minimum. The reduction in stimuli is not only quantitative but also qualitative. The available stimuli and the occasional social contacts are seldom freely chosen, generally monotonous, and often not empathetic.

The Supreme Court provides another useful description of solitary confinement in its opinion in *Wilkinson v. Austin*, involving a challenge to solitary confinement at the Ohio State Penitentiary (OSP), a supermax facility. The Court noted that incarceration at OSP was “synonymous with extreme isolation” and that its conditions were more restrictive than those at any other Ohio prison, including other units that the Court described as involving “highly restrictive form[s] of solitary confinement.” Prisoners at OSP were locked in their cells twenty-three hours a day, with cell lights on continually. Special steps were taken to prevent communications among prisoners, and visiting opportunities were rare. Meals were eaten alone in the cells. The conditions described by the Supreme Court in *Wilkinson* seem to be generally typical of segregation units, with the exception that most such units do not routinely prevent prisoners from talking to prisoners in neighboring cells, many but not all segregation units keep cell lights on continually, and the amount of out-of-cell time varies slightly in segregation units. While some units provide prisoners with more out-of-cell time, in other units, the average in-cell time is more than twenty-three hours a day. The size of the cells differs, and cells also differ in whether they possess a solid door, a door with a window, or sometimes even a window facing the outside through which the

prisoner can see the sky. Segregation units also vary in the amount and type of property they contain, such as books, magazines, and radios, and in how those rules affect the extent of isolation. Further, in my experience, segregation units differ across a range of factors that are difficult to quantify, including the tone of the relationships between custody staff and prisoners, the responsiveness of medical and mental health staff, the degree of sanitation and the upkeep of mechanical systems, the typical decibel level, and the nutritional quality of the food. Finally, of course, as the Supreme Court noted, the length of time spent in solitary confinement substantially affects the severity of the experience.

....

Into this century, variants of solitary confinement remained a feature primarily used to punish prisoners for misbehavior during their sentence, although death row prisoners continued in most states to be housed in separate death rows that often differed little, if at all, from the conditions imposed in disciplinary confinement. In the 1980s and 1990s, as prison populations skyrocketed, separate facilities called “supermaxes,” designed for isolated confinement, gained popularity. No longer was the purpose of solitary confinement assumed to be rehabilitation; now the primary goal was control. The supermaxes were intended to aid prison management by separating out the “bad apples,” so that the bulk of the prisoners could be more easily managed. Opening a supermax may generally result in a substantial increase in the number of prisoners subjected to isolated confinement. There is little empirical evidence, however, that this strategy reduces system-wide levels of violence. An evaluation of the effectiveness of supermax confinement in the Arizona, Illinois, and Minnesota correctional systems found that operating a supermax did not reduce the level of prisoner-on-prisoner violence in any of the systems. Only in Illinois did the existence of a supermax appear to reduce the level of prisoner-on-staff violence. Indeed, the level of prison violence appears to have increased within the California Department of Corrections, despite the use of the isolation units.

The number of prisoners in the nation who are confined in isolation, whether in a supermax or a special unit within a traditional prison, has been estimated to be as high as 80,000. Thus, the continuing popularity of supermaxes has contributed substantially to the numbers of prisoners who experience isolated confinement, even as the total number of prisoners has fallen slightly very recently. One reason for these large numbers is the variety of rationales that prison administrators have given for confining prisoners in isolation. Most prisoners are in isolated confinement because they have violated a prison rule or because they are viewed as a threat to prison security. A prisoner may also be assigned supermax confinement because the prisoner is under a sentence of death, is a youthful offender, is at risk of attack by others, is seriously mentally ill, or has a major medical problem. In fact, not only have these characteristics led to prisoners being assigned to isolation, but they have also resulted in litigation challenging the restrictive nature of that confinement. The various legal theories that have resulted in exclusions of members of these groups shed light on the prospects for a broader attack on the practice of isolation.

### III. EIGHTH AMENDMENT CHALLENGES

The most familiar and arguably most successful rationale for excluding a particular group of prisoners from isolated confinement involves the Eighth Amendment bar to cruel and unusual punishment. Challenges to prisoners' conditions of confinement generally arise under the Eighth Amendment, and the same standard applies to such challenges whether the claim involves medical care or other prison conditions of confinement. The standard involves both an objective and a subjective component. A violation of the objective component can be demonstrated by showing a serious deprivation of a basic human need, such as medical care or reasonable safety. In addition, the Eighth Amendment prohibits the unnecessary and wanton infliction of pain. Unreasonable risks of serious damage to a prisoner's future health or safety can violate the objective component of the Eighth Amendment, even if the damage has not yet occurred and may not affect all prisoners subjected to the risk. Proof of the subjective component of an Eighth Amendment violation with regard to prison conditions requires a showing of "deliberate indifference." Such a demonstration requires, in the context of a prison conditions of confinement claim, proof that the defendant "knows of and disregards an excessive risk to inmate health or safety."

#### *A. Challenges on Behalf of Seriously Mentally Ill Prisoners*

Mentally ill prisoners are common in large part because the United States lacks an effective system to provide treatment for those with psychiatric disorders in the community. Since the 1960s, public facilities providing inpatient mental health treatment have become an endangered species. Because these facilities were not replaced by programs offering outpatient services, the criminal justice system has become, by default, the system for the provision of services to the seriously mentally ill. Once in prison, the vulnerabilities of the seriously mentally ill put them at increased risk of isolated confinement because they have difficulty conforming their conduct to the disciplinary rules in the restrictive prison environment. Assignment to a segregation unit then adds substantial stress. A psychiatrist who extensively studied the effects of solitary confinement on the mentally ill has identified a number of symptoms that many mentally ill prisoners assigned to segregation developed: hypersensitivity to external stimuli; perceptual distortions; panic attacks; difficulties with thinking, concentration, and memory; intrusive, obsessional thoughts; overt paranoia; and problems with impulse control--comprising a psychiatric syndrome.

These particular vulnerabilities of the seriously mentally ill in isolation played an important role in spurring the campaign against isolated confinement. A Human Rights Watch report, for example, quoted this description of a mentally ill prisoner confined in a supermax facility in Indiana:

Prisoner Brown . . . has had seizures and psychiatric symptoms since childhood. He has bipolar disorder and a severe anxiety disorder, a phobia about being alone in a cell, and many features of chronic post-traumatic stress disorder. After he has been in his cell for a while, his anxiety level rises to an unbearable degree, turning into a severe panic attack replete with palpitations, sweating, difficulty breathing, and accompanying perceptual distortions and cognitive confusion. He mutilates himself--for example, by inserting paper clips completely into his abdomen--to relieve his anxiety and to be removed from his cell for medical treatment.

Evidence, such as this report by a psychiatrist, helped fuel the growing concern that solitary confinement of the seriously mentally ill is unacceptably dangerous. One manifestation of that concern was the action of the American Bar Association, which in 2010 adopted a new set of Standards on Treatment of Prisoners that included the principle that “[n]o prisoner diagnosed with serious mental illness should be placed in long-term segregated housing.” Because so many of the seriously mentally ill are confined in prison, and they suffer so profoundly from that confinement, the failure to exclude the seriously mentally ill from solitary confinement is probably responsible for the largest share of the unnecessary deaths among prisoners in isolation.

There are already a number of cases in which the Eighth Amendment argument for exclusion has succeeded. The first of the significant successful cases is *Madrid v. Gomez*, involving a class-action challenge to the Pelican Bay supermax in California. The court noted three basic factors that posed a risk to prisoners confined there: such prisoners were prone to engage in disruptive behavior, so that they were more likely to be assigned to Pelican Bay; the severity of the conditions and the restrictions placed upon prisoners caused deterioration among mentally ill prisoners; and some prisoners who were not seriously mentally ill became seriously mentally ill under the conditions in the prison. While the court rejected the claim that the extreme social isolation and reduced environmental stimulation constituted sufficient harm to violate the Eighth Amendment rights of all prisoners assigned to Pelican Bay, the court held that prisoners with serious mental disorders were at such high risk of severe injury that “placing them in the SHU is the mental equivalent of putting an asthmatic in a place with little air to breathe,” so that their placement in the facility violated the Eighth Amendment. A second case in essence expanded the application of the *Madrid* holding throughout the California Department of Corrections, finding that the California Department of Corrections inappropriately used disciplinary and behavioral control measures on mentally ill prisoners and that mentally ill prisoners were placed in segregation without any evaluation of their mental status. Of twenty-four mentally ill prisoners reviewed by one of the plaintiff’s psychiatric experts, seven were actively psychotic and needed hospitalization and nine had suffered serious reactions to confinement in the SHU, including periods of psychotic disorganization in a number of cases. Many other cases resulted in relief to mentally ill prisoners confined in isolation.

One case deserves particular note. *Gates v. Cook* involved Unit 32, a supermax unit of the Mississippi State Prison at Parchman. In 2004, the Fifth Circuit Court of Appeals affirmed various items of injunctive relief involving the Death Row Unit located within Unit 32, including the order that prisoners diagnosed with psychosis were to be transferred out to a specialized unit that would offer meaningful mental health services. Following that affirmance, prisoners represented by the *Gates* counsel filed *Presley v. Epps*, raising similar issues about conditions in the rest of Unit 32. The parties subsequently settled the litigation for relief that included the relief won in *Gates*, including the removal of the seriously mentally ill from isolated confinement. The results were dramatic. After implementation of the remedy began, the prison officials found that nearly eighty percent of the prisoners assigned to the unit did not require such restrictive confinement; subsequently the population dropped from about 1000 to the approximately 150 prisoners on death row. After the implementation of the treatment program for the seriously mentally ill who had been held in isolated confinement, their rates of disciplinary infractions

for a six-month period dropped from 4.7 per prisoner to 0.6. One feature of *Gates* is common: challenges to the confinement of the seriously mentally ill in isolation frequently end in settlement.

The broad-based success of challenges to the confinement of the seriously mentally ill in segregation is particularly important because it means that one of the biggest barriers to success across the board in closing down isolation can be overcome. Courts have been particularly anxious to defer to correctional officials when an issue is said to involve their special expertise in security matters. Indeed, the Supreme Court has noted that the standard for succeeding in a medical care claim brought by a prisoner is substantially lower than the standard for succeeding in a claim challenging the use of excessive or unnecessary force “because the State’s responsibility to attend to the medical needs of prisoners does not ordinarily clash with other equally important governmental responsibilities.”

Thus, it is key to the success of cases challenging isolated confinement that courts view them, as they should, as cases involving conditions of confinement and not through a distorted focus on security. This is another reason why the evidence from prison mental health and classification experts concluding that curtailing the use of isolation through treatment actually promotes institutional security is so critical.

As to the specific issue of the danger of confining the seriously mentally ill in isolation, however, the battle is pretty much over. The defendants generally dispute specific facts, at least until they settle, such as whether the treatment of the seriously mentally ill is as bad as plaintiffs claim, or whether a particular prisoner is in fact seriously mentally ill. Similarly, defendants are likely to claim that they have, at least temporarily, removed the seriously mentally ill from solitary confinement in order to assert that they are entitled to termination of existing orders pursuant to the Prison Litigation Reform Act. Nonetheless, challenges to the confinement of the seriously mentally ill in isolation can follow a well-beaten path to success.

### ***B. Challenges Related to Cognitive Disorders***

A few cases have specifically noted that prisoners with other cognitive disorders should be included in the categories of prisoners unsuitable for confinement in isolation units. As the Supreme Court recognized in *Atkins v. Virginia*, persons with intellectual disabilities have characteristics that make it more difficult for them to function in challenging environments:

[C]linical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18. Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.

Indeed, *Madrid v. Gomez*, the first of the significant cases articulating an Eighth Amendment rationale for the exclusion of the seriously mentally ill from isolation, noted that just as the California Department

of Corrections itself recognized a category of prisoners (classified as “Category J” prisoners) whose serious mental illness required a supportive inpatient environment, the system also recognized a category of prisoners (“Category K”) whose cognitive impairment required a supportive inpatient environment. Nonetheless, prisoners at Pelican Bay could not be classified to that category by staff at that facility; such classifications could be ordered only at two other prisons in the system. The court, relying on expert testimony that prisoners with brain damage or intellectual impairment, like the seriously mentally ill, were at particularly high risk of deterioration if placed in the SHU, ordered their exclusion from such confinement.

In *Indiana Protection & Advocacy Commission v. Commissioner, Indiana Department of Corrections*, the court found a violation of the Eighth Amendment in the confinement of the seriously mentally ill to isolation units in a number of state prisons. For the purpose of its opinion, the court defined the “seriously mentally ill” as including prisoners with organic brain syndrome as well as “mental retardation . . . leading to significant functional impairment.” The inclusion within the plaintiff class of prisoners with cognitive disorders suggests an appropriate strategy for these cases given the relative lack of cases challenging isolated confinement on behalf of prisoners with intellectual disabilities compared to the numbers that have been brought on behalf of mentally ill prisoners. Grouping may promote a showing of numerosity for class certification. At the same time, the effects of failure to treat the seriously mentally ill are likely to be far more dramatic than the slow deterioration of prisoners with cognitive disabilities in the environment of an isolation unit, combining a lack of mental stimulation with often stressful conditions, so the context of the larger class may make it easier to convey the evidence of the debilitating nature of such confinement.

### ***C. Challenges Related to Other Serious Medical Needs, Including Physical Disabilities***

Prisoners who have serious medical needs that do not concern their mental health may not be disproportionately at risk for being placed in isolated confinement, but they are particularly at risk in isolated confinement. Of course, many prisoners placed in segregation have both serious medical problems and serious mental health problems, and their various conditions interact to produce an unreasonable level of risk. For example, during a five-year period, at least four prisoners died in the Michigan prison system from an interaction of their mental illness with the conditions in their segregated housing and their resulting needs for medical attention.

One of these prisoners was Anthony McManus who was five-feet-seven inches tall and at the time of death weighed seventy-five pounds; he was reported as looking like a concentration camp prisoner. Nonetheless, staff restricted his access to food and water, and a nurse approved the use of chemical agents on him. A nurse also observed him when he was moved, naked and emaciated, to another cell, but did not examine him; a videotape shows him requesting water. Two days later, correctional officers asked that medical staff see him. The next morning he was found dead.

Another mentally ill prisoner was placed in a closed-door observation room at a facility for the mentally ill within the Michigan Department of Corrections. After that placement, a psychiatrist prescribed a

psychotropic medication that interfered with his body's ability to regulate heat. The temperature in the observation room reached ninety-six degrees although it was January. Despite noting that the patient's condition was worsening in the excessive heat of the room, the psychiatrist ignored a nurse's report indicating that the patient was dehydrated and needed immediate medical attention. The prisoner was vomiting and dry heaving, but stayed in the overheated room until he was found dead the following morning.

....

As the above examples illustrate, mentally ill prisoners, as well as other prisoners with urgent and emergent medical issues, can be particularly at risk when housed in isolation. Although the deaths discussed above all involve prisoners with serious mental health issues, such prisoners are the canary in the mineshaft demonstrating the risks for others with serious medical problems. For prisoners with disabilities, confinement in segregation can result in placement in a nonaccessible cell, or custody restrictions can bar assistive devices such as canes or crutches. In other cases, a prisoner may be assigned to an isolation cell because the cell happens to offer some feature related to the prisoner's medical condition, such as the isolation of prisoners who have potentially contagious conditions. Prisoners in isolation generally have more limited access to medical personnel. Medical staff may make rounds in an isolation unit, but the primary purpose for such rounds is typically to deliver medication. Even if medical staff do make rounds in the isolation unit, the solid (or mostly solid) doors typical of isolation units pose a barrier to confidential communications between staff and prisoners, as well as an obstacle to staff observation of the condition of the prisoners. Similarly, outside appointments, as well as medical appointments within the prison, may be delayed until the prisoner is out of isolation because of the reluctance to transport such prisoners outside the isolation unit. Sanitation is frequently far worse in isolation units because staff may not allow prisoners access to cleaning agents or equipment to clean their cells; custody staff may frequently discharge chemical agents; and prisoners may set fires or deliberately flood their cells, so the physical conditions pose special risks to prisoners with heightened vulnerability to infections or impaired respiratory function. The rules of isolation units also typically limit access to showers and to exercise, which may have health implications for particular prisoners.

Moreover, the fact that relationships between staff and prisoners are almost universally more fraught with tension in the isolation units--and more stressful for staff as well as prisoners--also has important consequences for the delivery of medical and mental health care. Staff members, including medical and mental health staff, are particularly likely to view prisoners in isolation as manipulators seeking medical attention for secondary gain. It would be deeply surprising if prisoners in isolation did not frequently exaggerate symptoms when seeking medical attention precisely because the restricted access to medical care and the distressing conditions of isolation itself provide an obvious motive to do so. Unfortunately, as the cases from Michigan illustrate, the development of a culture in which medical staff view prisoners seeking access to care as manipulators closes off the only access to medical care that a prisoner has and can easily lead to tragic consequences.

While the category of prisoners with serious medical needs may seem more diverse than the other categories considered so far, it is sufficiently defined to qualify for class treatment. In the ground-

breaking litigation regarding medical and mental health care within California's massive prison system, federal courts certified a class of prisoners with serious medical needs unrelated to mental health, as well as a class of prisoners with serious mental health needs. Thus, there is nothing conceptually novel about certifying a class of prisoners whose physical health would be placed at unreasonable risk by isolated confinement. To date, however, there appear to have been no cases in which a putative class of prisoners at serious risk of physical harm from confinement in isolation attempted to gain exclusion. Nonetheless, such a class is a conceptually straightforward application of *Farmer v. Brennan*.

In fact, in many if not most cases in which the plaintiffs seek to exclude a class of persons who are at substantial risk of serious mental or emotional harm when placed in isolated confinement, it seems likely that there is also a potential class of persons whose physical health would be substantially endangered. Although such a class would share a common vulnerability to serious harm in isolation, the source of that unreasonable risk could come from the interaction of medical and mental health issues, as in the Michigan death cases cited above. Alternately, such an unreasonable risk could arise from the combination of a prisoner's vulnerability and the cell's design (such as a prisoner at increased risk of heat injury in a cell that routinely overheats in hot weather, or a prisoner in a cell without accommodations who needs an assistive device to transfer from a wheelchair to a toilet); or from the nature of staff-prisoner interactions in the unit (such as use of chemical agents on a prisoner with serious mental illness or with a serious respiratory condition, such as asthma). Accordingly, this could be a fertile area for new litigation combating isolation.

#### ***D. Pregnant Women***

While the category of pregnant women could be simply folded into the last category of prisoners with challenges related to serious medical needs, there are two factors that justify some additional comments. First, the obvious: unlike any other category, confining a pregnant woman in isolation has effects not only on her health, but also on the health of her fetus. Second, it seems easier for judges and the general public to find unnecessarily harsh treatment of pregnant women inhumane and to view women in late pregnancy or labor as particularly unlikely to pose a security threat. Indeed, there is a useful model of this phenomenon of greater empathy for pregnant prisoners in the other highly effective campaign for prisoner health and safety in the last few years: the campaign to end the practice of shackling pregnant women. In 2000, Illinois became the first state to enact a law restricting the practice of shackling pregnant women; today there are twenty states with laws restricting shackling, and all but twelve state corrections systems, as well as the Federal Bureau of Prisons, have policies that in some manner restrict shackling during pregnancy and delivery. Restrictions on the use of isolation on pregnant women would seem likely to raise similar health and safety concerns. So far, however, the only example of successful litigation occurred in New York State. In February 2014, the New York Department of Corrections and Community Supervision agreed to a comprehensive settlement of a legal challenge to isolated confinement. In the settlement, the department agreed to take "immediate steps to remove . . . pregnant inmates" from "extreme isolation." This litigation could serve as a model for plaintiffs in other jurisdictions since the inclusion of pregnant women in this larger class avoids possible problems with attempting to demonstrate numerosity in a more limited class, and it adds a group of particularly

sympathetic plaintiffs.

#### **IV. SUBSTANTIVE DUE PROCESS AND THE SPECIAL CASE OF CONFINED YOUTH**

Challenges to isolated confinement of those under eighteen years of age based on the special vulnerabilities of youth take place in a more complex legal landscape than those seeking the exclusion of the categories discussed above. These cases include several different legal statuses: youth committed to a juvenile facility, youth detained awaiting a hearing on commitment to a juvenile facility, and youth who are held in an adult facility pursuant to criminal proceedings, whether pretrial or after conviction. Claims against a juvenile facility seeking an end to isolated confinement are frequently filed under both the Due Process Clause of the Fourteenth Amendment as well as the Eighth Amendment.

The courts have responded with a variety of conclusions about the applicable constitutional standard. Some courts have applied the Eighth Amendment to claims of youth who have been judicially committed to a juvenile facility, as well as those who have been convicted of an adult crime for which they are serving a sentence. Other courts have held that the Due Process Clause of the Fourteenth Amendment, rather than the Eighth Amendment, applies to those committed to juvenile facilities, since the youth have not been convicted of a crime. Still, other courts have applied the Eighth Amendment to certain claims regarding conditions of confinement and the Due Process Clause to other conditions claims.

In many cases, however, it does not matter which constitutional provision is applied because the court concludes that the “deliberate indifference” standard, applicable to conditions of confinement under the Eighth Amendment, is also the proper benchmark for conditions of confinement claims brought under the Due Process Clause. The application of the same standard, however, does not dictate that a “deliberate indifference” standard will produce the same results when applied to youth as it does in cases involving adult prisoners.

The Supreme Court has repeatedly recognized that the treatment of youth in the criminal justice system raises particular concerns because of differences in their state of intellectual and emotional development compared to that of typical adults. In *Ropers v. Simmons*, for example, the Supreme Court noted, in the course of striking down the imposition of the death penalty for crimes committed when the offender was under eighteen years of age, that youth show a “lack of maturity and an undeveloped sense of responsibility.” Similarly, in *Graham v. Florida*, in which the Court struck down life sentences without the possibility of parole as punishment for crimes committed before the age of eighteen that did not involve homicide, it noted the “fundamental differences between juvenile and adult minds.” Neurological evidence indicates that a part of the frontal lobe, the dorsolateral prefrontal cortex (DLPFC), is among the last regions of the brain to complete development. This region of the brain is “linked to the ability to inhibit impulses, weigh consequences of decisions, prioritize, and strategize.” Just as this lack of maturity may predispose youth to commit impulsive criminal acts, it could also lead youth to commit impulsive acts within the restrictive confinement of a correctional facility--including actions that violate the institution’s rules as well as incidents of self-harm.

Another risk factor for youth confined in an adult prison or jail is that they are often assigned to isolation for protection. This practice is based on the statistically accurate perception of staff that youth are at higher risk of physical and sexual assault because of their small size or assumed lack of sophistication. . . . .

When the unique psychological and cognitive issues affecting youth are considered, including the factors suggesting that youth are more impulsive and therefore less likely to fully consider the long-range impact from their actions, the data suggest that conditions like these, which are considered too extreme for an adult to tolerate for a short period, are likely to be experienced as even more intolerable by an adolescent. For that reason, it is not surprising that more than sixty percent of all suicides of adolescents in correctional facilities involve youth who have spent time in isolated confinement, and half of all youth suicides in such facilities occur in isolation.

Youth held in isolation (often called “room confinement” in juvenile facilities) thus constitute another group in which it should be possible to show the existence of an excessive risk of harm, satisfying the objective component of the deliberate indifference standard that applies to adult prisoners. Indeed, there is a body of case law holding that confinement of youth in isolation violates the Constitution. Recent developments also highlight the vulnerability to legal challenge of jurisdictions permitting the isolation of youth. In the recent settlement agreement in New York, state officials promised that youth in disciplinary confinement in the adult prison system would be given at least five hours of outdoor exercise and programming outside of their cells five days a week, and certain facilities would maintain separate housing for youth who would ordinarily be placed in solitary confinement.<sup>187</sup> The state also agreed to set aside space at designated facilities to accommodate the youth who would normally be placed in solitary confinement.

Shortly after the New York settlement, the U.S. Department of Justice expanded litigation challenging solitary confinement to all Ohio juvenile correctional facilities. Two months later, it announced a settlement that would reduce and eventually eliminate solitary confinement throughout Ohio. Significantly, that settlement was supported by a concession from Ohio that the relief approved in the settlement was enforceable as a court order because it was necessary to remedy a constitutional violation.

Litigation challenges to the use of isolation on youth, and state and local advocacy campaigns seeking to eliminate isolated confinement extending longer than necessary to defuse a crisis, seem to present a real target of opportunity, particularly because there are so many horror tales about youth sent to solitary. Moreover, there should be far fewer debates during monitoring about class membership. In contrast to questions of serious mental illness, for example, whether someone is below the age of eighteen is ordinarily not subject to debate.

## **V. PROCEDURAL DUE PROCESS**

As noted above, in *Wilkinson v. Austin*, the Supreme Court ruled that the prisoners subjected to indefinite confinement in Ohio's supermax, the Ohio State Prison, have a right to procedural due process. The Court held that the "extreme isolation" flowing from conditions at the supermax, in light of the indefinite length of confinement and the lack of eligibility for parole while prisoners were confined there, constituted an "atypical and significant" deprivation. Thus, confinement under such conditions satisfied the standard that the Court had announced in its earlier case of *Sandin v. Connor* for recognizing a protected liberty interest under the Due Process Clause.

Notwithstanding the Supreme Court's cautious endorsement of an "isolation plus" standard for the imposition of due process protections, the lower federal courts since *Wilkinson* have been somewhat more open to finding that prisoners have a protected liberty interest in avoiding isolated confinement. The most that one can say, however, is that conditions similar to the supermax conditions in the Ohio State Prison, imposed for a period of at least one year, have a good chance of being found subject to due process protections. Of course, prisoners considering such litigation might ask how much a successful lawsuit would actually improve their circumstances, as observance of procedural regularity hardly ensures that the result of the process will actually be fair and equitable. This is particularly so in light of the minimal nature of the procedural protections that the Supreme Court has mandated for decisions that can have serious consequences for prisoners threatened with solitary confinement.

....

There is, however, at least one discrete area where procedural due process claims could potentially have a significant effect in reducing the use of isolated confinement. In many states that retain capital punishment, prisoners under sentence of death are assigned to a segregated death row unit by statute or department of corrections policy, and the conditions on such units often approximate the restrictions in an isolation unit. In a recent case brought by an individual prisoner without certification as a class action, a district court struck down a practice that automatically assigned prisoners sentenced to death to segregated confinement. The court found that confinement on death row was more restrictive than confinement in general population at the maximum security facility where the death row was located, and that the conditions on death row "amount to a form of solitary confinement," with prisoners spending twenty-three hours a day in a small cell. The court also pointed out that confinement on death row meant that the prisoner spent almost all of his time without contact with any other human beings, except for staff at the prison. Finding the conditions of death row "uniquely severe" in comparison to conditions in the maximum security facility, the court determined that death row prisoners had a liberty interest in avoiding this classification, and that confining all prisoners under sentence of death to these conditions furthered few, if any, penological goals. The court concluded that the prison officials could cure the violation by providing the plaintiff with an individualized classification decision, or by changing the conditions on death row. This case, originally filed without counsel, suggests a possible model for class actions seeking similar relief in other jurisdictions that automatically isolate prisoners under sentence of death.

....

## VII. AN END TO TORTURE

When I have been inside an isolation unit, either to conduct legal interviews or to accompany an expert, I have experienced disturbing events ranging from walking across a tier in which I could not avoid stepping on human waste so that, after leaving the unit, I threw out my shoes, to coming across a cell where the walls and the floor were covered with blood because a prisoner had, several days earlier, deliberately cut himself. The decibel level from prisoners screaming and metal doors and gates clanging and often the smell make concentration difficult. I find it difficult to endure even a few hours in a bad unit. I find it even harder to imagine what it must be like for staff to spend a daily shift on such a unit, and they are victims too. The stress on someone who must live twenty-four hours a day in such a place is beyond my comprehension.

Isolation causes pain and suffering to everyone subjected to it, and places everyone at increased risk of physical and psychological deterioration. Indeed, this year the National Academy of Sciences published an extensive study of incarceration in the United States in which it decried the restrictions on social contact for prisoners in isolated confinement. The study described supermax prisons as a modern version of prison isolation “that had not been widely used in the United States for the better part of a century,” and that had been condemned by many penologists and correctional legal scholars as “draconian,” “redolent with custodial overkill,” and a kind of confinement that “raised the level of punishment close to that of psychological torture.”

Why then has it been so difficult to persuade courts to enjoin practices that approach or cross the line into torture? The most obvious reason is that courts are deeply reluctant to interfere with practices of correctional officials, particularly practices that are common throughout the country and involve managing large numbers of prisoners. Whether this reluctance stems from a belief on the part of judges that prison officials actually have some special expertise to which courts should defer, or from a belief that however badly the current system deals with prisoners, disruption is likely to result in dangerous unrest, the result is to allow isolation to continue for many of those subjected to it.

There is no basis in the Supreme Court’s case law on Eighth Amendment conditions of confinement for this reluctance. As noted above, in *Whitley v. Albers*, the Court held that, in the context of a prison disturbance in which staff use force against prisoners, establishing a violation of the Eighth Amendment required a demonstration that force was used maliciously or sadistically. In *Whitley*, the Court was careful to distinguish issues regarding the use of force from other prison staff concerns, such as medical care, in which there is ordinarily no need to balance competing institutional priorities such as the safety of other prisoners. Although in *Hudson v. McMillian* the Supreme Court expanded the reach of the “malicious or sadistic” standard by applying it to all cases involving the use of force by prison staff, it did not suggest that it was extending that standard to security measures other than the use of force. Moreover, *Farmer v. Brennan* explicitly applied the “deliberate indifference” standard to all prison conditions of confinement.

Nonetheless, when prisoners challenge conditions of confinement not involving the use of force and the defense contends that the practice or condition is justified by security concerns, courts continue to

struggle. The clearest analysis of this issue is in the en banc case of *Jordan v. Gardner*. *Jordan* involved women prisoners challenging a policy of using male correctional staff to perform pat searches of the women that involved touching their clothed breast and crotch areas. The plaintiffs presented evidence that the searches inflicted grave psychological pain because of the women's histories of physical and sexual abuse. On the basis of its finding that the searches were unnecessary for purposes of security, the district court had concluded that the searches lacked a penological justification and enjoined the practice. The court of appeals affirmed, applying the "deliberate indifference" standard, relying on the fact that the infliction of the pain from this practice was not simply a one-time event, and that the policy was formulated in the absence of time constraints, so that neither *Whitley* nor *Hudson v. McMillian* controlled. The court did not address what the outcome would have been if there had been a legitimate security rationale or if the decision to conduct such a search had occurred under real time pressures.

The Eighth Circuit has also grappled with the interaction of security concerns with the need to protect prisoner health and safety, in the context of challenges to shackling prisoners when such shackling poses health risks. In *Haslar v. Megerman*, the court rejected an appeal from the award of summary judgment against a former jail detainee. The detainee, who had suffered permanent injuries when he was sent out for medical care because of renal failure, claimed that the jail policy on shackling was deliberately indifferent. The policy required that detainees remain shackled at all times during outside medical treatment. At the time of the incident, the detainee was almost comatose, and at one point the detainee's legs were so swollen that the shackles could hardly be seen. The correctional officers guarding the detainee ignored complaints that the shackles needed to be removed. The county defendants offered evidence that there was an unwritten qualification to the policy allowing shackles to be loosened or removed when medically necessary. On the basis of the unwritten exception, the court of appeals held that the policy was neither deliberately indifferent to the detainee's medical needs nor did it impose punishment on a pretrial detainee in violation of the Fourteenth Amendment because it was a reasonable measure to prevent escape. The court expressly noted that because the correctional officers who failed to act were not defendants, it was not commenting on whether the actions of the correctional officers might have been deliberately indifferent.

As written, and if one is able to suppress doubts about how compelling the evidence of unwritten exceptions to the written policy was, *Haslar* is not an extreme decision. In *Nelson v. Correctional Medical Services*, however, the court appeared to expand *Haslar* from approval of a flexible policy that allowed unshackling when medically appropriate to blanket approval of a far less nuanced shackling policy. *Nelson* involved a prisoner who, pursuant to a general restraint policy of the Arkansas Department of Corrections, remained in shackles through most of her labor and was reshackled after delivery.<sup>283</sup> She filed suit, alleging pain and anguish as well as physical injuries from the shackling. A panel of the court of appeals held that the district court should have granted summary judgment against the plaintiff, reasoning that although she had a serious medical need, the shackling policy of the department, as written, lacked an express intent to punish.<sup>284</sup> The court quoted *Haslar* in finding that the policy also served a legitimate penological purpose:

A single armed guard often cannot prevent a determined, unrestrained, and sometimes aggressive inmate from escaping without resort to force. It is eminently reasonable to

prevent escape attempts at the outset by restraining hospitalized inmates to their beds[.]

The panel decision appears to suggest that a general policy without the claimed exceptions relied on in *Haslar* is equally defensible since it notes that the injuries in *Haslar* were even more serious and the risks of restraint more obvious. After rehearing en banc, the court of appeals rejected the panel's resolution of the implicit potential conflict between the medical needs of the plaintiff and the asserted security justification for the shackling policy. The court first focused on the Eighth Amendment question and determined that the record contained evidence from which a jury could find that the plaintiff had a serious medical need, and that the correctional officer knew of the risk posed by the need and nonetheless disregarded the need, despite discretion under the state policy that would have allowed unshackling. The court resolved the claimed security justification for shackling by determining that a jury could determine that the plaintiff did not present a flight risk, in light of the plaintiff's physical condition, since the officer was experienced and possessed a gun. Thus, again the court found it unnecessary to confront the possible conflict directly. The existence of this lurking question nonetheless suggests that plaintiffs challenging isolated confinement based on any Eighth Amendment theory should present evidence that isolation is unnecessary from a security perspective because alternative, financially feasible strategies are equally or more effective in preserving security while avoiding the serious risks to prisoners.

If, in fact, plaintiffs can effectively address the concerns of judges about security issues in cases challenging isolated confinement, they can return to the goal that, ironically enough, the plaintiffs sought in the *Madrid v. Gomez* case, which began this campaign: the abolition of isolated confinement. This is a propitious time for litigation to evolve from seeking removal of particularly vulnerable groups to ending the practice altogether because there is a developing consensus of expert opinion that isolated confinement causes serious harm. The recent study by the National Academy of Sciences summarizes and endorses the research literature finding that serious harm comes from isolated confinement.

....

Plaintiffs who seek abolitionist remedies in challenges to the use of isolation would be greatly assisted by having access to additional research results on several issues. For example, I strongly suspect that in Michigan and in other states the rate of unexpected deaths from all causes is significantly higher in isolated confinement than it is the general population because prisoners typically have more difficulties gaining access to health care while in isolated confinement and because of the physical effects of psychological stress of such confinement. The only research data that we have on that issue, however, concern the significantly higher risk of suicide in isolation. Although the Department of Justice Bureau of Justice Statistics publishes compilations of deaths in prisons and jails that include some demographic information and a reported cause of death where available, they do not include information about whether the death took place in general population or in isolated confinement, nor do the published data distinguish between expected and unexpected deaths. Collections of data that allowed comparison of unexpected death rates in isolation to deaths in general population, with other relevant variables taken

into account, could shed substantial additional light on the effects of isolated confinement.

Another research project that would be extremely informative would be the replication in other jurisdictions of a study in Washington State. That study compared the success in avoiding new felony convictions of prisoners released directly from supermax confinement to the community with that of prisoners who were reclassified to less restrictive housing prior to their release. The study found that prisoners released to the community directly from supermax confinement committed new felonies much more quickly than did prisoners who went through a period of less restrictive confinement prior to release. Moreover, the rate at which direct-release prisoners committed any new felony during the period was also significantly higher than for the prisoners who had a period in less restrictive confinement.

In addition, litigation on this issue should include experts prepared to discuss the steps necessary to move prisoners from isolation to general population, including a meaningful classification system to allow placement in housing where the prisoner can be held safely but without the debilitating effects of isolation. Such a program will require staff retraining and the careful screening of staff. It will also require the development of a range of treatment programs to support mental health and behavioral stability among the survivors of isolated confinement. Isolated confinement generally appears to be far more expensive than housing prisoners in general population, so at least a substantial portion of the cost of providing necessary treatment would likely be offset by the expected large percentage of prisoners who could be safely returned to general population immediately or in a relatively short period of time following reclassification.

The environment for a return to the *Madrid* goal has also improved because of the enormous energy in the advocacy campaign against solitary confinement. Public attitudes towards the treatment of persons convicted of crimes appear to have softened in recent years as the skepticism about the wisdom of continuing to lock up more people has increased. To the extent that the general public is exposed to accurate information about the harms occasioned by isolated confinement, as well as the lack of evidence that it improves either prison security or community safety, they may be even more likely to support such steps, or at least less likely to be strongly opposed.

An across-the-board attack on solitary confinement would necessarily be based on the Eighth Amendment, alleging that, taken together, the risks to mental and physical health from placement in isolated confinement pose a substantial and unreasonable risk of serious harm. Such a challenge would have one additional argument not available to the plaintiffs in *Madrid*. In *Hope v. Pelzer*, the Supreme Court held that cuffing a prisoner to a hitching post for longer than necessary to address an immediate danger or threat violated the Eighth Amendment. Several things about this decision are relevant to the litigation against solitary confinement.

First, the use of the hitching post, like the use of solitary confinement, raises issues about the discretion of prison officials to mandate policies that are justified as security needs but also pose risks of harm to prisoners. The Court disposed of the security concern by circumscribing the scope of its determination that the use of the hitching post amounted to a constitutional violation; it noted that “[a]ny safety concerns had long since abated by the time petitioner was handcuffed to the hitching post.” At the same

time, in describing another case in which a lower court upheld the temporary denial of water to a prisoner who was part of a work squad, the Court stated that a violation of the Eighth Amendment would have occurred if the coercion had jeopardized the prisoner's health. Although this statement is dictum, it is a clear rejection of the assumption that security issues trump serious risks to prisoner health and safety outside the context of direct use of force or emergency security steps. The Court also noted "the clear lack of an emergency situation," thus suggesting why *Whitley v. Albers* does not control without directly discussing the issue.

Even more significant is a second feature of *Hope*. In its analysis of the Eighth Amendment issue, the Court first applies the standard "deliberate indifference" analysis from *Farmer*; there is nothing surprising here. In its analysis of whether the defendants could employ a qualified immunity defense, however, the Court relies in part on something quite different to conclude that the Eighth Amendment violation was clearly established:

The obvious cruelty inherent in this practice should have provided respondents with some notice that their alleged conduct violated Hope's constitutional protection against cruel and unusual punishment. Hope was treated in a way antithetical to human dignity--he was hitched to a post for an extended period of time in a position that was painful, and under circumstances that were both degrading and dangerous.

The suggestion that the fact that a treatment that is "antithetical to human dignity" is an independent ground to find a violation of the Eighth Amendment is the first hint since *Farmer* that considerations of human dignity have any relevance to determining that prison conditions of confinement are unconstitutional. *Hope* thus acknowledges an older strain of Eighth Amendment law, best represented in *Trop v. Dulles*, in which the Court held that the Eighth Amendment barred Congress from enacting a statute imposing denaturalization as a punishment for wartime desertion from the military. In that opinion, the Court adopted a broad view of the Eighth Amendment: "While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards. . . . The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."

In contrast, by the time of *Farmer*, when the Court referred to "evolving standards of decency," it was in the context of explaining the limits of discretion of prison officials; allowing prisoners to be beaten or raped inflicts harm without any penological justification. There is no apparent suggestion that an affront to dignity could by itself, without other adverse consequences, violate the Eighth Amendment. The opinion in *Hope*, in contrast, suggests that a court hearing evidence about whether prolonged isolated confinement constitutes cruel and unusual punishment should be open to testimony about the effects of isolated confinement that goes beyond the body of literature addressing the propensity of such confinement to engender or exacerbate mental illness, but should also allow evidence regarding the emotional pain and anguish of isolated confinement, such as the effects of living in a tiny cell with no view of a world beyond, day after day confined without meaningful activity, physical contact with loved ones, or even normal face-to-face conversations with a friend.

One can speculate that the Supreme Court found it easier to perceive that the use of a hitching post is inconsistent with human dignity because the image of hitching posts may provoke the association of such treatment with the use of shackles during slavery and the post-Reconstruction forms of social control used on African Americans. To the extent that the advocacy campaign seeking to end the use of solitary confinement can link the practice to some similarly repugnant form of punishment, it will be far easier to make the argument that isolated confinement, like the use of the hitching post, is antithetical to human dignity. Perhaps a comparison to medieval dungeons or animal cages in a traditional zoo could serve as an appropriate frame for such advocacy. With that frame for the issue of isolated confinement, evidence of the high risk of harm and the safer alternatives to the use of solitary confinement might finally locate a more receptive judicial audience. When the “fatal experiment” ends and the isolation units become museums, people will wonder why such practices were ever tolerated in a civilized country.



Published on American Civil Liberties Union (<https://www.aclu.org>)

May 27, 2015

## Victory! UN Crime Commission Approves Mandela Rules on Treatment of Prisoners <sup>[1]</sup>

Author(s):

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Last week I was in Vienna, representing the ACLU at the United Nations Commission on Crime Prevention and Criminal Justice. Meetings of the Crime Commission, as it's informally known, are sometimes contentious. But the commission's closing session on Friday afternoon was anything but. Instead, the delegates erupted in thunderous applause as the Mandela Rules <sup>[2]</sup> on the treatment of prisoners were approved by acclamation — the culmination of years of work by the ACLU and many others.

The Mandela Rules — named in honor of the late South African President Nelson Mandela, who was imprisoned for 27 years by the country's apartheid regime — are the revised United Nations Standard Minimum Rules for the Treatment of Prisoners <sup>[3]</sup>, or SMRs. The SMRs are the leading international body of principles on the treatment of prisoners, but they were drafted in 1955 and were badly in need of updating.

The revisions provide that solitary confinement "shall be used only in exceptional cases as a last resort for as short a time as possible and subject to independent review." Indefinite solitary confinement and prolonged solitary confinement — defined as more than 15 consecutive days — are now prohibited. Solitary confinement will also be prohibited in the case of persons with mental or physical disabilities when their condition would be exacerbated.

The Mandela Rules include other important revisions addressing the treatment of women and persons with disabilities. The provisions regarding health care are strengthened, and significant safeguards on the use of restraints have been added.

Finally, the resolution approving the Mandela Rules calls for July 18 — the global icon's birthday — to be known as Mandela Prisoner Rights Day, which will promote humane conditions of confinement and raise awareness of prisoners as a continuing part of society.

One notable feature of this year's Crime Commission was the positive role played by the United States. The U.S. delegation strongly supported adopting the rules and naming them in honor of Nelson Mandela, whom it called "one of the greatest defenders of human rights and dignity in recent history." It resisted attempts to reopen the text of the Mandela Rules that had been agreed to in Cape Town earlier this year, and it fought back against efforts to insert language that would allow countries to disregard certain rules for cultural and religious reasons.

Perhaps most important, the U.S. delegation included the corrections directors from Washington <sup>[4]</sup> and Colorado <sup>[5]</sup>, two states that have significantly reduced solitary confinement and pioneered other progressive reforms. The two directors described their work at a panel discussion sponsored by the United States, and the duo played a key role in negotiations leading to adoption of the Mandela Rules.

It is important to remember that the outcome is a compromise that was reached after a lengthy intergovernmental process and extensive negotiations, which often attempted to water down progressive revisions. That said, civil society groups <sup>[6]</sup> as well as independent experts like the UN Special Rapporteur on Torture <sup>[7]</sup> played a significant role in guiding the process and advocating for progressive human rights-based revisions.

Our work isn't over yet.

The Mandela Rules still need to be approved by the U.N. General Assembly this fall, although approval is

overwhelmingly likely. Unlike a treaty, the rules aren't binding, although they represent a powerful global consensus on minimum standards. The real work — ensuring that the Mandela Rules make a difference in the lives of the millions of prisoners throughout the world — begins now. But the unanimous adoption of the Mandela Rules in Vienna last week was an indispensable first step, and a positive development for prisoners' rights everywhere.

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[3] <http://www.penalreform.org/priorities/global-advocacy/standard-minimum-rules/>

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[7] <http://antitorture.org/smr/>

## Annex

# United Nations Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules)

## Preliminary observations

### *Preliminary observation 1*

The following rules are not intended to describe in detail a model system of penal institutions. They seek only, on the basis of the general consensus of contemporary thought and the essential elements of the most adequate systems of today, to set out what is generally accepted as being good principles and practice in the treatment of prisoners and prison management.

### *Preliminary observation 2*

1. In view of the great variety of legal, social, economic and geographical conditions in the world, it is evident that not all of the rules are capable of application in all places and at all times. They should, however, serve to stimulate a constant endeavour to overcome practical difficulties in the way of their application, in the knowledge that they represent, as a whole, the minimum conditions which are accepted as suitable by the United Nations.

2. On the other hand, the rules cover a field in which thought is constantly developing. They are not intended to preclude experiment and practices, provided these are in harmony with the principles and seek to further the purposes which derive from the text of the rules as a whole. It will always be justifiable for the central prison administration to authorize departures from the rules in this spirit.

### *Preliminary observation 3*

1. Part I of the rules covers the general management of prisons, and is applicable to all categories of prisoners, criminal or civil, untried or convicted, including prisoners subject to “security measures” or corrective measures ordered by the judge.

2. Part II contains rules applicable only to the special categories dealt with in each section. Nevertheless, the rules under section A, applicable to prisoners under sentence, shall be equally applicable to categories of prisoners dealt with in sections B, C and D, provided they do not conflict with the rules governing those categories and are for their benefit.

### *Preliminary observation 4*

1. The rules do not seek to regulate the management of institutions set aside for young persons such as juvenile detention facilities or correctional schools, but in general part I would be equally applicable in such institutions.

2. The category of young prisoners should include at least all young persons who come within the jurisdiction of juvenile courts. As a rule, such young persons should not be sentenced to imprisonment.

## I. Rules of general application

### Basic principles

#### *Rule 1*

All prisoners shall be treated with the respect due to their inherent dignity and value as human beings. No prisoner shall be subjected to, and all prisoners shall be protected from, torture and other cruel, inhuman or degrading treatment or punishment, for which no circumstances whatsoever may be invoked as a justification. The safety and security of prisoners, staff, service providers and visitors shall be ensured at all times.

#### *Rule 2*

1. The present rules shall be applied impartially. There shall be no discrimination on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or any other status. The religious beliefs and moral precepts of prisoners shall be respected.

2. In order for the principle of non-discrimination to be put into practice, prison administrations shall take account of the individual needs of prisoners, in particular the most vulnerable categories in prison settings. Measures to protect and promote the rights of prisoners with special needs are required and shall not be regarded as discriminatory.

#### *Rule 3*

Imprisonment and other measures that result in cutting off persons from the outside world are afflictive by the very fact of taking from these persons the right of self-determination by depriving them of their liberty. Therefore the prison system shall not, except as incidental to justifiable separation or the maintenance of discipline, aggravate the suffering inherent in such a situation.

#### *Rule 4*

1. The purposes of a sentence of imprisonment or similar measures deprivative of a person's liberty are primarily to protect society against crime and to reduce recidivism. Those purposes can be achieved only if the period of imprisonment is used to ensure, so far as possible, the reintegration of such persons into society upon release so that they can lead a law-abiding and self-supporting life.

2. To this end, prison administrations and other competent authorities should offer education, vocational training and work, as well as other forms of assistance that are appropriate and available, including those of a remedial, moral, spiritual, social and health- and sports-based nature. All such programmes, activities and services should be delivered in line with the individual treatment needs of prisoners.

#### *Rule 5*

1. The prison regime should seek to minimize any differences between prison life and life at liberty that tend to lessen the responsibility of the prisoners or the respect due to their dignity as human beings.

2. Prison administrations shall make all reasonable accommodation and adjustments to ensure that prisoners with physical, mental or other disabilities have full and effective access to prison life on an equitable basis.

• • • •

. . . .

*Rule 42*

General living conditions addressed in these rules, including those related to light, ventilation, temperature, sanitation, nutrition, drinking water, access to open air and physical exercise, personal hygiene, health care and adequate personal space, shall apply to all prisoners without exception.

*Rule 43*

1. In no circumstances may restrictions or disciplinary sanctions amount to torture or other cruel, inhuman or degrading treatment or punishment. The following practices, in particular, shall be prohibited:

- (a) Indefinite solitary confinement;
- (b) Prolonged solitary confinement;
- (c) Placement of a prisoner in a dark or constantly lit cell;
- (d) Corporal punishment or the reduction of a prisoner's diet or drinking water;
- (e) Collective punishment.

2. Instruments of restraint shall never be applied as a sanction for disciplinary offences.

3. Disciplinary sanctions or restrictive measures shall not include the prohibition of family contact. The means of family contact may only be restricted for a limited time period and as strictly required for the maintenance of security and order.

*Rule 44*

For the purpose of these rules, solitary confinement shall refer to the confinement of prisoners for 22 hours or more a day without meaningful human contact. Prolonged solitary confinement shall refer to solitary confinement for a time period in excess of 15 consecutive days.

*Rule 45*

1. Solitary confinement shall be used only in exceptional cases as a last resort, for as short a time as possible and subject to independent review, and only pursuant to the authorization by a competent authority. It shall not be imposed by virtue of a prisoner's sentence.

2. The imposition of solitary confinement should be prohibited in the case of prisoners with mental or physical disabilities when their conditions would be exacerbated by such measures. The prohibition of the use of solitary confinement and similar measures in cases involving women and children, as referred to in other

United Nations standards and norms in crime prevention and criminal justice,<sup>28</sup>  
continues to apply.

• • • •

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8 IN THE UNITED STATES DISTRICT COURT  
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
10 OAKLAND DIVISION

12 <b>TODD ASHKER, et al.,</b>	C 09-05796 CW
13	
14 Plaintiffs,	<b>SETTLEMENT AGREEMENT</b>
15	
16 <b>v.</b>	
17	
18 <b>GOVERNOR OF THE STATE OF CALIFORNIA, et al.,</b>	
19 Defendants.	

19 The parties enter into this Settlement Agreement (the Agreement) to address and settle  
20 Plaintiffs' claims for declaratory and injunctive relief regarding the policies and practices of the  
21 California Department of Corrections and Rehabilitation (CDCR) for placing, housing, managing,  
22 and retaining inmates validated as prison gang members and associates, as well as the conditions  
23 of confinement in the Security Housing Unit (SHU) at Pelican Bay State Prison and other CDCR  
24 SHU facilities.

25 **I. BACKGROUND AND PROCEDURAL POSTURE**

26 1. Plaintiffs in this matter are inmates Todd Ashker, Ronnie Dewberry, Luis Esquivel,  
27 George Franco, Jeffrey Franklin, Richard Johnson, Paul Redd, Gabriel Reyes, George Ruiz, and  
28 Danny Troxell (Plaintiffs).

1           2. Defendants are the Governor of the State of California, CDCR's Secretary, Pelican  
2 Bay's Warden, and the Chief of CDCR's Office of Correctional Safety, each of whom is sued in  
3 his official capacity (Defendants).

4           3. This action was originally filed on December 9, 2009, as an individual pro se civil-  
5 rights suit by Plaintiffs Todd Ashker and Danny Troxell. A First Amended Complaint was filed  
6 on May 21, 2010. On September 10, 2012, Plaintiffs, having retained counsel, filed a Second  
7 Amended Complaint, which added class allegations and eight additional Plaintiffs. The Second  
8 Amended Complaint alleges that CDCR's gang management regulations and practices violate the  
9 Due Process Clause of the Fourteenth Amendment and that the conditions of confinement in  
10 Pelican Bay's SHU constitute cruel and unusual punishment in violation of the Eighth  
11 Amendment. The Second Amended Complaint seeks declaratory and injunctive relief to address  
12 the alleged constitutional violations.

13           4. Defendants filed a motion to dismiss the Second Amended Complaint, which the  
14 Court denied on April 9, 2013. (ECF No. 191.) On April 30, 2013, Defendants answered the  
15 Second Amended Complaint. (ECF No. 194.)

16           5. Plaintiffs filed a motion for class certification, which the Court granted in part and  
17 denied in part on June 2, 2014. (ECF No. 317.) Some Plaintiffs were appointed to represent two  
18 classes of inmates certified under Rules 23(b)(1) and (b)(2) of the Federal Rules to include: (i) all  
19 inmates assigned to an indeterminate term at Pelican Bay's SHU on the basis of gang validation,  
20 under CDCR's policies and procedures, as of September 10, 2012; and (ii) all inmates who are  
21 now, or will be in the future, assigned to Pelican Bay's SHU for ten or more continuous years.  
22 (*See, e.g.*, ECF No. 317 at 11, 14, 21; ECF No. 387 at 13-17.)

23           6. On October 18, 2012, CDCR implemented its Security Threat Group (STG) program  
24 as a pilot program which modified the criteria for placement into the SHU and initiated a Step  
25 Down Program designed to afford validated inmates a way to transfer from the SHU to a general  
26 population setting within three or four years. On October 17, 2014, and upon expiration of the  
27 pilot, CDCR's STG regulations were approved and adopted in Title 15.

28

1           7.     Plaintiffs filed a motion for leave to file a Supplemental Complaint, which the Court  
2 granted on March 9, 2015. (ECF No. 387.) On March 11, 2015, Plaintiffs filed their  
3 Supplemental Complaint. (ECF No. 388.) The Supplemental Complaint alleges an additional  
4 Eighth Amendment claim on behalf of a putative class of gang-validated inmates transferred to  
5 another CDCR SHU facility under CDCR’s Step Down Program, after having been housed in  
6 Pelican Bay’s SHU for ten or more years. Plaintiffs Dewberry, Franklin, Ruiz, and Troxell are  
7 the putative class representatives of this supplemental Eighth Amendment claim. Plaintiffs  
8 transferred from Pelican Bay’s SHU also pursue relief on an individual basis. Plaintiffs contend  
9 that the alleged constitutional violation that inmates suffered because of their confinement in  
10 Pelican Bay’s SHU for ten or more continuous years does not end notwithstanding their transfer  
11 from Pelican Bay to another facility under the Step Down Program. The Court stayed the  
12 litigation of this additional Eighth Amendment claim until resolution of the Eighth Amendment  
13 claim alleged in Plaintiffs’ Second Amended Complaint. (ECF Nos. 387, 393.)

14           8.     Apart from a 45-day litigation stay in early 2014 to discuss settlement, the parties  
15 engaged in extensive discovery for over three years. Fact discovery closed on November 28,  
16 2014. The parties responded to hundreds of written discovery requests, produced hundreds of  
17 thousands of pages of documents, and completed approximately thirty depositions of current and  
18 former prison officials and inmates. Expert discovery closed on May 29, 2015. Plaintiffs  
19 disclosed ten experts, Defendants disclosed seven, and the parties collectively completed a dozen  
20 expert depositions. The parties produced over 45,000 pages of documents in response to  
21 subpoenas directed to their respective experts.

22           9.     The parties have conducted extensive negotiations over several months to resolve  
23 Plaintiffs’ demands that CDCR revise its gang management and SHU policies and practices.  
24 Those negotiations have been undertaken at arm’s length and in good faith between Plaintiffs’  
25 counsel and high-ranking state officials and their counsel. The parties have reached agreement on  
26 statewide policies and practices to settle Plaintiffs’ claims for declaratory and injunctive relief,  
27 and, for settlement purposes only, agree that this Agreement meets the requirements of 18 U.S.C.  
28 § 3626(a)(1).

1           10. The parties agree that the putative supplemental class asserted in Plaintiffs’  
2 Supplemental Complaint—namely, all prisoners who have now, or will have in the future, been  
3 imprisoned in Pelican Bay’s SHU for longer than 10 continuous years and then transferred from  
4 Pelican Bay’s SHU to another SHU in California in connection with CDCR’s Step Down  
5 Program—may be certified as a class for settlement purposes under Rule 23(b)(2) of the Federal  
6 Rules of Civil Procedure. The parties agree that, after notice and an opportunity to object is  
7 provided to members of the two classes previously certified by the Court as well as members of  
8 the supplemental settlement class, the Court may enter an order finding this Agreement to be fair  
9 and reasonable to all class members.

10           11. All parties and their counsel recognize that, in the absence of an approved settlement,  
11 they face lengthy and substantial litigation, including trial and potential appellate proceedings, all  
12 of which will consume time and resources and present the parties with ongoing litigation risks  
13 and uncertainties. The parties wish to avoid these risks, uncertainties, and consumption of time  
14 and resources through a settlement under the terms and conditions of this Agreement.

15           ACCORDINGLY, without any admission or concession by Defendants of any current and  
16 ongoing violations of a federal right, all claims for declaratory and injunctive relief asserted in the  
17 Second Amended Complaint and Supplemental Complaint shall be finally and fully settled and  
18 released, subject to the terms and conditions of this Agreement, which the parties enter into freely,  
19 voluntarily, knowingly, and with the advice of counsel.

## 20   **II. JURISDICTION AND VENUE**

21           12. The Court has jurisdiction of this matter under 28 U.S.C. §§ 1331 and 1343. Venue is  
22 proper under 28 U.S.C. § 1391(b) because a substantial part of the events giving rise to Plaintiffs’  
23 claims occurred in the Northern District of California.

## 24   **III. TERMS AND CONDITIONS**

### 25           **A. NEW CRITERIA FOR PLACEMENT IN SHU, ADMINISTRATIVE SEGREGATION, OR** 26           **THE STEP DOWN PROGRAM.**

27           13. CDCR shall not place inmates into a SHU, Administrative Segregation, or Step Down  
28 Program solely on the basis of their validation status.

1           14. CDCR shall amend the SHU Assessment Chart located in Title 15 of the California  
2 Code of Regulations, section 3341.5, subsection (c)(9). The SHU Assessment Chart shall be  
3 amended as set forth in Attachment B.

4           15. Under the revised Step Down Program policy, STG-I inmates, as defined in Title 15  
5 of the California Code of Regulations, section 3000, will be transferred into the Step Down  
6 Program if they have been found guilty in a disciplinary hearing of committing, with a proven  
7 nexus to an STG, a SHU-eligible offense, as listed in the SHU Assessment Chart.

8           16. STG-II inmates, as defined in Title 15 of the California Code of Regulations, section  
9 3000, will be transferred into the Step Down Program if they have been found guilty in a  
10 disciplinary hearing of committing, with a proven nexus to a STG, two SHU-eligible offenses  
11 within a four year period, as listed in the SHU Assessment Chart.

12           17. Any STG-I or STG-II inmate shall be transferred into the Step Down Program as  
13 described in Paragraphs 15 and 16, upon the completion of the determinate, disciplinary SHU  
14 term imposed by the Institution Classification Committee for that offense. All time spent in the  
15 SHU following completion of the determinate SHU term prior to actual transfer into the Step  
16 Down Program shall be credited as part of the inmate's Step Down Program time. The Institution  
17 Classification Committee shall continue to have the authority to impose, commute, or suspend  
18 any part of the determinate SHU term, as provided in regulations.

19           **B. MODIFICATIONS TO THE STEP DOWN PROGRAM.**

20           18. CDCR shall modify its Step Down Program so that it is based on the individual  
21 accountability of each inmate for proven STG behavior, and not solely on the inmate's validation  
22 status or level of STG affiliation.

23           19. The revised Step Down Program shall be 24 months in duration and consist of 4  
24 program steps that take place within a SHU. Except as provided in Paragraphs 22 and 23, each  
25 step will be 6 months in duration. Step 5 of the existing Step Down Program shall be eliminated.  
26 Upon successful completion of the Step Down Program, the inmate shall be transferred to a  
27 General Population prison commensurate with his specific case factors and in accordance with  
28 existing regulations.

1           20. Each Step within the Step Down Program shall provide incremental increases in  
2 privileges and freedom of movement commensurate with program placement as set forth in  
3 Attachment A.

4           21. The Step Down Program incorporates rehabilitative programming consisting of both  
5 required and elective components. Within 90 days of the Court's preliminary approval of this  
6 Agreement, CDCR will afford Plaintiffs' counsel and four inmate representatives identified by  
7 Plaintiffs an opportunity to meet with CDCR officials to discuss the nature, content and substance  
8 of the mandatory and elective programming. It is CDCR's intent to provide programming with  
9 clear requirements and outcomes to provide an alternative path away from STG behavior and  
10 promote critical life skills. CDCR shall convene a panel of experts, of CDCR's choosing, to  
11 evaluate the Step Down Program curriculum and to make recommendations in keeping with this  
12 intent. CDCR will provide Plaintiffs' counsel with a copy of the panel of experts'  
13 recommendations. Plaintiffs' counsel and the four inmate representatives will have the  
14 opportunity to meet with Defendants regarding recommended components; however, CDCR  
15 retains its discretion to implement the mandatory programming of its choosing for this population.

16           22. Participation in the Step Down Program is mandatory for any inmate placed into the  
17 program. An inmate's refusal to participate in or complete the required programming in the Step  
18 Down Program shall not result in regression or retention in the program, but shall be addressed as  
19 follows: At the 180-day review performed by the Institution Classification Committee at the end  
20 of Step 3, if the Committee determines that the inmate refused to participate in or has not  
21 completed all components of the Step Down Program, the Committee shall retain the non-  
22 participating inmate in Step 3 for an additional 6 months. If, at the end of that additional 6-month  
23 period, the inmate continues to refuse or does not complete all Step Down Program components,  
24 the Institution Classification Committee shall remove the inmate from the program and transfer  
25 him to a Restricted Custody General Population (RCGP) facility. That inmate shall be assigned  
26 to the Step 3 privilege group, however the Institution Classification Committee may later reassign  
27 the inmate to the Step 4 privilege group based on his progression through the commensurate Step  
28 Down Program components remaining to be completed. If the inmate elects to complete the Step

1 Down Program requirements, he shall do so within the RCGP and shall not be returned to the  
2 SHU to complete the program, unless he is found guilty in a disciplinary hearing of a new SHU-  
3 eligible offense. If the inmate completes the Step Down Program components and, while in the  
4 RCGP, is not found guilty of either one serious STG-related or two administrative STG-related  
5 rules violations as listed in the STG Disciplinary Matrix, during the 180-day review period, he  
6 will then be released to the General Population. (See Attachment C.) The Institution  
7 Classification Committee shall conduct reviews no less than every 180-days to determine whether  
8 the inmate has completed the Step Down Program and is eligible for release to the General  
9 Population. Non-participation or lack of completion that is due to the unavailability or  
10 inaccessibility of programming components necessary for Step Down Program compliance shall  
11 not impede an inmate's progress to the next step and shall not be considered as a factor in an  
12 inmate's regression or retention in any step. CDCR shall provide an opportunity for each inmate  
13 to complete Step Down Program programming for each step within 6 months. All time spent  
14 awaiting transfer to another step shall be credited to the completion of the next step.

15 23. The Step Down Program is intended to be a rehabilitative, gang behavior diversion  
16 program for STG affiliated inmates. As such, inmates within the program are expected to remain  
17 disciplinary-free. Misconduct shall be addressed in accordance with existing disciplinary rules  
18 and regulations. The commission of repeated STG violations while in the Step Down Program  
19 shall not result in regression or retention in the program, but shall be addressed as follows: If an  
20 inmate has committed either 3 serious STG rules violations or 5 administrative STG rules  
21 violations as listed in the STG Disciplinary Matrix while in the Step Down Program, he shall be  
22 transferred to the RCGP facility. The Institution Classification Committee shall review the  
23 inmate's disciplinary history and make this determination during the 180-day reviews performed  
24 at the end of Steps 3 and 4. If, during the Step 3 review, the inmate is guilty of committing 3  
25 serious STG rules violations or 5 administrative STG rules violations while in the Step Down  
26 Program, the Committee shall retain the inmate in Step 3 for an additional 6 months. At the end  
27 of that additional 6-month period, the Committee shall remove the inmate from the program and  
28 transfer him to the RCGP. An inmate transferred to the RCGP pursuant to this Paragraph shall be

1 assigned to the Step 3 privilege group. The inmate can appeal the decision to transfer him to the  
2 RCGP to the Departmental Review Board, which would review the inmate's disciplinary history  
3 and determine whether removal from the program and transfer to the RCGP is appropriate; a  
4 hearing before the Board is not required for a determination of such an appeal. Consistent with  
5 Paragraph 22, if the inmate completes the Step Down Program components and, while housed in  
6 the RCGP, is not found guilty of either one serious STG-related or two administrative STG-  
7 related rules violations as listed in the STG Disciplinary Matrix during the RCGP 180-day review  
8 period, he will then be released to the General Population. The Institution Classification  
9 Committee shall conduct reviews no less than every 180-days to determine whether the inmate  
10 has completed the Step Down Program and is eligible for release to the General Population.

11 24. If an inmate is found guilty of committing a SHU-eligible offense while assigned to  
12 the Step Down Program or RCGP, he shall complete the intervening determinate, disciplinary  
13 SHU term as imposed by the Institution Classification Committee for that offense before  
14 returning to the Step Down Program or RCGP. If such SHU-eligible offense has a proven nexus  
15 to an STG as described in Paragraphs 15 and 16, upon completion of the determinate term  
16 imposed by the Committee, the inmate shall be returned to the Step Down Program at Step 1 or  
17 another step as determined by the Committee.

18 **C. REVIEW OF STG-VALIDATED INMATES CURRENTLY IN SHU.**

19 25. Within twelve months of the Court's preliminary approval of this Agreement, CDCR  
20 shall review the cases of all validated inmates who are currently in the SHU as a result of either  
21 an indeterminate term that was previously assessed under prior regulations or who are currently  
22 assigned to Steps 1 through 4, or who were assigned to Step 5 but are retained within the SHU.  
23 These reviews shall be conducted by Institution Classification Committees and prioritized by the  
24 inmates' length of continuous housing within a SHU so that those of the longest duration are  
25 reviewed first. If an inmate has not been found guilty of a SHU-eligible rule violation with a  
26 proven STG nexus within the last 24 months, he shall be released from the SHU and transferred  
27 to a General Population level IV 180-design facility, or other general population institution  
28 consistent with his case factors. An inmate who has committed a SHU-eligible rule violation

1 with an STG nexus within the last 24 months shall be placed into the Step Down Program based  
2 on the date of the most recent STG-related rule violation, as follows: Step 1: violation occurred  
3 within the last 6 months; Step 2: violation occurred within the last 6-12 months; Step 3:  
4 violation occurred within the last 12-18 months; Step 4: violation occurred within the last 18-24  
5 months. Inmates currently assigned to Step 5 in the General Population shall remain in the  
6 General Population and shall no longer be considered current Step Down Program participants.

7 26. During the review described in Paragraph 25, any inmate housed in a SHU program  
8 for 10 or more continuous years who has committed a SHU-eligible offense with a nexus to an  
9 STG within the preceding 2 years, will be transferred into the RCGP for completion of Step  
10 Down Program requirements. Inmates subject to this provision who are currently serving a  
11 disciplinary SHU term will be allowed to complete the SHU term in the RCGP prior to beginning  
12 the Step Down Program, unless the Institution Classification Committee determines by a  
13 preponderance of the evidence that to do so would pose an unreasonable risk to individual or  
14 institutional safety and security. This function of the RCGP shall be implemented as a pilot  
15 program. If the inmate completes the Step Down program requirements, he will be transferred to  
16 a General Population prison setting in accordance with his case factors. One hundred twenty days  
17 after completion of the reviews described in Paragraph 25, CDCR will produce a report on the  
18 functioning of this pilot program and shall inform plaintiffs' counsel whether it intends to make  
19 permanent, modify, or terminate this RCGP function. Within 30 days of receiving the notice  
20 from CDCR, the parties shall meet and confer regarding any proposed changes to the RCGP pilot  
21 program. If CDCR decides to terminate the RCGP pilot program, inmates housed in the RCGP  
22 pursuant to this Paragraph will, in the absence of pending disciplinary charges of a new SHU-  
23 eligible offense requiring segregation, either remain in the RCGP until they transition into  
24 General Population or will be transferred to non-segregated housing.

25 27. For those STG inmates considered for release to the General Population either  
26 following Step Down Program completion or pursuant to the review described in Paragraph 25,  
27 and against whom there is a substantial threat to their personal safety should they be released to  
28 the General Population as determined by a preponderance of the evidence, the Departmental

1 Review Board retains the discretion, in accordance with existing authority, to house that inmate in  
2 alternate appropriate non SHU, non-Administrative segregation housing commensurate with his  
3 case factors, such as a Sensitive Needs Yard or RCGP, until such time that the inmate can safely  
4 be housed in a general population environment. The Departmental Review Board shall articulate  
5 the substantial justification for the need for alternative placement. If the Institution Classification  
6 Committee refers a case to the Departmental Review Board pursuant to this Paragraph, the  
7 Departmental Review Board shall prioritize these case reviews and expeditiously conduct the  
8 hearing and render its placement decision. Thereafter, during their regular 180-day reviews, the  
9 Institution Classification Committee shall verify whether there continues to be a demonstrated  
10 threat to the inmate's personal safety; and if such threat no longer exists the case shall be referred  
11 to the Departmental Review Board for review of housing placement as soon as practicable. For  
12 Departmental Review Board hearings held pursuant to this Paragraph, a staff assistant shall be  
13 provided to help inmates prepare and present their case due to the fact that the complexity of these  
14 types of cases makes assistance necessary. If Plaintiffs' counsel contends that CDCR has abused  
15 its discretion in making housing decisions under this Paragraph, that concern may be raised with  
16 Magistrate Judge Nandor J. Vadas in accordance with the dispute resolution and enforcement  
17 procedures set forth in Paragraphs 52 and 53 below to determine whether CDCR has articulated  
18 substantial justification by a preponderance of the evidence for alternative placement.

19 **D. THE RESTRICTIVE CUSTODY GENERAL POPULATION HOUSING UNIT.**

20 28. The RCGP is a Level IV 180-design facility commensurate with similarly designed  
21 high security general population facilities. Inmates shall be transferred to the RCGP if they have  
22 refused to complete Step Down Program components as described in Paragraph 22; if they have  
23 been found guilty of repeated STG violations while in the Step Down Program as described in  
24 Paragraph 23; if identified safety concerns prevent their release to General Population and the  
25 RCGP is deemed to be appropriate as described in Paragraph 27; or if they meet the eligibility for  
26 placement in the RCGP under the pilot program described in Paragraph 26. Programming for  
27 those inmates transferred to or retained in the RCGP will be designed to provide increased  
28 opportunities for positive social interaction with other prisoners and staff, including but not

1 limited to: Alternative Education Program and/or small group education opportunities; yard/out  
2 of cell time commensurate with Level IV GP in small group yards, in groups as determined by the  
3 Institution Classification Committee; access to religious services; support services job  
4 assignments for eligible inmates as they become available; and leisure time activity groups.  
5 Contact visiting shall be limited to immediate family and visitors who have been pre-approved in  
6 accordance with existing Title 15 visiting regulations, and shall occur on the schedule set forth in  
7 Attachment A. Other privileges provided in the RCGP are also set forth in Attachment A. CDCR  
8 policy is that inmate movement, programming, and contact visits within the RCGP shall not  
9 require the application of mechanical restraints; any application of restraints shall be in  
10 accordance with existing Title 15, section 3268.2. CDCR will provide Plaintiffs' counsel with the  
11 opportunity to tour the proposed RCGP facility and to meet and confer with Defendants regarding  
12 the functioning and conditions of the RCGP, prior to its implementation.

13 **E. ADMINISTRATIVE SHU STATUS.**

14 29. An inmate may be retained in the SHU and placed on Administrative SHU status after  
15 serving a determinate SHU sentence if it has been determined by the Departmental Review Board  
16 that the inmate's case factors are such that overwhelming evidence exists supporting an  
17 immediate threat to the security of the institution or the safety of others, and substantial  
18 justification has been articulated of the need for SHU placement. Inmates may also be placed on  
19 Administrative SHU status if they have a substantial disciplinary history consisting of no less  
20 than three SHU terms within the past five years and the Departmental Review Board articulates a  
21 substantial justification for the need for continued SHU placement due to the inmate's ongoing  
22 threat to safety and security of the institution and/or others, and that the inmate cannot be housed  
23 in a less restrictive environment. Inmates currently serving an Administrative SHU term may  
24 continue to be retained in the SHU based on the criteria set forth in this Paragraph. The  
25 Institution Classification Committee shall conduct classification reviews every 180 days in  
26 accordance with Title 15, section 3341.5. The Departmental Review Board shall annually assess  
27 the inmate's case factors and disciplinary behavior and shall articulate the basis for the need to  
28 continue to retain the inmate on Administrative SHU status. The inmate's privilege group shall

1 be set in a range similar to S-1 to S-5, which can be modified by the Institution Classification  
2 Committee during the inmate's classification review, if deemed appropriate. CDCR shall provide  
3 inmates placed on Administrative SHU status with enhanced out of cell recreation and  
4 programming of a combined total of 20 hours per week. It is CDCR's expectation that a small  
5 number of inmates will be retained in the SHU pursuant to this Paragraph. If Plaintiffs' counsel  
6 contends that CDCR has abused its discretion in making a housing decision under this Paragraph,  
7 that concern may be raised with Magistrate Judge Vadas in accordance with the dispute resolution  
8 and enforcement procedures set forth in Paragraphs 52 and 53 below to determine whether the  
9 Defendants' decision meets the evidentiary standards and criteria set forth in this Paragraph.

10 30. The initial decision to place an inmate on Administrative SHU status, as described in  
11 Paragraph 29, can only be made by the Departmental Review Board.

12 31. At each 180-day review, institutional staff shall identify all efforts made to work with  
13 each inmate on Administrative SHU status to move the inmate to a less restrictive environment as  
14 soon as case factors would allow.

15 **F. HOUSING ASSIGNMENT TO PELICAN BAY'S SHU.**

16 32. Notwithstanding Paragraph 29 above, CDCR shall not house any inmate within the  
17 SHU at Pelican Bay State Prison for more than 5 continuous years. Inmates housed in the Pelican  
18 Bay SHU requiring continued SHU placement beyond this limitation will be transferred from the  
19 Pelican Bay SHU to another SHU facility within CDCR, or to a 180-design facility at Pelican Bay.  
20 Inmates who have previously been housed in the Pelican Bay SHU for 5 continuous years can  
21 only be returned to the Pelican Bay SHU if that return has been specifically approved by the  
22 Departmental Review Board and at least 5 years have passed since the inmate was last transferred  
23 out of the Pelican Bay SHU.

24 33. Notwithstanding Paragraph 32 above, inmates may request in writing that they be  
25 housed in the Pelican Bay SHU in lieu of another SHU location, but such a request must be  
26 reviewed and approved by the Departmental Review Board. An inmate's request to remain  
27 housed in the Pelican Bay SHU shall be reviewed and documented by the Institution  
28 Classification Committee at each scheduled Committee hearing.

1           **G. CONFIDENTIAL INFORMATION.**

2           34. CDCR shall adhere to the standards for the consideration of and reliance on  
3 confidential information set forth in Title 15 of the California Code of Regulations, section 3321.  
4 To ensure that the confidential information used against inmates is accurate, CDCR shall develop  
5 and implement appropriate training for impacted staff members who make administrative  
6 determinations based on confidential information as part of their assigned duties, consistent with  
7 the general training provisions set forth in Paragraph 35. The training shall include procedures  
8 and requirements regarding the disclosure of information to inmates.

9           **H. TRAINING.**

10          35. CDCR shall adequately train all staff responsible for implementing and managing the  
11 policies and procedures set forth in this Agreement. Plaintiffs' counsel shall be provided an  
12 advanced copy of all such training materials with sufficient time to meet and confer with  
13 Defendants, prior to the implementation of the trainings. Plaintiffs are entitled to have an  
14 attorney attend training sessions on these modifications, no greater than 6 times per year.

15          **I. NEW REGULATIONS.**

16          36. CDCR shall promulgate regulations, policies and procedures governing the STG  
17 management and Step Down Program as set forth in this agreement. The pilot program described  
18 in Paragraph 26 will not be required to be promulgated in regulations, unless the pilot program is  
19 made permanent.

20          **J. DATA AND DOCUMENTS.**

21          37. For a period of twenty-four months following the Court's preliminary approval of this  
22 Agreement, CDCR will provide Plaintiffs' counsel data and documentation to be agreed upon,  
23 under the protective order in place in this matter, to monitor Defendants' compliance with the  
24 terms of this Agreement. No later than thirty days after the Court's preliminary approval of this  
25 Agreement, and again twelve months after the Court's preliminary approval, the parties shall  
26 meet and confer to determine the details of the data and documentation to be produced. That  
27 agreement and any disputes regarding data and document production, including modification of  
28 the agreement, shall be submitted to Magistrate Judge Vadas in accordance with the dispute

1 resolution and enforcement procedures set forth in Paragraphs 52 and 53 below. In addition,  
2 Magistrate Judge Vadas can request and order the production of any documentation or data he  
3 deems material to compliance with this Agreement or the resolution of any dispute contemplated  
4 by the terms of the Agreement. The parties agree, nevertheless, that data and documentation will  
5 include, but not be limited to, the following:

6 a. The number of validated STG I and STG II inmates as of the first of the month  
7 following preliminary approval. Subsequently, the number of all new STG I and STG II  
8 validations shall be provided on a quarterly basis for a period of nine months following the  
9 Court's preliminary approval of this Agreement, and shall be provided on a monthly basis  
10 thereafter until the termination of this case;

11 b. A list of the names of all inmates serving a SHU term for a SHU-eligible  
12 offense with a nexus to an STG as of the first of the month following preliminary approval.  
13 Subsequently, the names of all new inmates serving a SHU term for a SHU-eligible offense with  
14 a nexus to an STG shall be provided on a monthly basis;

15 c. A list of the names of all inmates reviewed pursuant to Paragraph 25 and the  
16 outcome of those placement reviews on a quarterly basis;

17 d. A list of the names of all inmates in each of the following programs: Step  
18 Down Program, RCGP, and placed on Administrative SHU status. This document shall be  
19 provided on a quarterly basis;

20 e. The total number of Rules Violation Reports issued to inmates in each of the  
21 following programs: RCGP, Step Down Program, and Administrative SHU status. This data  
22 shall be provided on a semi-annual basis;

23 f. The total number of Rules Violation Reports issued for assaults and batteries on  
24 staff and other inmates, riots, weapon possession, attempted murder, and murder committed by  
25 inmates in each of the following programs: RCGP, Step Down Program, and Administrative  
26 SHU status. This data shall be provided on a semi-annual basis;

27 g. A list of the names of inmates who have not been progressed to the next  
28 successive step in the Step Down Program during their 180-day Institution Classification

1 Committee review, and a list of the names of inmates who have been retained in the RCGP during  
2 their 180-day Institution Classification Committee review; these lists shall be provided on a semi-  
3 annual basis;

4 h. The following documents shall be produced on a quarterly basis regarding all  
5 inmates found guilty of a SHU-eligible offense with a nexus to an STG: (i) STG Unit  
6 Classification Committee validation determinations; and (ii) the decision of the hearing officer to  
7 find the inmate guilty of a SHU-eligible offense. Defendants also shall produce on a quarterly  
8 basis a randomly chosen representative sample of the documents relied upon for the validation  
9 determinations and RVR decisions for these inmates, including redacted confidential information.  
10 The number of representative samples shall be sufficient to demonstrate CDCR's practice and  
11 procedure, but shall be reasonable in amount such that compliance with this request is not overly  
12 burdensome;

13 i. Institution Classification Committee chronos documenting the decision to place  
14 an inmate into the RCGP, on a quarterly basis;

15 j. All Departmental Review Board classification chronos in which the decision is  
16 made to house an inmate in alternate placement, pursuant to Paragraph 27, due to a substantial  
17 threat to their personal safety. Should Plaintiffs' counsel dispute the determination made, or  
18 require more information to determine whether a dispute may exist, Plaintiffs may request and  
19 will receive a redacted copy of the documents relied upon by the Departmental Review Board;

20 k. All Departmental Review Board classification chronos in which an inmate is  
21 placed on Administrative SHU status, pursuant to Paragraph 29; all non-confidential documents  
22 relied upon for that placement determination; and, on a quarterly basis, a random representative  
23 sample of redacted confidential documents relied upon;

24 l. All Institution Classification Committee chronos reflecting the committee's  
25 decision to not progress an inmate to the next successive step in the Step Down Program, or to  
26 retain an inmate in the RCGP; this document shall be provided on a quarterly basis;

27  
28

1 m. For all inmates placed on Administrative SHU status, all 180-day Institution  
2 Classification Committee review chronos, and all annual Departmental Review Board review  
3 classification chronos;

4 n. A random, representative sample of Rules Violation Reports relied upon to  
5 deny an inmate progression through the Step Down Program, including redacted confidential  
6 sections, on a quarterly basis.

7 38. Any and all confidential information provided shall be produced in redacted form  
8 where necessary, be designated as “Attorneys’ Eyes Only” as defined in the protective order in  
9 this case, and shall be subject to the protective order. CDCR shall provide Magistrate Judge  
10 Vadas, upon request, unredacted copies for *in camera* review in order to resolve any disputes in  
11 accordance with Paragraphs 52 and 53, below.

12 39. Representative samples, as discussed in this Paragraph, shall be of sufficient size to  
13 allow a determination regarding CDCR’s pattern and practice, but shall be reasonable in amount  
14 such that compliance with the request is not overly burdensome. Any disputes regarding data and  
15 document production shall be submitted to Magistrate Judge Vadas in accordance with the  
16 dispute resolution and enforcement procedures set forth in Paragraphs 52 and 53 below.

17 **K. ATTORNEY-CLIENT COMMUNICATIONS.**

18 40. Plaintiffs’ counsel shall be entitled to meet and speak with all inmates covered by this  
19 agreement. Institutional staff shall facilitate Plaintiffs’ counsel’s requests for reasonable access to  
20 these individuals without undue delay, whether by telephone, mail, or personal visit. Defendants  
21 shall facilitate Plaintiffs’ counsel having telephone conference calls with Plaintiff class  
22 representatives as a group annually.

23 **IV. TERMINATION**

24 41. Plaintiffs shall have thirty days after the end of the twenty-four-month period to seek  
25 an extension, not to exceed twelve months, of this Agreement and the Court’s jurisdiction over  
26 this matter by presenting evidence that demonstrates by a preponderance of the evidence that  
27 current and ongoing systemic violations of the Eighth Amendment or the Due Process Clause of  
28 the Fourteenth Amendment of the United States Constitution exist as alleged in Plaintiffs’ Second

1 Amended Complaint or Supplemental Complaint or as a result of CDCR's reforms to its Step  
2 Down Program or the SHU policies contemplated by this Agreement. Defendants shall have an  
3 opportunity to respond to any such evidence presented to the Court and to present their own  
4 evidence. If Plaintiffs do not file a motion to extend court jurisdiction within the period noted  
5 above, or if the evidence presented fails to satisfy their burden of proof, this Agreement and the  
6 Court's jurisdiction over this matter shall automatically terminate, and the case shall be dismissed.

7 42. Brief or isolated constitutional violations shall not constitute an ongoing, systemic  
8 policy and practice that violate the Constitution, and shall not constitute grounds for continuing  
9 this Agreement or the Court's jurisdiction over this matter.

10 43. If the Court's jurisdiction and this Agreement are extended by Plaintiffs' motion, they  
11 shall both automatically terminate at the end of the extension period not to exceed 12 months and  
12 the case shall be dismissed unless Plaintiffs make the same showing described in Paragraph 41.  
13 Any successive extensions under this Paragraph shall not exceed twelve months in duration, and  
14 any extension shall automatically terminate if plaintiffs fail to make the requisite showing  
15 described in Paragraph 41.

16 44. To the extent that this Agreement and the Court's jurisdiction over this matter are  
17 extended beyond the initial twenty four-month period, CDCR's obligations and production of any  
18 agreed upon data and documentation to Plaintiffs' counsel will be extended for the same period.  
19 The role and duties of Magistrate Judge Vadas, as described in Paragraphs 48-50 and 52-53, shall  
20 be coextensive with that of the Agreement, and in no event shall those roles and duties extend  
21 beyond the termination of the Court's jurisdiction.

22 45. At any time after the initial twenty-four month period, Defendants and CDCR may  
23 seek termination of this case and the Court's jurisdiction under the Prison Litigation Reform Act,  
24 18 U.S.C. § 3626(b)(1)(A).

25 46. If there is a motion contesting Defendants' compliance with the terms of this  
26 Agreement pending at the time the case is otherwise to be terminated, the Court will retain limited  
27 jurisdiction to resolve the motion.  
28

1 **V. RELEASE**

2 47. It is the intention of the parties in signing this Agreement that upon completion of its  
3 terms it shall be effective as a full and final release from all claims for relief asserted in the  
4 Second Amended Complaint and the Supplemental Complaint. Nothing in this Agreement will  
5 affect the rights of Plaintiffs regarding legal claims that arise after the dismissal of this case.

6 **VI. DISPUTE RESOLUTION AND ENFORCEMENT**

7 **A. MAGISTRATE JUDGE NANDOR J.VADAS.**

8 48. To assist the parties in ensuring compliance with this Agreement, the parties agree  
9 that Magistrate Judge Vadas will assume the role and duties as set forth in Paragraphs 48-50 and  
10 52-53. These duties shall commence upon the Court's preliminary approval of this Agreement  
11 and shall continue in accordance with Paragraph 43.

12 49. Following the Court's preliminary approval of this Agreement, Plaintiffs' counsel,  
13 CDCR officials, Defendants' counsel, and Magistrate Judge Vadas shall meet on a monthly basis  
14 or at other mutually agreed-upon dates to discuss questions and concerns regarding CDCR's  
15 compliance with the Agreement. The parties and Magistrate Judge Vadas may determine that  
16 such meetings can occur on a less frequent basis, but no less than every three months. No later  
17 than one week prior to the meetings contemplated by this Paragraph, Plaintiffs' counsel shall  
18 circulate an agenda to Defendants and Magistrate Judge Vadas setting forth the items to be  
19 discussed. The meetings described in this Paragraph may be accomplished telephonically or by  
20 other means. Defendants shall meet with Plaintiffs' counsel and the four inmate representatives  
21 semiannually to discuss progress with implementation of this Agreement. No later than one week  
22 prior to these meetings, Defendants shall submit to Magistrate Judge Vadas and Plaintiffs'  
23 counsel a compliance report setting forth progress toward implementation.

24 50. Magistrate Judge Vadas may conduct institutional visits and meet with any inmate  
25 subject to or affected by the terms of this Agreement. Magistrate Judge Vadas may submit to the  
26 parties and the Court a written compliance and progress review assessing the matters under his  
27 purview according to this Agreement after 18 months, irrespective of any other motions or  
28 matters under Magistrate Judge Vadas's review. Among the matters addressed shall be a review

1 of the conditions and programming in the RCGP and whether they comport with the design and  
2 purpose of that unit as provided in this Agreement.

3 **B. COMPLIANCE.**

4 51. The parties shall agree on a mechanism by which CDCR shall promptly respond to  
5 concerns raised by Plaintiffs' counsel regarding individual class members.

6 52. If Plaintiffs contend that current and ongoing violations of the Eighth Amendment or  
7 the Due Process Clause of the Fourteenth Amendment of the United States Constitution exist on a  
8 systemic basis as alleged in the Second Amended Complaint or Supplemental Complaint or as a  
9 result of CDCR's reforms to its Step Down Program and SHU policies contemplated by this  
10 Agreement, Plaintiffs shall provide Defendants with a brief written description of the basis for  
11 that contention and may request that the parties meet and confer to resolve the issue. Defendants  
12 shall respond to Plaintiffs' contentions no later than 30 days after receipt of Plaintiffs' written  
13 description of the issue. If the parties are unable to resolve the issue informally, Plaintiffs may  
14 seek enforcement of the Agreement by seeking an order upon noticed motion before Magistrate  
15 Judge Vadas. Plaintiffs must demonstrate by a preponderance of the evidence that CDCR is in  
16 material breach of its obligations under this Agreement. Defendants shall have an opportunity to  
17 respond to any such evidence presented to Magistrate Judge Vadas and to present their own  
18 evidence in opposition to any enforcement motion. If Plaintiffs have demonstrated by a  
19 preponderance of the evidence a material noncompliance with these terms, then for the purposes  
20 of Plaintiffs' enforcement motion only, the parties agree that Plaintiffs will have also  
21 demonstrated a violation of a federal right and that Magistrate Judge Vadas may order  
22 enforcement consistent with the requirements of 18 U.S.C. § 3626(a)(1)(A). An order issued by  
23 Magistrate Judge Vadas under this Paragraph is subject to review under 28 U.S.C. § 636 (b)(1)(B).

24 53. If Plaintiffs contend that CDCR has not substantially complied with any other terms  
25 of this Agreement that do not amount to current, ongoing, systemic violations as alleged in the  
26 Second Amended Complaint or Supplemental Complaint of the Eighth Amendment or the Due  
27 Process Clause of the Fourteenth Amendment of the United States Constitution, they may seek  
28 enforcement by order of this Court. Plaintiffs shall provide Defendants with a brief written

1 description of the basis for that contention and may request that the parties meet and confer to  
2 resolve the issue. Defendants shall respond to Plaintiffs' contentions no later than 30 days after  
3 they receive Plaintiffs' written description of the issue. If the parties are unable to resolve the  
4 issue informally, Plaintiffs may seek enforcement of the Agreement by seeking an order upon  
5 noticed motion before Magistrate Judge Vadas. It shall be Plaintiffs' burden in making such a  
6 motion to demonstrate by a preponderance of the evidence that Defendants have not substantially  
7 complied with the terms of the Agreement. Defendants shall have an opportunity to respond to  
8 any such evidence presented to the Court and to present their own evidence in opposition to  
9 Plaintiffs' motion. If Plaintiffs satisfy their burden of proof by demonstrating substantial  
10 noncompliance with the Agreement's terms by a preponderance of the evidence, then Magistrate  
11 Judge Vadas may issue an order to achieve substantial compliance with the Agreement's terms.  
12 An order issued by Magistrate Judge Vadas under this Paragraph is subject to review under 28  
13 U.S.C. § 636(b)(1)(B).

14 **C. RETALIATION.**

15 54. Defendants shall not retaliate against any class representative, class member, or other  
16 prisoner due to their participation in any aspect of this litigation or the Agreement. Allegations of  
17 retaliation may be made to Magistrate Judge Vadas in accordance with the procedures set forth in  
18 Paragraph 53.

19 **VII. ATTORNEYS' FEES AND COSTS**

20 55. Defendants agree to pay Plaintiffs' counsel attorneys' fees and costs for work  
21 reasonably performed on this case, including monitoring CDCR's compliance with this  
22 Agreement and enforcing this Agreement, and for work to recover fees and costs, at the hourly  
23 rate set forth under the Prison Litigation Reform Act, 42 U.S.C. § 1997e(d). Plaintiffs preserve  
24 all arguments for attorneys' fees and costs without limitation. The Prison Litigation Reform Act  
25 applies to all applications for attorneys' fees in this case. Plaintiffs shall have sixty days from the  
26 entry of a final order approving this Agreement to file their motion for attorneys' fees and costs  
27 for work reasonably performed before that date. Subject to the provisions under 42 U.S.C. §§  
28 1988 and 1997e, Plaintiffs' motion may request an award that includes their expert fees. On a

1 quarterly basis, Plaintiffs may file motions for reasonable attorneys' fees accrued in monitoring  
2 and enforcing CDCR's compliance with this Agreement.

3 56. The notice to the class members shall explain that Plaintiffs will file a motion for  
4 attorneys' fees following entry of a final order approving the Agreement.

### 5 **VIII. JOINT MOTION AND STAY OF PROCEEDINGS**

6 57. The parties will jointly request that the Court preliminarily approve this Agreement,  
7 conditionally certify a settlement class, require that notice of the proposed settlement be sent to  
8 the classes, provide for an objection period, and schedule a fairness hearing. Prior to or  
9 concurrent with the joint motion for preliminary approval, the parties will jointly request that the  
10 Court stay all other proceedings in this case pending resolution of the fairness hearing. Following  
11 the close of the objection period, the parties will jointly request that the Court enter a final order  
12 approving this Agreement, retaining jurisdiction to enforce it, and continuing the stay of the case  
13 pending the completion of the Agreement's terms.

14 58. If this Agreement is not approved by the Court, the parties shall be restored to their  
15 respective positions in the action as of the date on which this Agreement was executed by the  
16 parties, the terms and provisions of this Agreement shall have no force and effect, and shall not be  
17 used in this action or in any proceeding for any purpose, and the litigation of this action would  
18 resume as if there had been no settlement.

### 19 **IX. CONSTRUCTION OF AGREEMENT**

20 59. This Agreement reflects the entire agreement of the parties and supersedes any prior  
21 written or oral agreements between them. Any modification to the terms of this Agreement must  
22 be in writing and signed by a CDCR representative and attorneys for Plaintiffs and Defendants to  
23 be effective or enforceable.

24 60. This Agreement shall be governed and construed according to California law.

25 61. The parties waive any common-law or statutory rule of construction that ambiguity  
26 should be construed against the drafter of this Agreement, and agree that the language in all parts  
27 of this Agreement shall in all cases be construed as a whole, according to its fair meaning.  
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Dated: August 31, 2015

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# ATTACHMENT A

## **Inmate Privilege Groups**

### **Step 1**

- S-1 Privileges:
  - No family visit
  - Non-contact visiting
  - 25% maximum monthly canteen draw
  - Emergency telephone calls
  - One (1) phone call every 90 days if programming and no serious RVRs in that time period
  - Yard access in accordance with Title 15, section 3343(h), which shall be a minimum of 10 hours per week
  - One (1) personal package not to exceed 30 pounds, exclusive of special purchases
  - One (1) photograph
  - Electrical appliances in accordance with Authorized Personal Property Schedule for SHU/PSU

### **Step 2**

- S-2 Privileges:
  - No family visit
  - Non-contact visiting
  - 35% maximum monthly canteen draw
  - Emergency telephone calls
  - One (1) phone call every 60 days if programming and no serious RVRs in that time period
  - Yard access in accordance with Title 15, section 3343(h), which shall be a minimum of 10 hours per week
  - Receipt of (1) personal package not to exceed 30 pounds, exclusive of special purchases
  - Two (2) photographs if programming and no RVRs upon completion of Step 2
  - Electrical appliances in accordance with Authorized Personal Property Schedule for SHU/PSU

### **Step 3**

- S-3 Privileges:
  - No family visit
  - Non-contact visiting
  - 45% maximum monthly canteen draw
  - Emergency telephone calls
  - One (1) phone call every 45 days if programming and no serious RVRs in that time period
  - Yard access in accordance with Title 15, section 3343(h), which shall be a minimum of 10 hours per week
  - Receipt of (1) personal package not to exceed 30 pounds, exclusive of special purchases
  - Three (3) photographs if programming and no RVRs upon completion of Step 3
  - Electrical appliances in accordance with Authorized Personal Property Schedule for SHU/PSU
  - Small Group Programs at least two hours per week
  - All inmates shall have access to GED, high school, and college level educational programs, with adequate academic support.

#### Step 4

- S-4 Privileges:
  - No family visit
  - Non-contact visiting
  - 50% maximum monthly canteen draw
  - Emergency telephone calls
  - One (1) phone call every 30 days if programming and no serious RVRs in that time period
  - Small group yard in groups as determined by ICC, which shall be a minimum of 10 hours per week
  - Receipt of (1) personal package not to exceed 30 pounds and one additional 15 pound food package, exclusive of special purchases
  - Four (4) photographs every 90 days if programming and no RVRs
  - Electrical appliances in accordance with Authorized Personal Property Schedule for SHU/PSU
  - Small Group Programs at least four hours per week
  - All inmates shall have access to GED, high school, and college level educational programs, with adequate academic support.
  
- S-5 Privileges: (Inmates assigned Administrative SHU status)
  - No family visit
  - Visiting during non-working/training hours, limited by available space within facility non-contact visiting rooms
  - 75% maximum monthly canteen draw
  - Emergency telephone calls
  - One (1) phone call per month
  - Yard access in accordance with Title 15, section 3343(h)
  - Four (4) personal packages per year not to exceed 30 pounds each. May also receive special purchases, as provided in subsections 3190(j) and (k).
  - One (1) photograph upon completion of each 180 day ICC review
  - Electrical appliances in accordance with Authorized Personal Property Schedule for SHU/PSU
  - The local Inter---Disciplinary Treatment Team may further restrict or allow additional authorized personal property, in accordance with the institution's Psychiatric Services Unit operation procedure, on a case by case basis above that allowed by the inmate's assigned privilege group.

#### **Restricted Custody General Population (RCGP)**

The RCGP is a Level IV 180-design facility commensurate with similarly designed high security general population facilities. Inmates may be transferred to the RCGP if:

- they have refused to participate in or refused to complete SDP Program components
- they have been found guilty of repeated STG violations while in the SDP
- identified safety concerns prevent their release to General Population and the RCGP is deemed to be appropriate
- they have been housed in a SHU for 10 or more continuous years and must complete the SDP because they have committed a SHU-eligible, STG-related violation within the preceding two years

- Available to all RCGP inmates:
  - Education – Alternative Education Program and/or small group education
  - Yard – commensurate with Level 4 GP, but with a minimum of 10 hours per week.
  - Access to religious services
  - Support services job assignments
  - Access to GED, high school, and college level educational programs, with adequate academic support.
  - Leisure Time Activity Groups
  - Small group yards as determined by ICC
  - Electrical appliances commensurate with the Authorized Personal Property Schedule for Level IV GP
  - Privileges:
    - Inmates transferred to RCGP due to refusal to participate in SDP and/or repeated STG RVRs: S-3 privilege group, unless modified by ICC based on program participation or continued STG RVRs
    - Inmates transferred into to the RCGP pilot program after 10+ continuous years in a SHU: commensurate with Level IV GP
    - Inmates transferred into to the RCGP for safety needs: commensurate with Level IV GP
  
- RCGP Visiting:
  - No Family Visits
  - Non-contact visits that are no less than those afforded to inmates in the Pelican Bay SHU
  - Contact visiting for all inmates in the RCGP shall be limited to immediate family and visitors pre-approved in accordance with existing Title 15 visiting regulations. Contact visits shall be of the same duration as allowed for General Population Level IV inmates, and occur on the following schedule:
    - Inmates transferred to RCGP due to refusal to participate in SDP and/or repeated STG RVRs
      - 1 contact visit every 120 days if programming and no repeated RVRs. ICC shall have the discretion to increase this schedule to 1 contact visit every 90 days, on a case by case basis.
    - Inmates transferred into to the RCGP pilot program after 10+ continuous years in a SHU:
      - 1 contact visit every 60 days unless the inmate incurs a disciplinary violation for which the loss of privileges imposed restricts visiting.
  - All other RCGP Inmates:
    - 1 contact visit every 60 days unless the inmate incurs a disciplinary violation for which the loss of privileges imposed restricts visiting

Small Group programming available in Steps 3, 4, and in the RCGP may include: anger management, parenting skills, understanding criminal thinking, drug & alcohol abuse counseling. These programs shall be provided based on the needs of the inmate.

## ATTACHMENT B

### SHU Term Assessment Chart

OFFENSE	TYPICAL TERM (Mos)		
	Low	Expected	High
(1) Homicide:			
(A) Murder, attempted murder, solicitation of murder, or voluntary manslaughter of a non-inmate.	36	48	60
(B) Murder, attempted murder, solicitation of murder, or voluntary manslaughter of an inmate.	24	36	48
(2) Violence Against Persons:			
(A) Battery on a non-inmate with a weapon capable of causing serious or mortal injury; caustic substance or other fluids capable of causing serious or mortal injury; or physical force causing serious injury.	18	30	42
(B) Assault on a non-inmate with a weapon, capable of causing serious or mortal injury; caustic substance or other fluids capable of causing serious or mortal injury.	09	15	21
(C) Rape, sodomy, or oral copulation on a non-inmate, or any attempt.	18	30	42
(D) Battery on an inmate with a weapon capable of causing serious or mortal injury; caustic substance or other fluids capable of causing serious or mortal injury or physical force causing serious injury.	12	18	24
(E) Assault on an inmate with a weapon capable of causing serious or mortal injury; caustic substance or other fluids capable of causing serious or mortal injury.	6	9	12
(F) Rape, sodomy, or oral copulation on an inmate accomplished against the inmate's will, or any Attempt.	12	18	24
(G) Battery on a non-inmate without serious injury.	6	12	18
(H) Assault on a non-inmate	3	6	9
(I) Battery on an inmate without serious injury. (2 or more offenses within a 12 month period or 1 with direct STG nexus).	2	4	6
(3) Threat to Kill or Assault Persons:			
(A) To take or use a non-inmate as a hostage.	18	30	42
(B) Threat of violence to non-inmate.	2	5	8
(4) Possession of a Weapon:			
(A) Possession of a firearm or possession or manufacturing of an explosive device.	18	30	42

(B) Possession or manufacture/manufacturing of a Weapon including materials altered from their original manufactured state or purpose and which can be made into a weapon—other than a firearm or explosive device and which has been manufactured or modified so as to have the obvious intent or capability of inflicting serious injury, and which is under the immediate or identifiable control of the inmate.	4	8	12
(5) Distribution of Controlled Substances as defined in section 3000.	6	12	18
(6) Escape:			
(A) With force or Attempted Escape with force against a person.	12	24	36
(B) Or attempted Escape from any departmental prison or institution other than a camp, MSF or reentry facility.	6	12	18
(7) Disturbance, Riot, or Strike:			
(A) Leading a disturbance, riot or strike.	6	12	18
(B) Active participation in a disturbance, riot or Strike (2 or more offenses within a 12 month period or 1 with direct STG nexus).	3	6	9
(C) Inciting conditions likely to threaten institution security	3	6	9
(8) Harassment: a willful course of conduct that terrorizes a specific person, group, or entity either directly or indirectly .			
(9) STG Disruptive Behavior:			
(A) Acting in a leadership role by directing or controlling STG behavior that is a behavior listed in this SHU Assessment Chart.	6	12	18
(B) Recruiting inmates to become an STG affiliate, or to take part in STG activities that is a behavior listed in this SHU Assessment Chart.	3	6	9
(C) Acting in a leadership role to generate, move, or facilitate assets or proceeds as a result of, or in support of, prohibited STG business dealings.	3	6	9
(10) Theft or destruction of State property by any means where the loss or potential loss exceeds \$10,000 or threatens the safety of others.	2	8	12
(11) Extortion or Bribery:			
(A) Extortion or bribery of a non-inmate.	4	8	12

(B) Extortion or bribery of an inmate.	2	3	4
(12) Sexual Misconduct:			
(A) Indecent Exposure.	3	6	9
(B) Sexual Disorderly Conduct (two or more offenses within a twelve month period).	3	6	9
(13) Except as otherwise specified in this section or identified as an assault, proven attempts to commit any of the above listed offenses shall receive one-half (1/2) of the term specified for that offense.			
(14) Any inmate who conspires to commit or solicits another person to commit any of the offenses above shall receive the term specified for that offense.			

## ATTACHMENT C

### STG DISCIPLINARY MATRIX

STG DISCIPLINARY MATRIX		
<u>Behavior/Activity With Nexus to STG</u>	<u>Administrative or Serious</u>	<u>SDP Placement Options (Section 3378.4(b))</u>
<p><u>Section 1:</u></p> <ul style="list-style-type: none"> <li>a) <u>Murder, attempted murder, solicitation of murder, or voluntary manslaughter of a non-offender or offender;</u></li> <li>b) <u>Assault or Battery capable of causing serious injury; Assault or battery with a deadly weapon or caustic substance capable of causing serious injury, solicitation for offense;</u></li> <li>c) <u>Taking a hostage;</u></li> <li>d) <u>Possession of a firearm, explosive device, or weapon which has been manufactured or modified so as to have the obvious intent or capability of inflicting traumatic injury, and which is under the immediate or identifiable control of the offender;</u></li> <li>e) <u>Escape or attempted escape with force or violence</u></li> <li>f) <u>Rape, sodomy, or oral copulation against the victim's will.</u></li> </ul>	<u>Serious</u>	<u>3378.4(b)(2)</u> <u>3378.4(b)(3)</u> <u>3378.4(b)(6)</u> <u>3378.4(b)(7)</u>
<p><u>Section 2:</u></p> <ul style="list-style-type: none"> <li>a) <u>Introduction, Trafficking, or Distribution of any Controlled Substance (as defined in Section 3000);</u></li> <li>b) <u>Arson involving damage to a structure or causing serious bodily injury.</u></li> <li>c) <u>Possession of flammable, explosive, or combustible material with intent to burn any structure or property;</u></li> <li>d) <u>Extortion or Threat by Means of Force or Violence, including requiring payment for protection/insurance or intimidating any person on behalf of the STG;</u></li> <li>e) <u>Threatening to kill or cause serious bodily injury to a public official, their immediate family, their staff, or their staffs' immediate family;</u></li> <li>f) <u>Any other felony involving violence or injury to a victim and not specifically identified on this chart.</u></li> </ul>	<u>Serious</u>	<u>3378.4(b)(2)</u> <u>3378.4(b)(3)</u> <u>3378.4(b)(5)</u> <u>3378.4(b)(6)</u> <u>3378.4(b)(7)</u>
<p><u>Section 3:</u></p> <ul style="list-style-type: none"> <li>a) <u>Battery on a Peace Officer or non-offender not involving use of a weapon;</u></li> <li>b) <u>Assault on a Peace Officer or non-offender by any means likely or not likely to cause great bodily injury;</u></li> <li>c) <u>Assault or battery on a prisoner with no serious injury;</u></li> <li>d) <u>Destruction of state property valued in excess of \$400 dollars during a riot or disturbance;</u></li> </ul>	<u>Serious</u>	<u>3378.4(b)(2)</u> <u>3378.4(b)(3)</u> <u>3378.4(b)(5)</u> <u>3378.4(b)(6)</u> <u>3378.4(b)(7)</u>

<p>e) <u>Theft, embezzlement, arson, destruction, or damage to another's personal property, state funds, or state property valued in excess of \$400;</u></p> <p>f) <u>Any felony not involving violence or the use of a weapon not listed in this schedule with a direct nexus to STG Behavior.</u></p>		
<p><u>Section 4:</u></p> <p>a) <u>Bribery of a non-offender;</u></p> <p>b) <u>Leading/Inciting a disturbance, riot, or strike;</u></p> <p>c) <u>Active participation in, or attempting to cause conditions likely to threaten institution security;</u></p> <p>d) <u>Willfully resisting, delaying, or obstructing any peace officer in the performance of duties;</u></p> <p>e) <u>Possession of Cell Phone or Components;</u></p> <p>f) <u>Acting in a Leadership Role displaying behavior to organize and control other offenders within the STG;</u></p>	<u>Serious</u>	<u>3378.4(b)(2)</u> <u>3378.4(b)(3)</u> <u>3378.4(b)(4)</u> <u>3378.4(b)(5)</u> <u>3378.4(b)(7)</u>
<p><u>Section 5:</u></p> <p>a) <u>Gambling;</u></p> <p>b) <u>Tagging, or otherwise defacing state property valued at less than \$950, with symbols or slogans intended to promote affiliation with a STG.</u></p>	<u>Serious</u>	<u>3378.4(b)(2)</u> <u>3378.4(b)(4)</u> <u>3378.4(b)(7)</u>
<p><u>Section 6:</u></p> <p>a) <u>STG Related Tattoos and/or Body Markings (new since most recent arrival in CDCR and not previously documented);</u></p> <p>b) <u>Recording/documentation of conversations, the content of which evidences active STG behavior;</u></p> <p>c) <u>Harassment of another person, group or entity either directly or indirectly through the use of the mail, telephone, or other means;</u></p> <p>d) <u>Communications between offenders/others, the content of which evidences active STG behavior;</u></p> <p>e) <u>Leading STG Roll Call;</u></p> <p>f) <u>Directing Cadence for STG Group Exercise;</u></p> <p>g) <u>In Personal Possession of STG related Written Material including Membership or Enemy List, Roll Call Lists, Constitution, Organizational Structures, Codes, Training Material, etc.;</u></p> <p>h) <u>In Personal Possession of mail, notes, greeting cards or other communication (electronic or non-electronic) which include coded or explicit messages evidencing active STG behavior;</u></p>	<u>Serious</u>	<u>3378.4(b)(2)</u> <u>3378.4(b)(4)</u> <u>3378.4(b)(7)</u>
<p><u>Section 7:</u></p> <p><u>Except as otherwise specified in this section, proven attempts to commit or an offender who conspires to commit any of the above listed offenses shall receive the term range specified for that offense.</u></p>	<u>Serious</u>	<u>Identified in Section 3378.4(b)</u>
<p><u>Section 8:</u></p> <p>a) <u>Active Participation in STG Roll Call;</u></p> <p>b) <u>Participating in STG Group Exercise;</u></p>	<u>Administrative</u>	<u>3378.4(b)(1)</u> <u>3378.4(b)(4)</u> <u>3378.4(b)(7)</u>

<ul style="list-style-type: none"><li>c) <u>Using hand signs, gestures, handshakes, slogans, distinctive clothing, graffiti which specifically relate to an STG;</u></li><li>d) <u>Wearing, possessing, using, distributing, displaying, or selling any clothing, jewelry, emblems, badges, certified symbols, signs, or other STG items which promote affiliation in a STG;</u></li><li>e) <u>In Possession of artwork, mail, notes, greeting cards, letters or other STG items clearly depicting certified STG symbols;</u></li><li>f) <u>In Possession of photographs that depict STG association. Must include STG connotations such as insignia, certified symbols, or other validated STG affiliates.</u></li><li>g) <u>In possession of contact information (i.e., addresses, telephone numbers, etc.) for validated STG affiliates or individuals who have been confirmed to have assisted the STG in illicit behavior.</u></li></ul>		
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# Liman Program Releases New Report on Prisoners in Administrative Segregation

September 1, 2015

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- [Liman Program Releases New Report on Prisoners in Administrative Segregation](#)

In response to the growing problem of prolonged isolation of individuals in jails and prisons in the U.S., [The Arthur Liman Public Interest Program at Yale Law School](#) and the [Association of State Correctional Administrators \(ASCA\)](#) have released a new report outlining data on both the numbers and the conditions in restrictive housing nationwide.

Time-in-Cell: The Liman-ASCA 2014 National Survey of Administrative Segregation in Prison, is the first report to provide updated information on this issue. Time-in-Cell provides one way to measure and to learn whether the hoped-for changes are taking place, to reduce and to eliminate the isolation of prisoners, so as to enable prisoners and staff to live and work in safe environments, respectful of human dignity.

[The full Report may be downloaded free of charge here.](#)

The report is the result of a joint effort by ASCA and the Liman Program at Yale to develop a national database of the policies and practices on what correctional officials call “restricted housing” and is frequently referred to in the media as “solitary confinement.” The database sought to rectify the absence of data on this issue and to pave the way for changes.

The development of a national database and new report come amid a push for change, not only from legislators across the political spectrum, judges, and a host of private sector voices, but also from the directors of correctional systems at both state and federal levels.

But even as a national outcry has arisen about isolation, relatively little information exists about the actual number of people held in restrictive housing, the policies determining their placement, and whether and how conditions vary in different jurisdictions.

Prior to this effort, figures cited on the number of people held in isolation varied from 25,000 to more than 80,000, and those statistics were more than a decade old. Report authors said it is difficult to measure the impact of many efforts underway without baseline numbers to compare the new figures to.

Getting the numbers is a piece of the news; the other is that changes are underway at both the state and federal levels. Correctional leaders across the country are committed to reducing the number of people in restrictive housing and altering what it means to be there, according to the report. Thus, prison system directors insist that the 2014 figures are or will soon be out-of-date because they are placing new limits on putting prisoners into restrictive housing and developing activities to change what restricted housing means. In a few jurisdictions, for example, new programs mandate out-of-cell time (of up to 20 hours) for subpopulations, such as those with significant mental illness.

Thirty-four jurisdictions — housing about 73% of the more than 1.5 million people incarcerated in U.S. prisons — provided data on all the people in restricted housing, whether termed “administrative segregation,” “disciplinary segregation,” or “protective custody.” In that subset, more than 66,000 prisoners were in restricted housing. If that number is illustrative of the whole, some 80,000 to 100,000 people were, in 2014, in restrictive housing settings in

prisons (and these numbers do not include jails, juvenile facilities, or immigration and military detention).

The 2015 Time-In-Cell Report analyzes the results of a survey of more than 130 questions, again sent to the directors of all the prison systems. Forty-six jurisdictions responded with details on a subset of restricted housing, the 31,500 male prisoners reported held in administrative segregation. Across the country, in many jurisdictions, prisoners are required to spend 23 hours in their cells on weekdays, and in many, 24 hours in their cells on weekends. The permitted hours out-of-cell ranged from 3 to 7 a week in many jurisdictions. Phone calls and social visits ranged from one per month in several jurisdictions; in others, more opportunities existed. In virtually all jurisdictions, the possessions that prisoners can keep in their cells, the programs, visits, and telephone calls they might be able to have access to could be cut back or stopped as sanctions for misbehavior, according to the report.

Most jurisdictions had no fixed time limits on administrative segregation; only one state imposed a one-year limit, according to the report. Several jurisdictions did not track the numbers of continuous days a person has been held. In the 24 jurisdictions that did, the time spent varied widely. In a substantial number, people remained in segregation for more than three years. For those released, the 30 jurisdictions tracking information estimated that, in 2013, 4,400 prisoners were directly released from administrative segregation to the community, the report states.

Prison directors also described the challenges of staffing administrative segregation, and the need for additional training, flexible schedules, rotating staff, or more benefits. Many directors reported on the many incentives for changing the current policies – citing prisoner and staff well-being, litigation, and the costs and, as a few put it, because it “is the right thing to do.”

The 2015 Report is the second in a series. In 2012, the Liman Program and ASCA asked the directors of state and federal corrections systems to provide their policies governing administrative segregation, defined as removing a prisoner from general population to spend 22-23 hours a day in a cell for 30 days or more. That report, [Administrative Segregation, Degrees of Isolation, and Incarceration: A National Overview of State and Federal Correctional Policies \(2013\)](#) is based on responses from 47 jurisdictions.

By facilitating cross-jurisdictional comparisons of the rules and practices that surround administrative segregation, the two Reports both reflect and support ongoing efforts to limit or end extended isolation. In some states, new legislation limits administrative segregation for subpopulations, such as the mentally ill, juveniles, and individuals with disabilities; many more proposals are pending at the state and national level. Litigation has addressed segregation in specific state, and some advocates call for abolition. The 2015 “Mandela Rules,” shaped with input from leaders of ASCA and promulgated two months ago by the Committee on Crime Prevention and Criminal Justice of the United Nations, have called confinement of prisoners for 22 hours or more for longer than 15 days a form of “cruel, inhuman or degrading treatment.”

The 2013 Report details how broad the criteria for being put into administrative segregation were – staff has wide discretion to do so if perceiving that the prisoner posed “a threat” to institutional safety or was a danger to “self, staff, or other inmates.” The kind of notice and what constituted a “hearing” varied substantially, as did the level of staff with the authority to make the decision. In short, at the formal level, getting into segregation was relatively easy, but few policies focused on how people got out.

The Arthur Liman Public Interest Program supports the work of Yale law students and Yale law school graduates through Liman Fellowships as well as undergraduate students from Yale College, Barnard College, Brown University, Harvard University, Princeton University and Spelman College, all of whom work to respond to problems of inequality and to improve access to justice.

ASCA is the only national organization of persons directly responsible for the administration of correctional systems and includes the heads of each state’s corrections agencies, as well as the Federal Bureau of Prisons, the District of Columbia, New York City, Philadelphia and Los Angeles County.

This project has been supported by the Yale Law School, the Liman Program, the Oscar M. Ruebhausen Fund at Yale

135 S.Ct. 2187  
Supreme Court of the United States  
Ron DAVIS, Acting Warden, Petitioner  
v.  
Hector AYALA.

No. 13–1428. | Argued March 3, 2015. | Decided June 18, 2015.

Justice KENNEDY, concurring.

My join in the Court’s opinion is unqualified; for, in my view, it is complete and correct in all respects. This separate writing responds only to one factual circumstance, mentioned at oral argument but with no direct bearing on the precise legal questions presented by this case.

In response to a question, respondent’s counsel advised the Court that, since being sentenced to death in 1989, Ayala has served the great majority of his more than 25 years in custody in “administrative segregation” or, as it is better known, solitary confinement. Counsel for petitioner did not have a clear opportunity to enter the discussion, and the precise details of respondent’s conditions of confinement are not established in the record. Yet if his solitary confinement follows the usual pattern, it is likely respondent has been held for all or most of the past 20 years or more in a windowless cell no larger than a typical parking spot for 23 hours a day; and in the one hour when he leaves it, he likely is allowed little or no opportunity for conversation or interaction with anyone. It is estimated that 25,000 inmates in the United States are currently serving **\*2209** their sentence in whole or substantial part in solitary confinement, many regardless of their conduct in prison.

The human toll wrought by extended terms of isolation long has been understood, and questioned, by writers and commentators. Eighteenth-century British prison reformer John Howard wrote “that criminals who had affected an air of boldness during their trial, and appeared quite unconcerned at the pronouncing sentence upon them, were struck with horror, and shed tears when brought to these darksome solitary abodes.” In literature, Charles Dickens recounted the toil of Dr. Manette, whose 18 years of isolation in One Hundred and Five, North Tower, caused him, even years after his release, to lapse in and out of a mindless state with almost no awareness or appreciation for time or his surroundings. *A Tale of Two Cities* (1859). And even Manette, while imprisoned, had a work bench and tools to make shoes, a type of diversion no doubt denied many of today’s inmates.

One hundred and twenty-five years ago, this Court recognized that, even for prisoners sentenced to death, solitary confinement bears “a further terror and peculiar mark of infamy.” The past centuries’ experience and consideration of this issue is discussed at length in texts such as *The Oxford History of*

the Prison: The Practice of Punishment in Western Society (1995), a joint disciplinary work edited by law professor Norval Morris and professor of medicine and psychiatry David Rothman that discusses the deprivations attendant to solitary confinement.

Yet despite scholarly discussion and some commentary from other sources, the condition in which prisoners are kept simply has not been a matter of sufficient public inquiry or interest. To be sure, cases on prison procedures and conditions do reach the courts. See, *e.g.*, *Brown v. Plata*, 563 U.S. —, 131 S.Ct. 1910, 179 L.Ed.2d 969 (2011). Sentencing judges, moreover, devote considerable time and thought to their task. There is no accepted mechanism, however, for them to take into account, when sentencing a defendant, whether the time in prison will or should be served in solitary. So in many cases, it is as if a judge had no choice but to say: “In imposing this capital sentence, the court is well aware that during the many years you will serve in prison before your execution, the penal system has a solitary confinement regime that will bring you to the edge of madness, perhaps to madness itself.” Even if the law were to condone or permit this added punishment, so stark an outcome ought not to be the result of society’s simple unawareness or indifference.

Too often, discussion in the legal academy and among practitioners and policymakers concentrates simply on the adjudication of guilt or innocence. Too easily ignored is the question of what comes next. Prisoners are shut away—out of sight, out of mind. It seems fair to suggest that, in decades past, the public may have assumed lawyers and judges were engaged in a careful assessment of correctional policies, while most lawyers and judges assumed these matters were for the policymakers and correctional experts.

There are indications of a new and growing awareness in the broader public of the subject of corrections and of solitary confinement in particular. See, *e.g.*, Gonnerman, *Before the Law*, *The New Yorker*, Oct. 6, 2014, p. 26 (detailing multiyear solitary confinement of Kalief Browder, who was held—but never tried—for stealing a backpack); Schwirtz & Winerip, *Man, Held at Rikers for 3 Years Without Trial, Kills Himself*, *N.Y. Times*, June 9, 2015, p. A18. And penology and psychology experts, including scholars in the legal academy, continue to offer essential information and analysis.

These are but a few examples of the expert scholarship that, along with continued attention from the legal community, no doubt will aid in the consideration of the many issues solitary confinement presents. And consideration of these issues is needed. Of course, prison officials must have discretion to decide that in some instances temporary, solitary confinement is a useful or necessary means to impose discipline and to protect prison employees and other inmates. But research still confirms what this Court suggested over a century ago: Years on end of near-total isolation exact a terrible price. In a case that presented the issue, the judiciary may be required, within its proper jurisdiction and authority, to determine whether workable alternative systems for long-term confinement exist, and, if so, whether a correctional system should be required to adopt them.

Over 150 years ago, Dostoyevsky wrote, “The degree of civilization in a society can be judged by entering its prisons.” There is truth to this in our own time.

Justice THOMAS, concurring.

I join the Court's opinion explaining why Ayala is not entitled to a writ of habeas corpus from this or any other federal court. I write separately only to point out, in response to the separate opinion of Justice KENNEDY, that the accommodations in which Ayala is housed are a far sight more spacious than those in which his victims, Ernesto Dominguez Mendez, Marcos Antonio Zamora, and Jose Luis Rositas, now rest. And, given that his victims were all 31 years of age or under, Ayala will soon have had as much or more time to enjoy those accommodations as his victims had time to enjoy this Earth.

# What Can Reforming Solitary Confinement Teach Us About Reducing Mass Incarceration?

**It's not about non-violent offenders. And it won't be cheap.**

By Taylor Pendergrass. Posted on Tuesday, October 13, 2015 at 7:15 a.m.

Although it would have been hard to believe even several years ago, reform of solitary confinement is starting to look inevitable. For decades, a small movement of the incarcerated and their families, advocates, medical and mental health professionals, and forward-thinking corrections leaders labored against solitary confinement with only rare, incremental, and quiet success. Compare that to the last few years: two of the largest prison systems in the country (California and New York) announced major solitary reforms, solitary confinement was front and center at three U.S. Senate hearings, 15 states considered reform legislation last year, Justice Anthony Kennedy all but invited a constitutional challenge to the practice, President Obama advocated reform, and the national organization of corrections executives called solitary a “grave problem.”

Anyone looking seriously at solitary confinement is no longer debating whether it is a massive and tragic failure. Instead, the critical questions have become: what are the solutions, and how far will they go?

In every important respect, the search for a way out of solitary confinement mirrors the effort to reduce mass incarceration. While there is much low-hanging fruit, the ultimate success of both movements — curbing the use of solitary and seriously reducing prison populations — will come down to the same question: can we respond to violence differently?

The expansion of solitary confinement in the U.S. exploded alongside new prison construction, both driven by “tough on crime” politics. Just as “zero tolerance” policing and harsh sentencing practices flooded jails and prisons, the same philosophies inside prisons swelled the population of people in solitary — who are disproportionately young, black men. As the mentally ill were incarcerated in the absence of treatment, prisons had neither the resources nor the disposition to do anything other than to put them into solitary, their own “prison-within-a-prison.”

Today, solitary units are simply a microcosm of our prisons: a mix of non-violent rulebreakers, individuals with mental illness, the vulnerable, activists, innocents, and people who have committed dangerous, sometimes deadly acts. Everyone suffers, many get worse, and then they are released back to the general prison population or to the streets.

There seems to be an emerging consensus that the most vulnerable — juveniles and the mentally ill — and people engaged in non-violent behaviors — such as substance abuse, petty rule violations, or mere gang affiliation — should not be in solitary.

But limiting reforms to the most vulnerable and least menacing would leave untouched the underlying cause of

violence, and would do little to guard against a future resurgence of solitary confinement should political winds shift again. It would be a short-lived victory.

The reality is that most correctional systems are woefully unprepared to respond to violence in any way other than segregation. Like the criminal justice system as a whole, American corrections has long emphasized punishment over rehabilitation, and solitary confinement is the bedrock of that system. This is why corrections officers fiercely resist solitary reforms, despite widespread evidence that well-implemented reforms to solitary do not decrease safety and result in higher staffing ratios and better working conditions for staff. (Notably, not all unions are opposed). Some corrections staff simply cannot imagine a safe prison environment where solitary confinement is not readily at their disposal. This lack of vision is regrettably understandable given that little attention has been paid to any other kind of response.

Eliminating solitary confinement will require more than just a policy change or closing a cell block. A comprehensive approach to eliminating solitary confinement will require a cultural change touching every part of the corrections system. It must begin by reorienting corrections away from punishment and dehumanization, and toward rehabilitation and dignity. That will require extensive retraining, better compensation, and additional staffing. It will require robust oversight ensuring that corrections officers are imposing far more proportionate discipline balanced with positive reinforcement, and that they are intervening and de-escalating disputes well before long-term isolation is even a consideration.

Even in the best of futures, there will still be incidents of serious violence inside prisons. In these rare cases, there is a clear need to temporarily separate someone who poses a direct threat. There is no justification, however, for maximizing isolation and deprivation as we do in solitary confinement units.

The widespread use of solitary confinement reflects a longstanding philosophical belief that the highest-risk, hardest-to-handle individuals merit the least attention and the fewest resources. To eliminate solitary confinement, we will need to do the exact opposite. To actually reduce the risk of future violence in these cases — rather than just locking someone up in a concrete box for 23 hours a day and ignoring the problem — requires nuanced assessment and attention from highly trained professionals. States rethinking solitary confinement have shown it is effective to treat high-risk individuals humanely in units that deliver targeted rehabilitative programming and that maximize out-of-cell contact in an environment that *requires* social interaction, as opposed to modern solitary units that do everything possible to limit human contact. These approaches have proven successful in reformed juvenile justice systems in the United States and correctional systems in Europe that have long had lower recidivism rates with far shorter prison sentences.

This approach takes resources, some of which can be reallocated as the vulnerable and non-violent are removed and solitary units are depopulated and closed down. The “justice reinvestment” principle — ensuring that savings from reducing mass incarceration are reallocated back into the system in order to improve safety — is equally applicable when it comes to reducing solitary confinement. Corrections systems must be permitted to retain and reinvest a significant portion of the savings from reducing solitary back into their own systems, as an incentive for reform and to achieve the fundamental shift described above that will benefit long-term public safety. We invested hundreds of millions of dollars in constructing prison cells that were built for solitary confinement. It should come as no surprise that additional money will be required to deconstruct these punitive environments and create the physical spaces necessary for effective and humane alternatives.

Given the current momentum to reform solitary confinement, and the fact that these practices can often be changed by correctional agencies without the need for any legislation, there is good reason to believe reforms to solitary confinement will proceed more quickly than reforms to mass incarceration. Successfully reforming solitary could show the way for a more radical downsizing of our prisons and jails, by persuading crime victims, policymakers, and the public that a less punitive strategy — shorter sentences, real rehabilitation — can deliver both safety and accountability.

Just as removing the vulnerable and non-violent from extreme isolation units will not eliminate solitary confinement, removing drug users and other non-violent offenders will not solve the problem of mass incarceration. In both cases, to achieve the sweeping reforms we need, there must be a new approach to violence.

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## Only Once I Thought About Suicide

*Reginald Dwayne Betts*

### I.

Every prison and jail in Virginia has a series of cells used for solitary confinement. Fairfax County Jail had three units for solitary confinement. None had windows. The R-Cells had ceilings so high that a tall man could not reach them by jumping. The other had a door so thick and heavy that when it closed no sounds escaped. The third looked like the cells for the general population.

At Southampton Correctional Center, an entire building had been converted to hold men in solitary. The cells looked just like those housing the general population, except the doors only opened to take you to the shower once every three days, or to the kennel-like cages where you periodically had an hour to pace the fifteen steps back and forth, to do push-ups, jumping jacks, to stare out the window into the open countryside that taunted you.

Some of the cells in solitary confinement at Red Onion State Prison faced what people called the gutted side of a mountain. Three times a week guards would shackle and cuff prisoners and escort them, under the watchful eye of a guard holding a shotgun, to the showers.

Sussex 1 State Prison, like Southampton, had units initially constructed for general population converted into solitary confinement units. Men could stare from their cell into the yard and watch men going about the work of doing time, the basketball games, the circling the yard, the fights. At Sussex, they also held death row prisoners, and on occasion, while being walked to the shower, you would glimpse a man preparing to die.

At Coffeewood Correctional Center, the solitary confinement unit had about a dozen cells. The windows were so high up that a tall man would have to leap to glimpse the green of the outside grass. Of all these prisons, only Southampton's units had windows wider than an open palm or taller than a man's arm.

II.

In 1996, when I was sixteen, a fifteen-year-old friend and I carjacked a man in Virginia. Shortly after being arrested, I confessed. Back then, I did not know what it meant to be transferred to criminal court. But I would learn. Following John DiLulio's super-predator theory, state prosecutors began to rely increasingly on statutory mechanisms that allowed them to transfer children from juvenile to criminal court, where, if found guilty, they would be exposed to the same punishments and same prisons as people eighteen or older.<sup>1</sup> In Virginia, carjacking carries a minimum sentence of fifteen years and a maximum of life in prison.<sup>2</sup> Five months after my crime, after pleading guilty to carjacking and a weapons charge, I stood before the Honorable Judge Bach to be sentenced. Before sentencing me to nine years, he said, "I am under no illusion that sending you to prison will help, but you can get something out of it if you want." It should not have been a surprise to anyone that part of what I got out of my time in prison was nearly a year and a half of solitary confinement.

For a time, I called cells in the solitary units of the Fairfax County Jail, Southampton Correctional Center, Red Onion State Prison, Sussex 1 State Prison, and Coffeewood Correctional Center home. Inside those cells, I counted everything: days, weeks, months, birthdays, and frequently the tiny markings on the wall. All told, I spent more than fourteen months in isolation at these various institutions. Author Jack Abbott, reflecting on his time spent in solitary confinement, wrote that it could "alter the ontological makeup of a stone."<sup>3</sup> I know that what it does to men and women is far worse.

III.

A hundred and fifty years is a good spell of time to let pass without learning a lesson, but a case as secure as a cell in the hole attests to our modern failure. Jack Abbott's adage was old news a century before he penned it. The world's first prison kept all of its prisoners in solitary confinement.<sup>4</sup> Built in 1829, Eastern Penitentiary's enabling act required that "the principle of solitary confinement of prisoners be preserved and maintained."<sup>5</sup> Describing this

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1. JOLANTA JUSZKIEWICZ, CAMPAIGN FOR YOUTH JUSTICE, TO PUNISH A FEW: TOO MANY YOUTH CAUGHT IN THE NET OF ADULT PROSECUTION (2007), <http://www.campaignforyouthjustice.org/research/cfyj-reports> [<http://perma.cc/KG7A-V4FX>].
  2. VA. CODE ANN. § 18.2-58.1 (2015).
  3. JACK HENRY ABBOTT, IN THE BELLY OF THE BEAST: LETTERS FROM PRISON 45 (1981).
  4. Matthew W. Meskell, Note, *An American Resolution: The History of Prisons in the United States from 1777 to 1877*, 51 STAN. L. REV. 839, 855 (1999).
  5. *Id.* at 137.

system, Samuel Wood, Eastern's first warden, explained that "no prisoner is seen by another, after he enters the walls."<sup>6</sup> The effects were obvious. One official observer, British Penal Authority William Crawford wrote, "[t]he whip inflicts immediate pain, but solitude inspires permanent terror."<sup>7</sup> For some, including Crawford, this was a good thing; others knew better. When Charles Dickens toured the facility, he described its system as "rigid, strict, and hopeless solitary confinement" and denounced its horrors as "a secret punishment which slumbering humanity is not roused up to stay."<sup>8</sup>

The ASCA-Liman *Time-In-Cell* report provides the numbers that underscore the significance of this discussion. According to the report, between eighty and a hundred thousand men are in restrictive housing.<sup>9</sup> Over thirty thousand are in administrative segregation.<sup>10</sup> The report focuses on the latter group. By arguing that the practice is overused, the report addresses the issue of isolation as a form of social control within the contemporary prison—and raises serious questions about the legitimacy of the practice. But the report leaves equally important work to be done by future scholars. The absence of the voices of men and women who have experienced administrative segregation means that the ontologically troubling questions that pervade all practices involving isolation, whether they be done within a prison (in the form of administrative segregation) or through the use of supermax facilities or solitary confinement units, are not fully confronted.

#### IV.

Why, nearly two centuries after Dickens, does it still take studies like this one to make us consider the human beings who suffer and whose lives are often extinguished in these cells? How does a system that critics, prisoners, and correction officials all recognize as akin to torture remain intact today? The answer is simple: we justify prison policy based on our characterizations of those confined, not on any normative belief about what confinement in prison should look like.

The era of the "supermax"—or super-maximum security prison—arguably began with Marion Penitentiary. In 1983, Marion gained notoriety in the

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6. Jacqueline Thibaut, "To Pave the Way to Penitence": *Prisoners and Discipline at the Eastern State Penitentiary 1829-1835*, 106 PA. MAG. HIST. & BIOGRAPHY 187, 190 (1982).

7. *Id.*

8. Charles Dickens, *Philadelphia, and Its Solitary Prison* (1824), reprinted in AM. POETRY REV., Nov.-Dec. 2004, at 15.

9. THE ARTHUR LIMAN PUB. INTEREST PROGRAM & ASS'N. OF STATE CORR. ADM'RS, TIME-IN-CELL: THE ASCA-LIMAN 2014 NATIONAL SURVEY OF ADMINISTRATIVE SEGREGATION IN PRISON 3 (2015).

10. *Id.*

federal system after prisoners connected to the Aryan Brotherhood gang killed two correctional officers while being escorted from their cells in shackles and cuffs.<sup>11</sup> Marion prison officials responded by returning to the philosophy of Eastern Penitentiary and locking the entire institution down. For the next twenty-three years, men spent twenty-three hours in their cells for every hour they were allowed outside of them.<sup>12</sup> Over the next two decades, more institutions followed Marion's approach.<sup>13</sup> One was Red Onion State Prison, which Virginia opened sixteen years after Marion went on total lockdown. Billed as the state's toughest prison, Red Onion was meant to house the "worst of the worst"—a common catchphrase used to legitimate the harsh treatment of inmates. The *Washington Post* claimed Red Onion had been built for "inmates so dangerous that it's better to forget about rehabilitation and simply warehouse them."<sup>14</sup> If only this were true. I arrived at the place we all called "the Onion" months before the *Post* article appeared. By then I was many things—barely eighteen years old, frail, young, terrified—but far from the worst of the worst.

The continued use of solitary confinement as a punitive measure suggests the correctional officers fail to recognize its negative side effects. But scholars and medical experts have extensively documented them. One such expert, Dr. Craig Haney, concluded in 2003 that "[t]here are few if any forms of imprisonment that appear to produce so much psychological trauma and in which so many symptoms of psychopathology are manifested."<sup>15</sup> Others in the field overwhelmingly agree. Dr. Hans Toch has argued that "[t]he most extreme punitive confinement—such as supermaximum isolation—most heavily taxes limited coping competence, and leads, literally, to points of no return . . . . [P]rison cells become filled with prisoners who have withdrawn from painful reality and quietly hallucinate."<sup>16</sup> But even Dr. Toch does not capture how overwhelmingly oppressive a cell becomes when the door never opens. These quotes from his work, too, erase as they reveal. Because inside his

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11. Justin Peters, *How a 1983 Murder Created America's Terrible Supermax-Prison Culture*, SLATE (Oct. 23, 2013), [http://www.slate.com/blogs/crime/2013/10/23/marion\\_prison\\_lockdown\\_thomas\\_silverstein\\_how\\_a\\_1983\\_murder\\_created\\_america.html](http://www.slate.com/blogs/crime/2013/10/23/marion_prison_lockdown_thomas_silverstein_how_a_1983_murder_created_america.html) [<http://perma.cc/QQ8H-AGJC>].
  12. See Jesenia Pizzaro & Vanja M.K. Stenius, *Supermax Prisons: Their Rise, Current Practices, and Effect on Inmates*, 84 PRISON J. 248, 251 (2004).
  13. *Id.*
  14. Craig Timberg, *At Va.'s Toughest Prison, Tight Controls*, WASH. POST (Apr. 18, 1999), <http://www.washingtonpost.com/wp-srv/local/daily/april99/supermax18.htm> [<http://perma.cc/6PZ8-6WTX>].
  15. Craig Haney, *Mental Health Issues in Long-Term Solitary and "Supermax" Confinement*, 49 CRIME & DELINQ. 124, 125 (2003).
  16. Hans Toch, *Foreword* to TERRY A. KUPERS, PRISON MADNESS: THE MENTAL HEALTH CRISIS BEHIND BARS AND WHAT WE MUST DO ABOUT IT, at ix–xiv (1999).

quotes are the lives of men whose stories are lost. Some of them are lost inside my head. And the ones that are not lost, images of men screaming as guards in riot gear rushed into their cells, the makeshift nooses—these, even in their horror, fail to capture how time in a cell can haunt and ruin you.

Fortunately, there have been scholars who have used their research to get the voices of prisoners into this difficult conversation. In an effort to address mental health issues among inmates, ethnographer Lorna Rhodes spent eight years interviewing prisoners in Washington state penitentiaries.<sup>17</sup> In one interview, a prisoner told Rhodes that “[t]he experience [of solitary confinement] stays with you . . . A strong person with a strong will, if it’s not breaking them it’s gonna make them into something with a lot of violent potential, a lot of hostility.”<sup>18</sup> The men in administrative segregation are both visible and invisible. The conditions of their confinement are “concealed from public and even internal scrutiny behind layers of security precautions” while “representations of criminals and television documentaries of maximum-security prisons highlight the ritualized procedures that contain the dangerousness of the supermax inmate.”<sup>19</sup>

Narratives from prisoners reinforce what researchers have found. Rhodes explored the artwork of Todd Tarselli, a then-prisoner in a Pennsylvania supermax, to emphasize the way in which administrative segregation “plays a role in producing or exacerbating mental illness in prison . . . .”<sup>20</sup> In “Decompensation,” named after the psychiatric term for the failure to generate coping mechanisms in response to stress, Tarselli illustrates a man slowly losing the ability to recognize who he is and assert himself as an individual. Another powerful story comes from poet Etheridge Knight, who wrote about his experience in the hole:

I am being shoved into the Hole. I am stripped naked . . . . I am given a blanket, and the steel door behind me is shut and locked. It is dark and chilly in the Hole . . . . I pace the dark space, do push-ups, masturbate, curse the guards and the gods. Five or six days pass . . . . I begin to slow down, and the smothering starts. . . . After being in the Hole for a couple of weeks, not knowing night from day, I begin to lose track of time.<sup>21</sup>

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17. Lorna A. Rhodes, *Psychopathy and the Face of Control in Supermax*, 2002 *ETHNOGRAPHY* 442.

18. *Id.* at 445.

19. *Id.* at 446.

20. Lorna A. Rhodes, *Images of Health: Pathological Effects of the Supermaximum Prison*, 95 *AM. J. PUB. HEALTH* 1692, 1692 (2005).

21. Etheridge Knight, *The Belly Dance*, in *SINGULAR VOICES: AMERICAN POETRY TODAY* 147-48 (Stephen Berg ed. 1985).

These stories, too often untold, animate the ways that time in the hole and in administrative segregation ruins people.

V.

Today there is no question that solitary confinement and administrative segregation create psychological problems in prisoners.<sup>22</sup> By emphasizing the immense number of people in administrative segregation, the *Time-In-Cell* report creates an opportunity for us to discuss the stories of prisoners that would not have otherwise received mainstream attention—that would have gone untold. Eight years and four months in prison, two six month long stretches in solitary, and four shorter stints in the solitary give me an abundance of evidence to draw from.

On February 21, 1997, I was transferred from the Fairfax County Juvenile Detention Center to the Fairfax County Jail. At the time, my friend and codefendant was housed in the jail's only juvenile unit. To prevent us from housing together, the deputies placed me in administrative segregation. For ten days I awaited a cell in general population. For the first eight of those ten days, I was denied a mattress, a pillow, or a sheet. Given only a small gray blanket, I slept on a concrete slab covered in dried mucus and the grime of years without cleaning. The guy in the cell across from me spent all day talking to himself. Arguing with himself. Guards and nurses alike ignored his disintegration.

Later, while in administrative segregation at Sussex 1 State Prison, I watched men strapped down at four points, both arms and both legs. One old white man refused to shower. Periodically, they opened his cell door and forced him to bathe. I was in cell 5. The man in cell 6, he was afraid to go into general population.

At Coffeewood Correctional Center, I remember the exact moment when the man in the cell next to me lost himself. On the verge of being released to the general population, he changed his mind, turned around, and demanded to go back inside the cage that had held him. Once inside, he slammed a plastic chair against the door, again and again.

The hole broke some men. Others, it didn't. But while many of their stories are buried, hidden, this is not always true.

A short time ago, I walked into a local barbershop with a sheaf of papers. My barber knows that I am a writer and a law student, but he did not know about the time I spent in prison. That morning the papers I carried were a printed copy of *De Profundis*, Oscar Wilde's book about the time he spent in

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22. See Pizzaro & Stenius, *supra* note 12, at 257 (finding that, despite methodological limitations, "the vast majority of research suggests that inmates placed in restricted environments . . . for prolonged periods of time begin to develop psychological problems").

solitary confinement. Staring at it, my barber asked if the sheaf of papers was the start of a new book. I told him no, and explained that I was writing an essay about solitary confinement. “Why would you be writing that?” he asked. When I told him about the time I’d spent in prison, in solitary confinement, and how it has long informed my study of the law, he was silent for a second. Over the next few minutes, he and I began a dance where we exchanged a fact at a time, slowly admitting our mutual intimacy with the darkness of the hole. In *De Profundis*, Wilde wrote, “[m]any men on their release carry their prison along with them into the air, and hide it as a secret disgrace in their hearts, and at length, like poor poisoned things, creep into some hole and die.”<sup>23</sup> After I told him about the long stretches I spent in solitary, he told me that the hole had almost crushed him. It reminded me of when I was sixteen, alone in the hole, nearly broken.

When I was sixteen years old and had only been in general population at the Fairfax County Jail for a few days, the ten-person block where I was assigned seemed like a scene from *Blood In Blood Out* or *The Shawshank Redemption*. I wanted out and asked to be moved, arguing that the frequent lockdowns kept me from attending school. They called it writing yourself out the block. It was a coward’s move, what men who couldn’t protect themselves did. When a deputy came and informed me that I was being moved to a different unit, I balked. By this time, I’d lost my earlier fears, and feared more the stigma that would come from writing myself out the block. In the hierarchy of shame, only checking into protective custody trumped asking to be moved from one block to another out of fear. The deputy threatened to put me in the hole if I did not move. I touched his arm, a childhood gesture. I was trying to say: I will move, no need for the handcuffs. But before I could speak, he slammed me against a brick wall. Handcuffed me. Dragged me to a cell in the hole for assaulting an officer. They tossed me in a cell with a door so thick that no sound escaped. I was sixteen years old. Each morning they took my mattress from me so that I could not sleep during the day. How do I explain this? Each day, I lost a little bit of what made me want to be free. I’ve never told this story. Those were the longest days of my sentence. One afternoon, in a fit of panic, I slammed my right fist against the wall. I fractured my pinky. I thought about suicide. I almost disappeared.

All around us, there are men and women made invisible, their spirits wiped out by policies that we don’t notice. The *Time-In-Cell* report forces us to grapple with their narratives in a way that Due Process and Eighth Amendment challenges brought to court do not, because the majority of the thirty thousand people in administrative segregation will never be represented

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23. Oscar Wilde, *De Profundis* (1905), [http://upword.com/wilde/de\\_profundis.html](http://upword.com/wilde/de_profundis.html) [<http://perma.cc/RJJ5-SQSC>].

## ONLY ONCE I THOUGHT ABOUT SUICIDE

in a lawsuit. But their stories, if we listen, can be found. And those are the stories that demand change.

*Reginald Dwayne Betts is a member of the Yale Law School J.D. Class of 2016. He would like to thank the Liman Program for writing the report that has expanded this conversation; to Alexandra Cox for her thoughtful comments; to Graham White, Charlie Bridge, Joe Masterman, Elizabeth Ingriselli, and Michael Clemente of the Yale Law Journal for editorial assistance; and to the many men who helped him get through his time in solitary confinement and the men still suffering through theirs.*

Preferred Citation: Reginald Dwayne Betts, *Only Once I Thought About Suicide*, 125 YALE L.J. F. 222 (2016), <http://www.yalelawjournal.org/forum/only-once-i-thought-about-suicide>.

## *Time-In-Cell: A Practitioner's Perspective*

*Ashbel T. ("A.T.") Wall*

Earlier this year, *The New York Times* reported that President Obama ordered the Department of Justice to review the practice of federal prison administrative segregation, commonly referred to as "solitary confinement."<sup>1</sup> The Association of State Correctional Administrators (ASCA), the membership organization of the fifty state corrections directors, also issued a statement calling for corrections facilities to sharply limit its use.<sup>2</sup> Against this backdrop, Yale Law School's Arthur Liman Public Interest Program collaborated with ASCA to survey the policies and practices that currently govern the use of "ad seg," as it is commonly known in the corrections field. Their findings, published in the *Time-In-Cell* report,<sup>3</sup> establish a baseline from which to consider specific reforms. In fact, the report offers an unprecedented opportunity for those of us who supervise the operation of correctional facilities to see how this practice has been implemented across the country.

As a career practitioner in the field, I strongly concur in the need for reform. My years in corrections have also given me an appreciation for the complexities associated with preparing for and implementing such a significant change. It is crucial—both to the success of the reforms and to the well-being of the front-line staff who work in high-security settings—that we not underestimate the implications of this change. The success of any such venture will depend on our ability to win and maintain the trust of corrections personnel. In the following paragraphs, I define precisely the characteristics of administrative segregation; outline some key considerations for reform; reflect

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1. Timothy Williams, *Prison Officials Join Movement To Curb Solitary Confinement*, N.Y. TIMES (Sept. 2, 2015), <http://www.nytimes.com/2015/09/03/us/prison-directors-group-calls-for-limiting-solitary-confinement.html> [<http://perma.cc/SP9F-S2WR>].

2. *Id.*

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

on the role of culture—especially staff culture—in implementing reforms; and make recommendations for how to engage employees in the process.

#### I. THE CHARACTERISTICS OF AD SEG

Several varieties of restrictive housing exist, including disciplinary confinement (a form of temporary separation from the general population for a set period of time commensurate with the seriousness of an inmate's disciplinary infraction), and protective custody (a form of non-disciplinary separation from the general population for inmates who require additional protection from other inmates for reasons of safety or possible victimization). The *Time-In-Cell* report identifies 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.”<sup>4</sup> Another feature commonly associated with this form of isolation involves its indefinite duration, as opposed to the set time frame for disciplinary confinement. Administrative segregation usually does not include a fixed end date or time for release. Those decisions are often discretionary, and they are made at various levels of the corrections department according to the practices of that individual department.

Because of the nature of our inmate population, every correctional system will have a subset whose conduct poses a significant risk either to the physical safety of other inmates and staff or to the order, predictability, and therefore the security of the institution. Some will threaten other inmates and staff through physical intimidation, extortion, outbursts of rage, attempts to settle personal beefs or gang-related scores, brinksmanship, and other out-of-control behaviors. Unless addressed quickly and skillfully, these situations can escalate rapidly, extending the threat to additional other people. These behaviors generate punitive sanctions and separation from the population. Referred to as “disciplinary confinement,” the punishment generally involves placing the inmate in a cell with restrictive conditions for a set period of time. If the conduct is particularly egregious or dangerous, or is part of a pattern of threats to security and order, the inmate's time served in disciplinary confinement is usually followed by indeterminate administrative segregation. In these circumstances, administrative segregation has provided an important management option.

While this approach is the norm for cases of serious violence, in other instances confinement decisions become murkier. Without clear criteria to govern the use of administrative segregation, there is a risk it will encompass a hodgepodge of institutional offenders whose disruptive behaviors run the

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4. *Id.* at 11.

gamut from chronically irritating to truly frightening. And we must remember that whatever circumstances led to their stay in administrative segregation, all inmates become subject to conditions that can have a profound impact on their psychological functioning.

## II. KEY CONSIDERATIONS FOR REFORM

Corrections directors are taking notice, and a number have commenced reviews of administrative segregation protocols. The goals of these initiatives include: reducing the number of confinees, developing and using more stringent and precise criteria for admission into ad seg, scrutinizing the effectiveness of the various types of ad seg conditions, and providing more robust clinical services to those who need them. This last category covers those with mental illnesses who wind up in ad seg because they have difficulty following rules and decompensate under the stress of prison life. Other approaches in play involve engaging inmates in programs and activities that promote pro-social behavior; developing step-down programs to ease the transition back into the general prison population; implementing more frequent status reviews; and requiring correctional decision makers to clearly articulate the evidence that informs any decision either to place an inmate into or to release an inmate from this status.

These efforts deserve praise. But before they can effectively make our institutions safer and healthier for both inmates and staff, we correctional officials need to address some fundamental issues. And, importantly, we need the support of our staff. Specifically, the process of reviewing and reforming ad seg must include a reexamination of the following questions:

*A. What Criteria Should Figure in a Correctional Administrator's Decision To Transfer an Inmate to Administrative Segregation? How Is the Inmate Informed About the Reasons for the Decision? At What Level in the Organization Should the Final Determination Be Made?*

At a minimum, the criteria must be clear and written into the department's formal policy. But they must also bear a significant relationship to safety and security, based on specific documented evidence of serious behaviors and incidents that actually compromise these goals. In each case, an inmate must be informed about the specific behavior that triggered an ad-seg decision. The ultimate decision maker must be able to review the facts in light of the inmate's history and must be experienced enough to weigh evidence wisely. And those decision makers must apply carefully considered criteria when assessing the inmate's readiness to return to the general population. Frequent behavioral reviews are key.

*B. For Those Placed in Ad Seg, What Should the Conditions of Confinement Be?*

Absent either judicial intervention or legislation to the contrary, corrections departments have great latitude in structuring the components of the ad-seg inmate's daily life. The *Time-In-Cell* report identifies a wide array of rules that govern the inmate's living environment: rules on the size, lighting, and heating of a cell; an inmate's participation in rehabilitative programs; permitted personal items, ranging from photographs to hygiene products; the inmate's ability to connect to life outside the cell via radio, televisions, and other electronic devices; books and writing materials; exercise; telephone calls; and visiting privileges. Although each corrections department configures these regulations according to its own philosophy and management style, these decisions must be made with a view toward the purpose of administrative segregation. That purpose includes the well-being of the inmate. For as we in corrections have witnessed first-hand, the atmosphere of deprivation and control can—and often does—have serious consequences for inmates in ad seg.<sup>5</sup>

**III. THE ROLE OF STAFF CULTURE IN IMPLEMENTING REFORM**

Any process of reform will be insufficient if it fails to adequately address the challenges faced by corrections staff. When courts commit any individual to our custody, an ironclad “no refusal” policy precludes correctional facilities from turning him or her away. As a result, our employees must manage a population that extends across every dimension: age, race, ethnicity, sexual orientation, religious affiliation, nature of offense, criminal history, length of sentence, propensity for violence, gang membership, cognitive functioning, mental illness, and developmental disability, among others—all in the claustrophobic environment of a closed society. The risk of tension leading to violence is understandably high, and our fundamental obligation is to keep all parties safe. Unless inmates and employees feel safe, it is unlikely that much good can be accomplished in our institutions. It is a tall order and most of the burden falls on our staff, particularly those in uniform.

Many correctional officers and their superiors often function in a manner akin to community police. Some posts directly oversee inmate job assignments, such as laundry and food service preparation. Others are assigned to inmate housing areas and locations where prisoners congregate in large numbers, such as dining halls, recreational areas, visiting rooms, the gym, and the prison yard. Officers must simultaneously respond to inmate inquiries, resolve problems, and keep a watchful eye out for any risks or threats to institutional security.

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5. Craig Haney, Distinguished Professor of Psychology, Univ. of Cal. Santa Cruz, Address at the 2015 Ninth Circuit Corrections Summit (Nov. 4-6, 2015).

Some duties can put our staff directly in harm's way, including breaking up fights and assaults or extracting a violent inmate from a cell that he refuses to leave and escorting him to segregation. It is worth noting that the correctional officers in most systems perform these tasks with weapons that are only as powerful as pepper spray. Rhode Island carefully monitors the staff's use of pepper spray by requiring employees to submit a detailed report documenting incidents of use. An independent Security Specialist weighs the canisters to determine whether an excessive amount was used.<sup>6</sup>

The reforms discussed above are needed. But as we design, develop, and implement these changes, it is essential that we also prioritize the safety of our staff as well as other inmates. Failure to do so will doom our best efforts. Administrators require our line officers (those who interact face-to-face with inmates every day and night) and their superiors to supervise, manage, and give honest assessments of inmate behaviors. If those officers do not believe that the reforms we put in place adequately provide for their safety and for the stability of the institution—especially in high-risk facilities—we will lose them as allies.

Crucially, it is the custody personnel, many of whom have worked in the same prison for decades, whose values and beliefs mold what actually goes on in their institutions. Line correctional officers are very conscious of the risks they face every day. Their point of view is strongly shaped by critical incidents and their outcomes. Some officers have been victimized or know others who were harmed in the course of incidents that either led to an administrative segregation placement or that occurred while an inmate was already housed there. Even if the number of truly appalling cases is small, each one reverberates through the institutional culture for a long time afterward and reinforces the sense of danger that staff feel. Annual memorial services for officers killed in the line of duty underscore the officers' vulnerability. The fact that these acts of violence have occurred despite the precautionary measures already in place demonstrates that these acts do take place and may well occur again. Officers are keenly aware that if we don't get these changes right, it will be they who pay the price.

#### IV. RECOMMENDATIONS FOR ENGAGING STAFF IN REFORM

Given the stakes involved in reducing our reliance on administrative segregation—and the reality that line staff will be indispensable to the success of this effort—it is essential that we as leaders engage these personnel as partners in the change process. This approach will involve a shift from the hierarchical model that has traditionally characterized many corrections

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6. R.I. DEP'T OF CORRS., *Standard Operating Procedures* (2015) (on file with the author).

systems. Corrections departments have historically organized their custody operations along paramilitary lines with a top-down, command-and-control structure. Decisions are transmitted from above. Obedience from those below is assumed. To shift the model through changes to administrative segregation calls for a more horizontal, more collaborative approach in which a cross-section of staff from various levels identify challenges and agree upon solutions. We need to listen to and respect our employees' legitimate anxiety and give serious attention to their ideas and points of view.

An initiative from my own department gives me reason for optimism about the potential that alternative models have to advance our goals of reform. Over the years, collaborating with staff at all levels and across different disciplines of custody and rehabilitative services, we have moved from a mindset that viewed placement in administrative segregation as the end of the line to one that sees it as something very different. Now, uniformed personnel and clinical staff work closely as a team to develop and implement customized strategies that help individual inmates break the cycle of behaviors that have led to their confinement in ad seg. They meet in case management sessions as a multi-disciplinary team to address the most difficult cases. By integrating behavioral health, medical treatment, programming and security-based perspectives, we have enhanced the trust and the level of communication between custody and rehabilitative services. The results include more effective crisis intervention, a reduction in the frequency of repetitious self-injurious actions and a decline in the number of trips to hospitals associated with disruptive behaviors. Inmates are more involved in empirically based treatment programs that serve to promote pro-social conduct. As a result, we have successfully reintegrated a greater number of challenging inmates from administrative segregation into the general population at less restrictive institutions.

Such initiatives take creativity, work, and time to develop. There will not be shortcuts here. In our hands is the health and safety of the millions who live and/or work in our nation's prisons. No matter how lauded we may be outside our agencies for the reforms we create, we cannot afford to become untethered from our workforce. If we do, we risk losing a rare opportunity to obtain the support and commitment essential for achieving the reforms necessary for the wellbeing of the people housed in administrative segregation.

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Preferred Citation: A.T. Wall, *Time-In-Cell: A Practitioner's Perspective*, 125 YALE L.J. F. 246 (2016), <http://www.yalelawjournal.org/forum/time-in-cell-a-practioners-perspective>.