

Staying Alive: Reforming Solitary Confinement in U.S. Prisons and Jails

Marie Gottschalk

The United States is exceptional not only because it incarcerates so many people, but also because of the inhumane and degrading conditions that prevail in so many of its jails and prisons.¹ This country stands alone among Western nations in its widespread and routine use of extreme and prolonged isolation—commonly called solitary confinement—throughout its penal system.² In the 1970s, solitary confinement emerged as a standard tool to control and punish incarcerated people in the United States.³ Human Rights Watch has characterized the proliferation of extreme segregation in super-maximum security (“supermax”) prisons and other facilities as “the most troubling development in [U.S.] corrections in recent decades.”⁴

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1. The majority of U.S. prisons and many jails “hold more people than they can deal with safely and effectively, creating a degree of disorder and tension almost certain to erupt into violence,” a national blue-ribbon commission concluded in 2006. COMM’N ON SAFETY & ABUSE IN AM. PRISONS, CONFRONTING CONFINEMENT 12 (June 2006), http://www.vera.org/sites/default/files/resources/downloads/Confronting_Confinement.pdf [<http://perma.cc/46P5-C6AG>]. The massive increase in the number of inmates since the 1970s has “overwhelmed the capacity” of many correctional authorities “to safely and humanely house and administer to . . . prisoners.” Craig Haney, *Counting Casualties in the War on Prisoners*, 43 U.S.F. L. REV. 87, 87 (2008).
 2. Elizabeth Vasiliades, *Solitary Confinement and International Human Rights: Why the U.S. Prison System Fails Global Standards*, 21 AM. U. INT’L L. REV. 71, 91-95 (2005).
 3. For a concise overview of the history of the use of prolonged solitary confinement in the United States, see 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, 6-12 (2015); Alan Eladio Gómez, *Resisting Living Death at Marion Federal Penitentiary, 1972*, RADICAL HIST. REV., Fall 2006, at 58, 69; and Daniel P. Mears, *Evaluating the Effectiveness of Supermax Prisons*, URBAN INST. (Mar. 2006).
 4. *US: Look Critically at Widespread Use of Solitary Confinement*, HUM. RTS. WATCH (June 18, 2012), <http://www.hrw.org/news/2012/06/18/us-look-critically-widespread-use-solitary-confinement> [<http://perma.cc/TBB9-4KC3>] (written statement submitted to the U.S. Senate Committee on the Judiciary, Subcommittee on the Constitution, Civil Rights, and Human Rights).

The term solitary confinement is capacious. It is a shorthand way to refer to three broad categories of restrictive housing: (1) disciplinary or punitive segregation, which is imposed because of an alleged violation of the prison rules; (2) protective custody, used for people who reportedly are at special risk if placed in the general prison population, such as juveniles housed in adult prisons; and (3) administrative segregation for individuals deemed by correctional officers to pose a serious current or potential risk to other inmates and staff members. In reality, the distinction between these three types of restricted housing is often blurry. Many other countries use some form of solitary confinement to manage their inmate populations. Solitary confinement is distinctive in the United States because the isolation is comparatively prolonged, extreme, indeterminate, routine, and highly unregulated, as discussed further below.

The widespread use of solitary confinement in U.S. jails and prisons is an enormous human rights problem that has been hiding in plain sight for decades. Over the last couple of years, it has finally emerged as a major issue in criminal justice reform. Years of political activism by incarcerated people and their advocates on the outside have finally brought national and international attention to the expansive use of solitary confinement in U.S. prisons and jails. Key milestones include the 2009 establishment of Solitary Watch, a comprehensive Internet clearinghouse of articles, reports, and commentary on solitary confinement; the 2011-2013 prisoner hunger strikes against supermax facilities in California; and President Obama's July 2014 speech to the NAACP on criminal justice reform, in which he pointedly questioned the utility of extreme isolation.⁵

We now have a more precise accounting of the number of people held in solitary confinement and their distribution in the U.S. penal system, as discussed in Parts I and II, and of variations in the conditions of restricted housing amongst the states, as discussed in Part III. The proliferation of solitary confinement in the United States since the 1970s is strikingly at odds with the consolidation of an international consensus against this practice, as elaborated in Part IV. For all the newfound public attention on solitary confinement, this practice remains deeply entrenched in the U.S. penal system and the obstacles to dismantling it remain formidable, as discussed in Part V.

5. President Obama asked, "Do we really think it makes sense to lock so many people alone in tiny cells for 23 hours a day, sometimes for months or even years at a time? That is not going to make us safer." President Barack Obama, Remarks by the President at the NAACP Conference (July 14, 2015), <http://www.whitehouse.gov/the-press-office/2015/07/14/remarks-president-naacp-conference> [<http://perma.cc/HP3J-FZVC>]. On the significance of the hunger strikes, see, for example, Lisa Guenther, *Political Action at the End of the World: Hannah Arendt and the California Prison Hunger Strikes*, 4 CAN. J. HUM. RTS. 33, 33-34 (2015); and Keramet Reiter, *The Pelican Bay Hunger Strike: Resistance Within the Structural Constraints of a US Supermax Prison*, 113 S. ATLANTIC Q. 579, 581 (2014).

I. NEW PUBLIC VISIBILITY

Until recently, the widespread use of solitary confinement attracted little public attention in the United States. A reliable estimate of the total number of people held in restricted housing in U.S. prisons and jails did not exist. Most states did not release the relevant data and in many cases did not even collect it.⁶ Assessing the conditions of solitary confinement in U.S. jails and prisons has also been a challenge. The incarceration boom coincided with growing barriers to media, scholarly, and public access to U.S. penal facilities in general and isolation cells in particular.⁷ And the 1996 Prison Litigation Reform Act (PLRA) created huge, often insurmountable, obstacles for prisoners seeking redress through the courts.⁸ With fewer lawsuits, what had once been a vital window to expose abusive penal conditions to media and public scrutiny slammed shut.⁹ Supermax prisons have become “virtual domestic black sites, cut off from the public and the press, condoned by the courts, and largely ignored by elected officials.”¹⁰

In August, however, the Association of State Correctional Administrators (ASCA), in conjunction with Yale Law School’s Liman Program, released a pioneering report on prolonged isolation.¹¹ Weeks later, the Bureau of Justice Statistics (BJS) of the U.S. Department of Justice issued an important special report on restricted housing.¹² These reports are a significant step toward the transparency needed to achieve meaningful reform.

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6. See Angela Browne et al., *Prisons Within Prisons: The Use of Segregation in the United States*, 24 FED. SENT’G REPORTER 46, 46-47 (2011); Jean Casella & James Ridgeway, *How Many Prisoners Are in Solitary Confinement in the United States?*, SOLITARY WATCH (Feb. 1, 2012), <http://solitarywatch.com/2012/02/01/how-many-prisoners-are-in-solitary-confinement-in-the-united-states/> [<http://perma.cc/EZ9Z-M7UC>].
 7. MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS 273 (2015).
 8. Margo Schlanger & Giovanna Shay, *Preserving the Rule of Law in America’s Jails and Prisons: The Case for Amending the Prison Litigation Reform Act*, 11 U. PA. J. CONST. L. 139, 154 (2008).
 9. As Margo Schlanger recently concluded in a survey of prison litigation since enactment of the PLRA, “Litigation has receded as an oversight method in American corrections. It is vital that something take its place.” Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 U.C. IRVINE L. REV. 153, 171 (2015).
 10. James Ridgeway et al., *Senators Finally Ponder the Question: Is Solitary Confinement Wrong?*, MOTHER JONES (June 19, 2012), <http://www.motherjones.com/mojo/2012/06/congress-looks-solitary-confinement> [<http://perma.cc/NRG8-99AV>].
 11. THE ARTHUR LIMAN PUBLIC INTEREST PROGRAM & ASSOCIATION OF STATE CORRECTIONAL ADMINISTRATORS, TIME-IN-CELL: THE ASCA-LIMAN 2014 NATIONAL SURVEY OF ADMINISTRATIVE SEGREGATION IN PRISON (2015) [hereinafter TIME-IN-CELL].
 12. Allen J. Beck, *Use of Restrictive Housing in U.S. Prisons and Jails, 2011-12*, U.S. DEP’T JUST. (Oct. 2015), <http://www.bjs.gov/content/pub/pdf/urhuspj1112.pdf> [<http://perma.cc/FG9J-8XLF>].

II. THE EXTENT OF THE PROBLEM

Extrapolating from these two reports, I calculated that U.S. jails and prisons were holding between 89,000 and 120,000 men and women in isolation on any given day in 2014.¹³ This is a remarkable figure. Four decades ago—on the eve of the incarceration boom that transformed the United States into the world’s leading warden—the country’s entire prison and jail population was barely two hundred thousand people.¹⁴ The total number of people that U.S. jails and prisons hold in solitary confinement today exceeds the total prison and jail populations of other major advanced industrialized democracies, including Japan (60,000), Germany (63,000), France (67,000), and the United Kingdom (86,000).¹⁵

Thanks to the ASCA-Liman and BJS studies, we finally have concrete estimates of the total size of the solitary confinement population in the United States. This is a needed development. As are the ASCA-Liman findings enumerating the considerable variations amongst the states in the extent of their reliance on solitary confinement. The proportion of inmates confined to restrictive housing at a given moment ranges from 2.1% in Montana’s prisons (which is still comparatively high compared to other Western countries) to 14.2% in Delaware’s prisons. The median is 6.6% among the reporting jurisdictions.¹⁶ Thanks to the BJS report, we now know that restricted housing has an even wider impact than the ASCA-Liman figures suggest. The BJS reported that 20% of prison inmates and 18% of jail inmates had spent time in restrictive housing over just the previous year. In short, doing some time or

13. The Bureau of Justice Statistics survey of inmates concluded that “on an average day in 2011-12, up to 4.4% of state and federal inmates and 2.7% of jail inmates were held in administrative segregation or solitary confinement.” *Id.* at 1. Applying these estimates to BJS prison and jail total population figures for 2014, I arrived at the lower-end estimate of eighty-nine thousand. See E. Ann Carson, *Prisoners in 2014*, U.S. DEP’T JUST. 1 (Sept. 2015), <http://www.bjs.gov/content/pub/pdf/p14.pdf> [<http://perma.cc/4S53-HU3R>] (estimating the total state and federal prison population, at 2014 year-end, as 1,561,500 inmates). The ASCA-Liman survey concluded that between eighty and one hundred thousand people were held in restrictive housing in 2014 in U.S. prisons. TIME-IN-CELL, *supra* note 11, at 3. The one hundred and twenty thousand figure was computed by taking the ASCA-Liman upper-level estimate for prisoners in restrictive housing in 2014 and adding it to 2.7% of the jail population in 2014. See Todd D. Minton & Zhen Zeng, *Jail Inmates at Midyear 2014*, U.S. DEP’T JUST. 1 (June 2015), <http://www.bjs.gov/content/pub/pdf/jim14.pdf> [<http://perma.cc/Y5R6-WU3L>] (estimating the total county and city jail population at 2014 mid-year at 744,600).

14. GOTTSCHALK, *supra* note 7, at 16.

15. This figure for the United Kingdom excludes Northern Ireland and Scotland. Inst. of Criminal Policy Research, *Highest to Lowest-Prison Population Total*, WORLD PRISON BRIEF, http://www.prisonstudies.org/highest-to-lowest/prison-population-total?field_region_taxonomy_tid=All [<http://perma.cc/A36N-KAAC>].

16. TIME-IN-CELL, *supra* note 11, at 15 tbl.1.

lots of time in extreme isolation has become a routine experience for many prisoners in the United States.

III. CONDITIONS OF CONFINEMENT

The ASCA-Liman report focused primarily on administrative segregation, a subset of solitary confinement that has proliferated with the rise of mass incarceration and special supermax facilities over the past four decades. Corrections administrators and guards have broad discretion to determine who is placed in administrative segregation and the specific conditions of their confinement.¹⁷

Nearly all the states that responded to the ASCA-Liman survey reported that they imposed no time limits on how long prison officials could place someone in administrative segregation before returning him or her to the general prison population.¹⁸ And three-quarters had no policies concerning the release of inmates directly from administrative segregation back to the community, a jarring transition. Some do not even track how many people go directly from administrative segregation back to the outside world. In 2013, the thirty reporting jurisdictions that collect this information released a total of 4,400 people directly from their concrete tombs to the community with no step-down program.¹⁹

The ASCA-Liman survey documents troubling racial disparities that course through administrative segregation. African-American men comprise thirty-nine percent of the total male prison population for reporting jurisdictions but forty-eight percent of the men in administrative segregation. In several states, the disparities exceeded fifteen percent.²⁰ The racial disparities for African-American women in administrative segregation are even more striking.²¹ Although the overall disparities for Hispanic men and women are much smaller, some states house disproportionately more Hispanic than other men in administrative segregation by wide margins.²²

17. TIME-IN-CELL, *supra* note 11, at 1.

18. The two exceptions are Colorado, which reported a one-year limit, and Georgia, which reported a multi-level formula for determining the limits. TIME-IN-CELL, *supra* note 11, at 27.

19. *Id.* at 29.

20. *Id.* at 31.

21. African-American women comprise twenty-three percent of the female prison population for reporting jurisdictions, but thirty-five percent of the women in administrative segregation. *Id.* at 36 tbl.11.

22. In 2014, Hispanics comprised eleven percent of the total male population in reporting jurisdictions and fourteen percent of the administrative segregation population. The

The day-to-day conditions of prolonged solitary confinement can vary considerably among jurisdictions.²³ Most jurisdictions reported that prisoners in administrative segregation spend twenty-three hours per day in their cells. But nearly a third reported that these prisoners spend the entire weekend locked down, denied even an hour outside their cells on Saturday or Sunday to exercise, shower, or make telephone calls. Access to outside visitors, telephone calls, radios, televisions, and air-conditioned cells vary considerably across jurisdictions and are subject to wide discretion on the part of corrections administrators and correctional officers on the frontlines. Censorship of books and magazines is commonplace.²⁴ In one of the most notable examples, an inmate in the federal supermax prison in Florence, Colorado, had to go to court to fight for the right to read Barack Obama's two best-selling books after prison authorities deemed that the president's books were "potentially detrimental to national security."²⁵

IV. U.S. EXCEPTIONALISM

For the tens of thousands of people buried alive in these concrete tombs, sealed off from nearly all human contact, these differences among jurisdictions have a significant impact on their quality of life. These differences should not, however, obscure what all of these jurisdictions have in common: None have come close to abolishing extreme and prolonged isolation, a practice that is sharply at odds with international norms. In 2011, U.N. Special Rapporteur

respective figures were thirty-two percent and fifty-one percent for Colorado, and thirty-four percent and fifty-one percent for Texas. *Id.* at 32.

23. Administrative segregation inmates in the District of Columbia are permitted only one book in their cells. Those in North Dakota are allowed up to thirty books or other publications. All responding jurisdictions except Virginia permit people in administrative segregation to keep letters, blank paper, toiletries, and pens or pencils in their cells. Most permit photos in cells, but Missouri, New Hampshire, and Virginia do not. About eighty percent of the jurisdictions allow radios and about sixty percent permit television sets, but only a handful of them provide these free of charge. Nearly all of the jurisdictions provide heat to inmates in administrative segregation, and about seventy percent provide air conditioning. But several jurisdictions with stifling hot weather, including Alabama, the District of Columbia, Florida, Georgia, Louisiana, and Texas, do not air-condition administrative segregation cells. *Id.* at 39-43.
24. RACHAEL KAMEL & BONNIE KERNES, *THE PRISON INSIDE THE PRISON: CONTROL UNITS, SUPERMAX PRISONS, AND DEVICES OF TORTURE 2* (2003).
25. Ed Pilkington, *Supermax Prison Blocked Obama Books Requested by Detainee*, *GUARDIAN* (July 10, 2009), <http://www.guardian.co.uk/world/2009/jul/10/barack-obama-books-blocked-prison> [<http://perma.cc/SK8E-6W74>]. Contrary to claims made in court papers, a BOP spokesperson contends the bureau reversed course and permitted the inmate to read the books. Associated Press, *Al-Qaida Inmate Gets Access to Obama's Books*, *NBC* (July 10, 2009), http://www.msnbc.msn.com/id/31854575/ns/us_news-security/t/al-qaida-inmate-gets-access-obamas-books [<http://perma.cc/6EF7-79ML>].

Juan E. Méndes concluded that periods of solitary confinement greater than fifteen days constitute torture and recommended that juveniles and people with mental disabilities be exempt from any stint in isolation.²⁶

The United States stands alone in the oversight—or lack thereof—it places on solitary confinement decisions. The Supreme Court of the United Kingdom recently characterized six months in isolation as unacceptable if not subject to regulation and oversight by the country’s top criminal justice officials.²⁷ This decision was based on an interpretation of legislation governing prisons in Britain mandating that decisions to hold someone in isolation for an extended period of time (which it defined as more than three days) be made by the Secretary of State for Justice (a post roughly comparable to the U.S. Attorney General) and not by local prison officials. In the United States, low-level correctional officers routinely decide to put an individual in solitary confinement and keep him or her there with little oversight from wardens, let alone state directors of corrections or the U.S. Attorney General.

The United States is also exceptional with respect to the relatively long lengths of time that prisoners spend in solitary confinement. Years-long stints in administrative segregation are commonplace in the United States. Twenty-three percent of inmates housed in administrative segregation—in both state and federal prisons—have been isolated there for more than three years. An additional 19% have been isolated for one to three years. Only one-third of administrative segregation prisoners nationwide had been housed in restricted housing for less than ninety days.²⁸ These figures likely understate the proportion of prisoners housed in administrative segregation for long periods of time. Several jurisdictions known to be leaders in the use of administrative segregation, including California and Arizona, did not answer the ASCA-Liman survey question inquiring about lengths of time served in administrative segregation. A major federal class action lawsuit filed in 2012 challenging prolonged solitary confinement in California reported that about five hundred people held at Pelican Bay State Prison, the state’s pioneering supermax

26. *Solitary Confinement Should Be Banned in Most Cases, UN Expert Says*, U.N. NEWS CTR. (Oct. 18, 2011), <http://www.un.org/apps/news/story.asp?NewsID=40097> [<http://perma.cc/Z2PU-PHWV>].

27. In July 2015, the U.K. Supreme Court ruled that two men had been wrongfully held in prolonged solitary confinement for several months because the process lacked the requisite oversight. Garrett Zehr, *British Supreme Court Rules Against Unlawful Use of Prolonged Solitary Confinement*, SOLITARY WATCH (July 31, 2015), <http://solitarywatch.com/2015/07/31/british-supreme-court-rules-against-use-of-prolonged-solitary-confinement> [<http://perma.cc/ZYD8-ASR9>].

28. TIME-IN-CELL, *supra* note 11, at 29. The length of stay for prisoners in administrative segregation varies widely between individual states. At the top of the list is Texas, where forty-four percent of the nearly 6,500 people in administrative segregation have been there for more than three years, and another third have been there for one to three years.

facility, had surpassed ten years in solitary confinement, and seventy-eight had surpassed two decades.²⁹ The terms of the September 2015 settlement of this lawsuit stipulate, among other things, a ten-year limit on continuous indefinite confinement in isolation for most prisoners in California.³⁰

Recent developments at the United Nations have rendered the United States even more of an outlier on the issue of solitary confinement. Near the end of 2015, the U.N. General Assembly approved the first major revision of the Standard Minimum Rules for the Treatment of Prisoners (SMRs) since the guidelines were originally drafted in 1955. Renamed the “Mandela Rules,” the revised rules say, “[s]olitary confinement shall be used only in exceptional cases as a last resort, for as short a time as possible and subject to independent review.”³¹ The Mandela Rules forbid indefinite or prolonged use of solitary confinement (defined as anything more than fifteen consecutive days) and restrict its use for people with mental or physical disabilities.³² During the negotiations over the Mandela Rules, the U.S. delegation sided with other countries resisting tough restrictions on long-term solitary confinement. Remarkably, the United States found itself at odds with China, which reportedly “endorsed without hesitation” a fifteen-day limit on the use of solitary confinement.³³ This landmark revision of the SMRs has gone largely unnoticed in the U.S. media. Though not legally binding, the SMRs have served as the regulatory frameworks for many prison systems.³⁴

V. THE LIMITS OF REFORM

Although concerns about prolonged solitary confinement have escalated in the United States, corrections officials and other political leaders are a long way off from endorsing its abolition. Serious political obstacles lie in the way of serious reform. In May 2013, the U.S. Government Accountability Office

29. *Landmark Agreement Ends Indeterminate Long-Term Solitary Confinement in California*, CTR. FOR CONST. RTS. (Sept. 1, 2015), <http://ccrjustice.org/home/press-center/press-releases/landmark-agreement-ends-indeterminate-long-term-solitary> [<http://perma.cc/4B7Q-XDN6>].

30. *Id.*; *Summary of Ashker v. Governor of California Settlement Terms*, CTR. FOR CONST. RTS. (Sept. 1, 2015), <http://ccrjustice.org/sites/default/files/attach/2015/08/2015-09-01-Ashker-settlement-summary.pdf> [<http://perma.cc/KUC4-D59A>].

31. Economic and Social Council Res. 2015/20, at 19 (Sept. 29, 2015), http://www.un.org/ga/search/view_doc.asp?symbol=A/C.3/70/L.3 [<http://perma.cc/L53Q-NPQK>].

32. *Id.* at 18-19.

33. Jean Casella & James Ridgeway, *At U.N. Prisoners' Rights Meeting, U.S. Resists Limits on Solitary Confinement*, SOLITARY WATCH (Dec. 18, 2012), <http://solitarywatch.com/2012/12/18/at-u-n-prisoners-rights-meeting-u-s-resists-limits-on-solitary-confinement> [<http://perma.cc/4NSL-DQS7>] (quoting David Fathi, Director of the ACLU's National Prison Project).

34. Vasiliades, *supra* note 2, at 83.

(GAO) issued a report criticizing the federal prison system's growing use of administrative segregation without proper monitoring and safeguards.³⁵ A subsequent audit of the use of prolonged isolation in the federal prison system ended up reaching foregone conclusions. The final report recommended only minimal reforms while affirming the legitimacy and utility of prolonged isolation.³⁶ Although President Obama raised concerns last summer about solitary confinement, with his blessing the Bureau of Prisons has continued to push forward with plans to transform a state prison in Thomson, Illinois, into the country's second federal supermax prison.³⁷ Left unsaid was how many of Thomson's high-security prisoners would end up like the high-security prisoners in ADX Florence in Colorado—housed for years, if not lifetimes, in extreme isolation.

More recently, in October 2015 the Senate Judiciary Committee approved the Sentencing Reform and Corrections Act of 2015, which would, among other things, largely abolish prolonged solitary confinement for juvenile offenders incarcerated in federal prisons.³⁸ The number of individuals who would be affected by this change would be tiny. But the symbolic importance of the federal government rejecting solitary confinement for juveniles is enormous. In a lawsuit settlement reached with the New York Civil Liberties Union last month, New York state agreed to overhaul solitary confinement in state prisons. The agreement is expected to reduce the number of prisoners in solitary confinement by at least 25% and improve the conditions of confinement for those remaining in restrictive housing.³⁹

Differing viewpoints among corrections officials over the utility of solitary confinement also stand in the way of reform. The ASCA-Liman report appropriately characterizes prolonged isolation as a “grave problem.”⁴⁰ It also notes that the ASCA, the leading national organization for directors of corrections in the United States, has designated administrative segregation as

35. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-429, IMPROVEMENTS NEEDED IN BUREAU OF PRISONS' MONITORING AND EVALUATION OF IMPACT OF SEGREGATED HOUSING (2013), <http://www.gao.gov/products/GAO-13-429> [<http://perma.cc/Y8HG-GS4S>].

36. CNA ANALYSIS & SOLUTIONS, FEDERAL BUREAU OF PRISONS: SPECIAL HOUSING UNIT REVIEW AND ASSESSMENT (2014).

37. Carol Cratty, *Obama Administration Proceeds with Controversial Prison Purchase*, CNN (Oct. 2, 2012), <http://www.cnn.com/2012/10/02/politics/illinois-prison/index.html> [<http://perma.cc/FVK4-ERM9>].

38. Douglas A. Berman, *SRCA 2015 Passes Through Senate Judiciary Committee by Vote of 15-5*, SENTENCING L. & POL'Y (Oct. 22, 2015), http://sentencing.typepad.com/sentencing_law_and_policy/2015/10/srca-2015-passes-through-senate-judiciary-committee-by-vote-of-15-5.html [<http://perma.cc/RPJ3-SGNY>].

39. Michael Schwirtz & Michael Winerip, *New York State Agrees To Overhaul Solitary Confinement in Prisons*, N.Y. TIMES, Dec. 16, 2015, at A1.

40. TIME-IN-CELL, *supra* note 11, at i.

one of its “top five critical issues.”⁴¹ Many respondents to the ASCA-Liman survey indicated an interest in reducing the number of people held in solitary confinement and their level of isolation. But unsubstantiated claims by corrections officials that decreasing the use of solitary confinement will increase violence and disorder in their facilities have been a major impediment to restricting this practice.⁴² Many respondents in the ASCA-Liman survey “reported that administrative segregation was effective in ensuring the safety of staff and inmates in the general population.”⁴³ This conclusion is at odds with the findings of the 2014 National Academy of Sciences report on mass incarceration in the United States. This landmark study concluded that supermax facilities and other forms of extreme isolation “have done little or nothing to reduce system-wide prison disorder or disciplinary infractions.”⁴⁴ Yet even despite extensive evidence that solitary confinement exacerbates and incubates mental illnesses, corrections administrators continue to differ widely about whether it is advisable to place mentally ill people in restricted housing.⁴⁵

Some corrections officials have voiced support for reform—and emphatically so. Rick Raemisch, director of the Colorado Department of Corrections, has been an outspoken critic of solitary confinement, as was Tom Clements, his predecessor, who was murdered in 2013 by a man released directly from administrative segregation to the community. In 2011, with the support of Clements, Colorado legislators enacted pioneering legislation to restrict and regulate the use of solitary confinement.⁴⁶ In 2014, Raemisch wrote a blistering *New York Times* op-ed about the night he spent in solitary confinement in one of his prisons. Written by someone who is part of the

41. *Id.* at 3.

42. Timothy Williams, *Prison Officials Join Movement To Curb Solitary Confinement*, N.Y. TIMES, September 2, 2015, A1.

43. *Id.* at 56.

44. COMM. ON CAUSES AND CONSEQUENCES OF HIGH RATES OF INCARCERATION, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 186 (Jeremy Travis et al. eds., 2014).

45. *Id.* at 186-88. Some respondents to the ASCA-Liman survey reported that mental health issues play only a minor role in administrative segregation placement. Others characterized their role as “significant” or “100%.” Some jurisdictions reported that they are seeking to divert the mentally ill out of administrative segregation as much as possible. But one jurisdiction reported that administrative segregation is often “the only choice for dangerous mentally ill inmates.” Another said that clustering mentally ill inmates in restricted housing has “improved their group engagement and increased their access to mental health staff.” TIME-IN-CELL, *supra* note 11, at 57.

46. Rick Raemisch & Kellie Wasko, *Open the Door—Segregation Reforms in Colorado*, COLORADO DEP’T CORRECTIONS (2015), <http://www.colorado.gov/pacific/cdoc/news/open-door-segregation-reforms-colorado> [<http://perma.cc/8KK4-BSDY>].

system, this was a rare and noteworthy example of a bold individual challenge to the ingrained punitive sensibilities of the carceral state.⁴⁷

Under Raemisch's leadership, the Colorado Department of Corrections has implemented pioneering measures to reduce the use of solitary confinement, including designating three penal facilities for the treatment of inmates with mental illnesses.⁴⁸ In 2014, the department joined with supporters in the legislature and community to push through a ban on placing people with serious mental illnesses in restrictive housing, except under extraordinary circumstances.⁴⁹ Last year, the department adopted a policy that forbids placing women and youthful offenders in restrictive housing.⁵⁰ These policies have delivered results. Between 2011 and 2014, the proportion of men held under administrative segregation in Colorado dropped from 7.4% to 1.1%.⁵¹ During this same period, the proportion of administrative segregation prisoners fell only slightly in a little more than half the states, and remained the same or increased slightly in the rest.⁵² Colorado now ranks third from the bottom in the proportion of its prison population held in some form of restrictive housing in 2014.⁵³

Colorado's achievements are impressive. But its practices remain problematic when compared to other jurisdictions around the world. As of 2014, Colorado, a state with a population of five million people, was holding six hundred and sixty-two people in restrictive housing.⁵⁴ By comparison, the United Kingdom, with a total population of sixty-four million, was holding an estimated five hundred people in isolation. Nearly all of the U.K. inmates were being held in solitary for relatively short stints—measured in days and weeks, not months and years.⁵⁵

Political considerations dating back decades ago are another major obstacle. In the 1960s and 1970s, the United States was ground zero for a powerful

47. Rick Raemisch, Opinion, *My Night in Solitary*, N.Y. TIMES, Feb. 20, 2014, at A25; see also Aviva Stahl, *New York City's New Corrections Chief, Known for Solitary Confinement Reforms, Faces Steep Challenge on Rikers Island*, SOLITARY WATCH (Apr. 22, 2014), <http://solitarywatch.com/2014/04/22/new-corrections-chief-new-york-city-known-solitary-confinement-reforms-faces-steep-challenges-rikers-island> [<http://perma.cc/NB9W-ABGD>].

48. Raemisch & Wasko, *supra* note 46, at 6.

49. *Id.* at 5.

50. *Id.* at 7.

51. TIME-IN-CELL, *supra* note 11, at 24.

52. *Id.* at 22.

53. Montana (2.1%), Georgia (3.1%), and Colorado (3.2%) were the bottom three. *Id.* at 15 tbl.1.

54. *Id.* at 15.

55. Elisa Mosler, *Solitary Confinement in Great Britain: Still Harsh, but Rare*, SOLITARY WATCH (Jan. 19, 2012), <http://solitarywatch.com/2012/01/19/solitary-confinement-in-great-britain-still-harsh-but-rare> [<http://perma.cc/9FSY-XY8N>].

prisoners' rights movement that garnered widespread national and international attention.⁵⁶ Indefinite lockdowns in traditional cells were one of the initial weapons of choice to quell this unrest.⁵⁷ In the late 1980s and 1990s, prison administrators began deploying more sophisticated supermax facilities with state-of-the-art technology to suffocate political dissent and unrest in U.S. prisons and jails. It is often forgotten that supermaxes like Pelican Bay in California and the federal ADX in Colorado "were built with the explicit purpose of minimizing all forms of collective resistance" and political organization by people who are incarcerated.⁵⁸

It is an open secret that a number of prisoners – we still do not have a good count of how many – have been banished to solitary confinement in U.S. prisons because of their actual or perceived political views and political activities.⁵⁹ Political and religious beliefs deemed dangerous or out of the mainstream continue to provide "cause" for subjecting prisoners to prolonged isolation – like Rastafarianism and what Burl Cain, the former warden of Louisiana's infamous Angola prison, dismissively calls "Black Pantherism."⁶⁰ Steve Champion, an award-winning author and prisoner on death row in California, was "validated" as a gang member and banished to solitary confinement based on his possession of a Kiswahili dictionary and George Jackson's *Soledad Brother*.⁶¹ And in the wake of 9/11, the federal Bureau of Prisons established Communications Management Units in a couple of federal penitentiaries. According to a lawsuit filed in 2010, these units housed predominantly Muslim prisoners. These inmates were subjected to extreme isolation "for their constitutionally protected religious beliefs, unpopular

56. See MARIE GOTTSCHALK, *THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA* 165-96 (2006).

57. See, e.g., Stephen C. Richard, *Introduction*, in *THE MARION EXPERIMENT: LONG-TERM SOLITARY CONFINEMENT & THE SUPERMAX MOVEMENT* 1, 9-15 (Stephen C. Richards ed., 2015); Gómez, *supra* note 3, at 68.

58. Reiter, *supra* note 5, at 585.

59. See, e.g., DAN BERGER, *CAPTIVE NATION: BLACK PRISON ORGANIZING IN THE CIVIL RIGHTS ERA* (2014); Seth Ferranti, *The Realities of Special Housing Units in the Federal Bureau of Prisons*, in *THE MARION EXPERIMENT*, *supra* note 57, at 35, 46-47; Guenther, *supra* note 5, at 48-49; Reiter, *supra* note 5, at 588-90; Jon Marc Taylor, *The Politicization of the Hole in Indiana and Missouri*, in *THE MARION EXPERIMENT*, *supra* note 57, at 21, 22.

60. Alex Friedmann, *Solitary Confinement Subject of Unprecedented Congressional Hearing*, PRISON LEGAL NEWS (Oct. 15, 2012), <http://www.prisonlegalnews.org/news/2012/oct/15/solitary-confinement-subject-of-unprecedented-congressional-hearing> [<http://perma.cc/SLV5-R2BZ>]; James Ridgeway, *God's Own Warden: If You Ever Find Yourself Inside Louisiana's Angola Prison, Burl Cain Will Make Sure You Find Jesus – or Regret Ever Crossing His Path*, PRISON LEGAL NEWS 1, 3-11 (June 2012), <http://www.prisonlegalnews.org/media/issues/o6pln12.pdf> [<http://perma.cc/ZT26-UWBK>].

61. Guenther, *supra* note 5, at 49.

political views, or in retaliation for challenging poor treatment or other rights violations in the federal prison system.”⁶²

The barriers to mobilizing and protesting from within U.S. prisons and jails remain extraordinarily high, which makes the 2011-13 hunger strikes in California all the more remarkable. These protests focused public attention on the plight of people in extreme isolation but also reignited correctional administrators’ fears of the potential political power of incarcerated people who band together collectively.⁶³ They were a reminder that the line between a political organization and a gang sometimes rests in the eye of the beholder. Jeffrey Beard, who just stepped down after serving for three years as director of California’s Department of Corrections and Rehabilitation (CDCR), aggressively denounced the hunger strike leaders and sought to reframe their actions as a “gang power play” by “convicted murderers.”⁶⁴

The hunger strike leadership, with key support from advocates on the outside, pursued a sophisticated political strategy that did not focus on a call for the abolition of prolonged solitary confinement in California. Their main demands called for improvements in the day-to-day conditions in solitary confinement and for the CDCR to adhere to existing rules, regulations, and court-mandated settlements regarding admission to and release from prolonged confinement. The leaders of the hunger strike also demanded that the state adopt some of the relatively more lenient policies for restricted housing that prevail in the federal prison system and some state systems.⁶⁵ Corrections officials in California deny that the hunger strikes were a catalyst for a recent set of important—albeit potentially limited—reforms to restricted housing in the Golden State. Internal state documents suggest otherwise.⁶⁶

62. James Ridgeway & Jean Casella, *The Lonely Battle Against Solitary Confinement*, THE GUARDIAN (Jan. 19, 2011), <http://www.guardian.co.uk/commentisfree/cifamerica/2011/jan/19/bradley-manning-wikileaks> [<http://perma.cc/PD6E-4UG8>] (quoting filings from a lawsuit filed by the Center for Constitutional Rights); see also Alia Malek, *Gitmo in the Heartland*, NATION (Mar. 28, 2011), <http://www.thenation.com/article/gitmo-heartland> [<http://perma.cc/DPU6-9423>] (discussing restricted-communication prison units housing inmates suspected of having links to terrorists).

63. See Guenther, *supra* note 5, at 49-52.

64. *Id.* at 52.

65. For example, they demanded nutritious and adequate food, the right to have a single handball and warm clothes for their hour of outside exercise in the “dog run,” and permission to keep a single photo and wall calendar in their windowless, concrete cells. Reiter, *supra* note 5, at 593, 594, 599.

66. See, e.g., Sal Rodriguez, *California Prison Hunger Strikes Sparked Solitary Reforms, Internal Documents Show*, SOLITARY WATCH (Sept. 2, 2015), <http://solitarywatch.com/2015/09/02/california-prison-hunger-strikes-spurred-solitary-reforms-internal-documents-show> [<http://perma.cc/63GA-NAJE>].

CONCLUSION

Corrections administrators are often blamed, sometimes unfairly, for the country's high incarceration rate. After all, they did not write the laws. As they often remind us, they have to admit everyone that the police, prosecutors, and the courts send to their gates. However, these facts obscure the reality that corrections officials retain enormous clout to shape penal policy. For example, corrections officials have considerable discretion to determine the quality of life for people incarcerated in their facilities.

They have a wide berth to abolish, or at least greatly restrict, the use of prolonged isolation. They can make the conditions of solitary confinement more lenient.

The ASCA and Yale Law School's Liman Program have taken an important step by acknowledging that extreme isolation is a grave problem and by supporting a survey that enumerates the prevalence and conditions of administrative segregation. This is a major milestone on what remains a long road to transformative reform of solitary confinement in the United States. The recommendations of the blue-ribbon Katzenbach commission almost a decade ago still ring true today. The commission called upon the United States to intensify its efforts to "stop isolating people and ensure that segregated prisoners have regular and meaningful human contact and are free from extreme physical conditions that can cause lasting harm."⁶⁷

Marie Gottschalk is Professor of Political Science at the University of Pennsylvania. She was a member of the National Academy of Sciences Committee on the Causes and Consequences of High Rates of Incarceration in the United States. Her latest book is Caught: The Prison State and the Lockdown of American Politics. She is deeply grateful to the editors of the Yale Law Journal for their deft editorial assistance that made this a much better essay.

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67. COMM'N ON SAFETY & ABUSE IN AM. PRISONS, *supra* note 1, at 59.