

# If Solitary Confinement Amounts to Torture, How Can We Help the 100,000 Men, Women and Children Held in These Conditions Across America?

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## I. INTRODUCTION

It is estimated that there are between 80,000 to 100,000 people held in some form of isolated confinement across the United States.<sup>1</sup> This estimate does not include individuals in jail, juvenile, military or immigration detention centers – only individuals currently in prison.<sup>2</sup> Extensive psychological studies have found that solitary confinement can cause long term and sometimes irreversible psychological damage.<sup>3</sup> There is a growing consensus among correctional staff, criminal justice experts and policymakers that solitary confinement is overused and does more harm than good.<sup>4</sup> With many prisoners welfare at risk, we should consider what we can do to prevent harm and uphold human rights. This article will discuss the problems with solitary confinement, suggest reforms, and then consider how we can achieve these reforms through litigation and policy advocacy.

## II. THE PROBLEM

Solitary confinement consists of isolating an individual in a small cell approximately eight by six foot,<sup>5</sup> often without a window,<sup>6</sup> for 22 to 23 hours a day.<sup>7</sup> Individuals can be held for months, years or even

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<sup>†</sup> I would like to thank my inspiration Patricia Gannon. In the words of Abraham Lincoln “All that I am, or hope to be, I owe to my mother.”

I would also like to thank Rachel Gannon, Eilish Dowd, Genevieve Norris and Shannon Naughton for their overwhelming continued love and support. I am truly grateful.

I dedicate this article to all the men, women and children who are or have been isolated. Your strength is unparalleled.

<sup>1</sup> ASSOCIATION OF STATE CORRECTIONAL ADMINISTRATORS and THE ARTHUR LIMAN PUBLIC INTEREST PROGRAM, YALE LAW SCHOOL, AIMING TO REDUCE TIME-IN-CELL: REPORTS FROM CORRECTIONAL SYSTEMS ON THE NUMBERS OF PRISONERS IN RESTRICTED HOUSING AND ON THE POTENTIAL OF POLICY CHANGES TO BRING ABOUT REFORMS, 3-5 (2016) [hereinafter ASCA-Yale 2016].

<sup>2</sup> *Id.* at 5–6.

<sup>3</sup> Anna Conley, *Torture in US Jails and Prisons: An Analysis of Solitary Confinement Under International Law*, 7 VIENNA J. ON INT’L CONST. L. 415 (2013).

<sup>4</sup> Dan Nolan and Chris Amico, *Solitary By the Numbers* (Sept. 5, 2018), <http://apps.frontline.org/solitary-by-the-numbers/>.

<sup>5</sup> Tracy Hresko, *In The Cellars of the Hollow Men: Use of Solitary Confinement in U.S Prisons and its Implications Under International Laws Against Torture*, 18 PACE INT’L L. REV. 10 (2006).

<sup>6</sup> Cassandra Shaylor, “It’s Like Living in a Black Hole”: *Women of Color in Solitary Confinement in the Prison Industrial Complex*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 385, 387 (1993).

<sup>7</sup> Hresko, *supra* note 5, at 5.

decades.<sup>8</sup> Studies have shown solitary confinement causes significant psychological damage including cognitive delays, increased suspicion and paranoia, anxiety, fear, aggression, feelings of helplessness, depression, and increased thoughts and attempts at self-mutilation and suicide.<sup>9</sup>

Solitary confinement can be used for protection (protective custody), incapacitation (administrative segregation) and for punishment (disciplinary segregation).<sup>10</sup> Restrictive housing is a term associated with solitary confinement. It similarly includes placement in a locked cell with an inability to leave for 22 hours or more a day, however an inmate might not be isolated.<sup>11</sup>

Offences that can result in isolation range from murdering staff or an inmate, escape, misusing unauthorized medication to destroying property and even being unsanitary or untidy.<sup>12</sup> Louisiana was found to be the state with the most prisoners in solitary, with 15% of the prison population in these conditions,<sup>13</sup> closely followed by Utah with 14%.<sup>14</sup> In Texas, nearly half of all inmates in solitary had been there for over three years.<sup>15</sup> In Hawaii, however, no inmate was isolated for more than three months.<sup>16</sup>

In the 19<sup>th</sup> century, the United States was a world leader in introducing prolonged incarceration and solitary confinement as a way of dealing with criminal behavior.<sup>17</sup> Known as the “Philadelphia System”, solitary confinement became the predominant mode of incarceration, where isolation and total silence were used to control, punish and rehabilitate inmates.<sup>18</sup> The system was later abandoned because mental disturbances among prisoners were so high.<sup>19</sup> Prisoners, often who had no prior mental illness, had delirious states, hallucinations, agitation and random, impulsive violence, often self-directed.<sup>20</sup>

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<sup>8</sup> ASSOCIATION OF STATE CORRECTIONAL ADMINISTRATORS and THE LIMAN CENTER FOR PUBLIC INTEREST LAW AT YALE LAW SCHOOL, REFORMING RESTRICTIVE HOUSING: THE 2018 ASCA-LIMAN NATIONWIDE SURVEY OF TIME-IN-CELL 92 (2018) [hereinafter ASCA-Liman].

<sup>9</sup> Conley, *supra* note 3.

<sup>10</sup> Nolan, *supra* note 4.

<sup>11</sup> U.S. DEP'T. OF JUSTICE, REPORT AND RECOMMENDATIONS CONCERNING THE USE OF RESTRICTING HOUSING 3–6 (2016), <https://www.justice.gov/archives/dag/report-and-recommendations-concerning-use-restrictive-housing> [hereinafter DOJ Report and Recommendations].

<sup>12</sup> Nolan, *supra* note 4.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U.J.L. & POL'Y 325, 328 (2006).

<sup>18</sup> Brooke Shelby Biggs, *Solitary Confinement: A Brief History* (Sept. 19, 2018), <https://www.motherjones.com/politics/2009/03/solitary-confinement-brief-natural-history>.

<sup>19</sup> Grassian, *supra* note 17.

<sup>20</sup> *Id.*

The psychological effects of solitary confinement were discussed in the Supreme Court in as early as 1890 with *In Re Medley*. The Court explicitly acknowledged the psychiatric harm caused by the penitentiary system using solitary confinement.<sup>21</sup> Justice Miller stated:

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.<sup>22</sup>

Tragically, the lessons from the 19th century have essentially been ignored. Recent psychological studies only repeat what was stated back in 1890. In a study from California's Pelican Bay prison, Craig Haney found nearly 90% of inmates in solitary suffered a psychopathological effect and nearly half suffered from extreme forms of psychopathology including suicidal ideations, hallucinations and chronic depression.<sup>23</sup> In Texas, suicide rates for those in solitary confinement are five times higher than those in general population.<sup>24</sup> Evidence shows solitary confinement has overwhelmingly harmful psychological effects. Wes Boyd stated "Placing prisoners in solitary confinement is tantamount to torture and it needs to stop."<sup>25</sup>

In addition to solitary confinement being traumatic to individuals, it also has a wider effect on society. Research found that individuals released directly onto the streets from isolation had a higher reoffending rate compared to individuals who had spent time in general population.<sup>26</sup> Additionally, housing an inmate in solitary conditions can be three times more expensive than housing an inmate in general population.<sup>27</sup> Recently, Mississippi reduced the number of prisoners held in solitary from 1,000 to

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<sup>21</sup> *In Re Medley*, 134 U.S. 160, 388 (1890).

<sup>22</sup> *Id.*

<sup>23</sup> 4 REFORMING CRIM. JUST.: PUNISHMENT, INCARCERATION & RELEASE 261, 265 (Erik Luna ed., 2017).

<sup>24</sup> J. Wesley Boyd, *Solitary Confinement: Torture, Pure and Simple*, PSYCHOL. TODAY (Jan. 15 2018), <https://www.psychologytoday.com/us/blog/almost-addicted/201801/solitary-confinement-torture-pure-and-simple>.

<sup>25</sup> *Id.*

<sup>26</sup> John J. Gibbons & Nicholas de B. Katzenbach, *Confronting Confinement: A Report of the Commission on Safety and Abuse in America's Prisons*, 22 WASH. U.J.L. & POL'Y 385, 404-405 (2006).

<sup>27</sup> Jeffrey Ross, *Supermax Prisons*, 44 SOCIETY 60, 64 (2007).

150.<sup>28</sup> The reforms saw a 70% reduction in violence levels and taxpayers were estimated to save \$8 million a year.<sup>29</sup> Accepting the idea that it needs to stop because it is ineffective, expensive and torturous, we can then consider what reforms we should make.

### III. SUGGESTED REFORMS

The United Nations Special Rapporteur Juan Méndez believed solitary confinement should be prohibited except in very exceptional circumstances and for as short a time as possible, with an absolute prohibition for juveniles and people with mental disabilities.<sup>30</sup> Méndez stated that solitary confinement in excess of 15 days should be subject to an absolute prohibition, citing scientific studies that established lasting mental damage is caused after a few days of social isolation.<sup>31</sup>

Following these recommendations, in April 2018 a Solitary Confinement Reform Act 2018 was introduced into Congress. The bill includes a section for vulnerable populations. It states that the Bureau of Prisons or any facility that contracts with it shall not place an inmate in solitary confinement if the inmate is younger than 18 years of age, subject to certain exceptions such as the confinement is a temporary response to behavior which poses a substantial and immediate threat and all other options to de-escalate the situation have been exhausted.

The bill follows a similar style for inmates with serious mental illness, intellectual disabilities and physical disabilities with similar exceptions. The bill also includes prohibiting the placement of an inmate who is HIV positive in solitary if the placement is solely on the basis of their positive status.<sup>32</sup> The bill additionally proposes limiting administrative segregation to no more than 15 consecutive days, and no more than 20 days in a 60 day period.<sup>33</sup> Again however, subject to exceptions. The bill has been introduced into Congress and has been referred to the Committee on the Judiciary.<sup>34</sup>

If the bill becomes law, it would mark a substantial, progressive change in solitary confinement. It would also be a fair balance between the two opposing interest groups – the individuals in solitary and correctional facilities. Individuals in solitary would have more protection from arbitrary, indefinite solitary and correctional officers would still have the opportunity

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<sup>28</sup> Terry Kupers, *Beyond Supermax Administrative Segregation: Mississippi Rethinking Prison Classification and Creating Alternative Mental Health Programs*, 36 CRIM. JUST. & BEHAV. 1037 (2009).

<sup>29</sup> Leena Kurki & Norval Morris, *The Purposes, Practices and Problems of Supermax Prisons*, 28 CRIME & JUST. 391 (2001).

<sup>30</sup> Juan E. Méndez, (Special Rapporteur on Torture), *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, U.N. Doc. A/HRC/22/53 (2013).

<sup>31</sup> Méndez, *supra* note 30.

<sup>32</sup> S. 2724, 115th Cong. § 1 (2017–18).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

to use it for punishment when necessary. The bill encompasses many of the suggested proposals, such as a general prohibition on certain subpopulations including juveniles and a general prohibition on its use over 15 days.

Other proposed amendments could include more monitoring and recording of its use on a state level, have judges take it into account when sentencing, a ban on it entirety for certain subpopulations, regular health assessments and re-integration back into general population, rather than a direct release into society from isolation. These proposals will be discussed in turn.

Not all states regularly track information on how long an individual is kept in solitary confinement.<sup>35</sup> Only in 2017 did Delaware, Massachusetts, Oregon and Utah begin tracking the length of time an individual was in solitary confinement.<sup>36</sup> Eight jurisdictions admitted they do not regularly track information on the length of time an inmate is in solitary.<sup>37</sup> Not only does this make it difficult to collect information on the use of solitary, it is also worrying from a due process point of view. It is argued that inmates who are held in solitary without periodic review of their conditions are denied due process.<sup>38</sup> If states do not track how long individuals are in solitary, individuals could be held there for longer than necessary, causing further psychological harm. Requiring states to track the length of time would be beneficial both for prisoners' rights and gathering data to establish exactly how many individuals are in solitary and for how long.

In addition to tracking length of stays, states could also conduct regular behavior and health assessments on individuals. As some psychological studies have found harm is caused even after a few hours,<sup>39</sup> requiring states to regularly monitor prisoners health and the length of time they are isolated would be extremely valuable in establishing when, on average, harm is caused, thus preventing future harm. If facilities could establish when a particular prisoner generally displayed signs of psychological harm, the facility with reasonable certainty would then know to prohibit isolation beyond this point if they decide to isolate them again.

The American Correctional Association (ACA) previously called for regular behavior health assessments for individuals placed in restrictive housing.<sup>40</sup> It was suggested correctional facilities should have written policies to ensure a mental health practitioner evaluates and files written reports on prisoners within 7 days of placement in isolation.<sup>41</sup> Additionally,

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<sup>35</sup> Liman, *supra* note 8, at 28.

<sup>36</sup> *Id.* at 16.

<sup>37</sup> *Id.*

<sup>38</sup> Jules Lobel, *Prolonged Solitary Confinement and the Constitution*, 11 J. OF CONST. L. 115, 117 (2008).

<sup>39</sup> PAUL NITSCHKE & KARL WILMANN, *THE HISTORY OF THE PRISON PSYCHOSES* 31 (Francis M. Barnes Jr. & Barnard Glueck trans., 1912).

<sup>40</sup> Liman, *supra* note 8, at 48.

<sup>41</sup> *Id.* at 46.

the ACA proposed if an individual is held beyond 30 days, a behavioral health assessment should be completed at least every 30 days for individuals diagnosed with a behavioral health disorder.<sup>42</sup> While regular behavior and health assessments of thousands of prisoners held in solitary would be costly in time, money and resources, it would be a progressive step to civilizing a torturous practice and limiting damage caused.

Additional reforms that would help individuals in solitary confinement include a prohibition on isolating individuals for over 15 days following the UN's recommendation and a ban on its entirety for certain subpopulations such as juveniles and transgender prisoners for "protection". In a survey published by the Association of State Correctional Administrations in 2018, 21 jurisdictions identified a total of 157 transgender prisoners in restrictive housing.<sup>43</sup> Concerns about transgender prisoners being placed in solitary pushed the ACA to promote standards that prisoners should not be placed in restrictive housing on the basis of gender identity alone.<sup>44</sup> Implementing and enforcing policies such as this would protect against discrimination, while upholding basic fundamental human rights.

While most research on the psychological effects of solitary have been conducted on incarcerated adults, some evidence suggests the effects on juveniles are even greater due to their unique developmental needs.<sup>45</sup> Evidence concludes children have a special need for social stimulation<sup>46</sup> and because many children already in the juvenile system have histories of trauma and abuse,<sup>47</sup> solitary confinement can be even more harmful to their future ability to lead a productive life.<sup>48</sup> The American Medical Association called for "restricting the use of isolation in juvenile correction facilities for only extraordinary circumstances".<sup>49</sup>

Through legislation and policy, many state and local jurisdictions have already made reforms on the use of solitary confinement of children. President Obama issued a ban on juvenile solitary confinement in federal

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> American Correctional Association, Standard 4-RH-0039, ACA Restrictive Housing Standards (May 2016).

<sup>45</sup> Sandra Simkins, Marty Beyer & Lisa Geis, *The Harmful Use of Isolation in Juvenile Facilities: The Need for Post-Disposition Representation*, 38 WASH. U. J.L. & POL'Y 241, 257-61 (2012).

<sup>46</sup> Laurence Steinberg, Age Differences in Future Orientation and Delay Discounting, 80 Child Development 28 (2009).

<sup>47</sup> American Civil Liberties Union (ACLU), *Stop Solitary: Ending the Solitary Confinement of Youth in Juvenile Detention and Correctional Facilities* (Nov. 1 2018), [https://www.aclu.org/files/assets/4%2020%20Juvenile%20Solitary\\_Two%20Pager.pdf](https://www.aclu.org/files/assets/4%2020%20Juvenile%20Solitary_Two%20Pager.pdf).

<sup>48</sup> American Academy of Pediatrics, Policy Statement: *Health Care for Youth in the Juvenile Justice System*, 128 Pediatrics 1219, 1223-24 (2011), <http://pediatrics.aappublications.org/content/pediatrics/early/2011/11/22/peds.2011-1757.full.pdf>.

<sup>49</sup> American Medical Association Interim Meeting, *Solitary Confinement of Juveniles in legal custody* (Nov. 2014), [https://www.ama-assn.org/sites/default/files/media-browser/public/hod/i14-%20resolutions\\_0.pdf](https://www.ama-assn.org/sites/default/files/media-browser/public/hod/i14-%20resolutions_0.pdf).

facilities<sup>50</sup> and many states in recent years have abolished or placed restrictions on its use.<sup>51</sup> Statistics show 29 jurisdictions prohibited punitive juvenile solitary confinement, 15 states placed some limits on the practice and 7 states had no limits or allowed indefinite extensions with administrative approval.<sup>52</sup> There should be consistent procedures on both a state and federal level of prohibiting solitary confinement of juveniles. Policies must be reformed to ensure conditions are effective and safe and prioritize protection and rehabilitation.<sup>53</sup> Because of the psychological and developmental damage that can be caused to isolated juveniles, efforts should be made to ensure it is prohibited.

A final recommendation for helping individuals in solitary would be to have it considered in sentencing. When sentencing, there are no procedures in place for a judge to consider whether the defendant will be placed in solitary<sup>54</sup> and therefore subjected to further punishment. It is predictable if an individual will be placed in solitary based on either the crime itself or their previous disciplinary records. For example, defendants on death row are often isolated as are individuals who have been known to escape. In order to ease the severity of the sentence, if an individual is likely to spend time in isolation a judge could take this into consideration and lessen the length of the sentence.

Across the country, pressure and awareness have been increasing to reduce and reform solitary confinement.<sup>55</sup> The momentum encouraging reform has been influenced by a variety of factors including the realization that solitary confinement is overused, an awareness that it causes severe and lasting mental illness, a concern that it costs much more financially than it is worth and a belief that it makes prisons and communities less safe.<sup>56</sup> There are a variety of ways we can implement change using various advocacy strategies including litigating, organizing, lobbying for policy change, communicating through media to raise awareness and fundraising to obtain support for the work needed. The next part of this article considers how we can achieve change through policy advocacy and litigation.

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<sup>50</sup> Andrew B. Clark, *Juvenile Solitary Confinement as a Form of Child Abuse*, 45 J. AM. ACAD. PSYCHIATRY & L. 350, 350–357 (2017).

<sup>51</sup> SAL RODRIGUEZ, FACT SHEET: CHILDREN IN SOLITARY CONFINEMENT (2015), <https://solitarywatch.org/wp-content/uploads/2011/06/FACT-SHEET-Children-in-Solitary-Confinement1.pdf>.

<sup>52</sup> NATALIE J. KRANER, ET AL., JURISDICTION SURVEY OF JUVENILE SOLITARY CONFINEMENT RULES IN JUVENILE JUSTICE SYSTEMS (Lowenstein Center for the Public Interest, 2016).

<sup>53</sup> ACLU, *supra* note 47.

<sup>54</sup> *Davis v. Ayala*, 135 S. Ct. 2187 (2015) (Kennedy, J., concurring).

<sup>55</sup> ZACHARY HEIDEN, ACLU OF MAINE, CHANGE IS POSSIBLE: A CASE STUDY OF SOLITARY CONFINEMENT REFORM IN MAINE 12 (2013).

<sup>56</sup> *Id.*

## IV. POLICY ADVOCACY

Policy as an advocacy strategy involves appealing to other decision makers besides judges. In implementing policy changes, lawyers can draft statutory language for new bills or propose amendments to existing laws, conduct background research to provide policy analysis, draft memoranda laying out constitutional, statutory, and policy arguments opposing legislation that may harm their constitute groups or support good legislation.<sup>57</sup>

There have been some policy amendments on both a state and federal level that have made changes to solitary confinement. Two examples of subpopulations that have seen recent policy changes are juveniles and inmates on death row. Statistics indicate juvenile justice agencies have implemented policy changes in recent years increasingly limiting isolation, with a majority of states restricting it to a maximum period of five days.<sup>58</sup> For condemned inmates, Arizona moved away from automatically placing inmates on death row in solitary.<sup>59</sup> The previous policy placed individuals sentenced to death automatically and indefinitely in solitary, regardless of their behavior or risk to others.<sup>60</sup> Arizona joins other states in recent years, such as California, Colorado, Louisiana, and North Carolina among others, to allow condemned inmates more time out of their cells.<sup>61</sup>

An example of successful policy changes can be seen from Maine. The Maine Department of Corrections made changes throughout state facilities; fewer people were sent to solitary, inmates in solitary are held in better conditions and for less time, they are given access to more care and services to prevent deterioration of mental health and they are given a clear path, based on achievable goals, to get out of solitary.<sup>62</sup> Statistics show assaults are down and the number of prisoners sent back to solitary has dropped.<sup>63</sup>

In 2015, President Obama announced he requested the Attorney General conduct a review on the overuse of solitary confinement to understand how and why correctional facilities isolate certain prisoners from general population and develop strategies for reducing its use.<sup>64</sup> A report from the U.S Department of Justice was later issued in 2016 with over 50 guiding principles which were intended to “serve as a roadmap for correctional

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<sup>57</sup> ALAN K. CHEN & SCOTT L. CUMMINGS, PUBLIC INTEREST LAWYERING: A CONTEMPORARY PERSPECTIVE, PUBLIC INTEREST ADVOCACY STRATEGIES 259 (Wolters Kluwer, 2014).

<sup>58</sup> *Reducing Isolation and Room Confinement*, PBS LEARNING INST. (Sept. 2012), [https://pbstandards.org/uploads/documents/PbS\\_Reducing\\_Isolation\\_Room\\_Confinement\\_201209.pdf](https://pbstandards.org/uploads/documents/PbS_Reducing_Isolation_Room_Confinement_201209.pdf).

<sup>59</sup> Gabriella Robles, *Condemned to death and solitary confinement* (Jul. 23, 2017), <https://www.themarshallproject.org/2017/07/23/condemned-to-death-and-solitary-confinement>.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> HEIDEN, *supra* note 55.

<sup>63</sup> Susan Sharon, *Maine State Prison Leading Nationwide Charge to Reduce Solitary Confinement*, MAINE PUBLIC RADIO (Apr. 14, 2017), <http://www.mainepublic.org/post/video-maine-state-prison-leading-nationwide-charge-reduce-solitary-confinement#stream>.

<sup>64</sup> DOJ Report and Recommendations, *supra* note 11.



systems seeking direction on future reforms.”<sup>65</sup> Proposals included housing inmates in the least restrictive setting necessary to ensure their safety as well as others, all correctional staff to be regularly trained on restrictive housing policies, regular evaluation of policies and consideration of alternatives and absent of a compelling reason, and prison inmates to not be released directly from isolation into the community.<sup>66</sup>

While some of the reforms were implemented, they only applied to an estimated 10,000 inmates in the federal system – just a fraction of the total solitary population.<sup>67</sup> There is little evidence to suggest efforts will continue at the federal level under Attorney General Jeff Sessions.<sup>68</sup> There are worries further progressive reforms could be stalled and even reversed under the Trump administration.<sup>69</sup> Critics believe prison and jail conditions have worsened under the Trump administration,<sup>70</sup> pointing to rolled back protections for transgenders under the Obama administration (placements in facilities are now based on an individual's assigned sex at birth).<sup>71</sup> Sources including the Marshall Project and the Cato Institute reported on worries of how the Trump administration may negatively affect criminal justice issues, ranging from sentencing reform to police accountability.<sup>72</sup> Because of worries in the current political climate, it is important to keep pushing for further policy amendments and enforcement.

Lawyers and advocates have an important role in influencing and pushing policy amendments. Effective policy advocacy can include media coverage, educating the public in the reality of solitary – namely that it is expensive and ineffective, publicly pressuring law-makers and other government decision makers and policy analysis.<sup>73</sup> Advocates could continue to push for change by requiring decision makers to implement and enforce the many suggested proposals.

Solitary confinement faces challenges because, as Justice Kennedy said, “the conditions in which prisoners are kept simply has not been a matter of sufficient public inquiry or interest... Prisoners are shut away – out of sight,

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<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> Priyanka Boghani, *Reducing Solitary Confinement, One Cell At A Time*, PBS (Nov. 15, 2018), <https://www.pbs.org/wgbh/frontline/article/reducing-solitary-confinement-one-cell-at-a-time>.

<sup>68</sup> *Id.*

<sup>69</sup> Jean Casella & James Ridgeway, *What Trump and Sessions Could Mean for Solitary Confinement in America's Prisons*, SOLITARY WATCH (Nov. 18, 2016), <https://solitarywatch.org/2016/11/18/what-trump-and-sessions-could-mean-for-solitary-confinement-in-americas-prisons>.

<sup>70</sup> Helen M. Berg & Abigail DeHart, *Prison and Jail Conditions Worsen Under the Trump Administration – Unless You Are Paul Manafort*, TAKE CARE (Jul. 18, 2018), <https://takecareblog.com/blog/prison-and-jail-conditions-worsen-under-the-trump-administration-unless-you-are-paul-manafort>.

<sup>71</sup> Jenny Gathright, *The Guidelines for Protection of Transgender Prisoners Just Got Rewritten*, NPR (May 12, 2018, 4:12 PM), <https://www.npr.org/sections/thetwo-way/2018/05/12/610692321/the-guidelines-for-protection-of-transgender-prisoners-just-got-rewritten>.

<sup>72</sup> Casella, *supra* note 69.

<sup>73</sup> CHEN & CUMMINGS, *supra* note 57, at 260.

out of mind.”<sup>74</sup> Difficulty arises in how less powerful groups, such as prisoners, can find the leverage and allies necessary to succeed in the political arena<sup>75</sup> and create effective policy change. As some individuals in solitary are capital murderers, society has deemed them “the worst of the worst”, making it difficult for them to gain sympathy. In order to overcome this, it is possible to approach the situation from other viewpoints. For example, instead of highlighting the psychological harm inmates suffer, highlighting the excessive, unnecessary cost to the taxpayer could be more effective.

There are many advantages to policy advocacy. Advocates are not constrained by legal rules because judges are not the decision makers. Advocating for policy changes also considers the wider problem as a whole, not just the individuals in the lawsuit or those in similar circumstances. Litigation often involves individuals on death row as they are usually placed automatically in solitary until they are executed. Additionally, advocates can meet directly with decision makers and encourage others to do so, which could push decision makers to take action to address, or at least acknowledge, the problem because it is directly proposed to them. Unlike judges, decision makers are not constrained by *stare decisis*. Furthermore, policy amendments are democratically legitimate. As democratically elected decision makers make and encourage policy amendments, society may be more welcoming of changes.

However, particularly in the current political climate, policy advocacy may be difficult due to a strained power dynamic. Negotiating may be difficult and you may have a limited ability to persuade others with power. In the process of negotiating, advocates may leave behind important goals from their original campaign, because ultimately a small victory is better than none. Policy amendments require implementation and follow up to ensure enforcement. You may have to go to court to enforce a new policy, resulting in litigation anyway.

Overall, advocates could aim to raise awareness of the harm caused by solitary confinement and educate the public. Advocates could encourage members of the public to contact their local representatives and pressure decision makers, from local government to even prison wardens. Advocates could assemble a campaign targeting any of the suggested proposals above to push for further change. Successful advocates should consider the underlying policy issues and interest groups, including correctional officers and inmates, budgetary implications and understand the procedural rules that encompass most legislative settings.<sup>76</sup> While policy amendments can be seen on a local level in small jails, to throughout the country in federal prisons,

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<sup>74</sup> *Davis v. Ayala*, 135 S. Ct. 2187 (2015) (Kennedy, J., concurring); CHEN & CUMMINGS, *supra* note 57, at 263.

<sup>75</sup> CHEN & CUMMINGS, *supra* note 57.

<sup>76</sup> *Id.*

more can still be done. Advocates should continue with their commendable efforts to ensure better procedures, conditions, and rights for the thousands of men, women, and children in solitary across the country.

## V. LITIGATION

Alternatively, litigation is a valuable advocacy strategy. As previously mentioned, solitary confinement was discussed in the Supreme Court in as early as 1890. However, between 1890 and 1970 there was less use of solitary and as a result litigation was very limited.<sup>77</sup> In the late 1970's both incarceration levels and solitary confinement terms increased, which was followed by an increase in prison condition lawsuits.<sup>78</sup> When litigation was used in the 1970's, courts did not intervene because solitary was used temporarily and in limited circumstances.<sup>79</sup> While some litigation took place in state courts, the majority of cases were litigated in federal courts because inmates claimed federal rights, such as freedom from cruel and unusual punishment under the Eighth Amendment to the Constitution or by holding prison officials accountable under the Federal Civil Rights Act.<sup>80</sup>

As stated, there is overwhelming evidence that the use of solitary confinement amounts to torture and therefore could be deemed as cruel and unusual punishment. The Supreme Court has held that the Eighth Amendment applies to prison conditions, including solitary confinement.<sup>81</sup> Confinement in a prison or in an isolation cell is a form of punishment subject to scrutiny under the Eighth Amendment.<sup>82</sup> Additionally, the use of solitary confinement potentially violates international law. In *Estrella v. Uruguay*, the United Nations Human Rights Committee suggested that psychological harm could amount to torture under international law.<sup>83</sup> Tracy Hresko argues that because of the extreme psychological injury solitary confinement inflicts on inmates, it would likely be found as severe torture under international jurisprudence.<sup>84</sup> Hresko therefore believes prisoners may find a remedy under international law.<sup>85</sup>

While litigation is a possible route for reform in limiting or abolishing solitary confinement, based on the long, historical battle, change appears unlikely. Litigation is costly. Time, money and resources are put into litigating is little success. Because of stare decisis, courts are reluctant to

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<sup>77</sup> Keramet Ann Reiter, *The Most Restrictive Alternative: A Litigation History of Solitary Confinement in U.S. Prisons 1960-2006*, 57 *STUD. L., POL., & SOC'Y* 71, 80 (2012).

<sup>78</sup> *Id.* at 81.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 77.

<sup>81</sup> *Hutto v. Finney*, 437 U.S. 678, 685 (1978).

<sup>82</sup> *Weems v. United States*, 217 U.S. 349 (1910).

<sup>83</sup> *Estrella v Uruguay*, Comm. No. 74/1980, U.N. GAOR Hum. Rts. Comm., 18<sup>th</sup> Sess U.N. Doc. CCPR/C/18/D/74/1980 (1980).

<sup>84</sup> Hresko, *supra* note 5, at 27.

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

establish new precedent. Additionally, litigation only affects the parties in the suit or others similarly situated, not the thousands suffering across the country. Recently, in 2017 men on death row in Louisiana and Florida filed separate class action lawsuits. The men, following the route many others have taken, claimed their holdings amounted to torture and therefore violated the Eighth Amendment and additionally the Fourteenth Amendment because they were held indefinitely in solitary without periodic review.<sup>86</sup> While the Louisiana Department of Public Safety and Corrections denied the lawsuit was the reason for looser restrictions,<sup>87</sup> policy changes were made weeks later. Men were allowed to socialize face to face for the first time in decades and the amount of time spent outside their cell without restraints quadrupled.<sup>88</sup> Conditions in Florida unfortunately remain unchanged.<sup>89</sup>

While the lawsuit in Louisiana may be a small victory, the changes only affect the men on death row, not individuals state wide, which as previously mentioned, is a drawback of litigation. Winning in court, albeit unlikely, does not guarantee a win in reality. Rules can be overturned and victories are not permanent. Litigation for inmates in Louisiana continues to ensure the recent changes are “constitutionally adequate, properly implemented and permanent”.<sup>90</sup>

Litigation as an advocacy strategy can be met with skepticism because of the reasons mentioned above – namely that it is costly in time, money and resources, it is difficult to achieve change because of stare decisis and it does not change social views. Litigation can however be beneficial in allowing those in solitary get their story told and raise awareness. It can be empowering. Media attention can follow lawsuits and lead to humanization of individuals. This can lead to individuals obtaining hope, support and even new relationships from pen pals. Litigation has also been successful in pressuring facilities to make change. While Maine has been a leading example for recent amendments, these changes would not have happened without threatened lawsuits. Maine’s Corrections Commissioner said he did not come to Maine looking to reform solitary, but that the issue was waiting

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<sup>86</sup> Davis, Garalds, Guardado, Jordan and others v Jones, Jorden and Reddish from the Florida Department of Corrections 2017 Civil Action No: 3:17-CV-820-J-34PDB; Hamilton, Eaton, Perry and others v Vannoy, Cain, Cruze and others from the Louisiana Department of Public Safety Corrections 2017 Civil Action No: 3:17-CV- 00194-SDD-RLB.

<sup>87</sup> Julia O’Donoghue, *Louisiana tests relaxed restrictions on death row inmates*, NOLA.COM (Oct. 25, 2017), [https://www.nola.com/politics/index.ssf/2017/10/louisiana\\_death\\_row\\_changes.html](https://www.nola.com/politics/index.ssf/2017/10/louisiana_death_row_changes.html).

<sup>88</sup> *Id.*

<sup>89</sup> Gabriella Robles, *Lawsuits challenge the cruelty of decades in solitary confinement on death row*, SOLITARY WATCH (Oct. 10, 2017), <https://solitarywatch.org/2017/10/10/lawsuits-challenge-the-cruelty-of-decades-in-solitary-confinement-on-death-row>.

<sup>90</sup> Gabriella Robles, *Condemned to death and solitary confinement*, THE MARSHALL PROJECT (Jul. 23, 2017, 10:00 PM), <https://www.themarshallproject.org/2017/07/23/condemned-to-death-and-solitary-confinement#.eFy7GOWPZ>.

for him in the form of “threats of lawsuits by the ACLU.”<sup>91</sup>

In 2009, prisoners at Pelican Bay State Prison filed a lawsuit against California, challenging long-term solitary confinement in Security Housing Units (SHU).<sup>92</sup> In order to draw attention to their pending litigation and situation, the four empowered men organized a statewide hunger strike.<sup>93</sup> In 2013, more than 30,000 prisoners participated in a 60-day hunger strike supporting their cause – it was the largest prison hunger strike in history.<sup>94</sup> Later, *Ashker v. Governor of California* became certified as a class action case, covering hundreds of prisoners in SHU at Pelican Bay. In 2015, the plaintiffs and California entered into a settlement agreement that ended indeterminate solitary confinement, stopped solitary based on gang affiliation and created a step-down program designed to return those in solitary to general population in 2 years or less.<sup>95</sup>

The Supreme Court is yet to decide whether solitary is unconstitutional. The Court has turned down the broad question of whether extended solitary is prohibited by the Constitution. Justice Kennedy has openly criticized the prison system, claiming it is an “ongoing injustice of great proportions” and that solitary “drives men mad.”<sup>96</sup> In a concurring opinion in the case of Hector Ayala, a California death row inmate, Kennedy essentially invited lawyers to file appeals challenging the constitutionality of prolonged isolation<sup>97</sup> by saying if a case presented the issue “the judiciary may be required... to determine whether workable alternative systems for long-term confinement exist and if so, whether a correctional system should be required to adopt them.”<sup>98</sup> Kennedy further highlighted psychological effects of solitary, holding that isolations exact “a terrible price.”<sup>99</sup> Justice Thomas responded to Kennedy, “the accommodations in which Ayala is housed are a far sight more spacious than those in which his victims 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.”<sup>100</sup> Despite Justice Thomas’s opinion, the requested appeals from Kennedy arrived; however, the Supreme Court

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<sup>91</sup> HEIDEN, *supra* note 55, at 39.

<sup>92</sup> *Ashker v. Brown*, No. C 09-5796 CW, 2012 WL 847750 (N.D. Cal. Mar. 13, 2012).

<sup>93</sup> Benjamin Wallace-Wells, *The Plot from Solitary*, N.Y. MAG. (Feb. 26, 2014), <http://nymag.com/news/features/solitary-secure-housing-units-2014-2>.

<sup>94</sup> Rory Carroll, *California prisoners launch bigger hunger strike in state’s history*, THE GUARDIAN (Jul. 9, 2013), <https://www.theguardian.com/world/2013/jul/09/california-prisoners-hunger-strike>.

<sup>95</sup> *Ashker*, *supra* note 92.

<sup>96</sup> Interview with Supreme Court Associate Justice Anthony Kennedy, Harvard Law Today, in Cambridge, Mass. (Oct. 23, 2015).

<sup>97</sup> Adam Liptak, *Will the Supreme Court Scrutinize Solitary Confinement? One Justice Offers a Map*, N.Y. TIMES (May 14, 2018) <https://www.nytimes.com/2018/05/14/us/politics/supreme-court-solitary-confinement-exercise.html>.

<sup>98</sup> Ayala, *supra* note 54, at 2210.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

has consistently turned them down.<sup>101</sup>

In 2017, Justice Breyer quoted Kennedy in a dissenting opinion involving Texas death row inmate Rolando Ruiz who had been in isolation for 20 years.

Breyer believed the Court should have granted a stay of execution, in order to examine more carefully the issues raised by solitary confinement.<sup>102</sup> Breyer spoke of the “human toll” and the “terrible psychiatric price” caused by isolation.<sup>103</sup> Breyer cited Kennedy’s request for a case that presents the issue of whether extended solitary confinement survives Eighth Amendment scrutiny and believed Ruiz’s case was an appropriate case to conduct that constitutional scrutiny.<sup>104</sup> Breyer unfortunately was a lone dissent and Ruiz’s case did not become the case to examine the constitutionality of solitary confinement.

Thousands of claims have been brought alleging that solitary confinement constitutes cruel and unusual punishment; the claims have been relatively unsuccessful for many years.<sup>105</sup> While constitutional rights such as the Eighth Amendment can be applied to conditions in confinement, prisoners must generally show both injury and an objective state of mind from prison officials compromising “deliberate indifference” to the alleged injurious condition – not all pains of imprisonment are actionable.<sup>106</sup>

There are other avenues of litigation that can be explored by advocates aside from the Eighth and the Fourteenth Amendment. The Civil Rights of Institutionalized Persons Act was passed with the aim of improving various social institutions that housed vulnerable populations.<sup>107</sup> Section 1997 defines institution to include “jail, prison or other correctional facility.”<sup>108</sup> Advocates more recently have tried to utilize the Americans with Disabilities Act (ADA) to target the use of solitary confinement on prisoners with disabilities, including those with mental illness.<sup>109</sup> Institutions are required to provide reasonable accommodations to those with both physical and mental disabilities, unless accommodations cause an undue burden or fundamentally alter the nature of the correctional program.<sup>110</sup>

With any area of making changes in the public interest, it is important to measure and consider the definition of success. While litigation may not have abolished solitary or made significant reforms, it can be successful in raising awareness, empowering individuals in the lawsuit and claiming

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<sup>101</sup> Liptak, *supra* note 97.

<sup>102</sup> Ruiz v. Texas, 137 S. Ct. 1246 (2017) (Breyer, J., dissenting).

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

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

<sup>105</sup> Ariel A. Simms, *Solitary Confinement in America: Time for change and a proposed model of reform*, 19 U. PA. J. OF L. & SOC. CHANGE 253 (2017).

<sup>106</sup> Farmer v. Brennan, 511 U.S. 825 (1994).

<sup>107</sup> Simms, *supra* note 105.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 254.

<sup>110</sup> 28 C.F.R. § 35.150(a)(3) (2015).

smaller victories. These smaller victories can be seen on a state level, where lawsuits have pressured correctional facilities into making changes. Advocates should continue with lawsuits using the Eighth and Fourteenth Amendment, with hope that the Supreme Court will declare the use of solitary confinement to be unconstitutional in its entirety, or at least place restrictions on its indefinite use.

## VI. CONCLUSION

Reforming solitary confinement is not only a moral issue, but also a human rights issue. Jill Saxby, from the Maine Council of Churches said “Everything we’ve learned about solitary and its effects on the human person (the prisoner, the jailer, the society) tells us that it is morally wrong and that society needs to be reminded of our moral responsibility to those whose behavior leads to imprisonment.”<sup>111</sup> Solitary confinement is a widespread problem throughout the United States. Evidence shows that even after a few hours an individual can suffer psychological harm.<sup>112</sup> It can lead to long term and sometimes irreversible harm.<sup>113</sup> It is overused, expensive and causes problems not only to the individual, but also to society as a wider whole when the individual is released and more likely to reoffend.<sup>114</sup>

Change has been slow from a reluctance to accept the harm caused, deference given to correctional facilities and a lack of desire to help prisoners deemed by society as “the worst of the worst.” However, awareness of the problem is growing and changes can be seen throughout the country. Lawyers can combine traditional legal work with policy advocacy to achieve needed change. There are many amendments that could be made to solitary confinement including regular mental health assessments, have the conditions considered in sentencing, more opportunities for rehabilitation and the chance to return to general population and ensuring an individual is not released directly back into society after being in solitary.

While a desired result would be an absolute prohibition of isolation for adults and juveniles, it is unlikely this will be achieved for the foreseeable future because of deference given to correctional facilities that deem it necessary to either protect or punish. Because of this, advocates may look to other alternate reforms to ensure better rights, conditions and accountability. Lawyers should continue to file lawsuits, either with the aim of setting precedent or pressuring correctional facilities, and advocates can continue to push for further policy amendments and enforcement.

Successful changes in Maine arose from collective efforts of

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<sup>111</sup> Heiden, *supra* note 55, at 19.

<sup>112</sup> Nitsche, *supra* note 39.

<sup>113</sup> Conley, *supra* note 3.

<sup>114</sup> Gibbons, *supra* note 26.

organizations like the ACLU with experience in litigation and policy advocacy and from grassroots volunteers, many with personal connections either from their own experiences or friends and relatives in solitary.<sup>115</sup> With awareness raising and change happening throughout the country, over time we will continue to help the 100,000 men, women and children in isolation. We need to end this torturous practice because as Dostoyevsky wrote over 150 years ago, “the degree of civilization in a society can be judged by entering its prisons.”<sup>116</sup>

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<sup>115</sup> Heiden, *supra* note 55, at 39.

<sup>116</sup> Fyodor Dostoyevsky, *The House of Dead* (1862), translated by Constance Garnett, *The Yale Book of Quotations* 210 (2006).