SENTENCING INSIDE PRISONS: EFFORTS TO REDUCE ISOLATING CONDITIONS

Judith Resnik* and Kristen Bell**

Discussions of sentencing reform generally focus on limiting the scope of criminal sanctions through decriminalization, on lowering penalties of individuals who are convicted, and on shortening the duration of sentences imposed. We add another arena of sentencing: the penalties imposed on persons who have been sentenced and are serving time in prison. This essay brings sentencing *in* prisons to the fore. In doing so, we aim to make plain the link between the need for sentencing reform and the need to rethink the types of punishment imposed inside prisons.

Across the United States, prison systems separate some individuals from the general population and place them into special housing units under isolating conditions. An array of terms and rules govern what is variously called "administrative confinement," "administrative segregation," "close supervision," "behavior modification," "departmental segregation," "enhanced supervision housing" (ESH), "inmate segregation," "intensive management," "special management unit" (SMU), "security (or special) housing units" (SHU), "security control," and "maximum control units." The stated rationales for putting people into such confinement include punishment ("disciplinary segregation"), protection ("protective custody"), and incapacitation (often termed "administrative segregation"). In the media and in many reported decisions and commentary, these practices are termed "solitary confinement." Correctional departments and associations have come to use "restrictive housing" as an umbrella term to encompass all the many forms of segregation.

What is solitary confinement, and what has been constitutional law's relationship to the practices of holding prisoners in isolation? One answer comes from *Wilkinson v. Austin*, a 2005 U.S. Supreme Court case discussing Ohio's "supermax" prison, which opened in 1998 to hold more than five hundred people.[1] Writing for the unanimous Court, Justice Kennedy detailed a painful litany of conditions.

> [A]lmost 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 . . . and an inmate who attempts to shield the light to sleep is subject to further discipline . . . .
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> Incarceration [in supermax] is synonymous with extreme isolation. In contrast to any other Ohio prison . . ., cells have solid metal doors with metal strips along their sides and bottoms which prevent conversation or

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 Judith Resnik is the Arthur Liman Professor of Law and the Founding Director of the Arthur Liman Center for Public Interest Law at Yale Law School.
** Kristen Bell was a Senior Fellow in Residence in the Liman Center and, in 2018, became an Assistant Professor in the School of Law at the University of Oregon.
[1] Wilkinson v. Austin, 545 U.S. 209, 214 (2005).

> communication with other inmates. All meals are taken alone . . . . Opportunities for visitation are rare . . . . It is fair to say [that] inmates are deprived of almost any environmental or sensory stimuli and of almost all human contact . . . . [P]lacement . . . is for an indefinite period of time, limited only by an inmate's sentence.[2]

During the years since that decision, investigative reports, judicial decisions, and class action lawsuits have detailed the debilitating conditions of solitary confinement. In 2010, the ACLU's National Prison Project launched its "Stop Solitary" campaign, producing reports of horrific conditions for thousands of prisoners held in Texas and in "the box" in New York State.[3] As suicides and violence

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[2] *Id.* at 214-15. The specifics were in service of meeting the exacting test that the Court had crafted about when constitutional law has a role to play in protecting prisoners. In an earlier case, *Sandin v. Conner*, 515 U.S. 472, 484 (1995), the Supreme Court held that a prisoner could challenge his placement in segregation only if the change worked an "atypical and significant hardship" which, thereby, infringed a prisoner's liberty interests and triggered due process obligations under the Fourteenth Amendment. In *Wilkinson*, the Court concluded that placement in Ohio's supermax qualified as a significant hardship since "almost all human contact [was] prohibited, even . . . conversation . . . from cell to cell." *Wilkinson*, 545 U.S. at 201-11. Nonetheless, the Court held that Ohio's procedures sufficed to buffer against "arbitrary decision-making." *Id.* at 226. The approved procedures included an in-person hearing that the prisoner can attend; the provision of a written "brief summary of the factual basis for the classification;" "a rebuttal opportunity" at two levels of internal review (each authorized to reject the placement); "a short statement of reasons;" and another review thirty days after the initial placement. *Id.* at 211-12. The *Wilkinson* Court thus required some process but did not discuss whether subjecting individuals to such conditions was itself constitutionally impermissible. That opinion did help to produce lower court inquiries and arguments about what lengths of time spent in solitary under what conditions triggered the requirement for procedural protection.

Ten years after *Wilkinson*, Justice Kennedy returned to the topic of solitary confinement in a 2015 concurrence in *Davis v. Ayala*, 135 S. Ct. 2187, 2208 (2015) (Kennedy, J., concurring). Justice Kennedy noted that Hector Ayala, who had been sentenced to death in 1989, had spent most of "his more than 25 years in custody in 'administrative segregation' or, as it is better known, solitary confinement." *Id.* at 2208. If following "the usual pattern," Mr. Ayala had been held for decades "in a windowless cell no larger than a typical parking spot for 23 hours a day . . . [and] allowed little or no opportunity for conversation or interaction with anyone." *Id.* Relying on data collected in the late 1990s, Justice Kennedy observed it was likely that about "25,000 inmates in the United States" were living in such conditions, "many regardless of their conduct in prison." *Id.* at 2208-09. Justice Kennedy called for more "public inquiry or interest" in prisons. *Id.* In a vivid protest, he suggested that when imposing a capital sentence, a judge tell such a defendant 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." *Id.* at 2209. Justice Kennedy also raised the prospect that solitary confinement violated substantive constitutional rights: "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." *Id.* at 2210. Within a month, Justice Kennedy's distress was echoed by Justice Breyer who, joined by Justice Ginsburg, condemned the "dehumanizing effect of solitary confinement." *Glossip v. Gross*, 135 S. Ct. 2726, 2765 (2015) (Breyer, J., dissenting) (arguing the unconstitutionality of the death penalty).

[3] *See, e.g.*, BURKE BUTLER & MATTHEW SIMPSON, AM. CIVIL LIBERTIES UNION OF TEX., A SOLITARY FAILURE: THE WASTE, COST AND HARM OF SOLITARY CONFINEMENT (2015), http://www.aclutx.org/2015/02/05/a-solitary-failure; SCARLET KIM, TAYLOR PENDERGRASS & HELEN ZELON, N.Y. CIVIL LIBERTIES UNION, BOXED IN: THE TRUE COST OF EXTREME ISOLATION IN NEW

brought media attention to the suffering and deaths, the Vera Institute worked with prison officials to create alternatives.[4] Much of the focus has thus shifted from justifying solitary confinement to reducing the numbers of people so confined and the degrees of isolation.

Below, we provide some of the data gathered by the Arthur Liman Center for Public Interest Law at Yale Law School, which undertook a series of studies co-sponsored by the Association of State Correctional Administrators (ASCA), the organization of the directors of correctional departments in states, the federal system, and a few large city jails. In 2012-2013, we surveyed the policies on administrative segregation that were in effect in 46 states and the Federal Bureau of Prisons, and we published *Administrative Segregation, Degrees of Isolation, and Incarceration: A National Overview of State and Federal Correctional Policies*.[5] We learned that correctional policies made getting into segregation relatively easy, but few systems focused on getting people out of segregation. Constraints on decision-making about placement in segregation were minimal; the kind of notice provided and what constituted a "hearing" varied substantially.

In 2014, the Liman Program and ASCA took the next step by asking correctional administrators more than 130 questions—this time about the numbers of people in restrictive housing and the conditions under which they lived. The overall focus was on a subset of restrictive housing called "administrative segregation," while a few questions focused on all forms of restrictive housing. Responses came from 46 jurisdictions, though not all jurisdictions answered all the questions. Published in 2015, the report, *Time-In-Cell*, provided a multi-jurisdictional window into segregation.[6]

Before the ASCA-Liman data gathering, information on the number of prisoners held in restrictive housing was at least a decade old; the figure often cited was 25,000 people. The 2015 ASCA-Liman Report provided new information. The thirty-four jurisdictions that answered our question about the numbers of prisoners in restrictive housing reported a total of more than 66,000 people held in restrictive housing as of the fall of 2014. These thirty-four jurisdictions housed about 73% of the more than 1.5 million people incarcerated in U.S. prisons. With

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YORK'S PRISONS 5-10 (2012), http://perma.cc/D384-BGED.

[4] In 2016, the Bureau of Justice Assistance announced a grant of $2.2 million to fund the Vera Institute's Safe Alternatives to Segregation Initiative, which as of the fall of 2016, assisted several jurisdictions seeking to reduce their use of restrictive housing and to create alternatives to solitary confinement. *See* Press Release, U.S. Dep't of Justice, Office of Justice Programs, Justice Department Awards Over $6.3 Million to Study Effects of Incarceration (Sept. 26, 2016), http://ojp.gov/newsroom/pressreleases/2016/ojp09262016_2.pdf.

[5] HOPE METCALF, JAMELIA MORGAN, SAMUEL OLIKER-FRIEDLAND, JUDITH RESNIK, JULIA SPIEGEL, HARAN TAE, ALYSSA WORK & BRIAN HOLBROOK, YALE L. SCHOOL ARTHUR LIMAN PUBLIC INTEREST PROGRAM, ADMINISTRATIVE SEGREGATION, DEGREES OF ISOLATION, AND INCARCERATION: A NATIONAL OVERVIEW OF STATE AND FEDERAL CORRECTIONAL POLICIES (2013), http://perma.cc/X3T2-NQRJ [hereinafter ASCA-LIMAN ADMINISTRATIVE SEGREGATION 2013].

[6] SARAH BAUMGARTEL, COREY GUILMETTE, JOHANNA KALB, DIANA LI, JOSH NUNI, DEVON PORTER & JUDITH RESNIK, YALE L. SCHOOL ARTHUR LIMAN PUBLIC INTEREST PROGRAM, TIME-IN-CELL: THE ASCA-LIMAN 2014 NATIONAL SURVEY OF ADMINISTRATIVE SEGREGATION IN PRISON (2015), http://perma.cc/D5TA-HUHL [hereinafter ASCA-LIMAN TIME-IN-CELL 2014].

this 2014 data, ASCA and Liman estimated that some 80,000 to 100,000 people were in restrictive housing in U.S. prisons—or about one in every six to seven prisoners. Those figures, in turn, did not include jails, juvenile facilities, or immigration and military detention.

We also learned that prisoners in restrictive housing in many jurisdictions across the country were required to spend 23 hours in their cells on weekdays and 24 hours in their cells on weekends. Jurisdictions reported that cells, sometimes holding two people, ranged in size from 45 to 128 square feet. Opportunities for social contact, such as out-of-cell time for exercise, visits, and programs were limited, ranging from three to seven hours a week in many jurisdictions. While some jurisdictions permitted phone calls weekly, in others, phone calls and social visits were limited to once per month. Greater constraints existed in other jurisdictions, such as limiting telephone calls to once in three months or only for "verified serious family emergencies."[7] In most jurisdictions, prisoners' access to social contact, programs, exercise, and items kept in their cells could be cut back as sanctions for misbehavior.

Moreover, administrative segregation generally had no fixed endpoint, and several systems did not keep track of the number of continuous days that people remained in segregation. In the 24 jurisdictions reporting about the length of stay in restrictive housing, a substantial number indicated that prisoners remained in segregation for more than three years. As to release and reentry, in thirty jurisdictions tracking the numbers in 2013, a total of 4,400 prisoners were discharged directly from the isolation of administrative segregation to the outside community.

When releasing *Time-In-Cell*, ASCA stated that "prolonged isolation of individuals in jails and prisons is a grave problem in the United States." As that press release also explained, "insistence on change comes 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." Much commentary followed, including several essays published by the Yale Law Journal Forum in January of 2016.[8] These analyses explored the data in the Report, the need for reform, and the challenges entailed in making major changes.

In 2015, ASCA and Liman worked together to gather more information about the numbers of people in restrictive housing, the conditions under which they lived, and recent efforts toward reform. The data from that survey are detailed in the ASCA–Liman 2016 Report, *Aiming to Reduce Time-in-Cell: Reports from Correctional Systems on the Numbers of Prisoners in Restricted Housing and on*

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[7] *Id.* at 45-46.

[8] *See, e.g.*, Judith Resnik, Sarah Baumgartel, & Johanna Kalb, *Time-In-Cell: Isolation and Incarceration*, 125 YALE L. J. F. 212 (2016); Reginald Dwayne Betts, *Only Once I Thought About Suicide*, 125 YALE L.J. F. 222 (2016); Alex Kozinski, *Worse than Death*, 125 YALE L.J. F. 230 (2016); Jules Lobel, *The Liman Report and Alternatives to Prolonged Solitary Confinement*, 125 YALE L.J. F. 238 (2016); Ashbel T. ("A.T.") Wall, *Time-In-Cell: A Practitioner's Perspective*, 125 YALE L.J. F. 246 (2016); Marie Gottschalk, *Staying Alive: Reforming Solitary Confinement in U.S. Prisons and Jails*, 125 YALE L.J. F. 253 (2016).

the Potential of Policy Changes to Bring About Reforms.[9] In another report, we focused on understanding the use of solitary confinement for individuals who were subject to execution, and that report, *Rethinking "Death Row": Variations in the Housing of Individuals Sentenced to Death*, detailed three jurisdictions in which such individuals were not isolated.[10]

As work on *Aiming to Reduce Time-in-Cell* was underway, concerns about restrictive housing intensified. In January 2016, the Department of Justice published its *Justice Report and Recommendations Concerning the Use of Restrictive Housing*, prompted by a request from the President to conduct a review of the use of solitary confinement in the federal prison system.[11] That month, in a *Washington Post* op-ed that cited the ASCA-Liman *Time-In-Cell* Report, President Obama stated that he was adopting the Justice Department's recommended reforms, which included "banning solitary confinement for juveniles and as a response to low-level infractions, expanding treatment for the mentally ill and increasing the amount of time inmates in solitary can spend outside of their cells."[12] As he explained, those steps were to "affect some 10,000 federal prisoners held in solitary confinement—and hopefully serve as a model for state and local corrections systems."[13]

Changes were also underway in many states, some of which are discussed in *Aiming to Reduce Time-in-Cell*, as well as other reforms that took place after that publication. In a 2017 *New York Times* op-ed, Rick Raemisch, the Director of Colorado's Correctional System, explained why Colorado was abolishing solitary confinement.[14] As he put it, "enough data" existed to show that long-term isolation manufactures and aggravates mental illness. It has not solved any problems; at best, is has maintained them.[15]

One window into the data comes from the excerpts that follow from the ASCA–Liman 2016 Report, *Aiming to Reduce Time-in-Cell*.[16]

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[9] SARAH BAUMGARTEL, KRISTEN BELL, OLEVIA BOYKIN, COREY GUILMETTE, TASHIANA HUDSON, JOHANNA KALB, DIANA LI, JOSEPH MEYERS, HAVA MIRELL, JESSI PURCELL, JUDITH RESNIK & ANNA VANCLEAVE, YALE L. SCHOOL ARTHUR LIMAN PUBLIC INTEREST PROGRAM, 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 (2016), http://perma.cc/8GYN-CUXL [hereinafter ASCA-LIMAN AIMING TO REDUCE TIME-IN-CELL 2016]. The research and report were shaped by George and Camille Camp, co-directors of ASCA.

[10] CELINA ALDAPE, RYAN COOPER, KATIE HAAS, APRIL HU, JESSICA HUNTER, JOHANNA KALB, SHELLE SHIMIZU & JUDITH RESNIK, YALE L. SCHOOL ARTHUR LIMAN PUBLIC INTEREST PROGRAM, RETHINKING "DEATH ROW": VARIATIONS IN THE HOUSING OF INDIVIDUALS SENTENCED TO DEATH (2016), http://perma.cc/V6FW-C8QQ.

[11] U.S. DEP'T OF JUST., REPORT AND RECOMMENDATIONS CONCERNING THE USE OF RESTRICTIVE HOUSING (2016), http://www.justice.gov/archives/dag/file/815551/download.

[12] Barack Obama, *Why We Must Rethink Solitary Confinement*, WASH. POST (Jan. 25, 2016), http://perma.cc/VQ5N-CS8S.

[13] *Id.*

[14] Rick Raemisch, *Why We Ended Long-Term Solitary Confinement in Colorado*, N.Y. TIMES (Oct. 12, 2017), http://www.nytimes.com/2017/10/12/opinion/solitary-confinement-colorado-prison.html.

[15] *Id.*

[16] *See* ASCA-LIMAN AIMING TO REDUCE TIME-IN-CELL 2016, *supra* note 9, at 6-8, 28, 71-73 (internal citations and endnotes omitted).

In early October 2015, ASCA and Liman launched this follow-up study to gather national information on all forms of restricted housing, to learn what numbers of people were in that form of detention in the fall of 2015, and to see what changes were underway. The hope was twofold: that the numbers of people held in such settings were diminishing and that the conditions in restricted housing were improving by becoming less isolating.

This study relied again on asking the directors of prison systems to respond to questions. This time, a set of fifteen questions focused on the people in any and all forms of what we termed restricted housing (or what is also termed "restrictive" housing). We queried 53 jurisdictions (all the states, the federal system, the District of Columbia, and the Virgin Islands), and 52 responded; the one jurisdiction not providing any information was the State of Maine. As detailed below, a few jurisdictions that did respond did not have answers to all the topics surveyed. For many questions, 48 jurisdictions had sufficiently detailed and consistent information on which to report, and for each topic, we specify the number of responding jurisdictions.

We sought to learn about numbers and demographics—including race, gender identity, age, and mental health status. As the data set forth below reflect, those ambitions were made complex by the variety of different facilities under the control of statewide correctional departments, the many terms used to denote segregating prisoners, the range of data kept, and the limited amount of data available. The jurisdictions surveyed did not all keep comparable data about how many hours, over how many days, prisoners were in their cells.

To enable cross-jurisdictional comparisons, we imposed a definition by describing restricted housing as the separation of prisoners from general population and in detention for 22 hours per day or more, for 15 or more continuous days, in single-cells or in double-cells. This survey did not inquire into whether jurisdictions regularly audited their facilities to learn if the parameters were consistently met. For example, we did not ask about what methods were used to ensure that individual prisoners were out of their cells for the time stipulated in rules, nor did we learn how often or for how long lockdowns occurred during which no prisoners were permitted to leave cells.

> Further, if a jurisdiction provided for prisoners to spend 14.5 hours a week out-of-cell, or had no count of whether prisoners were held 15 days or more, that jurisdiction could have described itself as having no one in restricted housing, even as the jurisdiction understood itself *to have* a restricted-housing population. Therefore, and as noted below, in a few instances we included information provided by jurisdictions that required minor modifications of our 22-hour/15-days-or-more definition. . . .
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> As of the fall of 2015, 67,442 people were held in restricted housing across the 48 jurisdictions that reported their numbers. Relying on data on the United States and its territories from the Bureau of Justice Statistics, we looked at the total number of individuals confined in the 48 jurisdictions, and learned that these jurisdictions accounted for 96.4% of the total prison population in the United States.
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> We then calculated the percentage of prisoners who were held in restricted housing across all of the jurisdictions which regularly kept data on the number of prisoners in restricted housing (22 hours a day/15 days or more). The focus was on state prisoners housed under state (not local) control. The percentages of prisoners held in different jurisdictions in restricted housing ranged from 0.5% (Hawaii, in-state only) to 28.3% (the Virgin Islands). The median was 5.1%.
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> We also asked about the numbers of people held in segregation between 16 and 21 hours per day in their cells. Thirty-four jurisdictions responded about those populations. In 23 of those jurisdictions, we tallied a total of 16,455 additional prisoners in cells for 16 to 21 hours per day for 15 consecutive days or more. In these 23 jurisdictions, the median so confined was 1.6% of their total populations. Eleven of the responding 34 jurisdictions reported that they did not hold prisoners in-cell for 16-21 hours per day for 15 consecutive days or more.
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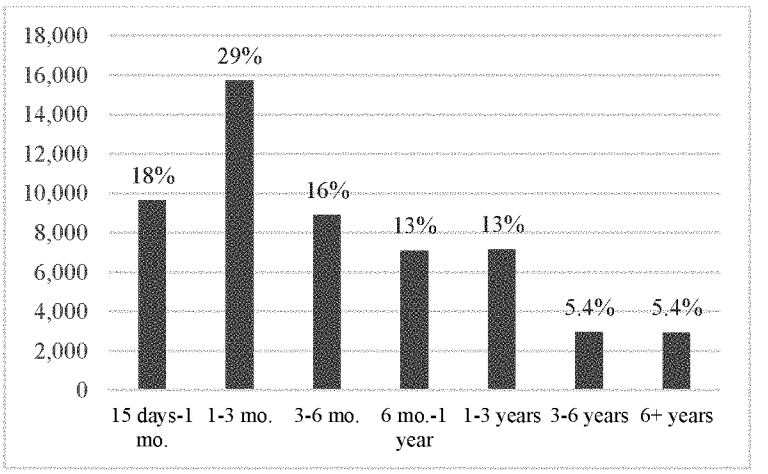
> Some of the reporting jurisdictions did not include information on all of the facilities directly under their control, and very few included information from county and municipal level facilities at which prisoners or pretrial detainees were held. The dearth of information on county jails is important to underscore because counties were responsible, as of 2016, for 91% of the jails in the United States, and "11.4 million individuals pass through jail each year." In short, through this survey, we have accounted for *at least* 67,442 individuals in restricted housing (22 hours a day/15 days

or more) in the fall of 2015. When adding the 16,455 people confined 16 to 21 hours, a total of at least 83,897 prisoners were held in their cells for more than 16 hours a day for 15 days or more. Yet, given the data limitations, neither of these numbers includes all the people held in cell for either 16-hours or more or for 22-hours or more in all of the types of U.S. prison and jail facilities.

How long, in months and years, did prisoners spend in restricted housing? Forty-one jurisdictions—holding 54,382 prisoners—provided length-of-stay data. The table below provides a snapshot. Of those prisoners, 15,725 people—or 29%—were in restricted housing from one month up to three months. Some 15,978 people—or 29%—were in restricted housing for three months up to one year. Another 13,041 prisoners—or 24%—were in restricted housing for a year or more. Of these, 2,976 people—5.5% of 54,382—had spent from three years to six years in restricted housing. Twenty-six jurisdictions reported holding some prisoners—a total of 2,933 people, or 5.4% of the 54,382—in restricted housing for six years or more.

Prisoners in Restricted Housing by Length of Time and by Percent of the 54,382 Prisoners for which Length-of-Stay Data Were Provided
(*n* = 41)



The survey also asked whether correctional systems were making policy-level changes to reduce the use of restricted housing. Forty-five jurisdictions reported on their policies, and many described proposed or recently implemented revisions. Jurisdic-

tions reported policies revising the criteria for being placed in isolation to limit its use, increasing the oversight of restricted housing, expanded efforts at programming and rehabilitative services in restricted housing, developing exit paths (sometimes called "step-down" programs), and imposing caps on the length of time spent in restricted confinement.

In addition to summarizing changes in policies, we provide descriptions of efforts reported by a few jurisdictions seeking to make substantial reductions in the use of restricted housing. We did not inquire into either the details or metrics of implementation, nor did we conduct case studies to learn about the effects, in practice, of the new policies described.

. . . In the course of conducting this research and writing the Report, correctional administrators repeatedly contacted us to discuss their efforts to reduce the numbers of persons confined in restricted housing. In addition, many Directors stressed the efforts to shift from the 22 or more hours in-cell model to forms of restrictions that provided more time out-of-cell. Indeed, as this Report was circulated in draft, system administrators sought us out to explain how the numbers detailed were out of date, for they had succeeded in reducing restricted housing prison populations from the levels described here.

These efforts reflect the profound shift that has occurred in the last few years, since ASCA and Liman began this series of research projects. While once restricted housing was seen as central to prison management, by 2016 many prison directors and organizations such as the ACA [American Correctional Association] and ASCA had defined restricted housing as a practice to use as little as possible for as short a duration as possible. Moreover, the large numbers of people in restricted housing are enduring conditions that are harmful not only to them, but also to staff and the communities to which prisoners will return. Indeed, some prison administrators are "abolitionists" in the sense that they would—if they could—end solitary confinement and find methods to ensure that no person remain for more than 15 days in 22-in-cell hours continuously.

Yet, as the data . . . reflect, unraveling the practices of isolation requires sustained work. This Report identified 67,442 prisoners in restricted housing and that number, as noted at the

outset, excludes most jails in the United States. Some 5,909 prisoners in 32 jurisdictions have been kept in-cell for 22 hours a day or more for three years or more. . . .

Moreover, a question emerges about why 22 hours or more should be definitional of isolation. The question is whether a move to 21 (rather than 22) hours in-cell responds to alleviate the harms of isolation. Equally important is the length of time a person is subjected to isolating conditions, and how to assess the number of hours in-cell within the context of the length of time confined in that manner. How many hours in continual confinement in a cell for how many days should be seen as impermissible? Moreover, prisoners may be held in their cells for days (if not 15 consecutive days) for 22 hours or more. Further, in many systems, the small amount of time out-of-cell that is permitted is spent in enclosed cubicles, sometimes without any natural light.

In short, neither a shift to 21 hours nor time out-of-cell in very tight spaces responds to the goals—expressed by ASCA, the ACA, among many others—of changing the conditions of confinement in significant ways. Thus, at its core, the issue is whether—as the proposed 2016 Senate solitary confinement reform legislation reflects—the isolation denoted by solitary confinement should be ended. Doing so would reflect that the *separation* of individuals to promote safety and well-being need not be accompanied by *deprivation* of all opportunities for social contact, education, programming, and other activities. . . .

From the inception of this joint work by ASCA and Liman, we have always understood that isolation ought not itself be understood "in isolation." Restricted housing practices are on a continuum with the placement of prisons in rural settings, far from the homes of many of the prisoners and imposing difficulties in having both able staff and volunteers, as well as regular visits by family members.

As the nation revisits its decades of over-incarceration, it must address restricted housing in the context of prison policies and criminal justice practices in general. This Report makes plain that correctional leaders in many jurisdictions are reconsidering their own systems, and joining with prisoners, their families, advocates, and members of all branches of government, the academy, and many others—who are seeking to achieve lasting changes in the use of incarceration itself.

As Director Raemisch's decision to abolish solitary confinement in Colorado makes plain, the concerns around the practice have intensified. Lawsuits have been filed in many places, including California,[17] Arizona,[18] New York,[19] Pennsylvania,[20] and Illinois.[21] Courts have sometimes issued judgments and in other cases approved settlements focusing on subsets of detainees (such as the seriously mentally ill,[22] juveniles,[23] or individuals with disabilities[24]) and specifying the predicates to and limits on the use of isolation.[25] Legislators have likewise weighed in.[26]

The developments in the United States need also to be placed in a transnational context. In December 2015, the U.N. adopted provisions (aptly called the Nelson Mandela Rules and drafted with input from U.S. correctional leaders) that defined confinement of prisoners for 22 hours or more per day for a period exceeding 15 days to be "prolonged" solitary confinement which constitutes "cruel, inhuman or degrading treatment."[27] The rules also call for banning isolation of vulnerable prisoners, limiting isolation's use to exceptional circumstances, and ensuring

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[17] *See, e.g.*, Ashker v. Governor of California, No. 4:09-cv-05796-CW, 2016 WL 4770013 (N.D. Cal. Sept. 1, 2015).

[18] *See, e.g.*, Complaint, Parsons v. Ryan, No. 2:12-cv-00601-NVM—MEA (D. Ariz. Mar. 22, 2012); *see also* Parties' Stipulation, Parsons v. Ryan, No. CV 12-00601-PHX-DJH (D. Ariz. Oct. 14, 2014).

[19] *See, e.g.*, Peoples v. Fischer, No. 11-CV-2694, 2011 WL 6034374 (S.D.N.Y. Dec. 16, 2015).

[20] *See, e.g.*, Johnson v. Wetzel, No. 1:16-cv-00863-CCC-MCC, 2016 WL 5118149 (M.D. Pa. Sept. 30, 2016).

[21] *See, e.g.*, Davis v. Baldwin, No. 16-cv-600-SCW, 2017 WL 951406, at *3-4 (S.D. Ill. Mar. 10, 2017).

[22] *See, e.g.*, Braggs v. Dunn, 257 F. Supp. 3d 1171, at *1267-1268 (M.D. Ala. June 27, 2017); Parsons v. Ryan, 754 F.3d 657, 662-72 (9th Cir. 2014).

[23] *See, e.g.*, Press Release, U.S. Dep't of Just., Justice Department Settles Lawsuit Against State of Ohio To End Unlawful Seclusion of Youth in Juvenile Correctional Facilities (May 21, 2014), http://www.justice.gov/opa/pr/justice-department-settles-lawsuit-against-state-ohio-end-unlawful-seclusion-youth-juvenile.

[24] *See, e.g.*, Disability Rights Network of Pennsylvania. v. Wetzel, No. 1:13-CV-00635 (M.D. Pa. Jan. 9, 2015).

[25] *See, e.g.*, Ashker v. Governor of California, No. C09-05796-CW, 2016 WL 4770013, at *2-3 (N.D. Cal. Jan. 26, 2016) (order granting final approval of class action settlement agreement). The settlement in *Ashker* imposed limits on the amount of time that prisoners may be confined in the Security Housing Unit at Pelican Bay, one of the state's maximum security prisons; provided for review of prisoners then in security housing units on the basis of gang affiliation within twelve months of the settlement agreement; and set forth a presumption that all prisoners detained in Security Housing Units for more than ten years would be moved into the general population. *Id.* Another example comes from New York. *See* Peoples v. Anthony Annucci, 180 F. Supp. 3d 294, 299-305 (S.D.N.Y. 2016).

[26] *See, e.g.*, S.B. 17-031, 70th Gen. Assemb., Reg. Sess. (Colo. 2017); 2017 Conn. Acts 17-239 (Reg. Sess.), Sub. H.B. 7302, 2017 Gen. Assemb., Reg. Sess. (Conn. 2017); L.B. 21-0683, 29th Council (D.C. 2017); H.B. 3800, 190th Gen. Assemb., Reg. Sess. (Mass. 2017); L.B. 894, 104th Leg., 2nd Sess. (Neb. 2016); S.B. 402, 79th Leg. (Nev. 2017); S.B. 946, 348th Gen. Assemb., Reg. Sess. (Md. 2016); S.B. 82, 2017 Leg. Assemb., 79th Sess. (Or. 2017).

[27] G.A. Res. 70/17, United Nations Standard Minimum Rules for the Treatment of Prisoners, U.N. Doc. A/Res/70/175, http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/70/175.

visiting opportunities for those in isolation. In short, it is time to understand solitary confinement as an impermissible form of post-conviction punishment and to ask, as Director Raemisch does, how to remove "this unethical tool . . . from the penal toolbox."[28]

[28] *See* Raemisch, *supra* note 14.